Appeal Nos: CA-2025-002356, 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 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)

Appellants / Claimants

-and-

(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

Respondents / Defendants

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 to the core bundle and the consolidated supplemental bundle are in the form {**CB/tab/page**} and {**SB/tab/page**}. References to the Claimants' appeal skeleton are in the form "**C Skel ¶[para]**".

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23 June 2026

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I. INTRODUCTION

1. This is the Defendants' skeleton argument in reply to the Claimants' cross-appeal. By way of overview and notwithstanding the Defendants' position on the main appeal:

   1.1. **Ground 1** is misconceived both procedurally (no pleaded conspiracy claim in respect of the Wolverine Transaction survives) and substantively (parties cannot combine to carry out passive acts pursuant to a conspiracy, as existing authority makes clear).

   1.2. The argument in **Ground 2B** – that a lack of independent bargaining makes a transaction a 'sale to self' - is unsupported by both authority and principle; there is no good reason why a strict prophylactic rule should be extended to such a scenario when the more flexible Price Duty already provides the necessary protection.

   1.3. **Ground 4B** is misplaced because Tydwell (and Mr Mirza) were under no duty to obtain informed consent to any profit, since the 'no conflict' and 'no profit' rules did not apply to them (a finding not subject to appeal) and no such requirement arose from the written contracts. Even if they were under such a duty, the material facts surrounding any profit were disclosed, as the Judge found. **Ground 5A** is misconceived for essentially similar reasons; further, the D&B Contract, properly construed, makes clear that Tydwell was entitled to profit from the cladding works. **Ground 5B** is largely parasitic on **Ground 5A**. If Tydwell was entitled to profit from this work, then that profit had to be measured whether that was by agreement (the Defendants' construction) or by another formula (the Judge's construction).

II. GROUND 1: ALLEGED BREACH OF THE PRICE DUTY AS UNLAWFUL MEANS

2. Without prejudice to **Ground 8(b)** of the Defendants' appeal - that the Judge was wrong to find a breach of the "*general duty* [on a mortgagee] *to take reasonable care to obtain the best price reasonably obtainable*" (the "**Price Duty**")[1] concerning the Wolverine Transaction - the Claimants' appeal is misconceived for the reasons outlined at ¶¶4-23 below.

(a) Elements of a claim in unlawful means conspiracy ("UMC")

[1] *Michael v Miller* [2004] EWCA Civ 282 at [131]; *Aodhcon LLP v Bridgeco Ltd* [2014] EWHC 535 at [206].

3. A UMC claim has six elements:[2] **Element 1:** A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. **Element 2:** An intention to injure another (albeit with no need for that to be the sole or predominant intention). Intent may be inferred from the primary facts, but foresight that the unlawful conduct may or will probably damage the claimant is not sufficient. **Element 3:** Concerted action (in the sense of active participation) consequent upon the combination or understanding. **Element 4:** The use of unlawful means as part of the concerted action. **Element 5:** each conspirator must know of the facts that render the means unlawful, as is common ground (**C Skel ¶37)**. **Element 6:** Loss being caused to the target of the conspiracy; this is the "*gist*" of the cause of action.[3]

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(b) Pleading defects

4. The **first** and shortest answer to this appeal is that the Claimants' pleaded conspiracy case failed. They did not plead a *separate* UMC concerning an appropriation by Wolverine of its interest in the Data Centre through the Viper Lease. They pleaded *one* single, overarching UMC by the Defendants to appropriate the Boomzone Leases, the LMH Lease and the Viper Lease: **PoC ¶119, ¶119A**. The Judge rejected that case, deciding that (i) there was no "*plot or single scheme*" **[J/1489]** or "*one deliberate plot*" **[J/1490**] encompassing the Wolverine Transaction and (ii) rather, "*the Wolverine Transaction and the similar plans preceding it were developed later by Mr Mirza*" **[J/1491]**, such that it was not part of the pleaded conspiracy ([**J/1506**], [**J/1519**]). The rejection of that case (not subject to appeal) should have been determinative, since it was not open to the Judge (nor is it open to this court) under an adversarial system to alight on a separate unpleaded conspiracy **[J/1518ff]**.[4]

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[2] *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [94], adopted by the Court of Appeal in *Lakatamia Shipping Co Ltd v Su* [2026] 2 W.L.R. 877 at [35] and by the Claimants (**C Skel ¶37)**. The sixth element not mentioned in *Marino* is **Element 5** above, which follows from *Racing Partnership Ltd v Sports Information Services Ltd* [2021] Ch. 233 at [141]; the Judge accepted this at **[J/620]-[J/622]**.

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[3] *Lonrho Ltd v Shell Petroleum Co Ltd (No.2)* [1982] A.C. 173 at p.188F per Lord Diplock.

[4] *Advanced Multi-Technology for Medical Industry (trading as HITEX) v Uniserve Ltd* [2025] EWCA Civ 1212 at [48]-[52] (concerning the same judge), citing *Al-Medenni v Mars* [2005] EWCA Civ 1041. In *Colliers CRE Plc v Pandya* [2009] EWHC 211 (QB) at [108], the court (rightly) rejected the notion of a second conspiracy on the basis that only one conspiracy was pleaded.

5. **Secondly**, and relatedly, the claim against the "*relevant Defendants*"[5] for UMC should have been rejected because the sub-elements of the claim were also not adequately pleaded (and certainly not proven); this follows in large part from the lack of a second pleaded conspiracy. While inferences *can* be drawn in conspiracy matters, it is well established that claimants must plead the primary facts from which knowledge, intention and/or joining in the combination can properly be inferred against each defendant.[6] This is true for any cause of action but is particularly important in conspiracy claims (because of the allegation's gravity) even when dishonesty is not alleged.[7] Each defendant's position must be pleaded distinctly because it must be shown what part, if any, they played in connection with any specific incident and that "*each conspirator joined in the execution of the conspiracy to a significant extent*".[8] These facts are simply not pleaded:

6. (1) The Defendants said to be involved are unclear; since no second conspiracy was pleaded the Claimants obviously do not distinguish between those involved in the *unpleaded* and *pleaded* conspiracies. They belatedly seek to rectify this by now (at the appeal stage) alleging a conspiracy only against Mr Mirza, LMH, Wolverine, Boomzone, Ameer and Mrs Mirza (i.e. abandoning their *pleaded* claim against Redwire, Tydwell and Mr John): **C Skel ¶39**.

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7. (2) The *only* pleaded intention to cause harm concerned the appropriation *to Boomzone* of the Boomzone Lease(s) (a matter irrelevant to the Wolverine Transaction, which occurred more than three years after the Third Boomzone Lease): **POC ¶119A**. That pleading lost any meaning once the Judge decided there was no "*plot or single scheme*" encompassing the Wolverine Transaction and it cannot support the unpleaded conspiracy now alleged (see [**J/1519**]). The Claimants' 'request' (**C Skel ¶39**) for the court to infer some other unpleaded intention to cause harm is hopeless, by application of the principles in *Al Medenni* and *Gerko v Seal* at [154]. Moreover, the Judge found no intention to cause harm against *any* of these Defendants in relation to either the pleaded conspiracy (see **[J/1511]-[J/1517]**) or any other.

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{CB/8/138} [5] See **C Skel ¶39(7)** and ¶6 below.

[6] *ED & F Man Sugar Ltd v T & L Sugars Ltd* [2016] EWHC 272 (Comm) at [33] and [35], *King v Stiefel* [2021] EWHC 1045 (Comm) at [145]-[151] and [153]-[154], cited and expanded on in *Gerko v Seal* [2023] EWHC 63 (KB) at [27]-[28], [44], [136]-[137] and [146].

[7] *Marinakis v Karipidis* [2025] EWHC 13 (KB) at [44] and [84], citing, *inter alia,* the Court of Appeal's dicta in *Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260 at pp.267-268, which equated conspiracy allegations to fraud allegations. It has been said that a conspiracy allegation is wholly inconsistent with an absence of fraud or dishonesty: *HMRC v Sunico A/S* [2012] EWHC 4156 (Ch) at [7].

