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 RESPONDENTS

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1. This is the Respondents' skeleton argument resisting the Appellants' grounds of 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' combined supplemental bundle are in the format **[SB/tab/page]**. References to the paragraphs of the Appellants' Skeleton Argument are in the format **[ASkel/para]**.

3. The Court already has an overview of the case from the writers' previous skeleton argument in support of the Respondent's cross-appeal, and the facts are not recited again here. The writers hereafter deal with each of the grounds of the appeal in the same sequence as the Respondents have addressed them.

GROUND 1: TORT OF ABUSE OF PROCESS

4. The issues that arise here are pure points of law. Simply put: (1) there is no tort of abuse of criminal proceedings known to the law; and (2) to the extent it is contended that the tort of abuse of civil proceedings may be extended to criminal proceedings, that (a) would impermissibly undermine the tort of malicious prosecution in a manner that would render the law incoherent, and (b) as the Judge held, rests on inapposite analogies between criminal and civil proceedings.

5. As to (1), in ***Crawford Adjusters v Sagicor* [2014] AC 366**, Lord Sumption (with whom Lord Neuberger agreed)[1] described it as a tort that applies "*to the initiation or conduct of civil proceedings*" (at [149]); and the leading textbook treats the torts as "*Abuse of Civil Process*": *Clerk & Lindsell*, Ch.15, Section 5. Neither of the two reported cases in which the tort of abuse of process has been made out involved criminal proceedings: ***Grainger v Hill* (1838) 4 Bing NC 212**; and ***Gilding v Eyre* (1861) 10 CBNS 592**. The purported tort simply does not exist. The cherry-picking of references to abuse of "*law*" and "*legal process*" in the judgments referred to by A has to be seen in the context of those cases, which were concerned solely with civil process.

6. As to (2), while novelty would not of itself be reason alone to reject the recognition of a tort of abuse of criminal process, there are sound – and in any event, established – reasons of public policy why no such tort may be recognised. Unlike civil law systems, the right to institute criminal proceedings has never been the preserve of the state in this jurisdiction. The common-law right to institute criminal proceedings has been recognised at the highest judicial level as a valuable constitutional safeguard against the indolent, capricious or biased failure of public authorities to bring punishment to bear upon those who have contravened the criminal law. Notwithstanding the

[1] While Lord Sumption JSC dissented on the malicious prosecution issue, he was in the majority on this point.

qualifications on the right imposed by statute, the basic principle remains that it is a "*valuable protection against an oversight (or worse) on the part of the public prosecution authorities*": see ***Gouriet v Union of Post Office Workers*** **[1978] AC 435** at pp 477 and 498; ***R (Gujra) v CPS*** **[2013] 1 AC 484** at [27]-[29], [49], [64]-[68]; and s. 6(2) of the Prosecution of Offences Act 1985. It is a right "*not readily to be undermined*": ***D Limited v A*** **[2017] EWCA Crim 1172**, *per* Davis LJ at [40].

7. Given the public interest in maintaining this constitutional safeguard, the tort of malicious prosecution has been made subject to stringent control devices. The tort of malicious prosecution is "*narrowly defined*": ***Gregory v Portsmouth CC*** **[2000] 1 AC 419**, *per* Lord Steyn at p 426. The rationale for keeping liability within strict bounds in the tort of malicious prosecution is to limit the 'chilling effect' that the threat of a civil action might exert upon an honest private prosecutor. The public interest in having the citizen cooperate in the enforcement of the criminal law outweighs the interest of a party ultimately vindicated in criminal proceedings in being able to proceed against their prosecutor: "*In the result malevolent individuals must receive protection so that responsible citizens may have it in respect of the hazards of litigation*" (***Gregory***, above, *per* Lord Steyn at p 426).

8. As to what these control devices are, "*a claimant must establish that (i) the defendant initiated a criminal charge against the claimant; (ii) the claimant was acquitted of the charge or the proceedings were otherwise determined in the claimant's favour; (iii) in instituting and continuing the prosecution, the defendant acted without reasonable and probable cause; (iv) the defendant was actuated by malice; and (v) in consequence, the claimant suffered damage*." (***A-G of Trinidad and Tobago v Maharaj*** **[2024] UKPC 1** at [8]). The third and fourth elements are separate but cumulative requirements, albeit the latter may be inferred from the former (***Maharaj*** at **[9]**).

9. The limits on liability for malicious prosecution would be fundamentally subverted were the courts to recognise a tort of abuse of criminal proceedings. Critically, there is no liability even if malice can be demonstrated and even if any criminal proceedings terminate in favour of a putative claimant. No action lies against a prosecutor – whatever their motives – if, based on the knowledge they had (or should have had on making proper enquiries) at the time of instituting the proceedings: (a) there was

objectively a proper case to put before a court; and (b) the prosecutor in fact believed that there was a proper case to bring: ***Willers v Joyce*** **[2018] AC 779** at **[54]**.

10. It is therefore obvious that this control device would easily be deprived of effect if the law were to recognise a novel tort of abuse of criminal proceedings with the same basic constitutive elements as the tort of abuse of civil proceedings. Provided some predominant, illegitimate collateral purpose could be demonstrated, an action could be sustained without the requirement to show that there was no probable cause (or, for that matter, that the proceedings had terminated in the claimant's favour).

11. It appears to be contended that this involves no introduction of incoherence to the law because, it is said, "[t]*he abuse consists in the purpose not the motive*" **[ASkel/21] [CB/7/83]**. This is untenable. There are, of course, circumstances where intentions, ends and means are distinguishable when determining whether a particular legal institution is engaged: see ***OBG v Allan*** **[2008] 1 AC 201** at [42]. However, in the context of the malicious prosecution tort, "malice" is constituted where the proceedings are instituted for a dominant purpose other than that of bringing an offender to justice: ***Glinksi v McIver*** **[1962] AC 726**; ***Crawford***, above, at [109]. To recognise a tort of abuse of criminal process would simply allow the reasonable and probable cause element to be outflanked by rebadging a claim with the "abuse of process" label.

12. It may be thought that these control devices are antiquated, or perhaps the need for them is not empirically established. However, the fact of the matter is that they have constrained liability for malicious prosecution for centuries. If it is thought that there should be some further relaxation of the rules, that is a matter for the Law Commission or Parliament.

GROUNDS 2-4: FIDUCIARY DUTIES

Ground 2

13. A's contentions that the Judge erred in finding that Mr Mirza owed fiduciary duties by applying the wrong legal test, or finding fiduciary duties to exist by virtue of his role as an 'advisor' (and the associated pleading points), is a complete straw man. None of the criticisms advanced is meritorious.

14. As to the **first**, the Judge did not fail to apply the relevant test. He correctly directed himself on the basis that the Legitimate Expectation Test applied: see **[J/165] [CB/14/287-288]**, referring to ***Ross River Limited v Waverley Commercial Ltd* [2012] EWHC 81 (Ch)** at [235]. He expressly directed himself by reference to the requirement of exceptionality identified in the *Al-Nehayan* case (and found it to be made out).

15. As to the **second**, the Judge did not pursue his own theory. The first limb of the pleaded case **[POC/26(a)] [CB/20/618]** was that Mr Mirza had control of the JV Companies. It is on this basis, and not on the footing that he was a mere 'advisor', that he was held to be a fiduciary **[J/187] [CB/14/293]**. The Judge found the nature of his relationship with the Directors was such that he was the *de facto* controller of the JV Companies even if he were not the *de jure* controller. He was entrusted with all dealings with counterparties and the Directors were accustomed to complying with his recommendations. In reality, the Judge held, Mr Mirza exercised huge and decisive influence on the decisions taken by the Directors **[J/190, 193(ii)] [CB/14/293]**. The Judge's finding was that the situation was indeed an exceptional one, but it was on a factual basis that was duly pleaded.

16. The issue as to whether he was in some respect an 'advisor' arose only because Mr Mirza himself contended in cross-examination that his role was to make "*suggestions*" or "*recommendations*" in the best interests of the JV Companies **[Day 10/186 to 191] [SB/169-170/1144-1145]**. Those recommendations and suggestions were no more than the mechanism through which the control was exercised.

17. As to the **third**, it is right to say that the Judge referred to submissions made by Counsel for R in relation to two credit-broker cases: ***Wood v Commercial First Business Ltd* [2022] Ch 123** and ***Johnson v FirstRand Bank Ltd* [2024] EWCA Civ 1282.** When, however, the Judge asked himself at **[J/182] [CB/14/292]** whether the circumstances were "*sufficiently similar*", he was plainly referring to the cases referred to in the foregoing paragraph – those "*where a participant in a joint venture has been found to owe fiduciary duties*" – and not the credit-broker cases. Although there is parenthetical reference to *Wood* at **[J/195] [CB/14/296]** and **[J/853] [CB/14/424]**, nothing in the judgment supports the contention that he relied on a factual analogy between Mr Mirza's role, and the very different role of credit brokers, in order to find that fiduciary duties existed.

18. As to the **fourth** point taken regarding the Undertaking Test, the Directors had indeed been appointed for tax reasons and had been instructed by Mr Morjaria not to second-guess Mr Mirza's recommendations. In a nutshell, while they retained a residual sliver of control, they would defer to Mr Mirza. There was abundant evidence for that. It is not, as A suggest **[ASkel/35] [CB/7/88]**, inherently unlikely that the Directors slavishly followed the recommendations of Mr Mirza. They had no expertise in construction and had manifestly been installed for the purpose of securing tax advantages. The Directors may have taken formal administrative steps independently of Mr Mirza and, conscious of their professional duties, would not (for example) trade while insolvent. This does not affect the reality that Mr Mirza determined essentially everything the JV Companies did in practice.

