Neutral Citation Number: [2021] EWHC 912 (Ch)

Case No: CR-2017-003513

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 21/04/2021

Before :

MRS JUSTICE JOANNA SMITH

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Between :

(1) GREIG WILLIAM ALEXANDER MITCHELL **(2) KENNETH MELVIN KRYS** **(JOINT LIQUIDATORS OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION))**	**Applicants**
- and –	
(1) SHEIKH MOHAMED BIN ISSA AL JABER **(2) MASHAEL MOHAMED AL JABER** **(3) AMJAD SALFITI** **(4) JWW HOTELS & RESORTS UK HOLDINGS LIMITED** **(5) JJW LIMITED (REGISTERED IN GUERNSEY) (IN LIQUIDATION)**	**Respondents**

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Reuben Comiskey (instructed by **Clyde and Co LLP**) for the **Applicants**
Clare Stanley QC and Lemuel Lucan-Wilson (instructed by **Baker & McKenzie LLP**) for the **Respondents 1,2 and 4**

Hearing dates: 30.3.21-31.3.21

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 21st April 2021.

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MRS JUSTICE JOANNA SMITH

Mrs Justice Joanna Smith :

Introduction

1. This judgment should be read together with my judgment of Friday 12 February 2021 in which I dealt with an application by the Joint Liquidators ("**the Liquidators**") of a BVI company, MBI International & Partners Inc., (in liquidation) ("**the Company**"), to amend the Re-Amended Points of Claim in the form of a Re-Re-Amended Points of Claim provided on the fifth sitting day of the ten day trial of the action ("**the Original Application**"). The background to the Original Application is fully set out in paragraphs 6-40 of that judgment.

2. I heard full argument on the Original Application, including submissions from the first, second and fourth Respondents ("**the MBI Respondents**") that the new pleading had no real prospect of success owing to the fact that it fell foul of the reflective loss principle. I rejected that argument and I held that, for the reasons set out in my judgment, the balancing exercise that I was required to undertake in the exercise of my discretion plainly weighed in favour of permitting the amendments. However, I accepted submissions from the MBI Respondents that the draft pleading as it stood was insufficiently particularised. Accordingly (and in light of the circumstances as described in the judgment), I permitted the Liquidators some additional time in which to serve a further version of the Re-Re-Amended Points of Claim and I made it clear that I then envisaged that I would hear submissions from the MBI Respondents directed only at whether the revised version of the pleading was now adequately particularised and, if necessary, on the existence of a real prospect of success. I hoped and anticipated at this point that once the amendment issue had been dealt with, it would be possible to continue with the trial.

3. The Liquidators duly produced a further Re-Re-Amended Points of Claim on the morning of Monday 15 February 2021, which very substantially revised and expanded upon the original proposed amendments. In a note produced on that same morning, the MBI Respondents then raised an entirely new and previously unheralded ground of objection (which it was accepted should have been identified in opposition to the original application), namely that the proposed amendments have no real prospect of success and should not be permitted because the claim advanced by them contravenes the rule, set out in *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 ("***Darker***"), that a witness of fact giving evidence in court has immunity from all claims, even where his or her evidence is dishonest.

4. Faced with this entirely new argument and in circumstances where the Liquidators had not had an opportunity properly to consider the point, or to research the authorities, I decided that I had little choice in the interests of justice other than to adjourn the trial yet again so as to permit the parties properly to prepare for a further contested hearing on the proposed amendments centred on the issue of whether they had any real prospect of success in light of the principle of witness immunity ("**the Amendment Application**").

5. By this stage it was clear that it would now be impossible to complete the trial within its allotted timescale, but it was my hope that it would at least be possible to resolve the dispute concerning the amendments and so I gave directions for a hearing on the Amendment Application to take place on Thursday 18 February 2021. At the Liquidators' request, I also permitted them a very short space of time in which to make any final further tweaks to the Re-Re-Amended Points of Claim that they considered necessary in light of the new grounds of opposition. This resulted in service by the Liquidators of a final version of their proposed amendments on the

evening of 15 February 2021. I shall refer to this version as "**the Final Proposed Amendments**".

6. Unfortunately, before the hearing fixed for Thursday 18 February 2021 could take place, circumstances arose which made it impossible for the Liquidators to have proper representation and so, with the consent of all parties, I therefore ordered on 17 February 2021 that the Amendment Application and the trial should be adjourned.

7. This judgment is my decision on the Amendment Application which was argued before me on 30 and 31 March 2021 by Mr Comiskey on behalf of the Liquidators (replacing Mr Curl who was instructed for the trial) and by Ms Stanley QC on behalf of the Respondents. I am grateful to both counsel for their detailed and skilful arguments.

The Final Proposed Amendments

8. As more particularly explained in my previous judgment, the Liquidators seek to amend their Re-Amended Points of Claim in circumstances where it became clear during the course of the trial that statements made by the First Respondent ("**the Sheikh**") (both during the course of section 236 examinations under the Insolvency Act 1986 ("**IA1986**") and in witness statements filed in these proceedings) as to the ownership and transfer of shares ("**the Holding BVI Shares**") held by the Company in JJW Hotels & Resorts Holding Inc ("**Holding BVI**") were untrue. This much was confirmed by the provision (on the morning of the fourth day of the trial) of a "list of corrections and additions" which the Sheikh intended would be made to his first and fourth witness statements when he entered the witness box. No explanation was provided at the time by the Sheikh for the change in his evidence, although he has since served a fifth witness statement dated 15 February 2021 acknowledging that his earlier statements were incorrect and apologising to the court. When the trial resumes, the Sheikh will undoubtedly have a considerable amount of explaining to do.

9. In brief summary, the Final Proposed Amendments:

    a. delete paragraphs which are now unsustainable in light of the Sheikh's change of case;

    b. plead that the Sheikh was under continuing fiduciary duties to the Company (including post liquidation) to account to the Company acting by its Liquidators for his stewardship of the Company and its assets ("**the New Fiduciary Duties**");

    c. plead that the Sheikh gave false information as to the ownership and movement of the Holding BVI Shares during two section 236 examinations held on 26 April 2018 and 1 November 2018 respectively and in a witness statement dated 4 May 2018 (provided pursuant to an order of Registrar Barber dated 26 April 2018), thereby breaching the New Fiduciary Duties;

    d. allege that those breaches have caused loss and damage;

    e. in an entirely new paragraph added after it became clear that an objection would be taken on the grounds of the principle of witness immunity, plead that, in breach of the New Fiduciary Duties, the Sheikh failed to disclose to the Liquidators correct information about the ownership and movement of the Holding BVI Shares, thereby causing damage;

f. allege that the breach of the New Fiduciary Duties was caused or allowed or participated in by one or more of the Sheikh, the Fourth Respondent ("**Holdings UK**") and the Fifth Respondent ("**JJW Guernsey**") pursuant to an unlawful means conspiracy already pleaded.

10. Owing to the fact that the submissions on the Amendment Application covered not only the issue of witness immunity, but also a number of other detailed issues arising in respect of individual paragraphs in the Final Proposed Amendments, I set out below in their entirety the new paragraphs in respect of which the Liquidators seek permission to amend from the court.

11. The bulk of the amendments are to be found in paragraphs 55A-55Q of the Final Proposed Amendments as follows:

"55A. The Sheikh first referred to the 2017 Resolution by an email sent on his instructions on behalf of Dr Alexander Petsche (the Sheikh's Austrian lawyer and a partner in Baker McKenzie) to the Former Liquidator's solicitors dated 12 December 2017. By that email, the Sheikh caused the Former Liquidator inter alia to be told:

"Thus, by Resolution of 27 July 2017 it was resolved that a 100% of JJW Hotels & Resorts Holdings Inc [i.e. Holding BVI] will be acquired by JJW Hotels & Resorts UK Holdings Limited [i.e. Holdings UK] (MBI International Holdings Inc had assigned its debt to JJW Hotels & Resorts UK Holdings Limited). This company is fully owned by MBI International Holdings Inc."

55B. At all times following the commencement of the liquidation of the Company on 10 October 2011, the Sheikh owed the following duties to the Company acting by its liquidator in his capacity as a director of the Company:

55B.a to account to the Company acting by its liquidator for his stewardship of the Company and its assets prior to the commencement of the liquidation (this duty is an incident of the Sheikh's fiduciary duties particularised at Paragraphs 61(a) and/or 61(d) and/or 61(g) in the premises set out at Paragraphs 62 and/or 66 below); and

55B.b to account to the Company acting by its liquidator for his stewardship of any assets of the Company that remained in his hands or otherwise under his custody or control or that he was aware were not under the custody or control of the liquidator (this duty is an incident of the Sheikh's fiduciary duties particularised at Paragraphs 61(a) and/or 61(d) and/or 61(g) in the premises set out at Paragraphs 62 and/or 66 and/or the duties particularised at Paragraphs 67 and/or 68 below).

55C. Each of the duties particularised at Paragraph 55B above was a fiduciary duty and as such was a duty that may only be discharged by a person subject to them by the provision by that person of honest, full, accurate and candid information given with reasonable care and skill.

55D. The Former Liquidator applied to the High Court on 31 July 2017 for an order under s.236 of the IA 1986 requiring the Sheikh inter alia to provide information to the Former Liquidator in relation to shareholdings held by the Company. That application was made against the Sheikh in his capacity as a director of the Company. All the information provided and each of the representations made by the Sheikh in the course of or following that application was provided or made by him to the Former Liquidator (and after their appointment on 8 July 2019 to the Joint Liquidators) in the purported performance of the duties owed by the Sheikh to the

Company particularised at Paragraph 55B above in the premises particularised at Paragraph 55C above.

55E. In the course of the application referred to at Paragraph 55D above, and in purported performance of the duties owed by the Sheikh to the Company particularised at Paragraph 55B above in the premises particularised at Paragraph 55C above, the Sheikh represented to the Former Liquidator (and after their appointment on 8 July 2019 to the Joint Liquidators) that the entirety of the shares in Holding BVI (i.e. necessarily including the 129,112 shares in Holding BVI that remained registered in the name of the Company as at 23 June 2017) had been transferred on or about 27 July 2017 to Holdings UK as follows:

55E.a while sworn in the witness box before ICC Judge Barber on 26 April 2018, the Sheikh represented that Holding BVI was:

"100 per cent owned today since June by…last year owned by JJW UK Limited."

"…now, since June last year, owned by JJW UK Limited and it is, it is nothing to do with the liquidation company."

55E.b while sworn in the witness box before ICC Judge Barber on 26 April 2018, the Sheikh represented that he had "moved everything to UK" and had done this "To be more transparent";

55E.c by paragraph 4 of his first witness statement dated 4 May 2018 (which is to be read with the correction made by the Sheikh at paragraph 20 of his third witness statement dated 1 November 2018), the Sheikh represented that:

"[Holdings UK] acquired all the shares of [Holding BVI]."

55E.d by paragraph 6 of his first witness statement dated 4 May 2018, the Sheikh represented:

"I set out in the paragraphs that follow the events that occurred concerning [the Company] which was a minority shareholder and its historical shareholding in [Holding BVI] and how the shares in [Holding BVI] now come to be held in [Holdings UK]."

55E.e while sworn in the witness box before Deputy ICC Judge Schaffer on 1 November 2018, the Sheikh represented that:

"Yes, we transfer the shares in [Holding BVI], to [Holdings UK].

…

On 27 July 2017."

55F. In the course of the instant proceedings, the Sheikh maintained the position he had adopted prior to the commencement of the instant proceedings, in that he stated by his fourth witness statement dated 19 June 2020 that:

"It was determined at the Second Meeting [i.e. a meeting on 27 July 2017 at which the 2017 Resolution was made], which was also attended at my request by Mr Ragheb, that it was in the best interests of [Holding BVI], its shareholders, employees and creditors, for [Holding BVI]'s shares to be transferred to [Holdings UK]. As a result, the transfer of [Holding BVI]'s shares to [Holdings UK] was effected in July 2017."

55G. By the representations made at Paragraphs 55E, the Sheikh represented to the Former Liquidator (and after their appointment on 8 July 2019 the Joint Liquidators) in the purported performance of his duties to the Company particularised at Paragraph 55B above in the premises set out at Paragraph 55C above that, pursuant to or as a consequence of the 2017 Resolution, on or about 27 July 2017 the entirety of the Company's Holding BVI Shares were transferred to Holdings UK and continued to be held by Holdings UK.

55H. The representations made at Paragraph 55E above were made by the Sheikh on his own behalf and on behalf of Holdings UK and/or JJW Guernsey in the premises set out at Paragraphs 6, 7 and 13 above.

55I. The representations made at Paragraph 55E above were continuing representations to the Former Liquidator (and after their appointment on 8 July 2019 to the Joint Liquidators) in that they were maintained by the Sheikh until 10:01 on 9 February 2021.

55J. The Former Liquidator (and after their appointment on 8 July 2019 the Joint Liquidators) were entitled to and did rely on the Sheikh's representations particularised at Paragraph 55E above in that the representations were made in the purported discharge of the duties owed by the Sheikh particularised at Paragraph 55B above in the premises particularised at Paragraph 55C above.