[8] *Bird v O'Neal* [1960] A.C. 907 at pp.920–921; *AA v Southwark LBC* [2014] EWHC 500 (QB) at [252]; *Gerko v Seal* at [146].

8. (3) The pleading concerning the (i) combination, agreement or understanding and (ii) concerted action as a result is entirely inadequate: **POC ¶119**. No particulars are given as to when, with whom or the means by which any Defendant entered the alleged conspiracy or what actions they took pursuant to it.[9] Nor is participation by omission alleged (as to which, see ¶12.2 below). The Claimants' bare reliance on office or role to infer a combination is also obviously inadequate: **POC ¶119(a), (e)**.[10]

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9. (4) Most strikingly, the Claimants do not even allege, let alone particularise, any Defendant's knowledge of the facts said to constitute the unlawful means, save for Wolverine's (**POC ¶119P)**; that is fatal.[11] Despite spotting the issue **[J/1517]**, the Judge failed to address the consequences (i.e. dismissal of the claim). Matters (1)-(4) cannot be inferred from unpleaded facts (which the Claimants wrongly ask this court to do): see ¶5 above and **C Skel ¶¶38-39**.

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10. **Third**, the position is even stronger concerning Ameer and Mrs Mirza, because the Judge found that the facts pleaded in support of their involvement in any conspiracy were inadequate, namely their "*being members of the same family and involved in the family business*" **[J/633]** (the Claimants wrongly still seek to rely on these matters on appeal: **C Skel ¶¶38-39**). Further, he found that there was no adequate plea or proof of knowledge or assistance against Ameer and Mrs Mirza concerning the Wolverine Transaction (encompassing "*any assistance they may have given to the Wolverine Transaction*", **[J/956]-[J/958], [J/1502]-[J/1503]**); while that finding was in the context of dishonest assistance, the Claimants did no better in respect of UMC (see **[J/1513]**-**[J/1514]**, **[J/1517]**, **POC ¶119**) and their closings relied on the same matters for both causes of action: **C Closing ¶180, ¶220**. None of these findings have been appealed. If the pleading and proof were inadequate to support the *pleaded* conspiracy, they must be inadequate to support the *unpleaded* conspiracy. Accordingly, even if – contrary to ¶¶15-23 below - the court determines that breach of the Price Duty can constitute unlawful means, the court is invited to find that it cannot possibly support a conspiracy claim against Ameer and Mrs Mirza (at the very least).

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11. Given these pleading defects, which are conclusive, this court need not determine whether breach of the Price Duty can constitute unlawful means. For the avoidance of doubt, these

[9] Butcher J considered this decisive in *ArcelorMittal USA LLC v Ruia* [2020] EWHC 3349 at [30].
[10] In *ED & F Man Sugar* at [35] the court rejected allegations resting only on vague inferences and the fact that defendants held directorships in relevant companies; see too *ArcelorMittal* at [31] and ¶10 below.
[11] Knowledge must be pleaded in any claim, including a conspiracy claim: *King v Stiefel* [2021] EWHC 1045 (Comm) at [165], [188] (citing Practice Direction 16 ¶8.2(5)), [192], [195] and [367].

defects were highlighted at trial. The Defendants' skeleton (opening and closing) described the claim as "*woefully under-particularised*", with the Claimants having "*not managed to provide any particulars in support of their case at all*" such that "*the proper inference for the court to draw is that the conspiracy has been entirely imagined by the Claimants*".[12] Without prejudice to this position, the Defendants address whether breach of the Price Duty can constitute an unlawful act for the purposes of UMC at ¶¶12-23 below.

(c) Legal principles

12. The precise scope of what constitutes an unlawful act for the purposes of UMC remains uncertain. As to what will not constitute such an unlawful act (the "**Negative Definition**"):

12.1. Breaches of statutory obligations will not (at least always) constitute unlawful means.[13]

12.2. Negligence cannot constitute unlawful means because "[o]*ne can hardly conspire with others to injure a third party by negligence… the very notion of a conspiracy to injure by the use of unlawful means requires that there be some deliberate act or omission, not merely some oversight or want of care*".[14] This is in part because a party must actively participate in the combination ("*to a significant extent*") to be part of the conspiracy.[15]

12.3. Liability will seemingly not arise by omission unless the party concerned is (i) in a position of authority over others or (ii) is otherwise able (legally or in practice) to stop those others *from carrying out wrongful acts*, such that his failure to stop them can properly be said to amount to (at least) tacit approval of what they are doing.[16] Thus, there must still be some "*overt act*" or "*concerted action*" by a party to the conspiracy (see ¶3 above) and when liability arises by omission, that omission will only be culpable where it is accompanied by act(s) done in pursuance of the conspiracy.[17]

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[12] **D Opening ¶¶356-358, ¶656**; **D Closing ¶¶526-528, ¶823 {SB/146/1100}, {SB/146/1101}**.
[13] *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at ¶236, Annex I; *Ablyazov* at [15].
[14] *Maranello Rosso Ltd v Lohomij BV* [2021] EWHC 2452 (Ch) at [167].
[15] *TCP Europe Ltd v Perry* [2012] EWHC 1940 (QB) at [35]-[36], cited in *Maranello*; see too ¶5 above.
[16] *Civil Fraud* at ¶¶2-032 to 2-033, citing, *inter alia, Kuwait Oil Tanker v Al Bader* [2000] 2 All E.R. (Comm) 271 at [111] and *Attorney General of Zambia v Meer Care & Desai (A Firm)* [2007] EWHC 952 (Ch) at [317] (reversed on other grounds). The proposition in (i) above follows from *Digicel* Annex I at [74].
[17] While "*it is not necessary that every overt act is done by every conspirator*", there must be at least one overt act "*done pursuant to the conspiracy or combination*": *Kuwait* at [110]. "*In most cases it will be necessary to scrutinise the **acts** relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination*": *Kuwait* at [112].

12.4. There is a further reason why an overt act is required; the "*acts*" must be the means by which intentional damage is inflicted on the claimant. As the Supreme Court has explained, this means that the acts must be "*directed at*" or "*directed against*" the claimant.[18] It is difficult to see how an omission can be "*directed*" at anything.

13. As to what will constitute such an unlawful act (the "**Positive Definition**"):

13.1. Criminal conduct *likely* will suffice (non-criminal acts raise "*more complex problems*")[19]. However, contrary to the Claimants' contention (**C Skel ¶22**), it is not clear that every crime will suffice; *Total Network* does not stand for that proposition.[20]

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13.2. The Supreme Court in *Ablyazov* left open whether equitable wrongs can constitute unlawful means. That said, a breach of fiduciary duty appears to suffice (despite judicial concerns about the overlap with equitable principles of accessory liability).[21]

13.3. Breach of contract can suffice, as can contempt of court and torts such as inducing breach of contract, unlawful interference with business, and deceit.[22]

14. Any further developments of the law should be by way of incremental steps, if at all.[23] The Supreme Court sought to outline a potential test (the "**Ablyazov Test**"), cited by the Claimants[24] and the Judge **[J/1525]**, depending on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. However, the Supreme Court did not outline how this test should be applied; if the test was applied in *Ablyazov*, it was applied cursorily; the judgment primarily focused on public policy considerations (see [17]-[24]).

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(d) Application to the present case

[18] *Ablyazov* at [9], [11], [13] and [14].
[19] *JSC BTA Bank v Ablyazov (No.14)* [2020] A.C. 727 at [15].
[20] The Supreme Court in *Ablyazov* analysed the case in the same way at [11].
[21] *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at [170]-[172].
[22] *Civil Fraud* at ¶¶2-056 to 2-057 and ¶2-068; the appropriateness of recognising liability for a conspiracy to breach a contract alongside liability for procuring such a breach was doubted in *Digicel* at Annex I [63]-[68].
[23] *Digicel* at Annex I [58], citing *Total Network* at [56] (Lord Scott).
[24] They criticise the Judge for not adopting the test: **C Skel ¶21**; the short answer is that they did not ask him to. The Claimants cited neither *Ablyazov* nor any authority at all on UMC at trial.

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15. The Claimants' appeal is misconceived for reasons of authority, principle and policy. **First**, there is no authority for the proposition that breach of the Price Duty can constitute unlawful means for the purposes of UMC: see the Positive Definition at ¶13 above.

