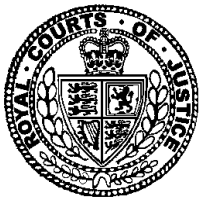

Neutral Citation Number: [2018] EWHC 2918 (Comm)

CL-2016-000553

Case No: CL-2016-000553

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1st November 2018

Before :

The Hon. Mrs Justice Cockerill

- -

Between :

RECOVERY PARTNERS GP LIMITED **REVOKER LLP**	**Claimant**
– and –	
MR IRAKLI RUKHADZE **MR IGOR ALEXEEV** **MR BENJAMIN MARSON** **HUNNEWELL PARTNERS (UK) LLP** **HUNNEWELL PARTNERS (BVI) LTD** **PARK STREET (GP) LTD** **PARK STREET (BR) LTD** **PARK STREET (GS) LTD** **PARK STREET (L) LTD**	**Defendant**

- -

Ewan McQuater QC, Tom Weisselberg QC and Tom Cleaver
(instructed by **Brown Rudnick LLP**) for the **Claimant**
Paul Girolami QC, Paul Casey and Watson Pringle
(instructed by **Signature Litigation LLP**) for the **Defendant**

Hearing dates: 25, 26, 27, 28, 29 June 2, 3, 4, 5, 9, 10, 11, 12, 18, 19, July 2018

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Approved Judgment

Mrs Justice Cockerill :

Introduction

1. This case concerns events arising out of the unexpected death of Arkady Patarkatsishvili (“Badri”), a Georgian businessman of immense wealth, who had at one time been the business partner of Boris Berezovsky ("BB"). He died suddenly at his home in Surrey in February 2008, leaving no will. His family (“the Family”) comprised his wife Inna Gudavadze ("Mrs Gudavadze", also referred to in some correspondence as "Inna") her daughters Iya and Liana, their husbands and Mrs Gudavadze’s brother Gregory.

2. Badri's death was highly problematic for the Family, since Badri was secretive about his assets and moreover disdained orthodox methods of holding those assets, preferring to place them in the hands of those with whom he had relationships of trust. Further the Family had had little or no involvement in his business interests during his life, though he pursued some charitable endeavours jointly with Mrs Gudavadze. The upshot was that on his death, his family believed that he had left behind a potentially hugely valuable estate consisting of business and property assets located in many different jurisdictions – but they had very little idea indeed what those assets were, where they were located and how they were held.

3. This dispute has its centre of gravity between two people who both did know Badri well and who became concerned in a project to locate the assets for the family of Badri – for a consideration. The first of these is Mr Eugene Jaffe, the founder and CEO of a company called Salford Capital Partners International ("SCPI") who had known Badri well for a number of years and had worked with him on numerous projects, in particular a private equity fund ("VDP") which was a vehicle for Badri's investments and which SCPI managed. Over time he had gained considerable knowledge of Badri's assets, and the subsidiaries of SCPI (based in Russia, Ukraine, Georgia and the Balkans) were in considerable measure occupied with managing some of Badri's other assets. He had also come to know Badri's family. His own London residence was in the same building where they maintained an apartment, once they relocated to London.

4. The second of these people is the First Defendant, Mr Irakli Rukhadze. He was a director of SCPI from 2004 until December 2009 and was from 2004 the head of its Georgia office. As such he had come to know and work closely with Badri and was one of the individuals trusted to be the nominal holder of assets for Badri. Mr Rukhadze knew Badri's family also before Badri's death, and came to know them very much better in the years which were to follow.

5. Initially the two worked together to assist the family and to put together an arrangement for the recovery of Badri's assets and to perform that

recovery ("the Recovery Services"); the details of the arrangements are a key issue in the case. During the course of the discussions, the Claimant companies ("RP" and "Revoker") were established by Mr Jaffe/SCPI with a view to their forming part of a structure for the agreement with the family. The Second Defendant ("Mr Alexeev") and the Third Defendant ("Mr Marson") joined to work on the project full-time in early 2009 and October 2009. Mr Marson, a lawyer, was employed by Revoker. Mr Alexeev's employment status is an issue, though he came to be a partner in Revoker. As necessary I will refer to Mr Rukhadze, Mr Alexeev and Mr Marson together as "the Individual Defendants".

6. In the end however, Badri's family came to an arrangement with Mr Rukhadze and the Fourth to Ninth Defendants ("the Corporate Defendants") only. That agreement was reached in 2012 between the Family and the Corporate Defendants in these proceedings, which are companies controlled by the Individual Defendants. Before that there was a major falling out between SCPI, the main individuals involved and the Family which resulted in Mr Rukhadze, Mr Alexeev and Mr Marson resigning in spring of 2011 and the Family disavowing any future connection with SCPI in May 2011.

7. The claims in these proceedings are in essence that one or more of the First to Third Defendants breached fiduciary duties owed to SCPI in that they diverted for themselves a business opportunity to conclude the contract for the Recovery Services with Badri's family. There are issues as to whether the Individual Defendants owed relevant fiduciary or other duties of loyalty to one or more of SCPI, RP and Revoker. It is common ground that some fiduciary duties were owed at some point, but there is a vibrant issue as to whether these duties persisted even for the whole of the period up to May 2011 and if so, to whom they were owed. There are also issues as to whether SCPI ever had a relevant business opportunity and whether it remained an opportunity of SCPI or was abandoned by SCPI either to a group of individuals (who styled themselves the "Salford Principals") or generally such that there could be no breach of fiduciary duty. There is also an issue as to whether there was no diversion of any SCPI business opportunity in that the Individual Defendants resigned from their various contracts with SCPI and the Claimants as a result of being wrongfully excluded from the project such that their fiduciary obligations ceased. The claim against the Corporate Defendants is a parasitic one in knowing receipt.

8. This judgment, which is necessarily somewhat lengthy, is arranged as follows:

The Trial and the witnesses

9. This case has been heard over four court weeks. During that time, I have heard extensive factual evidence from some of the main participants in the events which were in issue.

10. I wish I could say that this extensive witness evidence was extremely useful. However, despite the skilled and diligent cross-examination of Mr Girolami QC, Mr McQuater QC and Mr Weisselberg QC, I cannot say that it was.

11. Much of this is to do with the fact that the majority of the witnesses called were very intelligent and motivated and had plainly worked extensively to prepare for their evidence; firstly, with the legal teams in the preparation of their lengthy witness statements and secondly with the documents in preparation for their cross-examination.

12. However what sounds like a virtue is when pursued to this extent actually a vice; the result of this was that I could have very little confidence that the evidence which I was getting was their unclouded recollection rather than a heavily overwritten version based on their reconstruction of events in the light of their microscopic review of the documents – and their own view of their own case.

13. Leggatt J (as he then was) made an important survey of the problems attendant on witness evidence in litigation in his judgment in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) at [15-22]. In it at [20] he referred to this process thus:

> "Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

14. This paragraph is not alarmist; it reflects the reality established in several empirical surveys – for example in the work of Elizabeth Loftus, and in the post 9/11 survey conducted by Talarico and Rubin which demonstrated that even so called "flashbulb" memories can be eroded by subsequently acquired information.

15. Interestingly, the fallibility of recollection was a point to which more than one witness adverted. Mr Jaffe himself seemed at times to perceive it and indeed highlighted this in relation to a particularly key passage of his evidence. Dealing with the critical period leading up to the first emergence of the term "Salford Principals" he explained that the recollection to which he had alluded in his witness statement, and which he said it seemed to him he actually had of seeing a particular presentation, had proved to be erroneous because he had since found evidence in the form of a plane ticket which reminded him that at this time he had in fact had to fly to Rome, where his daughter was undergoing an emergency operation. To similar effect was Mr Alexeev who said in response to one question "*some of it is reconstruction*".

16. Overall, I have formed the view that I have to treat the evidence of Mr Jaffe, Mr Rukhadze and to a slightly lesser extent Mr Alexeev and Mr Marson with considerable caution, because for these reasons even to the extent that the witnesses were honestly trying to assist I could not be confident that I was receiving accurate factual evidence. This is regrettable not least because, as Mr Rukhadze mentioned more than once and Mr Alexeev echoed, these parties were not living by documents; plainly much occurred which I will not find reflected in the documentary record. As Mr Rukhadze put it: "*our lives cannot be reconstructed by emails and documents only*". Thus, the nature of the case and the disputes between the parties has forced me on occasion to choose between their accounts of key events, as the documentary trail was partial or lacking.

17. I have therefore in large measure adopted the course indicated by Leggatt J at [22] of *Gestmin* where he said:

> "…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the

> personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events."

18. I would add one further point of general application about the difficulties of relying on the evidence of these witnesses. It was apparent that the approach to analysing commitments which is reflected in English Law and which is second nature to English lawyers was not something which gelled easily with any of the main witnesses. Agreements and structures seem, in the world in which they have been doing business, to have been regarded much more fluidly than I must do when approaching this case. So, Mr Jaffe appeared at times genuinely to have difficulty in drawing a distinction between an agreement in principle and a binding contract and Mr Rukhadze was apparently (both orally and on the documents) supremely uninterested in the detail of the structures through which the Recovery Services were to be provided.

19. The Claimants' main factual witness was, unsurprisingly, Mr Jaffe. He gave evidence over the course of four and a half court days. The parties urged me to form very divergent views of his evidence. The Claimants said that he was an honest witness who despite a tendency to discursiveness was trying to assist the Court. The Defendants for their part said that I should reject his evidence wherever it diverged from that of the Defendants.

20. My own view was that Mr Jaffe, though plainly an extremely intelligent man, was not a particularly helpful witness. Unlike many witnesses, his intellect enabled him to maintain a clear recollection of all the documents, which he had plainly reviewed repeatedly. He also plainly had strong views on every aspect of the case which he was very keen to air. In addition, he appeared to find the lack of control inherent in the position of a witness difficult to accept. The result was that he tended to lose focus on the question he was being asked relating to a particular point in time, in order to direct attention to other earlier or later documents which he considered were helpful to his argument. This was disruptive in its effects, but also meant that he sometimes did not give clear answers on particular documents he was being asked about.

21. In addition, it is certainly true to say that Mr Jaffe's evidence was not assisted by his natural tendency to discursiveness, which could be seen in some of his emails, and also manifested itself in oral evidence, with him sometimes giving speeches or volunteering speculation instead of providing answers to the questions he was asked.

22. I should mention two other facets of Mr Jaffe's evidence to which I shall return. He appeared in his oral evidence to be more emotional than Mr Rukhadze or Mr Alexeev, and this was reflected in the documents where he was sometimes seen to respond impulsively to communications. He

evinced more emotional reaction to the position in which he found himself: he spoke repeatedly of Mr Rukhadze's friendship, and he also plainly found the loss of the Family's trust personally hurtful. He also evidenced a very positive, verging on over-optimistic view of business events. Both of these led him, at times, to overstate the position. There also were some respects in which I was persuaded that he was not entirely candid with the court; essentially providing answers which he had calculated to be helpful to his case, rather than his best recollection of the facts.

23. As for Mr Rukhadze, I was again urged to two very different views of his evidence. The Claimants urged me to conclude that he was a dishonest witness, making submissions on the subject which covered around 17 pages of their closing submissions. The Defendants suggested that he was an essentially honest witness, the defects in whose evidence could be attributed solely to *Gestmin* factors.

24. Mr Rukhadze's evidence shared most of the negative features of Mr Jaffe's evidence. He too tended to discursiveness, preferring to give speeches rather than answering questions. He was particularly irked by the role of witness; he was quite often insistent about points which he wished to make, focussing on those, interrupting questions to make his points and trying to insist on being directed to documents which he wanted to highlight.

25. Mr Rukhadze struck me over the course of his lengthy cross examination as an unusually focussed man with a strong sense of self belief. He considered himself a key person from the outset of his encounters with the Family and his estimation of most of his co-workers was a low one. His reactions to events appeared relatively unclouded by emotion. He focussed on the physical effects of difficult times rather than his reactions and upon the goal rather than the technicalities. While it was obviously his case that he owed no duty to SCPI at the critical points in time, this attitude seemed to be one which pervaded his relationship with SCPI more generally, with his evidence at times indicating a willingness to operate independently of SCPI if it suited him. So too his attitude to the company structures: "*structures are there to serve us …and not the other way around*."

26. I received the impression that he would not be overly concerned about lying in what he considered a good cause; and indeed, in some respects I have concluded that his evidence was not truthful but constructed (sometimes on the hoof and inconsistently with the case put by his legal team) on the basis that he perceived that this would be most helpful to his case. I shall come to examples during the course of the discussion of the factual issues, but one example of this was his novel suggestion that the business opportunity was always more his than SCPI's: *"it was my opportunity, I brought it to my friends, my co-venturers"*. This was entirely unheralded and appeared to be contrary to his pleaded case.

27. Likewise, his case that JSC Standard Bank (to which he held legal title as Badri's trustee) was really his asset and that Mr Jaffe's relationship with the Family was effectively dead as early as 2008 was not how his case, and his written evidence, had previously been put. So too one might point to his evidence that all the partners in the LLP were friends, when he never lost an opportunity to denigrate Mr Khan, and the documentary record amply demonstrated the dislike which Ms Gabbert had acquired for him as a consequence of what she perceived as his hostile treatment of her.

28. Mr Alexeev was generally less discursive as a witness than the two main witnesses, though like them he plainly struggled with the lack of control inherent in the role of a witness, leading to some confrontational moments. He was also a much less controlled witness than Mr Rukhadze, reacting with a degree of visible contempt to some questions. He impressed me both from his oral evidence and the documentary record as a man who was bad at keeping his feelings to himself. He was very open about the fact that his evidence was inevitably affected by the passage of time. Like Mr Rukhadze he seemed to hold his co-workers in low esteem; the only one he appears to have rated was Mr Rukhadze. Indeed, his regard for Mr Rukhadze appeared almost without limit; he spoke of him as being generally right about any issue. As with Mr Rukhadze I considered that he would not consider lying out of the question if it served his purposes; and I considered that his answers in some respects indicated that he had done so in his evidence.

29. Mr Marson was careful in his evidence and also careful not to be discursive. So far as demeanour is concerned (though this is a notoriously unsafe guide) he appeared to be trying to assist the court. However, at a number of points his answers appeared to be surprising, coming from someone who had trained as a lawyer with a leading UK firm and later worked with a leading US firm, albeit in transactional rather than litigation work. This may perhaps be explained in part by the fact that he had been out of the legal world for some time, having run his own business prior to joining Revoker; and in part by the fact that, like the other main witnesses, he had plainly considered the documents very carefully before giving his evidence. At points it appeared to me that he had persuaded himself of a position which was not, looked at objectively, credible. At others I was regretfully persuaded that despite his professional status he was prepared to be less than candid during his evidence. I also note that his casual approach to the erroneous use of Statements of Truth on the Defences (a point dealt with separately below) indicated that his conduct fell below the levels that one would expect for a qualified solicitor.

30. Mr Hauf's evidence was refreshing in the context of this case. Owing to health issues his statement was given without much intensive work on his part, though parts of it had plainly been "lifted" from earlier witness statements in other proceedings to which he may have given greater attention. Owing to further health issues he had been unable to do much

in the way of preparation for giving his evidence. He was clear and candid about what he could not recall, and ready to accept faults of recollection. I was generally able to accept his evidence as accurate. Unfortunately, it was only of tangential relevance to the matters in issue

31. Like Mr Hauf, Mrs Gudavadze had not prepared for her stint in the witness box with the thorough document by document preparation demonstrated by the principals in this dispute. However, although some features of her evidence appeared candid and telling I did not overall find her evidence particularly satisfactory. My clear impression was that one could discern indications that she had prepared for the hearing by embracing some broad lines for responses relating to certain periods, and she did appear to have some particular points which she was determined to get across, regardless of the questions asked – though to be quite fair to her at times I was unsure whether this approach derived from not having fully understood the question being asked. But certainly, her evidence did appear to have been considered in the light of the issues and to sit ill with evidence she had previously given, for example in the Berezovsky litigation.

32. I have less hesitation about reaching this conclusion because this approach was reflective of the evidence of Mrs Gudavadze's dealings as they appeared over the period in question. Although both Mr Jaffe and (to a lesser extent) Mr Rukhadze sought, in support of their case that they acted selflessly in stepping forward to assist with the Recovery Services, to portray Mrs Guduvadze as vulnerable and in need of their protection from other predatory persons who were desperate to take advantage of her (Mr Jaffe memorably described her being like "a juicy steak"), it is telling that neither was able to persuade her to do so to their timetable and that she ultimately signed an agreement which it appears was considerably less favourable to the Recovery Services providers than the terms which they had put forward. She and the Family were plainly not (at least at the outset) sophisticated operators; that much is clear from the assistance they sought, for example in negotiating with Mr Hauf. However, it appears to me that she was focussed and essentially clear sighted. Her evidence was clear as to her own motivations; she was concerned to protect her family. Even though appearing as a witness to support Mr Rukhadze's case she was not prepared to say that she trusted him fully: "Доверяй, но проверяй" was her answer ("Trust, but verify").

33. Witness statements were also served by the Claimants of Mr Petrovic, the former manager of Salford Belgrade, and Mr Bedineishvili who was Mr Rukhadze's predecessor at Salford Georgia. The Defendants elected not to cross examine them and their evidence is thus to be taken as accepted.

The Statements of Truth

34. Before entering on the full consideration of this case I should deal with one troubling aspect of the procedural position. A number of issues arose as to apparent inconsistencies between the Defendants' pleaded case and the evidence of the Individual Defendants. The Defences advanced for the First to Fourth Defendants featured a statement of truth signed only by Mr Marson. Thus, Mr Rukhadze and Mr Alexeev had not ever signed a statement of truth in relation to the pleading served on their behalf.