55K. Without prejudice to the Sheikh's duty to give honest, full, accurate and candid information with reasonable skill and care in the premises set out at Paragraphs 55B and 55C above, the Sheikh in any event knew that the Former Liquidator was (and after their appointment on 8 July 2019 the Joint Liquidators were) relying on the representations particularised at Paragraph 55E above in that:

55K.a the Former Liquidator's counsel submitted at the examination of the Sheikh before ICC Judge Barber on 26 April 2018 that the key thing that the Former Liquidator had come to court to find out was "…where the shares in the BVI entity have ended up", which submission the Sheikh heard and understood at the time it was made;

55K.b the Sheikh knew that the Former Liquidator considered that she was under a duty to realise the Company's Holding BVI Shares for the benefit of the Company's creditors having been told that by the Former Liquidator's letter to the Sheikh dated 16 September 2015;

55K.c the Sheikh gave an undertaking to the court on 26 April 2018 to provide the Former Liquidator's solicitor with a witness statement supported by a statement of truth that set out the name of the UK entity that then held the shares in Holding BVI and Judge Barber explained to the Sheikh the seriousness of such an undertaking and the importance of properly complying with it as follows:

"Now, an undertaking to the court is a solemn promise to the court and, if you fail to keep that promise, you can be found liable in contempt of court, which in England is punishable by imprisonment."

55L. The Sheikh's representations to the Former Liquidator and the Joint Liquidators particularised at Paragraph 55E above were false in that:

55L.a 891,761 of the Company's Holding BVI Shares had been transferred to MBI International Holdings Inc (a company registered in BVI of which the Sheikh was the

controlling mind at all material times) on or about 23 June 2017 and had not been transferred on again;

55L.b 129,112 of the Company's Holding BVI Shares remained registered in the name of the Company at all material times and had not been transferred to Holdings UK; and

55L.c none of the Company's Holding BVI Shares had been transferred to Holdings UK at any time.

55M. It is to be inferred that the Sheikh caused the transfer of 891,761 of the Company's Holding BVI Shares to MBI International Holdings Inc to be made on 23 June 2017 and/or caused the 2017 Resolution to be created in that the Sheikh was at all material times the controlling mind of every entity in the MBI Group including the Company and/or Holding BVI and/or Holdings UK and/or JJW Guernsey and/or MBI International Holdings Inc in the premises set out at Paragraphs 2, 4, 5, 6, 7 and 13 above and there was no other person with the necessary knowledge and/or control and/or desire to do those things.

55N. It is to be inferred that the Sheikh and/or Holdings UK and/or JJW Guernsey knew at all material times that his representations set out at Paragraph 55E were false in that:

55N.a the Sheikh was at all material times the controlling mind of every entity in the MBI Group including the Company and/or Holding BVI and/or Holdings UK and/or MBI International Holdings Inc in the premises set out at Paragraphs 2, 4, 5, 6, 7 and 13 above and was aware of all material facts at all material times including the registered title of the Company's Holding BVI Shares;

55N.b the Sheikh knew that neither he nor anyone else had transferred any of the Company's Holding BVI Shares to Holdings UK at any time;

55N.c had the Sheikh had any intention of giving an accurate account of the title to the Company's Holding BVI Shares to the Former Liquidator (and after their appointment on 8 July 2019 to the Joint Liquidators) he could and would have provided information in accordance with that held by Maples, which he was able to obtain or to cause to be obtained with ease at any time both prior to and subsequently to the 2017 Resolution in that:

55N.c(i) the Sheikh or some person acting on the Sheikh's instructions obtained from Maples a certificate of incumbency in relation to Holding BVI dated 23 June 2017 (i.e. 34 days prior to the making of the 2017 Resolution);

55N.c(ii) the Sheikh's in-house solicitor, Zahy Deen, requested and obtained from Maples a registered agent's certificate showing the shareholders of Holding BVI on 30 September 2019 (i.e. less than two months before Mr Deen signed a disclosure certificate for the Respondents other than Mr Salfiti on 23 December 2019);

55N.c(iii) Mr Deen requested and obtained from Maples a copy of the register of members of Holding BVI on 14 January 2020 (i.e. two days before Baker McKenzie came on the court record for the Respondents other than Mr Salfiti in place of Mr Deen on 16 January 2020);

55N.c(iv) the Sheikh or some person acting on the Sheikh's instructions obtained from Maples a further registered agent's certificate showing the shareholders of

Holding BVI and the register of charges for Holding BVI on 26 March 2020 (i.e. less than three months before the Sheikh made his fourth witness statement dated 19 June 2020 containing the falsehood set out at Paragraph 55F above);

and

55N.d further as to Paragraphs 55N.c(ii) and/or 55N.c(iii) above, it is to be inferred from the fact that the Sheikh was at all material times the controlling mind of every entity in the MBI Group including the Company and/or Holding BVI and/or Holdings UK and/or MBI International Holdings Inc in the premises set out at Paragraphs 2, 4, 5, 6, 7 and 13 above that the Sheikh was aware that Mr Deen had requested and/or obtained those documents from at or shortly after the time those matters occurred and/or that Mr Deen acted at all times under the Sheikh's direction.

55O. Despite the knowledge of the Sheikh and/or Holdings UK of the falsity of the representations particularised at Paragraphs 55E above neither the Sheikh nor Holdings UK corrected those representations with either the court or the Joint Liquidators until 9 February 2021, which was after the trial of this action had commenced. By a two-page unsigned document sent by an email timed at 10:01 on 9 February 2021 by Baker McKenzie to the Joint Liquidators' solicitors and headed "Corrections to Witness Evidence and comments on documents in Trial Bundle" ("Corrections"), the Sheikh and Holdings UK represented to the Joint Liquidators that on or about 27 July 2017 the assets and liabilities of Holding BVI (as distinct from the shares in Holding BVI) had been transferred to Holdings UK.

55P. It is to be inferred that the Sheikh acting on his own behalf and/or on behalf of Holdings UK caused the assets and liabilities of Holding BVI to be transferred to Holdings UK on or about 27 July 2017 in the way referred to in the Corrections, in that the Sheikh was at all material times the controlling mind of every entity in the MBI Group including the Company and/or Holding BVI and/or Holdings UK and/or JJW Guernsey and/or MBI International Holdings Inc in the premises set out at Paragraphs 2, 4, 5, 6, 7 and 13 above and there was no other person with the necessary knowledge and/or control and/or desire to do those things.

55Q. In giving a false account in relation to the registered title to the Company's Holding BVI Shares in the premises set out at Paragraphs 55A to 55P above and/or maintaining it until 9 February 2021 in the premises set out at Paragraphs 55N and/or 55O, the Sheikh and/or Holdings UK prevented the Former Liquidator and/or the Joint Liquidators from realising any value for the Company by means of the Company's Holding BVI Shares in specie, in that the value of the Company's Holding BVI Shares has been extinguished or otherwise put beyond reach by the Sheikh or on his instructions during a period when the Sheikh continuously failed to disclose a true account of the registered title of the Company's Holding BVI Shares despite being under a duty to do so in the premises set out at Paragraphs 55B and 55C above."

12. Breach of duty is pleaded in the Final Proposed Amendments at paragraphs 82A and 82B (the latter paragraph having been inserted to seek to ensure that some element of the proposed new pleading survived a potential defeat for the Liquidators on the witness immunity argument) as follows:

"82A. Further or alternatively, in making and maintaining the false representations particularised at Paragraph 55E in the premises particularised at Paragraphs 55A to

55Q above until 9 February 2021, which was a date after the Sheikh had taken or caused to be taken the steps set out at Paragraphs 55M and/or 55P in the premises set out at Paragraph 55Q that had the effect of causing to be extinguished the value of the Company's Holding BVI Shares such that value could no longer be realised from the Company's Holding BVI Shares in specie, the Sheikh breached his duties to the Company particularised at Paragraphs 55B above and/or 61 and/or his duty to have regard to the Company's creditors particularised at Paragraph 63 and/or committed a breach of trust in that:

82A.a the false representations had as their object the prevention and/or frustration of the Former Liquidator's and the Joint Liquidators' ability to take steps to realise the Company's assets for value in accordance with the BVI and/or English liquidation regime, which was an object that held no commercial benefit for the Company and was positively adverse to the interests of the liquidation of the Company and this was a breach of the duties particularised at Paragraphs 61(a) and/or 61(g) above;

82A.b the false representations were made for a collateral purpose, and the Sheikh did not act for a proper purpose, in that the principal beneficiary of the false account was the Sheikh and/or other entities within the MBI Group and in acting for this purpose the Sheikh acted for a purpose that was positively adverse to the interests of the liquidation of the Company and this was a breach of the duties particularised at Paragraphs 61(a) and/or 61(d) and/or 61(e) and/or 61(f) and/or 61(g) and/or 61(h) above;

82A.c the false representations had the effect of causing the Former Liquidator and the Joint Liquidators to pursue Holdings UK when the Sheikh knew that Holdings UK did not own any of the Company's Holding BVI Shares, which had the effect of increasing the deficiency in the Company's estate in circumstances where the Sheikh knew that Holdings UK had not received the Company's Holding BVI Shares and was a breach of the duties particularised at Paragraphs 61(a) and/or 61(g) and/or 61(h)

above; and/or

82A.d the false representations were made without reasonable care and skill, in that the Sheikh did not take any or any sufficient steps to ensure that the representations were true and accurate in every respect and this was a breach of the duties particularised at Paragraphs 61(c) and/or 61(g) above.

82B. Further or alternatively, the Sheikh failed to disclose to the Former Liquidator (and after their appointment on 8 July 2019 the Joint Liquidators) correct particulars of the registered title to the Company's Holding BVI Shares, despite being under a duty to do so in the premises set out at Paragraphs 55B and 55C above, until 9 February 2021, which was a date after the Sheikh had taken or caused to be taken the steps set out at Paragraphs 55M and/or 55P that had the effect of causing to be extinguished the value of the Company's Holding BVI Shares such that value could no longer be realised from the Company's Holding BVI Shares in specie and the Sheikh breached his duties to the Company particularised at Paragraphs 55B above and/or 61 and/or his duty to have regard to the Company's creditors particularised at Paragraph 63 and/or committed a breach of trust in that:

82B.a the Sheikh's failure to disclose particulars of the Company's Holding BVI Shares had as its object the prevention and/or frustration of the Former Liquidator's and the Joint Liquidators' ability to take steps to realise the Company's assets for value in accordance with the BVI and/or English liquidation regime, which was an

object that held no commercial benefit for the Company and was positively adverse to the interests of the liquidation of the Company and this was a breach of the duties particularised at Paragraphs 61(a) and/or 61(g) above;

82B.b the Sheikh's failure to disclose particulars of the Company's Holding BVI Shares was done for a collateral purpose, and the Sheikh did not act for a proper purpose, in that the principal beneficiary of that failure to disclose was the Sheikh and/or other entities within the MBI Group and in acting for this purpose the Sheikh acted for a purpose that was positively adverse to the interests of the liquidation of the Company and this was a breach of the duties particularised at Paragraphs 61(a) and/or 61(d) and/or 61(e) and/or 61(f) and/or 61(g) and/or 61(h) above;

82B.c the Sheikh's failure to disclose particulars of the Company's Holding BVI Shares had the effect of causing the Former Liquidator and the Joint Liquidators to pursue Holdings UK when the Sheikh knew that Holdings UK did not own any of the Company's Holding BVI Shares, which had the effect of increasing the deficiency in the Company's estate in circumstances where the Sheikh knew that Holdings UK had not received the Company's Holding BVI Shares and was a breach of the duties particularised at Paragraphs 61(a) and/or 61(g) and/or 61(h) above; and/or

82B.d the Sheikh's failure to disclose particulars of the Company's Holding BVI Shares was done without reasonable care and skill, in that the Sheikh knew that such a failure to disclose would prejudice the liquidation estate and according it was a breach of the duties particularised at Paragraphs 61(c) and/or 61(g) above."

13. Under the existing heading 'Unlawful Means Conspiracy', the Final Proposed Amendments include the following additional amendment to existing paragraph 96:

    96. Pursuant to the Conspiracy, the Sheikh ~~and/or Ms Al Jaber and/or Mr Salfiti~~ and/or JJW Guernsey and/or Holdings UK or any one or more of them caused or allowed or participated in the matters particularised at Paragraphs 55A to 55P above ~~the 2017 Resolution and/or further post-liquidation purported dealings with the Company's Holding BVI Shares~~, which were overt acts involving inter alia breaches of fiduciary duty and/or breaches of trust that had the foreseeable result of defrauding or otherwise harming the Company in the manner set out at Paragraphs 55Q and/or 82A and/or 82B above.

14. Finally, there is a small consequential amendment to paragraph (3) of the prayer under the heading 'Misfeasance by the Sheikh and/or Ms Al Jaber' (the Sheikh's daughter and Second Respondent) to seek a declaration that in causing or allowing the Company to enter into the transactions particularised at "Paragraphs 77 to ~~83~~ 82B above" the Sheikh and/or Ms Al Jaber committed breaches of statutory and/or fiduciary and/or other duties, and/or breaches of trust.

15. On my understanding of Ms Stanley's submissions, she objects to:

    a. paragraphs 55D, 55E, 55F, 55G, 55H, 55I, 55J, 55K, 55L, 55N, 55O, 55Q, 82A and 96 on the grounds that these paragraphs fall foul of the immunity from suit principle;

    b. paragraphs 55B, 55C, 55E, 55G, 55J, 55Q and 82B on the grounds that these paragraphs either plead the existence of the New Fiduciary Duties (which were not pleaded in the draft Re-Re-Amended Points of Claim prepared for the Original Application), or seek to rely on those duties;

c. paragraphs 55M and 55P on the grounds that they plead a "new asset transfer allegation", not previously relied upon in the draft for the Original Application.