19. This was not merely a practical reality. It is what Mr Mirza in fact undertook to do: see the observations below in relation to the seventh objection.

20. As to the **fifth** contention, insofar as it is said that there are 'policy implications' involved, that is to let the tax tail wag the dog of the substantive arrangements between the parties. There is in fact no fully argued case (save for a reference to previous tax advice) that the Judge's conclusions necessarily entail the loss of the tax privileges. The reality is that the parties were sailing close to the fiscal wind, and whatever they may have been advised to do, one has to look at what Mr Mirza in fact did undertake to do. The terms of the JVA and the events that in fact transpired cannot be rewritten retrospectively on the basis that, to give them their natural characterisation, would or might cause the loss of desired tax advantages.

21. As to the **sixth** contention **[ASkel/39] [CB/7/91]**, this is one of no weight. If someone chooses to serve two people with conflicting interests, that is a choice for that individual. In any event, Tydwell was owned and controlled by Mr Mirza. At least so long as Tydwell was solvent, the interests of the company were Mr Mirza's interests and he was answerable to himself. The alleged conflict of interest is hypothetical because Mr Mirza could authorise himself to act, *qua* director of Tydwell, as he saw fit.

22. As regards the **seventh** objection, the starting point of the Judge's analysis was that Mr Mirza was put in a fiduciary position by the terms of the JVA **[J/183] [CB/14/292]**. Pursuant to cl. 5.2.1, Mr Mirza undertook to "*manage the daily operation of the Joint Venture and make decisions (including the appointment of all contractors) to his UK construction company in the best interests of the Joint Venture*". The 'best interests' language is the language of fiduciary obligation: as the Supreme Court held in ***Hopcraft***[2] , the touchstone is whether the fiduciary has agreed, objectively, not to pursue their own interests. In the face of that clear language, A attempts to water down the provision by a process of contextual construction **[ASkel/43-45] [CB/7/92-93]**. These attempts are, however, contrived:

a. A contends that "*Joint Venture*" is "*nebulously*" defined ("*the arrangements between PKM, SM, CWM, SCM and Otaki Limited set out in this agreement*"). Be that as it may, only natural and legal persons can possess "*interests*". On any sensible construction, the duty to act in the best interests of the joint venture was owed to each of the named parties in connection with the arrangements between them. Were it otherwise, cl. 5.2.1 would be entirely nugatory. A argues that "[i]*f this clause had intended to create obligations on Mr Mirza to Otaki, it could and would have done so explicitly*". An obligation has to be owed to somebody and be actionable by them. None of the Joint Venturers is named in the clause itself. Any of the parties was entitled to enforce the obligation to the extent that their common interests were engaged by the management or decision-making of Mr Mirza in relation to the Joint Venture.

b. The words "*daily operation*" in cl. 5.2.1 are expansive, not qualifying words in the context of the JVA as a whole. The relevant contractual context is that, by cl. 5.1, there were to be three directors of the Company, each a named individual from an offshore professional director company. The plain intent of cl. 5.2.1 is to make clear that, notwithstanding that those individuals unconnected with the Joint Venturers were to be the directors, the person who was actually to manage the Joint Venture would be Mr Mirza. Moreover, on R's case **[ASkel/45] [CB/7/93]**, the matrix of fact against which the JVA is to be construed includes the fact that tax advice had been received as to the need for decisions to be taken offshore. If

[2] *Hopcraft v Close Brothers Limited* [2025] UKSC 33; [2025] 3 WLR 423 at [107].

that is right, then it provides relevant context. The "*management of the daily operation*" did not entail some minimal execution role. What was plainly contemplated was that Mr Mirza was the person with real management responsibility, save in respect of that which needed the nominal approval of the Directors.

c. Insofar as the provision also provides for Mr Mirza to make decisions "through his UK construction company", the tax background again explains that position. It is an odd and artificial provision unless one bears in mind that the making of the decisions outwith Tydwell might be regarded as the making of decisions on behalf of Otaki within the jurisdiction. The effect of the provision was to require Mr Mirza (to the extent possible) to take decisions on behalf of the Joint Venture through Otaki.

23. The presence of these express terms is also an answer to the argument from uncertainty made by R **[ASkel/50] [CB/7/95]**: Mr Mirza explicitly agreed to subordinate his interests to those of the Joint Venture. Duties are not being imposed upon Mr Mirza that he did not expressly agree to undertake.

24. As regards the reliance on the ***Connoisseur*** case, it is right to say that each party to the JVA owed the other a duty to act towards the other in good faith. However, the simple point is that the obligations of Mr Mirza under the JVA were not confined to a "*good faith*" obligation. Clause 5.2.1 imposed on Mr Mirza an obligation to act in the best interest of the Joint Venture in the management of the daily operation of the Joint Venture **[CB/25/878]**. That is the language of fiduciary obligation. The fact that the JVA also contained a lesser duty of good faith does not undermine the more onerous fiduciary obligations assumed by virtue of cl. 5.2.1. And the presence of the entire agreement clause does not prevent fiduciary duties arising; it merely defines the contractual arrangements.[3]

[3] *Courtwood Holdings S.A. v Woodley Properties Ltd* [2016] EWHC 1168 (Ch) at [34]; *Quantum Advisory Ltd* v Quantum Actuarial LLP [2023] EWHC 47 (Ch) at [47(8)]; and see [2024] EWCA Civ 247 at [29] to [40]; and see also *Kelly v Cooper* [1993] AC 205 at p 214. *UTB LLC v Sheffield United Limited* [2019] EWHC 2322 (Ch) is distinguishable as there was nothing in the terms of the relevant agreement upon which to found an undertaking to act as fiduciary.

25. As to the **eighth** contention **[ASkel/47] [CB/7/94]**, as noted above, the Judge made an express finding that, although Mr Mirza was not strictly a controller of the Company, his degree of influence was such as to bring him sufficiently within the exceptional category of cases where fiduciary relationships have been held to exist. The Judge rightly himself identified control as a basis for the imposition of a fiduciary duty. R's attempts to distinguish the facts of the present case merely serve to underscore that the supposed lack of control is illusory. The Viper sale was a decision made over a decade after the Joint Venture was embarked upon, in circumstances where the JV was in financial difficulty (and the residual control of the Directors was plainly engaged); and the inability to procure a dividend is an issue fundamentally bound up with his rights as a shareholder (and the willingness or otherwise of a majority to make a distribution) rather than his power as a director to direct the conduct of the Company's affairs. And insofar as it is said that IQEQ's contemporaneous recording that they had "*full management and control*", that is an assertion made on page which has to be weighed against the clear evidence of their defence to Mr Mirza in the lifetime of the Joint Venture.

26. Insofar as it is suggested that there is an absence of a power imbalance, that is not a necessary feature of a fiduciary relationship. The real issue is the existence of an expertise gap. This will sustain a fiduciary relationship even in commercial matters: see ***Courtwood Holdings v Maggs*** **[2018] EWHC 2163 (Ch)**, in which it was held that an SPV run by sophisticated investors was owed fiduciary duties by a land acquisition and planning consultant where, despite the formal position that decision-making power lay with the SPV, the practical reality was that the SPV was entirely dependent on the consultant's advice for day-to-day decision-making.

Ground 3

The Judge's reasoning on this point is sound and should not be disturbed. While Tydwell was not a party to the JVA, it was wholly owned and controlled by Mr Mirza, who was. Mr Mirza undertook by the terms of the JVA to make decisions through Tydwell in the best interests of the Joint Venture. It was therefore agreed – whether or not Tydwell was a party to the JVA – that Tydwell was to be the vehicle through which the Joint Venture was to be controlled and operated. That was in fact a role which Mr

Mirza caused Tydwell to adopt for the reasons set out at **[J/201] [CB/14/297]**. Conversely, through the agency of Mr Mirza, Tydwell willingly adopted that role. The Judge was right to hold that Tydwell owed fiduciary duties for the same reasons as Mr Mirza.

Ground 4

27. The argument that the Judge's reasoning was internally incoherent is unsustainable. The finding made at **[J/858(ii)] [CB/14/425]** has to be read with the Judge's finding at **[J/858(iii)] [CB/14/425]**: the Judge correctly found that the parameters of the relationship were such that the conflict of interest was authorised, subject to the qualification that a profit could only be made in compliance with the fair dealing rule. What the Judge was saying (as is apparent at **[J/855-856] [CB/14/424]**) is that there was no "*general duty*" not to allow interest and duty to conflict; the duty on the facts here was a qualified one. The argument from novelty made by A does not avail them: it has been recognised that the principle can apply to any transaction between fiduciary and principal irrespective of whether property passes.[4] The nature of the duties held to exist reflect the unusual position in which Mr Mirza was placed relative to the JV.

28. Insofar as A characterise the Judge as having found that all that had to be shown was that "*the transaction falls within the fiduciary relationship*",[5] that is a straw man. The Judge expressly declined to deal with matters on the basis that the fair dealing rule was engaged in all dealings that have some connection with the trust. When the Judge referred to the dealings here falling within the fiduciary relationship, he must fairly be taken as referring to the scope of the fiduciary relationship he actually found to exist at **[J/851-859] [CB/14/424-425]**.[6]

29. Whether or not the Judge erred in observing *obiter* that the issue may be one of nomenclature, he did in fact find that the fair dealing rule was engaged. In any event, even if the nature of the obligation here were in some way *sui generis*, no authority is

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[4] ***Johnson v EBS Pensioner Trustees Ltd*** [2002] EWCA Civ 164 at [50], [67], [2002] Lloyd's Rep. P.N. 309; ***Swindle v Harrison*** [1997] 4 All ER 705; and ***Re Thompson's Settlement*** [1986] 1 Ch. 99 at 115

[5] **[J/899-904] [ASkel/59]**.

