CIVIL APPEAL Nos: CA-2025-002348
CA-2025-002356

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

BETWEEN:

(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/Respondents to Cross-Appeal

and

(1) MR PRADEEP MORJARIA
(2) MRS SANGITA MORJARIA
(3) SUMMERHILL TRUST COMPANY (ISLE OF MAN) LIMITED (ACTING AS TRUSTEE OF THE WENTWORTH CAPITAL TRUST)
(a company incorporated under the laws of the Isle of Man)
(4) VIPER LIMITED
(a company incorporated under the laws of Jersey)

Cross-Appellants/Respondents to Appeal

SKELETON ARGUMENT ON BEHALF OF THE CROSS-APPELLANTS IN SUPPORT OF THEIR CROSS-APPEAL

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1. This is the Cross-Appellants' skeleton argument in support of the four grounds of their cross-appeal.

2. References to the judgment of Thompsell J dated 28 July 2025 are in the form **[J/para]**; references to the core bundle are in the format **[CB/tab/page]**; references to the Appellants and Cross-Appellants' supplemental bundle are in the format **[SB/tab/page]** .

Overview

3. The proceedings concern fraud and other common law and equitable wrongs committed against the Cross-Appellants over 17-years from 2007. The Cross-Appellants were largely successful on liability, with certain remedies and quantum held over to a further remedies trial, which is currently stayed pending the outcome of these appeals. The claim is complex and the Court is invited to read Thompsell J's judgment in full, including his overview of the case at paragraphs **11 to 66 [CB/14/262-269]**.

4. The dispute arises from a joint venture ("**the JV**"), established further to a Joint Venture Agreement entered into in 2007 ("**the JVA**") **[CB/25/870]** between the Morjarias (the First Cross-Appellant and the Second Cross-Appellant), and Mr Mirza (the First Appellant) and the JV vehicle, Otaki Holdings Limited (the Eighth Defendant in the claim) ("**Otaki**"). The JV aimed to develop 22-24 Uxbridge Road, London, via Jersey-based entities ("**the JV Entities**") overseen by professional directors (the Part 20 Defendants) ("**the Directors**"). The development resulted in a hotel (occupied by Premier Inn) at 24 Uxbridge Road ("**the Hotel**"), and a data centre/office complex (currently a television studio) at 22 Uxbridge Road ("**the Data Centre**"). The Appellants include Mr Mirza's wife, Mrs Mirza, and son, Ameer Mirza (the Third and Fourth Appellant), his development company, Tydwell Limited (the Second Cross-Appellant) ("**Tydwell**"), and multiple companies under his or his family's control (the Sixth to Eighth Appellants). The Fourth Cross-Appellant, Viper Limited ("**Viper**"), is a company which was until 2022 a wholly owned subsidiary of Otaki.

Cross-Appeal in respect of the Wolverine Transaction

5. Grounds 1 and 2B of the cross-appeal relate to Mr Mirza's dealings with the Seventh Appellant, Wolverine Finance Limited ("**Wolverine**"), and certain of the causes of action that the judge dismissed.

6. Viper held a 999-year leasehold interest over the Data Centre ("**the Viper Lease**") **[J/58] [CB/14/268]**. This was subject to a secured loan from the Bank of Singapore ("**BOS**"), entered into in 2018 ("**BOS Facility**") **[SB/104/617]**, which each of Mr Mirza and Mr Morjaria had personally guaranteed **[J/44] [CB/14/266]**. In March 2021, a sub-lease of the Data Centre was

granted in favour of Boomzone Limited (the Fifth Appellant), but at an annual rent of only £60,000 per annum ("**the Third Boomzone Lease**") **[SB/108/726]**. The judge found that the Third Boomzone Lease was entered into in breach of Mr Mirza's fiduciary duties, and had the effect of depressing the market value of the Viper Lease **[J/938] [CB/14/437]**.

7. In December 2021, BOS notified Viper that it intended to terminate the BOS Facility, and requested repayment. As a result, both Mr Mirza and Mr Morjaria submitted offers to the Directors (of Otaki) to acquire Viper. On 5 May 2022, Otaki's shares in Viper were acquired by a company ultimately owned by the Morjarias **[J/60] [CB/14/198]**.

8. On 19 May 2022, BOS terminated the BOS Facility and demanded repayment, leading to Mr Mirza and Mr Morjaria becoming liable under their personal guarantees. This ultimately led to the back-to-back transactions which saw Mr Mirza purporting to take an assignment of the BOS Charge, and transfer the Viper Lease to Wolverine. In short:

    a. In October/November 2023, Mr Mirza liaised with Al Rayan Bank ("**Al Rayan**") regarding the provision of a loan facility to an offshore Mirza family-owned company, Bane Solutions Ltd ("**Bane**"), to be secured on the Data Centre **[J/1383 to 1387] [CB/14/518-519]**. Bane had independent offshore directors **[J/1377] [CB/14/517]**.

    b. On 15 December 2023, Bane signed a term sheet with Al Rayan in respect of a prospective £16 million secured loan facility for the purpose of purchasing the Viper Lease, **[J/1388 to J/1389] [CB/14/519]**. Later in December 2023, Bane was replaced with Wolverine **[J/1390 to J/1393]** [**CB/14/519**], which was owned and controlled by the Mirza family.

    c. The term sheet noted that the Data Centre was let to Timeline Television Limited ("**Timeline**"), and was generating over £2 million per year in rental income [**J/1389**] [**CB/14/519**]. On 22 December 2023, Al Rayan instructed BNP Paribas to undertake a valuation of the Viper Lease for its customer, Wolverine [**J/1393**] [**CB/14/519**]. BNP Paribas subsequently produced a report on 23 January 2024, which valued the Viper Lease at £28.5m (on the basis that Timeline was in occupation) or £32m (on the

assumption that Timeline extended its lease to 20 years). However, this report did not mention the Third Boomzone Lease [**J/1394**] [**CB/14/520**].

d. The judge found that, on around 8 January 2024, Mr Mirza had in his personal capacity also instructed another valuer, Aitchison Rafferty, to carry out a valuation of the Viper Lease [**J/1395**] [**CB/14/520**]. Mr Mirza did so on the basis that the Viper Lease was subject to the Third Boomzone Lease; however, those instructions made no mention of: (a) the fact that Viper had served a notice rescinding, or purporting to rescind, the Third Boomzone Lease **[J/1396] [CB/14/520]**; or (b) the occupation by Timeline. This produced a valuation of £4.125 million.