16. Ms Stanley does not object to paragraph 55A.

17. It became clear during Mr Comiskey's oral reply, that if I accept that he is precluded from running a case of breach of duty in respect of the representations made in the course of the section 236 examinations by reason of the operation of the principle of witness immunity, then he maintains that he is nevertheless still entitled to rely on paragraphs 55A-Q as relevant background to the allegation of breach of the New Fiduciary Duties in paragraph 82B. I note also that Mr Comiskey accepts that paragraph 55F is concerned with a statement made in the course of the present proceedings, to which witness immunity would apply if any attempt had been made to plead misrepresentation arising out of that statement. However, he says that 55F is not relied upon as an actionable misrepresentation, but merely as background context to the breaches – i.e. as another occasion on which the Sheikh had an opportunity to provide accurate information but failed to do so.

18. Ms Stanley makes some additional detailed criticisms of the Final Proposed Amendments to which I shall return when I come to look at the detail of the pleading itself.

19. Before considering the central issue of witness immunity that arises in this case, I need to explain how the English court has become involved in providing assistance in BVI insolvency proceedings and I also need to set out some general principles which I hope will provide context for the arguments raised by the parties. Those arguments were wide-ranging and involved reference to numerous authorities which one or both parties relied upon as supporting the propositions they were seeking to advance.

The CBIR Order

20. The Eastern Caribbean Supreme Court ordered that the Company be wound up on 10 October 2011 ("**the BVI Liquidation**"). It subsequently granted permission on 11 October 2016 for the Company's liquidator at that time ("**Ms Caulfield**") to seek recognition in the UK for the purpose of interviewing the Sheikh and his associates.

21. On 9 June 2017 Registrar Derrett made an order ("**the CBIR Order**") recognising (i) the BVI Liquidation as a foreign main proceeding in accordance with the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**") as set out in Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("**the CBIR**"), and (ii) Ms Caulfield as foreign representative.

22. The section 236 examinations referred to above were ordered pursuant to Article 21 of the CBIR. Ms Caulfield filed a witness statement in support of her application for orders under Article 21 against (amongst others) the Sheikh dated 28 July 2017 which (i) stated that the liquidation had stalled owing to a lack of information and cooperation on the part of the Sheikh and others; (ii) identified the Sheikh's ongoing failure to cooperate with her enquiries and (iii) stated that the "only way to progress the liquidation is to require [the Sheikh] to attend an examination under oath to answer questions about the dealings and affairs of the Company".

23. The current proceedings were commenced by an application issued in May 2019 by Ms Caulfield, pursuant to an order of ICC Judge Barber dated 10 June 2019 giving the English court's assistance further to a letter of request from the Eastern Caribbean

Supreme Court sealed on 1 March 2019 ("**the Letter of Request**"). The current proceedings in which this Amendment Application is made have continued under case number CR-2017-003513 (the same case number as was given to the section 236 examinations).

24. On 8 July 2019, Ms Caulfield was replaced as liquidator by Greig Mitchell and Kenneth Krys, pursuant to an order of the Eastern Caribbean Supreme Court. On 16 October 2019, Deputy ICC Judge Schaffer made an order replacing Ms Caulfield as foreign representative pursuant to the CBIR and substituting Messrs Mitchell and Krys as the applicants in the current proceedings.

25. Pursuant to regulation 2 to the CBIR, the Model Law "shall have the force of law in Great Britain in the form set out in Schedule 1". Pursuant to regulation 3, British insolvency law shall apply with such modifications as the context requires for the purpose of giving effect to the provisions of the CBIR. Article 2 of the Model Law defines British insolvency law as "in relation to England and Wales, provision extending to England and Wales and made by or under…the Insolvency Act 1986 (with the exception of Part 3 of that Act) or by or under that…Act as extended or applied by or under any other enactment (excluding these Regulations)".

26. Article 2 of the Model Law defines "foreign main proceedings" as "a foreign proceeding taking place in the State where the debtor has the centre of its main interests". A "foreign proceeding" is defined as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation". A "foreign representative" is "a person or body…authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

27. Under Article 21 of the Model Law, wide ranging relief may be granted to the foreign representative, who can apply to the English courts for relief in accordance with the powers exercisable by insolvency practitioners in English insolvency proceedings. The Letter of Request was made under reciprocal arrangements between England and the BVI embodied in this jurisdiction in section 426 of the IA1986. Section 426(5) permits, and the Letter of Request requests, this court to apply to the extent necessary the law of the BVI and/or of England and Wales to the current proceedings.

28. The role and status of a foreign representative recognised as such by a CBIR Order was considered recently in the Court of Appeal in *In Re Peak Hotels and Resorts Ltd (in Liquidation)* [2020] Bus LR 1452 ("***Peak Hotels***"). In a judgment with which the other members of the Court of Appeal agreed, Rose LJ (as she then was) expressed the view (at [18]) that "An analysis of the CBIR shows that the recognition order does not have the effect that the foreign representatives are thereafter treated as either acting as or acting in the capacity of an English liquidator". She went on to explain (at [20]) that "Article 21 deals with the power of the court to grant any appropriate relief at the request of the recognised foreign representative where necessary to protect the assets of the debtor or the interests of creditors. That relief includes providing for the examination of witnesses, the taking of evidence or the delivery of information and entrusting the administration or realisation of the debtor's assets located in Great Britain to the foreign representative". At [22] she said that she agreed with the Judge below that "the effect of recognition is to confer on the foreign

representatives the right to request or initiate proceedings under the IA 1986". However (at [23]) "there is nothing in the structure or wording of Schedule 1 that supports the contention that a recognised foreign representative is to be treated as a British insolvency officeholder or that he acts in the capacity of a British insolvency officeholder".

The relevant statutory provisions

29. The law governing liquidation in England and Wales is to be found in the IA1986. Sections 235-237 are directed at enabling the court to help a liquidator, as officeholder (see section 234), to carry out his statutory function of discovering the truth about the affairs of the company in order that he may be able, as effectively as possible, to trace and then secure the assets of the company for the benefit of the creditors. In *In Re Rolls Razor Ltd [1968] 3 ALL ER 698,* in a passage approved by Mann LJ in *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch. 1 ("***Maxwell***") at 60 C-H, Buckley J said:

"The powers conferred by section 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible and with as much expedition as possible, to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation".

30. I can do no better in summarising the relevant statutory provisions than to begin by setting out an extract from the speech of Lord Browne-Wilkinson in *Hamilton v Naviede (In re Arrows Ltd (No 4))* [1995] 2 AC 75 ("***Re Arrows***") at pages 92-93, a case concerning the exercise of the discretion under rule 9.5 of the Insolvency Rules 1986 (now Rule 12.21 of the Insolvency (England and Wales) Rules 2016 ("**IR2016**")) to release the transcripts of a section 236 examination for use in criminal proceedings:

"When a company becomes insolvent, the liquidators or administrators need to obtain information as to the company's affairs for the purposes of the winding up or administration of the company. The Act of 1986 provides two procedures for this purpose, one informal, the other formal.

Section 235 of the Act of 1986 imposes on a wide class (consisting of all those who have been concerned with the running of the company) a duty to give to the liquidators

> '(2)(a)…such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time after the effective date reasonably require'

Failure to comply with that obligation is punishable by a fine under section 235(5) of the Act of 1986...

The second procedure is under section 236 which is the material section in the present case. It is more formal. The court, on the application of the liquidator, can summon to appear before it (2)(c) "any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company". An examination under section 236 takes place before a

registrar or judge, both the liquidators and the respondents being entitled to be represented by solicitors and counsel…A statement made by the respondent in the course of a section 236 examination may be used as evidence against him in any proceedings whether or not under the Insolvency Act: section 433 of the Act of 1986…"

31. I add, for present purposes, that on the application of the officeholder, section 236 permits the court to summon to appear before it "any officer of the company" (s.236(2)(a)); that the court "may require any such person as is mentioned in subsection 2(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection" (s.236(3)); and that the account submitted to the court under s.236(3) must be contained (in England and Wales) "in (a) a witness statement verified by a statement of truth" (s.236(3A)). If a person fails to appear before the court without reasonable excuse when he is summoned to do so, or there are reasonable grounds to believe that a person has absconded or is about to abscond so as to avoid his appearance before the court, then the court may cause a warrant to be issued for the arrest of that person and for the seizure of any books, papers, records, money or goods in that person's possession (see s.236(4) and (5)).

32. Section 237 of the IA1986 provides enforcement powers to the court as follows: "(1) If it appears to the court, on consideration of any evidence obtained under section 236 or this section, that any person has in his possession any property of the company", the court may order that it be delivered up to the office holder; and "(2) If it appears to the court, on consideration of any evidence so obtained, that any person is indebted to the company" the court may order that person to pay to the office holder the whole or any part of the amount due.

33. Section 237(4) provides that "Any person who appears or is brought before the court under section 236 or this section may be examined on oath…".

34. Section 433 of the IA1986, referred to by Lord Browne-Wilkinson in the extract cited above from *Re Arrows*, refers to various specific statements and provides that:

    "(1) In any proceedings (whether or not under this Act)

    …

    (b) any other statement made in pursuance of a requirement imposed by or under any such provision or by or under rules made under this Act,

    may be used in evidence against any person making or concurring in making the statement.

35. IR2016, rule 12.20 sets out the procedure for a section 236 examination, providing that the office holder may be "represented by an appropriately qualified legal representative, and may put such questions to the respondent as the court may allow" (12.20(1)). A written record of the examination must be made (12.20(5)) and "(6) The record may, in any proceedings (whether under the Act or otherwise), be used as evidence against the respondent of any statement made by the respondent in the course of the respondent's examination".

36. In *Maxwell* the Court of Appeal held that although there was no express abrogation of the privilege against incrimination in sections 235 and 236 IA1986, the statutory provisions of IA1986 impliedly abrogated that privilege. Their purpose was to enable

the liquidator to obtain the necessary information required to manage the affairs of the company and it would be contrary to that purpose if company directors could rely on the privilege to defeat the liquidator's statutory right.

37. As Lord Browne-Wilkinson said in *Re Arrows* at 93G "In sum, therefore, a person examined under section 236 can be compelled to give self-incriminating answers which are admissible against him in criminal proceedings".

Immunity from Suit

The general principles

38. The general principle of absolute immunity or privilege is long established. In the 1772 decision of Lord Mansfield in *The King v Skinner* 98 ER 529 (at 530) he described it as applying to various participants in legal proceedings as follows:

> "neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such enquiry, it will be punished suitably."

39. A more recent expression of the same principle appears in the speech of Lord Hobhouse in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 ("***Hall v Simons***") at 740 (a passage referred to in the speech of Lord Phillips in *Jones v Kaney* [2011] 2 AC 398 ("***Jones v Kaney***") at [1]):

> "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation…Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity".

40. The immunity of witnesses as a general class is a privilege enjoyed by witnesses who give evidence in civil or criminal proceedings. Its purpose is to "protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence" (per Lord Hope in *Darker* at 448E). It is thus an immunity "from any form of civil action in respect of evidence given (or foreshadowed in a statement made) in the course of proceedings" (per Lord Brown in *Jones v Kaney* at [65]). Where it applies, the principle bars a claim (whatever the cause of action) in subsequent proceedings, with the exception of suits for malicious prosecution, misfeasance in a public office and prosecutions for perjury, perverting the course of justice and for contempt of court (see e.g. *Jones v Kaney*, per Lord Collins at [82]). Furthermore, "where the immunity exists it is given to those who deliberately and maliciously make false statements; the immunity is not lost because of the wickedness of the person who claims immunity" (*Darker* per Lord Hutton at 468C).

41. The scope of the principle was considered most recently by the Court of Appeal in *Daniels v Chief Constable of South Wales* [2015] EWCA Civ 680 ("***Daniels***"). At paragraph [34] of his judgment, Lord Justice Lloyd Jones identified the justifications for the immunity and the need for it to be limited only to particular categories of case:

> "[34] In *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398, Lord Phillips (at [16]-[17]) summarised the justifications for witness immunity given by the House of Lords in *Darker v Chief Constable of the West Midlands Police* [2001] AC 435 as follows:

(1) To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims;

(2) To encourage honest and well meaning persons to assist justice, in the interest of establishing the truth and to secure that justice may be done;

(3) To secure that the witness will speak freely and fearlessly; and

(4) To avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.

However, it must be emphasised that the effect of a successful plea of immunity is to deny access to the courts and, in many cases, to leave a wrong without a remedy. As Lord Cooke observed in *Darker* (at p. 453 D-E) absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. Accordingly the immunity must be limited to cases where it is necessary to achieve the objectives identified above".

42. As will be clear from the extract from Lord Hope's speech in *Darker* referred to above, the immunity has been recognised as falling into two distinct categories: the 'core immunity' attaching to the giving of evidence in court (see for example *Roy v Prior* [1971] AC 470 per Lord Morris at 477F: "It is well settled that no action will lie against a witness for words spoken in giving evidence in a court even if the evidence is falsely and maliciously given"), and the 'extended immunity' attaching to the carrying out of acts preparatory to the giving of evidence in court (see for example *Hall v Simons*, per Lord Hoffmann at 687B-C: "The immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court").

43. Many of the recent cases (including both *Daniels* and *Darker*) have been concerned with the scope of this extended immunity; in the case of *Darker* by reference to whether the extension applied to protect police officers who were alleged to have fabricated evidence, as opposed to having given false evidence, from claims of conspiracy to injure and misfeasance in public office. In the case of *Daniels*, by reference to whether the extension applied to protect police officers who deliberately or recklessly failed to make proper disclosure or provided misleading disclosure.