[6] The pleading point **[ASkel/58]** is wrong: the case was expressly put on the footing that there was a no conflict duty and that there was a duty to seek informed consent: see **[POC/27(b) and 112(c)]**.

identified for the proposition that rescission would only be available if the breach of duty properly could be characterised as a breach of the 'fair dealing' rule.

GROUND 6: INVOICING CLAIMS

30. Every one of the grounds on which the judgment is attacked in relation to the deceit claims suffers from a failure to grapple with the fact that what was alleged was a systematic fraud. While it was understood that some charges would be levied, arbitrary markups were, as a matter of routine, being applied and passed off as proper subcontractor charges. That was the basis on which the claim was put: there was a process, the overall upshot of which was that significant overcharges were levied.

31. **Inadequate particularisation.** The allegation of inadequate particularisation is plainly ill-founded. As to the nature of the representations made by the presentation of each invoice, the case was put on the footing that, when an invoice was presented, it impliedly or expressly represented that the presenting party honestly believed that the costs had been properly incurred by Tydwell or its subcontractors, and to the extent that sums were claimed in respect of the subcontractors, Tydwell intended to pay those sums **[POC/54] [CB/20/626]**. Whatever might be said about the meaning of the express words, the implied representations go without saying: what else is an Invoice presented for? The pleaded case included allegations that the representations were made or were procured to be made by Mr Mirza and that he knew the representations to be untrue. The pleading, so far as it went, was perfectly acceptable. He was the person who stood to benefit.

32. **Invoicing Claims.** Were the overcharges isolated incidents, the global manner in which the case was put might have been a proper ground for complaint. However, the case put was that there was over £6 million in unaccounted-for charges which the relevant Defendants refused to explain **[POC/60(a), (d) and (e)] [CB/20/628-629]**, in circumstances where the immediate beneficiaries were Mr Mirza (and his family) and the Mirza companies. The very nature of the representations, in their globality, was such that they could not have been made other than deliberately and systematically, and the only realistic inference (once those facts were made out) was that Mr Mirza must have known about and orchestrated the overbilling because he was the person who stood to benefit.

33. The submissions made at **[ASkel/81-83] [CB/7/106-107]** disregard (and in any event fail to engage with) the Judge's reasoning at **[J/330] [CB/14/325]**. The Judge expressly addressed the fact that Tydwell had some right to charge fees. The mischief was that sums included in the invoice (which Tydwell would have had no right to charge) were being passed off as costs incurred to third parties. The Judge was right to hold, against the contractual backdrop and the fact that Project Management fees and Overheads were separately claimed on other occasions, that items of cost reflected the actual cost of the relevant subcontractor's work when in fact they included sums there was no entitlement to claim.

34. The suggestion that the Judge did not apply his mind to the question of Mr Mirza's knowledge **[ASkel/85-86] [CB/7/107-108]** is not reconcilable with the content of the judgment: the Judge held that he was the "*architect of the scheme to avoid the JV Entities and Mr Morjaria knowing the full extent of the monies that Tydwell was extracting from the JV*" **[J/341] [CB/14/329]**. He further made findings, plainly open to him on the evidence, that the representations were intended to be understood in the false sense. In short, the allegation the Judge found to be made out was one of systematic, rather than piecemeal, fraudulent overbilling.

35. **Cladding Claim.** The Judge was not in error in his interpretation of the meaning of the communications from Tydwell to Otaki. The reliance on the Cladding D&B Contract is not unrealistic legal formalism: it provided for an advance of £750,000 with an uplift for additional costs or expense. On any sensible view, if Tydwell sought additional funds, it had to be taken as saying (as the Judge held) that there were additional costs or expenses that justified the uplift when it was demanded on 11 June 2020. On the facts found by the Judge, there had been no change in circumstances between the date of contract and the 11 June Email other than the inability of Tydwell to obtain insurance, but Tydwell did not in fact obtain such insurance **[J/455 to 457] [CB/14/347]**. The Judge, permissibly, went on to draw the inference from Mr Mirza's refusal to explain the basis on which these additional costs had been claimed (when there were multiple contractual obligations to do so) that he knew there was no good basis for them **[J/462 to 464] [CB/14/348-349]**.

36. Turning to the three criticisms made at **[ASkel 88 to 90] [CB/7/108-109]**, they suffer from the fatal flaw that they do not respond to the one misrepresentation held to be made out. The representation held to be made out was Cladding Representation 1 – that there had

been a substantial increase in costs that had "*reasonably become necessary*" – a point which is actually reinforced by the Judge at **[J/445] [CB/14/345]**. The part of the cladding representations case that succeeded did not involve a representation that the costs were referable only to third parties. Every part of A's submissions is based on this fundamentally erroneous premise. It is plain wrong to say that the Judge contradicted himself on an elementary level. Likewise, **[ASkel/89 and 90] [CB/7/108 and CB/7/109]** proceed on the fiction that the Cladding Representation that succeeded was one where "*any increase in costs* [referred] *to third-party costs*", or that it is necessary to show that this is how Mr Mirza (and therefore Tydwell) understood it.

37. The case is very simple: Tydwell represented that substantial additional costs (whether internal or third-party) had been incurred; there was no basis for that contention; and a significant increase was claimed backed by a so-called "Valuation Spreadsheet" **[J/418 to 421] [CB/14/339-341]** which represented that there were over £1.25 million in additional costs that had recently become necessary, when in reality Tydwell had taken its subcontractors' spreadsheets and applied arbitrary markups that bore no relation to any actual change in circumstances.

GROUNDS 12-13: KNOWING RECEIPT

Ground 12

38. The arguments made are misconceived. Dealing first with Tydwell, the pleaded case at **[POC/78b] [CB/20/635]** was that there was a disposal of the JV Companies' assets in the form of payments to Tydwell in excess of what was required to defray costs.

39. It is accepted that, in light of the line of authority represented by ***Brown v Bennett*** **[1999] BCC 91** and ***Courtwood Holdings SA v Woodley Properties Ltd*** **[2018] EWHC 2163 (Ch)**, a wholly antecedent breach cannot be relied upon to found a claim in knowing receipt. Here, however, while Mr Mirza was nominally not a director, the extent of his control was such that payments (and in relation to the Boomzone Leases, the Boomzone Leases) were made on his say-so. It is artificial not to characterise him as being in control of the funds or the Property merely because the Directors formally rubber-stamped the invoices. On the facts found by the Judge, the role fulfilled by the

Directors was so ministerial in character that the transfers properly are to be characterised as 'direct consequences' of Mr Mirza's breaches of fiduciary duty.

40. As regards Redwire, the pleading at **[POC/78(f)] [CB/20/635]** is adequate the allegation again is that Mr Mirza actually caused the payments to be made while withholding the information necessary for informed consent to be obtained.

Ground 13: Constructive trust in respect of the Boomzone and LMH Leases

41. R further seek to uphold the decision of the Judge on the grounds that: (1) Viper is entitled to rescind the Boomzone and LMH Leases; and/or (2) each of Boomzone the and Tenth Defendant ("**LMH**") held the Third (or, to the extent that they remained in existence, the First and Second Boomzone) Leases on constructive trust for Viper (or alternatively, on the grounds that the corporate veil can be pierced so as to equate Boomzone and LMH with Mr Mirza for that purpose); or alternatively, on the grounds that the purported leases were simply ineffective to dispose of Viper's beneficial interest in its property.

42. The contentions that there is no factual basis for the case advanced in the Respondents' Notice[7] is plainly wrong. Mr Mirza was held to be the shareholder, director and controlling mind of Boomzone **[J/954] [CB/14/440]** and the judge held that the position was "*effectively the same*" in relation to LMH **[J/968] [CB/14/444]**; he merely dismissed the wider allegation that Mrs Mirza, Ameer and Mr John's knowledge or intentions should be imputed to Boomzone. The contention that the companies were alter egos of Mr Mirza is plainly made out on the Judge's primary findings of fact. This position is also entirely consistent with the case pleaded in relation to the incidence of a constructive trust in relation to the Leases, which turned on Mr Mirza's knowledge (see **[POC/117-118A] [CB/20/645]**).

43. The Leases are plainly rescindable as their grant was procured in each case by Mr Mirza's breaches of fiduciary duty (in particular, his breach of the fair dealing rule).[8] As to the constructive trust position, Boomzone was no more than the vehicle used by Mr Mirza to receive the Leases in breach of fiduciary duty. As the Leases represented

[7] **[ASkel/71] [CB/7/103], points two and three.**
[8] ***Johnson v EBS Pensioner Trustees Ltd*** [2002] EWCA Civ 164

the unauthorised profit made in breach of fiduciary duty, they were impressed with a constructive trust in Mr Mirza's hands. Mr Mirza, by reason of his fiduciary position, fell into the category of persons who, though not strictly a trustee of Viper's property, was in an analogous position. A director or other fiduciary who abuses the position entrusted to them in order to come into the property of the company, renders themselves constructive trustee of that property: ***Paragon Finance plc v Thakerar & Co*** **[1999] 1 All ER 400** at p 408H-J; ***JJ Harrison (Properties) Ltd v Harrison*** **[2002] BCC 729 a**t [29].

44. While the Leases were granted to Boomzone and then LMH, those companies were mere creature companies used to enable Mr Mirza to receive (or disseminate) profits from his position in breach of fiduciary duty, and who are therefore properly to have imputed to them the knowledge of Mr Mirza and to be identified with Mr Mirza in equity: see ***Gencor ACP v Dalby*** **[2000] 2 BCLC 734** at [26]; ***Prest v Petrodel Resources*** **[2013] 2 AC 415** at [31] to [33]. Since each of Boomzone and LMH was controlled by Mr Mirza (and/or the whole scheme of transactions was orchestrated by Mr Mirza), his knowledge is properly to be imputed to each of Boomzone and LMH. Boomzone took as the alter ego of Mr Mirza and LMH took with notice of the constructive trust. It is not in fact necessary to pierce the corporate veil in the strict sense of the term: in each case, Mr Mirza's knowledge and state of mind is to be imputed to the two companies.

