Appeal No: CA-2025-002348-Y

IN THE COURT OF APPEAL (CIVIL DIVISON)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JUSTICE THOMPSELL

B E T W E E N:

(1) MR CAMRAN MIRZA
(2) TYDWELL LIMITED
(3) MRS SAIRA MIRZA
(4) MR AMEER MIRZA
(5) BOOMZONE LIMITED
(6) REDWIRE DC LIMITED
(7) WOLVERINE FINANCE LIMITED
(8) LONDON MEDIA HUB LIMITED

Appellants / Defendants

-and-

(1) MR PRADEEP MORJARIA
(2) MRS SANGITA MORJARIA
(3) SUMMERHILL TRUST COMPANY (ISLE OF MAN) LIMITED
(4) VIPER LIMITED
(a company incorporated under the laws of Jersey)

Respondents / Claimants

DEFENDANTS' SKELETON ARGUMENT

Judgment and Order under Appeal	316-page Judgment of Mr Justice Thompsell (the "**Judge**") dated 28 July 2025 ([2025] EWHC 1961 (Ch)) and Order dated 11 August 2025 (the "**Order**"). References to paragraphs of the Judgment are in the form **[J/para.]**. Defined terms and abbreviations used in the Judgment are adopted herein.
References	References to the core bundle and the consolidated supplemental bundle are in the form {**CB/tab/page**} and {**SB/tab/page**}.

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7 May 2026

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I. INTRODUCTION

1. This appeal gives rise to important points of principle relating *inter alia* to fiduciary duties, knowing receipt (**Grounds 12-13)**, unjust enrichment (**Ground 7)**, deceit (**Ground 6)** and subrogation (**Ground 8)**. The Judge wrongly found that no tort of abuse of criminal process is known to English law (the first time that any court has drawn that distinction in the tort's 200-year history) (**Ground 1)**. The Judgment is also the first time a commercial joint venturer has been found to owe fiduciary duties to a JV company ("**JVC**") where the JVC has been managed and controlled by independent professional directors. The Judge's findings of a fiduciary relationship (**Grounds 2-4**) are inconsistent with the Supreme Court's decision in *Hopcraft v Close Brothers Limited* [2025] UKSC 33 (delivered 4 days after the Judgment) and raise issues of general importance for commercial joint venturers.

2. Regrettably, the Judge conducted the trial in a manner that was procedurally unfair to the Defendants and to Mr Mirza in particular (**Ground 11)**. The Judge took over his cross-examination for lengthy periods on multiple occasions, accusing him of dishonesty and openly disbelieving his evidence. Even worse, he put his own (unpleaded) case theory to witnesses in a way that tainted the oral evidence. Despite this, the Defendants emphasise that a retrial should only be a last resort and that, if anything, the Judge's irregular and unfair interventions strengthen **Grounds 1-4, 6-10** and **12-13** of this appeal.

3. Finally, by way of introduction, the Judge in his PTA Ruling criticised the Defendants for seeking to appeal "*just about every finding that was made against the Defendants*". Such criticism is unwarranted. The Claimants raised no fewer than 25 causes of action against 10 defendants **[J/9]**, most of which were unparticularised in the pleadings and developed only in closing submissions. The Judge found against Mr Mirza in respect of nearly every point. That has put the Defendants in the position of having to address a litany of errors, lest they be met with the objection (ironically, taken by the Judge himself in the PTA Ruling) that an appeal against some points only would be academic because the Defendants would still be liable.

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{CB/14/261}

{CB/15/588}

II. GROUND 1: TORT OF ABUSE OF PROCESS

4. The Morjarias brought a private criminal prosecution against Mr Mirza, his wife (Mrs Mirza) and his son (Ameer), purely to threaten imprisonment to force them to settle these civil proceedings. This is indisputable because: (i) Mr Morjaria's contemporaneous emails to his solicitors establish this beyond any question; (ii) two courts (including the Administrative

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Court on appeal) found this occurred and (iii) Mr Morjaria himself accepted this in his oral evidence **[J/1233]**, **[Day5/25-26]** and pleading (**Rep ¶111R**).

5. DJ Sternberg found at [6]: "… *I am more than convinced that the primary and dominant motive of the private prosecution is* ***not a proper one*** *and that the proceedings are plainly* ***an abuse of the court's process***"; at [85(iv)] "*From the very outset, the "story" that* [Mr Morjaria] *has put forward is one motivated by a desire to threaten the defendants with jail to* ***bring them to their knees*** *and* ***make them want to settle****…*"; at [85(vi] "*I am in no doubt that* [Mr Morjaria's] *motive in initiating criminal proceedings was* ***to threaten the defendants in order to extract a settlement from them***"; at [85(x] "*For him seeking justice meant forcing the defendants to settle the civil claim with* ***the threat of criminal prosecution*** *…****punishment being an ancillary benefit to what he sought to achieve****…his overwhelming primary and dominant motive was* ***to seek to force settlement and …he was prepared to initiate and pursue criminal proceedings to that end***"; and at [92] that his purpose was "***not****…to use these proceedings as a means* ***to obtain punishment for criminality****, but* ***as leverage to achieve recovery of money*** *…it was and is an abuse of this Court's process in seeking a summons* ***for that purpose***".[1]

{SB/226/1250}
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6. The Administrative Court upheld these findings,[2] deciding at [48] that DJ Sternberg's conclusion that "*PM's primary motivation… to use those proceedings* ***as a threat in order to force CM to settle*** *the civil claim cannot be open to sensible criticism…The …messages over the succeeding months confirmed that this was* [Mr Morjaria's] ***purpose****. This was* ***not a proper use of criminal proceedings*** *… the criminal proceedings were to be used as a means to an end. The purpose of the criminal process is not to serve the private interests of any individual…the criminal proceedings were* ***not an exercise in criminal justice****. Rather, they were* ***a tool*** *being used by* [Mr Morjaria] *for his* ***private purposes****. In our view, that constituted improper motive.*" Further, at [49] the court found: "… *The exchanges between* [Mr Morjaria] *and his son and both sets of lawyers are evidence of the* ***truly oppressive nature*** *of the criminal proceedings…*"; and at [50]: "… [Mr Morjaria's] *dominant motive rendered the prosecution* ***an abuse of the process of the court***" (emphasis added, see too [44]).

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7. The Judge accepted all of this [**J/1231**]-[**J/1239**].[3] Yet, he dismissed the Defendants' counterclaim based on the tort of abuse of process. He did so on the basis that (a) no tort

{CB/14/491}

[1] *Morjaria v Mirza* (DJ Sternberg sitting at Westminster Magistrates Court, 20 January 2023).
[2] *R (Morjaria) v Westminster Magistrates' Court* [2024] 1 Cr. App. R. 19, Davis LJ and Stacey J.
[3] Yet, he did not include these findings when assessing Mr Morjaria as a witness: [**J/74**]-[**J/77**]. {CB/14/271}

of abuse of *criminal* process exists, (b) he was unwilling to develop the law to encompass such a tort, and (c) in any event, the legal test for abuse of process was not satisfied.

(a) The tort encompasses abuse of both civil and criminal proceedings

8. In the nearly 200 years since *Grainger v Hill* (1838) 4 Bing NC 212 established the tort of abuse of process, no court has ever limited it to the abuse of *civil* process only or drawn any distinction between civil and criminal process. The Judge is the first to do so.

9. In *Grainger*, the defendants swore a false affidavit of debt and issued a writ of *capias* (issued to a sheriff to take a person into custody) for the plaintiff's arrest, threatening imprisonment unless he surrendered a ship's register. In finding the defendants liable for the tort, none of the judges drew any distinction between abuse of process of civil and criminal proceedings. Tindal CJ held that the action was for "*an abuse of the process of* ***the law***" (p.221), Park J that it was for *"having abused the process of* ***the law***" (p.222), Vaughan J that it was for *"abusing the process* ***of law***" (p.223) and Bosanquet J that it was for "*abusing the process of* ***the Court***" (p.224).

10. Neither of the two post-*Grainger* cases[4] in which the tort has been made out draw any such distinction. In (i) *Gilding v Eyre* it was said that the defendant "*had maliciously employed the process of* ***the court***" (p.589) and in (ii) *Total Extraction* it was never once suggested that the tort was limited to civil proceedings. In *Speed Seal Products Ltd v Paddington* [1985] 1 WLR 1327, the Court of Appeal granted an application for leave to amend since the draft pleading showed an "*arguable case*...[for] *an actionable abuse of process of* ***the court***" (p.1335H). Aside from Lord Sumption's *obiter* dissenting remarks in *Crawford Adjusters Ltd v Sagicor Insurance Ltd* [2014] AC 366 (see ¶¶11-12 below), repeated in *Patel* (also *obiter*),[5] decisions post-*Grainger* have **universally** described the tort as an abuse '*of the law*', '*of the court*', '*of the legal process*', or similar.[6] The Judge stated in his PTA Ruling that it was "*clear*" that no tort of abuse of criminal process exists, when, respectfully, this is far from clear. That no prosecutor has been found liable under the tort puts the cart before the horse. No court has ever drawn the distinction on which his decision relies; they have consistently and conspicuously avoided doing so.

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[4] *Gilding v Eyre* [1861] 142 E.R. 584, *Total Extraction Ltd v Aircentric Ltd* (Barnsley County Court, Sep 2020).
[5] *Patel v Minerva Services Delaware Inc* [2024] EWHC 172 (Ch) at [41].
[6] *De Medina v. Grove* (1847) 10 Q.B. 172 at p.175; *Goldsmith v Sperrings Ltd* [1977] 1 W.L.R. 478 at pp.489C, 490H, 498F; *Metall & Rohstoff v Donaldson Inc* [1990] 1 Q.B. 391 at p.469C; *Broxton v McClelland* [1995] E.M.L.R. 485 at p.497; *Land Securities plc v Fladgate Fielder* [2010] Ch. 467 at [49], [50], [77], [104]-[105]; *JSC BTA Bank v Ablyazov and others (No 6)* [2011] 1 W.L.R. 2996 at [2]; *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [414]; *Kings Security Systems Ltd v King* [2021] EWHC 325 (Ch) at [228].

11. In finding that the tort did not apply to the abuse of criminal process, the Judge wrongly relied **[J/1306]** on Lord Sumption's *obiter* refence to "*the abuse of civil proceedings"* in his dissent in *Sagicor*. The Judge found that, although Lord Sumption was in the minority, he was in accord with the majority that the tort did not apply **[J/1307]**. This reasoning is flawed. Although the majority found that the tort did not apply in that case, that was not because it only applied to the abuse of *civil* proceedings. Rather, it was because the predominant purpose test was not satisfied on the facts ([79], [93]). Minimal weight can be placed on Lord Sumption's lone, passing reference to the abuse of *civil* proceedings, particularly when the majority referred repeatedly to the tort of abuse of "*process*" and of the "*process of law*".[7]

{CB/14/506}

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12. The Judgment also materially misreads *Sagicor* as holding that the tort of malicious prosecution could be extended to cover civil cases **[J/1307]**. That is wrong. The majority held that the tort had **always** covered **both** civil and criminal cases.[8] That majority view, which rejected the basis of Lord Sumption's analysis, was one which prevailed in the Supreme Court in *Willers v Joyce* [2018] A.C. 779. That was the critical context in which Lord Sumption referred to the abuse of *civil* proceedings, the logic being that the tort was the civil analogue to the tort of malicious prosecution which, Lord Sumption considered, should only be applied in criminal cases (see [121]). The Supreme Court has roundly rejected that logic.

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13. The Supreme Court in *Willers* (following *Sagicor*) decided that **no distinction has ever existed** between civil and criminal law for the purposes of the malicious prosecution tort. There is no good reason now to create one for the tort of abuse of process. Lord Wilson in *Sagicor* at [62] said that the "*two torts* ***sprang from the same tree*** *and one would not expect issues common to them both […] to be resolved differently"*. If, having endorsed that view, the Supreme Court or the Privy Council were intending to draw a fundamental distinction between the two torts, at least one of the eminent appeal judges would have pointed this out.

14. Other common law jurisdictions, adopting the tort from *Grainger*, have not only drawn no distinction between abuse of civil and criminal proceedings but have repeatedly affirmed that the tort applies to both proceedings. **(1) Australia**:[9] In *Burton v Director of Public Prosecutions* [2019] NSWCA 245, a case concerning abuse of criminal process, Bell P

[7] See [56], [62], [66], [74], [79] (Lord Wilson); [83], [85] (Baroness Hale); and [91] (Lord Kerr).
[8] See [40], [43], [46]-[47] and [78] (Lord Wilson, with whom Lord Kerr and Baroness Hale agreed).
[9] See too *Williams v Spautz* (1992) 174 CLR 509, erroneously referred to by the Judge as *"a New Zealand Case"*; it is authority from Australia's highest court, cited with approval by Lord Wilson in *Sagicor* at [63] and [65]; see too *New South Wales v Spedding* [2023] NSWCA 180 at [52] and [268]–[281].

formulated the tort's elements at [42] by reference to commencing *"**a legal process** for an improper purpose"*. Although noting at [38] Lord Sumption's dictum in *Sagicor*, the Court did not accept this limitation on the tort's scope, holding that bringing criminal proceedings to vex or harass is *"plainly outside the scope of the purpose of criminal proceedings"* and could found a claim: see [2], [52], [97] and [124]. **(2) Canada:** In *Konstan v Berkovits* [2024] ONCA 510 at [27]-[51] the Court of Appeal for Ontario determined an abuse of process claim arising from a criminal prosecution entirely on its merits without questioning the tort's availability in criminal proceedings.[10] **(3) United States:** The *1977 Restatement of the Law of Torts, Second*, a treatise issued by the American Law Institute, considered as authoritative in *Sagicor* (see [71] and [168]-[176]), states the general principle in US law derived from *Grainger* as follows: *"One who uses a legal process, **whether criminal or civil**, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process"* (¶682).

(b) The alleged "*development*" of the tort to encompass criminal proceedings

15. As set out above, the tort **already** extends to both civil and criminal proceedings. In any event, there is no good reason for it to be **limited** to civil proceedings only. **First**, this would, as Lord Wilson said in *Sagicor* at [73], undermine "*the need for the law to be true to the reason for its very existence*": to right wrongs. Both Lord Wilson[11] and Baroness Hale (at [81]) cited Sir Thomas Bingham MR's statement that "*the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied*".[12] Partly for this reason Lord Wilson rejected arguments that malicious prosecution should be limited to criminal proceedings. The Judge did not explain why this reasoning did not apply to the tort of abuse of process **[J/1354]**.

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16. **Second**, the concern at **[J/1365]** that applying the tort to criminal proceedings would have a chilling effect on prosecutions is ill-founded. The tort is rare is because the test for abuse of process is difficult to fulfil (though not on this case's unusual facts). Further, while the criminal justice system previously relied heavily upon private prosecutions,[13] that is no longer the case, following the creation of the modern CPS in 1986. Since defendants are already

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[10] The court applied the tort of abuse of process as set out in *Harris v. Glaxosmithkline Inc.* [2010] ONCA 872 at [27], which ultimately derives from *Grainger*: see *Metrick v. Deeb* [2003] CanLII 804 (ON CA), *Atland Containers Ltd. v. Macs Corp. Ltd. et al.* [1974] CanLII 864 (ON SC) and *Guilford Industries Ltd. v. Hankinson Management Services Ltd.* [1973] CanLII 1065 (BC SC).

[11] Lord Wilson also cited at [73] Lord Dyson's statement that: "*To deny a remedy to the victim of a wrong should always be regarded as exceptional*": *Jones v Kaney* [2011] 2 AC 398 at [113].

[12] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at p.663.

[13] *R (Gujra) v Crown Prosecution Service* [2013] 1 A.C. 484 at [11].

protected by a requirement that crown prosecutors should not bring or continue abusive proceedings,[14] this court's affirmation of the existing tort of abuse of process would have no (certainly no material) chilling effect on such prosecutions. If the tort requires private prosecutors to assure themselves that the *predominant* purpose of the prosecution is proper, that should be welcomed; this applies to the RSPCA and the FCA (whose "*wider agenda*" **{CB/14/515}** **[J/1365]** was not raised in argument).[15] Finally, the 'chilling effect' argument was unsuccessful in *Willers*, only favoured by Lord Neuberger ([166]; see too *Sagicor* at [72]).

17. **Third**, it is wrong to suggest (**[J/1359]-[J/1360])** that the tort of abuse of process would **{CB/14/514}** undermine that of malicious prosecution. The tort of abuse of process already exists. Neither the Claimants, nor the authorities, suggest otherwise. If this argument were right, the undermining would already have occurred. It has not because the two torts have distinct **{CB/14/515}** elements; contrary to **[J/1360]**, establishing malice does not *per se* establish the improper purpose, as *Sagicor* makes clear. The Board at [79] upheld the lower courts' findings that Sagicor was not liable for the tort because it had not sued to secure an object for which the legal action was not designed ([33], [35]). The proximate cause of the proceedings was Sagicor's obsessive determination to destroy the claimant professionally, albeit through a legal suit. While this amounted to malice (see [32] and [80]), it was **not** an improper purpose in the sense required for abuse of process (see [63]). Plainly, not every instance of malicious prosecution is also an instance of abuse of process (the converse is also true).[16]

(c) The tort of abuse of process was satisfied in this case

18. The test, which the Judge failed to apply, is whether the predominant purpose in bringing the proceedings is not to obtain the remedy that the law offers (disregarding for this purpose the use he may seek to make of that remedy once he has obtained it) but to achieve some other object that lies outside the range of remedies that the law grants: *Fladgate Fielder* at [89].[17] Such a purpose will be improper. As to this test:

19. (1) Using proceedings "*otherwise than for the purpose for which they are designed*" is improper: *Sagicor* at [63]; it follows that the remedy sought must be one offered in those proceedings or ***of the***

[14] Section 3.5 of the Code for Crown Prosecutors (Oct 2018 ed.): *"Prosecutors should not start or continue a prosecution where … it is highly likely that a court will rule that a prosecution is an abuse of its process"; Sagicor* at [68].
[15] The Divisional Court in this case rejected a similar argument about the Environment Agency at [45].
[16] Malicious prosecution was not available in *Grainger* because the proceedings had not been determined in the plaintiff's favour (they were effectively settled rather than resolved by judgment).
[17] See too *Standard Life Assurance Ltd v Topland Col Ltd* [2011] 1 W.L.R. 2162 (Warren J at [77]-[78]).

same type (the "*reasonable relation*" qualifier in *Goldsmith* must be interpreted in this light: see ¶22-24). **T**he purpose is not improper if it is the natural consequence of a proper purpose (such as another's economic downfall flowing from victory in the action): *Sagicor* at [63].