44. In considering this extended immunity, Lord Justice Lloyd Jones said in *Daniels* (at [39]):

"In order to achieve the objective of enabling witnesses to speak freely in judicial proceedings it has been necessary to extend the absolute immunity beyond the giving of evidence by witnesses when they are actually in the witness box. Thus it has been extended to statements made by a witness in the course of the preliminary examination of witnesses to find out what they can prove (*Watson v M'Ewan* [1905] AC 48). It has also been extended to statements made out of court which could fairly be said to be part of the process of investigating a crime or possible crime with a view to prosecution. An example of this second category is *Taylor v Director of the Serious Fraud Office*".

45. Having considered the facts of *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 ("***Taylor***") in detail, Lord Justice Lloyd Jones went on at paragraph [40] to emphasise that "…the immunity is essentially a witness immunity concerned with the giving of evidence and the making of statements in judicial proceedings, which has necessarily been extended in the various ways indicated above". The immunity did

not extend to "conduct unconnected with the giving of evidence or the making of statements".

46. Originally, witness immunity overlapped to a degree with a wider immunity enjoyed by advocates from claims made by their own clients for a failure to exercise reasonable care and skill in the conduct of litigation on behalf of those clients. However, this wider advocates' immunity was abolished by the House of Lords in *Hall v Simons*. Advocates continue to be protected by absolute privilege from a claim in defamation in relation to statements made in the course of the conduct of legal proceedings (see *Jones v Kaney* per Lord Phillips at [13]).

47. Insofar as Lord Hoffmann in *Hall v Simons* had sought to distinguish between the position of the advocate and the expert witness in arriving at his decision (on the grounds that "A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth" at 698), that distinction came under scrutiny in *Jones v Kaney*. This was a case involving the liability of a so-called "friendly expert" to be sued by his client. The Supreme Court decided to abolish the immunity from suit for breach of duty which expert witnesses had previously enjoyed in relation to their participation in legal proceedings. The abolition did not extend to the position of the adverse expert.

48. Lord Phillips expressed the view (at [46]) that it was wrong to distinguish between an expert witness and an advocate on the basis that the latter is the only person who has undertaken a duty of care to the client. Both advocates and experts undertake a duty to provide services to the client, such that "the expert witness has far more in common with the advocate than he does with the witness of fact" (per Lord Phillips at [50]). A key distinction identified by Lord Phillips (at [18]) between an expert witness and a witness of fact being that "the former will have chosen to provide his services and will voluntarily have undertaken duties to his client for reward under contract whereas the latter will have no such motive for giving evidence".

49. Lord Collins identified the basis for the decision in *Jones v Kaney* as being that "where a person has suffered a wrong that person should have a remedy unless there is a sufficiently strong public policy in maintaining an immunity" ([72]). Lord Dyson made it clear at [125] that nothing he had said in support of the majority decision was "intended to undermine the long-standing absolute privilege enjoyed by other witnesses in respect of litigation".

The question in issue in this case:

50. At the heart of this Amendment Application lies a question as to whether an examination conducted pursuant to section 236 of the IA1986 in a compulsory liquidation attracts the protection of absolute immunity (whether core immunity because it involves the giving of evidence by a witness in judicial proceedings, or extended immunity because it is a preparatory, investigative step). Although, as I have said, the parties took me to a very substantial number of authorities in their submissions, they were unable to show me any authorities that were directly on point. Still less were they able to show me any authorities that indicated the approach the court should take to a section 236 examination conducted by a foreign representative under the CBIR.

51. The MBI Respondents say that a proper application of the principles set out in the authorities leaves me with only one answer to the question posed in the previous paragraph: that a section 236 examination is a judicial proceeding at which evidence

is given by a witness and that, accordingly, I must conclude that it attracts the protection of witness immunity (and that this applies equally to a section 236 examination made at the request of a foreign representative under the CBIR). The Liquidators argued primarily that section 236 examinations neither involve the giving of evidence nor attract the status of judicial proceedings. Alternatively, they contended that the MBI Respondents' case, if accepted, would amount to an extension of the witness immunity rule in circumstances where there are no policy reasons to justify such extension.

Real Prospect of Success

The test to be applied:

52. As I said in my previous judgment, and as is common ground between the parties, before the court can accede to an application to amend a pleading, it must be satisfied that the proposed amendments have a real prospect of success. The test to be applied is the same as that for a summary judgment application under CPR Part 24.

The desirability of a final decision:

53. During the course of the hearing, I explored with the parties whether they wished me to determine the question of immunity from suit, or whether, if I am of the view that the final proposed amendments have a real prospect of success, I should not go beyond such a finding but leave the issue to be finally determined at trial.

54. Mr Comiskey invited me not to make a final decision on the matter if I was of the view that the amendments had a real prospect of success. In particular he pointed to the fact that the question was a novel one, that it was highly fact sensitive and that it would be better to make a decision based on the facts discovered at trial than based on assumed facts. He pointed me to paragraph [48] of the judgment of Lord Justice Lloyd Jones in *Daniels*, in which the learned judge declined to make a final decision on witness immunity, finding instead that the appellant in that case had not established that the conduct alleged in the proposed amendments would clearly fall within the scope of the absolute immunity and (agreeing with Gilbart J at first instance) that the most appropriate course was to grant leave to make the contested amendments and for the issue of immunity to be revisited by the trial judge on the basis of his findings of fact.

55. Ms Stanley disagreed. She submitted that this is a question of law and that the court should "grasp the nettle" and decide it now, not only because it would be more consistent with the practical requirements of the overriding objective to do so having just heard two days of argument on the point, but also because if I come to the view that the section 236 examinations involved the giving of evidence in judicial proceedings then the allegations of breach based on representations made in the context of those section 236 examinations would not be justiciable. She makes the point that all relevant facts should be pleaded and that if what is already pleaded offends the witness immunity rule then that should be the end of the matter. She says that if I were to allow these allegations to go to trial on the basis that there is a real prospect of success, but I then find that there is absolute immunity, I will have allowed the Sheikh to be put into a position where he has to defend civil claims which he should never have had to defend.

56. I am bound to say that I agree with Ms Stanley in the context of considering the core immunity. If the section 236 examinations are judicial proceedings involving the giving of evidence by a witness, then it is difficult to see what benefit could be gained

from deciding only that there is a real prospect of success at trial in establishing witness immunity. Further, as I understand his submissions, Mr Comiskey accepts that if the section 236 examinations can properly be said to amount to judicial proceedings involving the giving of evidence by a witness (and subject to his purely legal argument as to the effect of s. 433 IA1986 and r. 12.20 of the IR2016), then the statements made by the Sheikh during those proceedings on which he seeks to rely would plainly be covered by the absolute immunity.

57. However, although neither party sought to make the distinction, it seems to me that the matter is not so straightforward when it comes to the extended immunity. *Daniels* concerned the question of whether conduct on the part of the defendants amounted to activity which was sufficiently associated with the judicial phase of criminal proceedings such that it attracted witness immunity, i.e. whether it fell within the extended scope of witness immunity. At first instance, Gilbart J observed (as Lord Justice Lloyd Jones recorded in paragraph 27 of his judgment) that "he was not persuaded that it was always possible to draw an immutable and immobile bright line of separation between investigation and the process of trial and litigation. In his view, much would depend on the context and therefore on the evidence", a point that is repeated in paragraph 31 of the judgment ("much might turn on the evidence as it is called"). Against that background and in circumstances where relevant evidence might be expected to be given at trial it is unsurprising that the Court of Appeal was reluctant to decide the point.

58. Similarly in this case, if I am concerned only with the extended immunity (which appears to be advanced by Ms Stanley as an alternative argument) then there might be scope for suggesting that further evidence at trial could potentially be relevant (i.e. as to the intentions of Ms Caulfield in pursuing the section 236 examinations). However, the trial of this action is already well underway, Mr Krys has already given evidence on behalf of the Liquidators and their case is now closed. Ms Caulfield did not provide a witness statement in these proceedings and has not been called upon to give evidence. Mr Comiskey did not seek to suggest, for example, that the existence of the extended immunity may be dependent upon the circumstances in which Ms Caulfield decided to pursue the applications or the extent to which she may already have decided to bring proceedings against the Sheikh – i.e. he does not suggest that there may be different outcomes to the issue of witness immunity depending upon the evidence (notwithstanding that on my reading of the authorities it would have been open to him to make such a submission). At no time did Mr Comiskey suggest that he wished to consider whether he might need to re-call Mr Krys, or even to call new evidence to address the potential for extended immunity. Accordingly, I cannot see what facts might now be discovered at the adjourned trial that will be relevant to the issue of witness immunity. None was suggested to me and I do not believe that any evidence from the MBI Respondents would have any bearing on the issue (the MBI Respondents' evidence remaining to be heard at trial).

59. In all the circumstances, it seems to me that the proper course of action is to accept Ms Stanley's invitation to decide the question of whether there is witness immunity by reference to the existing facts. I accept that subjecting the Sheikh to cross examination on his statements made during the section 236 examinations in circumstances where I may ultimately decide that he is immune from suit on those statements would be highly undesirable.

60. Accordingly, I intend to decide the issue of immunity from suit in this judgment having full regard to the detailed and extensive legal arguments that I have heard over the course of two days (the same period of time as is currently set aside for the full closing submissions in the whole trial) and on the basis that the relevant facts are pleaded in the Final Proposed Amendment and (insofar as relevant to the extended immunity) contained in the statement of Ms Caulfield dated 28 July 2017.

Clarity and Particularity in the pleading:

61. As I have already mentioned, one aspect that remained outstanding following my original judgment was the question of particularity and clarity in the proposed amendments, by reference in particular to *Brown v Innovatorone* [2011] EWHC 3221 (Comm), per Hamblen J at [14]. I commented in that judgment on the unsatisfactory nature of various elements of the amendments advanced pursuant to the Original Application and further issues are said to arise by Ms Stanley in relation to the Final Proposed Amendments. I shall return to consider these issues when I have dealt with the primary question of witness immunity.

The Arguments

The MBI Respondents' submissions in favour of witness immunity

62. Ms Stanley's case in favour of the immunity on the facts of this case may be summarised briefly as follows:

63. From the moment of the winding up order in this case (made by the Eastern Caribbean Supreme Court on 10 October 2011), there was a judicial proceeding on foot – it matters not that the judicial proceeding is in a foreign jurisdiction. The CBIR Order expressly recognises the BVI Liquidation as a foreign court proceeding and the section 236 examinations in this case were "part and parcel" of the single insolvency proceedings brought under the CBIR. Mr Krys is one of the joint liquidators in the BVI Liquidation and as such he is a court appointed official acting as an officer of the BVI court.

64. Sections 235-237 IA1986 are integral to the process of winding up a company in England and Wales and section 236 examinations have many of the characteristics of judicial proceedings.

65. The House of Lords has expressly recognised that an examinee under s.236 IA1986 is a "witness" (see *Re Arrows* per Lord Browne-Wilkinson at 96A, 96E-F, 101H and 104D) and that transcripts created of a section 236 examination are "transcripts of evidence" (per Lord Browne-Wilkinson at 103F).

66. In circumstances where the privilege against incrimination has been held to have been impliedly abrogated (see *Maxwell*) witness immunity must apply as it is the only protection left to the witness; otherwise the court may compel a person to give evidence against his will and leave him open to liability even for honest mistakes.

67. In the premises, Ms Stanley submits that this is a "paradigm case for the application of the immunity". The section 236 examinations were carried out under the umbrella of the existing insolvency proceedings and so fall within the immunity: the Sheikh's evidence given at his two section 236 examinations and in his witness statement of 4 May 2018 was evidence given in the course of judicial proceedings by a witness who is entitled to immunity. In further support of this proposition, Ms Stanley relies upon the case of *Mond v Hyde* [1999] QB 1097 (CA) ("***Mond v Hyde***") to which I shall return in due course. Ms Stanley also relies on *Taylor* in support of the proposition

that the Sheikh should benefit from the extended immunity and, in her oral submissions Ms Stanley suggested that, additionally, the Sheikh's status as a party (respondent) to the section 236 examinations made him immune.

68. In the event that the Sheikh lied during these proceedings, Ms Stanley points out that the court has existing mechanisms for dealing with false statements given under oath, through the power to institute proceedings for contempt of court (see by way of example *Power v Hodges* [2015] EWHC 2931 (Ch) which concerned a committal application for failure to comply with a disclosure order made pursuant to the provisions of s.234-237 IA1986).

69. In all the circumstances, Ms Stanley contends that to allow the Final Proposed Amendments would be to drive a coach and horses through the principle of witness immunity, the whole purpose of the rule being to prevent the witness from having to "encounter the expenses and distress of a harassing litigation" (*Dawkins v Lord Rokeby* (1874-75) L.R. 7 H.L. 744, per Lord Penzance at 756). She submits that I am bound by the weight of authority to which I have referred to refuse the amendments.

The Liquidators' submissions against witness immunity

70. Mr Comiskey's main arguments against the application of witness immunity on the facts of this case may be summarised as follows:

71. The immunity applies only to evidence (whether given at trial or created as a necessary preparatory step to the giving of evidence at trial) provided in the course of judicial proceedings.

72. This excludes statements made in the course of investigations under section 236 IA1986, which involve the provision of information and not the giving of evidence by a witness.

73. Further and in any event, Mr Comiskey says that section 236 examinations do not exhibit sufficient indicia of judicial proceedings to fall within the scope of the immunity.