35. Mr Rukhadze plainly did not see that this was a matter of moment, and said this was a matter for his lawyers. Mr Alexeev took the matter fairly lightly, although acknowledging that the signing of a statement of truth was a serious matter. Neither of them appeared to comprehend exactly what a statement of truth was, or to have been taken through the pleading in detail by Mr Marson, ensuring that they approved all relevant factual allegations before the statement of truth was signed. The impression which I received was that Mr Marson had provided a copy for the other Defendants to review and had simply taken their OK to sign it : Mr Marson suggested that "*I called or emailed him and said, you know, do I have your authority to sign?*". That was broadly consistent with Mr Rukhadze's view that Mr Marson *"assumed probably that I had read it and was okay with it".* The evidence of course did not cover, and I do not know, what dialogue Mr Rukhadze and Mr Alexeev had with their legal team in this regard.

36. This illustrates precisely why the rules as to the signing of a statement of truth were introduced. There was a concern under the previous regime for signing of pleadings that it made it too easy for parties to put forward a case which they knew to be untrue or unsupported by evidence, or plead aspirationally, hoping that something would turn up in the course of proceedings: *Clarke v Marlborough Fine Art (London) Ltd and another* [2002] 1 WLR 1731 at [20-21]. The importance of the requirement of the statement of truth is underpinned by the fact that it is given a whole rule, Rule 22 in CPR, and by the fact that the sanction for breach can be contempt of court.

37. The bottom line is that the process which was adopted here was defective. It is important that where there are multiple defendants; each defendant reviews and provides either his own statement of truth or his authority to his legal representative to make that statement for him. If composite defences are served, care should be taken to ensure that provision is made for each defendant to review and verify each element of the case as it pertains to him. It is troubling that this question, of ensuring that each individual defendant has signed or approved the appropriate person to sign a statement of truth following a proper consideration of the document, appears to have been be missed; not least because it indicates that a sense of the very real importance of statements of truth may have been lost in the years which have passed since they were introduced.

38. What was most troubling however, was Mr Marson's evidence on this subject. Mr Marson may not have been a litigation lawyer by training, but he was trained at one of the most prestigious firms in London. Further his role for Hunnewell after the events with which this case is concerned involved his being in day to day charge for Hunnewell of substantial litigation. Yet his evidence was surprising on this point in two respects.

39. The first is that he gave it as his view that there was no issue with this procedure – he said that he was entitled to sign statements of truth on behalf of the other Defendants as "someone given authorisation". This is not correct. What CPR 22 says is:

> "6) The statement of truth must be signed by –
> (a) in the case of a statement of case, ... –
> (i) the party or litigation friend; or
> (ii) the legal representative on behalf of the party or litigation friend; ..."

40. Mr Marson was, as regards Mr Rukhadze and Mr Alexeev, neither their litigation friend nor their legal representative. He plainly regarded this as an irritating formality – he had not checked the position once the issue became live in the proceedings and he appeared completely untroubled by the point even when it was put to him squarely in cross examination.

41. The second point is that it was quite apparent that he did not seem to grasp, even as he gave his evidence, that it was a matter of real moment that the essential requirement of CPR 22, that the litigant have checked and verified that the factual case which is being advanced on his behalf is true had not been complied with. My impression was that he would not see any reason to change his approach to statements of truth in future litigation.

42. I note these points not because they have any impact on the issues which I have to determine, but because the facts that Mr Marson, despite his training, could give such evidence and (putting Mr Marson aside) that this situation had been allowed to come about indicates that a clear reminder as to the importance of Statements of Truth and a careful observance of the requirements pertaining to them may not go amiss.

Relevant Legal Principles and Issues

Fiduciary duties

43. The factual issues in this case reference a number of issues in the authorities. Furthermore, the Defendants have submitted that the possibility for liability to arise in this case is, based on the authorities, very narrow. It is therefore most helpful, particularly for any readers not

parties to the case, to set out the legal backdrop and flag those points which required to be evaluated in the light of the factual findings in this case before returning to the specific issues later in the judgment under the heading "The Application of the principles".

44. I commence with the Defendants' case as to what the law establishes. The Defendants submitted that there are on the authorities three potential types of breach in relation to the diversion of an opportunity which a fiduciary may commit during the period whilst he still owes duties:

    i) Failing to disclose and account for (and therefore keeping for himself) a relevant business opportunity and instead resigning to pursue it for oneself;

    ii) Actively diverting to oneself and/or sabotaging for the company, whilst still a fiduciary, a maturing business opportunity for which the company is or should be pursuing; and

    iii) Taking illegitimate preparatory steps whilst still a fiduciary for post-resignation competition.

45. They argue that the only allegation with which this case could conceivably be concerned is a type (ii) breach. For the reasons which I will set out below I cannot entirely accept this summary, which appears to me to unduly constrain the operation of the relevant principles.

46. The general background to the case on fiduciary duties is not controversial. It was common ground that:

    i) Fiduciary duties are imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another: see Sales J in *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch), [2012] Ch 613 at [223]-[225].

    ii) The essential question (which falls to be assessed objectively) which dictates whether or not a person owes fiduciary duties is whether he has *"undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence"*: see Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18.

    iii) The categories of fiduciary relationship are not closed but there are a number of settled categories of fiduciary relationship, including (a) agents: see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 at [5]**;** (b) solicitors: *Boardman v Phipps* [1967] 2 AC 46 (HL); (c) company directors (*Snell* at 7-004).

iv) Although not every employee owes obligations as a fiduciary to an employer, employees may do so: *"the distinguishing mark of the obligation of a fiduciary in the context of employment, is not merely that the employee owes an obligation of loyalty but of single-minded or exclusive loyalty."* (per Moses LJ in *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735, [2007] FSR 16 at [36]).

47. A fiduciary relationship is a serious one and is not lightly found. Reflecting that:

i) A fiduciary may, depending on the character of the venture for which the undertaking exists, be in a fiduciary position in relation to a part of his activities and not in relation to other parts. Its ambit is determined by the character of the undertaking for which the partnership exists, to be ascertained, from the express agreement of the parties and from the course of dealing actually pursued by the firm: *NZ Netherlands Society "Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126 at 1130.

ii) In relation to a company, a director who is also a shareholder is under no obligation, when acting in his capacity as a shareholder, to act in accordance with the duties that he owes in his capacity as a director. See *Wilkinson v West Coast Capital* at [299] to [303].

48. The distinguishing obligation of a fiduciary is the obligation of loyalty. To put the matter negatively, a fiduciary relationship is one in which the fiduciary is not free to pursue their separate interests (*Meagher, Gummow & Lehane*, 5th Ed, 2015, page 143). Or, as it was put in *Mothew*: *"The principal is entitled to the single-minded loyalty of his fiduciary."*

49. This has for current purposes two salient aspects: the no-conflict and no-profit rules. These were highlighted by Lord Neuberger in the *FHR* case at [5]:

> "…an agent owes a fiduciary duty to his principal because he is "someone who has undertaken to act for or on behalf of [his principal] in a particular matter in circumstances which give rise to a relationship of trust and confidence". Secondly, as a result, an agent "must not make a profit out of his trust" and "must not place himself in a position in which his duty and his interest may conflict"—and, as Lord Upjohn pointed out in Phipps v Boardman [1967] 2 AC 46, 123, the former proposition is "part of the [latter] wider rule". Thirdly, "a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts

> himself in a position where his duty to one principal may conflict with his duty to the other". Because of the importance which equity attaches to fiduciary duties, such "informed consent" is only effective if it is given after "full disclosure", to quote Jessel MR in Dunne v English (1874) LR 18 Eq 524, 533."

50. Equity prohibits a fiduciary from making a profit out of his fiduciary position for his personal advantage. As a result, a fiduciary is required "*to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it*": *Chan v Zacharia* (1984) 154 CLR 178 at 198.

51. This obviously encompasses the diversion or appropriation of the company's current business. But the fiduciary is also forbidden from setting *"the groundwork for diverting a corporate opportunity whilst a director"*: *Kingsley IT Consulting v McIntosh* [2006] EWHC 1288 HC, Mowschenson QC at [53].

Business Opportunities and Fiduciaries

52. The critical part of that spectrum for the purposes of this case is the question of business which is not yet that of the principal. As part of the duty of loyalty a fiduciary is under a duty not to divert what is referred to in the authorities as "a maturing business opportunity" away from the principal. Thus, a fiduciary is prohibited *"from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing"*. This is discussed in a number of authorities.

53. The principal ones which have been ventilated before me are *Canadian Aero Service Ltd v O'Mailley* (1973) 40 DLR (3d) 371 (from which the above quotation derives – p 382), *CMS Dolphin v Simonet* [2002] BCC 600 at [84]-[97]; *Hunter Kane Ltd v Watkins* [2003] EWHC 186 (Ch), *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370, [2003] BCC 332 (CA) at [71]; *Quarter Master UK Ltd v Pyke* [2005] 1 BCLC 245 at [57]; *Ultraframe v Fielding* [2005] 1638 (Ch) at [1332]-[1356].

54. This of course begs the question of what constitutes a "maturing business opportunity"; and this is a key issue in this case. How mature is mature? The Defendants have, at least in passing, contended that the business opportunity is not to be regarded as meeting this hurdle unless the Claimants can show that a deal would, on the balance of probabilities, have been done: *" it needs to be maturing in such a way that one can infer that, were it not for some improper conduct during the currency of the fiduciary relationship, then a deal would have been done"*.

55. I do not accept this submission. The authorities are far from prescriptive on this point and certainly do not point to a test which is so strict as that. Nor were the Defendants able to point me to any authority which indicates that the test for which they contend is the correct one.

56. In *Island Export Finance Ltd v Umunna* [1986] BCLC 460 the existence of a past transaction which opened up the possibility of future business was held not to be a "maturing business opportunity". At the other end of the spectrum in *CMS,* ongoing business was, perhaps unsurprisingly, regarded as falling within the test.

57. The phrase derives from the *Canadian Aero* case, and the circumstances in which it was invoked in that case were circumstances where the directors in question resigned "*in the heat of the maturation of the project, known to them to be under active Government consideration*".

58. In *Hunter Kane,* Bernard Livesey QC (sitting as a Deputy Judge of the High Court) confirmed that the opportunity does not need to have progressed as far as a contract (at [56]). In that case he found that an opportunity met the threshold where it had progressed as far as "*a protocol, a formal arrangement between the parties, in accordance with which the [principal] had a reasonable expectation of doing business…"* especially given *"…the fact that [the client with whom the opportunity existed] had already set aside £100,000 for [it]*" (see references to the opportunity with Unilever at [57]).

59. The Defendants pointed to *Kao Lee & Yip v Koo Hoi Yan Donald & Ors* [2003] 2 HKC 113 per Ma J at [70] – [75] as significant in noting the importance of considering whether the opportunity was being actively pursued by the principal and the stage which the opportunity had reached. Ma J in that case also suggested that it may be seen as an aspect of the no profit rule which exists to ensure a causative nexus between the profits made and the breach of duty. The dichotomy he proposed was between tangible or mature opportunities and nebulous or uncertain ones. He also gave as an example of an "embryonic business project" which would not qualify one where a contract did not appear until a year after the manager had left the company and was in effect called into being by a fresh use of his skill and initiative. At [74] he posited this test: *"where the opportunity is so remote that the eventual obtaining of it by the fiduciary cannot realistically be said to be linked to any position of trust and confidence that the fiduciary was in regarding that opportunity, there is no breach."*

60. Such limited guidance as the authorities provide indicate to me that a business opportunity may be regarded as "maturing" so long as there is contact between the principal and a third party with regard to future business and that contact has progressed to the stage where some outlines of future contractual relations are in play. There need not be a draft contract or any imminence of agreement. Such regimented requirements would be out of keeping with the very fact sensitive nature

of these cases as pointed out by Rix LJ in *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200; [2007] BCC 804 at [76]) – a passage to which I shall return below.

61. I should note that there is a certain controversy about the applicability of the "maturing business opportunity" criterion, arising out of the judgment of the Court of Appeal in *Re Bhullar Bros* [2003] EWCA Civ 424 [2003] BCC 711 where the Court of Appeal declined to apply it (see Prentice & Payne "The Corporate Opportunity Doctrine" in [2004] LQR 198) refusing to limit itself to maturing business opportunities which are being pursued. However, it was not suggested for the Defendants that the doubts expressed there are relevant here; and that implicit concession appears to me to be correct given that that case was a case of active steps entirely pre-resignation.

62. I would also note that this approach to what constitutes a maturing business opportunity also seems to be consistent with the position on opportunities which are not likely to eventuate for the principal. Here the authorities indicate clearly that a fiduciary may be in breach by diverting an opportunity even if it is unlikely that the principal will be able to secure that opportunity: see for example *Canadian Aero* at p 383-4, *Re Bhullar* at 723D and most clearly perhaps *IDC v Cooley* [1972] 1 WLR 443 where the chances of the principal securing the opportunity were found to be no better than 10%.

63. Similarly the fact that the parties may be contemplating or negotiating a termination of a relevant relationship, or even that they have reached agreement in principle that the relationship will be terminated, does not result in duties ceasing to be owed. See *Re Bhullar* itself and *Pennyfeathers Ltd v Pennyfeathers Property Company Ltd* [2013] EWHC 3530 (Ch) at [58].

64. Both of these approaches are in turn consistent with the no profit rule, regarding the business opportunity as essentially part of the property of the company.

65. The opportunity however is subject to limits, both of which are relied upon in this case for the Defendants. The first is that it must have come to the director or fiduciary by reason (and only by reason) of his position as such fiduciary *Don King Productions Inc v Warren & ors* [2000] Ch 291 at [40] and [43]; *Wilkinson v West Coast Capital* [2007] BCC 717 per Warren J at [300]. Here this will require focus on whether on the facts the opportunity was one which came to the Defendants, but particularly Mr Rukhadze, independently or by virtue of his position with SCPI.

66. The second is that it must be an opportunity which the company/person to whom duties are owed is "actively pursuing". In this case this potentially feeds in to complex factual debates about the latter phase of SCPI's relationship with the Family and whether the opportunity had been essentially abandoned. The Defendants say that a director or other

fiduciary will cease to owe duties in respect of an opportunity if the company decides not to pursue the opportunity, leaving the director or other fiduciary free to do so and rely on *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 and *Peso Silver Mines Ltd v Cropper* [1966] SCR 673. The Claimants submit that these cases are best seen as cases where there was no breach because the principal had given informed consent.

67. I accept these submissions in broad terms. The *Queensland* case does indeed seem to have been a case about consent, with Lord Scarman expressly referring to the facts of full knowledge and assent. The *Peso Silver Mines* case however is in my view much more akin to *In Plus* in that it was a case where the business opportunity was effectively at an end, in that it had been definitively rejected by the board of the company. I conclude that while "active pursuit" will be fact sensitive, the cases indicate that a clear dissociation of the principal from the opportunity will be necessary to justify a conclusion that there is no longer active pursuit of a business opportunity which would otherwise be regarded as a maturing one.

68. I should also note that the formulation in *Canadian Aero* suggests that the two requirements are alternative rather than cumulative. However subsequent authority has made clear that it is unlikely that this was meant, and that if it was, the English cases diverge, and require the satisfaction of both criteria. See *Island Export Finance Ltd v Umunna* [1986] BCLC 460 (at p.481), *CMS Dolphin* (at [91]).

Duration of fiduciary duties

69. The issue which has been most hotly contested before me is the question of duration of fiduciary duties, it being Mr Rukhadze's contention that his fiduciary duties ceased to operate once he resigned and so the later conclusion of a deal with the Family – or a resignation with the relevant business opportunity in mind – cannot be categorised as a breach of any fiduciary duty which might be owed.

70. The starting point, which was not in issue is that:

    i) It is not a breach of fiduciary duty for a fiduciary to resign from his post, regardless of how much damage it causes the company; *CMS Dolphin* at [87], [95]. *British Midland Tool* at [89]. *Shepherd Investments Ltd v Walters* [2007] FSR 15, *Balston v Headline Filters Ltd* [1990] FSR 385 at 412.

    ii) In general, fiduciary duties do not extend beyond the end of the relevant relationship: *"We do not recognize the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it. Equity does not demand a duty of undivided loyalty from a former employee to his former employer"*: *Attorney General v Blake* [1998] Ch 439 at 453.

iii) As Snell puts it at 7-013, a fiduciary is not barred from *"resigning and exploiting opportunities within the market in which his principal operates, where he did not resign from his fiduciary position with a view to exploiting such opportunities and where the opportunity was not one which his principal was pursuing at the time of resignation or thereafter."*

71. This rule prevents what would otherwise be an unattractive situation: that, purely by virtue of having been a fiduciary of a company and having become aware of a business opportunity in that capacity, a director is the only person in the whole world who is forever prohibited from taking up that opportunity.

72. Nonetheless, in order to prevent the emasculation of fiduciary duties, a fiduciary may be found to have breached fiduciary duties by reference to what he later does. Resignation will not avoid liability where the fiduciary uses for their own benefit property or information which they have acquired while a fiduciary; this will be a breach of the "no profit rule": see *Snell* at 7-013 and *Ultraframe* at [309]. This ensures that he does not resign the fiduciary position in order to do what the fiduciary doctrine would otherwise bar the fiduciary from doing: see Snell at 7-013 and *Boles & British Land Company's Contract* [1902] 1 Ch 244 at 246 – or that if he does do so, he pays the price for so doing.