20. (2) One need not prove that the **only** purpose in the defendant bringing proceedings was improper, but that the predominant purpose was.[18]

21. (3) The test in criminal proceedings is instructive, namely whether the primary "*motive*" is one which is "*so unrelated to the proceedings that it renders it a misuse or an abuse of the process*".[19] "*Purpose*" and "*motive*" (at least in the civil context)[20] are related but distinct; the purpose of a claim is the result the claimant hopes to achieve in pursuing it, whereas his motives are those considerations that move him to commence or maintain the proceeding in the first place.[21] The abuse consists in the purpose, not the motive.

22. The Judge focused instead on Bridge LJ's remark in *Goldsmith* at p.503E-F that the purpose of the suit will not be improper *"if it is* ***reasonably related*** *to the provision of some form of redress* **{CB/14/505}** *for that grievance"* **[J/1303]**. This was made not in the context of tort claim but of an application to stay proceedings. Although these principles *do* apply at a high level of generality to the tort,[22] the formulation is too broad to constitute the overarching test; what "*reasonably related*" or what "*form of redress*" means are unclear. The Judge made **two errors**.

23. **First,** even if Bridge LJ's formulation does assist, the Judge misapplied it, reasoning (without **{CB/14/515}** much thinking through **[J/1365]**) that Mr Morjaria's purpose was "*to obtain redress* ***in relation*** **{CB/14/516}** ***to*** *the very* ***matter*** *on which he was bringing the prosecution"*, which was not improper **[J/1368]**. This further confused the test. Bridge LJ's formulation at least (seemingly) drew a comparison between (i) the purpose for which the proceedings were brought and (ii) the **{CB/14/510}** remedy available in those proceedings, as in *Fladgate Fielder* and *Williams v Spautz* **[J/1329]**. The Judge's application instead compares (i) the remedy sought (in separate proceedings) with (ii) the "*subject matter*" of the criminal proceedings; the Judge thus ignored the purpose for which *the criminal proceedings* were brought, which *is the key question:* see ¶18 above. Applying Bridge LJ's formulation, no '*reasonable relation'* exists between Mr Morjaria's purpose of using

[18] *Goldsmith* at p.490H; *Metall & Rohstoff* at p.469F; *Williams v Spautz* at p.529; and *Sagicor* at [65].
[19] *Morjaria v Mirza* at [90]; *R (Morjaria)* at [42], [44] and [50].
[20] The criminal courts in this case referred to motive and purpose interchangeably but the substance of both judgments is clear: see ¶25 below.
[21] *Williams v Spautz* at pp.534-535; *Total Extraction* at [39].
[22] *Fladgate Fielder* at [89], as explained in *Holyoake v Candy* at [415].

the threat of imprisonment to extract a civil settlement and the redress the criminal justice system is *designed* to provide. While compensation orders exist,[23] the purpose of criminal proceedings is not to serve private individuals through compensation but to punish criminality. It is settled law that using criminal proceedings as leverage to recover money is an abuse of the court's process (as DJ Sternberg and the Divisional Court confirmed).[24]

24. It is easy to see how Bridge LJ's examples of settlement in the civil context (*Goldsmith* at **{CB/14/508}** p.503D-E, which the Judge relied on **[J/1320]**) are categorically different; dispute resolution **is** the aim of civil courts ("*the purpose for which they are designed*") and the granting of a different right of way to the one sought or the offering of contractual performance are either within the range of remedies the law offers in civil disputes or ***of the same type*** (which is what the "*reasonable relation*" qualifier must mean: see ¶18 above). While an apology in libel belongs in its own category, it is a remedy that civil courts recognise and encourage (since it can form a statutory defence under s.2 of the Defamation Act 1966 or mitigate damages).

25. **Secondly,** despite accepting that the question of Mr Morjaria's "*primary motivation*" was *res* **{CB/14/495}** *judicata* **[J/1239]**, the Judge wrongly ignored the significance of that; DJ Sternberg and the Divisional Court had already decided the only factual question before him. They had declined to issue the summons on grounds that "*the prosecutor's dominant motive would render the prosecution an abuse of the process of the court*".[25] Despite conflating "*purpose*" and "*motive*" (see ¶21), their judgments are clear: Mr Morjaria's dominant aim was to use the threat of imprisonment to extract a civil settlement; that was so unrelated to the criminal proceedings as to be abusive: see ¶¶5-6 above. The application of the test was straightforward on these **{CB/14/516}** indisputable facts. If the Judge identified a different purpose ("*to obtain redress…*" **[J/1368]**), that was a collateral attack on two previous courts' findings (which was itself abusive).[26]

26. Standing back, two courts have held that Mr Morjaria abused the court's process. Mr Mirza and his family now seek redress, yet the Judge has extraordinarily found no fault in Mr Morjaria's actions. There is a troubling inconsistency in these positions. Indeed, the Judge's decision appears to provide fertile ground for parties to support hostile civil actions with parallel private criminal prosecutions (despite the criminal courts taking the opposite stance).

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[23] Mr Morjaria's purpose was not to obtain financial compensation through the criminal courts.
[24] *Morjaria v Mirza* at [92]; *R (Morjaria)* at [42] and [44].
[25] r 7.2(14)(f) of the Criminal Procedure Rules.
[26] *Hunter v Chief Constable of the West Midland* [1982] A.C. 529 at p.541B.

III. GROUNDS 2-4: FIDUCIARY DUTIES

27. Whether someone is a fiduciary is a question of mixed fact and law but mainly a question of law.[27] The Judge erred both (i) in identifying the law (the test articulated in *Hopcraft* and the key cases on joint ventures cited below) and (ii) in applying that legal test to the facts, through an objective assessment of the parties' relationship at the outset of the JV (by reference principally to the JVA, the tax advice and IQEQ's letter of engagement).[28] As a further preliminary point, the Judge's reasoning on fiduciary duties is opaque and difficult to follow, in particular concerning the incidence of Tydwell's fiduciary duties: see ¶50 below. In the critical passages where he found that Mr Mirza and Tydwell were fiduciaries he stated that such duties were owed in the abstract,[29] but not (i) what the duties were[30] or (ii) who they were owed to. At times the Judge suggested that fiduciary duties were owed to the Morjarias and the JV Entities (**[J/160]**, **[J/851]**), and on other occasions that they were only owed to the latter (**[J/554]**, **[J/805**], **[J/857]**, **[J/872]**, **[J/1498]**, **[J/1544]**).[31] This confusion has no doubt arisen due to the numerous errors of law and reasoning outlined below.

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(a) Ground 2: The Judge was wrong in law to find that Mr Mirza owed fiduciary duties by virtue of his role as an "advisor", in reliance on the "disinterested duty" referred to in the recent cases involving secret commissions being paid to credit brokers

Misplaced reliance on the Secret Commission Cases

28. The Judge made **eight** errors. **First**, he applied the wrong legal test. The well-established case law at the time of the Judgment demonstrates that outside of the established categories such as agent and principal, fiduciary duties arise only *exceptionally*,[32] and in the context of a commercial JV, *only* where the nature of the relationship is such that one party has a *legitimate*

{CB/14/295}

[27] *Connoisseur Developments Ltd v Koumis* [2023] EWHC 855 at [238]. {CB/14/296}

[28] In his PTA Ruling, the Judge sought to make his findings about fiduciary duties 'appeal-proof', stating that his approach was based on his impression of the evidence and that an "*appellate court will recognise..it is not appropriate for it to substitute its judgment for that of the trial judge*" {**CB/15/578**}. This is wrong. The Judge's finding is wrong due to errors of law (failing to apply the legal tests correctly), not findings of fact. {CB/14/297} {CB/14/375} {CB/14/281} {CB/14/292}

[29] See e.g **[J/193]**, **[J/196]**, **[J/201]**, **[J/601]** and the headings at **[J/147]**, **[J/183**] and **[J/197]**. {CB/14/297}

[30] The list of fiduciary duties at **[J/858**] appears in relation to the Boomzone Lease Claims. The duties said to have been breached at **[J/554]** in relation to the Invoicing and Cladding Claims by Mr Mirza and Tydwell therefore fall to be implied. Further, the list at **[J/858]** primarily focuses on duties that Mr Mirza did not have. At no point did the Judge outline precisely what fiduciary duties Tydwell owed. {CB/14/425} {CB/14/364} {CB/14/425}

[31] His PTA Ruling further confused matters by saying there was nothing surprising about Mr Mirza "*being held to owe a fiduciary duty to his joint venturers and* [the JV Entities]" {**CB/15/579**}.

[32] Fiduciary duties are exceptional in commercial relationships because it is normally inappropriate to expect a commercial party to subordinate their interests to that of another commercial party: *Hewitt on Joint Ventures* ¶11-12, *Snell's Equity* ¶¶7-004–7-007; *Civil Fraud* at ¶11-043, *Hopcraft* at [110].

expectation that another will *put aside his interests and act solely in the principal's interests* (the "**Legitimate Expectation Test**"): *Al Nehayan v Kent* [2018] 1 CLC 216 at [157]-[165].

29. The Supreme Court explained in *Hopcraft* at [107] that the legitimate expectation by the principal, "*arises because the putative fiduciary has, or is treated as having, undertaken to act with the loyalty of which Millett LJ spoke in Mothew*" and "*the relationship of trust and confidence is the consequence, and not the cause, of a fiduciary duty. The fiduciary duty exists because, looking at the matter objectively, the fiduciary has undertaken not to pursue his own interests*" [108]. Thus, the Supreme Court re-framed and clarified the Legitimate Expectation Test as focusing on whether the party has undertaken, or may be taken to have undertaken, to act *solely* in the interests of the principal and not his own interests (the "**Undertaking Test**"). The test is objective [93].

30. However, the Judge erroneously found that Mr Mirza owed fiduciary duties *by analogy* with cases dealing with secret and half-secret commissions paid to credit brokers recommending products to their customers (*Wood v Commercial First Business Limited* [2022] Ch 123, *Johnson v FirstRand Bank Ltd* [2024] EWCA Civ 1282) (the "**Secret Commissions Cases**") **[J/173]-[J/180]**; thus, he found that Mr Mirza owed a "*disinterested duty*" (**[J/175**], **[J/853]**), the relevance of which the Supreme Court has, in any event, doubted in *Hopcraft* ([201]). Further, the Judge wrongly framed the enquiry as to whether "*the circumstances are sufficiently similar such that* ***a fiduciary duty of some kind*** *can be found despite the difference in circumstances*" **[J/182**]. Accordingly, the Judge erred both (i) in focusing on the Secret Commission Cases, when a clear line of authorities govern the circumstances in which fiduciary duties exceptionally arise in commercial joint ventures[33] and (ii) in effect, working backwards from seeking to find "*a fiduciary duty of some kind*", rather than starting by consideration of the Undertaking Test. The statement in his PTA Ruling that "*if* [Mr Mirza] *did not owe such a duty…it would leave the* [JV]*and the* [JV] *companies completely open to precisely the sort of fraud…committed*" vividly shows this flawed reasoning. The Undertaking Test in *Hopcraft* assesses the assumption of single-minded loyalty objectively at a relationship's inception, not by reference to later alleged misconduct.

{CB/14/290} **{CB/14/290}** **{CB/14/424}** **{CB/14/292}** **{CB/15/579}**

31. The Judge sought to rescue his approach in his PTA Ruling, by reference to the "*court's practice of recognising fiduciary duties by analogy to well-established categories of fiduciary*"; but that misses the point. He was not reasoning by analogy to such categories; not only is a credit broker not an established fiduciary (see too **[J/152]**), but the analogy is wholly inapt: see ¶32 below.

{CB/15/577} **{CB/14/283}**

[33] *Al Nehayan* at [157]-[165]; *Glenn v Watson* [2018] EWHC 2016 at [131]-[134]; *Russell v Cartwright* at [71]-[79]; *O'Brien v Phipps* [2023] EWHC 1153 at [39].

Further, while the Judge stated that he did "*engage with*" the Legitimate Expectation Test, the point is that he did not *engage adequately* with it (or the Undertaking Test): see ¶¶35-46 below.

32. **Second**, in so proceeding, the Judge pursued *his own theory* (which he identified during opening submissions, prior to hearing the evidence, while expressly acknowledging the point was unpleaded [**Day2/129-131**])[34] that Mr Mirza was an advisory fiduciary making recommendations to the JV Entities that the Directors simply followed. He further pursued this theory during oral evidence (see ¶¶138-141 below), following which this unpleaded argument materialised for the first time in the Claimants' closings. The Judge's statement in his PTA Ruling that a pleading complaint had "*no merit*" because "*the* [Secret Commission] *cases were relevant…to a point…pleaded – the existence of fiduciary duties*" is misconceived; pleadings must "*mark out the parameters of the case that is being advanced*",[35] including facts relied upon: **CPR 16.4(1)(a)**. In a fiduciary duty claim, "…*to call a person a fiduciary is only the beginning of the analysis. It is necessary to identify the respects in which he is a fiduciary and the duties which follow*";[36] accordingly, the pleading must "*allege facts which give rise to a necessary or probable inference that a fiduciary relationship existed*"[37] and outline the scope of the duties alleged.[38] Only then is it possible to determine any breach.[39] This applies *a fortiori* outside the recognised categories of fiduciary.[40] In their pleading,[41] the Claimants alleged no practice of advising the JV Entities (or the Morjarias) (**POC ¶26**), nor any duty to advise (let alone disinterestedly) (**POC ¶27**), nor any breach of such a duty (**POC ¶78**, **¶112**). That should have been determinative. Instead, the Judge alighted *on his own outline* of the duties owed by Mr Mirza **[J/858]**, even departing from the (late) framing in the Claimants' written closings (**C Closing Skel ¶56BB, ¶56DD)** to find an unpleaded duty of disinterested advice and a breach of that duty **[J/862]**. That was not open to him. While this was also procedurally unfair (see **Ground 11**), the theory can be safely dismissed on the grounds that it was simply unpleaded and not argued for.

{SB/149/1108}
{CB/15/579}
{CB/20/618}
{CB/20/619}
{CB/20/635}
{CB/20/643}
{CB/14/425}
{SB/143/1092}
{CB/14/425}

33. **Third**, and in any event, the Secret Commission Cases are inapposite in fact as well as law. Mr Mirza was neither a credit broker, nor in an analogous position. He was a commercial

[34] See too [**Day1/16:7-24]** in which the theory was put by the Judge to the Claimants. **{SB/147/1104}**
[35] *Al-Medenni v Mars UK Limited* [2005] EWCA Civ 1041 at [22].
[36] *Item Software (UK) Ltd v Fassihi* [2004] B.C.C. 994 at [35].
[37] *Portland Stone Firms Ltd v Barclays Bank Plc* [2018] EWHC 2341 (QB) at [109].
[38] *Alesco Risk Management Services Ltd v Bishopsgate Insurance Brokers Ltd* [2019] EWHC 2839 at [220].
[39] *University of Nottingham v Fishel* [2000] I.C.R. 1462 at p.1493F.
[40] *University of Nottingham v Fishel* at pp.1490F-1493 and especially p.1491B-E.
[41] The Claimants' pleading, as did their openings (**C Opening Skel ¶¶7-20, [Day2/123-124])**, focused primarily on whether Mr Mirza owed fiduciary duties to Mr Morjaria, not the JV Entities. **{SB/142/1088}** **{SB/148/1107}**

joint venturer in a real estate development, project managing the construction works (always subject to the Directors' approval). He had no contractual duty to advise the directors (or the Morjarias), let alone disinterestedly. Nor did he take a secret commission. Nor were the JV Entities like "*vulnerable*" or "*unsophisticated*" customers seeking credit products **[J/180]**: they were corporate entities holding the JV assets, controlled by professional, independent directors who charged the joint venturers c.£1.6m for performing their fiduciary functions.

{CB/14/291}

34. The Judge erred in re-casting Mr Mirza as "*an advisor*" (using an anachronistic and inappropriate analogy from the Middle Ages **[J/190]**), resulting in the forced analysis that Mr Mirza made "*implied recommendations*" **[J/862]**. His finding at **[J/185]** applies the wrong test (trust in another will not make them a fiduciary: see ¶29 above) and was made without any example of instances in which the Directors slavishly followed recommendations **without** considering independently whether they were in the JV Entities' best interests (see ¶35 and ¶47 below). The examples at **[J/186]** do not qualify. As to examples (i) and (iv), entry by the JV Entities into contracts with Tydwell and Boomzone with no material negotiation establishes neither the lack of such consideration nor control by Mr Mirza.[42] To the extent it indicates incompetence by the Directors, that would not make Mr Mirza a fiduciary; the only legitimate basis for finding such duties is that Mr Mirza undertook them, not that someone else failed to uphold their own responsibilities. As to (ii), paying invoices without obtaining underlying sub-contractor invoices "*in ignorance of what profit Tydwell was taking*" is *precisely* what would be expected from commercial counterparties.[43] As to (iii), appointing Mr Mirza as agent for a specific and limited purpose and only for a very small proportion of the JV strongly indicates that Mr Mirza was not an agent more generally (nor considered one by the JV Entities). The longest serving director, Mr Lewin (2008-2022), expressly confirmed in evidence that Mr Mirza and Tydwell were not agents.[44]

{CB/14/293}
{CB/14/425}
{CB/14/292}
{CB/14/293}
{SB/45/206}

Inadequate engagement with and application of the correct legal test (the Undertaking Test)

35. In failing to engage adequately with the Undertaking Test, the Judge fell into further error. His **fourth** error (related to the third) was to lend insufficient weight to the imposition of

[42] Mr Lewin's written evidence was that the IQEQ administration team would review and assess the contract and *that team* would provide a recommendation (**Lewin 1 ¶34,** {**SB/130/1048**}**)**. None of that amounted to accepting or expecting advice from Mr Mirza and certainly not "*disinterested advice*".

[43] They would not openly reveal their books, as Tydwell made clear from the outset {**SB/25/119**}.

[44] They could not take decisions on the JV Entities' behalf without referring to the Directors [**Day7/16:2**]. The Claimants' pleaded case also disavowed an allegation that Mr Mirza was an agent of the JV Entities generally (**May 2023 RFI**, **[Day1/17:1-21]**).