16. **Second**, the Negative Definition also indicates, by analogy, that breach of the Price Duty cannot constitute unlawful means. While the Price Duty is an equitable duty, it is akin to the duty of care in negligence, which will not found a claim in UMC: see ¶12.2 above and the Judge's PTA Ruling, citing *Maranello*. This explains why, in one of the only cases to consider the question, the claimants conceded that breach of the Price Duty, being a "*duty of care*", would not constitute unlawful means.[25] In fact, the Price Duty is seemingly weaker than the duty of care in tort,[26] since a mortgagee (i) "*is at all times free to consult his own interests alone whether and when to exercise his power of sale*" and (ii) "*is not constrained by the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor*".[27] Accordingly, if negligence cannot constitute unlawful means, *a fortiori* breach of the Price Duty cannot.

17. **Third**, it is clear from ¶¶12.3-12.4 above that omissions alone will not suffice as unlawful means. An omission is only culpable because of its failure to prevent the unlawful activity complained of. There is no such thing as, and no authority for, a passive conspiracy. Since the Price Duty is a breach of the "*duty to take reasonable precautions*", it is breached by omission not by action (such as a failure to advertise or take valuation advice), as the Judge found in this case (**[J/1482]**-**[J/1485**]), when deciding the burden of proof had not been discharged. **{CB/14/536}**

18. Relatedly, the Claimants say that "[w]*hile the Price Duty will ordinarily be breached due to mere carelessness or lack of thoroughness, that was not the case put here*": **C Skel ¶35**. While they cite **POC ¶119B**, that is not supportive; it only refers to other paragraphs where unlawful means is alleged. If their submission is that deliberate and intentional wrongdoing is needed, the Defendants agree. The consequence of that, however, is that a different wrong than breach of the Price Duty is required; if only some breaches of the Price Duty suffice for the tort, that would introduce intolerable uncertainty into the law. In *Alpstream* (HC), it was suggested that breach of the Price Duty involving "*wilful misconduct*" could suffice as unlawful means, which seems to confirm that something more than just a breach of that duty is needed **{CB/8/136}** **{CB/20/647}**

[25] *Conditioning House Ltd v JBG Enterprises Ltd* [2025] EWHC 3260 (Ch) at [150] and [259].
[26] The core principle in tort is to take reasonable care to avoid causing foreseeable harm to anyone closely and directly affected by one's acts/omissions: *Donoghue v Stevenson* [1932] A.C. 562 at p.580.
[27] *Silven Properties Ltd v Royal Bank of Scotland Plc* [2004] 1 W.L.R. 997 at [14].

(limited reasoning was given and the decision was overturned on other grounds).[28] Wilful misconduct creates a much higher bar, which has not been pleaded or proven in this case.[29] As the Judge stated in his PTA Ruling, he only found that the relevant Defendants had "*not discharged a burden of proof to show…they had taken reasonable precautions…this was…not a crime and not the basis for an independent tort*".

19. **Fourth,** the reasoning at ¶¶16-17 above also provides the answer to the Ablyazov Test. As to limb (i), a failure to take reasonable precautions is, as the Judge recognised, far removed from the unlawfulness that has thus far sufficed and is not the sort of conduct (being passive) that will constitute unlawful means. As to limb (ii), passivity cannot be "*directed at*" anyone such that it lacks the necessary relationship with any resultant damage to the claimant.

20. The Claimants' three considerations at **C Skel ¶24** are unsupported by any authority (even academic) and are unhelpful. What is meant by a "*sufficiently universal*" rule of law is unclear; "*universal*" is a binary (not relative) descriptor, since something is either universal or it is not. The fact that a duty exists to protect another (as the duty of care in negligence does) is not a reason why breach of it should found a UMC claim, since breach of those duties already have their own remedial consequences. Public policy will rarely deem unlawful conduct just or excusable, but that should not necessarily and of itself lead to liability in conspiracy.

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21. **Fifth,** the foregoing must be right as a matter of principle. It is conceptually very difficult, if not impossible, to see how parties can agree or combine to carry out "*a failure to take reasonable precautions*". A passive act is completed by one entity and cannot sensibly be "*participated in*". It would be non-sensical, for example, if a party sitting next to a man in an armchair became liable because it did not force him out of the armchair and into action.

22. **Sixth**, there are two good policy reasons to limit what can constitute unlawful means in this way: (1) Since breach of the Price Duty will commonly involve two parties (buyer and seller, especially in related party cases)[30], if it can constitute unlawful means there will often also be

[28] *Alpstream AG v PK Airfinance Sarl* [2014] 1 All ER (Comm) 441 at [109], overturned by the Court of Appeal in [2016] 1 C.L.C. 135 at [252]-[256].
[29] See *Alpstream* (CA) at [270]-[277], in which the Court of Appeal cited the test for wilful misconduct in *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at p.434 that the defendant must know they are committing and intend to commit a breach of duty. That allegation was neither pleaded nor put to any Defendant, nor did the Judge make such a finding: see ¶17 above.
[30] Morgan J made a similar point in *Digicel* at Annex I [61], now that parent and subsidiary companies and directors and companies can conspire together.

an arguable conspiracy claim (since intention can be inferred from harm caused);[31] this risks a multiplicity of conspiracy claims in such cases, not least as conspiracy claims have a more generous damages measure[32] and lead to joint and several liability.[33] (2) Uncertainty about what can amount to participation in such cases (see ¶21 above) risks third parties who are aware of the sale taking place coming under (or considering that they do) onerous obligations to ensure reasonable precautions are taking place; this in turn risks stymieing the efficient exercise of powers of sale by mortgagees. Neither outcome is desirable.

23. **Finally**, the Defendants re-iterate the point made on their appeal;[34] if no loss can be shown from the alleged failure to take reasonable precautions (because no buyer would have paid a higher price), there is no actionable conspiracy, since damage is the "*gist*" of the action.[35]

III. GROUND 2B: THE SELF-DEALING RULE

24. The Claimants' argument is not obvious. In their PTA Skeleton they argued that the rule against self-dealing by a mortgagee encompasses "*transactions lacking independence of negotiation as between the buyer and seller*" (¶49). In their latest skeleton they argue that the rule encompasses **{CB/8/139}** "*illusory transactions*" where "*it cannot fairly be said that there is a sale at all*": **C Skel ¶42**. At first glance, this appears to be a new argument. On closer inspection, it is a re-packaging of the first argument; the Claimants' complaint as to why the transaction is said to be "*illusory*" is **{CB/8/142}** simply the lack of independent bargaining: **C Skel ¶51**. In any event, this argument for an extended self-dealing rule is misconceived on the law and the facts:

25. **First,** the proposition is unsupported by authority. As the editors of *Lightman and Moss* explain at ¶13-047, the mortgagee is subject to (a) a strict but very limited "*Self-Dealing*" Rule whereby he may not sell to himself or to a trustee for himself and (b) a "*Fair Dealing*" Rule whereby a conflict of interest makes a sale voidable (or the subject of a claim to damages) unless it can be shown (the onus being on the mortgagee or purchaser) that the sale was at market value. These are less strict than the duties on a fiduciary.

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[31] Compare *Digicel* at Annex I [84], where Morgan J suggested that the court was being asked to act like a tailor altering an ill-fitting garment, letting it out here (e.g. as to unlawful means) and taking it in there (e.g. as to the test for intention) just to suit the alleged facts of the particular case.
[32] Damages are "*at large*", such that investigation costs can be claimed: *Civil Fraud* at ¶¶2-134 to 2-136. It may also be easier to obtain aggravated damages: *Sorrell v Smith* [1925] A.C. 700 at p.713.
[33] *Civil Fraud* at ¶2-129.
[34] See the Defendants' main appeal skeleton ¶¶97-103 **{CB/7/111}**.
[35] See this court's analysis in *Alpstream (CA)* at [252]-[256] and ¶3 above.