e. The judge also found that, at this time, Mr Mirza had also instructed the valuers Rolfe East and JLL on a similar basis. Those valuers indicated that offers at below £3m and £6m respectively could be expected **[J/1398] [CB/14/520]**.

f. On 31 January 2024, Wolverine concluded the £16 million loan facility from Al Rayan **[J/1401] [CB/14/521]** ("**the Al Rayan Loan**"). In doing so, Wolverine, Boomzone and the Eighth Appellant, London Media Hub Limited ("**LMH**") – companies owned and controlled by the Mirza family – represented to Al Rayan that they were the legal and beneficial owners of the Data Centre. At the time, however, Wolverine did not have an existing interest in the Data Centre.

g. From the proceeds of the Al Rayan Loan, £10 million was lent by Wolverine to Mr Mirza **[J/1407] [CB/14/521]**, and Mr Mirza (acting as a guarantor of the BOS Facility) used that £10 million loan to discharge Viper's liability under the BOS Facility **[J/1407] [CB/14/521-522]**. In return for the discharge of that liability, Mr Mirza took an assignment of BOS's security over the Viper Lease **[J/1405] [CB/14/521]**. The Viper Lease was sold to Wolverine for £6 million (but with no actual cash changing hands: the sum of £6 million was set off against Mr Mirza's £10 million indebtedness to Wolverine) **[J/1407 to J/1408] [CB/14/521-522]** ("**the Wolverine Transaction**").

9. The judge observed at **[J/1409] [CB/14/522]** and **[J/1413] [CB/14/523]** that the Wolverine Transaction appeared to be uncommercial for all the participants in that: (a) while the Aitchison

Rafferty valuation was based on an incorrect assumption, Wolverine paid almost £2 million more than the valuation; (b) Wolverine had no apparent means of repaying the Al Rayan Loan, in circumstances where it had previously been a dormant company and the rent it would now receive under the Third Boomzone Lease would not suffice to meet the interest repayments due under the Al Rayan Loan, and yet it had lent £4 million to Mr Mirza, without security; (c) Mr Mirza was left owing the £4 million to Wolverine; (d) Boomzone was guarantor of the £16 million Al Rayan Loan that Wolverine had no means of repaying; and (e) Boomzone and LMH were guaranteeing and providing security for a loan from which they did not directly benefit. Insofar as the guarantee given by LMH was concerned, the judge could not find any sensible commercial rationale for it **[J/1411] [CB/14/523]**.

10. Taking matters in the round, the judge held that the Mirza family companies (namely Wolverine, LMH and Boomzone) were being run for the benefit of the family collectively, and that the Wolverine Transactions only made sense on that basis **[J/1413] [CB/14/523]**.

11. The judge found that the Wolverine Transaction was entered into in breach of Mr Mirza's equitable duties to Viper as mortgagee, to take reasonable precautions to achieve the true market value of the Wolverine Lease. He found that he had conflicts of interest in that: (a) the transaction involved his establishing a borrower-lender relationship between himself and Wolverine; (b) by securing a superior leaseholder well-disposed towards him, he could avoid a challenge to the validity of the Third Boomzone Lease; and (c) the family worked together, and had a close and loving relationship **[J/1473 to J/1474] [CB/14/535]**. Accordingly, he held, the burden was placed on Mr Mirza (and Wolverine) to establish that he discharged his equitable duties as a mortgagee under the principle in ***Tse Kwong Lam v Wong Chit Sen*** **[1983] 1 WLR 1349**, including the duty to ensure that reasonable precautions were taken to secure the best price possible.

12. The judge held that Mr Mirza had failed to discharge that burden of proof. In doing so, he held that the only precautions taken were the obtaining of valuations in circumstances where he had withheld from the valuers the fact that Viper had issued a notice of rescission to Boomzone (a matter that fundamentally affected the value of the lease) **[J/1482 to 1483] [CB/14/536]**. He found that not only were those the only safeguards but there was also not "*very much by way of*

negotiation between Mr Mirza and Wolverine in setting" the sale price of the Viper Lease **[J/1484] [CB/14/536]**.

13. However, the judge rejected the contentions that:

    a. Breach of the equitable duty to use reasonable precautions to achieve a market price was, in principle, capable of constituting "unlawful means" for the purposes of an unlawful means conspiracy ("**UMC**") among the First to Sixth Appellants and Mr John, the Third Defendant (and accountant to Mr Mirza and his family); and

    b. The extended version of the strict rule against self-dealing by a mortgagee was engaged by Mr Mirza's selling the property to Wolverine (the judge having found that Mr Mirza neither acted as agent for Wolverine nor owned it).

14. It is on those two grounds that the Cross-Appellants have permission to appeal in relation to the Wolverine Transaction.

Cross-Appeal in respect of charges levied by Tydwell to the JV Entities

15. Grounds 4B, 5A and 5B of the cross-appeal relate to the propriety of charges levied by Tydwell – a company controlled by Mr Mirza – to the JV Entities.

16. Pursuant to clause 5.2.1 of the JVA, Mr Mirza was entrusted with the day-to-day operation of the JV, and was made responsible for the appointment of contractors. He was to action this through Tydwell. Clause 15 of the JVA provided that, unless otherwise agreed, all costs incurred in connection with the performance of the JVA would be borne by the party that incurred the costs.

17. The judge found (correctly) that both Mr Mirza **[J/192-193] [CB/14/295]** and Tydwell **[J/201] [CB/14/297]** owed fiduciary duties to the JV Entities.

18. In each case, the question is whether the JV Entities gave informed consent to charges levied. These fall under three categories: (1) management charges and overheads claimed by Tydwell (ground 4); (2) a profit margin claimed by Tydwell under an agreement for the installation of

cladding (ground 5A); and (3) a further mark-up on the profit margin under the cladding agreement (ground 5B). The relevant facts are addressed in more detail in the relevant sections below.

GROUND 1: THE JUDGE ERRED IN FINDING THAT A BREACH OF A MORTGAGEE'S EQUITABLE DUTY TO TAKE SAFEGUARDS IN RELATION TO THE PRICE COULD NOT CONSTITUTE THE "UNLAWFUL MEANS" FOR THE PURPOSES OF THE CONSPIRACY TORT

19. The judge's reason for so holding was that breach of the mortgagee's price duty is too far removed from what he described as the "*paradigm*" cases of criminal acts and torts **[J/1526] [CB/14/544]**. As submitted below, he erred in this regard.