{SB/156/1130}
{CB/23/856}
{SB/147/1104}

three professional directors to hold the JV's assets **by design**.[45] The Directors had duties to take independent decisions in the JV Entities' best interests,[46] as each confirmed at trial[47] {SB/156/1131} (despite the Judge's inappropriate interventions [**Day7/21:11-12]**). Mr Morjaria himself {SB/150/1112} understood that the Directors would take the decisions and "*the responsibility*" [**Day3/204-205]**. Mr Mirza had no special powers under the JVA to select directors that suited him (see Recital C); in fact, the longest-serving directors were introduced by Mr Morjaria and managed the corporate trustee of his family trust (the "**WCT**"). Mr Lewin, who headed the director team, was Mr Morjaria's personal trustee.[48] He also had significant experience in {SB/209/1220} commercial real estate [**Day18/108-109]**. The directors made their decisions at board meetings in the Isle of Man,[49] without Mr Mirza present, and recorded them in written minutes.[50] No minute during the JV refers to a decision taken on Mr Mirza's recommendation (let alone on that solely), nor were the Directors required to follow any such recommendation. This was consistent both with the JVA's terms (see ¶¶37-43 below) and IQEQs' terms of engagement {**SB/19/92**}.[51] It is both wrong and inherently unlikely that the Directors slavishly followed Mr Mirza's recommendations, as that would have (i) breached their fiduciary duties to the JV Entities, (ii) contravened their obligations to WCT's {CB/14/353} beneficiaries (a point Mr Lewin made contemporaneously [**J/497])**, (iii) defied the tax advice and law underpinning it (see ¶37 below) and (iv) been contrary to their terms of engagement. The role of these professional directors distinguishes the case from every JV in which

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{SB/156/1130} [45] Conducting affairs through a sophisticated corporate structure points away from a fiduciary relationship: *Glenn v Walker* [2025] EWHC 1286 (Ch) at [151].

{SB/156/1131} [46] A duty enshrined in the Jersey Companies Law 1991 Art. 74(1)(a), reflecting English law.

{SB/163/1138} {SB/214/1229} {SB/211/1223} [47] Mr Lewin ([**Day7/16:15-16]**, who described himself as head of an executive team, akin to the CEO of BP [**Day7/19-20**], [**Day8/20:6-7**]); Mr Webster [**Day18/89-92]**; Ms Yates [**Day19/19]**.

{SB/165/1140} {SB/161/1136} [48] He had known Mr Morjaria since 2002 **{SB/134/1054}**, was a director of the trustee of WCT throughout **([Day8/91**], **{SB/55/228}**) and described himself as Mr Morjaria's "*offshore trustee*" [**Day7/156-159]**. Mr Morjaria described Mr Lewin privately as his "*long standing professional trustee and adviser*" **{SB/62/256}** and IQEQ as "*my trustees*" in his criminal witness statement (¶38) {**SB/133/1051**}.

[49] The location of such board meetings is relevant to where real control is exercised for the purpose of tax residency: *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455 at p.459.

[50] Entry into two of the contracts at [**J/186]** is recorded at {**SB/114/1004**}, **{SB/115/1005}**. Minutes accompanied the entry into the First **{SB/118/1008}**, Second **{SB/119/1009}** and Third **{SB/123/1016}** Boomzone Leases and the Design and Build Contract **{SB/121/1012}**. Each minute typically records an absence of any conflict of interest by the directors (to illustrate their independent judgment) and a {SB/116/1006} {SB/117/1007} {SB/120/1010} {SB/122/1014} {SB/124/1017} {SB/125/1020} {SB/126/1024} {SB/127/1025} {SB/128/1033} {SB/129/1038} recording of "*due consideration*": see too the minutes in Jan-16, Oct-16, May-18, Jun-20, Dec-21, Mar-22, Apr-22 and May-22 (x3). That the Directors meticulously recorded the decisions at these meetings reflects their understanding that they had to be the decision-makers. No allegation has been made that these minutes were a sham.

[51] These terms also contained an entire agreement and no oral modification clause **{SB/19/98}**.

fiduciary duties have been held to arise, and points markedly away from Mr Mirza undertaking the same duties he (and Mr Morjaria) were paying IQEQ to carry out.

36. Further, the extensive cladding negotiations (partially referred to at **[J/409]**-**[J/419]** but conspicuously absent from **[J/186]**) illustrate how the Directors did not slavishly follow Mr Mirza's requests. Mr Lewin explained in his evidence that, ultimately, he decided to proceed with the quote for cladding, without seeking the opinion of an independent surveyor because "***we decided*** *it was just too late in the day and* ***we just wanted*** *to get things moving*" [**Day7/83:18-25]** and he felt exposed as a director of the company [**Day7/89:11-16**]. The Directors clearly treated their responsibilities as real responsibilities and did not merely pay lip service to them.

{CB/14/337} **{CB/14/293}** **{SB/157/1132}** **{SB/158/1133}**

37. **Fifth,** the Judge lent virtually no weight to the tax advice from Jordan Fiscal Services Limited[52] in June and August 2007, pre-dating and forming the basis of the JV, which also points markedly away from the imposition of fiduciary duties. This advised that (i) Mr Mirza's UK construction company had to charge the Jersey company a full arm's length price and pay UK tax on its profits, (ii) the Jersey directors had to "*genuinely take decisions on behalf of each company at properly constituted board meetings in Jersey*" and (iii) "*[n]either* [Mr Mirza] *nor any other person resident in the UK must give instructions to the directors…since that will give ammunition to HMRC…to argue that the companies are therefore effectively managed and controlled and therefore resident in the UK*" **{SB/6/26}**. Unless this advice was followed, the JV Entities risked creating a Permanent Establishment in the UK, becoming subject to UK corporation tax at (then) 30%. Mr Morjaria accepted that the JV was formed based on this advice ([**Day3/192**, **200**, **205**, **209**]).[53] Mr Lewin received this advice contemporaneously [**Day7/153-156]**,[54] as did IQEQ when engaged **{SB/17/89}**. The Judge's statement in his PTA Ruling that "*Mr Morjaria and the Directors were largely unaware of the detail of the tax advice at the relevant time*" is plainly wrong. The tax efficiency of the JV remained a consistent source of concern for Mr Morjaria, as the December 2015 Email Exchange shows (**[J/281]-[J/283]**). In 2016, IQEQ again assured Mr Morjaria that "*full management and control…has taken place…outside the UK*" and "*all of the major strategic decisions have been made* [there]". This unguarded, internal documentation carries particular weight for "*getting to the truth*".[55]

{SB/150/1109} **{SB/150/1111}** **{SB/150/1112}** **{SB/150/1113}** **{SB/160/1135}** **{CB/15/578}** **{CB/14/313}** **{SB/35/167}** **{SB/34/162}**

[52] This entity was part of the Jordans Group which provided the JV Entities' first directors.
[53] Mr Morjaria received the tax advice on 13 August 2007 **{SB/8/31}** and had still retained it in July 2016 {**SB/37/173**}, revealing the significance it had for him.
[54] In fact, Mr Lewin gave similar advice on 7 August 2007 {**SB/3/17**}**:** "*so long as the offshore company is managed and controlled outside the UK, it should not be liable to UK corporation tax*".
[55] As per Males LJ in *Simetra Global Assets v Ikon Finance* [2019] 4 W.L.R. 112 at [48].

38. Despite the accepted significance of the tax advice to the design of the JV, the Judge addressed it in a 3-line paragraph [**J/189**], having cursorily and inaccurately summarised the advice at [**J/188**]. He dismissed the point in his PTA Ruling by suggesting (without justification on the facts, or with a finding to that effect in his Judgment) that parties often act "*contrary to*" or pay only "*lip service to*" tax advice. This failure to apply any (or any significant) weight to the tax advice was a misapplication of the correct test; in *Glenn v Walker* [2025] EWHC 1286, involving a JV formed on the basis of tax advice ([46], [81]-[82]), the court concluded (rightly) that tax consequences pointed away from the imposition of a partnership and, by extension, fiduciary duties ([118]-[119], [127], [133], [150]-[152]).

{CB/14/293}
{CB/14/293}
{CB/15/578}

39. **Sixth,** the Judge took no account of Mr Mirza's fiduciary duties to Tydwell as director,[56] highly relevant to whether he objectively undertook additional fiduciary duties to Otaki. Since Tydwell was always intended to contract with the JV Entities (see ¶37 and {**SB/10/41**}), if the JVA created a fiduciary obligation on Mr Mirza to Otaki, this would have created a structural conflict between these twin fiduciary duties at the outset of the JV (the Judge did not grapple with the inherent inconsistency at [**J/887]**), which neither Mr Mirza nor Otaki can have intended. Given that Otaki was professionally managed, it would (or should, and did not over a 15-year period) have required Mr Mirza to resign as Tydwell's director if it thought the JVA required him to act *solely* in Otaki's interests.

{CB/14/429}

40. **Seventh,** despite identifying correctly that "*a fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them*"[57] [**J/154(i)]**, the Judge incorrectly analysed the significance of the JVA's terms, including (i) the 'good faith' clauses (12.1, 12.2), (ii) the 'whole agreement' and 'no oral modification' clauses (13.1, 13.2, 14.1), (iii) the 'third party' clause (1.3), (iv) the 'director' clauses (5.1, 6), (v) Recital (E) and (vi) the 'no partnership and no agency' clauses (8.1, 8.2). Such specific and limited obligations strongly suggest no fiduciary relationship was intended, since implying more general, wider obligations would be inconsistent with these express terms.[58] This principle applies *a fortiori* where the contract is detailed and professionally drafted.[59]

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[56] A factor of importance in *Gray v Smith* [2022] EWHC 1153 (Ch) at [410] and considered a potentially relevant factor (on different facts) in *Ross River* (CA) at [60].
[57] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at [97], *Hopcraft* at [103].
[58] *Russell v Cartwright* [2020] EWHC 41 at [87]-[89]: *Ross River* [2012] EWHC 81 (HC) at [258].
[59] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 All E.R. (Comm) 1321 at [161]. The JVA was professionally drafted by Mr Morjaria's lawyers and had input from two other law firms (see e.g. the email thread at **{SB/9/35})**, including a Jersey law firm acting for Otaki.

41. As to ¶40(i) above, it was held in *Connoisseur* that "*the fact that there is an express good faith clause suggests, at the least…no fiduciary duties owed over and above that contractual duty*" [241].[60] The Judge wrongly distinguished *Connoisseur* in reliance on the *Ross River* decisions, erroneously believing there was an express good faith clause in *Ross River* (**[J/193(i)]**). There was none: *Ross River* (HC) at [258].[61] Nor did the Judge refer to the Defendants' reliance on the statement in *Al Nehayan* at [167], that a contractual obligation of good faith is a **limited** one and inconsistent with a subordination of interests to the JV Entities by Mr Mirza (note also the reference to him dealing on an "*arm's length basis*" in clause 12.1). The Judge in fact wrongly appeared to view an express contractual duty of good faith as *supporting* (rather than pointing away from) the imposition of fiduciary duties at **[J/201]**, an obvious error of law.

{CB/14/295} {CB/25/884} {CB/14/297}

42. As to ¶40(ii) above, such clauses indicate that Mr Mirza did not undertake additional fiduciary duties;[62] the Judge ignored[63] these clauses when stating that *Ross River* (CA) (in which there was no entire agreement clause) stood for the proposition that a JVA need not encompass all the parties' rights and duties **[J/167(i)]**. As to ¶40(iii) and (iv) above, these clauses make clear that Viper and Krugar would not have rights under the JVA and that at least three directors would retain control of all company funds and transactions (as they did in May 2022 **[J/1141]**). As to ¶40(v) above, this records that Otaki only entered into the JVA "*to confirm* ***its obligations***" (not to acquire any rights). As to ¶40(vi) above, while these clauses applied only between the "*Joint Venturers*" (i.e. including the Morjarias), that Mr Mirza is described in Clause 8.1 as an "*independent contractor*" (alongside him dealing "*on an arm's length basis*") is instructive, since these terms are inconsistent with fiduciary duties.[64]

{CB/14/288} {CB/14/474} {CB/25/882}

43. The Judge focused instead on clause 5.2, interpreting it wrongly, failing to do so objectively by reference to (i) the whole agreement,[65] (ii) the surrounding words,[66] (iii) the factual matrix at the time of contracting and (iv) the commercial consequences.[67] **Four** points are notable: **1)** The "*Joint Venture*" is defined as "*the arrangements between PKM, SM, CWM, SCM and Otaki*

{CB/25/878} {CB/25/872}

[60] See too *Russell* at [89], [97]; *Re Compound Photonics* [2022] EWCA Civ 1371 at [205]; *Al Nehayan* at [167].
[61] Morgan J set out the full terms of the JVA in Appendix I to his judgment. He implied such a duty (a "*fiduciary…duty of good faith*" [264]) in the absence of an express clause covering the point.
[62] *UTB LLC v Sheffield United Limited* [2019] EWHC 2322 (Ch) at [170]-[181], *Re Edwardian Group* [2018] EWHC 1715 (Ch) at [157]; *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2019] A.C. 119 at [14]-[17]. Equity will "*follow the law*", recognising the legal effect of the term agreed: *UTB* at [173].
[63] The Judge was fully aware of these clauses because he relied on them elsewhere **[J/228]**. **{CB/14/303}**
[64] *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 at [88].
[65] *The Interpretation of Contracts* (8th edn) ¶¶7.07-7.23.
[66] *The Interpretation of Contracts* (8th edn) ¶¶7.147-7.152.
[67] *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[13].

Holdings Limited set out in this Agreement". The best interests of the "*Joint Venture*" is therefore a nebulous concept, referring to the best interests of a set of arrangements (and **not** of any individual or entity); an important nuance the Judge failed to grapple with (see **[J/858]**[68] and the conflation of JV and Joint Venturers at **[J/851])**. To the extent that the phrase necessitates reference to the "*Joint Venture Objectives*", those objectives focused only on acquiring, building and enhancing the value of the Property (again without reference to any individual or entity). This is consistent with clause 5.2.2 which refers to the "*progress of the Joint Venture*" (an entity or individual would not have "*progress*" but a project or set of objectives could). If this clause had intended to create obligations on Mr Mirza to Otaki, it could and would have done so explicitly.

{CB/14/425} {CB/14/424} {CB/25/872} {CB/25/878}

44. **(2)** Clause 5.2 contains multiple limiting words. Mr Mirza's "*management*" role was limited to the "*daily operation of the Joint Venture*"; "*daily*" and "*operation*" are restrictive (not expansive) words, limiting management to day-to-day, operational matters (as opposed to multi-year, strategic matters). His "*decision-making*" role was limited to decisions "*through his construction company* (i.e. Tydwell)" and defined by reference to matters like "*the appointment of contractors*"; strongly indicating that decisions were limited to the Tydwell-level and to construction matters only. Mr Mirza's duty to provide information *only* applied to Mr and Mrs Morjaria (clause 5.2.2) and *only* to the "*progress of the Joint Venture*"; strongly suggesting no separate duty to the JV Entities. The Judge's finding that he accepted "*a duty to make recommendations to the JV Entities*" (**[J/853]**) accordingly sits wholly uneasily with this clause.

{CB/14/424}

45. **(3)** Once this clause is construed alongside the JVA's other clauses (at ¶¶40-42 above), the established assumption that commercial parties do not normally subordinate their own interest to those of another and the factual matrix (principally the tax advice at ¶37 and Mr Mirza's directorship of Tydwell, both of which limited his decision-making duties), it cannot objectively have created a fiduciary duty by Mr Miza to the JV Entities. Nor would it have made commercial sense for Mr Mirza (or Mr Morjaria) to pay vast fees to professional directors for work he was to undertake, especially if that risked compromising the tax advantages from such an arrangement (see ¶49).

46. **(4)** Emails Mr Mirza sent after the JVA (including 13 years later), which the Judge relied on **[J/191]**, have no bearing on how the JVA should be interpreted, especially given the 'whole

{CB/14/293}

[68] At **[J/858(i)]** Mr Mirza is said to have a duty to make recommendations to the *JV Entities*, but when conducting that duty he is bound to be considering the best interests of the *JV* (not of the JV Entities). {CB/14/425}

{CB/25/884} agreement' and 'no oral modification' clauses (13.1, 13.2 and 14.1). Mr Mirza's subjective view as to the effect of clause 5.2 in June 2020 **[J/191(iii)]** was both irrelevant and incorrect (see ¶¶43-44). Mr Mirza asking *Mr Morjaria* to trust him prior to the JVA **[J/191(i)]** is also irrelevant to whether he owed fiduciary duties *to the JV Entities* (see too *Glenn v Watson* at [136]). Nor could Mr Mirza realistically create new duties or vary those of the directors by a request that they follow his instructions **[J/191(ii)]**. These examples do not provide a basis for finding that Mr Mirza undertook to act exclusively in the interests of the JV Entities.

{CB/14/294} {CB/14/294} {CB/14/294}

Failure to distinguish this case from the exceptional cases in which fiduciary duties have been found to arise

47. The above errors led to the Judge's **eighth** error: his failure to distinguish *Ross River*, *Murad* and *Farrar v Miller* **[J/192]**-**[J/194]**, cases that are the exception rather than the rule in the JV context.[69] In *Ross River*, **control** was the key factor.[70] The defendant's own company, WCL (the JVC formed for the JV), had "*complete control over the operation of the joint venture*" [257], with the power (i) to handle disposals of interests in the development site, and (ii) to receive the proceeds, whereafter it would account to Ross River for the profits. Ross River had no nominee director on WCL's board, nor any shares in WCL. There were no intervening professional directors holding the assets with independent duties to act in the JVC's best and, *inter alia,* no good faith or entire agreement clauses in the JVA. The duties were owed *by* the JVC to the shareholder (not the other way around). The Judge erroneously did not refer to these material, distinguishing facts when reaching his finding **[J/192]**. Further, two examples graphically illustrate Mr Mirza's lack of control over the JV Entities' assets and profits (see too **[J/883]-[J/886])**, namely (i) the sale of Viper by Otaki without Mr Mirza's knowledge or consent in May 2022 to Mr Morjaria's vehicle ([**J/1121**], **[J/1146], [J/1153]**); and (ii) his inability to procure payment of a dividend by Viper or Otaki to enable him to retain the VAT advances (**[J/210]-[J/214]**), despite Viper's exceptional profit in 2014 that enabled one (**Def ¶127.2)**. The contemporary evidence of IQEQ was that they had "*full management and control*" of the JV Entities throughout: see ¶37 above and ¶49 below. Finally, the Judge expressly found that the Directors were the controlling minds of the JV Entities generally, which is inconsistent with Mr Mirza controlling them (**[J/872]-[J/873]**).