26. **The Self-Dealing Rule**: This rule derives from Lindley LJ's judgment in *Farrar*, where he confined the rule to a sale by the mortgagee (i) to himself either alone or with others, (ii) to a trustee for himself or (iii) to one employed by him to conduct a sale (i.e. his agent).[36] The point is that under each of these three categories, the "*substance of the transaction*" remains a 'sale to self'. Nothing in this passage supports the Claimants' extended version of the Self-Dealing Rule. The re-packaging at ¶24 above may constitute an attempt to bring their argument within Lindley LJ's comment that "*a sale by a person to himself is no sale at all*". However, alleging that there is 'no sale at all' obviously does not mean that there is a 'sale to self'. Once that sleight of hand is exposed, it is apparent that the Claimants rely on a single authority[37] in support of their argument, namely Chitty J's dicta at first instance in *Farrar* at pp.404-405, which has two parts, addressing both rules:

> **The Self-Dealing Rule (Part 1**): "*A mortgagee cannot sell to himself, nor can two mortgagees sell to one of themselves, nor to one of themselves and another. The reasons for this are obvious, and are not merely formal but substantial. A man cannot contract with himself, and in the cases supposed there cannot be any independent bargaining as between opposite parties. For similar reasons a mortgagee cannot sell to a trustee for himself; he cannot buy in the name of another*".
>
> **The Fair Dealing Rule (Part 2)**: "*But when mortgagees sell to a corporation, there are, prima facie, two independent contracting parties and a valid contract, and if the bargaining is real and honest, and conducted independently by the mortgagees on the one hand, and by the directors or officers of the corporation on the other, and it is satisfactorily shewn that in concluding the terms of the sale the parties were in no way affected by the circumstance that one of the mortgagees had some interest as a shareholder in the corporation, I see no sufficient reason that the sale ought not to stand*".

27. Chitty J's categories under the Self-Dealing Rule are very similar to Lindley LJ's (in fact, they are narrower since Lindley LJ's third category of agent is not included). Chitty J explains that in these circumstances, there "***cannot***" as a rule be any independent bargaining. That is for obvious reasons; these parties cannot possibly bargain independently since "*a man cannot contract with himself*". Where the mortgagee is selling to a trustee for himself or his agent, those individuals are acting on his behalf and have a duty to act in his best interests; the mortgagee remains the economic beneficiary of the purchase (such that he is in effect on both sides of the transaction and - in Chitty J's words - there are no "*opposite parties*"). That explains the harshness of the Self-Dealing Rule, where the sale is set aside without further inquiry. It does

[36] *Farrar v Farrars Ltd* [1888] 40 Ch. D. 395 at p.409.

[37] Neither of the other authorities cited by the Claimants support any expansion of the self-dealing rule: *Cuckmere Brick* was neither a fair-dealing nor self-dealing case and *Williams v Wellingborough Council* was a literal 'sale to self' case.

not follow that the reverse is true - i.e. that a failure to bargain independently makes the sale a 'sale to self' - and Chitty J does not suggest it does.

28. **The Fair-Dealing Rule:** This rule also derives from Lindley LJ's judgment in *Farrar* (building on Chitty J's dicta under Part 2 above), where he made clear that a "s*ale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself*" (p.409) since that would ignore the core principle of separate corporate personality. As he pointed out, this might warrant (i) setting aside for fraud or (ii) a reversal of the burden of proof to uphold the validity of the transaction but it would not be invalid by the Self-Dealing Rule. The concept in (ii) was later enshrined in *Tse Kwong Lam*[38] to become the Fair-Dealing Rule. This rule requires further inquiry; Chitty J's suggestion was that it required *an examination of whether there has been real, honest and independent bargaining* between the buyer and seller. Thus, he could not have been clearer that it is only under the Fair-Dealing Rule that such an inquiry is conducted.

29. Even if – contrary to the above - Chitty J's dicta could somehow be taken as support for the Claimants' extended version of the rule, any comments about the self-dealing rule were *obiter* (*Farrar* was a fair-dealing case)[39] and have not been followed since. Chitty J's dicta were not even incorporated into the Fair-Dealing Rule. The test under that rule is not whether the bargaining was real or independent[40] but (i) whether the mortgagee took all reasonable steps to obtain the best price reasonably obtainable (**Element 1**) and (ii) whether the sale was at the best price reasonably obtainable (**Element 2**): *Tse Kwong Lam* at p.1359H.

30. Further support for the narrowness of the Self-Dealing Rule comes from this court's decision in *Alpstream*; the borrowers transferred title to mortgaged aircraft to Wells Fargo (a bank acting as owner trustee) at the direction of the mortgagee (PK) so that the aircraft could be sold at an auction, when PK subsequently bought them (see [81]). Christopher Clarke LJ agreed at [82] that this was not a 'sale to self' either literally or in substance and the sale was not "*akin to a sham or an illusion*". Instead, he analysed it under the Fair-Dealing Rule since it gave rise to a conflict between interest and duty, concluding that "*there* [was] *no*

[38] *Tse Kwong Lam v Wong Chit Sen* [1983] 1 W.L.R. 1349.

{CB/14/530} [39] The Judge set out the facts of *Farrar* at [**J/1452**]-[**J/1453**].

[40] There is no bargaining under an auction sale, but it may still be a good test of the market: see *Alpstream* (CA) at [199]-[203].

good reason to apply or expand the self-dealing rule to the [case]". The same logic applies to this case, when Mr Mirza was not even a director or shareholder of the purchasing company.

31. In short, the Claimants' extended version of the Self-Dealing Rule finds no support in the authorities, which, contrary to the Claimants' contention (**C Skel ¶50)** point the other way; the Self-Dealing Rule applies where there ***cannot*** be independent bargaining, not where the evidence might – after full inquiry - show there has not been. The Judge's analysis of the law at **[J/1465]-[J/1469]** is correct and is reflected in the textbooks.[41]

{CB/8/141}

{CB/14/532}

32. **Second**, contrary to the Claimants' contention (**C Skel ¶50**), there *are* good reasons in principle for this, outlined at **C Skel ¶¶48-49**. An equitable duty already exists to protect against transactions that lack bargaining, namely the Price Duty; the Fair-Dealing Rule strengthens the duty by reversing the burden of proof against the mortgagee. The Claimants have not explained why that duty (with its own remedies) should be circumvented. The lack of need to expand the Self-Dealing Rule is *why* the authorities do not support it. The court should not extend a strict prophylactic rule where a more flexible rule already provides the necessary protection. Further, the notion that a sale to a company owned by the mortgagee's family members is the same as a sale to an agent or nominee (**C Skel ¶51)** is simply wrong; under the former, the company and (ultimately) the family members are the economic beneficiaries; under the latter, only the mortgagee is.

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{CB/8/141}

{CB/8/142}

33. **Third**, there are practical reasons why the Claimants' extension is wrong. Even if a lack of independent bargaining can vitiate a transaction (see ¶29 above), it can only do so after *full inquiry* into the evidence. The point about the Self-Dealing Rule is that *there is no inquiry;* it is a strict prophylactic rule that operates without discretion when a mortgagee is selling to himself (alone or with others), his trustee or his agent. This tension is exposed in the Claimants' argument that the Self-Dealing Rule is engaged when "the *prima facie evidence*" (what that phrase means is entirely unclear) shows there has been no bargaining (**C Skel ¶50)**; no court will or should set aside a transaction on '*prima facie'* evidence.