45. The further argument that the Leases cannot be impressed with a constructive trust because (1) a lease is a creature of contract; (2) the underlying contract must first be set aside; and/or (3) there is a need for there to be trust property at the outset, is wrong.[9] There is no binding authority for any of those propositions (and the purported '*Criterion* principle' is no more than an *obiter dictum* in that case). For the reasons identified in ***London Capital***[10] , there is no such principle: indeed, in almost every case where a transferee is found not to be a bona fide purchaser without notice, the effectiveness of the contract at law, as opposed to the incidence of property, is taken as a given: London Capital at [1971]. Insofar as reliance is placed by A on other dicta of Lord Burrows in

[9] **[ASkel/66-68] [CB/7/101-102]**.
[10] ***London Capital & Finance Plc v Thomson*** [2024] EWHC 2894 (Ch) at [1961]-[1980].

Byers[11] and ***Hotel Portfolio II***[12]**:** (a) the former were *dicta* doubting the *Criterion* principle and were not, taken in context, purporting to lay down any rule but reflected the fact that the scope of what he was discussing was the remedies available where an *ultra vires* contract is entered into; and (b) the latter were *dicta* from a dissenting judgment. Neither are actual or persuasive authority for the proposition contended for. Insofar as ***Ultraframe***[13] is relied on for the proposition that a receipt of assets is required, a licence is a purely permissive right that has no impact on the proprietary rights of the principal: there is no grant or transfer (and therefore no property to which the equity can attach). By contrast, a lease is both a package of contractual rights and a grant of property rights. There is no conceptual reason why the constructive trust cannot attach to the Leases.

GROUND 7: UNJUST ENRICHMENT

46. A's case under this limb stands or falls on the contentions made in its Respondent's Notice. It is accepted that 'wrongdoing' is not a recognised factor that gives rise to a claim in unjust enrichment. However, the claim should have been allowed in any event on the basis of a conventional mistake claim. The underlying premise of the claim, which the Judge held to be made out, was that the sums had not been duly earned under the contract and therefore were not due: **[J/563] [CB/14/336]**.

47. The Judge's reasoning on this point is, respectfully, incoherent. The effect of the subsisting contract rule is that the existence of the legal obligation to make payment contractually entails that the conferring of the benefit cannot be unjust: ***Barton v Morris*** **[2023] AC 684** at [96]; and see ***Fairfield Sentry v Migani*** **[2014] UKPC 9** at [18]. The Judge did not heed the relevant qualification in the passage cited from Goff & Jones, that "*the contract will bar the claim, to the extent that it entitles the defendant to receive the relevant benefit*" (emphasis added).

[11] ***Byers (CA)*** [2022] 4 WLR 22 at [21]-[22] and [79];
[12] ***Hotel Portfolio II*** [2025] 3 W.L.R. 293 at [117] and [137];
[13] ***Ultraframe (UK) Ltd v Fielding*** [2005] EWHC 1638 at [1491]-[1494].

48. It is right to say that, if R were required to certify[14] the sums claimed as due, mistake would not avail R because the certification itself, although mistaken, would crystallise a contractual right to payment that would not otherwise exist: that is precisely what happened in ***Migani***.

49. However, the subsisting contract rule does not affect an overpayment where the sum of money is not actually due. A sum of money paid in the mistaken belief it is due under a contract is not, to that extent, a sum paid 'pursuant to' that contract. As the Judge identified, the sums of money were paid "*purportedly*" pursuant to the contract, but the mere fact of making the mistaken payment did not enlarge any contractual entitlement of A. There was no right to the benefit. Insofar as it is said that R assumed the risk of their error, that point is misconceived: no factual basis is identified for the proposition that contract expressly or impliedly allocated the risk[15] of error to R.

50. Insofar as it is said that no findings of mistake were made, the Judge made ample findings in the context of the deceit claim that the JV Entities/Mr Morjaria believed the sums being claimed were genuinely claimed. To the extent of the overcharging, they are plainly not sums to which A were entitled.

GROUND 8: SALE OF THE VIPER LEASE IN MAY 2024

Ground 8(a): the price duty was not complied with

51. The framing of the attack on the Judge's reasoning is misconceived in its fundamental premises. This is a matter where the Judge held that the principle in ***Tse Kwong Lam v Wong Chit Sen*** **[1983] 1 WLR 1349** applied **[J/1473] [CB/14/535]** (a finding that is not challenged). The onus was therefore on A to demonstrate that the Price Duty had been complied with. **[ASkel/97] [CB/7/111]** proceeds on the opposite assumption (and this contaminates the submissions that follow). That onus was stated in ***Tse Kwong*** to be a "heavy" one.

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[14] As construction contracts, each of the Development Contract (cl. 18-19 **[CB/28/945-946]**), and Cladding D&B Contract (cl. 15.2 **[CB/29/953]**) have *interim* payment provisions compliant with the HGCRA 1996. However, it is well-established that payments made pursuant to such a regime have only temporary finality in the event of overpayment (indeed, cl. 15.2 expressly contemplates that invoices in respect of additional costs will be checked after the works are complete): see ***Rupert Morgan Building Services (LLC) Ltd v Jervis*** [2004] 1 WLR 1867 at p 1872 and ***Aspect Contracts (Asbestos) Ltd v Higgins Construction plc*** [2015] UKSC 38; [2015] 1 WLR 2961 at [23] to [24].

[15] ***Deutsche Morgan Grenfell Group Plc v IRC*** [2007] 1 A.C. 558 at [26]-[27].

52. The suggestion that the Judge followed the mistaken premise that he had a "*duty to discover the highest price*" is not remotely borne out on the face of the judgment. Nor is there any merit in the straw man argument that his reasoning assumed a modest premium needed to be paid as against the market price. What he held, simply put, was that there was a sale to a connected party in circumstances where there was no meaningful negotiation over the price **[J/1484] [CB/14/536-537]**.

53. The suggestion that reasonable steps were taken was obviously unsustainable. The sole point of any substance pleaded by A was that a Red Book valuation had been obtained **[Def/125L and 125M] [CB/21/747 and 748]**, despite the fact the onus was on A to make good the case at trial and not the reverse. That was a contention that A either made good or it did not.

54. Likewise, the contention that the Notice of Rescission need not be disclosed to the valuer was wholly untenable on the facts. As came out in expert evidence, the rent being achieved under the Third Boomzone Lease (with years to run) was of an order of magnitude lower than the market rent, in circumstances where Mr Mirza had to his knowledge artificially depressed that rent. Although no valuation evidence specifically on point was available, it is manifestly the case that an unencumbered (or potentially unencumbered) holding is likely to be worth substantially more than one subject to a lease on uncommercial terms. The issue is not one of law **[ASkel/100] [CB/7/112]**; it is simply a question of what ought to have been done on the particular facts. The Judge's finding that it was not reasonable to keep the valuers in the dark about this matter is clearly unimpeachable. The heavy onus was not discharged.

55. As for the reliance placed on Counsel's advice, Michael McLaren KC was not available to be cross-examined. However, it is clear that he was instructed at short notice and was given minimal documents to review in advance of the conference **[SB/139/1079]**. Those documents did not include the Red Book valuation. In all the circumstances, the Judge was not required to take Mirza's evidence at face value that he had explained the circumstances of the sale to Wolverine and obtained his blessing.

56. Insofar as issue is taken with the Judge's finding that Wolverine would or could have paid a higher price: (a) the Judge was not required to take at face value Ameer's hypothesising as to what Wolverine might have paid in an at-arm's-length deal; and (b)

to do so would ignore the fact that the entire transaction (including the financing) was orchestrated by Mr Mirza, and was not meaningfully negotiated.

Ground 8(b): The Judge was not in error in holding that the clean hands doctrine applied

57. It is contended by A that the 'clean hands' argument ought to have failed at a threshold level because Mr Mirza discharged the indebtedness to BOS *qua* co-guarantor, and obtained a statutory right under the Singaporean equivalent of s.5 of the Mercantile Law Amendment Act 1856[16] which, being statutory in character, is not subject to any equitable controls[17].

58. The only authority advanced for the proposition that the 1856 Act creates an independent right is the decision of the Deputy Master in ***Leon v Kensington Mortgage Co Ltd*** **[2023] EWHC 121 (Ch)**. A rely on a number of paragraphs in the judgment which refer, in a belt-and-braces fashion, to the sureties' rights in equity and the 1856 Act. Nothing in that case turned on whether rights under the 1856 Act were greater in extent than in equity (and on no sensible reading is it authority for the very wide proposition that the clean hands doctrine could not apply to the remedy of subrogation).

59. It is clear on a consideration of the mischief it was designed to address that the 1856 Act does not have the effect contended for, and was not intended to put a joint debtor or joint guarantor in a better position in terms of subrogation rights than a person not answerable for the debt themselves. The mischief s.5 addressed was narrow and specific. It was not intended to effect great change: ***Re Russell (1885) 29 ChD 254*** at pp 265-6. At common law, payment by the surety extinguished the security, such that there was nothing left to transfer, leaving them with nothing but a personal claim against the principal debtor: ***Copis v Middleton*** **(1823) 1 Turn & R 224**. Section 5 was enacted to reverse that rule, so that the security is treated as surviving payment and the pre-existing equity may fasten upon it.