{CB/14/295} {CB/14/295} {CB/14/428} {CB/14/470} {CB/14/475} {CB/14/478} {CB/14/299} {CB/21/752} {CB/14/427}

[69] Cases in which fiduciary duties have been held not to arise in a joint venture are innumerable, including *Al Nehayan v Kent, Glenn v Watson*, *Russell v Cartwright*, *Glenn v Walker, Baturina v Chistyakov* [2017] EWHC 1049 and *Cullen Investments Ltd v Brown* [2017] EWHC 1586.

[70] It has consistently been analysed in this way in subsequent authorities: *Ross River* (CA) at [60], *Al Nehayan* at [160], *Glenn v Watson* at [131(9)], *Glenn v Walker* at [123]-[124].

48. In *Murad* the imbalance of power was key (though doubted as being definitive in *Hopcraft* at [105]-[106]). Mr Al-Saraj acted as agent of two sisters who had no property experience and were "*wholly dependent upon* [him] *for his advice and recommendation*" [328], [332]. There were no experienced professional directors (c.f. *Gleen v Watson* at [137]) looking after their interests (as the Morjarias had) and no limiting contractual clauses. Nor were the duties in *Murad* owed *to* the JVC. Rather, the court established a fiduciary duty between co-joint venturers *proposing to establish* one. In *Farrar*, an application to amend, it was merely "*arguable*" that the director of the JVC entrusted with corporate aspects of the JV (there were no professional directors), owed duties to his co-joint venturer (not to the JVC). None of these cases assist.

Policy implications and other consequences

49. **Finally,** this Court must consider the policy implications and commercial consequences of a finding that Mr Mirza (and Tydwell) owed fiduciary duties to the JV Entities (and/or the Morjarias), notwithstanding the JV's tax structure and the professional directors' role. Such a finding, concerning the location of management and control (see ¶37 above), would risk not only (i) onshoring this JV and mean that IQEQ's letters to HMRC - that the JV Entities were not taxable in the UK - were false, but also (ii) onshoring other, similar business ventures, thereby introducing unwelcome uncertainty into English commercial law. Lord Walker's dicta in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 at [81] holds true: "*the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel*".[71]

{SB/43/202}
{SB/44/205}

(b) Ground 3: The Judge was wrong in law to find that Tydwell also owed fiduciary duties on the same basis as he had found such duties to be owed by Mr Mirza

50. The Judge's errors were compounded when he went on to find at [**J/201**] that Tydwell, an independent company, also owed fiduciary duties, because it (i) "*was placed within the same position of trust, and subject to the same expectations as Mr Mirza*" and (ii) "*willingly assumed those responsibilities*", so that "*the reasons for regarding Mr Mirza as a fiduciary apply equally to Tydwell*". This reasoning is both superficial and flawed. Its brevity makes it difficult to understand precisely *why* the Judge reached his decision, beyond the conflation of Tydwell with Mr Mirza. In the single paragraph containing his reasoning, the Judge outlined no evidence he accepted nor any legal principle he applied. In fact, the finding was seemingly not based on

{CB/14/297}

[71] Applied in the JV context in *Glenn v Watson* at [132] and *Gray v Smith* at [384]; see *Wood v Capita* at [15].

any legal principle, as the Judge noted that the Claimants had found no authority to support a contention that Tydwell's fiduciary duties should follow from Mr Mirza's [**J/199**].[72] **{CB/14/297}**

51. In any event, the same analysis cannot "*apply equally*" to Tydwell: **First,** Tydwell was not a party to the JVA and so was not under any of the contractual obligations the Judge relied on in finding that Mr Mirza owed fiduciary duties (an error repeated at **[J/601]-[J/602]**). That **{CB/14/375}** Tydwell was the "*UK construction company*" named in clause 5.2, a factor the Judge relied on **{CB/14/297}** [**J/201**], would not create such obligations, absent Tydwell being a party to the JVA, due to the basic principle of privity of contract. Instead, Tydwell only undertook the obligations it assumed under the separate contracts it entered into with the JV Entities: see ¶53 below.

52. **Second,** to the extent the Judge was suggesting either (i) that Mr Mirza could impose such obligations on Tydwell by entering into the JVA personally or (ii) that Tydwell had obligations concerning the JV because Mr Mirza had them, that would violate the (further) basic principle of separate corporate personality (a director's liabilities are their own).[73]

53. **Third,** Tydwell was not in a position of trust: it was Mr Mirza's construction company providing services on an "*arm's length basis*"[74] to the JV Entities under a series of written **{CB/14/359}** contracts (see [**J/523**]). Clause 2.2 of the Procurement Contract, the Development Contract **{CB/26/897}** and the Design & Build Contract provided that Tydwell was not Viper or Otaki's agent. **{CB/28/935}** **{CB/29/955}** Such a clause points away from Tydwell owing fiduciary duties (a factor the Judge overlooked in his Judgment, despite it being cited in evidence and submissions).[75] Nor was Tydwell contractually required to, nor did it in fact, provide advice or recommendations to the JV Entities about the operation of the JV. Rather, Tydwell provided services to the JV, and invoiced the JV Entities. The basis on which the Judge found that Mr Mirza owed **{CB/14/424}** fiduciary duties [**J/853**], was not only wrong in law; it could not have applied to Tydwell.

54. **Fourth,** and in any event, trust is not the test (see ¶29 and ¶34 above); the test is whether Tydwell undertook to subordinate its interests to those of the JV Entities. It is commercially unreal to suppose that Tydwell, a company incorporated in April 2006 (over 18 months before the JVA), with a turnover of £60m+ during the course of the JV, involved in

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[72] The Claimants' closings stated simply that "*the same analysis applies to Tydwell*" [**J/148(viii)**]. **{CB/14/282}**
[73] As enshrined in *Salomon v Salomon & Co Ltd* [1897] AC 22.
[74] This is inimical to a fiduciary relationship since a bargain at arm's length "*connotes a transaction between two parties with separate and distinct interests who have each agreed terms (actually or inferentially) with a mind solely to his own respective interests*": *Mansworth (Inspector of Taxes) v Jelley* [2002] STC 1013 at [13].
[75] *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 at [88].

numerous construction projects, with its own stakeholders (creditors, employees, shareholders), would undertake to subordinate its interests to the JV Entities. No doubt Tydwell's distinct interests and stakeholders led the Judge (rightly) to decline to consider piercing the corporate veil since Tydwell was "*a genuine commercial company*" **[J/200]**. A finding that Tydwell undertook to act solely in the JV Entities' interests is also flatly inconsistent with the tax advice underpinning the JV: see ¶37 above. When it suited him (when obtaining tax advice), Mr Morjaria was content to say he had "*no connection with Tydwell this is Camran Mirza's construction company through which he does other UK development projects*" **{SB/37/173}**.

{CB/14/297}

55. **Fifth,** the Judge's finding was made without any reference to the JV cases: see ¶50 above. As far as the Defendants are aware, the only corporate entity that has been found to owe fiduciary duties in a JV context is WCL in *Ross River,* which was unlike Tydwell in all the ways set out at ¶47 above (including that it held the JV's assets and funds and was the JVC incorporated specifically for the JV, such that it did not have other interests).

56. The Judge should never have concluded, in one paragraph, that the reasons why Mr Mirza owed fiduciary duties applied equally to Tydwell, when Tydwell is a distinct legal entity and with a different relationship to the JV Entities. The Judge should have analysed separately whether Tydwell undertook to act solely in the JV Entities' interests. The obvious result of this test (had it been carried out) is that Tydwell did not so undertake. In his PTA Ruling, the Judge dealt briefly with these arguments, adding only the (new) point that "*Mr Mirza was the controlling mind of Tydwell*". That does not explain why or how Tydwell's obligations would mirror Mr Mirza's: see ¶52 above. Nor does it begin to engage with the Undertaking Test.

{CB/15/580}

(c) Ground 4: The Judge was wrong in law to find that the Claimants' belated argument that the fair-dealing rule applied was (a) open to them and (b) made out

57. At **[J/879]** the Judge permitted the Claimants to run the argument that the Court should apply the self-dealing or fair-dealing rule, despite that not having been pleaded nor raised prior to closing submissions, because it would be an "*overreaction*" to reject the argument, it being "*essentially the development of the legal argument arising out of the matters that have been pleaded*". This was wrong. The two rules are distinct aspects of the no-conflict rule arising in the particular context of a fiduciary who deals with trust property.[76] Since they concern duties imposed on a fiduciary they must be pleaded for the same reasons that the fiduciary duties

{CB/14/428}

[76] *Tito v Waddell (No 2)* [1977] Ch. 106 at p.241A-B.

relied on must be pleaded: see ¶32 above. The Claimants offered no explanation for their failure to raise these arguments at any point prior to closing submissions.

58. Nor did the Claimants' very late arguments arise out of matters they pleaded. The duties they pleaded did not even mention the no-conflict rule, let alone the fair-dealing rule (**POC ¶27)**. Their pleading in respect of the Boomzone Claims was confined to three paragraphs (**POC ¶¶112-113A**), none of which arguably raises the self-dealing or fair-dealing rules. In his PTA Ruling, the Judge noted that the Claimants "*had pleaded that there was a fiduciary duty*"; that is a wholly insufficient basis for finding that these points were open to them on the pleadings. To disregard such arguments would have been an appropriate and fair response.

{CB/20/619} {CB/20/643} {CB/15/580}

59. The Judge went on, wrongly, to find at [**J/915**] that, although there was no authority to support the Claimants' argument, the fair-dealing rule applied. **First**, he erred by finding that all the Claimants were required to show was that the transaction "*falls within the fiduciary relationship*" and that the property in question "*was the subject of the fiduciary relationship*" [**J/904**]. This is an insufficient basis for finding that the fair-dealing rule is engaged and is unsupported by authority. Fiduciary duties are not "*some sort of universally applicable homogenous mass*"[77] and their content must be analysed with care outside of the established categories.[78] The authorities cited in *Snell's Equity* that the Judge relied on (**[J/899]-[J/900])** are not authority for a principle of general application. They involve dealings between a solicitor and a client or trustee and beneficiary (paradigmatic and specific types of fiduciary relationship),[79] a point the Judge misunderstood (**[J/903]-[J/904])**. The point is that no example exists of the fair-dealing rule being applied outside such traditional categories, not *only* that the rule should not apply to all dealings with the trust. The awkwardness of applying the fair-dealing rule to cases outside the established categories can be seen by trying to apply the language in *Tito v Waddell* of "*purchase of a beneficial interest*" by a "*trustee*" to cases such as this one: see too *Lewin on Trusts* at ¶46-096 (which the Judge cited **[J/901],** but ignored). This explains why the fair-dealing rule is not even mentioned in the Secret Commission Cases.

{CB/14/434} {CB/14/432} {CB/14/431} {CB/14/432} {CB/14/431}

[77] *Fisher v Dinwoodie* [2023] EWHC 1279 (Ch) at [50].

[78] *F&C Alternative Investments Ltd v Barthelemy* [2012] Ch. 613 at ¶222.

[79] *Swindle v Harrison* [1997] 4 All ER 705) concerned a solicitor's offer to extend a loan from his firm to his client. *Re Thompson's Settlement* [1986] Ch. 99 concerned whether trustees (family members of the settlor who declared trusts in respect of four farming estates) were prevented by the self-dealing rule not only from selling trust property to themselves, but from vesting leases in such property by means of assignment. *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164 can be distinguished for the reasons stated by the Judge himself **[J/903]**; it concerned a breach of the duty of confidence (see [40]-[51]).

{CB/14/432}

60. **Second,** he erred by making inconsistent findings. The fair-dealing and self-dealing rules are based on the principle that underpins the "*no-conflict*" rule.[80] They have therefore been described as "*sub-rules*" of that rule or simply "*part of* [that] *wider rule*".[81] Finding that the fair-dealing rule was engaged was wholly inconsistent with the Judge's finding that the no-conflict rule did not apply to Mr Mirza **[J/858(ii)]**. If the rule upon which it stems from did not apply, it is difficult to see how the fair-dealing rule could apply. Further, the assertion that rescission is available because "*the property*" is the subject of the fiduciary relationship **[J/904]** is confused. Since the fiduciary duties the Judge found that Mr Mirza owed were not custodial, he did not owe *any* duties in relation to the Viper Lease and it cannot be said (even if fiduciary duties were owed) that the lease fell within that relationship.

{CB/14/425}

{CB/14/432}

61. **Finally,** the Judge's finding that since he had "*found a breach of fiduciary duty it should not really matter whether that breach is regarded as a breach of the fair-dealing rule or as some other type of breach of fiduciary duty*" **[J/905]**, is difficult to understand and reflects the lack of precision about what the Judge was doing and what duties Mr Mirza owed. The type of duty owed and breached *do matter*; there is no free-standing rescission remedy for *any* breach of fiduciary duty: see ¶59 above. Rescission becomes available, and is still discretionary **[J/907]**, following a breach of the no-conflict rule (into which receipt of a bribe falls): *Hopcraft* at [165]. That rule, and the fair-dealing rule flowing from it, did not apply to Mr Mirza; thus the duties and breaches the Judge identified do not found the remedy of rescission. Unless the principles by which the fair-dealing rule was engaged applied, the argument should have been rejected.

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IV. GROUNDS 12-13: KNOWING RECEIPT

(a) Ground 12: The Judge was wrong to find that there could be any knowing receipt claim in light of the breaches of fiduciary duty he found in relation to the Invoice Misrepresentations Claim and the Cladding Claim

62. Even if Mr Mirza is deemed a fiduciary, the Judge was nevertheless wrong to find that there had been "*a disposal of* [the claimant's] *assets in breach of fiduciary duty*" (the first element of a knowing receipt claim).[82] That the disposal of assets itself must be a breach of fiduciary duty to found such a claim is well established. *Brown v Bennett* [1999] BCC 91 concerned a knowing receipt claim against company B on grounds that the Bennetts had, by putting company A

[80] *DLA Piper UK LLP v Henshaws Farming LLP* [2025] EWHC 542 (Ch) at [192].

[81] *Civil Fraud* at ¶11-086; *Snell's Equity* at ¶7-025; *Caldicott v Richards* [2020] EWHC 767 (Ch) at [78]. The Judge's assertion in his PTA Ruling that it stems from the no-profit rule is both novel and wrong.

{CB/15/581}

[82] *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at p.700f-g.

(as directors) into financial difficulties, caused its administrative receivership and enabled company B (controlled by them) to purchase company A's assets. Morritt LJ stated that, since the sale was not itself a breach of trust, there could be no knowing receipt, since the receipt must be "*the direct consequence of the alleged breach of…fiduciary duty*" (p.655e).

63. Nugee J (as he then was) explained the *ratio* of *Brown v Bennett* in *Courtwood*; the receipt would only be "*the direct consequence*" of the breach if the disposal itself was a breach.[83] It is not enough that the disposal follows, and is caused by, other breaches of trust or fiduciary duty [190]. If the disposal is only procured by a breach of fiduciary duty, that will not found a knowing receipt claim [203]. This fits with the principle that such a claim is based on a flawed transfer of title; the transfer itself is impugned (not the antecedent steps) and the focus – at least in the claim's first element - is on the disposer not the acquirer: *Courtwood* at [199], [201]-[202]. This reasoning (albeit *obiter*) has been followed as good law.[84] While a director's disposal of assets can qualify, since directors are deemed trustees of the company's assets for (at least) such a claim,[85] it is only the breach of that trust over company property (i.e. a custodial breach)[86] that gives rise to liability in knowing receipt: *Courtwood* at [189].

64. There was no disposal in breach of fiduciary duty (nor was one pleaded: **POC ¶78**). Under **{CB/20/635}** the Invoice Misrepresentations Claim the Judge stated (a) "*insofar as Tydwell was making secret profits…then* ***this was a breach of fiduciary duty*** *by Mr Mirza* ***in causing Tydwell****…to do this. This is also true insofar as he* ***procured or caused Redwire*** *to do the same*" (**[J/542]**); and **{CB/14/362}** (b) "[t]*here was…* ***a breach of fiduciary duty*** *by Mr Mirza, to the extent that* ***he procured that*** *Redwire would obtain and keep sums…not justified by a clear request for a management fee*" (**[J/545]**). **{CB/14/363}** Under the Cladding Claim it "*was* ***a breach of fiduciary duty*** *for Mr Mirza and Tydwell* ***to arrange for Tydwell*** *to receive a profit that the JV Entities had not consented to*" (**[J/542]**, **[J/554]**). **{CB/14/362}** **{CB/14/364}** These breaches fall into the type identified in *Courtwood* as not founding a knowing receipt claim; they occurred prior to and can only have caused a disposal rather than amounting to a disposal in themselves. Moreover, the Judge erred by focusing on the acquirer, not the disposer (contrary to *Courtwood*), having identified no breaches of custodial duties. As

[83] *Courtwood Holdings SA v Woodley Properties Ltd* [2018] EWHC 2163 (Ch) at [188].
[84] The Court of Appeal approved of *Courtwood* in *Byers v Saudi National Bank* [2022] 4 WLR 22 at [74], as Lord Burrows also appeared to ([2024] A.C. 1191 at [127]-[129], [148]-[149] and [151]). *Courtwood* was also applied in *Davies v Ford* [2021] EWHC 2550 (see [238], [248], [257] and [264]).
[85] This was accepted in *Byers* (UKSC), albeit via different routes, at [60]-[61] and [175]-[188].
[86] Breaches of fiduciary duty can be (i) "*custodial*" (i.e. the misapplication of trust assets which are already under the fiduciary's custody) or (ii) "*non-custodial*" (e.g. breaches of the no conflict or no profit rules); see e.g. the categories approved of in *Libertarian Investments Ltd v Hall* [2014] 1 H.K.C. 368 at [75].

{CB/14/292} acknowledged at [**J/184**], Mr Mirza did not have custody over the assets; the Directors did: see ¶35, ¶47 above. Accordingly, the knowing receipt claim falls at the first hurdle. Although {SB/223/1240} this was raised in oral closings [**Day28/174-175**], it was not addressed in the Judgment.