74. Mr Comiskey argues that in the cases where immunity has recently been stripped away (ie. *Hall v Simons* and *Jones v Kaney*), the key feature has been the separate free-standing duty owed by the advocate and by the expert witness to clients. Mr Comiskey contends that this freestanding duty to clients is analogous to the duty a director owes to the company and the liquidator to provide an account of the company's affairs and that the existence of this duty is itself a reason why a section 236 examinee does not require witness immunity to ensure that he or she provides a full and comprehensive account in the course of a private examination.

75. Next, Mr Comiskey argues that there are no policy grounds for extending the immunity to statements made pursuant to s.236 IA1986. On the contrary there are very good policy reasons for declining to extend witness immunity to such statements due to the significant problems it would cause to office holders.

76. Finally, even if immunity did apply in relation to such statements, section 433 IA1986 and rule 12.20(6) of the IR2016 would give rise to a free-standing exception to that immunity, or put another way, these provisions have abrogated witness immunity insofar as it would otherwise have applied to section 236 examinations. Further to a question from me, Mr Comiskey confirmed that if he is right on this point, it is a complete answer to the witness immunity argument.

77. In his oral submissions Mr Comiskey dealt for the first time with the fact that these proceedings were commenced by an order of the Eastern Caribbean Supreme Court, submitting that the BVI Liquidation does not give rise to English proceedings and that a foreign representative does not act in the capacity of an English officeholder and relying for this proposition on *Peak Hotels*. Essentially, he submitted that no judicial proceedings had been commenced or created by the CBIR Order.

Discussion

78. Setting aside for a moment the fact that the Company is a BVI company in a BVI Liquidation, I must first consider whether the private examination process under section 236 IA1986 attracts the protection of the witness immunity rule. So far as I know (and somewhat surprisingly), it is not a category of absolute immunity which has been considered before; the parties have been unable to show me any authority for the proposition that an examinee under section 236 IA1986 enjoys the benefit of witness immunity. The question for me therefore appears to be whether the private examination process falls within the underlying rationale for the existence of the rule of witness immunity established over many years in the various authorities to which I have already referred.

79. Ms Stanley submits that any "exception" to the rule would require a decision of the Supreme Court and that I am bound by existing authority to hold that the Final Proposed Amendments fall foul of the rule. However, this submission is of course dependent upon establishing that the rule already encompasses section 236 examinations by reason of their nature and scope – i.e. because they are a judicial proceeding at which a witness gives evidence. If, in fact, a section 236 examination is properly to be viewed merely as an investigative step which does not involve either the giving of evidence in judicial proceedings or the taking of steps preparatory to the giving of evidence in such proceedings (as Mr Comiskey contends), then the rule does not apply.

80. Given that the purpose of the rule, as explained in *Darker* by Lord Hope "is to protect the witness in respect of statements made or things done when giving or preparing to give evidence" (see also Lord Hope at 452F), I must look to see whether a section 236 examination (and specifically the section 236 examinations in this case) falls within this rationale.

81. I have already set out in some detail the statutory background, but Ms Stanley invites me to have regard, in particular, to the following characteristics of a section 236 examination:

    a. When conducted in respect of a UK company, a section 236 examination involves a summons to court of the persons referred to in section 235(3), which is applied for by the liquidator, who is an officer of the court for this purpose (section 236(2) IA1986 and rule 12.19(1) IR2016)).

    b. This summons will be made under the auspices of existing winding up proceedings (a court managed process) and will usually be necessary where the relevant individuals have failed to comply with their duty to cooperate with the liquidator under section 235.

    c. The examinee will be a respondent in the proceedings and will be the subject of questioning by legal representatives for the liquidator.

d. The evidence may be given on oath (IA1986, section 237(4)) and the court can direct the examinee to give a witness statement. Proceedings for perjury or contempt may follow the giving of false evidence or a refusal to respond to questions.

e. The court has a role in ensuring that the questioning is not conducted in any way unfairly or oppressively (Rule 12.20(1) and *Shierson v Rastogi* [2003] 1 WLR 586 ("***Shierson v Rastogi***") per Peter Gibson LJ at [43]).

f. The information supplied by an examinee during a section 236 examination will be given in the course of winding up proceedings and is used by the office holder to report to creditors and the court.

g. For the purposes of bringing a reluctant examinee before the court, the court may issue a warrant for his or her arrest and for the seizure of any books, papers, records, money or goods in that person's possession (section 236(5) and (6) IA1986). This explains the "catch all" reference to the provision of "information" in section 236.

h. IA1986 expressly refers to the information obtained by the office holder pursuant to section 236 as "evidence" in section 237, which also gives the court powers of enforcement, namely to order delivery up of property to the office holder (section 237(1)) and payment to the office holder of an amount that the court considers is due to the office holder (section 237(2)).

82. Ms Stanley maintains that these characteristics place the section 236 examinations in this case firmly within the boundaries of the core witness immunity as that rule has been established over centuries. She submits that it is plainly a "proceeding in the course of justice" (see *Cutler v Dixon* 76 E.R. 886) and she took me through the well-known cases to which I have referred above in which the principle was clearly set out.

83. In what I understood to be an alternative argument (by reference to the extended immunity) she points out that the rule was applied in *Taylor* to out of court statements which could fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution and she says that the role of the police in such a situation is not unlike that of a liquidator who investigates the affairs of the company and whether proceedings should be instigated using the mechanism of a section 236 examination. On this hypothesis, statements made at s.236 examinations fall foul of the witness immunity rule because they are preparatory to court proceedings.

84. I have not found it easy in this case to decide on which side of the putative line a section 236 examination should fall. On the one hand it is an examination which occurs before a court, with many of the formalities of procedure that ordinarily attach to court proceedings; on the other, it is simply a mechanism created by statute to enable office holders to investigate the affairs of the company by seeking information from those who are most intimately acquainted with the detail of those affairs. If a section 236 examination is properly to be regarded as a judicial proceeding and the examinee at such examination a "witness", then immunity from suit must apply. However, having regard to all of the arguments presented by the parties together with a detailed reading of the authorities to which they referred, I have decided that there can be no immunity from suit in the circumstances of this case. My reasons are as follows:

The Core Immunity:

85. Beginning first with the statutory regime, it is clear that sections 235-237 IA1986 must be read together and that they are intended to provide for an investigative process, designed (as I have said) to assist the liquidator to carry out his or her statutory functions, first by the informal process under s.235 and second by the more formal process provided for under section 236 (see the passage from *Re Arrows* referred to above). The language of both sections focusses on the giving of information concerning the company and its promotion, formation, business, dealings, affairs or property. That the private examination process under section 236 involves an examination before a court does not seem to me to remove it from the investigatory sphere. That this is so is amply borne out by a number of the authorities relied upon by Mr Comiskey.

86. Thus in *In Re Rolls Razor Ltd (No. 2)* [1970] Ch 576 ("***Rolls Razor***"), a case involving an application to set aside an order for an examination of a former director together with the production of books and papers (under section 268 of the Companies Act 1948, a broadly similar provision to s.236 IA1986), Megarry J expressed the view at 591-592 that:

> "The process under section 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the law of bankruptcy, can only be described as sui generis".

87. This passage was approved by the House of Lords in *Re British & Commonwealth Holdings PLC v Spicer and Oppenheim* [1993] AC 426 ("***Re British & Commonwealth***") by Lord Slynn at 438-439. This was a case concerning the legitimate ambit of an order for the production of documents under section 236 IA1986. In a speech with which the other members of the House of Lords agreed, Lord Slynn reviewed with approval previous authorities which had explained the purpose of section 236 as being to enable the office holder to obtain information to facilitate the exercise of his statutory functions (see generally 434C-439D). He went on to say that "An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims…".

88. Ms Stanley suggests that I should treat the focus on "information" in *Re British & Commonwealth* with caution in circumstances where it concerned the disclosure of documents and not an oral examination. However, I note that a very similar approach to the purpose of section 236 examinations, in particular the focus on obtaining information, was also taken by the Court of Appeal in *Shierson v Rastogi*, a case concerning the question of whether an order for a private examination under section

236 should be made, or whether it would amount to oppression. At [23] Peter Gibson LJ said:

"The primary duty of a liquidator of a company being wound up by the court is to collect its assets with a view to discharging its liabilities to the extent the assets permit. To perform that function the liquidator needs information, and the companies legislation has for very many years given the liquidator power to obtain it from those who can be expected to have relevant information".

89. It seems to me to be inconsistent with the fact that a section 236 examination is designed to enable the liquidator to perform his "primary duty" of obtaining information, that it is also to be characterised as a judicial proceeding involving the giving of evidence by a witness in the sense identified in the cases to which I have referred in the general section on witness immunity above. I do not regard the use of the word "evidence" in section 237 as determinative, notwithstanding Ms Stanley's submissions to the contrary. In my judgment, the provision in section 433 IA1986 that a statement made at a section 236 examination may be used in evidence against the examinee makes it entirely unsurprising that in the context of considering enforcement based on the information provided at the s.236 examination, section 237 refers to "evidence obtained".

90. I accept that in *Re Arrows* Lord Browne-Wilkinson did indeed describe examinees at a section 236 examination as "witnesses" and made reference to "transcripts of evidence", just as, a few years earlier when sitting as V-C in the Court of Appeal in *Cloverbay Ltd v Bank of Credit & Commerce International SA* [1991] Ch 90 ("**Cloverbay**") at 103D-E, he had referred to the "oral examination of witnesses" under section 236 IA1986 as giving rise to the "opportunity for pre-trial depositions". However, I agree with Mr Comiskey that this use of language was perhaps unsurprising in the context of the issues arising in those cases and that I should be wary of reading too much into it given that the particular question with which I am concerned, namely the nature of the proceedings and the precise status of the examinees, was not under direct consideration (whereas Megarry J had expressly remarked upon the status of examinees in *Rolls Razor*, drawing a clear distinction between an examinee and a witness in the "ordinary sense").

91. Indeed in this context I note that in both *Re Arrows* and *Cloverbay*, Lord Browne-Wilkinson emphasised the primary purpose of section 236 in very similar terms to those used by Megarry J in *Rolls Razor* (one of the authorities cited in *Cloverbay*). Thus in *Re Arrows* at 96E-F he said that "The primary purpose of…an examination by liquidators under section 236 of the Act of 1986 is to enable the true facts to be elicited from those who know them". In *Cloverbay* (a case concerned with the exercise of the court's discretion to order a section 236 examination and, in particular, whether the joint administrators were seeking to obtain a collateral advantage) he expressed the view (at 102D-E) that "the purpose of section 236 is to enable [the liquidator or administrator] to get sufficient information to reconstitute the state of knowledge that the company should possess".

92. I am fortified generally in my view that section 236 examinations do not constitute judicial proceedings in which witnesses give evidence by the case of *Trapp v Mackie* [1979] 1 WLR 377 ("***Trapp v Mackie***").

93. I should pause to explain that I was shown authorities which found that witness immunity applied (i) to evidence given before a military court of inquiry, on the

grounds that a witness who gives evidence at such a court stands in the same situation as a witness giving evidence before a judicial tribunal (*Dawkins v Lord Rokeby* (1873) L.R. 8 QB 255); (ii) to testimony given at an inquiry before the Benchers of Lincoln's Inn (*Marrinan v Vibart* [1962] 1 QB 528); and (iii) to a local inquiry held before a Commissioner appointed by the Secretary of State under section 81(3) of the Education (Scotland) Act 1946 (*Trapp v Mackie*). Ms Stanley contended that these cases support the proposition that a section 236 examination has the characteristics required to render it a judicial proceeding at which a witness gives evidence. I disagree. In my judgment, although section 236 examinations take place in court in front of a judge, the function of the court is extremely limited, and indeed is more limited than was the function of any of the tribunals dealt with in these authorities.

94. In *Trapp v Mackie*, the House of Lords (per Lord Diplock at 379G-H), considered the questions that would need to be addressed before making any decision as to whether a tribunal acts in a manner that is similar to courts of justice, thereby providing an insight into the features considered important if proceedings are to be viewed as judicial proceedings (or analogous to judicial proceedings):

    "So, to decide whether a tribunal acts in a manner similar to courts of justice and thus is of such a kind as will attract absolute, as distinct from qualified, privilege for witnesses when they give testimony before it, one must consider first, under what authority the tribunal acts, secondly the nature of the question into which it is its duty to inquire; thirdly the procedure adopted by it in carrying out the inquiry; and fourthly the legal consequences of the conclusion reached by the tribunal as a result of the inquiry".

95. The first question plainly does not give rise to any particular difficulties for the MBI Respondents in seeking to establish immunity in this case. A section 236 examination takes place in the High Court, so authority is not usually in issue, and in the current proceedings the High Court has agreed to assist the BVI court pursuant to the CBIR Order. In this regard, I note that Lord Diplock expressed the view that the tribunal must be "recognised by law", albeit that "the absolute privilege does not attach to purely domestic tribunals" (379H).

96. As to the second question (the nature of the question into which the tribunal is inquiring), Ms Stanley concedes, as she must, that the English court in the section 236 examinations was not deciding any "lis" but she maintains that this does not matter where the English court is the "forum in which an essential part of the liquidation proceedings are being conducted". However, it is clear from *Trapp v Mackie* that a (or possibly the) key factor for the court was whether the question for the tribunal "partakes of the nature of a lis inter partes" (Lord Diplock at 380E-F and Lord Fraser at 389C where he described the decision of a dispute between the parties as "the element which in my opinion was the most important for the present purpose"). At 383, Lord Diplock identified that the inquiry in that case "was inquiring into an issue in dispute between adverse parties of a kind similar to issues that commonly fall to be decided by courts of justice".