{CB/8/141}

34. **Fourth**, the Claimants' argument is in any event wrong on the facts. The Judge did not find that "*there had been no bargaining whatsoever*" (**C Skel ¶50)** (see the opening line of [**J/1484]**). Further, as the Defendants point out in their main appeal skeleton (¶102), the Judge's resultant conclusion that "[Mr Mirza] *would have been able to negotiate a higher price from Wolverine*"

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{CB/14/536}
{CB/7/113}

[41] *Snell's Equity* at ¶39-038; *Lightman & Moss* at ¶13-047; *Cousins: The Law of Mortgages* at ¶25-63.

was not open to him since Ameer Mirza's unchallenged evidence was that Wolverine would only pay £6 million. Comparing a sale by Mr Mirza to Wolverine to a sale to his agent or nominee (**C Skel ¶51)**, appears to be a collateral attack on the Judge's findings about Wolverine's independence from Mr Mirza, including that he "*did not have control over Wolverine*" **[J/1467]**, he was not its agent or controlling mind **[J/1469]-[J/1470]** and did not have sufficient interest and/or control of it for it to be a sale to himself **[J/1506(a)]**.[42]

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{CB/14/533}
{CB/14/533}
{CB/14/541}

35. For all these reasons, the appeal on **Ground 2B** should be dismissed.

IV. GROUND 4B: THE AMOUNTS INVOICED AS MANAGEMENT AND OVERHEAD CHARGES

(a) Position on the main appeal

36. **Ground 4B** alleges that the Judge erred in finding that Tydwell was entitled to keep amounts invoiced as management and overhead charges because the Judge failed to direct himself that Tydwell required (but did not receive) fully informed consent to this profit. However, as the Defendants argue on their main appeal (**Ground 6)**, Tydwell was entitled to keep not only the amounts invoiced as *"project management"* or "*project management and overhead*" charges **[J/1593(i)(b)]**, but **all** amounts invoiced to the JV Entities since, *inter alia*:

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36.1. Neither Tydwell nor Mr Mirza were fiduciaries and no other legal basis (deceit, breach of contract, conspiracy) for requiring Tydwell to repay these sums should be upheld.

36.2. There was no factual or logical basis for the Judge to distinguish between these charges and any other charges on a Tydwell invoice, in light of the facts and findings outlined at ¶¶51-59 below, including (i) the critical tax advice received by the parties; (ii) the finding that charges on a Tydwell invoice would have been understood as charges levied by Tydwell; and (iii) the finding that a Tydwell invoice amounted to an "*application*" for payment to the JV Entities.

37. The remainder of this section proceeds without prejudice to that position.

38. As a final preliminary point, the Claimants wrongly assume that any **fees** charged by Tydwell for its services were **profit** for Tydwell, which is commercially incoherent. Not only did Tydwell incur its own costs in providing these services, but it also paid corporation tax to

[42] A point on which the Claimants were denied permission to appeal: see **Ground 2A**.

{CB/14/313} HMRC on any profits in its accounts (see **[J/282]-[J/283]** and, for example, its 2019 accounts in which payment of corporation tax is recorded **{SB/39/181})**.

(b) No duty to obtain fully informed consent

39. The Defendants' primary contention is that, even if Tydwell or Mr Mirza owed fiduciary duties to the JV Entities, such duties were limited; they did not encompass the no profit rule and no conflict rules and so no question of needing to obtain "*fully informed consent*" to obviate those rules arose.

40. **First**, the Claimants' starting point is fundamentally wrong. They proceed on the mistaken premise that the same principles apply to all fiduciaries (referring to the "*fundamental* **{CB/8/143}** *principles*": **C Skel ¶53)**. That is not the law (certainly not outside the recognised categories of fiduciary relationship). Where a fiduciary duty arises in the context of a commercial relationship, the scope of the duty (and, therefore, the obligations it imposes on any fiduciary) must be *"moulded"* in accordance with that relationship: *Hopcraft*[43] at [101]. Where the relationship is governed by contract, the fiduciary relationship cannot be superimposed in a way that alters the operation of the contract according to its true construction: *Hopcraft* at [103]. The wider commercial context, the practicalities of conducting business and the course of dealing between the parties must also be borne in mind: *Hopcraft* at [101] and [104].

41. The Judge himself recognised this, finding that the usual no profit and no conflict rules did **{CB/14/424}** not apply to Mr Mirza or Tydwell **[J/854]-[J/858]** (a finding not subject to appeal). In doing so he cited *Ross River v Waveley Commercial Ltd* [2012] EWHC 81 (Ch) at [263], a decision which is a paradigm example of the *Hopcraft* principles; as Morgan J explained at [259], the no profit and no conflict rule could not apply to WCL (the JVC through which the JV was conducted) because "*the* [relevant contract] *created a commercial relationship between WCL and Ross River from which WCL was to profit in its own interests*" [259].

42. **Second**, a finding that the no profit rule does not apply is (or should be) the same as a finding that there is no duty to obtain fully informed consent to a profit; the duty arises from the rule which is "*a general and strictly enforced prohibition on fiduciaries making any profit for themselves out of their fiduciary position without the fully informed consent of their principals*": *Hopcraft* at [68] (see too [211] and *Rukhadze*[44] at [2], [47], [52], [95]). The Defendants are unaware of any case

[43] *Hopcraft v Close Brothers Ltd* [2025] 3 W.L.R. 423.
[44] *Rukhadze v Recovery Partners GP Ltd* [2026] A.C. 209.

where a fiduciary has been required to obtain the principal's fully informed consent to a profit, in the absence of the no profit rule. This is why there was no mention of obtaining "*fully informed consent*" in *Ross River.* To the extent the Judge found otherwise in the context of the Boomzone claims (**[J/854]**, **[J/858]**), albeit not in the context of the invoicing claims, such a finding is contradictory with his other findings, contrary to authority and wrong.

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{CB/14/425}

43. **Third,** application of the *Hopcraft* principles at ¶40 above shows in any event that any fiduciary duty cannot have included a duty to obtain fully informed consent to any profit:

44. **(1) The contracts:** Tydwell entered into written contracts with the JV Entities that provided for Tydwell to charge 'fees' for its services without any provision for informed consent (**[J/254]**, **[J/262]**, **[J/269]**). The Judge expressly found that the Claimants' alternative construction (that 'fees' referred to fees suffered by Tydwell, rather than Tydwell's own fees) *"makes no sense"* given that separate provision was made for "*Project Costs*" in both the Procurement and Development Agreements **[J/292]**. The Claimants seek to relitigate the Judge's construction of the contracts at **C Skel ¶59** but, not only does a challenge to the Judge's contractual construction not form part of **Ground 4B** as drafted, the Claimants also never address the Judge's fatal objection to their alternative construction.

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{CB/8/145}

45. Mr Mirza's only contract with any JV Entity was the JVA (which Otaki was a party to), which, *inter alia,* contained (i) provision for Mr Mirza to make a profit (clause 4.1.2), (ii) 'no partnership and no agency' clauses (8.1, 8.2),[45] (iii) 'whole agreement' and 'no oral modification' clauses (13.1, 13.2, 14.1) and (iv) 'good faith' clauses (12.1 and 12.2) referring to Mr Mirza dealing with his Joint Venturers, absent any other agreement, on "*an arm's length basis*" (see ¶46 below). Nowhere did the JVA require Mr Mirza to obtain Otaki's fully informed consent to any profit; implying any such duty would be inconsistent with both the specific and limited express obligations in the JVA and the entire agreement clause.[46]

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{CB/25/882}
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46. **(2) The wider commercial context:** The tax advice that formed the basis of the JV in 2007[47] was that (i) Tydwell should charge the JV Entities on an arm's length basis and (ii) the Directors should take all fiduciary decisions and management responsibility offshore (without instruction from Mr Mirza) to avoid the JV Entities paying UK corporation tax.

[45] That Otaki appointed Mr Mirza as agent for a specific and limited purpose and only for a very small proportion of the JV **{SB/45/206}** strongly indicates that Mr Mirza was not an agent more generally.

[46] The Defendants analysed the JVA's terms in detail in their main appeal skeleton (¶¶40-46).

{CB/7/91}

[47] The Defendants analysed the tax advice in detail in their main appeal skeleton (¶¶37-38).

{CB/7/90}

This form and basis of charging is incompatible with (or "*irreconcilably hostile to*") the obtaining of fully informed consent: see *Hopcraft* at [277]. That is because a party acting on an arm's length basis cannot owe a single undivided duty of loyalty (the duty that underpins the no profit rule and the duty to obtain informed consent: *Hopcraft* at [68]); they cannot simultaneously be pursuing their own interests at arm's length from the principal and providing that principal with full information. Further, seeking to impose the "*fully informed consent*" standard onto this framework amounts to an attempt to benefit from the offshore tax advantages of an arms-length consultancy model while simultaneously claiming the protections of a strict onshore fiduciary relationship.