73. The underlying basis of the liability of a fiduciary who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the fiduciary owed fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property: *CMS Dolphin* at [96].

74. How the rules regarding breaches and post resignation actions are best to be regarded appeared to be in issue between the parties. The Claimants' position appeared at some points to be that post-resignation conduct can amount to a breach of fiduciary duty; they pointed to the decision in *Hunter Kane* at [25] applying the earlier decision of the High Court in *CMS Dolphin*:

> " A director is however precluded from acting in breach of the requirement [to avoid conflict of duty and acting in self-interest], even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the Company and where it was his position with the Company rather than a fresh initiative that led him to the opportunity which he later acquired."

75. The Defendants' position is that post-resignation conduct is not capable of amounting to a breach of fiduciary duty. This is on the basis that resignation has the effect of terminating the fiduciary relationship and, upon termination, all fiduciary obligations cease. Therefore, it cannot be said that anything done post-resignation amounts to a breach of fiduciary duty. The Defendants rely on the decision of the Court of Appeal in *Foster Bryant* at [69] where Rix LJ clarified the reasoning in *CMS Dolphin* saying that:

> "In my judgment, Lawrence Collins J. was not saying that the fiduciary duty survived the end of the relationship as director, but that the lack of good faith with which the future exploitation was planned while still a director, and the resignation which was part of that dishonest plan, meant that there was already then a breach of fiduciary duty, which resulted in the liability to account for the profits which, albeit subsequently, but causally connected with that earlier fiduciary breach, were obtained from the diversion of the company's business property to the defendant's new enterprise."

76. In my judgment the Defendants are right about this as a matter of analysis and authority. Where liability arises from post resignation conduct it arises not because duties persist post resignation, but because of breaches of fiduciary duties prior to resignation which manifest only post resignation. However, in many ways this is a distinction without a difference, albeit that it alerts one to the necessity of rigorous analysis of the breach in question.

77. The second point at issue by reference to the same authorities was the question of whether resignation alone can be a breach.

78. The Defendants reject the proposition that at the moment the fiduciary resigns, if his motivation for doing so is to take up an opportunity, then that is a wrongful diversion as being unprincipled, and contrary to subsequent authority. The Defendants point to *British Midland Tool* and *Shepherd Investments v Walters* where the directors were found to have breached their fiduciary duties by reason of what they actually did whilst still directors in anticipation of the competition they planned. They submit by reference to these authorities that a director is not precluded from laying the groundwork for a new competing business if he does not do anything relevant to diversion of a maturing business opportunity.

79. The Claimants for their part point to *CMS* where the issue was defined by Lawrence Collins J (as he then was) thus:

> "The case raises (among other questions) the existence and applicability of the principle […] that a director is disqualified from usurping for himself or diverting to a company with which he is associated a maturing business opportunity of his company not only while he is still a director, but also even after his resignation, when the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company."

80. They also point to:

i) *Hunter Kane Limited v Watkins* [2003] EWHC 186 (Ch) at [25]: *"A director is however precluded from* [*obtaining for himself, either secretly or without the informed approval of the Company, any property or business advantage either belonging to the Company or for which it has been negotiating], even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the Company and where it was his position with the Company rather than a fresh initiative that led him to the opportunity which he later acquired."*

ii) Jackson & Powell on Professional Liability 8th Ed, 2-157, *" a fiduciary who resigns from the position which gave rise to his fiduciary obligations and then exploits for himself an opportunity of which he learnt from his fiduciary position will be liable to account for the profits he makes, as will a company which he forms in order to exploit the opportunity."*

iii) Bowstead & Reynolds on Agency 21st Ed, 6-067 *"An agent who resigns in order to exploit an appropriate opportunity remains subject to fiduciary obligations at any rate in respect of that matter."* (and to similar effect: Snell's Equity 33rd Ed, 7-013).

81. On this issue it seems to me that there is some force in what the Claimants say, but that the position is not quite as clear as they suggest. To my mind Rix LJ, in a characteristically rigorous analysis of the principles in his judgment in *Foster Bryant* at [76]-[77] has sounded a warning about over-constraining the doctrine, refusing to endorse the analysis in *Hunter Kane* because of the fact sensitive nature of the cases in which the issue arises and the need to take account of nuanced cases between the extremes. He stated:

> "The jurisprudence has shown that, while the principles remain unamended, their application in different circumstances has required care and

> sensitivity both to the facts and to other principles, such as that of personal freedom to compete, where that does not intrude on the misuse of the company's property whether in the form of business opportunities or trade secrets. For reasons such as these, there has been some flexibility, both in the reach and extent of the duties imposed and in the findings of liability or non-liability. The jurisprudence also demonstrates, to my mind, that in the present context of retiring directors, where the critical line between a defendant being or not being a director becomes hard to police, the courts have adopted pragmatic solutions based on a common sense and merits- based approach."

82. It is also apparent from his consideration of the cases that he regarded the question of fact specific disloyalty as being likely to be of significant importance in delineating cases on the borders of the doctrine. This approach is also clear from the passage at [108] of the *Shepherd Investment* case:

> "What the cases show, … is that the precise point at which preparations for the establishment of a competing business by a director become unlawful will turn on the actual facts of any particular case. In each case, the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties … or, in the case of an employee, will be in breach of the obligation of fidelity. It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case."

83. The turning point in any case will thus depend upon whether what has in fact been done is inconsistent with the fiduciary duty of a director to act in good faith in the best interests of the company ie. to do his best to promote its interests and to act with complete good faith towards it, and not to place himself in a position in which his own interests conflict with those of the company (or equally with the duty of fidelity of an employee).

84. Thus, it is quite possible that a "bad faith resignation" in breach of fiduciary duty may exist unaccompanied by any preparatory steps which qualify as separate breaches. That seems in the abstract to be consistent with the approach of regarding business opportunities as the property of the company, so that a resignation specifically to exploit such an opportunity can be seen both as a breach of a duty of loyalty and as a breach of the no-profits rule. In *Midland Tools* it is noteworthy that evidence of specific business opportunities was lacking. However, I do not consider that the authorities to date justify a firm conclusion that a resignation with an intention to compete is necessarily by itself a breach. Further it will be a rare case where there is literally nothing more to assist in discerning which side of the line a particular case falls.

The death of fiduciary duties

85. The Defendants also rely on the proposition that fiduciary duties can cease to exist, or be reduced in scope, if the relationship on which they are based effectively breaks down (even if formally it remains in place). In so doing they point me to *In Plus Group Ltd v Pyke* [2003] B.C.C. 332 and *Halcyon v Baines* [2014] EWHC 2216 (QB).

86. In *In Plus* Mr Pyke was a director of a company. He suffered a stroke, followed by a period of illness which led to his spending six months unable to concentrate on the firm's business. His relationship with his co-shareholder "became icy" and In Plus Group Ltd sought to force him to resign. Mr Pyke was deprived of any remuneration or information about the company. His office was moved. He was also refused repayment of loans he had made to the company. After six months of having been effectively excluded from the company, but while still a director, Mr Pyke set up his own company. That company then secured a contract with In Plus Group Ltd's major client. The Court of Appeal upheld the decision of the trial judge that there had been no breach of fiduciary duty. In the words of Sedley LJ (at [90]) Mr Pyke's duty to In Plus Group Ltd "*had been reduced to vanishing point by the acts (explicable and even justifiable as they may have been) of his sole fellow director*".

87. The Claimants assert that these cases do not establish any general principle that fiduciary duties cease to exist if a relationship breaks down, but only a rather narrower point; namely that there may be cases where fiduciary duties cease to be owed because the relationship has come to an end in all but name, even if the formal arrangements have

not yet caught up with the reality. In *In Plus* the key findings were that Mr Pyke's *"working relationships"* with the companies were *"at an end"* and that he *"remained, in name only, a director of each company"*.

88. As for *Halcyon* this is not said to establish any distinct principle.

89. To the extent that it is contended for the Defendants that these authorities do establish any broad principle, I do not accept that proposition. The *Halcyon* case really goes nowhere, in that the decision in that case was based on another point, the judge preferring not to decide the case on the *In Plus* point. All it provides is an endorsement of the *In Plus* judgment and a tentative suggestion that the principle might well have been applicable on the facts of the case.

90. However, it seems to me that the judge's refusal to decide that case on that basis actually reflects the fact that the *In Plus* case was an exceptional one. This is plain from the following passage of Sedley LJ's judgment:

> "Quite exceptionally, the defendant's duty to the claimants had been reduced to vanishing point by the acts (explicable and even justifiable though they may have been) of his sole fellow director and fellow shareholder Mr. Plank. … the claimants' relationship with Constructive was consistent with successful poaching on Mr. Pyke's part, [but] the critical fact is that it was done in a situation in which the dual role which is the necessary predicate of Mr. Yell's case is absent. The defendant's role as a director of the claimants was throughout the relevant period entirely nominal, not in the sense in which a non-executive director's position might (probably wrongly) be called nominal but in the concrete sense that he was entirely excluded from all decision-making and all participation in the claimant company's affairs. For all the influence he had, he might as well have resigned."

91. Three points are apparent from this: (i) it was an exceptional case (ii) the presence or absence of a dual role was key and (iii) that was because for all of the relevant period there was a full exclusion from decision-making and participation (at [76] Brooke LJ notes that this had pre-dated the relevant events by more than six months). I conclude that it is on these points that focus must be turned when the question of exclusion is considered.

LLPs

92. LLPs were created by the Limited Liability Partnerships Act 2000 ("the 2000 Act") and have independent legal personality. The law relating to

partnerships does not apply to an LLP (section 1(5)). The mutual rights and duties of the members and the mutual rights and duties of the LLP and the members are determined, subject to the provisions of the general law and to the terms of any limited liability partnership agreement, by the default provisions set out in the LLP Regulations 2001.

93. By reason of Regulations 7(9) and 7(10) a member of an LLP owes the following duties:

> (9) If a member, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.
>
> (10) Every member must account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property of the limited liability partnership, name or business connection.

94. The nature of the duties to account in Regulations 7(9) and 7(10) appear to be closely analogous to the equitable duties. That being so, Whittaker and Machell in *The Law of Limited Liability Partnerships* (4th edition, 2016, p187-188) express the view that the 'no profit' rule applies in the same way, i.e. encompassing post-termination use of a pre-termination opportunity.

95. Another facet which requires consideration is the rule which states that every member of a limited liability partnership is the agent of the LLP (section 6(1)). There is an issue between the parties as to whether that imports a fiduciary duty of good faith. The Claimants submit that every member of a limited liability partnership is the agent of the LLP under section 6(1). They point to the judgment of Sales J (as he then was) in in *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch), [2012] Ch 613.

96. The Defendants dispute that this is the effect of Sales J's judgment, submitting that one must look to whether a particular LLP partner is acting in any situation as the agent of the LLP. They say that Sales J rejected the submission that members of the LLP owed a general fiduciary duty of good faith outside the duties conferred by Regulation 7, concluding that whether or not such duties existed would depend on the facts of a particular case. In particular they point to the passage where he said:

> "That would still leave open the possibility of imposition of more limited fiduciary obligations in

> relation to actions taken by them in particular situations. In particular, section 6(1) of the LLPA provides that every member of a limited liability partnership is its agent, and there is nothing in the Act to qualify the usual fiduciary obligations which an agent owes his principal in relation to the transactions which the agent enters into on the principal's behalf."

97. Here they say the factual basis for such a duty is not made out and that Mr Rukhadze and Mr Alexeev were simply members of Revoker, so no fiduciary duty could follow.

98. I accept this submission in part. I do not consider that Sales J was saying that all LLP partners will be fiduciaries (see for example [208] *"A limited liability partnership is not a partnership in the traditional sense, in which the individual partners owe fiduciary duties to each other in relation to the management of the affairs of the partnership and when acting as agents for the partners"* and see also at [218]) and accept that whether they do so will turn on the role which they in fact perform, in line with the fact that fiduciary obligations essentially arise from particular circumstances, where a person assumes responsibility for the management of another's property or affairs. Whether Mr Rukhadze (and Mr Alexeev) fall within the principle is a matter I will consider below, once the facts have been found.

Facts and Factual Disputes

The background

Badri

99. Badri was born in 1955 in what was then the Georgian Soviet Socialist Republic (part of the USSR) and began his career working for the Georgian arm of a state-owned car manufacturer. He moved to Russia towards the end of the Communist era and it was there, during the 1990s, that he made his initial fortune, principally through business dealings with BB and Roman Abramovich. However, in October 2000 BB fled Russia following a public dispute with the new President of the Russian Federation, Vladimir Putin. Since Badri's well-known association with BB made him the target of government hostility he too left Russia and returned to live in Georgia in 2001.

100. For a number of years after 2001, the constant threat of extradition proceedings by Russia left Badri virtually stranded in Georgia. By 2006 he was able to travel more freely – partly due to the announcement in 2006 that (at Badri's instigation) he and BB had ended their business relationship, an event that became known as the "Economic Divorce". From 2006, Badri and his family spent increasing amounts of time in

the UK and he acquired a UK residence in Leatherhead, called Downside Manor. Nonetheless, Georgia remained the centre of gravity of Badri's life until the regime forced him to flee the country just months before his death.

101. In contrast to BB (who continued his campaign against President Putin from exile) in general Badri showed little interest in politics. He gave some support to the 2003 Rose Revolution that brought Mikheil Saakashvili to power in Georgia, but his public activities until 2007 focused on philanthropy and investing in Georgian institutions, such as the football club Dynamo Tbilisi and Mtatsminda Park, a well-known amusement park overlooking Tbilisi. However, another asset that Badri acquired during this period was Imedi, Georgia's only independent TV broadcaster. As a result, his relationship with President Saakashvili, who did not appreciate its coverage of Georgian politics, was often fraught.

102. In 2007, Badri's relationship with the President deteriorated into open hostilities. The *casus belli* was Imedi's broadcast of an interview with the former Georgian defence minister, Irakli Okurashvili, during which he claimed that corruption was widespread within the government and that the President had personally ordered him to arrange Badri's assassination. Shortly afterwards, Mr Okurashvili was arrested and made a public confession that he and Badri had fabricated the allegations to discredit the government. But on his release, Mr Okurashvili retracted the confession and asserted that it had been obtained by duress.

103. These events sparked mass protests throughout Georgia. On 2 November 2007, Badri made a speech at an opposition rally in Tbilisi and left the country the same day, never to return. To defuse the crisis and re-establish his authority, the President called a snap presidential election for 5 January 2008. Badri stood as an independent candidate from exile but came third. In the meantime, the government began to appropriate his Georgian assets and opened a criminal investigation against him.

104. The crisis in Georgia was ongoing when Badri died suddenly at Downside Manor on 12 February 2008.

105. The problems that confronted the Family after Badri's death were the direct consequence of his idiosyncratic way of doing business. He had little time for documents or legal structures. He did not use a private office. His record-keeping was practically non-existent. Once he had negotiated a business deal, he had minimal involvement in managing the assets he had acquired. This was left to others – usually trusted individuals drawn from his network of patronage, as opposed to professional managers. Due to Badri's fear that he, or his assets, might be attacked by the Russian or (later) Georgian governments, many of these individuals held the assets they were managing in their own names, almost invariably under arrangements that were informal, un-

documented, and based on personal trust. Badri did not even have direct access to his sources of cash, which were kept by informal "treasurers". Disastrously for the Family, he made no plans whatsoever for what should happen to his assets in the event of his death.

106. Two examples may be given of Badri's approach to his assets, both of which feature prominently in the evidence:

i) The Rustavi steel plant in Georgia ("Rustavi") and a plot of prime development land in Florida called Fisher Island were among the most valuable of Badri's assets. However, so far as the world outside was concerned, they were held and thus owned by his cousin, Joseph Kay ("JK"). This subterfuge extended to the holding structures for the assets: during litigation between the Family and JK in Gibraltar, the manager of the trusts which held Rustavi and Fisher Island told the Court that he had been entirely convinced until after Badri's death that the trusts had been settled by JK and that JK and his family were the intended beneficiaries of the trust assets.

ii) The Family discovered after Badri's death, and only then as a result of litigation instigated by BB, that in 2004 and 2005 Badri had transferred control of US$600 million of his money to his friend, a Russian businessman called Vasily Anisimov ("VA") without recording anything in writing, and that VA was the only living witness to the arrangements.

107. While Badri's approach to business more or less worked during his lifetime, it was critically dependent upon the strength of his personality and of the relationships he had formed over many years. Furthermore, the absence of any centralized organization, and the secrecy surrounding many of his business interests, meant that nobody apart from Badri himself had full visibility of his diffuse business empire.

Mr Jaffe, SCPI & VDP

108. Mr Jaffe's background was in private equity and investment banking. He had left Russia in 1989 and after a short period of time finding his feet, he rapidly gained qualifications in the US university system and graduated from Harvard Business School in 1996. After that he worked for two large investment and merchant banks operating in Central and Eastern Europe, Russia, and the CIS.

109. Mr Jaffe met Badri in August 2001. SCPI was established by Mr Jaffe in 2001 specifically to provide investment management services to BB and Badri, and he remained its sole shareholder and CEO at all material times. As alluded to above, SCPI was one of the few professional managers with which Badri did any substantial amount of business.

110. Mr Jaffe was a member of a 'Board of Directors' in respect of Mr Berezovsky's and Badri's economic interests. In the course of his various

roles, he became aware of Badri's ownership interests in a range of assets, and he had worked closely with people such as BB, Mr Anisimov and others involved in Badri's business empire. He developed a strong personal, as well as professional, relationship with Badri. From around 2002, Mr Jaffe also came to know the Family; and this interaction increased from 2006 when they relocated to the UK.