20. The starting point for consideration of this issue is the decision of the Supreme Court in ***JSC BTA Bank v Ablyazov*** **[2020] AC 727** ("***Ablyazov***"). As the Court held (in a unanimous judgment) at [11], when considering whether the putative unlawful means adopted suffice for the purposes of the UMC tort:

> "[t]*he real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant.*"

21. It can be seen straight away that the judge applied the wrong test altogether. While of course analogies with cases that have previously characterised conduct as unlawful means may be a relevant tool in the analysis of the nature of the unlawfulness, the proper approach is not to look at the unlawful means and see if they are sufficiently analogous to a supposed paradigm case. While the judge directed himself by reference to the relevant passage in ***Ablyazov***, he did not apply it: the overriding consideration is whether there is just cause or excuse for the relevant conduct.

22. As regards the nature of the unlawfulness, it is right of course to say that criminal conduct is at the highest end of the scale, because there is a universal obligation to adhere to the criminal law. It can never be said that there is a just cause or excuse for combining to engage in harmful actions directed at another that contravene the criminal law. It has been said that, provided that

the conduct is directed at the relevant claimant, it goes without saying that criminal conduct will constitute unlawful means for the purposes of a UMC, irrespective of whether that conduct is independently actionable by that claimant or others: ***HMRC v Total Network*** **[2008] AC 1174**, *per* Lord Walker of Gestingthorpe at [94].

23. However, as the Supreme Court held in ***Ablyazov*** at [15], the position is more nuanced in relation to non-criminal acts that involve unlawfulness, such as breaches of contract and breach of fiduciary duty, or non-criminal breaches of statutory duty.

24. It is submitted that, when one considers why the position may be more nuanced in relation to these types of legal duty, three considerations underlie the analysis of the question whether there will be "*just cause or excuse*". The first is whether or not the norm is sufficiently universal, such that the putative conspirator can reasonably be required to respect it in the pursuit of their own interest: the elements of the tort are "*carefully defined so as to avoid trespassing on legitimate business activities*": ***Ablyazov***, at [6]. The second is whether the relevant norm can be said to be intended for the protection of the putative victim (even if not independently actionable by them), such that the putative conspirator can reasonably be required to respect that norm in actions or dealings directed at the putative victim (in the relevant sense that expression is used in the context of UMCs). The third is whether there is some other reason of public policy that requires or justifies a finding that the conduct is just or excusable.

25. In the case of contractual or fiduciary duties, their content is a product of a consensual relationship entered into between the parties to it. Subject only to the consideration that the agreement must not be unlawful, the parties to it have the power to create their own normative framework. While the courts will enforce those arrangements as between the parties, there is a less compelling reason for requiring strangers to those arrangements, acting in the rational pursuit of their own interests, to refrain from conduct that may involve interference with them. Even then, there are circumstances where breach of contract to which a claimant is a stranger may constitute unlawful means for the purposes of the UMC tort[1] (and it has been observed, obiter, that there is no principled reason not to treat breach of fiduciary duty or trust in the same way[2]).

[1] *Racing Partnership Ltd v Done Bros* [2021] Ch 233
[2] [2] *Danish Customs and Tax Administration v Solo Capital Partners* [2025] EWHC 2364 (Comm), General Points at [38].

26. In the case of non-criminal statutory duties, the considerations are different. There are many reasons why statutory duties are imposed. Although an incidental effect of a particular statutory duty may be to afford protection to some interest of a particular person, the purpose (or predominant purpose) of the relevant statutory norm may not be to afford protection to the person bringing the UMC claim. If the relevant norm is not intended to protect the putative victim of the UMC, one might more readily conclude that the conduct of the putative conspirators has some just cause or is otherwise excusable.

27. The first two considerations also inform the question whether (i) a putative conspirator has the relevant intention to cause harm and (ii) whether or not the putative unlawful means are the instrumentality by which the harm is caused, or are the mere occasion for it.[3] It is submitted that the existence of other control devices on the scope of the UMC tort will often be (and in any event, is in this case) a reason not to impose restrictive limits on the categories of unlawful conduct that amount to unlawful means (or to take an expansive view of what may constitute a "*just cause or excuse*").

28. As regards public policy, a key point will often be that, to recognise means as unlawful involves the extension of tortious liability in a field already governed by legislation (or the common law) in a way which would subvert the limits of liability Parliament[4] or the courts[5] have laid down.

29. These considerations have no force in connection with the duties of a mortgagee in this claim. While the mortgagee's price duty arises out of a contractual relationship with the mortgagor (and will be conditioned by the particular terms of the mortgage, if relevant terms are present), it is a *sui generis* duty imposed by operation of law arising out of a particular relationship. The law exacts standards of conduct from the mortgagee for the protection of the mortgagor, whose interests stand to be prejudiced if the mortgagee does not comply with them. It is not entitled to "*act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off his debt*": ***Silven Properties v RBS*** **[2004] 1 WLR 997** at [19].

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[3] See *Racing Partnership v Done Bros* [2021] Ch 233 at [148] to [156]; *4vv Ltd v 435 Claimants* [2024] EWHC 2434 (Comm) at [637] to [647] for examples; 'instrumentality' appears to straddle the intention, causation and 'unlawful means' elements of the tort.

[4] *OBG v Allan* [2008] 1 AC 1 at [157]; *Ablyazov* at [15]; *Racing Partnership v Done* [2021] Ch 233 at [150]

[5] *Danish Customs,* above, General Points at [38].

30. It cannot be said, therefore, that by treating a breach of the mortgagee's price duty as capable of constituting the unlawful means for the purposes of a UMC, the Court will effectively be enforcing a purely private arrangement between the mortgagor and mortgagee, and thereby hampering those who conspire to purchase property at an arbitrary undervalue in the legitimate pursuit of their own interests. The relevant norm is a universal rule of law applying to a particular legal relationship, in default of contrary contractual agreement, and reflects a policy choice made by the courts that balances the interests of the mortgagee in securing prompt discharge of indebtedness, and the interests of the mortgagor in not having their property disposed of on uncommercial terms merely to satisfy the mortgagee's commercial interests. The price duty has a sufficiently 'universal' character in the sense that, by default, anyone who stands in the shoes of a mortgagor is entitled to the benefit of it.