47. **(3) The practical realities**: The practical consequences of the Claimants' argument - **{CB/8/144}** requiring full disclosure of and consent to *"every charge"* (**C Skel ¶54**) - is commercially incoherent and would have been unworkable. Tydwell, a property development company with its own overheads and creditors, which was and is involved in numerous other development projects,[48] would have had to operate with an open set of accounts, informing the JV Entities each time it was to pay the salary of its staff, an overhead or any other invoice or to receive any payment and seeking the consent of the JV Entities to do so. The parties cannot have intended that.

48. **(4) Course of dealing**: Nor was the JV conducted in that way from 2007-2022. Tydwell expressly refused to from the outset, informing IQEQ in 2010 (following a request for backup invoices) that "*this work was carried out by Tydwell. Tydwell ltd is a separate entity to Viper. We cannot disclose the books of Tydwell Ltd to a 3rd party…*" **{SB/25/119}**. As the Judge acknowledged, there is no evidence of further attempts to obtain backup invoices until the **{CB/14/312}** cladding issue in 2020 **[J/277]** (see too **[J/552]**), when Mr Mirza again refused to operate in **{CB/14/364}** such a way **[J/414]**. The JV Entities continued to make payments to Tydwell on the 142 **{CB/14/338}** occasions it presented an invoice.

49. Insofar as any fiduciary duty arose, its content cannot be superimposed above the contractual provisions or the wider commercial relationship, as described at ¶¶44-48 above. The upshot is that the no duty of fully informed consent arose and there was no need for the Judge to direct himself that Tydwell (or Mr Mirza) required such consent.

(c) The necessary consent was in any event obtained

[48] See the Defendants' analysis in their main appeal skeleton (¶54) **{CB/7/96}**.

50. Alternatively, insofar as Tydwell (or Mr Mirza) were under a duty to obtain fully informed consent, that simply means consent given after disclosure of all the **material** facts: *Hopcraft* at [211]–[212]. The material facts depend on the circumstances of the case: *Hopcraft* at [226] **{CB/8/144}** (cited at **C Skel ¶53(h)**). In the circumstances, all the material facts were disclosed:

51. **First**, the tax advice circulated by Mr Mirza at the outset of the JV in 2007 (see ¶46 above) made clear that Tydwell would charge fees on an arm's length basis; Mr Morjaria accepted that this advice formed the basis of the JV: see the Defendants' main appeal skeleton (¶¶37-38). The JV Entities also received and acted upon this advice to avoid UK tax residency; IQEQ confirmed this to Mr Morjaria in an email on 28 January 2016, in which it stated that "*We believe that our files will reflect that full management and control of these entities has taken place in Jersey and the IoM (and most importantly, outside the UK) and that all of the major strategic decisions have been made by a Board resident in these jurisdictions (making the appropriate consultant / contractor appointments into the UK for works to be undertaken)*" (see too **[J/80]**, **[J/829]**, **[J/872]**).[49] **{CB/7/90}** **{CB/14/272}** **{CB/14/419}** **{CB/14/427}**

52. **Second**, Mr Mirza also expressly told Mr Morjaria that Tydwell was charging arm's length fees in December 2015 and paying tax on its profits **[J/281]**-**[J/283]**; Mr Morjaria confirmed that he knew this and even wrote in those terms to his tax advisor (**[J/284]**, **[J/299]**, **[J/336]**). **{CB/14/312}** **{CB/14/313}** **{CB/14/315}** **{CB/14/328}**

53. **Third**, the JV Entities (as represented by the Directors and IQEQ) knew that Tydwell could charge such fees and make profits; this was clear from the written contracts (**[J/292]**, **[J/857]**), as properly construed at ¶44 above. In entering into these contracts, each JV Entity was therefore aware that Tydwell was making a profit and consented to the same. It is non-sensical to suggest that the JV Entities entered into contracts providing for Tydwell to charge fees and make a profit but assumed those fees and profit were zero. Further, the Judge found (neither of which has been appealed) (i) that the JV Entities had accepted that Tydwell could "*make and keep a management charge*" **[J/854]** and (ii) the reference to "*Project Management*" or "*Project Management or OH*" in the invoices was a disclosure of Tydwell's fees by Tydwell (**[J/336]**, **[J/342]**). In the premises, the JV Entities did consent to Tydwell's fees (at the very least their project management fees); when Tydwell presented 142 invoices to the JV Entities, they approved them and paid the sums sought in the knowledge that Tydwell was to charge arm's length fees, that multiple contracts so provided and having accepted that Tydwell could "*make and keep a management charge*". **{CB/14/314}** **{CB/14/424}** **{CB/14/424}** **{CB/14/328}** **{CB/14/329}**

[49] Each year the Directors confirmed that Otaki was "*subject to income tax in Jersey at 0%*": see the accounts for 2019 {**SB/38/176**} and the letters to HMRC in the Defendants' main appeal skeleton (¶49).

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54. Against this, the Claimants seize on the Judge's comment 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**] (**C Skel ¶59(d))**, making the bold comment that the contemporaneous documents "*cannot reasonably permit the inferences the judge sought to draw from them*". There are two answers to that: (1) The word "*really*" is important because other contemporary correspondence does show this; for example, the statement in the email at ¶48 above that "*this work was carried out by Tydwell*" indicates that Tydwell was charging fees for its own work and not merely passing on third party costs. (2) to the extent that contemporary correspondence is slight, that is understandable in circumstances where all relevant parties knew Tydwell that was charging fees: see ¶¶51-53 above. The exact fee does not fall to be disclosed: see ¶56 below. In any event, this argument does not meet the high hurdle needed for overturning a finding of fact.

{CB/8/147}

55. While the Claimants also argue that the "*Project Manager*" for the "*Project*" was CSA (**C Skel ¶58**, **¶61**), they do not define what they mean by "*Project*". The only Project Manager that remained constant from 2007-2022 (i.e. throughout the JV) was Tydwell. When it was put to Mr Stobart of IQEQ that there was no other candidate who could have been a project manager in 2018 (an invoice in that year was shown to him {**SB/98/473**}),[50] he had no answer to this. Rather, he admitted that "*they* [Tydwell] *are looking after this project*" [**Day9/109-110]**. When a project management charge was presented to the JV Entities on a Tydwell invoice, it was therefore obvious to all that this was Tydwell's charge.

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{SB/167/1142}

56. **Fifth**, as the Claimants correctly state at **C Skel ¶53(i)**, where there is a duty to disclose material facts, it is not necessary for a fiduciary to disclose the exact amount of profit made, provided: (i) the fact of a profit is disclosed; and (ii) the profit is reasonable: *Hopcraft* at [215] and [226].[51] For the reasons given at ¶¶51-55 above, the fact of a profit was disclosed. As regards reasonableness, the Judge stated that no basis had been established to think that the fees were unreasonable [**J/525**]. The Claimants do not suggest otherwise in their skeleton and it is therefore understood that no point is taken on this issue.

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{CB/14/359}

[50] CSA could not have been project manager at this time because construction had been completed long previously, in June 2012 when Premier Inn took occupation of the Hotel [**J/30]**. Nor could HPF because the partial fit-out of the data centre was completed on 25 April 2016 [**J/33]**.

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{CB/14/265}

[51] The Supreme Court cited with approval dicta from Leggatt J (as he then was) in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co (No.1)* [1990] 1 Lloyd's Rep. 167 at p.171 (also cited in *Secretary of State for Justice v Topland Group Plc* [2011] EWHC 983 (QB) at [70]).

57. The Claimants raise two additional matters: **(1)** The assertion at **C Skel ¶56** that the Judge approached the issue of consent *"entirely the wrong way around"* is misplaced, not least for the reasons outlined at ¶¶39-49 above. Further, while the Judge asked himself whether there was *"an understanding that Mr Mirza or Tydwell would not charge for services"* [**J/285**] this appears in the context of 80 paragraphs of reasoning on the question of consent [**J/221]-[J/301**]. Indeed, the Judge phrased the question before him at the outset as whether there was *"any understanding or agreement between the parties as to* ***whether or not*** *Tydwell would charge for its services"* [**J/221**]. No fair-minded reader of these paragraphs could conclude that the Judge assumed the matter in Tydwell's (or Mr Mirza's) favour and required the Claimants to displace that assumption, if that is what the Claimants suggest.