111. The principal asset under SCPI's management at the times material to these proceedings was a BVI limited partnership formed in 2004 called Value Discovery Partners ("VDP"). The Principal Limited Partner in VDP was a later incorporated Gibraltar company called New World Value Fund ("NWVF"). It held virtually all of the partnership assets which had been acquired on behalf of Badri and BB. These comprised shares in food and beverage businesses in Eastern Europe and the Balkans. SCPI was the General (i.e. managing) Partner. Pursuant to the articles of partnership (the "VDP Articles") SCPI was entitled to an annual management fee of 2% of the aggregate capital contributions of the limited partners. Carried interest in the assets of VDP was payable to two Special Limited Partners, KBC Partners LP and SCI Partners LP. Both entities were created to receive and hold the economic interests in the assets managed by VDP of Mr Jaffe and the other individuals who managed VDP or its assets. The overall effect of the provisions of the VDP Articles concerning carried interest was that the Special Limited Partners would together be paid 30% of the profits or gains made on the sale of the assets.

112. VDP and the Fund were time-limited in that the VDP Articles provided at clause 1.5 that the partnership should terminate on 1 July 2008, subject to SCPI's right under clause 11.2 to extend the partnership for successive periods "in order to permit an orderly liquidation of the Partnership Assets", though with a longstop date of 1 July 2012 (to which date it was in the result extended).

113. Although the assets contributed by NWVF had been acquired using money which ultimately belonged to BB and Badri, VDP was deliberately structured to conceal their connection. Thus, they had no interest of any kind in VDP or in NWVF. Instead, entities held in trust structures associated with BB and Badri held loan notes in NWVF which were convertible into shares – the plan being that conversion would take place upon the sale of the assets.

114. The reason why VDP was structured as it was, was the real fear that the assets would be placed at risk if it became known that Badri and (especially) BB, with all of their political and legal problems, were the investors. Despite SCPI's efforts to actively distance itself and Badri from BB, rumours circulated that BB was the real investor in the underlying assets and that Salford itself was a front for his business interests. It is common ground that the public announcement of the Economic Divorce in 2006 came as a huge relief to the management of SCPI and that the possibility of a relationship with BB remained a sensitive issue.

Individuals and offices

115. Most of the people who became involved in the Recovery Services were originally based at SCPI's head office in Pall Mall in London, and were working on VDP issues both before and after the start of the recovery work for the Family. In addition to Mr Jaffe himself, these were Paul Blyumkin (CFO), Peter Nagle (COO), Jamal Khan (in-house counsel), and Kira Gabbert (accountancy and compliance).

116. SCPI had its head office in London. It also had offices in Belgrade (headed by Mr Petrovic) and Moscow (headed by Mr Ashurov and which handled the day to day management of the VDP assets) and another registered branch office in Tbilisi ("Salford Georgia") which was managed from 2004 by Mr Rukhadze in succession to Mr Bedineishvili. By February 2008 SCPI had operations in 4 countries/regions and had investments worth around US$1 billion under its management, including US$320 million invested in VDP. It held assets across a range of industries in Russia, Ukraine, Georgia and the Balkans.

117. Mr Jaffe's general practice was to employ senior staff as consultants, with agreed fees and/or economic interests in the assets they were employed to manage.

118. Mr Rukhadze was born in Georgia but has been a US citizen since 1997. After completing an MBA at Dartmouth College (Tuck Business School) he worked for McKinsey & Co. In 1996 he created a private equity investment fund focused on investment in the Caucasus region, which was transferred to JP Morgan in 2001. He became known to SCPI through a deal in 2002 and thereafter took on some consultancy work for SCPI focussed on the telecoms industry. He was appointed as the head of SCPI's Georgian office in 2004, and had become a director of SCPI at around the same time. He had no knowledge of Badri or his family before he started consulting for SCPI, but became close to Badri and to a lesser extent Mrs Gudavadze as a result of his role. His good relationship with them was encouraged by SCPI who paid his expenses of events which mixed business and social aspects, such as a trip to the Emmys.

119. Salford Georgia was in some ways distinct from SCPI's other offices. The extent of this is in issue, but by way of introduction it can be said that it had no responsibility for managing the assets of VDP. During Badri's life Mr Rukhadze took many of his instructions direct from Badri. Further, although Salford Georgia engaged in major M&A transactions and managed valuable commercial assets (for example Badri's interest in Georgia's largest telecommunications company, MIG) it also managed projects that were personal to Badri and were not intended to make money. Finally (and a point which was plainly close to Mr Rukhadze's heart), Salford Georgia's assets were not part of VDP and Mr Rukhadze effectively held legal title to some assets as Badri's trustee, for example his interest in JSC Standard Bank ("Standard Bank"), an asset acquired

via SCPI in 2005. At the time of Badri's death, Mr Rukhadze was attempting to negotiate a deal with the Georgian government and as part of that process, Mr Rukhadze negotiated the sale of Standard Bank.

120. This distinctness led to something of an issue as to Mr Rukhadze's role vis a vis SCPI. He resisted the contention that he had a senior role in SCPI in relation to the management of the Salford Georgia assets or that in terms of the business as a whole, Mr Jaffe was his boss. His evidence was that he had wanted to partner with SCPI, that although Mr Jaffe appointed him to head up Salford Georgia, Salford Georgia was distinct and was essentially his business – he was *"a partner in a strangely defined partnership"*. Certainly, there was a noticeable distinction in terms of email addresses: while other SCPI executives used SCPI email addresses, Mr Rukhadze continued to use the email address of his own consultancy company. However, it seems to be the case, as reflected in the documents, that Mr Rukhadze was, as regards Badri, put in place to assist Badri by SCPI. The role had been taken by Mr Bedineishvili before him as a part of the SCPI structure reporting to Mr Jaffe and nothing changed when he handed control to Mr Rukhadze. Mr Rukhadze's own evidence in earlier proceedings that the assets managed by Salford Georgia were part of SCPI and that he functioned as a manager through Salford was clear and consistent with the contemporaneous documents. This evidence which is reflected in the documents and the other witnesses evidence is to be preferred to his last-minute attempts to portray himself as truly independent. The fact is that until Badri's death he regarded himself as an SCPI man, albeit of a *sui generis* nature.

121. Mr Rukhadze said that even at that stage he saw himself as the next most important person in SCPI after Mr Jaffe. I have no difficulty in believing this evidence. However, in broader terms he was seen within SCPI as only one of the most important people. A presentation from around this time indicates that he took rank officially as equal to the other managing directors Mr Ashurov and Mr Petrovic. While Mr Jaffe certainly had great confidence in him, and regarded him as a likely heir if he ever stepped back from SCPI, Messrs Blyumkin and Nagle took at least equal rank operationally; all slightly below Mr Jaffe. As Mr Hauf said, in SCPI terms if Mr Jaffe didn't want something to happen, it would not happen. Mr Jaffe was not only the owner of SCPI, he exercised control over its management.

122. This hierarchy is reflected in the fact that none of the Salford managers apart from Mr Jaffe held an equity interest in SCPI. Instead, they (and Mr Rukhadze was in this respect no different to Mr Ashurov and Mr Petrovic) were given percentage shares in SCPI's entitlement to carried interest arising upon the sale of managed assets. These amounted in early 2008 to a very large sum – estimated by Mr Jaffe as US$300 million. Mr Petrovic's unchallenged evidence was that Mr Jaffe was the person who made decisions as to the amount of the economic interest which each "partner" should have; and this was reflected tellingly in a series of Excel spreadsheets which noted shares in various assets including the

Recovery Services at different times, with amendments noted as "EJ approved".

Badri's death and immediate consequences

123. Badri's death was more than a personal tragedy for the Family. It was also a financial nightmare. The Family were not business people and Badri had maintained a strict separation between his business and home life. They had no access to cash and very little idea of what Badri had owned. Due to Badri's aversion to documentation, they had no easy way of finding out what assets existed. Even if no threats had appeared, it would have been a considerable legal and forensic undertaking just to identify the extent of the estate, let alone secure it.

124. But threats did appear at once. Many of the informally appointed managers of Badri's assets took advantage of Badri's death to claim the assets as their own. Virtually all of Badri's cash was held or administered by JK who had held various assets in his name, and a Russian businesswoman called Natalia Nosova in their capacities as his informal "treasurers". Neither of them would release funds to the Family. In consequence, they were so short of cash that they could not even afford to pay for Badri's funeral, or meet their household expenses.

125. JK also launched a two pronged attack. First, he relied on a document purporting to be a validly executed will which appointed him as executor of Badri's estate. Secondly, he claimed ownership of various assets within the estate such as Rustavi and Fisher Island. In relation to the will JK took proceedings in Georgia to establish his status, obtain control over Badri's assets, and prevent the Family from interfering. Although the testamentary documents on which JK relied were later shown to be forgeries, his claims were initially successful before the Georgian courts. He was recognized as the sole executor of the alleged will, and obtained orders prohibiting the Family from exercising any rights or interfering with his administration of Badri's assets.

126. But he was not the only wolf circling the Family. The other key threats came from:

    i) BB: initially painting himself as the Family's protector, BB attempted to manoeuvre himself into a position of control over the Family and the estate. His initial position was that the Economic Divorce was a transaction under which Badri had agreed to buy him out of their joint interests, but that it had not completed by the time of Badri's death. Accordingly, he claimed that the estate owed him a substantial debt. When BB's attempt to negotiate an agreement with the Family on this basis failed, he began to assert that the Economic Divorce was a sham and a PR exercise intended to shield Badri's and BB's joint investments from attacks by the Russian government. He therefore claimed an entitlement to 50% of the assets managed by VDP.

ii) Olga Safonova, a woman who claimed to have been married to Badri in St Petersburg in 1997, came forward asserting that as his lawful wife (and mother of his son) she was entitled to 50% of his estate.

iii) The Georgian government, with whom Badri had been unpopular due to his involvement in Georgian politics, took a number of aggressive steps against his Georgian assets. One example was Borjomi, a bottled water company, in relation to which they pursued criminal charges against employees and refused to renew its water extraction licence.

127. Over the weeks immediately following Badri's death, Mr Jaffe and Mr Rukhadze, among others, provided emergency assistance to help the Family cope with the crisis. Mr Jaffe was one of the first people to visit Mrs Gudavadze after Badri's death expressing his affection and support. He also took steps to help the Family; for example, he arranged for Mrs Gudavadze on behalf of the Family to instruct Debevoise & Plimpton LLP, who deployed a team led by Lord Goldsmith QC of that firm. Mr Jaffe also met with private client lawyers with a view to instructing them on behalf of the Family. Pending lawyers coming on stream he lent the services of Jamal Khan, SCPI's Head of Legal, who for a while was spending about half his time on this assignment. Mr Rukhadze's attempts in his evidence to undermine Mr Khan's efforts as being part of an effort to make himself more important were not convincing, particularly in the light of the contemporaneous documents which do show some of the work which was being done.

128. SCPI and specifically Mr Jaffe and Mr Rukhadze were well-placed to provide such assistance, for the reasons outlined above. Both Mr Jaffe and Mr Rukhadze tended to emphasise the philanthropic nature of their actions; the Defendants submitted in opening: *"Mr Jaffe and Mr Rukhadze assisted the Family on an entirely gratuitous basis and mainly out of a sense of obligation and sympathy"*. Nonetheless, the reality was that, however great their sympathy with the Family, they had an interest in doing so because of their carried interests in assets managed within SCPI. If the assets under SCPI's management were to fall under the control of JK or BB those interests would probably be lost or at least damaged. The damage to the fund from association with BB could be anywhere up to 30%.

129. Of course, it was open to them to side with one or more of the hostile claimants, and protect their interests by cutting a deal with them; and indeed, some within SCPI favoured this approach. To that extent it may be said that their actions in choosing the family's side were altruistic. But the reality is, it has seemed to me, that the reasons for the decision were decidedly mixed. This is reflected in some of the later correspondence, where in moments of tension self-interest often reared its head – thus in July 2009 Mr Jaffe wrote to Mr Rukhadze: *"If she [messes] it up and the value of VA deal is miniscule but at least get some*

cash we will need to change our deal completely with her. The risk reward ratio is becoming not interesting for us". This was also seen in Mr Jaffe's admission in evidence that the Fund was the reason he became involved in the Recovery Services. And indeed, even early on Mr Rukhadze seems to have been ambivalent about which strategy should be followed, floating the possibility of changing horses at least as regards some of the assets in which SCPI was interested. What was the predominant reason for the assistance given is not necessary for me to decide; but I do conclude that both Mr Jaffe and Mr Rukhadze in their conclusions that the preferable course was to support the Family included a healthy portion of self interest in their calculations, along with the genuine sympathy which I am persuaded did exist.

130. Thus, in the weeks following Badri's death SCPI instructed lawyers and PR advisors in Russia and Georgia, and Risk Advisory Group to assist in searching for assets and identifying their holding structures. Mr Rukhadze, charged with helping to locate assets in Georgia, did so, but also complained of the cost that the work was incurring for Salford Georgia. Mr Jaffe worked on a proposal as to how Ms Gudavadze would be able to cooperate with BB so as to avoid or minimise the impact of his claim. However, this led to an unhappy incident when Mrs Gudavadze met with BB alone and was persuaded to sign a Memorandum of Understanding ("the MoU") which stated that BB was the owner of half of Badri's estate. Mr Jaffe regarded this as a catastrophic mistake and took action to help her oppose BB's claims. Another area requiring urgent attention was alleviating the Family's cash crisis in the short-term by arranging in May 2008 for Mrs Gudavadze to receive a US$17 million loan from the proceeds of sale of Standard Bank, a task which obviously involved Mr Rukhadze, the nominal holder of the legal title to the Bank.

131. There is an issue as to whether the help provided during this stage should be termed Recovery Services. While there were elements which should probably be seen as falling outside the spectrum of Recovery Services, and the services provided were at an early stage, the aim of the assistance provided was the same as the aim of the services which were later provided – namely to assist the Family in identifying and recovering assets and withstanding threats from those who sought to divert Badri's wealth. Thus I conclude that SCPI's actions at the time amounted to the provision of some embryonic Recovery Services.

132. It became apparent, as the Family's problems multiplied, that they required a full-time adviser to assist them in dealing with the issues they faced. An initial suggestion was that Mr Mark Hauf ("Mr Hauf") (an American businessman who had known and worked with Badri in Georgia) should provide assistance; whether he was to do so as SCPI's nominee was in issue between the parties.

133. Mr Hauf appears to have entered the picture sometime around late March 2008. It is common ground that he was known to both Mr Jaffe

and Mr Rukhadze and that he was recommended for this role by Mr Rukhadze.

134. The factual dispute concerning Mr Hauf was really the first limb in the dispute as to whether the provision of the Recovery Services was ever an SCPI opportunity. Mr Jaffe's evidence was that in March 2008, Mrs Gudavadze had invited him and SCPI to begin to provide the Recovery Services on a "formal fee-paying basis". Whether there was any such agreement was formally in issue, though it was not addressed by the Claimants in closing. Mr Jaffe then said that he wanted to take up this opportunity immediately, he encountered strong resistance within SCPI, mainly from Mr Nagle and Mr Blyumkin. He therefore decided to agree to the appointment of Mr Hauf (though on the basis that his role was to implement strategies devised by SCPI) until such time as SCPI could become involved directly.

135. Mr Jaffe's evidence was that he and Mrs Gudavadze agreed a *"two-stage approach"* under which SCPI would provide informal assistance in the first instance (with Mr Hauf taking the lead role) and would step in more formally later with Mr Hauf taking a secondary role. The Claimants point in support of this to contemporaneous emails referring to the *"two-stage approach"* under which *"[MH] steps out, Salford is running it and mark only supports as directed by us"* and also to an email exchange between Mr Jaffe and Mr Rukhadze agreeing that Debevoise should draft Mr Hauf's contract with the Family but that *"corporate governance should be tight including yours and mine role vs mark"*.

136. Mr Rukhadze, Ms Gudavadze, and Mr Hauf himself said that Mr Hauf was to be engaged to work for and to take his instructions from the Family. Mr Rukhadze says that it was not until after Mr Hauf started work that people within SCPI began to discuss amongst themselves the possibility that they might begin to provide the Recovery Services in return for fees, and the Defendants point in support of this to Mr Blyumkin's later email suggesting that the possibility of SCPI providing Recovery Services only came about after an issue emerged with Mr Hauf.

137. My conclusion in relation to this portfolio of issues is that there was no formal agreement between Mrs Gudavadze and Mr Jaffe as to SCPI's performing the Recovery Services, but that the idea was discussed. It appears that there were two areas of friction which prevented Mr Jaffe proposing that SCPI take a headline role at this point. The first was that Mr Nagle and Mr Blyumkin, both long time collaborators of Mr Jaffe, and influential figures, were not happy for SCPI to nail its colours to the family mast, for reasons which are not entirely clear and which I do not need to decide, but may have involved a concern about the enemies who might be made as a result of such an action. They preferred to see how matters began to play out before committing to any side, if indeed such commitment was necessary. The second was that SCPI did not themselves have an appropriate person to appoint. The obvious person to take on this role was Mr Rukhadze, who was known to the family and

intimately familiar with the Georgian end of affairs; but he was in Georgia and at this point had no intention of leaving Georgia.