31. Moreover, it is universal in the sense that it is an important plank in a broader coherent economic order. Mortgaged homes and business premises will be the single largest asset owned by most private individuals and small businesses. While the duty is for the immediate protection of the mortgagor and any guarantor, requiring the mortgagee to take reasonable precautions protects the interests of other creditors of mortgagors, who will be left with little to pursue if properties are sold at 'knock-down' prices to a purchaser who receives a windfall.

32. The second point is obvious: the mortgagee (and any guarantor(s)) is the person for whose protection the relevant norm exists.

33. As regards the third point, there are no reasons of public policy not to recognise the means deployed as the proper basis of a UMC. The relevant normative context is non-statutory, such that so to hold would not extend tortious liability into terrain where the legislature has intervened and seen fit not to create liability. Further, no incoherence in the law is created by treating these means as unlawful: although they are an equitable wrong, the duty is non-fiduciary and sits outside the equitable regimes for accessory liability.

34. There is no "*just cause or excuse*" for the relevant conduct, it was the instrumentality of loss, and the judge should have found that the unlawful means were made out.

35. In refusing to give permission to appeal, the judge further made a point to the effect that it is conceptually impossible to have a conspiracy to do something inadvertently (citing ***Maranello Rosso Ltd v Lohomij BV*** **[2021] EWHC 2452 (Ch)**). While the price duty will ordinarily be breached due to mere carelessness or lack of thoroughness, that was not the case put here. The case advanced by the Cross-Appellants **[Amended Particulars of Claim/119B]** was that the First to Sixth Appellants and Mr John had agreed to an arrangement in which the Viper Lease was to be transferred to Wolverine for an arbitrary sum, with no attempt to make any sale to a third-party purchaser **[J/1406 to 1414] [CB/14/521-523]**. There was no suggestion of any 'inadvertent' wrongdoing.

36. Having dismissed the contention that breach of the price duty could constitute unlawful means, the judge did not go on to make any finding of fact either way as to whether: (a) for the purposes of the conspiracy claim, reasonable precautions had in fact been taken (the reversal of the burden of proof in the claim against Mr Mirza not being relevant to the conspiracy claim); or (b) whether the failure to adopt reasonable precautions was deliberate as opposed to merely inadvertent. Accordingly, even if this Court resolves the issue of law in favour of the Appellants, that alone will not dispose of the issue.

37. The full elements of the tort are recited in the tour d'horizon of the authorities[6] at **[J/620]** to **[J/623] [CB/14/378] to [CB/14/381]**. The Court is referred to its own recent summary in ***Lakatamia Shipping Co Ltd v Su*** **[2025] EWCA Civ 1389; [2026] I.L.Pr. 4** at [35] to [37]. Critically for present purposes, it is not necessary to demonstrate that the conspirators appreciated that the means employed would be unlawful.[7] What must be shown is that they knew all the facts rendering the conduct unlawful (and 'blind-eye' knowledge suffices[8]). They need not have known that the sale of the Viper Lease was a breach of the price duty, provided they knew of the facts that objectively demonstrate that it did not comply with the price duty.

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[6] *Kuwait Oil Tanker SAK v Al Bader* [2000] 2 All E.R. 271 (Comm) at [108]; *Lakatamia Shipping Co Limited v. Su* [2021] EWHC 1907 (Comm) ("*Lakatamia Shipping*") at [76]-[106]
[7] *Forse v. Seccarma Ltd* [2019] EWCA Civ 215; [2019] IRLR 587; *The Racing Partnership Ltd v Sports Information Services Ltd* [2021] Ch 233 at [139] and [171]
[8] *Lakatamia Shipping* (CA) at [36(6)]

38. Had the judge applied his mind to these questions, the inferences that follow from his other findings are clear. Each of the Appellants must be taken to have known that the property was to be sold without an open sale process:

    a. The judge found that there was no negotiation over the price between Mr Mirza and Wolverine. The arrangements between the parties in connection with the Wolverine Transaction were entirely uncommercial, and part of an arrangement designed to benefit (and only benefit) the Mirza family as a whole.

    b. Each Appellant knew that the Wolverine Transaction was part of a broader scheme of pre-determined arrangements beginning with the Al Rayan Loan, the ultimate aim of which was the transfer of the Viper Lease to Wolverine **[J/1388] [CB/14/519]**.

    c. It follows that all of the Appellants knew that the Lease was transferred otherwise than as a result of a sale process on the open market. They must all have appreciated that Mr Mirza was to sell the property as mortgagee to Wolverine, and therefore knew that no (or no genuine) efforts would be made to seek an alternative buyer. They each must be taken to have known and appreciated that Mr Mirza would refrain from complying with his price duty as mortgagee.

39. On the material that is available, it is submitted that, pursuant to CPR 52.21(4), this Court can and should draw affirmative inferences[9] that: (1) reasonable precautions were not taken; (2) that failure was deliberate; (3) each of Mr Mirza, Boomzone, LMH and Wolverine (and, by virtue of being the directors of LMH and Wolverine, Mrs Mirza and Mr Ameer Mirza) combined in a sale knowing that no attempts would be made to offer the property to the open market; (4) the sale was the instrumentality of loss to Viper; (5) the act was done pursuant to the combination; (6) the sale caused Viper loss by yielding less than would have been achieved on the open market (the quantification being a matter for the quantum phase); and (7) each of the relevant Defendants intended to cause loss, in the sense that they knew a reduced price would inevitably cause loss to Viper.

[9] As to the principles applicable under CPR 52.21(4), see *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR at [16] to [23] and [197]; and as to the drawing of inferences in a conspiracy matter, see *Lakatamia* [2021] EWHC 1907 (Comm) at [59] to [66]

40. In the result, the Court is invited to overturn the judge's finding on the question of principle, draw the inferences of fact set out above, and find that each of the First to Sixth Appellants is liable in respect of a UMC to cause Viper loss, by selling the Viper Lease in breach of the price duty. Like the other UMC claims in these proceedings, the quantification of such loss is to be determined at the remedy hearing.