{CB/8/145} {CB/14/313} {CB/14/301} {CB/14/301}

58. **(2)** The Claimants also seek to make something of the Judge's reference to giving Tydwell the "*benefit of the doubt"* (**C Skel ¶61**). The Judge used this expression in relation to specific points in relation to which there should not have been any doubt, namely that:

{CB/8/147}

58.1. when Tydwell rendered an invoice whilst operating under the Procurement Agreement or the Development Agreement and that invoice made reference to *"Project Management"* or *"Project Management and OH"* that amounted to an application in accordance with clause 19 of the Procurement Agreement [**J/295**]; and

{CB/26/910} {CB/14/314}

58.2. in the context of a fraudulent misrepresentation claim where the representor must subjectively appreciate that their representation is false (or be reckless as to the same),[52] the Judge found on the balance of probabilities that Mr Mirza and Mr John had no such understanding in respect of invoices marked *"Project Management"* or *"Project Management and OH"* [**J/336**].

{CB/14/328}

59. Neither of these discrete findings on narrow issues amount to the Judge giving the Defendants a general *"benefit of doubt"* that fully informed consent was obtained.

V. GROUND 5A - TYDWELL WAS ENTITLED TO MAKE A PROFIT MARGIN ON THE CLADDING WORKS

60. **Ground 5A** in substance repeats the argument under **Ground 4B** (a purported lack of informed consent) in the context of the Cladding Claim. The Defendants' position is that the Judge was correct to find that Tydwell was entitled to profit from the cladding work,

[52] *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) at [117].

even on the mistaken finding that Tydwell owed fiduciary duties. Without prejudice to the Defendants' position that Tydwell was not a fiduciary (**Ground 3** on the main appeal), the arguments outlined under **Ground 4B** above apply *mutatis mutandis* to **Ground 5A**.

61. **First**, the no profit rule did not apply to Tydwell (or Mr Mirza): see ¶¶41-48 above. It would be commercially illogical if Tydwell was entitled to charge fees and make a profit in relation to the JV more generally ([**J/330**], [**J/206**], [**J/853**], [**J/856**]), a finding which is not subject to appeal,[53] but was precluded from doing so solely in relation to the cladding works. There is no good reason either legally or in practice for such an approach, nor for Tydwell to have agreed to carve out the cladding works from the broader commercial relationship.

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62. **Second,** application of the *Hopcraft* principles (see ¶40 above) shows that Tydwell was entitled to profit on the cladding works, without any requirement of fully informed consent.

63. **(1) The wider commercial context, the practical realities and the course of dealing:** The matters highlighted at ¶¶46-48 above apply *mutatis mutandis* to **Ground 5A**, including, notably, the advice and practice that Tydwell should charge arm's length fees.

64. **(2) The contract:** As set out in the Defendants' main appeal skeleton (¶43), a contract or clause falls to be construed objectively by reference to (i) the whole agreement,[54] (ii) the surrounding words,[55] (iii) the factual matrix at the time of contracting and (iv) the commercial consequences.[56] These factors indicate that Tydwell was to make a profit:

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65. **As to ¶64(i)**: Clause 2.1 of the D&B Contract provides that Tydwell would complete the Project "*in* ***consideration of the payment of the Contract Sum***", indicating – on the ordinary and natural interpretation of those words - that Tydwell was to be remunerated for delivering the project. Clause 2.2 of the D&B Contract – that Tydwell would not be deemed an agent of Otaki – indicates an arm's length relationship.[57] So too do clauses 12.4 and 12.5, providing that any change in the Contract Sum needed to be agreed between the parties (and providing for adjudication in the absence of such agreement); if Tydwell was only passing on costs, there would be no need for such agreement or adjudication because Tydwell could simply evidence the costs. Moreover, clause 14.4 refers to Otaki adjusting the Contract Sum

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[53] The Claimants sought and failed to obtain permission to appeal on this point **{CB/18/601}**.
[54] *The Interpretation of Contracts* (8th edn) ¶¶7.07-7.23.
[55] *The Interpretation of Contracts* (8th edn) ¶¶7.147-7.152.
[56] *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[13].
[57] *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 at [88].

(for work undertaken by Tydwell) based on what was deemed "*fair and reasonable*"; if the Contract Sum was comprised only of costs, the "*fair and reasonable"* qualifier would be superfluous, since any adjustment would instead be based on the cost of the work (it would be non-sensical for Tydwell to contract to operate at a loss; see ¶68 below). That the Cost Plan in the Appendix and in clause 15.1 provided for "***advance** payment*" is inconsistent with the simple pass-through of costs; there would be no need for an advance payment if Tydwell could simply pass on costs to Otaki as and when they arose. Nowhere does the contract set out a requirement of "*fully informed consent*".

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66. The contract as a whole imposed a series of onerous obligations or limitations on Tydwell including (a) strict limitations on the time taken to complete the work (clauses 13.2 and 13.3), **{CB/29/962}** (b) the requirement that snagging, other repairs and any work outstanding at the Practical Completion date be carried out at Tydwell's "*own expense*" (clauses 14.3 and 14.4), (c) the **{CB/29/963}** provision of a series of warranties (clauses 2.9, 2.13 and 3) and indemnities (clause 7.3), (d) the requirement to maintain appropriate insurances (clause 7.4) and (e) the ability of Otaki to deduct any damage suffered from the Contract Sum (clause 9). These obligations support construing the Contract Sum as making provision for Tydwell to earn a fee. For example, if the contract limited Tydwell to passing on costs, it would make no sense for certain activities to be carried out at Tydwell's "*own expense*".

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67. **As to ¶64(ii)**: The "*Cost Plan*" (setting out the Contract Sum) is described as "*the agreed cost plan **for of the Project***" (clause 1.1). The fact that Cost Plan is described as being the cost plan "*for"* or "*of*" the Project, indicates that "*cost*" is a reference to the Project's costs, not Tydwell's (or any other third party's) costs. Similarly, clause 2.10.1 provides for a revised "*Cost Plan **to the Employer***" and clause 2.10.2 provides that Otaki might require Tydwell to reduce the Cost Plan; both clauses indicate that the Cost Plan captures the cost of the project **to** Otaki (not to Tydwell). This is how the Judge correctly interpreted the contract at **[J/1541]-[J/1542]**.

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68. **As to ¶64(iii)**: On 13 February 2020, Mr Mirza wrote to Mr Morjaria stating that "*Strictly, between you and me I estimate **the works** for remediation of the ACM, Trespa & insulation **should be carried out within £750,000** and no more although I can't guarantee it but quite confident*" **{SB/46/208}**. On 7 March 2020, Mr Morjaria wrote to IQEQ stating that "*Camran has deliberately done this and pushed you to sign this asap and send it back and I feel **made £200,000-00 odd out of this job***" **{SB/47/210}**. This factual matrix supports the construction that the Cost Plan captured the cost of the project **to** Otaki (not to Tydwell). The fact that Otaki

chose to enter into the contract without first obtaining evidence of the costs to complete the project further supports this construction.

69. **As to ¶64(iv)**: If the Claimants' interpretation were correct, Tydwell would be taking on a series of open-ended and onerous obligations for no fee and seemingly operating at a loss (certain items being at Tydwell's "*own expense*"). That makes no commercial sense; there would be no incentive (rather, a disincentive) for Tydwell to do the work. That Tydwell required an advance payment even to commence the work rather suggests the opposite.

70. **Third**, even if there was a requirement of "*fully informed consent*", there was such consent because the material facts were disclosed:

{SB/41/198} **{SB/50/214}**

70.1. Mr Mirza provided sub-contractor quotes on 12 March 2020, quoting prices as low as £528,550, at the same time as informing the Directors that the expected outturn costs would be between £750,000 and £1 million even assuming that render did not need to be replaced (10 March 2020) **{SB/49/212}**, thereby making it clear that there was to be a substantial mark-up for Tydwell's fees **[J/111]**.