138. The nature of that idea then progressed to one whereby the provision of Recovery Services would be in essence an SCPI project and that Mr Hauf would work with and/or report back to SCPI; however, there was still no plan at this stage for SCPI to enter into a contract with the Family or to be remunerated. They would allow Mr Hauf to take the lead operationally, with him following their strategic lead. This is consistent with the email exchange between Mr Jaffe and Mr Rukhadze in which they are at idem in the view that they would have an ongoing role at the same time as Mr Hauf. The two stage possibility to which Mr Jaffe refers from June 2008 appears to have been somewhat inchoate. It seems unlikely that this was the first version of the possibility discussed; but by May/June 2008 there appears to be evidence that SCPI considered that this was a way forward – and that Mr Jaffe felt he had sufficient endorsement from Mrs Gudavadze to be characterising their discussions as an agreement, though again there was no contract as an English lawyer would understand the concept.

139. The evidence suggests that the plan was not well thought through; it appears to have been assumed (in line with Mr Jaffe's sanguine approach to problem solving) that Mr Hauf would rely on SCPI staff and information, but no plans were made for how this would work, or how SCPI would be compensated for this role. Nor does it appear that it was squarely put to Mr Hauf that he was expected to work alongside and report to SCPI. It appears probable that this was known to be a likely problem; Mr Hauf was adamant (and apparently genuinely so) that he would not have agreed to work for SCPI and Mr Rukhadze appears to have commented on the unlikelihood of this being possible at the time. But nor is it likely that it was intended that Mr Hauf would be standing alone in performing the Recovery Services; he did not have the back up to do so – as became apparent in due course. I conclude that Mr Jaffe and SCPI took the optimistic view that some accommodation could be arrived at; and that Mr Hauf was aware of the expectation which he accepted might have been suggested to him, but was rather minded to see if some more congenial way of structuring things could be achieved.

140. During May 2008 it became apparent that Mr Hauf was in fact minded to act fully independently of SCPI. The fact that this was unsatisfactory to SCPI (who later criticised him as acting as a loose cannon and not necessarily in SCPI's interests) and that shortly thereafter it began to propose a direct involvement is in my judgment indicative of the fact that SCPI had been previously interested in acting covertly, but had decided that overt involvement was preferable to being sidelined.

141. It was, until Mr Rukhadze began to give oral evidence, common ground that in May 2008 Mr Jaffe, Mr Blyumkin, Mr Rukhadze and others began to formulate plans for SCPI to enter into a contract with the Family for the Recovery Services. This was Mr Rukhadze's pleaded case and his

case in his witness statement and the written opening served on his behalf. However orally he said that it was never intended that SCPI would provide the Recovery Services; that was simply one of a range of possibilities.

142. I conclude that Mr Rukhadze's evidence here is unreliable. This was one of the areas where I received the impression that his evidence was at best corrupted by a combination of intensive scrutiny of the documents and focus on his own case, and very possibly deployed without any real belief in its truth because he felt it to be an answer which addressed a difficulty in his case, namely the transition between SCPI opportunity and Salford Principals. Mr Rukhadze himself drafted what was entitled a "Salford Proposal" for the Family's support. In context and at this point in the time line this can only sensibly have been a reference to SCPI. The argument that Salford at this stage could mean a reference to a wider brand does not make sense. Likewise, Mr Rukhadze's reference to the project being a "Salford project" indicates his contemporaneous understanding that SCPI was looking to take up the opportunity.

143. For the avoidance of doubt I do not accept Mr Rukhadze's unpleaded evidence that the Family had any issue with Mr Jaffe (and SCPI) at this early stage. Mrs Gudavadze was clear about this, and this was reinforced by her use of a pet name for Mr Jaffe (roughly equivalent to “my dear little one”) in correspondence in mid- 2008.

144. It appears clear on the documents and the rest of the evidence that (not unnaturally) SCPI having started the recovery effort off, and perceived that there was a substantial job to do, which might have a considerable financial upside, sought to position itself to provide the Recovery Services on a formal basis. It appears that they did so partially because it was already perceived that Mr Hauf was not collaborating with or consulting them in relation to key strategic decisions which affected SCPI. In particular there was a concern that Mr Hauf was too eager to settle with BB and JK – the danger being that he would negotiate a deal giving BB and/or JK rights or influence in relation to SCPI-managed assets in which SCPI personnel had carried interests. At the same time, it was perceived that if SCPI took the lead on the Recovery Services there would be an opportunity to persuade the Family to contribute recovered assets to a new private equity fund, which they hoped could be larger (and more remunerative) than VDP and provide a replacement for and improvement on VDP after it was wound up.

145. The problem remained that SCPI had no-one to head up their offering and so it was anticipated that Mr Hauf would remain as project lead, albeit formally rather than informally subject to SCPI. However, by this stage Mr Hauf had made progress in trying to conclude his own separate contract with the Family for the provision of Recovery Services. When the Family asked Mr Jaffe to help them negotiate with Mr Hauf, it became clear that the contract that Mr Hauf had proposed not only involved a highly lucrative fee structure, but also envisaged him creating

his own recovery office team (as opposed to utilising SCPI personnel and resources). If this came about it would grant him great influence over the recovery project to the possible exclusion of SCPI.

146. SCPI therefore put forward its own formal proposal. The initial proposal was made in May 2008. It was that the Recovery Services would be provided by SCPI or a specially-formed subsidiary of SCPI. This was reflected in the documentation which stated:

> "the main principles of how Salford can:
>
> - Assist the family of BP to maximize its net worth through identification, protection and recovery of assets, monetary instruments, rights and any other form of value that constitutes the estate of BP ("BP Estate")
>
> - Set up family office for surviving member of BP's family".

147. This was followed up on 7 June 2008 with a PowerPoint presentation which defined "Salford" as "SCPI". It provided:

> "Asset Recovery – Structure
> Becomes dedicated Salford Project […]
> All Salford resources could be utilized
> Project CEO and leads overall day-to-day activities; reports to Salford CEO"

148. It was proposed that the vehicle for the provision of services would be a company (referred to at this stage as Recoverco) which would be 100% owned by Salford and that there should be a Salford Management Committee comprising Mr Jaffe as Chairman, together with Mr Blyumkin, Mr Rukhadze, Peter Nagle and Mark Hauf. The services would be provided by *"the Salford 'Team'"* using *"Salford resources"*.

149. There was an issue on the evidence as to whether any agreement was reached at this meeting for SCPI's involvement. To the extent that the point was actually in issue I find that there was no binding agreement in June 2008. On the balance of probabilities this meeting involved another affirmation by the Family that SCPI's involvement in some form was wanted and welcome, but there was no specific agreement or discussion of structures and the role of SCPI versus Mr Hauf.

150. One reason why this seems inherently likely is because at around this time an issue surfaced as to whether SCPI would be able to act on behalf of the Family in view of a potential conflict concerning its ongoing role with VDP/NWVF ("the Conflicts Issue"). SCPI took advice from Macfarlanes and Holman Fenwick & Willan ("HFW") in June 2008 and

September 2008. At the time of the June meeting Mr Blyumkin was indicating clearly that this question needed to be bottomed out before any agreement could be reached to act for the Family. Again, therefore there was an internal SCPI drag on committing to the project.

151. The parties took different views of the advice, the Claimants seeing it as essentially a green light and the Defendants as a red light. In truth, like much legal advice, it was equivocal. What was said was (in very high level summary);

    i) The VDP Articles required exclusivity from SCPI in respect of the type of services that it provided to VDP, though there was an exemption if SCPI provided such services to *"the investors represented by NWVF"*;

    ii) SCPI was potentially exposed to allegations of conflict if it was advising one investor in VDP, i.e. the Family against another, i.e. BB who was asserting against the Family that that he was entitled to 50% of the Fund. One of the loan-note holders in NWVF, an entity called LMC, had come under BB's influence and was already alleging on his behalf in proceedings in Gibraltar that SCPI was not acting impartially between him and the Family;

    iii) Providing services as individuals was not an answer as sufficient separation between the two operations would be difficult unless the individuals in question ceased being employed by SCPI;

    iv) SCPI also had to be alert not to carry out any "regulated activities" for the purposes of FSMA;

    v) SCPI would be safe from these risks if it confined itself to advising on probate matters.

    vi) It might be possible to avoid the problems if the letter of engagement made very clear that SCPI's role was so limited and did not encompass any corporate finance advice, investment advice or similar.

152. The parties' views as to what was understood are reflective of the positions they take on the key issue. Mr Jaffe said that he was never particularly bothered by the issue, though others within SCPI were more cautious and acted as a drag on him. He also said that Mr Rukhadze was likewise sanguine about the position. He said that he saw the issue as time limited since they were due to wind up VDP within months.

153. Mr Rukhadze however was adamant in his evidence that the legal advice made it clear that any structure involving SCPI would be problematic.

154. Again, it seems to me that both of the key witnesses overstate their case. Mr Jaffe was definitely at the relaxed end of the spectrum of opinion at the time, but he appreciated that it was inadvisable to

conclude any final agreement while the matter was still under discussion, and his response to the September advice ("pederasti", roughly equivalent to "sons of bitches") was one which indicated that he felt that it would at least make persuading his more cautious colleagues to go ahead something of a challenge. At the same time Mr Rukhadze's "red light" case of 2018 is hardly consistent with what he was saying in early October 2008 when he said in regard to conflicts: *"Salford has consulted its lawyers and we feel comfortable that we can play the role we are just about to undertake"*.

155. At the same time issues as to Mr Hauf had continued to cause a degree of concern; the draft of his agreement in late June had been seen by Mr Jaffe as *"starting a war against Salford"* leading him to express frustration with the Family. But with no alternative possible the negotiations proceeded. It was Mr Jaffe's evidence that he thought Mr Hauf had signed an agreement over the summer (including a substantial break fee), and that he only knew he had not in October. The Defendants contend that the explanation of what happened next is best consistent with Mr Jaffe having discovered that the Family had not signed in early September, by which time Mr Rukhadze was back in London and available to run the Recovery Services instead of Mr Hauf.

156. It does not seem to me that this issue is of central importance. To the extent that it does have a significance the evidence seemed to me to sit perfectly with neither approach, but better with that of Mr Jaffe. This would mean that despite considering that Mr Hauf had signed, SCPI considered it worth trying to oust him once Mr Rukhadze was available, even if that cost the Family a lot of money in a break fee. (This is another point which illustrates the slightly ambivalent approach to the Family's interests which crops up at times).

157. Meanwhile in June something changed as regards SCPI's ability to undertake the role leading the recovery effort for which Mr Hauf had been slated. In June Mr Rukhadze was the subject of a (fortunately unsuccessful) bomb attack in Georgia. Following this he was persuaded that it would be prudent to move himself and his family to London. He was thus now available to head up an SCPI effort – if Mr Hauf could be got out of the way, and the conflicts issue could be made to work.

The emergence of "the Salford Principals" in the documents

158. Against this background the team began to work up an updated proposal. On the same day that the Macfarlanes conflicts advice came in on 26 September 2008, Pili Balay, a secretary at SCPI, sent a copy of a slightly amended version of the June 2008 presentation to Mr Nagle and Mr Rukhadze. It still referred to SCPI providing the services. There are no documents recording any discussion about it. However, Mr Nagle sent an email on 27 September 2008 making some technical suggestions about terms.

159. On 28 September 2008 Mr Rukhadze circulated an updated presentation to Mr Jaffe and Mr Blyumkin, again referring to SCPI. In his covering email he wrote, among other things: "*Does this structure still make sense? Should RecoverCo be owned by Salford?*". On that day Mr Jaffe left England for Italy to be with his daughter and became somewhat incommunicado.

160. Mr Nagle – who was unwell and unable to attend the office – replied on 29 September 2008 saying he would fax his comments ahead of a meeting which it appears was scheduled for 3pm. He circulated his comments later that morning, noting that he was still feeling unwell. His comments referred repeatedly to Salford in contexts which appear plainly to mean SCPI.

161. However, he later sent a copy of the presentation with handwritten amendments. That document, for the first time, amended 'Salford Capital Partners' to 'Salford Principals' in the introduction, though SCPI continued to be referenced in the org chart for the proposed structure.

162. On the evening of 29 September 2008, Mr Khan circulated an amended presentation making changes which had been discussed at the meeting as well as "most" of Mr Nagle's comments. A number of changes had been made, but not to the text 'Salford Capital Partners'.

163. The presentation contained a revised structure chart which showed 'RecoverCo' as the party which would have a direct relationship with the Family and which "*has ultimate responsibility to manage the asset recovery and protection process on behalf of BP Family*".

164. Later that evening Macfarlanes sent to the circulation list a "Dos and Don'ts" document which was a practical guide to the conflicts advice. Mr Jaffe had not been responding to the emails dealing with the powerpoint, but he quickly responded to this one with the "pederasti" comment, to which Mr Rukhadze responded in the small hours saying (approximately*) "[For heavens' sake] – what on earth can we advise on?"*.

165. Mr Nagle made further amendments on the morning of 30 September 2008. He did not change the references to SCPI. On the morning of 1 October 2008, he sent an email to Pili Balay asking for a number of typographical and presentational changes to be made to the most recent presentation, and added: *"Pg 3 – para 1 change Salford Capital Partners Inc to Salford Principals."*

166. Mr Rukhadze emailed at 9:02 on 1 October 2008 saying *"Eugene will be in the office at noon. Let's have our final, internal Inna meeting then. Inna/family are expecting us from 1 PM on (I told them most likely we will see them at 2pm." He also raised the possibility that "we do not need any formal presentation. Let's just have a conversation with them how this would work"*.

167. An updated version of the presentation saying 'Salford Principals' was sent to Mr Nagle at 9:58 on 1 October 2008. A meeting apparently did take place later that day, which led to Mr Jaffe the next day describing the Family's decisionmaking processes as "a nightmare". It does not appear likely that the presentation was deployed at this meeting; indeed, it appears to pass from peoples' attention at this point.

168. The next document to use the term 'Salford Principals' was Mr Rukhadze's revised version of the Term Sheet circulated the following day. There is no record of who suggested that amendment.

169. The Defendants contend that what this chronology illustrates is that in the light of the identified conflicts problem it was concluded that neither SCPI, nor a subsidiary of SCPI, could provide the Recovery Services and the idea was therefore dropped. Accordingly, the six core individuals who were involved in SCPI's business took the proposal forward themselves with the intention of setting up a new and separate corporate structure for the provision of Recovery Services and the management of a fund established from the recovered assets. This is, they say, the origin of the term "Salford Principals", also referred to as "the Group" and simply "Salford".

170. Mr Rukhadze says that at the same time an agreement was made between himself, Mr Jaffe and Mr Blyumkin that any corporate structure used to provide the Recovery Services would be owned by them in proportion to their agreed shares in the profits. Since by this stage it was clear that Mr Rukhadze would be leading the project, it was also agreed that Mr Rukhadze would have the largest single share of 40%.

171. The Claimants submit that this contention cannot stand. They point out that prior to the hearing it was not clear how the Defendants said that this agreement – to move between an SCPI opportunity and a confederation of principals and as to the split of shareholding – was concluded. They point to the fact that the pleaded case appears to be incompatible with this argument, in that paragraph 3.6 of the Defence states: *"The Salford Principals began to provide the Recovery Services in the absence of any agreement with the Family or between themselves"*. They flag up the fact that no document was identified and no oral agreement alleged formally. At best, they submit, Mr Rukhadze suggested in his witness statement that an agreement was reached between Mr Jaffe, Mr Blyumkin and Mr Rukhadze that because the Family had said that they didn't want Mr Jaffe to control things it was agreed to approach the Recovery Services as individuals. In cross-examination of Mr Jaffe it was put to him that the agreement was reached orally on 1 October 2008. This position was maintained in his own cross-examination by Mr Rukhadze.

172. The Claimants' position was as follows:

i) It was submitted and Mr Jaffe gave evidence to the effect that it was always understood and intended, and indeed so obvious that it did not need to be said, that the Recovery Services would be provided either by SCPI, or by another entity that replicated its corporate and management structure, *i.e.* that it would 100% owned and controlled by Mr Jaffe.

ii) The term "Salford Principals" was at most a cosmetic attempt to create an appearance of distance between the Recovery Services and the existing Salford structure, while also making clear that the precise structure remained to be designed. Thus, in order to make clear that the services would not necessarily be provided by SCPI itself but by another entity or entities nominated by it, some terminology was needed; it was envisaged that at a later stage SCPI would determine which entities would provide the Recovery Services.

iii) At this stage, the structure was not final and “Salford Principals” captured the fact that the services would be provided by a number of senior Salford staff including Mr Jaffe, Mr Blyumkin, Mr Nagle and Mr Rukhadze. The senior Salford staff consisted of a relatively small group of people who worked closely together, and who were in many cases not only business colleagues but also close friends. It remained well-understood however that the business was still a Salford opportunity.

iv) This, he says, is the reason why 100% of the shares of RP were transferred into his ownership shortly after its incorporation.

v) Accordingly, whenever the Salford Principals can be seen in the documents discussing their percentage interests in the Recovery Services, these were potential economic interests only, and had nothing to do with their having any interest in the corporate structure.

173. On this issue I conclude that there was no such agreement as that alleged by Mr Rukhadze.

174. Dealing first with the question of "the Salford Principals", I conclude that the change to Salford Principals appears to have been made by Mr Nagle (who was not in the office) and probably reflects his personal concerns, reflected in the documents, to distance SCPI from the Recovery Services while any possible conflict issue remained. There is no discussion of it by email, and no sign that any particular significance was attached to it by anyone. Such discussion would be expected in the context of an entirely new model for business within the SCPI world.

175. Nor does the agreement alleged work in the context of the timeline described above; there is no window where the agreement can be made to fit within the correspondence. Similarly the involvement of each of

the Salford Principals in reaching the agreement would be necessary; yet there was no evidence or even a case as to how Mr Khan and Ms Gabbert joined the agreement.