97. As to the third question, the procedure adopted, I of course accept that a section 236 examination proceeds with considerable procedural formality and that the court has the power to compel attendance and to make orders for enforcement. However, I note that the procedure adopted is different from the usual procedure at a civil trial. In the first place, the court has a discretion to refuse to allow a section 236 examination on the grounds that it would be oppressive. If the examination is permitted to proceed, it

takes place in private so as to protect the confidentiality of the information being provided by the examinee. Unlike ordinary court proceedings, there is no privilege from self-incrimination (see *Maxwell*), which is of course a function of the abrogation of that right by Parliament, but which highlights the unique nature of section 236 proceedings. There is no examination in chief followed by cross-examination and re-examination. Instead there is simply a free ranging examination, subject to the court's power to control oppressive lines of questioning (as to which see *Shierson v Rastogi* at [43]). As Megarry J pointed out in *Rolls Razor*, the examinee is not an ordinary witness giving evidence to the court, he or she is simply providing information which might later be admissible as evidence against him or her pursuant to section 433 IA1986, whether in the context of enforcement under section 237 IA1986, or in separate proceedings.

98. As to the fourth question, the legal consequences, Lord Diplock said this (383B-C):

"In deciding whether a particular tribunal is of such a kind as to attract absolute privilege for witnesses when they give testimony before it, your Lordships are engaged in the task of balancing against one another public interests which conflict. In such a task legal technicalities have at most a minor part to play. Where the report of a tribunal though not necessarily decisive as a matter of legal theory nevertheless in practice has a major influence upon the final decision that in law is binding and authoritative, the same considerations apply to such a tribunal as those that weigh the balance down in favour of absolute privilege for evidence given before a tribunal whose decisions are in strict law binding and authoritative in their own right".

99. Just as there is no 'lis' between the parties, there is also no final decision made by the court following a section 236 examination – indeed there is no decision made at all. The court is not determining or establishing the existence of rights; as was common ground between the parties the court merely facilitates the process of putting questions to the examinee and, if a further process is required (such as another examination, as occurred in this case, or the service of a witness statement, or enforcement) the court will make an appropriate order on the application of the liquidator. Whilst there are certainly powers of coercion vested in the court, their purpose is to enforce a pre-existing duty owed by the office holder.

100. I note in this regard, that in her submissions, Ms Stanley focussed on the legal consequences of the examination in general (i.e. that the information obtained on an examination could be used in evidence against the examinee pursuant to section 433 IA1986, that the information would enable the liquidator to reconstitute the company's knowledge of its affairs and that following the examination in this case, the liquidator and the BVI court would be in a better position to wind up the Company). However, in my judgment, the legal consequences with which Lord Diplock was concerned were the legal consequences of the decision reached by the tribunal as a result of the inquiry. Whilst the House of Lords in *Trapp v Mackie* recognised that the fact that a tribunal did not reach a binding decision was not always fatal to the issue of witness immunity (e.g. *Dawkins v Lord Rokeby* (1874-75) L.R. 7 H.L. 744), it also contemplated that some tribunals are necessary steps on the way towards ultimate decisions (as was the case on the facts of *Trapp v Mackie* itself). Ms Stanley's submissions do not address this point. The court at a section 236 examination neither makes a decision nor exists as a staging post on the way to an ultimate decision made elsewhere.

101. The fact that a section 236 examination takes place under the umbrella of existing insolvency proceedings, as described in *AWH Fund Ltd v ZCM Asset Holding Co (Bermuda) Ltd* [2019] UKPC 37 per Lady Arden at [61]-[63], (albeit in this case in the BVI), does not seem to me to outweigh the fact that the private examination process is deficient in various of the indicia of judicial proceedings which have been held to be important. I accept of course that, as Ms Stanley submits, the exercise I must undertake in having regard to the *Trapp v Mackie* indicia is evaluative, but looking at the four considerations identified by Lord Diplock and also having regard to the features he identified as applicable in that case at 383D-H, I am of the view that there are simply too many important characteristics missing in relation to section 236 examinations to regard them as judicial proceedings at which evidence is given by a witness.

102. For the sake of completeness I should add that insofar as Ms Stanley sought to identify a different category of immunity applicable to the Sheikh as a party and respondent to the section 236 examinations, she did not show me any authorities which identified how that immunity differed in any way from witness immunity. The focus of her arguments throughout was on the witness immunity rule and not on a rule of "party immunity" and accordingly I reject any suggestion that the Sheikh attracts immunity in the context of the section 236 examinations solely because of his status as a party.

103. In presenting her argument as to the significance of the overarching insolvency proceedings and in submitting that whatever took place in the context of such proceedings is covered by absolute privilege owing to their status as judicial proceedings, Ms Stanley placed considerable reliance on *Mond v Hyde*. To address her submissions, I need to consider that case in a little detail.

104. Mr Mond was a trustee in bankruptcy who sued in his personal capacity and in his capacity as trustee. Mr Hyde was an assistant official receiver. In reliance on four statements made by Mr Hyde in his capacity as official receiver, Mr Mond defended an action by the bankrupt, which he lost. He therefore sued Mr Hyde in negligent misstatement and the matter came before the court on a strike out application. At first instance, the argument appears to have focussed on witness immunity, with Sir Richard Scott VC holding that the official receiver was entitled to such immunity in respect of a statement he supplied to Mr Mond's solicitors and to a statement he made in an affidavit (made in his capacity as a witness in the legal proceedings brought by the bankrupt against Mr Mond), but that he was not entitled to immunity in respect of two earlier statements made to Mr Mond before any proceedings by the bankrupt began or were contemplated "for they were not made as a witness or potential witness in the proceedings" (see Beldam LJ at 1103G-1104A and 1105C).

105. On appeal, Mr Hyde, sought to contend that all four of the statements he had made were covered by the witness immunity rule (Beldam LJ at 1105H) but it seems that during the course of argument the thrust of the official receiver's claim to immunity changed "from reliance purely upon the rule that a witness is immune from suit for statements made in preparation for and in giving evidence in court to a wider claim for immunity based upon the public policy that all those who take part in the administration of justice should be immune from suit in respect of their actions and statements in the course of such proceedings or in preparation for them. The wider claim arises from the official receiver's position as the official receiver and the appellant's as trustee in bankruptcy" (per Beldam LJ at 1108C-E).

106. At the outset of his judgment, Beldam LJ identified the principal issue in the appeal as "whether an official receiver in bankruptcy is, on grounds of public policy, immune from an action for damages at the suit of the trustee who has suffered financial loss by relying on a negligent statement made to him by the official receiver in the course of the bankruptcy proceedings". In considering this question, Beldam LJ looked in detail at the statutory position of the official receiver, identified the general principle of witness immunity as it applies to various different court users and then noted that the question of whether an official receiver acting in the course of the liquidation of a company attracted immunity had been considered in *Burr v Smith* [1909] 2 KB 306 ("***Burr v Smith***").

107. In *Burr v Smith* the Court of Appeal held that an action could not be brought against an official receiver acting as an officer of the court for a statement made in his capacity as official receiver and contained in a report made under the Companies (Winding Up) Act 1890. Beldam LJ identified that the reasons given in *Burr v Smith* were that the duty exercised by the official receiver necessitated him stating with the greatest frankness all the matters that he may have ascertained referred to in the relevant statutory section and that he was performing a duty as an officer of the court in connection with an inquiry which might rightly be termed a judicial inquiry. Beldam LJ observed that bankruptcy proceedings tend to be protracted and that "in carrying out his functions as an officer of the court the official receiver will have to embark on many inquiries and make many statements which are not formally part of the proceedings" (1112H). Where a statement is made for the purpose of the proceedings, as occurred in *Burr v Smith* then "it must prima facie come within the absolute protection from action". However Beldam LJ went on to express the view (with reference to *Taylor*) that statements made "in the course of" preparing a report should also attract immunity (1114A-B).

108. Against that background, Beldam LJ found that immunity attached to all four of the statements, saying at 1115H-1116B:

> "To be afforded immunity from suit in respect of the statement made, the official receiver must be acting in the course of the bankruptcy proceedings and within the scope of his powers and duties. In the preparation of his reports, which are to be accepted as prima facie evidence, statements which he makes are it seems to me as much in need of immunity as statements made by a witness in the preparation of a proof of evidence or in the course of investigating offences of fraud. In the present case the official receiver was acting pursuant to his duty under rule 351(4) of the Rules of 1952 'to give [the trustee in bankruptcy] all such information respecting the bankrupt and his estate and affairs as may be necessary or conducive to the true discharge of the duties of the trustee'.
>
> The getting in of the assets of the bankrupt's estate for the purpose of being distributed to the creditors is part of the bankruptcy proceedings and accordingly I would hold that in making the statements on which reliance is placed by the appellant the official receiver is entitled to immunity from suit".

109. Ms Stanley submitted that this case was not decided on the basis that the official receiver was acting as an officer of the court, but rather on the basis that the statements he made were made as a witness and that he was acting under a statutory duty to provide information in the course of the bankruptcy proceedings. She said this was clear from the fact that the Court of Appeal accepted immunity in respect of the two statements made in advance of the bankruptcy proceedings, which could not

possibly have fallen within the principle articulated in *Burr v Smith*. In just the same way, she contended, the Sheikh gave his statements at the private examinations in the course of winding up proceedings as a witness and pursuant to his similar statutory duty under section 235 IA1986.

110. I am bound to say that I am not convinced by this argument. As I understand the Court of Appeal's decision in *Mond v Hyde,* it was made by reference to the wider arguments advanced during the appeal and, in particular, the argument that the official receiver as an officer of the court acting in accordance with his duties attracts immunity from suit. There is no suggestion in the decision that in providing the earlier two statements Mr Mond was doing anything which went beyond his duties as officer of the court under rule 351 of the 1952 rules. Whilst I accept that the Court of Appeal plainly had to go beyond the decision in *Burr v Smith* in the sense that it was concerned with statements made by the official receiver (as opposed to a report made for the purpose of the proceedings, as had been the case in *Burr v Smith*), nonetheless it seems to me to be clear from the passage referred to above that its decision was firmly founded on the fact that the official receiver had been acting as an officer of the court within the scope of his statutory duties.

111. Accordingly, in my judgment I cannot take any broad propositions from *Mond v Hyde* as to the approach the court should take to witness immunity (as opposed to the separate category of immunity applicable to officers of the court in the discharge of their statutory duties), much less can I conclude that *Mond v Hyde* is authority for the proposition that witness immunity covers the words spoken in the course of a private examination under section 236 IA1986. Indeed, in the passage referred to above, Beldam LJ appears to have been drawing a distinction between witness immunity and the court officer immunity with which he was concerned. In this regard, I note in particular that, as Mr Comiskey pointed out, the Sheikh is not an officer of the court and is not carrying out a similar statutory duty. Instead he is subject to existing fiduciary and statutory duties in relation to the Company, which the court has power to enforce pursuant to sections 235 and 236 IA1986 (duties to which I shall return later in this judgment).

112. Finally on the subject of the core immunity, I am not persuaded that section 433 IA1986 or rule 12.20(6) IR2016 affects the position, one way or the other. I agree with Ms Stanley that, as Lord Browne-Wilkinson made clear in *Re Arrows* at 102H, section 433 is concerned with the admissibility of statements made in a section 236 examination in subsequent court proceedings. Rule 12.20(6) is concerned with the admissibility of the written record of the section 236 examination which may be used "as evidence against the respondent of any statement made by the respondent in the course of the respondent's examination". These provisions are plainly necessary because of the privacy that surrounds a section 236 examination and the record of that examination (see rule 12.21 IR2016). They are certainly not expressly concerned with permitting statements made at a section 236 examination to be used to found a cause of action in subsequent proceedings.

113. However, in circumstances where I have found that witness immunity does not apply to section 236 examinations, the question of whether Parliament has abrogated the witness immunity rule in section 433 and rule 12.20(6) does not arise.

The Extended Immunity

114. Whilst the function of the court at a section 236 examination is to facilitate the liquidator's investigation into the company's affairs, it does not seem to me (certainly on the basis of the evidence given by Ms Caulfield in her statement in support of the application for the s.236 examinations) that it can fall within the extended immunity, as that has been explained in the authorities to which I have referred and I reject Ms Stanley's submission that the case of *Taylor* is analogous with the facts of this case.

115. *Taylor* was concerned with information obtained by the SFO during investigations into the activities of two individuals for fraud. At 214D-E, Lord Hoffman noted that the test for immunity "is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle". In what appears to be a broad statement as to the scope of immunity, he went on to say this at 214E-G:

> "Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends on the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the police with their inquiries may not be able to give admissible evidence…But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial".

116. At first blush, this paragraph, together with similar observations from Lord Hutton at 221A-C, might be regarded as supportive of Ms Stanley's case. However, the facts of *Taylor* concerned investigations into a crime and it is instructive to consider how the decision in Taylor was dealt with by the House of Lords in *Darker*.

117. Thus, in *Darker*, Lord Hope expressly identified the ratio of *Taylor* as being that "the immunity extended also to statements made out of court which could fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution" (447G) (see also Lord Mackay at 450F). Lord Cooke expressed the view that *Taylor* cannot have been intended to be a guide in the different circumstances with which the House was concerned in *Darker* and said that "Each category of immunity requires separate consideration and justification, while each set of facts requires full examination in determining whether it can be brought within a particular category" (454G).