(b) <u>Ground 13: The Judge was wrong both to find that Boomzone and LMH were liable in knowing receipt and that the Boomzone Lease and the LMH Lease were held on constructive trust</u>

65. **<u>First</u>**, the Judge repeated the error outlined in **Ground 12** above, *mutatis mutandis*, overlooking the principle that a disposal must <u>itself</u> be a breach of fiduciary duty. Under the Boomzone Lease Claim the Judge identified breach of (a) a duty of disinterested advice {CB/14/425} ([**J/862]-[J/870**]) and (b) a duty to obtain informed consent ([**J/871]-[J/876**]). Thus, any {CB/14/426} disposal (if there was one) followed or was caused by these breaches, as the Judge stated {CB/14/444} expressly at [**J/966**]: "*the three Boomzone Leases were each entered into* ***<u>following</u>*** *and* ***<u>in consequence of</u>*** *Mr Mirza's breach of fiduciary duty*". That is insufficient as a straightforward application of the principles in *<u>Courtwood</u>*. Again, the claim falls at the first hurdle.

66. **<u>Secondly</u>**, the Judge failed to grapple with further problems concerning the interaction {SB/223/1240} between contract and knowing receipt claims (also flagged in closing [**Day28/176-180**]). The creation of contractual rights between a company and third party does not constitute a "*receipt*" of assets from the company in the sense that a "*knowing receipt*" involves a receipt of assets[87] because the third party acquires rights <u>created</u> by the contract. Lewison J (as he then was) applied this principle in *<u>Ultraframe</u>* to reject the claim that an intellectual property licence granted by the company (and not yet set aside) could <u>itself</u> be held on constructive trust.[88] The grant of a new sub-lease in this case is akin to the grant of an intellectual property license*;* it also involved creating new rights, rather than disposing of assets. Accordingly, the Boomzone Leases <u>themselves</u> cannot be held on constructive trust for Viper; that analysis would be "*very artificial*": *<u>Ultraframe</u>* at [1491] (not least because contracts create obligations as well as rights). Rather than engaging with this, the Judge simply conflated disposal and {CB/14/444} creation **[J/966]**. Further, that was not the Claimants' case. They pleaded that Boomzone and LMH received the "*benefit*" of the leases and held that "*benefit*" on constructive trust (i.e {CB/20/645} not the leases) (**POC ¶¶118-118A)**, a distinction the Judge ignored [**J/964]**. {CB/14/443}

[87] *<u>Civil Fraud</u>* at ¶12-015; *<u>Criterion Properties Ltd v. Stratford UK Properties Ltd</u>* [2004] 1 WLR 1846 at [27].
[88] *<u>Ultraframe (UK) Ltd v Fielding</u>* [2005] EWHC 1638 at [1491]-[1494].

67. A re-framing based on that pleading would not rescue the issue. Such a benefit can be held on constructive trust only where the law treats that benefit itself as trust property from the outset, for example because it was a fiduciary gain that should have been acquired for the principal. Thus, fiduciaries can hold the benefit of a commercial opportunity on trust for their principal, but non-fiduciaries will not; they must have received trust assets, not just benefited from them.[89] That the benefit arises from a contract with the principal does not assist the Claimants; where non-fiduciaries receive benefits under a valid contract with the principal, there is no misapplied trust property (and so no knowing receipt claim) unless and until the contract is set aside (the "**Criterion Principle**").[90] As Lord Goff has put it, a company "*cannot short circuit an unrescinded contract simply by alleging a constructive trust*".[91] None of the Boomzone Leases have been rescinded and so no action in knowing receipt can lie.

68. While the Criterion Principle has been challenged at first instance in *London Capital*,[92] it has not at the Court of Appeal level and the reasoning in *London Capital* is in any event flawed, primarily based on the misunderstanding that the principle conflicts with *Akindele*; it does not, since the contractual arrangements in that case were between ICIC and Akindele, not between the claimant (BCCI (Overseas)) and Akindele.[93] Further it is also based on a misreading of Lord Burrows' decision in *Byers*; he stated that a knowing receipt claim would arise "***if*** *the contract is void*" ([192] and [196]), which *supports* the Criterion Principle. Lord Burrows' later dicta in *Hotel Portfolio II* - where he agreed that the hotels could not be held on constructive trust until their sale had been rescinded – further supports this reading.[94]

69. **Thirdly**, **t**he formulation that, since the Third Boomzone Lease constituted Viper's asset, the LMH Lease was also Viper's asset, suffers from similar defective reasoning. Since the Boomzone Leases themselves cannot have been trust property (see ¶66 above), it follows *a fortiori* that the LMH Lease cannot have been trust property.

(c) The Claimants' Respondents' Notice

[89] *Byers* (CA) [2022] 4 WLR 22 at [21]-[22] and [79]; *Davies v Ford* [2023] EWCA Civ 167 at [74]-[95].
[90] *Civil Fraud* at ¶12-015; *Ultraframe* at [1493]-[1494]; *Criterion Properties* at [3]-[4].
[91] *Guinness Plc v Saunders* [1990] 2 A.C. 663 at p.698e.
[92] *London Capital & Finance Plc v Thomson* [2024] EWHC 2894 (Ch) at [1961]-[1980].
[93] See the analysis of *BCCI v Akindele* [2001] Ch 437 in *Contracts and Knowing Receipt: Principles and Application* (2013) 129 LQR 359 at pp.372-373; see too *Byers* (UKSC) at [189] and [197].
[94] *Hotel Portfolio II* [2025] 3 W.L.R. 293 at [117] and [137]; [2024] 2 All E.R. 903 at [30] and [35].

70. Argument 1: The Claimants seek to uphold the Order on the basis that the Boomzone Leases and LMH Lease constituted the unauthorised profits of Mr Mirza's breach of fiduciary duty since they were (i) companies of which Mr Mirza was the controlling mind, (ii) nominees of Mr Mirza and (iii) companies which he arranged to take profits which he was in a position to take himself or set up to do so, alternatively that the corporate veil should be pierced (i.e. relying on either the 'concealment' or the 'evasion' principle in *Prest*).[95]

71. This argument faces insurmountable obstacles. **First**, the leases themselves cannot constitute unauthorised profits: see ¶66 above. **Second**, the Claimants' pleading does not come close to making these allegations; it would be unfair to permit them to change course now.[96] Worse still, their pleading is, if anything, inconsistent with this new case, since it alleges that Mrs Mirza, Ameer Mirza and Mr John's knowledge and intention should be attributed to Boomzone (**POC ¶88(e), ¶119)**, these individuals procured or assisted Mr Mirza's breaches through their roles at Boomzone (**POC ¶116)**, Boomzone acted through Shaima Mirza (**POC ¶97A)**, Boomzone, was an independent entity from Mr Mirza (**POC ¶¶106-107)** that assisted him in his breaches (**POC ¶116A**), "*the Mirzas*" procured the LMH Lease (**POC ¶100)** and LMH and Boomzone (as opposed to Mr Mirza) benefited from the leases (**POC ¶100A, ¶¶118-118A, ¶119, ¶135A)**. This can be contrasted with how the Claimants *did* plead that Mr Mirza should be identified with Wolverine (**POC ¶116A, ¶119J)**.

{CB/20/638} **{CB/20/646}** **{CB/20/644}** **{CB/20/640}** **{CB/20/642}** **{CB/20/644}** **{CB/20/641}** **{CB/20/641}** **{CB/20/645}** **{CB/20/646}** **{CB/20/658}** **{CB/20/644}** **{CB/20/649}**

72. **Third,** related to the second obstacle (since pleadings dictate the evidence), that these companies were Mr Mirza's nominees / 'alter egos' is unevidenced. This is a fact-sensitive inquiry that would involve, *inter alia,* close examination of the companies' transactions and source of funding, the influence of other individuals over the companies and the extent to which the companies sought to advance their interests rather than Mr Mirza's (ownership and control of a company is insufficient alone).[97] The evidence (and judicial findings) suggest the opposite; for example, the Judge found that, if Boomzone did act uncommercially, it did not do so for the benefit of Mr Mirza, but of LMH, in which Mr Mirza was not a shareholder and which the Judge described as "*a family company*" (**[J/115]**, **[J/931], [J/934]**). **Fourth,** and in any event, there was no such factual finding and no exceptional reason to depart from the usual position that parties cannot take new points on appeal that would necessitate new evidence, have resulted in the trial being conducted differently or require further factual

{CB/14/277} **{CB/14/436}** **{CB/14/436}**

[95] *Petrodel Resources Ltd v Prest* [2013] 2 A.C. 415.
[96] *Kalma v African Minerals Ltd* [2020] EWCA Civ 144 at [84]; *Al-Medenni* at [21]-[22] and [25].
[97] *Prest* at [8], [32], [52]; *Hotel Portfolio II* [2022] EWHC 383 at [6]-[7].

inquiry.[98] **Fifth,** the evasion principle[99] provides no second limb to the argument; Mr Mirza cannot have been seeking to evade a pre-existing liability unless Boomzone and LMH were his nominees: *Prest* at [33]. **Sixth,** LMH's corporate veil cannot be pierced when Mr Mirza is neither a shareholder nor ultimate beneficial owner of LMH: see *Hurstwood* at [67].

73. Argument 2: The Claimants ask the Court to find that the grant of the Boomzone Leases was ineffective to dispose of Viper's beneficial interest in its property. This argument is also misconceived. **First,** this analysis requires a trust; in the corporate context, this arises where the director is deemed a constructive/express trustee of the assets at the point of their breach of fiduciary duty: see ¶63 above. No analogous trust existed here, as Mr Mirza held no assets. **Second**, the requirement that the disposal itself be in breach of trust or fiduciary duty exists because that is the basis on which the beneficial interest in the property does not pass: *Courtwood* at [201]. The Claimants' argument dispenses with the first element of any knowing receipt claim; in fact, their argument seems to abandon the jurisprudential need for knowing receipt claim at all. **Third,** the argument again ignores the existence of a valid contract, which precludes a constructive trust unless and until it is rescinded: see ¶66-68 above, [**J/890**]. **{CB/14/429}**

V. GROUND 6: INVOICING CLAIMS

74. The Judge was wrong in law to find that Tydwell and Mr Mirza were liable for the tort of deceit under the Invoicing Claims in circumstances where his findings were (i) based on a generalised plea of deceit, (ii) inconsistent and (iii) based on flawed and inadequate reasoning.

(a) The allegation of fraudulent misrepresentation was inadequately particularised

75. A claimant who alleges fraud must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent. It is not open to the court to infer dishonesty from facts which have not been pleaded (or that are consistent with honesty).[100] Where representations are said to be implied, there must still be "*clear words*" or "*clear conduct*" of the representor from which the relevant representation can be implied.[101]

76. Although the Judge accepted the relevant principles (**[J/308]-[J/310])** he failed to apply them. The Claimants pleaded their case generically, referring only to a *"process"* they say was **{CB/14/318}**

[98] *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2022] EWCA Civ 415 at [27]-[37].
[99] Its existence has been doubted: *Hurstwood Properties (A) Ltd v Rossendale BC* [2022] AC 690 at [71].
[100] *Three Rivers DC v Bank of England* [2003] 2 A.C. 1, at [55]-[56] and [184]-[186]; *ED & F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWHC 229 at [69]-[71].
[101] *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) at [136].

{CB/20/625} *"routinely"* followed over 14 years (**POC ¶¶52-59**). Even when setting out that *"process",* they did not plead a single email or communication in which a *"Request"* (defined in **POC ¶52(a)**) was allegedly made. Indeed, the Claimants have **never** identified a specific representation that: (i) was made; and (ii) was known to be false. This is striking given the plea that the *"Invoice Representations were made on the face of the relevant Requests and/or Invoices"* (**POC ¶55**). Immediately after this, the Claimants plead, alternatively, that some representations were implied, but no "*clear words*" or "*clear conduct*" are relied on. Equally defective were the pleas to the Defendants' alleged knowledge (**POC ¶60**, **¶75; Def ¶64**, **¶80**).

{CB/20/625} {CB/20/627} {CB/20/628} {CB/20/632} {CB/21/694} {CB/21/707}

77. Yet, the Judge excused these inadequacies by saying that the Claimants "*were in a position to make a claim that the body of Invoices* ***as a whole*** *made a series of representations…and that* ***somewhere within this series…there must be untrue representations***" but they could not at the pleading stage to plead their case more fully (**[J/325]-[J/326]**). That reasoning is mistaken for four reasons. **First**, the Claimants did **not** plead that the body of Invoices "*as a whole*" made such representations and that there *must have been* untrue representations "*within* [them]"; they pleaded that the misrepresentations were *"made on the face of the relevant"* (i.e. specific) Requests or Invoices. **Second**, the notion that the Claimants lacked necessary information is inconsistent with that plea (and is not a point the Claimants themselves took). **Third**, if, as the Claimants contend, the Requests and Invoices showed representations on their face, the Claimants did not need to match up Requests and Invoices to underlying third party invoices. **Fourth**, the Claimants had ample opportunity to amend their pleading, reserving the right to do so (**POC ¶60(d), ¶60(f), Reply ¶33d**), but ultimately chose not to, even post-disclosure. Even if a generous approach to pleadings were taken pre-disclosure (the third party invoices were provided before the pleadings: **POC 60(f)**), the justification for that approach (seemingly limited to cartel cases) disappears post-disclosure.[102]

{CB/14/324} {CB/20/628} {CB/20/629} {CB/22/796} {CB/20/629}

78. The Judge constructed the Claimants' case for them, finding that "***the body*** *of requests…did misrepresent what was being claimed*" and any line items not labelled *"Project Management"* or *"Project Management or OH"* were, ***inferentially,*** misrepresentations (**[J/335]–[J/338]**). Not only was this case not pleaded, but, in accepting it (and not identifying whether the representations were implied or express), the Judge violated the essential principle that a fraudulent representation must be clearly identified: *Vald Nielsen* at [132]. Nor were the facts

{CB/14/328}

[102] *Portland Stone Firms Ltd v Barclays Bank Plc* [2018] EWHC 2341 (QB) at [26]–[28].

{CB/20/628} {CB/14/332} the Judge relied on to infer dishonesty pleaded (**POC ¶60, [J/368]-[J/369]**). In so inferring, the Judge did precisely what Lord Millett in *Three Rivers* said should not be done.

(b) The Judge's flawed, inadequate and inconsistent reasoning

79. Even leaving aside the issue of inadequate pleadings, the Judge's finding of fraudulent misrepresentation was flawed in respect of both (1) 'Invoicing' and (2) 'Cladding' claims.

80. **(1) Invoicing Claims:** The Judge operated on the premise that Tydwell's invoices purported to show only third-party costs – save for the "*project management*" labels. This underpinned his conclusion that any invoice including amounts not so labelled and not justified by reference to third-party invoices *"must be considered to include misrepresentations"* **[J/337]**. The Judge erred both in considering (i) the representor and (ii) the representee.

{CB/14/328}

81. As to the representee, the representation must be construed objectively according to the impact on a reasonable representee fixed with the JV Entities' actual knowledge and character: *Vald Nielsen* at [132], **[J/307]**. The Judge did not engage with this test at all, save for the bare assertion that "*it would have been the expectation of all parties that if Tydwell was charging a fee, it would do so specifically and not by marking up costs that it had received from third parties*" **[J/338]**.

{CB/14/318}

{CB/14/328}

82. In so asserting, the Judge made **two errors**: **First,** that assertion, made without reference to the evidence, relied (as "*background*") on essentially legal matters, namely (i) the Judge's finding that Mr Mirza was a fiduciary, (ii) the Judge's interpretation of clauses 5.2 and 12 of the JVA and (iii) the Judge's understanding of the payment mechanisms under the written contracts. Apart from the errors of law in this approach (see **Grounds 2-4**), this imposes a lawyer's construct over what occurred in practice and, again, amounted to the Judge pursuing his own case theory; there was no evidence that the parties contemporaneously sought or expected applications from Tydwell for payment under Clause 18 of the relevant contracts or a separate application for payment under Clause 19 (itself inconsistent with **[J/295]**). If the Judge were right, it would mean that the parties (given ¶83 below): (i) knew that Tydwell was entitled to fees; but (ii) assumed these fees were zero. That is commercially nonsensical. The Claimants' case was premised on an alleged agreement for Tydwell not to charge fees (**POC ¶22)**; that case failed. Mr Morjaria knew that Tydwell was profiting on its work (**[J/283]**, **[J/284]**, **[J/336]**). If Mr Morjaria (with whom the alleged agreement was made) knew there was no such agreement, there was no basis for the Directors to assume otherwise.

{CB/14/314} {CB/26/908} {CB/26/910} {CB/20/617} {CB/14/313} {CB/14/313} {CB/14/328}

83. **Secondly**, the Judge's assertion was inconsistent with his other findings, specifically, that: (i) Tydwell was entitled to charge fees **[J/330]**; (ii) Mr Morjaria accepted this **[J/299]**, **[J/336]**; (iii) the JV Entities were on notice of this **[J/292]**; (iv) presenting an invoice amounted to an application for payment of Tydwell's fees **[J/295]**; and (v) Mr Morjaria was likely *"relaxed about not being provided with details of fees from subcontractors"* **[J/552]**. It was also inconsistent with the tax advice that all parties had received: see **Ground 2**. Given all this, there was no basis (certainly not one adequately explained by the Judge) for the inference that all items (save for *"Project Management"*) on a Tydwell invoice referred only to third-party costs. Indeed, the opposite should have been true. Invoices shared by Tydwell, especially those on a Tydwell-headed invoice, should have been read as invoices for Tydwell's fees.

{CB/14/325} **{CB/14/315}** **{CB/14/328}** **{CB/14/314}** **{CB/14/314}** **{CB/14/364}**

84. Furthermore, the email relied on for finding that Mr Morjaria knew that Tydwell was charging fees began *"Tydwell was project managing the initial build and also carried out building work later"* **[J/283]-[J/284]**. Thus, the notion that Tydwell's fees were limited to *"Project Management"* does not follow from the Judge's own reasoning. Where Tydwell invoiced for, *inter alia*, *"Site fees", "Temporary Services", "Site Compound", "Repair Hoardings", "Rates & Sundries", "Works carried out Fence/lights etc", "Partitioning and Electricals",* or *"Carpentry Works",* there was no particular reason for reading these as being limited only to third party costs. No reasonable representee in the JV Entities' position would have concluded thus.