176. I conclude that in context the term "Salford Principals" was considered by those involved to be a "placeholder" name covering current conflicts concerns pending clarification of the position and the plan as to structure. (Interestingly in a different context Mr Alexeev referred to "placeholders" within the undeveloped structure.) However, all those involved considered it to be representative of what was essentially still an SCPI project. This is reflected in the contemporaneous correspondence and documentation.

177. For example, the draft Term Sheet which came next refers to "the Group" but references to assets managed by "the Group" make it clear that this is a figleaf for SCPI. The email sent by Mr Rukhadze to Debevoise & Plimpton with the draft Term Sheet stated: *"Salford will play an active role in recovery and post-recovery management stages … on the Family's behalf. I am attaching a term sheet that will serve as a basis for definitive agreements that the Family and Salford will execute down the road"*. So, too, Macfarlanes' initial memorandum of 7 November indicates that the project is for SCPI to manage the Family's assets. And perhaps most tellingly, when on 2 October 2008 the new LLP that become Revoker was formed with the name *"IKA Recovery LLP"*, Mr Rukhadze strongly challenged this name (*"What [on earth] is IKA Recovery LLP"*) and proposed instead *"Salford Recovery Partners, LLP": "it is another Salford operation that hopefully we will be proud about and who knows where it can lead in the future".*

178. Nor is the case on oral agreement at all attractive. The timeline shows that Mr Jaffe, whose interests would be directly and seriously affected by this change, was out of the country and had only half an hour prior to the meeting to "get up to speed". To anyone who has heard Mr Jaffe and Mr Rukhadze giving evidence the idea that they could make such an agreement on a serious matter in this short time seems completely implausible.

179. This implausibility is reinforced by the position on the documents where no trace of any such agreement can be found. It is not credible that such a serious decision could leave not a trace in the documentary record at the time. I note that a similar conclusion was reached by Leggatt J (as he then was) at [102] in *Blue v Ashley* [2017] EWHC 1928 (Comm). I note that I do not accept the submission that the change was not a matter of moment to Mr Jaffe; plainly, to put it at its lowest, it would affect his ability to control the amounts of carry which he colleagues could take and it was precisely this power which was at the heart of his authority. But it would also affect the ability to control the new private equity fund and the terms of any future deal with BB or VA, the latter of which had serious impacts for SCPI's existing carried interests.

180. Indeed, so far as the slightly later documentary record is concerned it is certainly not inconsistent with this conclusion. The first version of the Term Sheet drawn up for signature was intended to be signed by Mr Jaffe "*for and on behalf of Salford Capital Partners Inc*", though later versions bore different signature strips. And when Mrs Gudavadze sent letters of authority in October 2008, some indicated that she had *"recently engaged Salford Capital Partners Inc and certain of its executives"* although others referred only to Salford executives. Further what one does not see as the timeline moves on and the relationship between the parties sours is any cry from Mr Rukhadze invoking an agreement along the lines now alleged.

181. I would add that this is a conclusion which I reach without hesitation on the basis of the evidence alone. However it is also notable that the agreement which the Defendants alleged was in forensic terms essentially a new argument which did not feature in any of the versions of the Defence; which appeared to be inconsistent with the pleaded case that there was no agreement between the principals; and which was never consistently described by Mr Rukhadze. Such delay in raising the case and such lack of clarity is another indicator, if such were needed, of the lack of merit in the argument.

The Term Sheet and the Steps Papers

182. Thus, in early October 2008, a term sheet was drafted to reflect the outline terms of the engagement ("the 2008 Term Sheet"). It was headed "Term Sheet for Recovery of Assets and New Family Office" and was to be signed by the Family and by Mr Jaffe on behalf of SCPI. On 9 October 2008, Mr Rukhadze sent a copy of the draft to the Family's lawyer (Lord Goldsmith QC), saying:

> "…. We have debated and negotiated the terms of our engagement at length with various extended Family members. I am not asking you to look at the terms on Inna's behalf at this point. I would like you to confirm to the Family the non-binding nature of the Term Sheet (chapter called "Definitive Agreements") so that it can be executed this week.
>
> Salford is willing to take risk and start working on Inna's behalf as soon as the Term Sheet is executed fully aware that the definitive agreements may never get signed."

183. Having taken advice from Debevoise, on around 12 October 2008 the Family signed the 2008 Term Sheet. It contained headline terms for the provision of the Recovery Services and fund management services (i.e. the new private equity fund). The Term Sheet set a date of 10 November

2008 for the execution of a formal contract. It records that (a) the Family would engage the "Salford Principals" (defined as the "Group") to provide the Recovery Services (paragraph 1); (b) the Group would be paid a management fee of US$3 million per annum (paragraph 2); (c) the Group would receive carried interest of between 3% and 10% in the recovered assets, either in the form of cash or proprietary interests (paragraphs 5 to 7); and (d) the Group would set up a company or other corporate entity which the Group controlled that would exclusively manage the recovery process (paragraph 10).

184. The Term Sheet contemplated that the company that the Group would establish to provide the Recovery Services (i.e. the management arm of the corporate structure) would be governed by a board on which the Family would be represented, but also that the Group would enjoy veto rights over the Family's dealings and any final settlement with BB, Olga Safonova, and JK.

185. Immediately following this Macfarlanes were engaged (a) to begin drafting a contract with the Family; and (b) to advise on a structure for the provision of the Recovery Services and fund management services. There appears to have been no change in the basis on which Macfarlanes was instructed.

186. Macfarlanes' written advice in relation to the corporate structure was recorded in a series of "steps" papers outlining the steps to a final structure produced between late October 2008 and January 2009 (the "Steps Papers") and leading up to a draft Framework Agreement. The significance of these papers was in dispute but on any analysis, they give some indication of how RP and Revoker were envisaged as operating.

187. The Steps Papers envisaged a UK LLP and BVI company being established to function in combination as the management arm of the proposed corporate structure, i.e. the arm through which the Salford Principals would provide the Recovery Services and receive a management fee. They were not however the structure through which the carried interest and fund management would occur.

188. The reason for the interposition of a BVI company was to ensure that the management fees would be VAT exempt and the requirements of FSMA did not operate. This was necessary because the Recovery Services were regulated activities under FSMA 2000, a group exemption from regulation would apply if a UK LLP was set up which (a) entered into a contract with and provided the services to the BVI company in return for fees; and (b) granted the BVI company a majority of its voting rights.

189. Historically as noted above Salford operatives had not had any shareholding in the company or in assets being managed. However, under the diagrams produced by Macfarlanes it appeared to be contemplated that the Salford Principals would become shareholders in

RP. The Steps Papers also envisaged that all of the Salford Principals who were UK tax resident would become members of the LLP and receive their share of the management fee as partnership drawings. However, to avoid adverse tax consequences, the Salford Principals who were not UK tax resident (ie initially Mr Rukhadze) would need to receive their share of the fee direct from RP.

190. The entitlements to carried interest would be dealt with through a different arm of the overall structure. In brief summary:

a) The Family would establish a BVI limited partnership (termed "Recovery Partners LP") to which they would contribute their beneficial interests in the recovered assets.

b) The "Salford Principals" would also establish a BVI limited partnership (termed "Principal Partners LP") of which they would be the members.

c) Principal Partners LP would then be granted a 10% interest in Recovery Partners LP, thereby giving it, and ultimately the Salford Principals, an indirect 10% interest in the recovered assets.

d) The rights of the Salford Principals to the 10% interest *inter se* would be governed by the Principal Partners LP principal limited partnership agreement.

191. The Defendants submitted that the Steps Papers clearly and consistently provide, both in the commentary and the structure diagrams, that all of the Salford Principals (who are identified by name in the later versions) would become shareholders of RP and members of Principal Partners LP.

192. Mr Rukhadze said in his oral evidence that the Steps Papers accurately recorded and sought to give effect to the instructions given to Macfarlanes by the Salford Principals, principally himself, that they would own the structure which would provide the Recovery Services. The Defendants also say that there is no sensible explanation from Mr Jaffe as to why this structure was pursued in so much detail by Macfarlanes if it had not been agreed that the Salford Principals would between them own and control the entities in the Macfarlanes structure.

193. The Defendants also rely on this period as a counter to the Claimants' case on Mr Jaffe's ownership of RP. They say that the Steps Papers show that the shares were transferred to Mr Jaffe (a) to enable the company to open a bank account; and (b) on the express basis that they would be reapportioned later (although they never were).

194. The Defendants contended that Mr Jaffe's reliance on documents produced in-house between May and September 2008 and upon his being registered with 100% of the shares in RP, to claim that SCPI was pursuing the opportunity to provide recovery and fund management

services, and that the Defendants owed it duties in that connection, is false and a crude attempt to rewrite history.

195. In relation to this submission the Claimants say that in the absence of any evidence of the instructions given to Macfarlanes very little weight could be put on the documents, detailed as they are. They noted that there was no positive case advanced by the Defendants that the instructions for the set-up had come from anyone except Mr Rukhadze who said that he had told Macfarlanes that the Salford Principals should own the structure. They also noted that there was no single document which gave any information as to what instructions had been given and submitted that Mr Rukhadze's evidence was self-serving. They submitted therefore that there was no agreement as to shareholding and that there was no agreement to any format for the carried interest other than that which had historically operated.

196. The position in relation to the Steps Papers must, in my judgment, be set against the background as to the agreement (or otherwise) as to the Salford Principals. On the basis that there is no credible case that there was an agreement in late September/early October as to the Salford Principals' ownership of the recovery structure, the Steps Papers logically mean nothing, unless they evidence a later agreement on this point. Yet no such later agreement is suggested. Even if there were an earlier agreement, the timeline on that dictates that subsequent discussion would have been necessary to agree details (eg. as to issues like shareholdings). Yet, again, no such agreement is suggested.

197. The existence of the Steps Papers simply cannot plug that gap. There is a danger here of accepting the documents as truth of their contents simply because they are documents. But documents, particularly documents produced by third parties, have to be evaluated as products of their authors and reflections of the circumstances of their production. As such, what they say as to Salford Principals' ownership, and indeed agreement as to shareholding, logically falls with the case that there was an agreement.

198. I reach this conclusion despite giving considerable thought to the points which provide indications in the other direction. For example, to a lawyer it is obviously initially counterintuitive that these substantial documents, prepared by a well-known London firm, mean nothing. There was also some force in the point made by the Defendants that Mr Jaffe's evidence that he attended a presentation on the Steps Papers and read the drafts of the Framework Agreement without really giving any mind to the structure appear surprising. Yet I have reached the conclusion that these points are explicable, whereas the Defendants' case on the conclusion of the agreement which underpins what comes next is not.

199. As to the Steps Papers, Mr Rukhadze might well (despite his professed ignorance of their meaning in early 2009) have given such instructions;

but that does not mean that they reflected an agreement. In fact it was not originally his case that he gave such instructions at all; the Steps Papers, so heavily relied on by the Defendants at the hearing, were treated cursorily by him in his statement, indicating that they were primarily the fruits of Mr Khan's and Mr Blyumkin's liaison with Macfarlanes. That version of events is credible. Mr Blyumkin was certainly involved in liaison with Macfarlanes and he might well not have flagged this up to Mr Jaffe because of his own concerns about SCPI's direct involvement; the Salford Principals structure may well on its face have looked to him like a firewall for conflicts problems (although the advice in fact suggested it was not).

200. Although Mr Jaffe's missing the point did seem on its face surprising he did appear, on the documents, to be much less involved (and interested) in day to day details. Without that involvement, and operating with his own idea of what the half-way house was for in his head (ie. as a placeholder to get a structure in place until the SCPI conflicts issues could be resolved) I do in the end find it credible that he did not "join the dots" and see that there was an appearance emerging of a structure which was different to the normal SCPI approach. As regards shareholding this was perhaps the more credible in that the existing concept of carried interest was operated by references to percentages and therefore shaded into the idea of a percentage entitlement by each of the key SCPI people. So too with the complex structure itself; as there was to be considerable carried interest, there would be nothing remarkable with the payment of carried interest being hedged around with a tax efficient structure.

201. I should also deal here with the question of the significance of Mr Jaffe's shareholding in RP and the alleged agreement as to the split of RP shareholding. In the end I consider this matter to be of little significance. I do not accept that there was ever an agreement for shareholding in RP to be split; that may have been what the Macfarlanes papers said, but there was no other agreement on this point alleged, and as I have indicated, I do not regard the Macfarlanes papers as proving any such agreement. Even if there were, this fact is not to my mind significant, given that RP was simply one facet of a complicated structure, and a share of outcome was always anticipated.

202. To the extent that the Claimants relied on it as evidencing Mr Jaffe's control of SCPI and the proposed recovery project, it also gives very little assistance. The fact is that the project was initially intended to be an SCPI project; this shareholding might be said to be consistent with that. However, the argument is unnecessary given the conclusions which I have already reached. Further on this point I broadly accept the Defendants' submission that the shareholding was part of the work being done to set up RP and Revoker and that those doing that did not necessarily intend for the shareholding to stay that way. Mr Khan certainly expressed it as setting up *"the GP with just Eugene to start with."*. However, the real point is that absent any agreement, the

decision as to what would happen to the shares was Mr Jaffe's as it had historically been his decision who acquired carried interests in assets and to what extent.

The incorporation of RP and Revoker

203. Moving from the theoretical to the actual, steps were taken in late 2008 and early 2009 to put in place a structure for the provision of the Recovery Services. Recovery Partners and Revoker were both formally incorporated (in late October and early November), and the former was admitted as a member of the latter, along with Mr Jaffe, Mr Blyumkin, Mr Nagle, Mr Khan, and Ms Gabbert. Mr Rukhadze was not initially a member because he was not yet an English resident.

204. Part of the organisation involved dealing with the addition or allocation of the personnel to provide the Recovery Services. Mr Rukhadze signed a Consultancy Agreement with Recovery Partners at the end of January 2009, setting out his various duties in relation to the Recovery Services. This agreement was accordingly relied on as being of significance by the Claimants. The case advanced for Mr Rukhadze before the hearing was that it was of no significance because it was only entered into for tax reasons. In his evidence however, Mr Rukhadze denied this; asserting that the agreement was of little significance, but for a different reason – he said that it was entered into only because he was not resident in the UK and could not legally be employed. This was certainly a different case to the one previously run, but I am not persuaded that the difference is of any significance save insofar as it goes as one minor point in evaluating the general reliability of Mr Rukhadze's evidence.

205. There is an issue (to which I shall revert later) as to whether this Consultancy Agreement remained in effect; however, I am entirely satisfied on the evidence that the Consultancy Agreement was and was intended at the time to be a genuine agreement giving rise to genuine obligations. Certainly, Mr Rukhadze had expected something less formal; but he was clearly advised by Mr Khan, following similar advice from Macfarlanes, which Mr Rukhadze seems to have read, that the agreements had to reflect reality: "*we have to make the agreement somewhat formal to give substance to the structure*".

206. Mr Alexeev joined the team in February 2009, following discussions between Mr Rukhadze and Mr Jaffe. No formal agreement was executed, but the Indicative Terms and Conditions which he drew up place him as a senior executive/partner with RP. The terms of his appointment were reviewed by Jamal Khan. Mr Alexeev entered into a Confidentiality Agreement in fairly standard terms (to which I shall refer further below) with SCPI on 13 March 2009. A term sheet with "*Salford Capital Partners Inc. and associated entities and persons*" and a draft consultancy agreement with Recovery Partners were created and circulated in late 2008/early 2009. These indicated that he was expected to *"devote substantially all of his business time to the Partners' business and*

affairs and shall use his best efforts to perform his responsibilities. […] present to the Partners each business opportunity which falls within or is related to the Partners business and shall not, directly or indirectly, exploit any such opportunity for his own account" and to *"Act at all times in the best interests of the Company and Group Undertakings"*. There are issues as to whether Mr Alexeev owed fiduciary duties as a result of his retainer and based on these documents and to whom he owed them.

207. Mr Rukhadze and Mr Alexeev both became members of Revoker on 17 April 2009.

The provision of the Recovery Services in early 2009

208. With the assistance of Macfarlanes a Framework Agreement was drafted and approved for submission to the Family. Peter Nagle on 5 January 2009 wrote in connection with the draft documentation to be proposed to the Family: *"I am not comfortable sending the agreement out until we are all (Particularly Eugene) comfortable with our position on this as this is where virtually all the money is for Revoker"*. The approved documentation was provided to the Family's lawyers Debevoise on 14 January 2009.

209. The purpose of the draft Framework Agreement, so far as the Recovery Services were concerned, was to give contractual effect to the structure described in the Steps Papers. Accordingly, the Claimants were to act as the management arm of the structure and receive cash fees, while the Salford Principals' carried interest would be structured to give them an indirect proprietary interest in the recovered assets via the use of offshore limited partnerships. Also in conformity with the Steps Papers, the draft Framework Agreement expressly provided that the Salford Principals would be the shareholders of RP, the members of Revoker, and the members of Principal Partners LP, the vehicle through which carried interest would be received. In addition to the terms governing the Recovery Services, the Framework Agreement required the Family to commit to setting up a new private equity fund with an initial capital value of at least US$500 million, comprising (a) 50% of all recovered liquid assets (meaning cash or assets readily convertible into cash) and (b) all liquid assets distributed to the Family following recovery. This fund was to be managed by new offshore entities established for that purpose.

210. The Defendants relied on the draft Framework Agreement as establishing that the business opportunity was that of the Salford Principals.