118. At 448C-E Lord Hope said:

> "But there is a crucial difference between statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence, where the functions that they are performing can be said to be those of witnesses or potential witnesses as they are related directly to what requires to be done to enable them to give evidence, and their conduct at earlier stages in the case when they are performing their functions as enforcers of the law or as investigators…The purpose of the immunity is to protect witnesses against claims

made against them for something said or done in the course of giving or preparing to give evidence."

119. At 452F, Lord Mackay described the "essential character of the immunity" by reference to the speech of Lord Hoffmann in *Taylor* as limiting "the application of the immunity to conduct which can be called in question only by a founding on a statement in court or a statement which is part of the preparation of evidence for court proceedings."

120. At 457C-E, Lord Clyde returned to a theme identified by Lord Hoffmann in *Taylor*, namely the desirability of some degree of certainty as to the existence of the immunity in any given case. Having acknowledged that "the quality of an immunity may be absolute, but its application may not be invariable" Lord Clyde went on to say:

"On the other hand there has to be some degree of certainty about the existence of an immunity for it to be effective. The matter cannot be entirely left as one to be determined on each and every occasion. For the immunity of a witness to be effective it is necessary that the person concerned should know in advance with some certainty that what he or she says will be protected. So even although the matter may depend in any case upon a balancing of interests it ought to be possible to predict with some confidence whether or not an immunity will apply. The law has sought to achieve this by making it clear that the substance of the evidence presented to the court in judicial proceedings will be immune from attack. But a more difficult question arises with regard to the preparation of material and the investigation of a case before the matter comes before the court."

121. As to this more difficult question, Lord Clyde went on to identify that where evidence is being collected with a view to court proceedings (458G-H):

"some delicate questions of fact may arise as to whether or not the material in question was or was not provided with a view to court proceedings. But while the line may be difficult to draw in some cases the distinction in principle is clear. In the case of statements, as Drake J recognised in *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184, 191, the statement must be made 'for the purpose of a possible action or prosecution and at a time when a possible action or prosecution is being considered'…It is then not enough that there be an investigation; the investigation must also be with a view to an action or to a prosecution which is already under consideration. Before that stage is reached it would be very difficult to justify the grant of an immunity".

122. I note in this regard, the acknowledgement by Lord Cooke in *Darker* at 453H-454A that "There may be some borderline cases where it is not easy to draw the line as to the precise extent of witness immunity. The solution of these cases may be helped to some extent by bearing in mind that witness immunity is a general doctrine applying to all persons called upon to give evidence…Conduct which is primarily and naturally to be seen as belonging to the investigatory function, even though it may have some ultimate link with the giving of evidence, should not be within the general protection."

123. Pausing there, whilst it seems to me on the basis of the guidance given by the House of Lords in *Darker* that I cannot rule out that there may be cases where a section 236 examination will cross the line, this case is not one of them. I have already made the point that Ms Stanley does not suggest that she wishes to try to

investigate the evidence; but instead expressly invites me to rely solely on the facts as pleaded. Those facts provide me with no more information than that the section 236 examinations took place, that the witness statement of 4 May 2018 was prepared and that representations were made. Having regard to the statement of Ms Caulfield filed in support of the application to examine the Sheikh (which was included in the bundle for this hearing), I can see nothing that goes beyond the assertion that the Sheikh has failed to cooperate and that an order is required to "facilitate the progress of the liquidation". To my mind such evidence is insufficient for the purposes of establishing that the section 236 examinations in this case "crossed the line" such that they attract the protection of the extended witness immunity.

124. In the context of their Lordship's remarks about the need for certainty, I should also draw attention at this juncture to Ms Stanley's submission, designed to address Mr Comiskey's strong case on public policy, to which I shall turn shortly, that information given under section 235 IA1986 must also attract the protection of immunity from suit, a proposition she said was supported by *Mond v Hyde*. This seems to me to stretch her arguments to breaking point. Section 235 does not involve any form of court hearing or tribunal and, although I do not make any final decision on the point in circumstances where I am not concerned with an investigation under section 235, I find it very difficult to see how it could possibly be the case that "informally obtained information" under section 235 (as it was described by Lord Browne-Wilkinson in *Re Arrows* at 102B) would attract witness immunity simply because it falls under the general umbrella of insolvency proceedings. To my mind information obtained under section 235 naturally belongs to "the investigatory function", as Lord Cooke described it in *Darker*. I can see nothing in *Mond v Hyde* that suggests otherwise. If I am correct on this score, then it supports my view that the general umbrella of insolvency proceedings is also not itself enough to ensure witness immunity for examinees at section 236 examinations.

125. By reference to *In Re TH Knitwear (Wholesale) Ltd* [1988] 2 WLR 276, Mr Comiskey observed that a liquidator in a voluntary liquidation is not an officer of the court and he pointed out that it would be impossible to contend that a section 235 interview or section 236 examination in the context of a voluntary liquidation was subject to witness immunity (Ms Stanley did not suggest otherwise). Mr Comiskey went on to make the point that it would be odd if the entitlement to immunity depended upon whether the liquidation was compulsory (and thus subject to overarching insolvency proceedings) or voluntary. I agree. Again, this seems to me to detract from Ms Stanley's central argument that the mere fact of insolvency proceedings must give rise to the immunity.

Public Policy/Is the rule necessary in this context?

126. I have already referred to the passage in *Daniels* at [34] where Lord Justice Lloyd Jones observes that witness immunity should only be allowed where it is necessary in the interests of justice. He refers in that passage to Lord Cooke's speech in *Darker* at 453D-E, which bears repetition here:

"Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in *Rees v Sinclair* [1974] 1 NZLR 180, 187, "The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice…"

127. Lord Clyde commented to similar effect in *Darker* at 456H:

> "It is temptingly easy to talk of the application of immunities from civil liability in general terms. But since the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should only be allowed with reluctance, and should not readily be extended. It should only be allowed where it is necessary to do so".

128. Mr Comiskey submits that there are no policy reasons for applying or extending witness immunity to cover section 236 examinations. In particular, he focusses on the four justifications for the rule, as summarised by Lord Phillips in *Jones v Kaney* (as set out above) and points out that the rule is not necessary in the current circumstances to achieve those objectives.

129. I agree with Mr Comiskey that it is difficult to see how a section 236 examinee may be brought within any of the four established justifications. Where there is already a duty to provide information to the liquidator, the immunity is certainly not required to "encourage honest and well meaning persons to assist justice". The duties of an ordinary witness go no further than telling the truth and the existence of this duty to provide information is a real point of difference. Further, given that a section 236 examination neither involves an existing dispute nor any determination of such dispute, the need for immunity could not be justified by the need to avoid a multiplicity of actions.

130. This leaves only the question of whether a director attending a section 236 examination should be protected from being harassed and vexed by unjustified claims and whether immunity is necessary to ensure that he will speak freely and fearlessly. I agree with Mr Comiskey that these are really ways of describing the same thing: the reason a witness might not speak freely or fearlessly is because of the possibility of unjustified claims. However, the answer to this seems to me to lie partly in the privacy of the examination and partly in the existence of the pre-existing duty to assist an office holder in the provision of information about the company (a duty which also exists under BVI law pursuant to section 175(1) of the BVI Insolvency Act 2003).

131. In the latter context I note in particular the observation of Lord Browne-Wilkinson in *Cloverbay* at 102-103 (albeit in the context of considering whether a section 236 examination may be oppressive) that:

> "Officers owe the company fiduciary duties and will often be in possession of information to which the company is entitled under the general law. Their special position as officers of the company is emphasised by section 235 of the Insolvency Act 1986 which imposes on them a statutory obligation to assist the liquidator or administrator. The enforcement of these duties owed by its officers to the company may require an order under section 236 of the Act of 1986 even though it exposes such officers to the risk of personal liability".

132. For anyone with a pre-existing duty to cooperate under section 235 IA1986, such as the Sheikh in this case, there is a free-standing obligation to speak freely and fearlessly in any event, without the need for any court involvement. Given this existing obligation, and given that it is very difficult to see why statements made at a meeting between an office holder and an officer of the company which takes place pursuant to section 235 IA1986 should attract witness immunity, it is to my mind equally difficult to see why there is any need for examinees attending court for a section 236 examination to benefit from such immunity.

133. Ms Stanley contends that in light of the abrogation of the privilege against self-incrimination brought about by sections 235 and 236 IA1986 as identified in *Maxwell*, witness immunity is the only protection left to an examinee who is compelled to attend court for a private examination. However, this alone does not justify the imposition or extension of a rule that cannot otherwise by justified by reference to recognised policy grounds. The fact that there is scope to bring proceedings for perjury or contempt in the event of dishonesty or a refusal to cooperate in the provision of information is also not a reason to cut across the right to a legal remedy.

134. In circumstances where I have found that there is otherwise no immunity, I certainly cannot see any necessity to extend the existing categories of immunity to cover the section 236 examinations in this case.

135. In the context of dealing with the duties owed by the Sheikh as a director, I should make clear that, given my reasoning as set out above, I do not need to decide whether the duties owed generally by directors are analogous with the duties of advocates and experts to their clients, as Mr Comiskey contends, and I do not gain any real assistance from either *Hall v Simons* or *Jones v Kaney* in arriving at my decision in this case. I do not consider that the immunity attaches in the first place, so there is no need in any event to consider whether it should be abrogated, as occurred in those cases on their own particular facts. Of course, if I am wrong about the existence of the immunity in the circumstances of this case, then I accept Ms Stanley's submission that any decision to remove it could only be taken by the Supreme Court.

136. Finally, I turn to another policy consideration raised by Mr Comiskey, who submitted that if the Respondents are correct that immunity attaches to examinees at section 236 examinations, then this would give rise to a perverse incentive; it would mean that it was in an individual's interests not to cooperate with an office holder in accordance with his or her statutory and other duties, but instead to wait for an order to be made pursuant to section 236 IA1986, because in that way the individual ensures that he or she can avoid civil liability for the provision of false information. Indeed, Mr Comiskey goes on to point out that this is precisely what the Sheikh seeks to do in this case. Had he cooperated with Ms Caulfield in providing information when asked to do so, he would have had no claim to an immunity, but because he has been subject to section 236 examinations following a failure to comply with his obligations as director of the Company, he now has an opportunity to argue that he is immune from suit. Mr Comiskey says this would reward the Sheikh for his own failure to cooperate, just as any general principle of witness immunity covering section 236 examinations would result in other individuals who are subject to similar duties refusing to cooperate when asked to do so under section 235 so as to obtain the protection of the immunity in the context of the section 236 examination.

137. Of course, this argument does not work if information provided under section 235 also attracts witness immunity – hence Ms Stanley's argument to which I have already referred and which (although I do not need to decide it) seems most unlikely to be correct. I agree with Mr Comiskey that the result for which the Sheikh contends has the potential to create a perverse and unfortunate situation in which individuals who might otherwise have cooperated with the company at the first time of asking might well decide, or be advised, to await the more formal section 236 process so as to attract the protection of witness immunity. This would not be in the interests of justice and, to my mind, supports my decision that (certainly on the facts of this case)

there can be no immunity in respect of the Sheikh's statements made during the section 236 examination process.

BVI Proceedings

138. Mr Comiskey argues that a foreign representative under a CBIR Order does not act as an English office holder (see *Peak Hotels*) and that the CBIR Order does not give rise to insolvency proceedings in England. Accordingly, he says, Ms Stanley is wrong in submitting that there are overarching judicial proceedings on foot.

139. In response, Ms Stanley points to the passage in *Trapp v Mackie* at 379H which appears to contemplate the application of the witness immunity rule to tribunals that are not merely domestic tribunals; the key, she says, is not whether the court or tribunal is domestic or foreign but whether evidence was given by a witness in a judicial proceeding. The position in the BVI is the same as the position in England (at least there is no evidence to the contrary): the winding up is a court winding up and the liquidator is the court appointed official who implements the winding up. The section 236 examination is a part of the court managed process. In light of the CBIR Order pursuant to which the English court is giving its assistance under the CBIR to the BVI court, she says that the BVI insolvency proceedings are a judicial proceeding for the purposes of the witness immunity rule.

140. Given my decision, and given that this issue was not argued in detail before me, I do not need to decide whether Mr Comiskey's argument would provide yet another factor in support of the absence of witness immunity on the particular facts of this case. I simply observe that if I had accepted Ms Stanley's argument that the existence of overarching insolvency proceedings is itself sufficient to bring section 236 examinations within the remit of the witness immunity rule, then I think it very unlikely that the fact that the overarching proceedings are BVI proceedings would have made any difference, notwithstanding that the Liquidators are not officers of the English court.

Conclusion on Witness Immunity

141. For all the reasons set out above, I find that in this case, no immunity attached to the Sheikh during his two section 236 examinations and in his witness statement provided pursuant to that process on 4 May 2018. Accordingly, the Final Proposed Amendments do not fall foul of the witness immunity rule.

Remaining Issues on the Final Proposed Amendments

142. I turn now to consider the amendments by reference to the MBI Respondents' remaining objections.

New Fiduciary Duties

143. Ms Stanley says that paragraphs 55B, 55C, 55E, 55G, 55J, 55Q and 82B either plead or rely upon New Fiduciary Duties arising from the Sheikh's capacity as a director of the Company. In summary she contends that there is no evidential basis as a matter of BVI law for these new post-liquidation duties. She says that the expert evidence (which has already been given at the trial) does not support such duties. During her oral submissions she also raised the point (by reference to *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 ("***Paragon Finance***")) that breach of a duty to account does not render a fiduciary liable to pay equitable compensation. Finally she contends that paragraph 82B is confusing and unclear and

that it has not improved upon the previous iteration which was before me on the Original Application.