{CB/14/313}

85. As to the representor: the Judge's finding that Mr Mirza, Mr John and Tydwell knew that they were making false representations (**[J/338]**, **[J/368])** is also misconceived. **First**, the finding at **[J/338]** suffers from the same defects outlined at ¶82 above including because Mr Mirza never saw himself as a fiduciary. **Second**, at **[J/368]** the Judge relied (inferring from unpleaded facts, which was not open to him), on two supposed *objective* matters namely (i) the "*circumstances…and text of the Invoices and Requests*" and (ii) that backup information was not forthcoming when IQEQ asked. As to (i), that superficial and vague wording reinforces that the alleged misrepresentation cannot be identified; no text is mentioned and no circumstance referred to save for the same distinction about contractual mechanisms at **[J/338]**. As to (ii), the (unparticularised) failure to provide third-party invoices does not indicate Mr Mirza hiding the fact that Tydwell was charging fees. It indicates the opposite - that Tydwell was acting as an arm's length entity and was not prepared to open its books.

{CB/14/328} **{CB/14/332}** **{CB/14/332}** **{CB/14/328}**

86. **Third**, at no point did the Judge consider the key question: what was Mr Mirza's (and Mr John's) *subjective* understanding about what, if anything, was being represented? If, however unreasonably, a defendant believes the representation he is making is true, he cannot be

liable in deceit.[103] The Judge's conclusions as to this subjective state of mind are unstated (if they were ever considered), despite the Judge being aware of this legal requirement **[J/810]**. In circumstances where Mr Mirza (i) had received tax advice for Tydwell to charge arm's length fees, (ii) had told Mr Morjaria Tydwell was making profits (which it was entitled to do so (**[J/330]**); and (iii) did not consider himself to be a fiduciary, it is difficult in any event to see how such a subjective assessment could have been (or could now be) arrived at.

{CB/14/417}

{CB/14/325}

87. **(2) Cladding Claim:** Similar flaws of reasoning apply. Under the Design & Build Contract, Tydwell was the *"Contractor"* and was to be paid the "*Contract Sum"* defined by a *"Cost Plan"* providing for an advance payment of £750,000 plus *"payments to cover any further additional costs and expenses as may reasonably become necessary to complete the Project."* On 11 June 2020, Mr Mirza provided a 'Tydwell Costs Breakdown' (as defined at **[J/409]**) estimating the total "*cost to Otaki*" at £2,545,763 inclusive of VAT. The Judge found that this and subsequent communications constituted a representation that the substantial increase in costs arose from additional third-party costs of the cladding works. The Judge erred in three respects.

{CB/14/337}
{SB/52/218}

88. As to the representee: **First**, the Judge's reasoning was internally inconsistent. He found that (i) Otaki and Mr Morjaria understood that Tydwell was including within its figures some charge for its own work **[J/438(iii)]** and (ii) that Mr Morjaria, Mr Lewin and Mr Stobart understood (critically **after** 11 June 2020) that Tydwell was charging more than it was paying to subcontractors **[J/438(iv)]**, (see too **[J/111]**).[104] Yet, the Judge simultaneously found that all recipients of the 11 June Email would have understood that the increase in costs from £750,000 to £2,545,763 was due to additional (third-party) "*costs*" **[J/445]**. In effect, the Judge found unsustainably that Otaki understood the truth **and** was deceived by a falsehood. Given the findings as to Otaki's knowledge of Tydwell's fees, no reasonable representee in this position would have understood the increase to consist only of third party costs. The Judge wrongly lent no weight to the 17 June email in which Mr Lewin stated that IQEQ would instruct its "*own independent expert*" to verify the amount was "*aligned to market*" **[J/417]**.

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89. As to the representor and representee: **Second**, the Judge failed to apply the logical consequences of his conclusions. He concluded that the meaning of *"further additional costs and expenses"* in the Cost Plan covered costs for Tydwell's services (i.e. that costs meant *costs to Otaki*) **[J/1542].** He was right to do so: (1) This prevented the commercially absurd result

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[103] *Derry v Peek* (1889) 14 App Cas 337 at p.374; *Vald Nielsen* at [137].

[104] The email the Judge relied on (**[J/420]**, {**SB/56/244**}**)**, suggested that Mr Morjaria knew Tydwell was charging a lot more ("*at least double if not more*").

{CB/14/340}

that Tydwell otherwise would have undertaken open-ended obligations under the Design & Build Contract for zero further remuneration. (2) It reflected the meaning of the word "*further*": since all parties knew that the Cost Plan included fees for Tydwell (see ¶88 above), "*costs and expenses*" must have included Tydwell's fees. (3) This was also consistent with Mr Mirza's email on 11 June that the figure represented the "*costs to Otaki*". However, having so concluded, there was no logical basis for concluding that the parties would have understood any increase in costs as referring to third-party costs.

90. As to the representor: **Third**, the Judge failed to explain adequately the basis for holding that Mr Mirza and Tydwell **knew** that any representation concerning the costs increase would be attributable to third-party costs **[J/495]**. In so doing he appeared to rely primarily on apparent contractual breaches **[J/461]-[J/464]**, but (i) that does not explain how they understood the representations themselves and (ii) that does not arise from the facts pleaded to infer dishonesty (**POC ¶75)**; it was therefore not a finding open to him.

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VI. GROUND 7: UNJUST ENRICHMENT

91. The Judge was wrong in law to find unjust enrichment in relation to the Invoice Misrepresentations Claim, the Cladding Claim and the Boomzone Lease Claim. **First**, no established unjust factors were pleaded and proved.[105] In respect of the Invoice Misrepresentations Claim and the Cladding Claim, the Judge wrongly relied on the purported unjust factor of "*wrongdoing*". That is neither within the established categories of factors in *Goff & Jones* (¶1-29 and Part 5), nor in the case law:[106] The authors of *Civil Fraud* at ¶14-001 specifically state that *"wrongdoing (legal or equitable) is neither necessary nor sufficient to engage the law of unjust enrichment"*. The Claimants' closing submissions failed even to rely on "*wrongdoing*" as an unjust factor (**Cs' Skeleton Argument ¶103(c)**). Nor was a recognised unjust factor pleaded in relation to the Boomzone Lease Claim (**POC ¶115)**. The Judge fell into further error by seeking to find one beyond the pleaded claim, stating that a breach of Mr Mirza's contractual duties formed part of the *"circumstances"* rendering the enrichment unjust **[J/923]**. If the Judge was seeking to expand the list of unjust factors, that was not explained, nor was any attempt made to explain why such an extension would be desirable or necessary.

{SB/143/1095} {CB/20/644} {CB/14/435}

[105] An unjust factor must both (i) fall within an "*established category*" or "*some justifiable extension*" thereof; and (ii) be pleaded and proved: *Samsoondar v Capital Insurance Co Ltd* [2021] 2 All ER 1105 at [18]-[21], citing *Uren v First National Home Finance Ltd* [2005] EWHC 2529 at [16]; *Goff & Jones* at ¶1-28.
[106] *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2022] 1 All ER at [58] – [60], *Samsoondar* at [19].

92. **Second**, the well-established case law (referred to by the Judge at **[J/568]–[J/571]** and **{CB/14/367}** **{CB/14/368}** **[J/574]–[J/575]**) shows that there is no room for an unjust enrichment claim where there is a subsisting contract since it would subvert the parties' own allocations of risk.[107] The Court of Appeal has described this principle as the *"general rule"* but articulated no exceptions to it.[108] If there are exceptions, they are very limited: see *Civil Fraud* at ¶14-062, ¶14-064. The Judge correctly applied the general rule to reject the primary claims in unjust enrichment (based on *"mistake"* and *"failure of basis"*) by (i) not disputing the Defendants' submission at that the relevant contracts were *"never terminated for breach, they were discharged by performance"* **{CB/14/368}** **[J/572]***;* (ii) accepting that they were not *"invalid […] non-existent, void or voidable"* **[J/574]**-**[J/576]***;* and (iii) accepting the Defendants' submissions that Tydwell provided services to the Claimants pursuant to these contracts, that the contracts provided the justifying grounds for payments and, therefore, an unjust enrichment claim was ruled out **[J/577]-[J/578]**. **{CB/14/369}**

93. However, the Judge failed to apply the same factors to the claim based on *"wrongdoing"* (not **{CB/14/369}** **{CB/14/435}** an unjust factor in any event). His reasoning at [**J/579**] (see also [**J/923**]) that *"[i]it would be unjust for Tydwell, [or] Mr Mirza, to be able to retain amounts that they receive through deception"* falls foul of the judicial warnings not to base unjust enrichment on a wide-ranging and open-ended assessment of fairness in the round.[109] The Judge explained in his PTA Ruling that *"it* **{CB/15/587}** *was a question of undoing unjust enrichment arising from fraud"*, but that takes matters no further. These are distinct causes of action with distinct ingredients that cannot simply be assimilated. The proposition that fraud circumvents the general rule is unsupported by authority.

94. In relation to the Boomzone Lease Claim, the Judge did not engage **at all** with the general rule. The Judge's explanation in his PTA Ruling that the Boomzone Leases themselves **{CB/15/587}** constituted the unjust enrichment does not assist in circumventing the general rule because none of the Boomzone Leases have been rescinded, with the Judge directing further **{CB/14/432}** argument on the topic at a remedies hearing (**[J/906]**-**[J/913]**).

95. **The Claimant's Respondents' Notice:** The Claimants now say that because the Judge **{CB/14/362}** held ([**J/538**], [**J/579**]) that amounts overcharged were not due under the relevant contracts, **{CB/14/369}** he was wrong to find at [**J/576**] that contracts prevented an unjust enrichment claim in **{CB/14/369}**

[107] *Goff & Jones* ¶¶3-12, 9-02, 9-98, 12-06; *MacDonald Dickens & Macklin v Costello* [2012] QB 244 at [21], [23], [30]; *Fairfield Sentry Ltd v Migani* [2014] 1 CLC 611 at [18]; *Dargamo* at [133]; *Barton v Morris* [2023] AC 684 at [88]-[106].
[108] *MacDonald* at [23]; see also *Barton* at [89] and *Dargamo* at [70].
[109] *Civil Fraud* at ¶14-002, ¶14-048 and *Dargamo* at [59]-[64].

mistake. As to this, the amounts were due: see **Ground 6**. That the Claimants might have proceeded on a mistaken assumption about how the sums paid were to be applied is of no relevance where those sums were due under the relevant contracts.[110]

96. In any event, a claim in unjust enrichment on the ground of mistake is precluded in circumstances where: (i) the Judge made no finding that the JV Entities held any mistaken beliefs, let alone beliefs with any causative effect; (ii) in fact, his findings suggested their belief that fees were being charged (see ¶83, ¶88 above), so they could not have, simultaneously, held a mistaken belief to the contrary; and (iii) the parties had agreed a contractual allocation of the relevant risks. As to (iii), at [**J/527**]-[**J/530**] the Judge held that Tydwell had breached the relevant contracts by failing to repay sums in excess of those properly owing, even finding a breach of an implied term in the Procurement Contract and Development Agreement. There cannot be both a contractual mechanism for the repayment of excess sums and a valid claim in restitution based on mistake: *Goff & Jones* ¶¶9-98. Finally, the Claimants assumed the risk of their error.[111] For example, in relation to cladding, despite indicating an intention to instruct their own expert [**J/417**], the Directors never did. In the circumstances, the Claimants' decision to pay the amounts invoiced amounted to an assumption of risk, breaking the chain of causation and obviating any mistake.

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{CB/14/339}

VII. GROUND 8: SALE OF THE VIPER LEASE IN MAY 2024

(a) Ground 8(a): The Judge was wrong in law to hold that the sale of the Viper Lease to Wolverine is susceptible to rescission on the grounds that Mr Mirza failed to meet the burden of proof to show that he took reasonable precautions to obtain the best price reasonably obtainable for the Viper Lease at the time of sale (the "Price Duty")

97. For breach of the Price Duty to invalidate a transaction, it must be shown that the mortgagee failed to take reasonable steps to obtain the best price reasonably obtainable ("**Element 1**") and, consequently, that the resulting sale was not at such a price ("**Element 2**"). Both requirements follow as a matter of (i) principle (otherwise, no remedial consequences would arise) and (ii) authority: *Tse Kwong Lam v Wong Chit Sen* [1983] 1 W.L.R. 1349 at p.1359H.

98. Element 1: The Judge made four errors: **First**, he mistakenly accepted the incorrect premise that Mr Mirza had a duty to "*discover the highest amount*" a purchaser would pay (**POC ¶119N(b)**), concluding (under Element 2) that he "*would have been able to negotiate a higher price*

{CB/20/651}

[110] *Fairfield* at [18] and *Goff & Jones* at ¶¶9-99 and 9-100.
[111] *Deutsche Morgan Grenfell Group Plc v IRC* [2007] 1 A.C. 558 at [26]-[27].

{CB/14/536} *from Wolverine*" [**J/1484]**). That is wrong in law: his duty was not to obtain the best price possible, but that *reasonably obtainable* after taking *reasonable precautions*; the mortgagee is entitled to a "*margin of error*", "*will not be…in default unless he is plainly on the wrong side of the line*" and is not liable though he might have obtained a higher price.[112] Even if Wolverine were {CB/14/536} deemed a 'special purchaser' (the Judge at [**J/1484**] wrongly conflated Wolverine and LMH), it still did not need to pay a "*modest premium to the market price*" and was not obliged to pay a price more than it was genuinely prepared to pay.[113]

99. **Second**, the Judge adopted an unargued case, finding that Mr Mirza should have disclosed {CB/14/536} a *notice of rescission* to valuers ([**J/1482**]-[**J/1483**]);[114] that was neither part of the pleaded case {CB/20/651} (see **POC ¶119N(a)**) nor the case advanced in closing; in closing, the Claimants argued (itself beyond their pleaded case) that Mr Mirza had duties (i) to disclose to valuers that {SB/221/1238} Timeline was in occupation and (ii) to tell Mr Morjaria about the sale [**Day27/80**]. Making a finding based on his own theory was not open to the Judge: *Al-Medenni* at [21]-[22], [25].

100. **Third**, the Judge identified no authority (nor did the Claimants) to show (i) that a mortgagee has a duty to disclose a *notice of rescission* to valuers or (ii) that that duty arose from the Price Duty. A mortgagee is entitled to sell the mortgaged property as it is (i.e. prior to any determination otherwise, on the basis that rescission has not taken place).[115] Mr Mirza had no duty to advertise a notice of rescission, especially where (i) its effect on value was and remains inherently uncertain, (ii) the claim to rescind belongs to Viper (not the owner of the lease) and (iii) the purchaser might then be on notice and face a proprietary claim: see ¶¶103 below. In any event, this duty of disclosure goes nowhere; the Judge's conclusion (Element 2) was not that Mr Mirza could have got a higher price *from a third party*, but that he could have got a higher price *from Wolverine* (the notice of rescission was irrelevant to this).

101. **Fourth**, the Judge at [**J/1482**] ignored the advice from Mr McLaren KC to Mr Mirza that {CB/14/536} while "*Viper might allege a sale at under-value…that might well be difficult for* [it] *on the facts, given the Red Book valuation*" {**SB/139/1079**}. Thus, Mr Mirza not only had the Red Book valuation and advice from two estate agents, he also had professional advice confirming this should be sufficient to discharge concerns about selling at an undervalue. The Judge's statement in {CB/15/591} his PTA Ruling that Mr McLaren KC did not know about the "*common Mirza family ownership*"

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[112] *Michael v Miller* [2002] EWCA Civ 282 at [135]-[138]; *Cuckmere Brick* [1971] Ch 949 at p.969.
[113] *PK Airfinance SARL v Alpstream AG* [2016] 1 C.L.C. 135 at [233], [240]-[241] and [247].
{CB/14/536} [114] To the extent that he found Mr Mirza should also have alerted Viper [**J/1482]**, that was also unpleaded.
[115] *Silven Properties Ltd v RBS* [2004] 1 W.L.R. 997 at [16]–[17] and [20].

of Boomzone and Wolverine, apart from disregarding separate corporate personality, ignores Mr Mirza's evidence that Mr McLaren KC *did know* (i) that Mr Mirza owned {SB/186/1180} Boomzone and (ii) that Wolverine was wholly owned by his children [**Day12/194-195]**.

102. Element 2: The Judge failed to address this requirement at all, save for the bare assertion that Mr Mirza "*had* [he] *wanted to, would have been able to negotiate a higher price from Wolverine*" {CB/14/536} [**J/1484**]. He made three errors. **First**, Mr Ameer Mirza's oral evidence was that he put Wolverine's best price forward for the Viper Lease, which was a "*ceiling*" of £6 million {SB/208/1219} ([**Day17/276:23-24]**, **[Day17/278**]). That evidence was not challenged in cross-{SB/208/1219} examination; contrary to the Judge's assertion in the PTA Ruling, the Claimants only put to {CB/15/590} {SB/208/1219} Mr Ameer Mirza that there "*wasn't any hard-nosed arm's length negotiation*" [**Day17/278:5-6**] (a different point, going to Element 1). Nor was Mr Ameer Mirza found to be dishonest, whether in making that statement, or more generally (see e.g. [**J/489**] and [**J/1469(ii)**]). His {CB/14/352} evidence as to Wolverine's best price was not incredible or without logical foundation. The {CB/14/533} Judge's unreasoned assertion to the contrary did not follow from the evidence (or pleading) and so was not open to him.[116] **Second**, the Judge had no evidence and made no finding that Wolverine *could* pay more than £6 million (even if it had wished to).

103. **Third**, findings on valuation are entirely absent. The Judge did not explain what effect disclosure of the notice of rescission would have had on any valuation of the Viper Lease in {CB/14/536} May 2024, stating only that it "***could*** *fundamentally affect the value* ***to a third party***" ([**J/1483**]). The Judge had before him no evidence on the effect of such a notice because that was not the Claimants' pleaded case. It is unlikely that a potential purchaser would apply *any* value to a notice that relied on Viper to litigate and fund a claim (where the benefit would not accrue to Viper); alternatively, if anything, the purchaser would have been alerted to Viper's *proprietary claim* to the lease and *put off* from bidding. Even the effects of rescission on value are far from straightforward, not least given the principle of counter-restitution ([**J/911**], {CB/14/433} {CB/14/545} [**J/1534**], [**J/1660**]). The Judge erred by ignoring the only valuation evidence before him, {CB/14/569} namely that the effect of rescission was inherently uncertain, being "*non-standard for valuers*", "*a primarily legal question*" and "*not a term I come across as a property valuer*" **{SB/141/1084}**.