211. The Framework Agreement was not signed, though negotiations continued on it for some time. Meanwhile the Recovery Services continued to be provided. Recognising that those involved could not be expected to continue to work for nothing pending formal agreement,

on 14 January 2009 Ms Gudavadze signed a letter providing for the payment of a $3m annual fee to RP. An amended version signed on 26 January 2009 recorded the basis on which Ms Gudavadze would pay RP the sum of US$1.22 million as an interest-free loan. The letter acknowledged that the Family were negotiating an agreement with the Salford Principals and provided for two possible outcomes: if the contract was concluded, Ms Gudavadze would contribute the benefit of the loan as a capital contribution to "Recovery Partners LP" to be "formalised into the desired structure at a later date"; if not it was anticipated that the loans would be written off. The letter itself referred to RP assuming responsibility for the provision of the services. A further 8 such letters were signed over time, the last on 13 April 2011.

212. The sums paid to RP were treated as management fees and were distributed, in part, to the various members of the Salford and Revoker teams who had been identified as "Salford Principals", either as partnership drawings from Revoker, or, in Mr Rukhadze's case for some of the relevant period, as remuneration under the consultancy agreement with RP.

213. The Recovery Services were essentially intended to restore the Family, so far as possible, to the position they would have been in if Badri had made appropriate estate plans. They involved a number of strands.

214. The first was managing the litigation which the Family were either bringing or defending, both in this jurisdiction and abroad. Their principal litigation antagonists during the period in issue for trial were BB (litigation in England between 2008 and 2012); JK (litigation in England, Georgia, Gibraltar, Liechtenstein and the United States between 2008 and 2016); and the Georgian government (arbitral proceedings between 2008 and 2012).

215. The second was managing the Family's cash position. The Family had to raise enormous sums, first to fund the litigation, and second to fund the assets, many of which were operating businesses which had themselves been starved of cash and/or had assets stripped and/or mismanaged since Badri's death. In order to avoid achieving a pyrrhic legal victory, recognizing their title to assets which were potentially worthless or insolvent, the Family felt themselves required to fund the assets even though they did not control them. Because the Family held few assets to speak of and could not borrow on anything like ordinary commercial terms, it was a constant struggle just to keep them sufficiently in funds to continue the recovery project.

216. Thirdly there were negotiations with the individuals and entities who were believed to hold Badri's assets and with the individuals who claimed to be beneficiaries of Badri's estate or claimed to hold interests in his assets, for example Olga Safonova.

217. There appears to be little dispute about how the Recovery Services were provided. In summary:

i) The large majority of the active and detailed recovery work was carried out by Mr Rukhadze, together with (from early 2009) Mr Alexeev and (from October 2009) Mr Marson, all of whom worked closely with the Family and were based at the Family's offices in Park Street in Mayfair ("Park Street").

ii) A further two employees (Ms Miftakhova and Mr Karadaghi) were added to the Park Street team, with Mr Rukhadze (or Mr Alexeev on his behalf) referring the proposed hires to Mr Jaffe for approval on each occasion.

iii) The remainder of the Salford Principals were based at SCPI's head office in Pall Mall where they spent most of their time performing their normal duties for SCPI.

218. The extent of the Pall Mall office's personnel's involvement was in issue. Mr Rukhadze made it plain in his evidence that he held most of the SCPI staff (other than Mr Jaffe) in low esteem and contended that their contribution was minimal to the Recovery Services. Mr Jaffe was cross-examined on the basis that he had very little grasp of the detail of what was going on at the time.

219. My conclusion is that all the main SCPI staff performed some role, though its extent was defined by their own expertise as well as their location. Ms Gabbert handled Revoker's corporate filings, kept its books and records, and controlled its bank account. She also passed on and appears to have co-ordinated tax advice.

220. Mr Khan as SCPI's General Counsel acted mainly with regard to legal documentation. He liaised with Macfarlanes in relation to the corporate structure and the steps papers as well as the proposed contract with the Family. Mr Nagle worked with Mr Rukhadze for a short period in late 2008/early 2009. He then became ill and dropped out of the picture until 2011.

221. Mr Blyumkin and Mr Jaffe had greater roles. Mr Blyumkin was responsible, on behalf of SCPI, for co-ordinating its defence of the proceedings which BB, or his proxy companies, had brought against SCPI in England and Gibraltar. His main role in relation to the Recovery Services was therefore to liaise with the Family to further their common interest in defeating BB's claims to VDP, and other Salford-managed assets. Although he was included on the general email distribution list of the Family's then English litigation lawyers, Hogan Lovells, and sometimes contributed to the internal discussions concerning the litigation with BB, he had little hands on involvement in the recovery work.

222. Mr Jaffe was also involved in the claims made by BB as well as discussions about how to deal with Olga Safonova and some of the aspects of the JK claims. He advised the Family directly regarding a range of issues. In terms of the detailed Recovery Services he substantially confined his involvement to giving Mr Rukhadze informal advice by email, attending some internal strategy and legal review sessions, and going to some of the meetings between the Family and their key negotiating counterparties, such as VA – a role that he felt played to his strengths in "big picture" strategizing and negotiations.

223. At this stage there does not appear to have been any major issue as to how matters were proceeding. Mr Rukhadze's evidence was that he kept Mr Jaffe informed of developments that Mr Rukhadze believed would be of interest to him, either by email, text, or by walking over to SCPI's offices in Pall Mall. Mr Alexeev says that at least in the early part of 2009, there were regular update meetings attended by Mr Rukhadze, Mr Alexeev, Mr Jaffe, Mr Blyumkin and Mr Nagle. Mr Blyumkin does appear to have asked for regular written reports in late December 2008, but there is no evidence that such reports were ever made, and no concerns were raised about their absence at this stage.

224. Mr Jaffe asserted in his evidence that the most difficult recovery tasks had been completed by the beginning of 2009, and that the project as a whole was approaching total success by the time he left it in May 2011. In his view what was important was that by late 2009 there was a strategy in place to resist the threats to the Family and they were *"taking it to where we wanted it"*. It is fair to say that on the evidence before me, given the substantial work involved in dealing with the individual threats, this represented a rather rose-tinted view of the facts, and offers a very good example of his tendency to exaggerate the upsides of a situation.

The contractual negotiations

225. It was not until some months after the submission of the draft Framework Agreement that, in May 2009, Debevoise eventually provided comments on behalf of the Family. The Family were not in agreement with the proposal. Key points were that:

    i) They objected to the fee structure (which included a number of matters not mentioned in the Term Sheet) and governance provisions.

    ii) They were not prepared to grant the Salford Principals proprietary interests in recovered assets, and wanted their commitment to any new fund to be capped at 50% of the aggregate distributions they received from VDP.

226. However, neither was the Family's proposal agreeable to Salford. Macfarlanes reviewed the comments and reported that the Family's

position was completely at odds with the carry structure recommended in the Steps Papers and would not, in their view, be anything like as tax efficient. It was suggested that further commercial changes were also desirable from the perspective of RP and Revoker as regards the percentage participation in relation to assets previously managed by SCPI.

227. The draft Framework Agreement does not appear to have been taken any further, and the corporate structure was left incomplete. Principal Partners LP was never set up, no agreement was ever concluded in respect of that partnership, and a draft partnership agreement prepared for Revoker was never finalized.

228. The only agreement that was put in place was an asset recovery agreement between RP and Revoker: but, as Macfarlanes had advised, that agreement was required to avoid FSMA regulation, and the Salford Principals could not have provided the services, even on a *pro tem* basis, without it.

229. There then followed a lengthy course of negotiations with the Family. This was explored extensively in evidence before me and I conclude that:

    i) Those involved from the Salford side did not attempt to pursue detailed discussions about the draft Framework Agreement, but instead tried to proceed by way of a further term sheet.

    ii) Mr Jaffe, Mr Rukhadze and Mr Blyumkin were all involved in considering revised terms to put to the Family. They also attended face to face discussions with the Family to discuss the revised terms.

    iii) Debevoise were not involved. There is no evidence, and none of the witnesses suggest, that the Family engaged any transactional lawyers to assist or advise them to take matters forward after Debevoise had provided their comments on the draft Framework Agreement.

    iv) A number of draft term sheets were however prepared by the Principals between May 2009 and January 2010. They indicate that:

        a) The Family were willing to agree that the Principals' success fee for all recovered assets would be 9% (an increase from 3% on the Term Sheet in relation to the recovery of assets managed by Salford).

        b) The Family wanted to be or remain the 100% owners of the recovered assets. This is reflected in the initial drafts for a second term sheet.

c) The new private equity fund was a major focus of the discussions.

d) There was some friction in the discussions, with Mr Jaffe indicating in November 2009 that if a deal could not be reached in a matter of weeks he would distance himself from the Family or look to institute a "divorce" which might even be hostile.

v) There was a discussion in December 2009 in which the parties seemed very close to agreement. The Claimants described the outcome of the meeting as being an "agreement in principle". Mr Jaffe said in evidence that he and the Family "shook hands" on a deal at the meeting in early December 2009. There was however no concluded agreement.

230. Sometime in early December 2009 Mr Rukhadze resigned as a director of SCPI. The reasons for that resignation are in issue and are considered below, when Mr Rukhadze's duties, if any, come to be considered. There is an email from Mr Khan suggesting that the resignation was for tax reasons, in particular that there was a need to reduce to four the number of onshore directors. Mr Rukhadze denies this; he says that he resigned in order to help with the Recovery Services.

231. On 12 January 2010, Mr Rukhadze circulated a draft term sheet ("the January 2010 Term Sheet") to Mr Jaffe and others. He did so under cover of an email saying *"Please find attached new version of the Term Sheet that I believe will be executed by the Family. Please let me know any changes that you would like to incorporate"*.

232. This document was referred to by the Claimants as "the Second Term Sheet" but that description was objected to by the Defendants because there had been a number of iterations of the draft between the 2009 Term Sheet and this draft and would be more later. This draft, which apparently reflected the outcome of the December 2009 meeting, is significant not because it was signed, but because (i) Mr Rukhadze stated at the time that he believed the Family would sign it and (ii) Mr Jaffe's evidence was that the Family did agree it, although they did not sign it. It was also part of the Claimants' case that but for the Defendants' breaches of duty a contract for the Recovery Services would in due course have been entered into, substantially on the terms of this document.

233. The January 2010 term sheet provided in relation to the new private equity fund that the first US$400 million of recoveries would be for the Family to use as they saw fit. The Family would then be entitled to elect between (a) using the next US$400 million of recoveries to set up a private equity fund; or (b) paying a break fee to the Principals of up to US$50 million (the precise amount would depend on the level of recovery above the initial US$400 million). Mr Rukhadze says in his

evidence that he believed that these provisions were a reasonable compromise between the Family's reluctance to commit to a new fund and the Principals' longstanding commercial objective to "leverage" the Recovery Services into a new fund for them to manage.

234. A further term sheet was prepared in March 2010 by Mr Khan and Macfarlanes, apparently on the instructions of Mr Blyumkin. The genesis of this document appears to have been a consultative process following Mr Rukhadze's circulation of the document, which included input from Macfarlanes on the document's consistency with the Steps Papers structure and discussions on how it could be made into a legally binding document, either up front or as a fall-back in the event of supplemental agreements not being reached.

235. Amongst other changes to the January 2010 Term Sheet, this further document (a) was expressed to be legally binding if definitive contracts were not concluded within 90 days; and (b) sought to revive the Macfarlanes' proposal that the Salford Principals would be given proprietary interests in the recovered assets (though in language so obscure that the Family are unlikely to have appreciated its intended effect).

236. One other factor seems to have been of interest at least to Mr Rukhadze in the drafting. On 1 April 2010 Mr Rukhadze emailed Mr Blyumkin saying: *"We have to put our own house in order to have company ready that would eventually sign."* Followed up by another email speaking of *"we said we should get shareholding of Recovery GP align with shareholding in spoils of the recovery effort."*. Mr Blyumkin's response was that this was a secondary issue *"we distribute interests immediately. The point is Recovery GP is signing".* This was relied on by the Defendants as being only logically consistent with an agreement in a shareholding (and hence Salford Principals) structure. I am not persuaded that the exchange must be read in that way; the alternative readings referring to money or economic interests are, given the senders' positions and the background of carried interests, perfectly possible. Nor does reliance on this exchange deal with the problems which I have earlier identified as to the argument on agreement to the Salford Principals structure.

237. However, this exchange is interesting in another sense, in that in February 2010 Mr Rukhadze had, via Revoker, instructed BTG Tax to develop a new structure and their report was expected (it in fact came in in May). These instructions and the content of the discussion had not been shared with anyone in the Pall Mall office.

238. I conclude as regards the January 2010 Term Sheet that there was no agreement either in December 2009 or to it. It may be that agreement was very close, and seemed for a moment to be within sight – and this is reflected in Mr Rukhadze's belief that the Family would sign and his use of the word "execute" rather than "agree". I do not accept his

evidence that his email is irrelevant because he did not pay attention to the formalities; plainly he understood the significance of this document and expressed a clear positive view on its likely acceptability. But ultimately matters did not proceed beyond positive indications. No agreement was reached as Mr Jaffe sought to suggest; had it been so there would have been no need for a Term Sheet of the type produced or the complications of the provisions as to making the agreement binding. Again, his evidence that such an agreement was reached appears to have been generated by both his history and experience in informal deal making and his positive outlook in matters of business. It was also, it seems likely, affected by the process of preparing for trial. I do not accept Mr Jaffe's evidence that he thought he had an agreement in principle on main terms – reflected in his evidence that he and the Family "shook hands" in early December 2009. It appeared to me that he really knew that there was no binding deal even as to main terms, and that, at best, he allowed his wishes to colour his recollection. Into this again two factors feed. One is the slightly different cultural approach to agreements which seems to have surrounded Badri, and the second is Mr Jaffe's tendency to regard as done that which he hoped would be done.

239. Be that as it may, the Term Sheet continued to go through further iterations until around late April 2010. To the extent that it remained in issue, I do not consider that any delay in signing or failure to procure the Family's signature at this time was to be placed at the door of Mr Rukhadze. The reality is that the parties could still not align their views on all the terms necessary to reach agreement. Had there been a deal to be done Mr Jaffe, who had come close to procuring a deal in December was probably as well placed to finalise it as Mr Rukhadze. Yet in May 2010 he was writing: *"I do not think we will ever see the 400m commitment"*.

240. I therefore accept that the January 2010 Term Sheet document simply represents a particular point of time in an ongoing process albeit one which represented one of the closest approaches to agreement of a deal – and one which is significant in terms of the division of the ways between Mr Jaffe and Mr Rukhadze. For it was after this point that relations between these two friends began to sour.

The beginning of the end: May- August 2010

241. From here on two very different stories are told by the parties. The Claimants say that in the lack of disclosure as to any attempts to finalise the Term Sheet and the evidence as to the Defendants' next steps I should infer that the Defendants had decided at this point to annex the business opportunity represented by the Recovery Services. In relation to the extant disclosure they point to the commissioning of BTG Tax to develop a new structure without input from the other members of Revoker, and without sharing that information with the other members. The advice was received in May 2010 but was not passed on even after

a specific request from Mr Blyumkin in September 2010. They also point to apparent concerns about information flow back to the Pall Mall Office, evidenced by emails from Mr Blyumkin, Mr Nagle and Ms Gabbert starting in late 2009 and continuing into 2010. This concern about lack of contact is to some extent verified by the fact that Mr Rukhadze, questioned about Ms Gabbert's email and the complaints she made about his aggressive tone towards her in phone conversations (during the course of which she suggested that she had entered labour prematurely as a result of the stress he was causing her), responded that he had not even known that she was pregnant. If true, that would suggest that he had not been visiting the Pall Mall office for some months.

242. The Defendants for their part say that this distance reflected a different reality, namely that by early 2010 at the latest Mr Jaffe had become disillusioned with the Family and their approach to the project, with the fact that there was no end in sight to the Recovery Services, and with the shape the commercial discussions were taking. Specifically, they suggested that Mr Jaffe had become convinced that the Family would never set up a new private equity fund; and that without that, the rump of the project was in his view unattractive. Further they said that he disliked dealing with the Family and believed that they were inappropriately involving themselves in decisions which should be left to experienced businessman. It was also said that at this point both SCPI and Mr Jaffe personally were at this point very short of money and were looking for a quick payment of a capital sum, so a clean break from the Family with compensation to be paid in short order was more attractive than pursuing the elusive goal of a final agreement for the Recovery Services.

243. Yet further the Defendants say that certainly by later in 2010 the Family themselves were no longer happy to do a deal with Mr Jaffe, who they regarded as under-involved, overly controlling and patronising, and that they preferred to enter into an agreement with himself, as the person they saw daily working long hours in their interest.

244. The evidence suggests that there was an emerging issue with the Family from around April 2010, though there were some more minor flare ups in 2009. In the wake of these events Mr Jaffe would indicate that he considered the Family to be amateur and disorganised while at the same time the Family was beginning to perceive Mr Jaffe's approach to advising them to be overly directional, as they themselves became more au fait with the details of their financial world.

245. It was an incident between Mr Jaffe and Badri's sons in law which led to the first open sign of rupture between Mr Jaffe and Mr Rukhadze. The row, which occurred at Park Street, appears to have originated in a discussion about reporting and decision-making, with Mr Jaffe raising issues both about absence of information being provided to him, and

Mr Rukhadze allowing the sons in law too free a hand, given their relative lack of experience of the business world.