GROUND 2B: THE JUDGE ERRED IN HOLDING THAT THE RULE AGAINST SELF-DEALING WAS NOT BREACHED BY THE SALE OF THE VIPER LEASE TO WOLVERINE

41. The fundamental issue of principle that arises is whether the rule against self-dealing by a mortgagee is violated where the entity to which the property is transferred is one in which the mortgagee is not personally interested, but family members are interested:

    a. There is a hard-edged prohibition on a mortgagee selling to themselves, absent a provision permitting a sale to self in the relevant instrument: ***Martinson v Clowes* (1882) 21 Ch D 857**.

    b. In its extended form, the rule against self-dealing has also been held to apply to a sale by the mortgagee to its agent or nominee. It is also a breach of the self-dealing rule for there to be a sale to any person as part of a scheme for getting the property back into the hands of the mortgagee: ***Barnard v Brandon* [2023] EWHC 3043 (Ch)** ("***Barnard***") at [68].

    c. The extended version of the rule does not apply where there is a sale to a company in which the mortgagee has an interest. Rather, in such circumstances, the mortgagee has imposed upon it the "*heavy onus*" of demonstrating both that reasonable precautions were used to secure the best price possible and that the sale was made in good faith: ***Tse Kwong Lam v Wong Chit Sen* [1983] 1 W.L.R. 1349** ("***Tse Kwong Lam***").

42. Here, the judge found Wolverine not to be the alter ego of Mr Mirza. Nor did the extended form apply because the sale by Mr Mirza to Wolverine fell outside the categories referred to above **[J/1468] [CB/14/533]**. However, it is submitted that the extended form of the rule against self-dealing *stricto sensu* is not confined to the categories to which reference is made in ***Barnard***. Rather, it applies to any situation where the nature of the transaction is such that there are not

merely concerns about the independence of the mortgagee (such as to engage the principle in ***Tse Kwong Lam***), but where the evidence as a whole demonstrates that there is no 'exchange' or 'transaction' whatsoever, or the purported 'transaction' giving rise to the sale is merely illusory to the point where there is not simply a sale tainted by non-exposure to the market, but it cannot be fairly said there has been a sale at all.

43. The concern that underlies the rule against self-dealing overlaps with the rule that requires reasonable precautions to be taken to secure the best price for the property. As Cross LJ (as he then was) held in ***Cuckmere Brick v Mutual Finance Ltd*** **[1971] Ch 949** at p. 969, the raison d'être of a mortgagee's duties is a "*genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at*". The mortgagee is empowered to sell the mortgaged property and not merely to dispose of it. It is inherent in the concept of a sale that the price is a product of market forces between parties dealing with one another at arm's length. This consideration underpins the mortgagee's duties (whether in its ordinary or enhanced, ***Tse Kwong Lam*** form) and the rule against self-dealing.

44. However, where the latter rule goes beyond the mortgagee's duties is that the concept of a sale to oneself is treated as a contradiction in terms. A disposal of the mortgaged property which does not flow from a freely negotiated bargain is simply not a sale at all, and the mortgagee is not entitled to carry it out. As Lindley LJ (as he then was) held in ***Farrar v Farrars Ltd (1888) 40 ChD 395*** ("***Farrar***") at p. 409:

> "*A sale by a person to himself is no sale at all, and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power.*"

45. Chitty J (as he then was) explained in the same case that the common feature of the cases in which the rule against self-dealing had been held to apply, was that:

> "*A man cannot contract with himself, and in the cases supposed <u>there cannot be any independent bargaining</u> as between opposite parties. For similar reasons a mortgagee cannot sell to a trustee for himself; he cannot buy in the name of another*" (emphasis added).

46. Put more graphically, it has been said that a sale to self is a mere "*see-through dress*", incapable of being described as a sale: ***Williams v Wellingborough Borough Council*** **[1975] 1 W.L.R. 1327**, *per* Russell LJ at p. 1329.

47. The practical difference between a situation where the rule against self-dealing *stricto sensu* or its extended form applies on the one hand, and a situation where the principle in ***Tse Kwong Lam*** applies on the other, is that in the latter situation, the propriety of the transaction is subject to heightened scrutiny, but may ultimately be justified by the mortgagee satisfying the court that reasonable safeguards were taken. By contrast, once the ordinary or extended forms of the rule against self-dealing are engaged, there is no scrutiny of the propriety of the disposal at all – it is *ipso facto* a breach of duty: see ***Williams v Wellingborough***, *per* Stamp LJ at p. 1330.

48. The Appellants will doubtless contend that there is already an intermediate category between a sale to self (or the extended forms), and a transaction which is *prima facie* freely negotiated at arm's length. The mischief of dealing with connected persons, it might be said, is already adequately policed by the reversal of the burden of proof for the price duty in circumstances where there is a connection between the vendor mortgagee and the purchaser.

49. However, the reason why the law does not automatically treat sales to companies in which the mortgagee has an interest as improper is that, unless the company is the literal *alter ego* of the mortgagee, it is a person with its own interests, rights and obligations. There are, at least *prima facie*, two independent parties: see Chitty J in ***Farrar***. Although there is a risk of the exercise of the mortgagee's judgment being contaminated by their own interest in benefitting the purchaser company – hence the "*heavy onus*" of demonstrating the propriety of the transaction borne by the mortgagee – the sale price is nonetheless a product of an exchange between the two parties and there is at least a real possibility of the transaction price being fair.

50. Where, however, the *prima facie* evidence clearly demonstrates that there has been no bargaining whatsoever, it is submitted that there is no reason of authority or principle why the disposal of the relevant property should not fall within the self-dealing rule. The rationale underpinning the rules is to protect the mortgagor from a sale at an inadequate price resulting from the absence of negotiation.