[16] Section 2 of the Singapore Act of the same name, which is cognate terms and was approached at trial on a presumption of similarity.
[17] The concession referred to at **[ASkel/106] [CB/7/114]** at **[Day 27/31] [SB/220/1237]** was not on point: the concession was on the different point whether the existence of the written assignment agreement barred the right of subrogation.

60. To that end, the statute does three things. **First**, it affords a co-debtor or surety an entitlement to an assignment of every judgment, specialty or other security held by the creditor to the extent of payment of the debt ("**the First Right**"). **Secondly**, it reverses the rule in ***Copis v Middleton*** by providing that this entitlement arises "*whether such Judgment, Specialty, or other Security shall or shall not be deemed at Law to have been satisfied by the Payment of the Debt or Performance of the Duty*". **Thirdly**, it removes any procedural bar that would otherwise prevent the co-debtor or surety from proceeding in their own name ("**the Second Right**").[18] The Second Right is a purely procedural entitlement, rather than a substantive right: ***Re CC Automotive Group*** **[2019] EWHC 2771 (Ch)** at [57].

61. The fundamental issue concerns the nature of the First Right. It plainly is not a *sui generis* right which extends beyond the deemed assignment which gives effect to subrogation in equity. Section 5 does not provide for an automatic statutory vesting of the relevant cause of action. It explicitly provides that the co-debtor or surety is "*entitled to an assignment*" of the relevant rights.

62. Assignment is a creature of equity. Legal assignment was not known to English law until the coming into force of the Law of Property Act 1925. On any view, the draftsman of the Act must have been taken to intend that the transfer of the rights would, like any other assignment, be subject to any equities and be subject to any equitable defences. There is no reason to impute to the legislature an intention to expand the rights of the co-debtor/surety beyond those which would have been enjoyed but for the rule in ***Copis v Middleton***.

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

63. **The threshold points raised by A**. Two separate threshold points are made by A: first, it is said that the right to subrogation is not equitable in character at all (such that the

[18] ("*such Person shall be entitled to stand in the Place of the Creditor, and to use all the Remedies, and, if need be, and upon a proper Indemnity, to use the Name of the Creditor, in any Action or other Proceeding, at Law or in Equity, in order to obtain from the principal Debtor, or any Co-Surety, Co-Contractor, or Co-Debtor*").

clean hands doctrine cannot apply at all); and secondly, it is suggested by reference to other authority that the doctrine does not in any event apply to the right to subrogation.

64. As to the first point, the basic principle on which a security arises by way of subrogation is well established. In the following passage from ***Burston v Speirway*** **[1974] 1 WLR 1648**, Walton J held:

> "[Where] *A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded* ***in equity*** *as having had an assignment to him of B's rights as a secured creditor ... In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged in whole or in part by the money so provided by him.*"
>
> (Emphasis added)

65. This passage was cited with approval in ***Menelaou v Bank of Cyprus*** **[2016] AC 176** by Lord Clarke (with whom the majority agreed). While technically *obiter*, Neuberger LJ (as he then was) further held in ***C & G v Appleyard*** **[2004] EWCA Civ 291** at [44] that "*normal equitable principles apply to subrogated rights. Thus, the familiar equitable defences can be raised against a claim for subrogation, and priority as between the person with the subrogated right and other parties are to be determined in accordance with normal equitable principles*".

66. The characterisation of the decisions in ***Banque Financière de la Cité v Parc*** **[1999] 1 AC 221** and ***Menelaou*** as barring the invocation of equitable defences, is misconceived. Those decisions essentially resituate the primary question whether a right to subrogation has arisen within the conceptual framework of unjust enrichment. There is, however, a difference between the liability framework that determines when a right arises on the grounds of unjust enrichment and the question of the proper remedial response to it. As Lord Hoffmann held in ***Banque Financière*** at p 236, "[s]*ubrogation is not a right or a cause of action but an equitable remedy*"; and see also ***Boscawen v Bajwa*** **[1996] 1 WLR 328** at p 335. Even if the primary basis of liability in subrogation is properly to be characterised as a form of unjust enrichment, the remedial response – at least in a case where the dischargor of a debt seeks to succeed to the creditor's security - is the proprietary remedy of equitable subrogation: see ***Swynson v Lowick Rose LLP*** **[2018] AC 313** at [31]; and ***Menelaou*** at [37].

67. Moreover, Lord Clarke considered (at [36]) that a bona fide purchaser without notice would have an arguable defence to an equitable subrogation claim. The claim to be equity's darling is the equitable defence *par excellence*; it is not a general defence in the law of unjust enrichment. Its invocation only makes sense if Lord Clarke considered equitable defences to be available.

68. Insofar as it is suggested that there is other authority[19] that points against the application of the doctrine of clean hands to subrogated rights, even if the right to subrogation is equitable in character, neither of the cases cited by A at **[ASkel/107] [CB/7/114]** takes matters further. In ***Day v Tiuta***, the purportedly 'unclean' conduct deemed to be irrelevant consisted of the co-debtor's having acquired the funds to discharge the debt with funds fraudulently obtained from third parties. In ***UBS AG v Rose Capital Ventures Ltd*** **[2018] EWHC 3137**, the defective appointment of receivers was held to have nothing to do with the enforcement of the security. These are cases decided on their own facts that do not evince any general principle.

69. **The pleading point at [ASkel/111] [CB/7/116].** This point is without merit. Pleadings are to be concise and must spell out the parameters of the case advanced: ***McPhilemy v Times Newspapers Ltd*** **[1999] 3 All ER 775** at p 793. Provided that fair notice of the case advanced is conveyed, there is no requirement for meticulous, mechanistic internal cross-referencing. On any reasonable reading of the pleading: (a) the impropriety was pleaded; (b) the allegation that the earlier impropriety enabled the subsequent Wolverine Transaction was expressly spelt out; and (c) this was one of the circumstances contemplated by POC/119G[20].

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[19] For completeness, the citation from ***Day v Tiuta*** **[2014] EWCA Civ 1246** at [81] is taken out of context. It was, as Gloster LJ recorded at [51], common ground that equitable defences could be raised against a claim to subrogation. The context in which the quotation arose was whether the principle that an unliquidated cross-claim cannot defeat a right to possession applies to an equitable, as opposed to a legal, proprietary right. Vos LJ (as he then was) was doing no more than to make clear that, if one had to approach matters from first principles, the enrichment would still be unjust. He was not making a sweeping pronouncement that equitable defences would not be available (and it would be bizarre if he had intended to do so, having agreed (at [73]) with the judgment of Gloster LJ proceeding on the basis that equitable defences were available.

[20] **[POC/119G] [CB/20/646]** pleaded that Mr Mirza did not come to the Court with clean hands "*in all the circumstances set out herein*". The circumstances pleaded at paragraph 113A were that Mr Mirza had "*used the existence of the Third Boomzone Lease to procure the transfer to Wolverine of the Viper Lease at a reduced value, as set out at* [...] *119C-119E below. He thereby engineered a situation in which companies closely related to him (Wolverine, Boomzone and LMH) came to own the entire chain of leases between the freehold and the profitable lease to*

70. **The Judge correctly applied the relevant test**. As for the contention that the Judge failed (whether adequately or at all) to apply the "Immorality" limb of the test by finding that the relevant conduct of Mr Mirza involved an "*important element of impropriety*", A are inviting the Court to conjure up a self-misdirection by the Judge through an over-zealous dissection of the language of the judgment. This is an exercise from which an appellate court must refrain: see ***Piglowska v Piglowski*** **[1999] 1 WLR 1360** at p 1372; and ***Ming Siu Hung v JF Ming*** **[2021] BCC 438** at [22].

71. The Judge's finding that there had been an "*important element of impropriety*" was not an inappropriate paraphrase of the relevant legal criterion. It also has to be viewed in light of the Judge's findings that the breaches of fiduciary duty by Mr Mirza in connection with the creation of the Boomzone leases were self-interested, deliberate and dishonest: see **[J/954] [CB/14/440]**. That conclusion satisfies any tenable formulation of the requirement that the misconduct be reprehensible and of more than trivial gravity; a more direct recitation of the language of earlier authorities could not have produced a different result – and it is conspicuous that there is no suggestion that any other conclusion was in fact open to the Judge.

72. The "*immediate and necessary relation to the equity sued for*" is a relation of substance, not of chronology. It imports no requirement that the impropriety be contemporaneous with, or committed in contemplation of, the relief later sought. In ***RBS v Highland Financial Partners*** **[2013] EWCA Civ 328**, the antecedent fraud founded the bar because the relief would have entrenched its fruits. That Mr Mirza had not yet conceived the discharge when it granted the leases is immaterial: premeditation is no part of the maxim, and the unconscionability lies in his subsequent attempt to extract, through the remedy, the advantage of its own continuing wrong.

73. "*Necessary*" qualifies the relation, not the misconduct: the requirement is that the connection between the impropriety and the equity be intrinsic rather than collateral, not that the impropriety be a *sine qua non* of the right asserted. The test is one of

Timeline". While the words "*all the circumstances set out herein*" are a compendious reference, they naturally capture the matters pleaded at para. 113A because that paragraph explicitly links the Wolverine Transaction to the earlier breaches of fiduciary duty.

connection test, not causation. The Leases created in breach of fiduciary duty were not collateral to the equity sued for: they depressed the value of the very freehold over which the Defendant asserted the subrogated security, the value of which Mr Mirza then realised by sale to Wolverine. Far from being unnecessary to the relief, the relation is a necessary one in the only relevant sense. Recognising the claim to subrogation would necessarily perfect the advantage Mr Mirza obtained through the breaches – the two being inseparable on the facts.