144. In response, Mr Comiskey accepts that the fiduciary duties pleaded in paragraph 55B go beyond the duties already pleaded in the existing pleading at paragraphs 67 and 68, but he says that these new duties are "an incident of" the broad fiduciary and statutory duties owed by the Sheikh at common law to the Company in his capacity as its director (already pleaded in paragraph 61). I shall not lengthen this judgment further by setting out in full paragraph 61, but suffice to say that it pleads the well-known duties of directors to act in good faith and in the interests of the company, to promote the success of the company, to avoid conflict with the interests of the company, and so on. Mr Comiskey says that it cannot be controversial that a director owes a duty to account for what he has done with company assets, even after the date of liquidation and he argues that *Paragon Finance* is not on point where I am concerned with a case in which it is alleged that the breach of duty in failing to account itself caused loss.

145. I accept that the pleaded duties in paragraph 55B go beyond what has previously been pleaded albeit that I am bound to say that it does not seem to me to be fanciful to suggest that the New Fiduciary Duties are incidental to those already pleaded in paragraph 61. I note that in his opening skeleton for the trial, Mr Curl, then acting for the Liquidators, pointed to *Re System Building Services Group Ltd (in Liquidation)* [2020] BCC 345, in which ICC Judge Barber rejected a submission that duties only survive post-liquidation in respect of the exercise by the director of powers *qua* director that are preserved or permitted in accordance with statute. He also relied upon *GHLM Trading Limited v Maroo* [2012] 2 BCLC 369, in which Newey J (as he then was) held (at [148]-[149]) that a company director (like other trustees) "…must show what he has done with that property" and went on to make it clear that this goes to the burden of proof when the director accounts to the principal (i.e. the company): "In a similar way, it seems to me that, where debit entries have correctly been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account".

146. I reject the suggestion that there is no evidential basis for such duties. The Liquidators' expert, Mr Fay, gave evidence that after the commencement of a liquidation "the directors retain a duty owed to the company, not in property law but as directors, not to deal with the assets of the company" and he expressed the view that "the duty is the same as the duty that arises as a matter of trust, but directors are really fiduciaries rather than trustees, and I don't think that a liquidation order changes them from being fiduciaries to trustees".

147. Although Mr Lowe QC, the MBI Respondents' expert, said that a director does not continue to owe fiduciary duties after a company goes into liquidation (but does have a duty as trustee of property belonging to the company), it became clear that it was his view that directors continue to owe duties as a matter of common law and that in fact there was very little between the experts as to the nature of the duty owed – their disagreement really focussed on what the duty should be called ("Mr Fay: I think it's the same duty and we're really arguing about what you call it"). In re-examination by Mr Curl, on behalf of the Liquidators, Mr Lowe QC said that he did not know whether a director continued to have "fiduciary duties" after liquidation which persisted at common law, saying "That's obviously, I think, with respect, Mr Curl, a matter for Her Ladyship". He went on to confirm that he and Mr Fay were "ad

idem" on the fact that "almost everywhere [in BVI law] English common law is applied".

148. As to whether the breach of the pleaded New Fiduciary Duties can give rise to a claim for equitable compensation, I agree with Mr Comiskey that *Paragon Finance* does not appear to provide the answer. That case was concerned with looking at limitation in the context of a claim in constructive trust. In so doing, Millett LJ distinguished between two different types of constructive trust claims: those in which the defendant, although not expressly appointed as a trustee has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the claimant, and those in which the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the claimant.

149. Ms Stanley drew my attention to a passage in the judgment at 416E-F in which Millett LJ commented on *Nelson v Rye* [1996] 1 WLR 1378 to the effect that: "The fact that the defendant was a fiduciary did not make his failure to account a breach of fiduciary duty or make him liable to pay equitable compensation".

150. However, the constructive trust on which the claimants in *Paragon Finance* sought to rely fell within the second class of case identified by Millett LJ. This case, on the other hand plainly falls within the first class of case and I accept that Millett LJ does not appear to have been dealing with the question of whether a trustee (or fiduciary) in the first class of case may be liable for equitable compensation if his failure to account (in this case his alleged concealment of the true factual position) itself causes loss. In circumstances where this particular point was raised by Ms Stanley for the first time during the hearing and responded to by Mr Comiskey in his reply, I am not prepared to find (absent proper and detailed argument) that the New Fiduciary Duties are not arguable on the grounds that they are not capable of giving rise to a claim of equitable compensation.

151. Finally, and for clarity, I should say that even if I am wrong as to witness immunity, that rule only arises in relation to a cause of action based on the words said by a witness in court proceedings. I accept that in pleading a failure to disclose correct information as to the registered title to the Company's Holding BVI Shares to the Liquidators, paragraph 82B does not fall foul of the rule and I would have permitted this paragraph, together with paragraphs 55A-55Q as background context, in any event. I did not understand Ms Stanley to argue to the contrary.

The New Asset Transfer Allegation and the allegation that representations made by the Sheikh were made on behalf of Holding BVI

152. Ms Stanley objects to paragraphs 55M and 55P on the grounds that they plead allegations as to the transfer of the Company's Holding BVI Shares by reference to an inference that it was the Sheikh who caused the relevant transfers. In particular, she contends that the new pleading has not remedied the defects in the pleading put forward for the purposes of the Original Application, essentially because the pleader has not identified how it is said that the Sheikh was himself responsible for the transfers, whether as agent or by reason of acting as a de facto or shadow director.

153. Mr Comiskey responds that the pleading makes clear that the Sheikh has "at all material times been the ultimate owner and controlling mind of the MBI Group and all entities comprising the MBI Group, including the Fourth Respondent and the Fifth Respondent" (paragraph 6 of the existing Re-Amended Points of Claim) and that "In

the premises the knowledge and state of mind of the Sheikh should be imputed to all entities comprising the MBI Group at all material times, including the Fourth Respondent and the Fifth Respondent" (paragraph 7 of the existing Re-Amended Points of Claim). Further he points to the fact that in both paragraphs 55M and 55P, not only is the fact that the Sheikh is the controlling mind of every entity in the MBI Group pleaded, but also it is asserted that "there was no other person with the necessary knowledge and/or control and/or desire to do those things". In the circumstances, Mr Comiskey says that it is legitimate to infer that by reason of the fact the Sheikh was the controlling mind and no one else had the necessary knowledge or control, the Sheikh is the only person who could have caused these transactions to take place.

154. Whilst I can very well see that there may be a basis at trial on which Ms Stanley will be able to invite me not to draw the pleaded inference, nevertheless, on balance I am satisfied that Mr Comiskey's arguments have a real prospect of success. I note in this regard that Mr Comiskey has clarified during the course of the hearing that the breaches complained of in the Final Proposed Amendments are breaches of the duty to account – essentially the complaint is that the Sheikh hid the truth about the transfers from the Liquidators in breach of his duties (as pleaded in paragraph 55B), thereby causing loss. It is not a part of the Liquidators' case (as a close reading of the amendments confirms) that the transfer of assets was itself a free standing breach of fiduciary duty owed to the Company.

155. This addresses another of Ms Stanley's criticisms as to what she referred to as "the rolled-up plea" in paragraph 96 relying on (amongst others) paragraph 55P as involving "inter alia breaches of fiduciary duty and/or breaches of trust". The Liquidators are not pursuing a case of breach of fiduciary duty or breach of trust in relation to the New Asset Transfer allegations and such a case is not pleaded in the Final Proposed Amendments. I do not understand the amendments at paragraph 96 to be seeking to allege that any of the facts and matters pleaded in paragraphs 55A-55P are breaches of fiduciary duty and/or breaches of trust unless they have already been identified as such. Accordingly, I am prepared to permit the amendment to paragraph 96. For completeness, I add as an aside that if I had accepted the application of the witness immunity rule, I would not have acceded to Mr Comiskey's submission that the plea of conspiracy in paragraph 96 falls outside the scope of witness immunity owing to the fact that the Liquidators can rely on contempt of court – an allegation that is not pleaded and would ordinarily not be investigated in any event during the course of substantive proceedings.

156. I was initially troubled by the pleading in paragraph 55H that the representations pleaded in paragraph 55E were made by the Sheikh on his own behalf "and on behalf of Holdings UK and/or JJW Guernsey". Ms Stanley is correct to say that there is no plea that the representations were made by the Sheikh acting as Holding BVI's agent or that the Sheikh was even a director of Holding BVI at the relevant time or was otherwise held out by it as being its agent with authority to make statements on its behalf. Furthermore, I note that paragraph 55D expressly pleads that the application for the section 236 examination was made against the Sheikh in his capacity as a director of the Company. His failure to disclose relevant material to the Liquidators is pleaded as a breach of his fiduciary duty to the Company.

157. However, Mr Comiskey says that it is possible that the representations were made by the Sheikh in multiple capacities and certainly possible that he may have had his

"Holding BVI hat on" and he points out that this is a question of fact for determination at the trial. Whilst it may be unlikely that the Liquidators will be able to show at trial that the making of the representations and the failure to disclose information were acts done for or on behalf of Holdings UK, in the end, and particularly in circumstances where (i) the question of the capacity in which the Sheikh made the representations is a question of fact to be determined at trial, and (ii) there is a broad plea as to the extent of the Sheikh's control over all companies in the MBI Group, it seems to me that the point has been sufficiently pleaded and that there is an arguable case here with a real prospect of success that must go to trial.

Loss

158. Finally, Ms Stanley says that it is not clear what loss is being alleged in relation to (i) the representations made by the Sheikh during the section 236 examination (pleaded in paragraph 82A) and (ii) the failure to disclose to the Liquidators the true particulars of the registered title to the Company's Holding BVI Shares (pleaded in paragraph 82B). This is of particular significance in relation to the claim against Holdings UK, because that claim is purely a claim in tort which requires proof of loss. The absence of any loss suffered by reason of the allegedly false statements is, says Ms Stanley, "absolutely fatal to the claims against [Holdings UK]".

159. In particular, Ms Stanley points to the fact that paragraph 55P dates the transfer of the assets and liabilities of Holding BVI to Holdings UK to "on or about 27 July 2017", which means that by the earliest of the Sheikh's statements in the section 236 examination (namely 26 April 2018), the transfer had already taken place and the Company's shareholding in Holding BVI was "worthless". Ms Stanley says that the way the loss claim is pleaded continues to raise the spectre of reflective loss, a point argued in detail in response to the Original Application (but not a point that I intend to revisit in this judgment).

160. Mr Comiskey responds that it is not the Liquidators' case that their loss represents a diminution in value of the shareholding in Holding BVI; their case, as pleaded in paragraph 55Q, is that in giving a false account of the transfer, the Sheikh and/or Holdings UK "prevented the Former Liquidator and/or the Joint Liquidators from realising any value for the Company by means of the Company's Holding BVI Shares *in specie*" (paragraph 55Q; see also 82A and 82B) – the words *in specie* being clarified in submissions by Mr Comiskey as meaning simply "themselves". He disavows any attempt to plead reflective loss and further, he says that this is a case involving breach of fiduciary duty which does not require proof of loss (a proposition with which Ms Stanley said she did not agree but which was not argued before me and in respect of which I am not in a position to make a final decision). Mr Comiskey goes on to say that it is of course open to the MBI Respondents to assert that there is no loss in a Re-Amended Points of Defence in due course and that this would then have to be resolved at trial. Finally he points out that the pleading in paragraph 82B relies upon breach of a duty to provide information which dates back to the commencement of the liquidation (see paragraph 55B) and that in any event both paragraphs 82A.c and 82B.c plead a freestanding head of loss, namely that the representations/failure to provide information "had the effect of increasing the deficiency in the Company's estate".

161. Having regard to all of the arguments, I am not convinced by Ms Stanley's submissions that there is no arguable case to be presented at trial and nor do I think that the Liquidators are trying to resurrect a reflective loss claim. In my judgment

there is a real prospect of success in relation to the question of loss which must be determined at trial.

Conclusion on the Amendment Application

162. For the reasons set out in this judgment, I shall permit the Final Proposed Amendments in their entirety, save that the words "*in specie*" in paragraphs 55Q, 82A and 82B are to be replaced with "themselves" for the sake of clarity.

Directions

163. The parties have invited me to give directions for the further conduct of this case once I have made my decision on the Amendment Application. I am minded to order that:

a. The Re-Re-Amended Points of Claim is to be formally re-served by the Liquidators (with the removal of the words "*in specie*" from paragraphs 55Q, 82A and 82B and their replacement with the word "themselves" as identified above) by 4pm on 23 April 2021.

b. The Respondents have permission to serve a Re-Amended Points of Defence making amendments which are consequential upon the amendments made by the Re-Re-Amended Points of Claim by 4pm on 7 May 2021.

c. If so advised, the Liquidators have permission to serve a Re-Amended Points of Reply by 4pm on 21 May 2021.

164. When providing their corrections and typos I invite the parties please to provide any additional suggestions they may have on directions so that I can incorporate these (if appropriate) into a final order. It would obviously be of assistance if the parties could liaise over the question of further directions.

165. On the question of the costs of the Original Application and the Amendment Application, subject to any agreement that the parties may reach, it is my view that I should determine these on paper without a hearing and so I also invite the parties to liaise over the timing of written submissions on costs. If, for whatever reason, the parties consider that a further short hearing is necessary, they should please contact my clerk in the usual way.