51. On any realistic view of the facts found, Mr Mirza and Wolverine did not bargain independently. There was simply a scheme hatched to secure funding for Wolverine, guaranteed by Mr Mirza's own company, Boomzone, in order to bring about a sale of the Viper Lease to Wolverine in circumstances the judge himself described as "*uncommercial*" and for the benefit of the Mirza family as a whole. The only distinction between a situation where the extended rule against self-dealing has been held to apply and the facts here are that, as a result of the relevant transaction, the property found its way into the hands of a company controlled by a family member (rather than an agent or nominee of Mr Mirza). Any bargaining between Mr Mirza and Wolverine was just as illusory as if Mr Mirza had sold the Viper Lease to an agent or nominee

52. In the premises, the Court is invited to find that: (1) there is no rule of law confining the extended form of the rule against self-dealing to situations where the transferee of the property is to an agent or nominee of the mortgagee or otherwise receive the property as part of a scheme to transfer the property into the hands of the mortgagee; (2) the rule against self-dealing applies, in addition to its established forms, where (a) the purchaser is connected to the mortgagee (whether by ownership, control, or close family relationship); and (b) the disposal is shown, on the prima facie evidence, not to have resulted from any genuine negotiation but rather from a unilateral arrangement made by the mortgagee for the benefit of the connected purchaser; (3) on the facts as found by the judge, there was a carefully orchestrated scheme to cause the transfer of the property into the hands of Wolverine where no price negotiation took place and for the benefit of the Mirza family as a whole (*i.e.*, including companies owned and operated by Mr Mirza); and (4) in the premises, the sale to Wolverine offended the extended form of the rule against self-dealing.

THE TYDWELL-RELATED GROUNDS OF APPEAL

GROUND 4B – THE JUDGE ERRED IN LAW IN FINDING THAT TYDWELL WAS ENTITLED TO KEEP AMOUNTS INVOICED AS MANAGEMENT AND OVERHEAD CHARGES BECAUSE HE FAILED TO DIRECT HIMSELF THAT THEY REQURIED , AND LACKED, FULLY INFORMED CONSENT

Informed consent – the relevant legal framework

53. The issues that arise under ground 4B (and, for that matter, grounds 5A and 5B) are all concerned with the judge's treatment of the issue of informed consent, in light of his finding that Mr Mirza and Tydwell owed fiduciary duties to the JV Entities. The fundamental principles can be shortly stated:

    a. To be exempted from the consequences of a transaction that a fiduciary would otherwise be precluded from entering into under the rule against self-dealing, the fiduciary must have the informed consent of the principal: ***FHR European Ventures LLP v Cedar Capital Partners LLC*** **[2015] AC 250** ("**FHR**"), *per* Lord Neuberger of Abbotsbury at [5].

    b. In order for the consent to be informed, the fiduciary must have given full and frank disclosure of all material facts: ***New Zealand Netherlands Society "oranje" Inc v Kuys*** **[1973] 1 W.L.R. 1126 at pp 1131-1132**; ***FHR*** at [33].

    c. Whether or not there has been adequate disclosure depends on the facts of each case: ***Hurstanger Ltd v Wilson*** **[2007] 1 WLR 2351** ("***Hurstanger***"), *per* Tuckey LJ at [35].

    d. The burden lies upon the fiduciary to establish that informed consent was secured, and not the inverse: ***Hurstanger*** at [35].

    e. Consent to the transaction can be inferred from words or conduct in an appropriate case, but consent must be "*positively shown*". Nothing short of unqualified agreement will suffice: ***Hurstanger*** at [36]; ***Schofield v Schofield*** **[2011] EWCA Civ 154** at [32]; and ***Alta Trading UK v Bosworth*** **[2025] EWHC 91 (Comm)** ("***Alta Trading***") at [861].

    f. Disclosure is approached in a functional, rather than formalistic way, so that the sufficiency of disclosure may depend upon the sophistication and intelligence of the principal: ***Belsner v Cam Legal Services Ltd*** **[2020] EWHC 2755 (QB); [2020] Costs L.R. 1371** at [34]; ***Alta Trading*** at [861].

g. The mere disclosure of an interest, or of facts that put the principal on inquiry, is not sufficient to discharge the duty of full and frank disclosure. Accordingly, where a director stands to make a profit from their position, they must disclose not only the nature of the conflicting interest, but also the source and scale of the profit: ***Alta Trading*** at [861].

h. While not every fact relating to the circumstances of the profit need be disclosed, every material fact must be disclosed (and what is material depends on the facts of the particular case). Partial disclosure is not enough: ***Hopcraft v Close Brothers*** **[2025] 3 WLR 423** at [226].

i. In the right context, it will not however be necessary for the exact amount of a profit to be disclosed, provided that: (a) the fact of the profit is disclosed; and (b) that profit is reasonable: ***Anangel Atlas Cia Naviera SA v IHI*** **[1990] 1 Lloyd's Rep 167** at pp 171 and 176, cited with approval in *Hopcraft* at [226].

j. Once a breach is established, the court will not enquire further as to whether the principal would have taken a different decision had they known the true position. Whether or not a fact is material depends on whether it might have affected the principal's decision and not whether it in fact did affect it: ***Alta***, above, at **[861]**.

The overhead and management charges levied

54. The judge's approach to the relevant charges claim was fundamentally flawed. Every charge that Tydwell levied under contracts entered into with the JV Entities was a profit made by Tydwell and (by virtue of his interest in Tydwell) Mr Mirza that conflicted with their fiduciary duties, and was permissible only with the informed consent of Mr Morjaria and/or the Directors of the relevant JV Entity.

55. It follows that, in relation to every charge which Tydwell proposed to make: (a) Tydwell and Mr Mirza were required to disclose to Mr Morjaria and/or the directors of the relevant JV Entity the fact of, and extent of, the profit to be made; and (b) Mr Morjaria and/or the directors had then to consent to the making of the profit.

56. The judge approached the issue entirely the wrong way round. He asked himself, "*was there an understanding that Mr Mirza or Tydwell would not charge for services?*" **[J/222] [CB/14/302] [J/285] [CB/14/313]**. The question the judge should have asked himself was as follows: was there an understanding that Mr Mirza or Tydwell would charge (and if so, what those charges would be).

57. Having asked himself the wrong question, the judge never in fact proceeded to make a finding that informed consent had been given to the incurring of management charges or overheads (or any profits in respect of them). The judge instead drew certain inferences from the factual record as to the knowledge of Mr Morjaria and/or the directors of the JV Entities in relation to the charges that were to be levied, which it is respectfully submitted are unsustainable.

58. At trial, the Appellants placed reliance upon a Development Appraisal document produced by the lender Clydesdale **[SB/11/43]**, which set out the cost of the project and contained a £350,000 allowance for project management. It was alleged by the Appellents that this was a clear reference to Tydwell (and therefore insinuated that Mr Morjaria/the directors must have been aware that Tydwell would be charging for its services) **[J/231] [CB/14/304] [J/240] [CB/14/305]**. The judge rightly noted that the Project Manager for the project was identified as a third-party, CSA, and it was not clear on the face of the Development Appraisal where else their services would feature if not at least as part of the 'Project Management' allowance. While he concluded from those exchanges that, as between Clydesdale and Tydwell, there was an expectation that the latter would charge for project management services, the judge rightly identified, later, that it would not have been clear from the Development Appraisal (to Mr Morjaria/the directors of the JV companies) that Tydwell would be charging for its services **[J/289] [CB/14/313]**. To the extent that the Development Appraisal played any part in the judge's thinking, it is plainly irrelevant.