GROUND 9: BREACH OF CONTRACT

74. As set out in R's Respondents' Notice[21], the Judge did not in fact find that contractual duties were owed by Mr Mirza to each of the JV Entities as contended. It is further clear that the Judge was aware of the distinction between the position of Viper and that of Otaki: **[J/914] [CB/14/433]** makes clear that the Judge well understood that the duties owed to Viper were owed only in equity and **[J/144] [CB/14/281]** correctly identifies the parties subject to the contratual duty. However, to the extent that any part of the judgement is to be read as A suggest, the true position is that, although the other JV Entities were not parties to the JVA, the content of the duty of good faith[22] owed to Otaki logically required Mr Mirza to act in good faith toward the other JV Entities. The objective of the Joint Venture was to maximise the value of the Property (which was let to the two Subsidiaries Viper and Kruger) and the Net Losses and Profits[23] were to be apportioned[24] by reference to Receipts from those Subsidiaries[25]. The making of profits in a commercially improper, unacceptable or unconscionable from dealings with the Subsidiaries would necessarily harm Otaki (and indirectly, the Morjarias). Furthermore, Otaki was the party liable under the Cladding D&B Contract,[26] such that Otaki's rights under the JVA were engaged directly in any event in relation to conduct relating to that contract.

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[21] Respondents' Notice dated 19 January 2026, "*Paragraph 1.3 and 8.1*".
[22] Joint Venture Agreement, cl. 12.2.
[23] Joint Venture Agreement, cl. 1.1, definition of 'Net Loss' and 'Net Profit' **[CB/25/872]**.
[24] Joint Venture Agreement, cl. 4.1 **[CB/25/877]**.
[25] Joint Venture Agreement, cl. 1.1, definition of 'Subsidiaries' **[CB/25/873]**.
[26] Design & Build Contract dated 9 March 2020 **[CB/29/953]**.

75. As regards the point relating to the implied term, it was pleaded **[POC/79(d)] [CB/20/636]** that the demand for an excessive amount was in itself a breach; that term went without saying, and is simply slightly narrower than the good faith term pleaded. The suggestion that the matter was decided on an unpleaded case is pedantic literalism.

GROUND 10: DISHONEST ASSISTANCE AND CONSPIRACY

76. R's case on fiduciary duties ought to prevail for the reasons set out above, and therefore the case on dishonest assistance succeeds. As regards the points made at **[ASkel/117] [CB/7/118]** regarding the quality of the pleading are ill-founded (and the writers repeat their submissions regarding the Invoicing Claims). Given that the relevant facts had all been pleaded in the context of that claim, A were adequately on notice of the factual matters going to R's case on attribution and A were indeed, as the Judge held, making "*heavy weather*" of the manner in which the matter was pleaded.

GROUND 11: PROCEDURAL UNFAIRNESS

77. The Judge did not conduct the trial in a manner that was procedurally unfair. The criticisms made of the way he conducted the trial are fundamentally unfair and present a wholly distorted picture of what happened at the trial.

78. The writers do not dissent from the summary of the law at **[ASkel/123 to 130] [CB/7/119 to CB/7/121]**. As pointed out, the mere fact of frequent judicial intervention in the course of evidence is not by itself unfair. The analysis is a qualitative one, not a quantitative: ***In re K*** **[2023] 4 WLR 61** at [23] to [27] and [39]. Whether or not a trial is fair is indeed a fact and context-sensitive inquiry. And while the basic principles laid down in ***Jones v National Coal Board*** **[1957] 2 Q.B. 55** and ***Yuill v Yuill*** **[1945] P. 15** still hold good, it must be borne in mind when applying them that the degree of interventionism of modern judges is significantly higher than it was at the time those cases were decided: ***Southwark LBC v Kofi-Adu*** **[2006] HLR 33** at [145].

79. General criticisms are made about the volume of interventions. However, the scope and nature of the judge's interventions reflected the need for robust trial management within the 30 sitting days allotted to the matter (of which 7 $^{1}/_{2}$ were taken up with openings and

closings). The factual narrative spanned 18 years of business dealings, with effectively 8 sub-narratives **[J/9] [CB/14/261]**, involving a welter of causes of action in which the actions of multiple parties were under scrutiny. There were 11 lay witnesses giving oral evidence, for some of whom sitting days had to be extended, along with 7 experts (who also gave oral evidence). The parts of the documentary universe referred to in the hearing ran to 1,300 discrete items. If ever there was a case where a substantial measure of judicial intervention was necessary to keep the proceedings moving, this was it.

80. Insofar as the Judge is reproached generally for interventions in the course of evidence, given the number of disparate topics and issues involved, it would have been wholly unrealistic for the Judge simply to have held back his questions on everything until the end of each witness and deal with them perhaps days after the relevant evidence had been given, putting additional strain on the witness and necessitating a reopening of the bundle. In circumstances where there were multiple discrete issues, it was both fairer to the witnesses to afford them an opportunity to deal with questions as and when they arose, and eminently sensible from the perspective of procedural economy.

81. The sundry specific criticisms made of the Judge in his conduct of the hearing are in any event misconceived. What this court has been presented with is cherry-picked snippets of the transcript, shorn of their proper context and given a tendentious characterisation in an attempt to portray anodyne judicial intervention as an "*egregious*" exercise in inquisitorialism. These criticisms are not individually well-founded and are not symptomatic of some broader failing that rendered the trial unfair.

82. **Examples (1)-(7)**: The contentions that the Judge "*consistently cross-examined Mr Mirza alongside the Claimant's Counsel*" **[ASkel/132] [CB/7/121]**, questioned the veracity of his evidence as he gave it, was otherwise partisan or descended into the arena, are wholly unsustainable on a careful review of the exchanges upon which A rely.

83. The first example **[Day 11/38-47] [SB/175/1154-1156]** was preceded by a testy exchange between Leading Counsel for CC and Mr Mirza as to the propriety of a supposed markup for insurance or a warranty, said to be wrapped into purported costs for the "*Removal and Disposal of existing Façades, Insulation & Sub-Frame*", which the latter accepted was not itemised or apparent on the face of a schedule he presented to the JV. Mr Mirza

then accepted, in response to the Judge's question, that there was no risk relevant to those works (which logically entailed that the explanation Mr Mirza had given was unsustainable). The Judge then gave Mr Mirza an opportunity to explain what the uplift was for. When he then said he had "*some sympathy with Mr Peto's question*" **[Day 11/39] [SB/175/1154]**, that is not to be (and cannot be) taken as a sign of partisanship or pre-judgment. What the Judge was doing, out of conspicuous fairness to the witness, was to point out to Mr Mirza that there was an inherent logic to the questions put in light of his answers – he could have been transparent about the hidden markup, and was not. The Court will see that this afforded Mr Mirza to clarify what on its face appeared to be conduct that admitted of no reasonable explanation.

84. The second example **[Day 11/59-60] [SB/177/1159]** was no more than an indication to the witness, put in entirely temperate terms, that he did not need to repeat the same point in every answer. The third example **[Day 11/63-65] [SB/177/1160]** did not involve the Judge's repeating counsel's point that Mr Mirza had Mr Lewin "*over a barrel*". Far from being unfair to Mr Mirza, the Judge conscientiously and in as neutral a manner as possible went over the gist of what had been put to Mr Mirza, flagged what he saw as the potential difficulty in relation to the timings, and gave him an opportunity to give a response **[Day 11/63-65] [SB/177/1160]**.

85. The contention that the Judge "*took over the cross-examination*" of Mr Mirza at **[Day 10/217-225] [SB/172/1148-1150]** is inaccurate. What happened was that the Judge insisted that Mr Mirza be given the opportunity to look at certain quantities in the quotation provided by Teampol (a subcontractor of Tydwell), in circumstances where he had repeatedly asked to see the quantities and not been afforded that opportunity by the cross-examiner.

86. The alleged doubting of the truthfulness of the evidence given by Mr Mirza is misconceived. As to the first of A's complaints, Mr Mirza made a contention in response to a judicial question that Tydwell would be unable to sue Teampol if it produced a defective design **[Day 14/243-244] [SB/203/1208]**. That was: (a) a proposition that was obviously wrong in light of the terms of the Teampol agreement that had been put to him; and (b) a proposition of law and not fact, and thus inherently not a matter for the witness but rather something for counsel to address in submissions. The judicial interventions at **[Day 15/57-63] [SB/205/1210-1211]** are concerned with the same topic. Again, the

Judge was not questioning the truthfulness of the evidence given by Mr Mirza in the relevant passage. What he said was "*untrue*" was a reference to the objective fact of what was in the Teampol agreement **[Day 15/58:15-22] [SB/205/1210]**.[27]

87. The suggestion that Mr Mirza was "*dizzied by the array of questions coming at him*" from counsel and Judge alike is wholly irreconcilable with the exchanges that preceded that observation: see **[Day 11/52] [SB/176/1158]**. In response to a question as to whether Mr Mirza had done his best for the JV in relation to securing the best price for the cladding works, Mr Mirza gave a lengthy answer running to a page of the transcript. Counsel for R asked a single, dense question and repeated it. His complaint that he was being asked 3 or 4 questions at once was not correct and was directed at Mr Peto, not the Judge.

88. **Examples (8)-(11)**. The complaint about the intervention at **[Day 11/226-229] [SB/181/1170-1171]** again ignores how the evidence developed. Mr Mirza appeared not to have understood what the questions put were driving at. The Judge asked Mr Mirza an open question which fairly afforded him the opportunity to explain his suggestion that despite being reversioner on the Second Boomzone Lease, Viper was not the party properly entitled to the benefit of the opportunity to lease to Timeline for ten years when Boomzone only had 2 $^{1}/_{2}$ years left on the Lease. The Judge's questions were framed in a neutral manner and elicited Mr Mirza's side of the story. When the Judge said that he was "*stealing* [Mr Peto's] *lines*", that was no more than a recognition that, in fairness to the cross-examiner, the point had come where he had to give way: it was not some tacit admission that he had behaved in an "*unorthodox*" way.