{CB/14/276}

70.2. The contemporaneous correspondence in June 2020 **[J/409]–[J/422]** further makes clear that Tydwell was charging fees and that the Directors and Mr Morjaria knew this. For example, on 11 June 2020, Mr Mirza wrote to Mr Lewin and Mr Morjaria stating that (i) Tydwell would use "*a combination of Tydwell's workers and… a specialist external wall sub-contractor*" and (ii) the "*total cost **to Otaki** will be £2,545,763.70 inclusive of VAT*" (**[J/409]-[J/410**]). On 17 June 2020, the Directors instructed Tydwell, in an email run past Mr Morjaria **[J/417]**, to commence work on that basis, subject only to their right to appoint an independent expert to ensure that Tydwell's charges were "*aligned to market*" (which the Directors never did). Otaki's board minutes two days prior **{SB/54/226-227}** also sought to ensure that the project costs (i.e. to Otaki) fell within "*reasonable market levels*". The foregoing is inconsistent with the JV Entities (and Mr Morjaria) believing that Tydwell was merely passing on subcontractor costs without any margin.

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

{CB/14/337}

{CB/14/339} **{SB/57/247}**

70.3. In light of (i) the foregoing, (ii) the terms of the contract and factual matrix (¶¶64-65 above) and (iii) the wider commercial context, the practical realities and the course of dealing (¶¶46-48 above) the JV Entities and Mr Morjaria were aware that Tydwell was making a profit margin on the cladding works under the D&B Contract. The Judge

{CB/14/344} {CB/14/354} {CB/14/354} {CB/14/362}

concluded that they were so aware ([**J/438(iii)-(iv)**], [**J/499]**, **[J/504]**). To the extent the Judge suggested this was not informed consent [**J/542],** he was wrong to do so for these reasons and as outlined at ¶56 above and ¶¶71-72 below.

71. Against this, the Claimants argue that even if Tydwell received consent to make a profit, there was no disclosure that the profit margin on the Teampol tender was 70%: **C Skel ¶74**. However: (i) the Claimants' 70% figure is both unexplained and inflated,[58] (ii) disclosure of the precise profit margin is not necessary in every case (see ¶56 above); (iii) the price charged by Tydwell **was** reasonable in the context of the relevant market benchmark, namely Mace's settlement figure of £2.75 million (Mace, as the original contractor, being the best placed to know what the remedial works would involve) [**J/382]**; and (iv) in any event, the Judge made no finding on the precise margin charged (which will be a matter for determination at a quantum trial), although he did suggest a method for calculating that margin (**[J/1542],** addressed below under **Ground 5B)**.

{CB/8/150} {CB/14/334} {CB/14/547}

72. The Claimants argue (**C Skel ¶70**) that one cannot be suspicious of a transaction if one has been provided with all the facts, but Mr Morjaria was not only suspicious; he said to Mr Lewin "***I can tell you for sure*** *that the cost of the job is a lot less than what is quoted by Tydwell*" [**J/419]**. The Judge found that Mr Morjaria (and the JV Entities) knew that Tydwell was charging fees under the D&B Contract: see ¶70.3 above. In any event, the Defendants were not required to disclose *"all the facts"*. They were under a duty to disclose all the **material** facts – which were disclosed.

{CB/8/149} {CB/14/340}

73. In the circumstances, Tydwell was entitled to retain **the entirety** of the profit it made on the D&B Contract in circumstances where there was no duty to obtain informed consent; alternatively, there was sufficiently informed consent, as evidenced by the JV Entities freely: (i) entering into the D&B Contract; and (ii) agreeing to the increased final sum and instructing work to commence on that basis ([**J/417]-[J/418])**, all in the knowledge that that price contained a profit margin for Tydwell.

{CB/14/339}

{CB/14/335} [58] If they are deducting the Teampol quote of £418,000 **[J/393]** from £750,000 this would result in a gross profit margin of 44% (excluding other costs such as waste disposal). Further, for the reasons outlined at ¶38, caution needs to be used when referring loosely to a "*profit margin*" (with distinctions needing to be drawn – at least - between gross profit, operating profit and net income). The statements that this margin was (i) "*so significant*" that it needed to be disclosed and (ii) "*not a reasonable profit margin*" (**C Skel ¶74**) is mere bold assertion, unsupported by any expert evidence or judicial finding. {CB/8/150}

VI. GROUND 5B – TYDWELL WAS ENTITLED TO A PROFIT MARGIN SCALED UP BY REFERENCE TO THE INCREASE IN THIRD-PARTY COSTS

74. **Ground 5B** only arises in the event that the Claimants' construction of the D&B Contract is wrong in that Tydwell **was** entitled to charge fees and that the contract was not simply a mechanism by which Tydwell acted as a conduit. For all the reasons given in relation to **Ground 5A** above, the Claimants' construction is indeed untenable.

75. The Claimants aver that, even if Tydwell was entitled to charge fees, it had no entitlement to a scaled-up profit margin as described by the Judge at **[J/1542]** because the scaled-up margin does not fall within *"additional costs and expenses as may reasonably become necessary to complete the project"*. Without prejudice to their primary position that Tydwell was entitled to retain all its profit under the D&B Contract (see ¶73 above), Tydwell's entitlement to a scaled-up profit margin as described by the Judge is justified for **three** reasons.

{CB/14/547}

76. **First**, the D&B Contract itself plainly envisaged that Tydwell's fees / profit margin would be dynamic and responsive to further costs, since: (i) the definition of "*Contract Sum*" in the D&B Contract, as set out in the Cost Plan, provided for an "*Advance payment*" of £750,000 and "*payments to cover **any further additional costs and expenses** as may reasonably become necessary to complete the project*" **[J/264]**; and (ii) the "*Cost Plan*" was defined to mean "*the agreed cost plan for of the Project…**as may be revised from time to time by agreement** between the parties*". In short, the parties had agreed at the outset that Tydwell would not suffer from taking on the open-ended responsibility to complete the project. This is consistent with commercial common sense; there is no basis for supposing that Tydwell reached a commercial bargain in which its profit could be easily eroded (even entirely) by the addition of further costs, particularly where such costs were anticipated by Tydwell and Otaki.

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77. **Second**, the parties' further negotiations after entry into the contract reflected this dynamism. Otaki ultimately agreed to the increased "*cost to Otaki*", not on the basis that this reflected a simple pass-through of further costs, but subject to them verifying that the increased price was "*aligned to market*": see ¶70.2 above.

78. **Third**, the Claimants' suggestion at **C Skel ¶79** that the Judge devised an *"absurd"* contractual construction which gave Tydwell *"carte blanche"* to incur further costs (and charge more fees) is mistaken. As is set out at ¶76 above, the Cost Plan had to be varied by agreement. If the Cost Plan was not being varied, only costs *"as may reasonably become necessary*

{CB/8/151}

to complete the project" could be incurred. Mr Ekanyake, who drafted the contract, made this point when he said that the clause *"does not represent an open cheque book for Tydwell to claim monies as they please"* **[J/385]**. There are two answers to the Claimants' complaint that there was no adequate mechanism for determining what "*becoming necessary*" entailed: (1) The obvious mechanism for resolution is by agreement between the parties (the Defendants' case at ¶¶70-73 above); (2) in the absence of such agreement, the Judge's formula at **[J/1542]** provides a means of measuring those costs (to Otaki). As is clear from reading **[J/1541]**, the Judge construed *"additional"* costs to mean those costs not in contemplation at the time the contract was signed (including costs and expenses – to Otaki - associated with removing the render). **After** that construction, the Judge then went on to consider how the cost of Tydwell's services to Otaki should be **measured**. Since the Claimants do not argue that the contractual term is void for uncertainty, it fell to the Judge to do so.

{CB/14/334} {CB/14/547} {CB/14/546}

79. In the premises, it is difficult to see how the Claimants' argument under **Ground 5B** goes any further than that under **Ground 5A** (which appears to be conceded at **C Skel ¶80**).

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VII. CONCLUSION

80. For the reasons set out above, the Court is respectively invited to dismiss each of the Claimants' grounds of appeal and their cross appeal in its entirety, with costs.

23 June 2026

HEFIN REES KC
Three Verulam Buildings

JACK FLETCHER
MICHAEL CAMPBELL
4 Stone Buildings