59. At **[J/292] [CB/14/314]**, the judge relied upon the terms of the Written Project Agreements as evidencing a general awareness that 'fees' would be charged. On their face, however, those documents would not have put Mr Morjaria or the directors on notice that a profit was being made as the terms of the agreements did not provide for anything other than reimbursement of costs:

a. The Development Contract did not (i) give any contractual entitlement to a profit, (ii) disclose that any profit was going to be made or, (iii) even if a profit were to be charged, disclose (a) the costs to be charged or (b) the profit amount. The "Fee" was stated to mean "*any sums to be paid by* [Viper] *to* [Tydwell] *in respect of the* [Tydwell's] ***costs*** *in properly performing its obligations under this Contract*" [**CB/28/933**] (emphasis added). On the face of the provision, Tydwell was entitled only to reimbursement 'at cost'. There is no basis for implying a 'reasonable profit margin': none was allowed. There was no entitlement under that agreement to claim a profit margin (much less can it be said that the mere fact that the Directors signed the document and had sight of it entails that they were aware a profit was to be made).

b. The Procurement Agreement dated 22 October 2010 **[CB/26/890]** contained a similar provision, save that it added the proviso "*provided that any such sums have been previously approved in writing by the Funder's Surveyor*" **[CB/26/894].** Accordingly: (1) the Procurement Agreement provided for the reimbursement of costs, but made no allowance in respect of any profit margin (such that a right to make a profit was not disclosed); and (2) the Procurement Agreement required the incurring of such sums to have been sanctioned in writing by Clydesdale's surveyor. In no circumstances could it sensibly be said that the mere fact of reading the Procurement Agreement disclosed the existence of a profit.

c. The only other matter the judge identified as relevant was an exchange of emails on 15 December 2015, where Mr Morjaria passed on queries from his tax adviser **[J/281] [CB/14/312-313]** to Mr Morjaria and Mr Mirza made a passing reference to Tydwell's having "*paid UK tax on any profits it has made*". While Mr Morjaria relayed that information to Mr Mirza, it has to be seen in the context of that exchange. This was an incidental exchange over a tax issue raised by a third party. The level of any profit made was not disclosed, and there was simply a boilerplate assurance that tax has been paid "*on any profits*" (which is not literally a disclosure that a profit has in fact been made). To treat this as full and frank disclosure is to invest this exchange with a significance it cannot reasonably bear.

d. Beyond that, the judge found that "[t]he fact that the JV Entities were aware that Tydwell was receiving fees cannot really be separately deduced from contemporary correspondence" **[J/293] [CB/14/314]**. The contemporaneous documents set out above speak for themselves, and cannot reasonably permit the inferences the judge sought to draw from them.

60. Against that backdrop, there was plainly no or no adequate basis for holding that the JV Entities had agreed to the incurring of management costs or overheads.

61. Further, the judge erred in principle in relation to the project management costs by giving Tydwell the "*benefit of the doubt*" in relation to any fees that were described as 'project management' amounts, but which were not properly claimed in accordance with the Procurement Agreement payment procedure. The mere fact that there was a reference to 'Project Management' would not disclose to the JV Entities that the sums claimed were sums claimed in respect of Tydwell's own services, as opposed to those of CSA or others. The sums claimed are sums which are *prima facie* earned in breach of fiduciary duty, and the onus is on Tydwell (and Mr Mirza) to prove that the JV Entities gave their informed consent to the charges. Tydwell is not entitled to the benefit of the doubt in principle (all the more so in circumstances where the judge considered it at least plausible that Tydwell was seeking to withhold from the JV Entities the fact it was earning fees **[J/294] [CB/14/314]**).

62. In the premises, this Court is asked: (1) to find that the judge erred in law by asking himself whether there was no understanding that Tydwell would not profit from the provision of its services, rather than asking whether there was an understanding that it would; (2) to draw the inference on the available material that no informed consent was in fact given (alternatively, to remit the matter for the consideration of the judge in the course of the quantum proceedings).

GROUND 5A – THE JUDGE ERRED IN FINDING THAT TYDWELL WAS ENTITLED TO MAKE A PROFIT MARGIN ON THE CLADDING WORKS

63. On 9 March 2020, Tydwell and Otaki entered into a design and build contract for Tydwell to procure certain cladding works in the wake of the Grenfell Tower disaster **[J/47; J/264] [CB/14/266; CB/14/310]**. As above, Tydwell owed a fiduciary duty to Otaki and, therefore, was

required to obtain informed consent from Mr Morjaria and/or the directors if it were to make a profit under this contract.

64. The Contract Sum under that agreement **[CB/29/953]** was defined as the sums payable to Tydwell (as Contractor) by reference to the Cost Plan set out in the Appendix **[CB/29/968].** The Cost Plan provided:

    - "*Advance payment of £750,000 (exclusive of VAT).*
    - *Then payments to cover any further additional costs and expenses as may reasonably become necessary to complete the Project.*"

65. The Project was defined as "the replacement of the ACM Panels, Trespa Panels and the Kingspan Kooltherm K15 insulation on the external walls of the Property".

66. The Cladding D&B Contract contained no provision for any profit to be kept by Tydwell in respect of the works.

67. The judge found that, prior to the signing of the Cladding D&B Contract, Mr Mirza had provided two quotations to the Directors for the cladding works from Harley Facades and Argonaut Cladding of £528,550 plus VAT and £736,368.42 respectively (which were not inclusive of all the works to be carried out), but that Mr Mirza had not shared the third and cheapest quotation received for £418,000 plus VAT (from Teampol, who was eventually used) **[J/389 to 393] [CB/14/334 to CB/14/335]**. None of the quotes provided covered works relating to the replacement of render, that was eventually required. When the price of the cladding works increased from £750,000 to £2,545,763 inc. VAT, Mr Mirza refused to provide to the directors the breakdown of said increase **[J/414 to 417] [CB/14/338 to CB/14/339]**.