89. The contention that the Judge made a premature "*effective*" accusation of dishonesty against Mr Mirza **[Day 13/202] [SB/194/1194]** also disregards the evidence that precedes it. Mr Mirza had admitted that the information given to the lenders as to the rents received showed the net rent from the 4th-floor offices to be £6,950 **[SB/63/259-260]**. A version of the same schedule was shown to the Directors which set out the net rent in the same period to be £1,050 **[SB/64/262]**. That version marked certain units as "Vacant" which were in

[27] As for the intervention at **[Day 15/77-83] [SB/206/1213-1214]**, the Judge merely picked up on an obvious issue and, with a few pointed but fair questions, gave Mr Mirza an opportunity to deal with it. It was put to him in re-examination that the tenant hotel and project lender would have withdrawn if no-one had said that insurance was being provided. The Judge's intervention was merely concerned with the implicit premise of the question: namely, that such an indication had been given, which did not appear to him to be the case on the basis of the evidence he had heard. It would have been much less fair to the witness for the Judge to have left his doubts unexpressed and later resolved the point against him without affording an opportunity to address them.

fact tenanted but in default on the rent. Mr Mirza admitted that this was incorrect **[Day 13/201:17-24] [SB/194/1194-1195]**. It was put to Mr Mirza that he had lied about the income being generated to the Directors. At first blush, given that the tenants were named in the version given to the Bank, there had to have been a deliberate decision to pass off as "*vacant*" units which in fact had tenants. By putting to Mr Mirza that the honest thing to have done would have been to say that there were tenants who were not paying, the Judge was simply affording Mr Mirza an opportunity to explain documents which *prima facie* strongly pointed to a falsehood having been told on Mr Mirza's behalf.

90. As regards the exchanges at **[Day 12/75 to 85] [SB/183/1174 to 1177],** the detail must again be considered. The Judge had an exchange with Mr Mirza in which he made the point that he struggled to see why the Directors would commit Viper to the Third Boomzone Lease for a ten year-term, 2 $^{1}/_{2}$ years before the expiry of the existing Lease, on terms that provided for no upward revision of the rent during the term, unless they were under a belief it was part of the joint venture. While the Directors had not been cross-examined on this point at that stage, the lack of commerciality of the agreement was obvious on the face of the Lease itself. This caused the Judge to have reservations about Mr Mirza's evidence that he made a business case to the Director for the grant of that Lease to Boomzone (when there appeared to be no urgency for it). The Judge made clear that he was being upfront about those reservations in order to afford Mr Mirza an opportunity "*to disabuse* [him] *of any false ideas*", a course of action which Leading Counsel for Mr Mirza, far from meeting with an objection, described as "*very wise*". It is also clear from the exchanges that followed that such an opportunity was in fact afforded. The contention that the questioning was hostile or leading is untenable: the very fact the questions were asked made clear that the Judge's mind was not, in fact, made up.

91. **Examples (12)-(14)**. The contention that the Directors' case was "*adopted*" by the Judge at **[Day 14/154-159] [SB/200/1203-1204]** is not understood. The Judge simply put to Mr Mirza that he had not given an answer to what was a difficult question and broke it down through a series of follow-up questions. While some of the questions were

testing, the transcript shows that they afforded Mr Mirza an opportunity to clarify his version of events. There was nothing unfair about the questions.[28]

92. The doubts expressed in relation to the evidence being given **[Day 14/3-5] [SB/196/1197]** were prompted by the inherently surprising proposition that Mr Mirza did not know that Viper could not repay the BOS debt on one day's notice. The exchange ended on an open question as to whether Mr Mirza believed that the Directors had secured further finance of which he was unaware in order to discharge the BOS liability **[Day 14/3:22-24] [SB/196/1197]**. No unfairness or prejudice resulted from the asking of this question.

93. **Example (15)**. It is contended at **[ASkel/136 and 147] [CB/7/123 and 126]** that the Judge alighted on a theory of his own that Mr Mirza was an 'advisor' and entered the fray, this being the "*worst example*" of the Judge's supposed lack of neutrality. The suggestion that the Judge invented a theory at this point is a gross misrepresentation of how the evidence evolved. Mr Peto had put to Mr Mirza a contemporaneous email he had sent to the Directors telling them that they were to take "*instructions*" from him on the construction phase of any development and such instructions would "*follow whatever is in the best interests of*" the JV Companies **[K1/50/1] [SB/18/90] [Day 10/186:6 to 23] [SB/169/1144]**. Mr Mirza attempted to explain away this email on the basis that his attempts to instruct the Directors were rebuffed by Mr Lewin **[Day 10/188:14-25] [SB/169/1144]** and he came to the realisation he could "*only recommend*" **[Day 10/189:12] [SB/169/1144]**. It was Mr Mirza who offered up the contention that his role was to give suggestions in the best interests of the JV Companies in an attempt to explain away the contemporaneous assertion he was entitled to give instructions. While the Judge may have used the expression "*suggestions, recommendations advice or whatever*", the point of his question was that, whatever label was applied to this communication from him to the Directors, Mr Mirza would have made those communications in the best interests of the JV Companies **[Day 10/191:21-25] [SB/170/1145]**. The Judge was not inventing a novel case theory for the benefit of R.

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[28] The expressed "*agreement*" with Counsel was as to the construction of a footnote in the document, and was put tentatively ("*I think I agree that* [information provided to the Morjaria parties] *doesn't include offers from one party to the other*") **[Day 14/115:9-16] [SB/198/1200]**. It had nothing to do with the content of the evidence being given by Mr Mirza, and was in no way partisan or otherwise unfair.

94. **Examples (16)-(23)**. The complaint about the exchange at **[Day 12/161-162] [SB/185/1179]** is patently overstated. The Judge had asked why London Media Hub would grant security over its own sublease in respect of lending to its lessor (Boomzone), and Mr Mirza made the point that London Media Hub had sunk costs in the form of investment in the fit-out. The Judge had the point, and there was no reason for the witness to elaborate further. The Judge's comment that he would not be glad if he received a lengthy explanation of what "*value engineering*" was no more than an indication to the witness that he wanted a basic explanation of the concept **[Day 13/39] [SB/188/1185]**. The Judge's comment that a "*yes or no would be fine*" **[Day 14/50:13] [SB/197/1199]** was perfectly reasonable when the question admitted of a binary answer, and Mr Mirza had already answered "*Yes*".

95. As regards the complaints about going to documents, a witness has no right to insist on being shown documents to which the cross-examiner has not referred him. The cross-examiner has control of the cross-examination. If there are relevant documents, that is a matter that properly can be picked up in re-examination. That was precisely the point made by the Judge in the first instance complained of **[Day 13/161] [SB/193/1193]**.[29]

96. **Interventions during the Claimants'/Part 20 Defendants' evidence**. As regards the criticisms levelled at **[ASkel/138] [CB/7/123]**, the intervention from the Judge followed a somewhat opaque series of questions. Mr Lewin was shown an exchange of correspondence about non-compliant cladding and then asked a semi-open question as to whether he was involved in the resolution of these issues, or whether it was left to Mr Mirza to deal with them. When Mr Lewin did not give a binary answer, Leading Counsel sought to commit him to "*take it from him*" that he did indeed leave it to Mr Mirza to deal with all of the issues. Mr Lewin gave a positive answer, only for it then to be put to him that he was a director and had a pretty important role as well. Read in the cold light of day after the event, those questions were not well expressed. What was being driven at was a different point: namely whether, whatever the actual involvement of Mr Lewin was, he should have had a greater role. The witness appears to have understood the question in that sense and made the point that a CEO would not be on top of

[29] In any event, the Judge patiently explored with Mr Mirza whether the reason he wanted to look at the document in issue was relevant to the question he was being asked, indicating that he would allow him to look at it if it were. It was, however, established that the purpose for which Mr Mirza wished to go to the document related to a point different from the one he was being asked about. The Judge's approach was scrupulously fair to Mr Mirza[29].

operational matters in a company. The Judge's intervention did no more than clarify that this was the essence of his role.[30]

97. The line of questioning criticised at **[ASkel/139] [CB/7/123]** concerned the appointment of Mr Lewin as a director of Viper. When the Judge intervened, he was not stepping into the arena. His intervention was a properly framed paraphrasis of what had previously been said, in circumstances where cross-examiner and witness were visibly at cross-purposes over the purport of a vaguely worded question. It was an entirely correct exercise of a trial judge's discretion.[31]

98. As regards the suggestion that Counsel's questions were impermissibly "*diluted*", that criticism is wholly unsustainable. The intervention at **[Day 4/101:6-7] [SB/152/1121]** was simply to correct the proposition that was being put to Mr Morjaria about the content of a witness statement from other proceedings: the questioner put to him that the document showed he was "*totally reliant on*" Mr Lewin, when in fact the proposition in the witness statement was that he was reliant on them for "*record keeping of* [his] *payments*" **[SB/132/1050; Day 4/100/16, [SB/152/1121]]**. The question did not fairly represent the content of the document put to him. Fairness plainly demanded an intervention[32].

99. The two interventions impugned at **[ASkel/140] [CB/7/124]** were completely anodyne. The contentions made in relation to the board meeting to approve the First Boomzone

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[30] Insofar as the Judge gave an indication that further cross-examination on the point was unlikely to be of assistance ("*Let's not delve too far into this. I think we all understand what the role was*"), that was an anodyne suggestion of the kind trial judges make all the time which a cross-examiner is free to heed or disregard as he saw fit. This was in circumstances where the witness had already given evidence to the effect that he did not have a hands-on role, which is what the line of questioning was interrogating **[Day 7/19-21] [SB/156/1130-1131]**. The Judge was not stepping into the arena to prompt or otherwise come to the rescue of a struggling witness.