(b) Ground 8(b): The Judge was wrong in law to hold at [J/1440] that Mr Mirza's sole remedy to exercise a power of sale was that available to him in equity according to the doctrine of subrogation because the original debt had been repaid {CB/14/529}

[116] *Griffiths v TUI (UK) Ltd* [2025] A.C. 374 at [41] and [70].

104. The Judge erred in failing properly to consider or apply the Mercantile Law Amendment Act ("**MLAA**") 1856, which makes clear that, upon payment of the debt (i) Mr Mirza was "*entitled to*" have assigned to him BOS's securities under statute (rather than equity) and (ii) that the security (the BOS Charge) "*shall not be deemed at law to have been satisfied by the payment of the debt… and such person shall be entitled to stand in the place of the creditor, and to use all the remedies… at law or in equity…*".[117]: If repayment of the debt extinguished his legal rights that would contradict the statute's express wording. The court in *Leon* correctly treated subrogation as operating independently under statute: see [81], [98], [101], [121], [124]. Mr Mirza was therefore legally entitled to exercise the power of sale in the BOS Charge because the charge and the remedies contained in it survived (by the effect of statute) the repayment of the debt.

105. The Judge's answer in the PTA Ruling - that the parties to the [Settlement] Agreement "*expressly contracted out of the application of* [the] *MLAA*" - is wrong: the BOS Settlement Agreement simply recorded the parties' disagreement on the operation of the MLAA, with BOS taking the view that "*any assignment that* [a] *surety is entitled to pursuant to…the MLAA arises automatically by operation of law, without the need or obligation…to enter into any assignment agreement*". That provides no basis for saying that the parties contracted out of the statute nor even that they could do so (no part of the statute, nor any other authority, suggests that is possible).

{CB/15/591}

106. Finally, the Judge overlooked the Claimants' express concession that Mr Mirza could exercise a power of sale by virtue of the MLAA 1856 [**Day27/30-31**] (i.e. by statute rather than equity). It was not open to the Judge to go behind that, for good reason; that concession prevented argument on the point: see *Al-Medenni.*

{SB/220/1237}

(c) Ground 8(c): The Judge was wrong, in any event, in law to hold that Mr Mirza did not come to the court with "clean hands" such that equitable principles might bar the remedy of subrogation

107. **First**, the Judge was wrong to hold that the "*clean hands*" maxim applied to the remedy of subrogation. The Defendants are unaware of (and the Claimants have not cited) a single case where this maxim has been applied to (let alone barred) the remedy of subrogation;[118] its application was raised and rejected in *Day v Tiuta International Ltd* [2014] EWCA Civ 1246 (see ¶109 below) and *UBS AG v Rose Capital Ventures Ltd* [2018] EWHC 3137 at [121]-[122].

[117] See s.5 of the UK statute and s.2 of the Singaporean statute of the same name and date; *Leon v Kensington Mortgage Co Ltd* [2023] EWHC 121 (Ch) at [68], [69], [71]; *Chitty on Contracts* at ¶48-154 (fn 799).
[118] The Judge's concession in his PTA Ruling that this is "*unsurprising*" because of the rarity of the situations in which it might arise does not ameliorate the position {**CB/15/593**}.

The Claimants' skeleton argument at trial did not even mention the maxim, let alone rely on it as a bar to subrogation (indicating their lack of conviction in its operation).

108. While the right to subrogation is "*by origin an equitable right*", it is now "*considered to be a remedy in the law of unjust enrichment*": *Pagett's Law of Banking* at ¶18.26. In *Banque Financiere* [1999] 1 AC 221 the appellants submitted that, since subrogation is not "*wholly equitable in origin…there is no justification for the deployment of the concept of "clean hands*" (p.223G). The House of Lords did not reject that submission, with each Lord accepting (prior to the development of a general unjust enrichment doctrine) that subrogation was not a wholly equitable remedy and none mentioning the clean hands maxim.[119] More recently, the Supreme Court in *Menelaou* went further and made clear that subrogation is now properly analysed through the prism of unjust enrichment (rather than equitable principles).[120] At no point was the clean hands maxim mentioned. Neither *Pagett's Law of Banking* (ch 18) nor the *Law of Guarantees* (ch 11) mention it. If subrogation is to be analysed through the prism of unjust enrichment, restitutionary (rather than equitable) defences logically apply.[121]

109. Further, the Court of Appeal in *Day* (decided before *Menelaou*) did not *decide* that the maxim should apply to subrogation (implied at [**J/1444**]). The point was not argued (see [51]) and its application was rejected at [65]-[68]. Vos LJ in *Day* (with whom Moses LJ agreed) at [79] cited Neuberger LJ's statement in *C&G plc v. Appleyard* [2004] EWCA Civ 291 at [33] that "*subrogation is a remedy principally aimed at preventing unjust enrichment*"[122] and added at [81] that "*the remedy will **only** be denied if it can be shown that* [the creditor] *would not be unjustly enriched if it were denied*". Further, any reliance on *C&G* at [44] for the proposition that equitable defences can be raised against a claim for subrogation, was unsafe because the reasoning was *obiter* and the authority cited[123] did not state that proposition.

{CB/14/529}

110. **Secondly**, even if the maxim does apply, the Judge was wrong to hold that it barred the remedy of subrogation. Equitable principles should produce the result that victims of wrongdoing are protected, not that they receive a windfall (the "**Windfall Test**").[124] The

[119] *Banque Financiere* at pp.226F-227E (Lord Steyn, referencing restitutionary defences), p.237D-E (Lord Clyde; the principle is only equitable in the limited sense that "*it seeks to secure a fair and just determination*") and p.234C (Lord Hoffmann, outlining the questions applicable in an unjust enrichment claim).
[120] *Menelaou v Bank of Cyprus Plc* [2016] A.C. 176 at [18], [22], [37], [46], [50] (Lord Clark), [58], [61], [91] (Lord Neuberger) and [141] (Lords Kerr and Wilson). Only Lord Carnwath at [108] disagreed.
[121] See *Menelaou* at [18], [61] and [74]-[75] and [77].
[122] See too *Orakpo v. Manson Investments Ltd* [1978] A.C. 95 at p.104C-E.
[123] *Halifax Plc v Omar* [2002] 2 P. & C.R. 26 at [81]-[83].
[124] *Ball v De Marzo* [2019] EWHC 1587 (Ch) at [42].

clean hands maxim "*is reserved for exceptional cases, where those seeking to invoke it have put themselves beyond the pale by reason of serious immoral and deliberate misconduct such that the overall result of equitable intervention would not be an exercise but a denial of equity*" (the "**Immorality Test**") and, for it to operate at all, the misconduct complained of "*must have an immediate and necessary relation to the equity sued for*" or "*be sufficiently closely connected to the relief sought*" (the "**Relation Test**").[125] The Judge was wrong to state in his PTA Ruling that "*immediacy*" had nothing to do with time, since (i) the plain meaning of the word has a temporal meaning and (ii) the chronology must form part of the "*close connection*" / Relation Test.[126]

{CB/15/594}

111. In applying the Relation Test (which the Claimants did not engage with), the Judge made **three** errors: (1) He wrongly made the Claimants' case for them; having accepted that the "*Claimants have not expressly advanced any pleading or argument that Mr Mirza was not "doing equity" in relation to the Wolverine Transaction*" [**J/1530**] he wrongly expanded their pleading to assert that "*the matter they rely on is pleaded at 113A of the PoC*" [**J/1531**]. At no point in ¶119G of the POC is ¶113A referred to. The absence of such a case should have been conclusive.

{CB/14/545} **{CB/14/545}** **{CB/20/648}**

112. (2) Having rejected the notion that the Wolverine Transaction (i) formed part of one deliberate plot in relation to the Boomzone Leases, since it occurred more than 3 years later and "*the timing does not fit*" [**J/1490**][127] and (ii) was a consequence of the breach of fiduciary duty in relation to the Boomzone Leases ([**J/1492]-[J/1494**]), the "*immediate…relation*" part of the test was not satisfied on grounds of <u>both</u> timing and causation.

{CB/14/538} **{CB/14/538}**

113. (3) The "*necessary*" part of the test was not satisfied either. The misconduct the Judge identified, namely the creation and grant of the Boomzone Leases, was not "*necessary*" for Mr Mirza to exercise his subrogation rights. The entry into the BOS Facility and Viper / Mr Morjaria's failure to repay it allowed Mr Mirza to exercise those rights.[128] Contrary to **[J/1533]**, the price that Mr Mirza undertook the transaction at was defined by the size of the BOS Facility and the interest that had accrued (not by any breaches of fiduciary duty). The Judge's statement that "*the complaint is not that Mr Mirza exercised the right of subrogation, it is that he did so in breach of the price duty*" makes the Defendants' point for them: if this is merely a restatement of the breach of the Price Duty, then the maxim does not and need not apply..

{CB/14/545}

[125] <u>*Recovery Partners GP Ltd v Rukhadze*</u> [2022] EWHC 690 at [344]-[349].
[126] <u>*Terceira v Terceira*</u> [2011] SC (Bda) 6 Civ at [81]–[82], cited in <u>*Snell's Equity*</u> at ¶5-011.
[127] In June 2022 the Claimants wrote that "*Viper is clearly no longer a joint venture asset*" {**SB/69/273**}.
[128] It was always open to them as mortgagor/surety to redeem the mortgage: <u>*Silven Properties*</u> at [18].

114. Finally, the Judge failed to consider or apply properly the Immorality Test[129] or the Windfall Test. Denying Mr Mirza the remedy of subrogation would hand Viper a windfall (granting it unencumbered title to the Viper lease at Mr Mirza's expense) and there is no evidence that Viper can afford to repay the c.£10m Mr Mirza incurred (hence why the BOS Facility was never paid off), nor an order to that effect. The assertion in the PTA Ruling that any "*windfall*" will be considered later simply reinforces this lack of engagement. **{CB/15/594}**

VIII. GROUND 9: BREACH OF CONTRACT

115. The Judge found that wrongdoing in relation to the Invoicing Claim "*involved breaches of the contractual duties owed by Mr Mirza to the JV Entities and to Mr and Mrs Morjaria"* **[J/554]** and made similar findings in respect of the Boomzone Leases (**[J/859], [J/914]**). He erred in **four ways. First**, Mr Mirza did not owe contractual duties to the *"JV Entities*"; he only owed a duty of good faith to Otaki. The Judge's assertion in his PTA Ruling that this duty "*included a duty to act in good faith towards Viper*" was neither pleaded nor argued for and so was not a open to him (nor is it supported by any reasoning in the Judgment); in any event, the JVA, containing an entire agreement clause, does not come close to suggesting this extended duty. **Second,** the Judge did not set out the contractual "*duties*" breached (save in respect of the Boomzone Leases, wrongly treating them as identical to fiduciary duties: see ¶41 above). **Third,** the Judge found that Tydwell had breached the JV/Tydwell contracts "*through requesting more payment than was properly due"* (**[J/518], [J/529]**, **[J/1538]**) but the pleading relied on an implied term of good faith (**POC ¶79(d)**, which the Judge rejected **[J/519]**; he could not substitute that with an unpleaded point concerning other contractual terms **[J/518]**. **Fourth**, in any event, the findings were premised on deceit and alleged breaches of fiduciary duty; for the reasons outlined at **Grounds 2** and **6** above, this head of liability should also fall away.

{CB/14/364} **{CB/14/425}** **{CB/14/433}** **{CB/15/589}** **{CB/14/358}** **{CB/14/360}** **{CB/14/546}** **{CB/14/358}** **{CB/14/358}**

IX. GROUND 10: DISHONEST ASSISTANCE AND CONSPIRACY

116. The Judge's findings of dishonest assistance also fall away with fiduciary duties: see **Grounds 2-4** above. The finding at **[J/642]** of an unlawful means conspiracy relies (as the unlawful means) on there being fraudulent misrepresentations and breaches of fiduciary duties **[J/629]**; this head of liability also falls away: see **Grounds 2, 3** and **6** above. The same analysis applies to the unlawful means relied upon in respect of the Boomzone Leases **[J/1509]**, which is wrong for the reasons outlined at **Grounds 2-4, 7** and **9** above. **{CB/14/384}** **{CB/14/382}** **{CB/14/541}**

[129] The Judge recorded only that there was "*an important element of impropriety*" **[J/1533]**. **{CB/14/545}**

117. Finally, the Judge's conclusions as to the attribution of knowledge as between Mr Mirza, Tydwell, Redwire and Boomzone, were also wrong. The Judge said that the Defendants' complaint that the basis for attributing knowledge was unpleaded was "*making heavy weather of* [it]*"* because the "*basis of attribution is a point for legal argument"* **[J/641]**. That the attribution of knowledge depends on the application of legal principles does not mean that a Claimant should not have to identify the basis for attribution with sufficient particularity.[130] That is especially so in a fraud claim. Even if the basis for attribution is a point for legal argument, the Judge did not refer to any such legal arguments, nor did the Claimants advance any.

{CB/14/384}

X. GROUND 11: PROCEDURAL UNFAIRNESS

118. Regrettably, the Judge – through constant interventions - conducted the trial in a manner that was procedurally unfair to the Defendants and to Mr Mirza in particular. This section, building on the Schedule appended to the Grounds of Appeal, outlines the most egregious examples of such interventions. The detail and number that can be set out herein is necessarily limited. The court is respectfully invited to read the transcript excerpts cited. Unfortunately, these were not rare or isolated incidents nor are the examples exhaustive. Of the 1,021 pages of the Opus transcript in which Mr Mirza was cross-examined, the Judge appears on 645 (63% on average). During Mr Morjaria's cross-examination, the Judge also interrupted extensively, albeit less so, appearing on 379 out of 678 pages (56% on average). The sheer volume of interruptions had a corrosive effect on the evidence. While the Judge stated that counsel's role was to ask the questions and his role was to "*ask questions when I don't think we've got to the bottom of things*" [**Day11/219-220],** the Judge went significantly beyond that role by asking questions while "*the bottom of things*" was still being explored with witnesses; that is not the judge's role in an adversarial system: see ¶119 below.

{SB/180/1169}

119. **The legal principles**: Civil litigation in England is generally conducted on an adversarial (rather than inquisitorial) basis by the opposing parties calling and cross-examining witnesses and making submissions to the judge, sitting to decide the case based on issues raised by them (not to "*conduct an investigation…on behalf of society at large*").[131] The "*core principle*" is that the judge remains above the fray and neutral during the elicitation of the evidence.[132] The is

[130] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at p.507D – F.
[131] *Jones v National Coal Board* [1957] 2 QB 55 at p.63, *Rea v Rea* [2022] EWCA Civ 195 at [63].
[132] *Michel v The Queen* [2009] UKPC 41 at [31]; *Rea v Rea* [2022] EWCA Civ 195 at [63]; *Serafin* at [42].

particularly important during the oral evidence;[133] while the judge is not a mere umpire,[134] excessive judicial interventions affect (1) the judge himself, (2) the witness and (3) counsel.

120. (1) If the judge takes on the cross-examination, he "*descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation…*";[135] he "*drops the mantle of a judge and assumes the robe of an advocate…*[which] *does not become him well*": *Jones* at p.64. The risk is that this so hampers his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may for that reason render the trial unfair: *Southwark* at [146].

121. (2) It affects the witness whose "*demeanour is apt to be very different when…being questioned by the judge from what it is when he is being questioned by counsel*": Yuill at p.20. The witness may feel that they are simultaneously facing two cross-examiners: counsel and the judge: *Southwark* at [57].

122. (3) Excessive interruptions during counsel's cross-examination are also distortive. First, they weaken the cross-examination's effectiveness by giving the witness time to think out answers to awkward questions. Second, the interventions place counsel "*at a grave disadvantage*" by preventing them from following a preconceived line of inquiry which, in their view, is most likely to elicit admissions or qualifications: *Jones* at p.65. Counsel should be allowed the freedom to develop their line of questioning unless intervention really is necessary.[136] Cross-examination is of central importance where the parties' credibility is particularly material: *Re G* at [47]. Consequently, the judge should postpone his questioning until after cross-examination and re-examination: *Keane v Sargen* [2023] EWCA Civ 141 at [59], *Hossain* at [58].

123. The ultimate question is whether the interventions render a trial unfair.[137] As to this test:

124. (1) The judge's motives are irrelevant: *Jones* at p.63. The trial's fairness is assessed objectively; either it was fair or it was not: *Serafin* at [38]; *Hossain* at [54] and [69].

125. (2) What fairness requires is essentially an intuitive judgment and is fact-specific and context-specific: *Hossain* at [61]; *HA (Afghanistan) v SSHD (no 2)* [2010] S.C. 457 at [4].

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[133] *Southwark* at [142].
[134] He is entitled to ask questions where it is necessary to clear up certain points or to see that the advocates behave themselves or to exclude irrelevances and discourage repetition: *Jones* at pp.63-64.
[135] *Yuill v Yuill* [1945] P 15 at p.20, endorsed by Denning LJ in *Jones* at p.64.
[136] *Re G (A Child)* [2015] EWCA Civ 834 at [46].
[137] *Hossain v SSHD* [2024] EWCA Civ 608 at [48]-[49]; *Keane v Sargen* at [66].

126. (3) The test is both qualitative and quantitative.[138] Quantitatively, while excessive judicial interventions during cross-examination do not *by themselves* render a trial unfair,[139] they should be *"as infrequent as possible"* given that *"the very gist of cross-examination lies in the unbroken sequence of question and answer"*: *Jones* at p.65. The greater the frequency of the interventions, the greater the risk of unfairness; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one: *Southwark* at [145]. It will not make a trial fair if there are long stretches of evidence of which no criticism can be made: *Serafin* at [48].

127. (3) Qualitatively, it is necessary to look at the *nature* of the judge's interventions: *Re G* at [39]. Where they go beyond seeking clarification of a page number or an aspect of questioning or seeking to move matters along, they may prevent cross-examination from getting off the ground or significantly hamper the progress and take up a disproportionate amount of the limited time available, pointing towards an unfair hearing: *Re G* at [47]. Further, the judge should not develop a different case from that presented by the parties or pursue his own theory; the judge should not take over conduct of the case: *Hossain* at [58]. The *manner* in which an intervention is undertaken is also important; interventions should not be hostile or suggest the judge's mind is made up, nor should the questions be leading: *Hossain* at [58]. The judge should not put to the witness that they are dishoenst: *Serafin*, Schedule [A.10].