68. The judge found that informed consent to the making of a profit from the Cladding D&B Contract had been given, on the following basis:

> "*The position is a little more nuanced in relation to any claim for payment made in relation to the Cladding D&B Contract. I would consider that the Directors received sufficient information (**or at least information that they considered to be sufficient**) to make a decision to enter into the Cladding D&B Contract in that they had received some sub-contractors quotes and would, I think, have understood that*

Tydwell was proposed as the main contractor and was itself charging" (**J/542**) [**CB/14/362**] (emphasis added).

69. This reasoning is not consistent with the judge's findings of fact. As he noted: (i) the quotations received from two of the contractors not ultimately engaged (Harley Façades and Argonaut) did not appear to be all inclusive, and did not cover the later render works (such that a direct comparison could not be made); (ii) the cheaper quotation obtained from Teampol was not circulated prior to the Cladding D&B Contract being entered into (presumably, because this would have put the directors on notice of the very significant difference between the advance and the quotation); or (iii) when the price increased, Mr Mirza refused to provide a breakdown of such price increase (contrary to Mr Mirza's protestation at the time that he had "*given* [the directors] *full information on the cladding*" **[J/415] [CB/14/338-339]**). Against that backdrop, there was no reason for the directors to infer from any potential discrepancy between the subcontractor quotes and the advance payment sought under the agreement that there was a delta between the two which would be retained by Tydwell.

70. In any event, the judge failed to ask himself the right question: was there full and frank disclosure of all the material facts? Plainly, the answer to that question was no. It is not simply that the profit margin was not disclosed: the fact a profit was to be made was not disclosed. The judge himself noted that there was something in Mr Morjaria's suspicion that the costs being quoted by Tydwell were not accurate **[J/419, 449, 454, 464] [CB/14/340, 346, 347, 349]**, but instead costs invented by Mr Mirza to obtain the lion's share of the Mace Settlement, with the justification for such increase being fabricated at a later date. Suspicion and informed consent are mutually exclusive; one cannot be 'suspicious' of a transaction if one has been provided with all the facts required to understand it.

71. If (which is unclear) the judge is to be taken as saying that the Cladding D&B Contract in and of itself put the directors of Otaki on notice of the fact Tydwell might charge a profit, if not the amount, that is simply not apparent on the face of the agreement. Nowhere in the contract is there any provision for a profit to be charged.

72. The only sensible construction of the Cost Plan is that Tydwell was to be no more than a conduit through which costs incurred in relation to the cladding works were to be passed through to Otaki. This is clear from the interrelationship between the two bullet points referred to above.

There was to be an advance payment of £750,000 excl. VAT, followed by any "*further additional costs and expenses as may reasonably become necessary to complete the Project*". The second limb becomes unworkable unless the advance of £750,000 is itself treated as an advance to cover "*costs and expenses*".

73. As the judge observed in passing **[J/443] [CB/14/345]**, there was no provision for variations in the agreement. The only sensible reading of the Appendix as a whole is that (1) payment is to be reimbursement at cost; and (2) there is to be an advance of £750,000 against the anticipated costs. The agreement is not one at a contract price of £750,000.

74. Even if the Cladding D&B Contract allowed a profit margin to be claimed on the basis alleged, on the judge's findings, there was no disclosure of the fact that the profit margin on the Teampol tender in fact accepted was fully 70%. The level of that margin was so significant that it was obviously a fact it was incumbent on Mr Mirza and Tydwell to disclose in order to secure informed consent. It was not a reasonable profit margin.

75. Simply put, on the facts found by the judge, there was no basis for finding that informed consent had been given to any profit margin by Tydwell (and the judge did not in fact make any such finding in terms, as he was bound to do if Tydwell were to be entitled to retain such funds).

GROUND 5B – THE JUDGE ERRED IN FINDING THAT TYDWELL WAS ENTITLED TO A PROFIT MARGIN SCALED UP BY REFERENCE TO THE INCREASE IN THIRD-PARTY COSTS

76. In the alternative, the judge was wrong to hold (at **[J/1542] [CB/14/547]**) that Tydwell was entitled to retain a scaled-up profit margin on any costs incurred in excess of the £750,000 advance, reflective of the profit margin it would have achieved if the actual subcontractor costs had been in the amount of the original subcontractor quotation of £418,000 and the amount of the £750,000 advance. This profit margin was never expressly authorised nor would have been apparent on the face of the Cladding D&B Contract.

77. If the Cross-Appellants are correct in their construction of the Cladding D&B Contract (*i.e.*, that on its face, it was simply a mechanism for passing through the cost of the cladding and associated works), there is no entitlement under the terms of the contract itself for Tydwell to

claim any profit on its costs (whether or not there was any allowance for overheads), and therefore the question whether the margin could be scaled up simply does not arise.

78. Tydwell can only be entitled to any profit on the additional sum above the £750,000 if the Cross-Appellants are wrong in their approach to the construction of the Cladding D&B Contract and £750,000 represents a fixed contract price, rather than an advance on actual costs to be reimbursed in the lifetime of the contract.

79. If that is the case, the scaled-up margin does not fall within the contractual concept of "*additional costs and expenses as may reasonably become necessary to complete the project*". There is no provision for a profit margin to be added, and such a construction would be commercially perverse, as Tydwell would simply be given carte blanche to incur costs and would face no penalty for a failure to control them (and the contract on its face provides no adequate mechanism for determining what 'becoming necessary' entails). That aside, there is no logical reason why, if the contract does allow the recovery of a profit (which is denied), that should simply be calculated by reference to a markup on the actual costs in circumstances where (1) the contract does not say so in terms; and (2) there is no necessary correlation between the amount of work Tydwell might do in relation to the subcontractors and the actual costs incurred. If, for example, there were massive material cost increases, there is no reason why, having been reimbursed the cost of paying the subcontractor the additional amount, Tydwell should receive a 70% markup on that cost increase. In the absence of an agreement profit formula, that would be absurd.

80. The difficulties in saying why or to what extent a profit margin could properly be charged, simply underscore the fundamental point that the Cladding D&B Contract simply does not provide for a profit margin of any kind to be charged (and Tydwell was not otherwise authorised to draw a profit).

THOMAS WILLIAMS KC
OLIVER MCENTEE

Kings Chambers

7 May 2026