[31] Leading Counsel for the Defendants put to Mr Morjaria a series of questions which appeared to be building to a suggestion that Mr Lewin was a mere proxy for Mr Morjaria, drawing on the fact that Mr Morjaria trusted him from previous dealings. Mr Morjaria somewhat pre-empted that by following up an answer by saying that the situation was not one where one "*joint venturer has put in somebody else who's their man* [...] *to do their bidding*". The question in response was put in the following terms: "*No, no. Mr Lewin was your man*". The questioner failed to specify what he meant by "*he was your man*" – if he meant something different by that from what Mr Morjaria had said – nor did he put to Mr Morjaria any factual matter to gainsay it. In response, Mr Morjaria then explained that Mr Lewin was a director of hundreds of other trusts and he was just another customer – a perfectly reasonable response to the question. The questioner then sought to shut down Mr Morjaria's response by contending that he was "*not asking about that*" (which inevitably prompts the question, "*what was he asking about?*"). The exchange then descended into repeated allegations that Mr Morjaria was arguing not only his case but that of Mr Lewin **[Day 4/96/25-97/17] [SB/152/1117-1124]**.

[32] The second alleged 'dilution' was nothing of the sort. The questioner put to Mr Morjaria a question about the volume of emails between himself and the trustees that had arisen "*in the relevant period*", without specifying what the relevant period was. Again, whether that was a large volume of emails (and supported the contention that there was a close relationship between Mr Morjaria and IQEQ) depended on what the "*relevant period*" was, and the question was meaningless without the timeframe being specified. It transpired, following an exchange between the Judge and Leading Counsel, that the relevant period was 17 years, and the question was put again on that basis **[Day 4/103-104] [SB/152/1121-1122]**. The question was meaningless unless put into that context. On no basis can it be said that there was any partisanship or unfairness in those interventions.

Lease ignore the fact that 8 lines below in the transcript, the Judge put to Mr Lewin that the Directors did in fact understand what was being agreed at the time (which is the pointat which the questions were driving): the Judge made an even-handed intervention to clarify the position, and concluded it with a question which put an adverse proposition to the witness. On no view was this procedurally unfair (nor in any way material to the outcome) **[Day 7/105] [SB/159/1134]**.

100. As to the criticisms at **[ASkel/141] [CB/7/124]**, the contention that it was the 'Judge's theory' that Mr Mirza's role was to advise the Directors is an unfair representation of the way the evidence unfolded. Put in its proper context[33], the question was a clarification of the witness's evidence rather than the Judge putting words in the witness's mouth (and much less did it involve the putting of a novel case theory to her)[34].

101. The contention that the Judge 'rescued' C's witnesses at multiple points is ill-founded. As regards the Judge's treatment of the Non-Contemporaneous Note at **[Askel/143] [CB/7/124-125]**, there was nothing "*extraordinary*" about the Judge's expression of views about the document. The Judge's comments were concerned solely with what was apparent within the four corners of the document. The Judge's intervention in relation to the supposed inconsistency at paras 28 and 29 of Mr Stobart's statement **[SB/131/1049]** was simply to point out that when one read the statement, it was not apparent that the contradiction alleged was there. The Judge was doing no more than ensure that the question was being put on a proper basis.

102. The exchanges between Counsel and the Judge at **[Day 4/89-92] [SB/152/1118-1119]** involved a clarification of what R's case was, and the point in question arose immediately out of Mr Morjaria's evidence – he had said that he was "*going by the 8 million*" **[Day 4/91:4] [SB/152/1118]**. The case put to the witness was that the profit for the joint venture was only £300,000 and therefore Mr Mirza/Tydwell must have been intended to receive

[33] The Judge asked an open question first as to whether or not IQEQ was relying on advice from "*anybody*" (in circumstances where: (a) Mr Mirza's own evidence was that he made "suggestions" or "recommendations" in the best interests of the JV; and (b) it was not contended that the Directors had direct contact with the contractors and therefore could not sensibly have taken decisions on their own in the abstract) **[Day 19/161:15] [SB/215/1230]**. The witness pointed to Mr Mirza's responsibilities under the JVA, and it was only then that the Judge asked her whether it was being said that advice was being given by Mr Mirza.

[34] It is right that the Judge, when clarifying Mr Stobart's evidence, did not refer to the possibility that Mr John might have provided the information. Mr John, however, was Mr Mirza's accountant and the omission of the Judge to say "*(or Mr John)*" was immaterial. The point was that, whichever of the two of them made the recommendation, Mr Stobart himself had not exercised any independent judgment about its merits **[Day 9/141-143] [SB/168/1143]**. The Judge then pressed Mr Stobart as to whether it was right that he would have waved through the recommendation despite the possible conflict of interest (which plainly points against any unfairness or partisanship on his part).

a profit on the construction works. These exchanges did not in any conceivable way "rescue" Mr Morjaria[35].

103. As regards the suggestion that Dawn Yates was led in relation to whether the source of her knowledge was Mr Lewin, it had been put to her a few minutes earlier that (a) her answer to "almost everything" was that she was dependent on Mr Lewin and (b) in the same vein she simply followed what Mr Lewin told her to do on 5 May. The case that was being put to her was that she was not exercising any independent judgment **[Day 19/213:15-25] [SB/218/1233]**. When the Judge suggested to her that Mr Lewin might have been the source of the information, that was not steering her towards a favourable answer but one consistent with the adverse case theory being put to her[36].

104. As regards the supposed 'reframing' of Ms Yates' evidence, she had said that there was a concern that Mr Mirza could have taken steps to stop Mr Morjaria concluding a deal with the Directors **[Day 19/1-7] [SB/210/1221-1222]**. To say that the Judge embellished the evidence by adding that the mechanism for stopping the deal would be "*by action*" is an exercise in linguistic pedantry. The deal could not be stopped unless Mr Mirza did something. The Judge's comment could only be a gloss if given the technical legal meaning of initiating legal proceedings, but that is not reasonably how it would have been understood by a lay witness against the backdrop of the exchanges. And even if that were the meaning to be attributed to the Judge's words, it was immaterial to his findings[37].

105. The instance where Counsel asked if they may ask some questions followed an exchange with the Judge about a potential point for submissions and were ostensibly prompted by

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[35] The intervention in relation to Mr Webster's evidence is again anodyne once one looks at the sequence of questions and answers. The Judge (reasonably) intervened to make the point that there was a tacit premise in the questions being posed that price was the only differentiator between the two parties. Mr Webster had already made the point that, even if Mr Mirza's offer was the better one, there were concerns about the fact that the Boomzone lease might have depreciated the asset. While the Judge said it was implicit in his question that he was being asked whether one party was trusted more than the other, that was also implicit in the answer Mr Webster had just given that they were concerned about the purpose of the Boomzone lease (such that, even if taken in isolation, the question were arguably leading, it did not contaminate the evidence in any way) **[Day 19:86-87] [SB/213/1228]**.

[36] A similar point applies to the discussions over the use of the Directors' lawyers in the criminal proceedings, Mr Morjaria was not steered towards a *helpful* answer. The proposition being put to Mr Morjaria was that he had ceased to pay the criminal lawyers PCB Byrne for any services after the criminal proceedings were issued (and therefore did not intend to see the criminal proceedings through to the end). The Judge actually put the proposition more starkly: the instruction of PCB was a mere scare tactic, and his questions elicited an admission that they were not used to any great extent **[Day 5/67:1] [SB/154/1126]**.

[37] It is also disingenuous to contend that Ms Yates' evidence was the source of the finding at **[J/1155] [CB/14/478]**. That is plainly derived from the contemporaneous correspondence from CMS cited in the preceding paragraph (where the threat was of getting BOS to call in the loan was made). The risk for Otaki to which the Judge adverted was an objective, documented reality that had nothing to do with Ms Yates' evidence.

two sardonic comments by Leading Counsel for R which were admittedly inappropriate and should have been reserved for submissions later **[Day 19/43:19-42:1] [SB/212/1227]**. There is no indication they were prompted by the intervention of the Judge itself.[38]

106. **Summary**. None of the individual allegations about the supposed unfairness of the trial is made out. The Judge was certainly interventionist – in a case where he needed to be – but not inquisitorial. The allegation that he was partisan or invented case theories, or derailed the cross-examination of witnesses, is totally unsustainable.

107. The submissions made at **[ASkel/148] [CB/7/126]** as to the appropriate disposal of this ground of appeal are also unsatisfactory. A trial is like the proverbial curate's egg: once it is sufficiently vitiated by unfairness, there are no parts that can be salvaged. As A contend, a trial will not be rendered fair if there are large section of evidence of which no criticism can be made: ***Serafin v Malkiewicz*** at [48]. In the following paragraph, the Supreme Court held in terms that the only logical order is for a full retrial. In circumstances where a full retrial would ineluctably redound to the advantage of A, the very fact the contention has been made that there should be some sort of impermissible halfway house on what is a binary question, reflects that the allegations regarding the trial's fairness simply are not made out.

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23 June 2026

[38] As regards the other alleged 'derailments' of witness examination, these were nothing of the sort: the intervention at **[Day 15/78] [SB/206/1213]** was brief and addressed obvious shortcomings in the evidence being advanced in re-examination which it was proper to give Mr Mirza an opportunity to address; and the intervention at **[Day 9/107] [SB/166/1141]** was made in circumstances where Counsel had put a supposed inconsistency to the witness which was ostensibly not an inconsistency at all and was merely ensuring the question was put on a fair basis.