128. (4) As to the effect of the interventions, the court should look at the issues in the case and how the judge's conduct impacted on them: *Shaw* at [46], *Hossain* at [49]-[50]. While procedural impropriety may not vitiate a decision if it is apparent that no prejudice was suffered, if it cannot be clearly shown that the impropriety was of no significance, that points towards an unfair hearing: *HA (Afghanistan) v SSHD (no 2)* at [15], [32]-[34]. Where the judge derives little assistance from the oral evidence, that may support a conclusion that something has gone wrong: *Southwark* at [147]. It is not necessary to show that 'but for' the interventions, the judge would have reached different conclusions; the flaw lies not so much in the decision itself but the way the judge reached it: *Southwark* at [148], cited in *Shaw* at [42]. A trial can be rendered unfair if the judge's conduct impacts on the parties' ability to advance their case, such that the judge cannot fairly appraise it: *Hossain* at [54]; *Serafin* at [48].

[138] *M and P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) at [23(3)], *Hossain v SSHD* at [51]; *Re G* at [66].
[139] *Hossain v SSHD* at [50]-[51].

129. (5) The fairness of the hearing is not *dependent on* a comparison between the way in which the judge has treated the two sides: *Re G* at [38], *M&P* at [23].

130. (6) A carefully and cogently written judgment will not redeem a trial where the judge prejudiced the exploration of the evidence: *Serafin* at [44]; *Re G* at [52].

131. **The length of Mr Mirza's evidence**: Mr Mirza was required to give evidence over 6 days of extended sitting ([**Day10/164]-[Day15/127])**, despite the agreed trial timetable providing for 3 days. The Judge acknowledged at the close of his evidence both (i) that he had been "*profusely*" asking questions throughout and (ii) that it had been a gruelling period for Mr Mirza [**Day15:127]** (noting elsewhere that Mr Mirza had faced "*lots of different questions coming at you from all angles*" **[Day13:220-221])**. Despite this and despite requests from counsel [**Day14/139-141]**), the Judge made little attempt to curtail Mr Mirza's cross-examination.[140] On Friday 14 February (Day 12), Mr Mirza was questioned from 10am-5:30pm, with counsel objecting to the sitting length at the day's start [**Day12/1-2]** and end [**Day12/234-236]**. While the length of Mr Mirza's evidence did not *in itself* make the trial unfair, it provides important context for and exacerbates the unfairness of the interventions that follow.

{SB/135/1055} {SB/207/1218} {SB/195/1196} {SB/199/1202} {SB/182/1172} {SB/187/1183}

(a) Interventions during the Defendants' evidence

132. **Examples (1)-(7):** In relation to the Cladding Claim, the Judge consistently cross-examined Mr Mirza alongside the Claimants' counsel. He did so while indicating his sympathy with counsel's questions ((1) [**Day11/38-47**]), curtailing Mr Mirza from providing context ((2) [**Day11/59-60]**), and repeating counsel's point that Mr Mirza had Mr Lewin "*over a barrel*" ((3) [**Day11/63-65]**). At times, he took over Mr Mirza's cross-examination *in toto* ((4) [**Day10/217-225]**). The Judge openly doubted the veracity of Mr Mirza's evidence, telling him that he would "*hear representations from the lawyers whether that's true or not*" ((5) [**Day14/243-244]**). The Judge exceptionally recommenced cross-examination of Mr Mirza during re-examination *multiple times* including putting to him that he was not telling the truth[141] ((6) [**Day15/57-63]**, (7) [**Day15/77-83**]). In so acting, the Judge descended into the arena, distorting his ability to assess the evidence and preventing Mr Mirza from giving evidence fairly. As in *Southwark*, Mr Mirza likely felt he was being cross-examined by both counsel and judge. Understandably dizzied by the array of questions coming at him, he was forced

{SB/175/1154} {SB/177/1159} {SB/177/1160} {SB/172/1148} {SB/203/1208} {SB/205/1210} {SB/206/1213}

[140] In fact, the Judge indicated that, since Mr Mirza was the "*star witness*", cross-examination could extend into further days, with the time made up later [**Day12/3-5] {SB/182/1172}**.
[141] **[Day15/58:17] {SB/205/1210}**.

{SB/176/1158} to ask if one question could be put to him at a time [**Day11/51-52].** Strikingly, the Judge's
{CB/14/346} consequential findings at [**J/448]-[J/460]** do not mention the oral evidence, an indication that he formed a view and descended into the arena prior to hearing it.

133. **Examples (8)-(11)**: In relation to the Boomzone Lease Claim, the Judge again cross-examined Mr Mirza alongside counsel. At one point, in putting the Claimants' points to Mr Mirza, he implied that Mr Mirza was dishonest and apologised to counsel for *"stealing* [his] *lines"* (seemingly a judicial admission he knew his actions were unorthodox) ((8) [**Day**
{SB/181/1170} **11/226-229**]). When the Directors' counsel accused Mr Mirza of lying, the Judge took over the cross-examination and effectively accused Mr Mirza of dishonesty by putting what an
{SB/194/1194} "*honest*" response would have been instead ((9) [**Day 13/202**]). The Judge also cross-examined Mr Mirza *on whether the Directors believed* that Boomzone was part of the JV ((10)
{SB/179/1166} [**Day11/192-199]),** a matter not within Mr Mirza's knowledge. This led to him announcing a pre-emptive finding of fact mid-cross-examination ("*I can't see any other explanation*" [**Day**
{SB/183/1175} **12/79-80**]) on an important issue in dispute (that the Directors believed that Boomzone was part of the JV when the Boomzone Leases were entered into). This occurred amidst a longer
{SB/183/1174} section of judicial cross-examination ((11) [**Day12/75-86]),** in which the Judge also "*warned*"
{SB/183/1176} Mr Mirza he was not persuaded by his evidence [**Day12/84]**.

134. As explained in *Hossain* at [58], these hostile and leading questions, indicating that the Judge's mind was made up, were inappropriate and unfair including because (i) cross-examination and re-examination of Mr Mirza had not concluded; (ii) it was unsettling to put these pre-emptive findings to Mr Mirza; and (iii) two of the Directors who gave direct – and contrary
{CB/14/420} [**J/832]-[J/833**] - evidence on this question, which was for them to answer, had not yet been called.[142] It underpinned the Judge's conclusions on liability for breach of contract, breach of fiduciary duty, unjust enrichment and knowing receipt:[143] **Grounds 4, 7, 9, 12, 13**. Again, the Judge did not refer to Mr Mirza's oral evidence on this point in his Judgment.

135. **Examples (12)-(14)**: During cross-examination on the Part 20 Claim, the Judge cross-examined Mr Mirza alongside the Directors' counsel, either adopting the Directors' case
{SB/200/1203} ((12) **[Day14/154-159]**), siding with counsel ("*I agree with you, Mr Lloyd*" (13) [**Day14/114-**
{SB/198/1200} **115]**), or openly doubting the evidence Mr Mirza was giving ((14) [**Day14/3-5]**).
{SB/196/1197}

{CB/14/395}
{CB/14/419} [142] The point is particularly pertinent given that Ms Yates was the only director giving evidence who signed
{CB/14/420} the Second Boomzone Lease and approved it in the relevant board meeting.
{CB/14/421} [143] **[J/710]**, **[J/824]**, **[J/830]-[J/831]**, **[J/842]-[J/844]**, **[J/861]**, **[J/868]ff**, **[J/923]**, **[J/939]**, **[J/968]**.
{CB/14/425}
{CB/14/426}
{CB/14/435}
{CB/14/437}
{CB/14/444}

136. **Example (15)**: On the key question of fiduciary duties, the Judge intervened early in Mr Mirza's evidence to put to him that he was giving advice or recommendations in the best interests of the company ((15) [**Day10/191-192]**); this was a theory that the Judge had alighted on himself and that he developed with other witnesses: see ¶¶138-141 below), something that the Judge should not be doing in a fair trial: see *Hossain* at [58].

{SB/170/1145}

137. **Examples (16)-(23)**: The Judge intervened in other ways likely to unsettle Mr Mirza by (i) showing exasperation or curtailing his answers ((16) [**Day12/161-162],** (17) [**Day13/39],** (18) [**Day 14/49-50**]), (ii) preventing him from going to documents ((19) [**Day 13/161-162**], (20) [**Day 14/224**], see (2) and (5) above), and (iii) accusing him of dishonesty (see examples (5), (8), (9), (11) above). In doing so, the Judge signalled an adverse view of his credibility mid-evidence, contrary to *Hossain*. In contrast, the Judge did permit Mr Morjaria to move to documents when in difficulty ((21) [**Day4/52-54],** (22) [**Day4/85]**, (23) **[Day4/110-111]**).

{SB/185/1179}
{SB/188/1185}
{SB/197/1199}
{SB/193/1193}
{SB/201/1205}

{SB/151/1115}
{SB/152/1117}
{SB/152/1123}

(b) Interventions during the Claimants'/Part 20 Defendants' evidence

138. **Examples (24)-(31)**: The Judge intervened inappropriately on the key question of the professional directors' role in managing the JV Entities (a central factor concerning fiduciary duties: **Grounds 2-4**). In particular, the Judge developed his own theory (see ¶32 above) that Mr Mirza was an advisory fiduciary making recommendations to the JV Entities that the Directors simply followed. During cross-examination of Mr Lewin, the JV Entities' longest serving director, the Judge interrupted Mr Lewin saying that he was a director with strategic oversight to put to him that he was not an *executive* director, leading the transcriber to ask the Judge not to talk over the witness. When Mr Lewin replied that he was an executive director and the Defendants' counsel sought to ask further questions, the Judge curtailed further cross-examination on the topic stating: "*I think we all understand what the role was*" ((24) [**Day7/19-21]).** That curtailment was on Day 7 (out of 30), only minutes into the questioning of the second factual witness and first director.

{SB/156/1131}

139. When it was put to Mr Morjaria that he appointed his own man (Mr Lewin) to oversee the JV Entities, the Judge intervened (using words Mr Morjaria had not used) to suggest that his evidence was that Mr Lewin was "*not my creature…not my puppet, he was an independent contractor*" ((25) [**Day4/96-98]**). The Judge intervened *twice* after to dilute counsel's questions and to re-frame Mr Morjaria's answer concerning (i) the reliance he placed on the Directors ((26) [**Day4/101:6-7])** and (ii) the number of emails between them ((27) [**Day4/103-104]**).

{SB/152/1120}
{SB/152/1121}
{SB/152/1121}

140. When it was later put to Mr Lewin that he had specifically approved of the First Boomzone Lease at a board meeting, the Judge intervened to put *his theory* to Mr Lewin that "*sometimes I think these minutes like this get prepared by the lawyers dealing with the lease ahead and the meeting consists of you nodding at each other*". Mr Lewin answered that it was not prepared by lawyers but was "*internally prepared*", at which point the Judge put to him (without any supporting evidence) that he may not have gone through it "*line by line*" ((28) [**Day7/105]**). The Judge made a similar intervention to Ms Yates concerning the 5 May agreements ((29) **[Day19/222-223]**). This theory resurfaced in a different form in the Judgment [**J/733**]. {SB/159/1134} {SB/219/1235} {CB/14/399}

141. During cross-examination of the third director, Ms Yates, the Judge interrupted counsel mid-questioning to ask a series of leading questions (contrary to <u>*Hossain*</u> at [58]) on this issue. The Judge even more directly put *his case theory* to Ms Yates, namely that Mr Mirza's role was to <u>*advise*</u> the Directors, a point hitherto neither pleaded nor argued for ((30) [**Day 19/161-162**]). Similarly, during cross-examination of Mr Stobart, the Judge intervened to put the leading question to him that, in placing the Second Boomzone Lease before Ms Yates, he was simply "*passing on Mr Mirza's recommendation*", despite Mr Stobart saying that Mr John might have recommended the lease a few sentences before ((31) [**Day9/141-143]**). These examples show how the Judge intervened in pursuit of his own theory in a way that distorted the evidence. The purported role of Mr Mirza as an advisory fiduciary thereafter materialised for the first time in the Claimants' closing submissions; all of this infected the Judge's finding that the Directors simply followed Mr Mirza's recommendations [**J/185**]. {SB/215/1230} {SB/168/1143} {CB/14/292}

142. **<u>Examples (32)-(37):</u>** The Judge rescued the Claimants' witnesses at multiple points **before** they could answer difficult questions, which went either to the general issue of their credibility or a separate substantive issue. The credibility of the witnesses was important (<u>*Re G*</u> at [47]) because, for example, (i) the nature of Mr Mirza's role in the JV, (ii) whether and how Tydwell charged fees and (iii) whether the JV Entities were deceived by this turned on what Mr Mirza, Mr Morjaria and the Directors agreed and understood at the time, which was not apparent from the documents alone, as the Judge acknowledged (despite not always referring to the oral evidence): see e.g. [**J/258], [J/285**]-[**J/288**], [**J/293**], [**J/341**], [**J/368**]. {CB/14/309} {CB/14/313} {CB/14/314} {CB/14/329} {CB/14/332}

143. During cross-examination of Mr Morjaria on the fabrication of the Non-Contemporaneous Note (a central point on his credibility and the alleged agreement not to charge fees) the Judge intervened to suggest (obviously incorrectly) that the document's metadata showed it had been created in 1900 ((32) [**Day5/100-101]**). While the Judge later accepted that the metadata showed otherwise [**J/1219]**, his intervention diluted counsel's questions at a critical {SB/155/1128} {CB/14/489}

moment, providing the witness with valuable thinking time. The Judge went on to intervene mid-cross-examination to explain to counsel the conclusions he drew from the Note extraordinarily *prior to hearing the evidence on it* ((33) [**Day5/104-106]**). His finding that the Note made him cautious about Mr Morjaria's evidence [**J/1227]** is an understatement that reflects how the cross-examination was derailed, including because he still concluded that Mr Morjaria was an impressive and honest witness based on his comfort in the witness box [**J/74]-[J/77]** (the wrong test,)[144] placed no reliance on the Note [**J/1226]** and found that Mr Morjaria may have misunderstood the meaning of the word "*contemporaneous*" [**J/1221]**.

{SB/155/1129} {CB/14/491} {CB/14/271} {CB/14/490} {CB/14/490}

144. When it was put to Mr Stobart in cross-examination that two lines of his witness statement, concerning his understanding that Tydwell was charging fees, were inconsistent, the Judge intervened before Mr Stobart could answer, leading counsel to ask if he could hear from the witness ((34) [**Day 9/106-107**]). The Judge also intervened during questioning of Mr Morjaria to ask counsel whether Mr Mirza had misled Mr Morjaria about the amount of profit on the deal (a point not for Mr Morjaria's evidence) ((35) [**Day4/89-92**]).

{SB/131/1049} {SB/166/1141} {SB/152/1118}

145. When Ms Yates was pressed on how she could have known that BOS might have called in the debt in May 2022, the Judge intervened to suggest an answer the witness gratefully adopted ((36) **[Day19/219-220]**). The Judge also intervened during counsel's questions on the offers in May 2022 to put the leading question to Mr Webster that he might have *"trusted one of the parties more than other*", another suggestion the witness adopted ((37) [**Day19:86-87]**).

{SB/219/1234} {SB/213/1228}

146. **Examples (38)-(40)**: When Mr Morjaria was questioned about his use of the Directors' lawyers in the criminal proceedings, the Judge re-framed the question and assisted him to find a helpful answer ((38) [**Day5/65-67]**). When Ms Yates was pressed on what she meant by Mr Mirza "*stopping the deal*" in May 2022, the Judge sought to reframe her answer to be that Mr Mirza might bring an action to prevent the Directors from selling; though her answer did not confirm that ((39) [**Day19/217-219**]), this finding still appeared in the Judgment [**J/1155]**. Elsewhere, the Judge simply derailed cross-examination by the Defendants. During cross-examination of Mr Webster on information shared with Mr Morjaria (but not with Mr Mirza) prior to May 2022, going to the issue of good faith by Otaki and Mr Morjaria (central to the Part 20 Claim and Counterclaim), his interventions were so extensive that counsel had to ask if he could ask the witness some questions ((40) [**Day19/32-45**]).

{SB/154/1126} {SB/219/1234} {CB/14/478} {SB/212/1224}

[144] *Re Mumtaz Properties Ltd* [2012] 2 BCLC 109 at [12] per Arden LJ, as she then was.

147. **Summary:** As is apparent from the above, the interventions were so extensive that they cannot be neatly categorised. Drawing the threads together, however, the interventions breached the core principle of the judge remaining neutral and above the fray during the evidence. His extensive cross-examination of Mr Mirza alongside counsel was indicative of him descending into the arena in a manner that prevented him from assessing the evidence dispassionately and fairly: see **examples (1)-(20).** This had an unsettling effect on Mr Mirza, exacerbated by accusations of dishonesty, curtailment of answers and pre-emptive findings: see **examples (5), (8), (9), (11), (16), (17)**, (**18)**. In the worst examples, the Judge entered the fray to advance his own case theory that Mr Mirza was an advisory fiduciary. This can be seen in **examples (24)-(31)** above. This was a central issue in the case, as can be seen from **Grounds 2-4** and **12-13**, and this shaping of the evidence infected his findings. As in *Southwark* at [148], the Judge wrongly arrogated to himself a quasi-inquisitorial role. The Judge also de-railed the Defendants' cross-examination by intervening before or after witnesses had answered, assisting the witness and driving counsel off-course. At numerous points, the Defendants' counsel did ask the Judge if they could ask questions of the witness (see e.g [**Day15/78]**, [**Day9/107]**, [**Day19/43**]), flagging that they were being derailed.

{SB/206/1213}
{SB/166/1141}
{SB/212/1227}

148. These factors rendered the trial unfair (to Mr Mirza in particular). The options available to this court are (i) to allow the appeal on **Grounds 1-10** and **12-13,** substituting the Judge's findings, (ii) alternatively, to remit limited issues or (iii) to order a complete re-trial, including of the Part 20 Claim. The Defendants respectfully invite the court to follow option (i), allowing the appeal on other grounds; these grounds raise errors of law, which, individually and cumulatively, vitiate the Judge's Order, a position strengthened by **Ground 11**. If, contrary to that position, due to the procedural unfairness set out herein, the court considers that the appeal cannot be finally determined without revisiting findings of fact then limited issues should be remitted. A complete retrial must be a last resort.

7 May 2026

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