246. The discussion descended into an argument in which Mr Rukhadze may not actually have said in terms that the Family no longer wanted Mr Jaffe (he certainly denied doing so in evidence), but rather wanted Mr Rukhadze, but that distinct impression was conveyed – as reflected in Mr Jaffe's email in the early hours of the next day:

> "I think we need to cool off, meet next week and talk business. Clearly Salford and you and Salford and the family have issues and we have to resolve it. Maybe the best is to face reality – the family does not need Salford anymore (they only need our cooperation in court and to protect its investments in the fund) but needs you and no longer need Salford in revoker and in managing Georgian investments (outside of Borjomi and Magti). So, let's untangle it (Salford is compensated and is out of revoker and family's life, you stay with them and fully control revoker, we agree on rules of the game with the family and with you, including on remaining projects such as US embassy, etc)."

247. Accordingly, amongst other things, in a series of emails between May and July 2010, between Mr Jaffe and Mr Rukhadze the pair attempted to come to terms encompassing a way forward including how the parties could communicate more effectively in future, and possible commercial terms including the division of a hypothetical US$50 million break fee payable by the Family between those involved in the recovery effort and its re-investment into a new "Salford" branded business. Other matters in play were additional financial benefits that Mr Jaffe wanted to negotiate with the Family such as treatment of loans or quasi loans made to him personally, annual bonuses for the managers of VDP and an increase in the carried interest in the assets managed by Salford Georgia. There were also disputes about other matters, for example whether Mr Marson should be awarded a 5% interest in the project as Mr Rukhadze proposed.

248. The Claimants suggested in their written opening that this was part of an attempt by Mr Rukhadze in 2010 comprehensively to renegotiate his own deal terms in respect of the Recovery Services. The Defendants disputed this, noting that Mr Jaffe does not say what it was that Mr Rukhadze was seeking to renegotiate. Mr Rukhadze's evidence is that he made no attempt to negotiate his deal terms, since his 40% interest in the Recovery Services had been agreed for over a year by this point, and the division of any break fee had only arisen for discussion – quite plainly – once it became apparent in the course of the negotiations that the Family were unlikely to set up a private equity fund.

249. There was, it seems, tension as to the Family's role. Mr Rukhadze says that it would have been both impractical and unfair to attempt to exclude the Family (who of course were paying for the Recovery Services) from involvement in day-to-day decisions. They were insistent that they should be directly involved in the project, and for the understandable reason that their current predicament was due to Badri's *laissez-faire* way of business. Mr Rukhadze was also of the view that the Family were more than capable of understanding the issues and risks involved in the decisions they had to make and that, if anything, they were better informed and certainly more engaged than Mr Jaffe himself. What does not seem to have been in issue however was that SCPI/Mr Jaffe had some rights in relation to the opportunity. When he said to Mr Rukhadze *"You cannot hijack what is not yours"* there was no comeback.

250. There were obviously other points of friction between Mr Jaffe and the Family in 2010. In early June there was an incident in which Mr Jaffe apologised to Mrs Gudavadze after "crossing the line" in a conversation when he apparently lamented that he had picked her side and not that of BB in 2008. There is also correspondence where he expresses impatience with what he plainly regarded as unprofessional interference from the Family. This was reflected in evidence from Mr Alexeev that from 2009 the Family on their side were criticising the level of involvement from the Pall Mall team. For all this, the evidence does not suggest that the Family had, as Mr Rukhadze at times appeared to suggest in his evidence, definitively wearied of Mr Jaffe and decided that they would not do a deal with him.

251. Mr Rukhadze relies in the context of his case as to the Family upon another highly charged incident in August 2010.

252. The context in which this occurred was that the Family, who themselves were again short of cash, were in simultaneous settlement negotiations with BB and VA. It appears that they hoped that settlements with BB and VA could be reached in short order and would greatly ease both their financial and litigation problems. The two negotiations were linked, because VA (who had been a major source of interim funding for the Family) was aware of the Family's discussions with BB and hoped that they could procure BB to drop his claims against VA as a condition of any settlement.

253. Mr Jaffe saw this as a misguided move which would prejudice the level of recovery and on 3 August 2010, he replied to an email from Badri's daughter Liana (copying in the entire Family and the Individual Defendants) as follows:

> "What I see is very chaotic movements, rush and naïve thinking and decisions (plus total breach of what we agreed in a term sheet). What I see is total interference of non-professionals into domains

> where small mistake can mean a disaster (I can illustrate it if you like). I understand that every cook can be an economist but I saw many times what happens next and am nervous and do not want to be part of it. I cannot even argue certain things – certain things not so easy to explain especially when trust is gone (I can simply tell you that in my experience it is wrong to rush into BB negotiations to help VA – will not help VA or you in the end). I know it creates more frustration for you (what is his problem).
>
> I guess it is time for me to say that I and Salford have no place in Revoker and I cannot act as Family advisor anymore. We should sit down in September and restructure our relationship and agree on rules of the games going forward. I will continue acting as the Family business partner until we clarify everything. If you proceed with BB deal, Paul and I will deal with BB separately on Salford issues (coordinating with the family of course). Irakly can make his own decision and I will deal with the outcome of it."

254. Mr Rukhadze's evidence was that he had told Mr Jaffe not to discuss any such thoughts with VA. Mr Jaffe's evidence was that he certainly did not understand any such communication to have been made; he understood Mr Rukhadze's communication to relate to something different. But in any event, he did have a conversation with VA, who reacted with fury, considering himself to have been "led up the garden path" by the Family and Mr Rukhadze, and refusing to deal with Mr Rukhadze for a number of weeks.

255. It is the Defendants' case that these events were a turning point in the relationship between Mr Jaffe and the Family and between Mr Jaffe and Mr Rukhadze. As to the former they said that after August 2010, the Family no longer trusted Mr Jaffe and no longer permitted Mr Jaffe to speak to VA on their behalf. From his side they said that from at least that point on, Mr Jaffe's objective was to negotiate what he called a "clean break" between him and Mr Rukhadze in relation to such interest as each of them had in SCPI and such interests as each of them had in RP and Revoker pursuant to which he would cease his involvement in the recovery project in return for a substantial "exit" payment and other benefits for himself and SCPI. As to the latter the Defendants say that Mr Jaffe stopped attending meetings with the Family – essentially bringing to an end his already marginal involvement in the Recovery Services and that by September 2010 at the latest, Mr Jaffe and Mr Rukhadze were dealing with each other on the basis that a split between them was highly likely, and ultimately inevitable.

256. The Claimants' case was that this incident had been inflated out of all reasonable significance. Mr Jaffe's evidence was that it was a small incident which was quickly cleared up both as between him and the Family and as between the Family and VA. As to the former they point to emails in this period from Mrs Gudavadze addressing Mr Jaffe in affectionate terms *("Eugene, remember that we love and respect you…"*), and also to one from Mr Rukhadze on 19 August 2010: "*at this critical juncture we need all our resources fully mobilized (AND WE DEFINITELY NEED YOU!)*".

257. It is obviously hard to unpick this highly charged event at this distance in time. I am not persuaded that later emails sent in December 2010 shed much light on what happened. It is possible that Mr Jaffe did misread Mr Rukhadze's email; the relevant portion could possibly have referred to something other than the BB deal and his views of it and there was something of a blizzard of emails at the time. However, had he read it with any care this seems unlikely. It seems to me most probable that he did not give careful thought to the email, having decided to do what he thought was the right thing. However, the account given by the Defendants of what was said to be a key issue was confused and contradictory and the documents do not support the submission that this was an event which actually cost Mr Jaffe the Family's trust. It was another step on the road to their transferring their loyalty to Mr Rukhadze, but Mrs Gudavadze's correspondence and subsequent events support the conclusion that Mr Jaffe remained trusted and valued by the Family; even if they were increasingly finding him trying to deal with.

The second stage: September 2010-February 2011

258. The relationship between Mr Jaffe and Mr Rukhadze however continued to deteriorate. Another ill-tempered meeting occurred in early September in which Mr Jaffe understood Mr Rukhadze to be asserting his primacy with Mrs Gudavadze *("Inna is mine"* was how he recalled it being put), and that he might join the Family to help them negotiate against Mr Jaffe. Mr Jaffe pressed Mr Rukhadze to say how he wanted to take matters forward. At the same time, he accidentally permitted a communication to be sent which indicated that SCPI did not accept that Mr Rukhadze had a carried interest in Borjomi (which he did), causing Mr Rukhadze grave offence.

259. On 13 September 2010 Mr Rukhadze sent Mr Jaffe an email setting out two options. This was referred to by the Claimants as "the Ultimatum", although the Defendants denied that this was remotely a fair description, preferring to call it the "Options email". Option 1 would enable the business relationship between them to continue. Mr Rukhadze would get a 40% share in the proceeds of the "*recovery effort*" and various percentages of other projects, with Mr Marson and Mr Alexeev (who at that time had a 46% share in the recovery effort) being "*taken care of with 10% extra share in the recovery effort (or something*

else acceptable to them)". The "break-up" fee (a fee which the Family was expected to pay if they did not proceed with the new private equity fund) would be divided in a manner he specified.

260. Option 2, which was stated to be operative if Option 1 was not accepted within roughly two days, would involve Mr Rukhadze "perfecting" his 40% interest in the project direct with the Family letting "*Igor and Ben know that I cannot get them a deal with you and suggest that they take their conversation with you directly or with whomever else they feel like*" and Mr Jaffe and Mr Rukhadze splitting the Salford-managed assets between them (with Mr Rukhadze taking Salford Georgia).

261. The Claimants' characterisation of the email derives from the fact that it was expressed to be binary, with a default setting to come into operation two days later. Mr Rukhadze says that it was not intended as such, that he was angry when he wrote it (just after being told he was being deprived of his Borjomi shareholding) and that he made no attempt to implement Option 2. Both he and Mrs Gudavadze said that the Family first learned about the conflict from Mr Jaffe and Mr Blyumkin and not from Mr Rukhadze. The Defendants also say that Mr Jaffe took the email rather as an opportunity to commence negotiations for a split.

262. Mr Jaffe's attempted to begin a negotiation on a split with Mr Rukhadze by sending him, the following day, the outline terms of a "clean break" agreement between Salford, Mr Rukhadze, and the Family, referred to as "the Amicable Divorce". That email included a clear marker as to Mr Jaffe' perception of Mr Rukhadze's position. *"If you will register your interest without fully agreeing with me on everything, I would view it as a very hostile act and in breach of your duties as Salford employee and partner. I note we only had few short discussions and ultimatum at the last moment is not proper and plainly wrong. It was always your responsibility to structure/protect all Salford's (not just yours) interests within Revoker environment."*

263. The terms he proposed included (a) that Salford would cease to be involved in Revoker; (b) that Salford would have a full power of veto over any settlement between the Family and BB concerning VDP; (c) that Salford would be paid a percentage success fee in respect of the amount recovered by the Family from VDP; (d) a provision for the Family to pay Salford's legal and security costs during the recovery stage and for 5 years afterwards; and (e) a $100 million break-up fee payable by the Family for ending the relationship with Salford.

264. Mr Rukhadze, however, was not receptive to this overture or to a similar set of proposals that Mr Jaffe emailed to him on 2 December 2010. In that Mr Jaffe reiterated that "*Revoker was* [a] *Salford Project*" but provided a further proposal in which the parties could seek to resolve the problems encountered by agreeing a comprehensive deal between Salford, the Family and Mr Rukhadze. Mr Rukhadze prepared a response (which he never sent) saying: "*You should try to negotiate with the*

family whatever deal you want. You are free agent as far as I am concerned." In discussions with Mr Alexeev he characterised the proposal as *"completely unacceptable of course".*

265. Between mid-September 2010 and early March 2011 Mr Jaffe and/or Mr Blyumkin held several meetings with the Family to discuss the situation with Mr Rukhadze. In late September, after sending a number of texts to Mr Blyumkin redolent of an intention to play hardball with the Family, Mr Blyumkin met with the Family. There was a dispute as to what was then suggested. On my reading of the relevant documents and evidence Mr Blyumkin seems to have suggested a Family/SCPI deal for what was termed the "Salford share", with Salford and Mr Rukhadze parting ways (and inferentially Mr Rukhadze performing the Recovery Services) or for the deal to proceed simply as an agreement with SCPI with Mr Rukhadze within that structure. At this point it appears to have been envisaged that Revoker, as a 100% owned entity staying with SCPI; however some later exchanges indicate that thought was given to Revoker being taken out of the Recovery Services structure. It was suggested by the Defendants that Mr Jaffe sought to exclude Revoker. That does not appear to be justified by the evidence; what was occurring was rather a continuing attempt to work out a modus vivendi, with Revoker's role in that being unclear, given its ownership by Mr Jaffe through SCPI, and its partnership structure which included Mr Rukhadze.

266. In reality if hardball was successfully played by anyone in this negotiation it was played by Mrs Gudavadze. She said, effectively as she said in evidence, that she was not going to allow this to be her problem, that there was no current agreement, that the Family would not sign a deal with either side and that Mr Jaffe and Mr Rukhadze should endeavour to solve their dispute and come back once they had done so.

267. With Mr Rukhadze not engaging, Mr Jaffe and Mr Blyumkin appear to have revived an interest which they had demonstrated from time to time, but not pursued for some period, in reporting between the Park Street team and Pall Mall.

268. In January 2011, Mr Jaffe went back to Mrs Gudavadze. He informed her that he had tried to find a solution with Mr Rukhadze but that, after 2 months of negotiations they had reached an impasse and Mr Jaffe had concluded that a deal between Mr Rukhadze and Salford was not possible. He suggested to Ms Gudavadze that there were two options: either the Family should now sign a Recovery Services deal, or negotiate an agreement under which "Salford" (meaning Mr Jaffe, Mr Blyumkin and the others based permanently at SCPI) would withdraw from the project in return for an exit fee.

269. Ms Gudavadze sent a holding response on 4 February 2011 but did not respond further. On 28 February 2011, she responded to a renewed request for a meeting by saying "not this week, please". Mr Jaffe met

with Ms Gudavadze one last time on 10 March 2011 but without a resolution.

270. By this time Mr Jaffe's emails and texts indicate that he was determined to get an answer out of the negotiations, whether that answer was a deal for SCPI, an exit agreement or some other possibility. He was also, fairly plainly, as thoroughly exasperated with the Family and Mr Rukhadze as they were with him.

271. At the same time Mr Blyumkin became more pressing in his requests for regular reporting from the Park Street team, highlighting the fact that fewer reports on the litigation were being fed back and seeking regular reports on the asset recovery project. Mr Rukhadze responded to these requests by suggesting that Pall Mall attend meetings in Park Street or employ someone to write reports – or that he copy Mr Blyumkin in on every email. Both parties suggested that the other was behaving tactically at this point. On this point I consider that both parties' submissions are correct. Had Mr Rukhadze been more co-operative in forwarding the negotiations it is unlikely Mr Jaffe and Mr Blyumkin would have pressed this point. However, Mr Rukhadze's response, although somewhat tongue in cheek, indicates a keen desire not to put himself formally in the wrong.

272. The key dispute in this period is whether Mr Rukhadze had at some point between September 2010 and March 2011 persuaded the Family not to sign any Recovery Services deal with Mr Jaffe – a contention that both Mr Rukhadze and Ms Gudavadze reject. That is an issue with which I shall deal below.

The end: March 2011 onwards

273. Mr Jaffe met with the Family on 10 March 2011.

274. On 14 March 2011, Mr Huntley (then of Hogan Lovells, acting for the Family) emailed a number of people including Mr Blyumkin about a proposal to make enquiries with the Russian investigatory authorities to obtain information and documents. Mr Blyumkin replied expressing his firm view that no such enquiries be made and ended his email by saying "*Right now Revoker is strongly against this move*".

275. This resulted in an angry email from Mr Rukhadze: *"Who the hell is Revoker in this case before reaching such strong objection on supposedly such important point? Does it even understand what is going on? Has it seen all the documents that we are trying to get and has it considered alternative ways to get them? If yes, please share these ideas with us. Revoker works out of 110 Park Street and we here have not reached any strong objections yet (we usually discuss these issues first)"*.

276. Mr Blyumkin replied: *"Majority partners of [Revoker] that is and Salford. I suggest discussing this in person."*

277. Mr Rukhadze replied: *"I thought Igor and I had at least 50% […] What is Revoker anyway? Don't we have another company called Recovery something? […] I confuse these structures as they are meaningless. There are people who do work and then there are meaningless structures that exist today and may be gone tomorrow.".*

278. The Claimants then revived the question of reporting. A further exchange took place on 24 March 2011, in which Mr Blyumkin said: *"Irakli, we ask you as CEO of Revoker to establish system of bi-weekly reporting and system of written approvals for all major decisions. System of approvals must be introduced immediately and going forward no major decisions should be done without proper approval process. Please confirm that this will be done."* Mr Rukhadze replied (in similar vein to his email of the week before): *"What is Revoker anyway, a partnership? What other companies do we have (I believe Recovery something rather). Can you please make sure I am briefed about the current status of these entities by Jamal as somehow these structures are now presented as meaningful?"*

279. Mr Rukhadze also pressed for a shareholding to be assigned to him, garnering a response from Mr Blyumkin: "*Recovery GP is owned 100% by Mr Jaffe. Most likely you refer to economic interest, but even that isn't majority*". Mr Rukhadze responded reiterating the stance he had taken in 2010 that before any agreement with the Family was signed he expected to be assigned a 40% shareholding.

280. On 29 March 2011, Mr Jaffe sent Ms Gudavadze a lengthy email to follow up from the 10 March meeting. Described by the Claimants as an explanation of the problems which had arisen, it in fact took a somewhat aggressive tone asserting that: (a) Mr Rukhadze owed duties to Salford in respect of the Recovery Services; (b) the Family were interfering with and encouraging Mr Rukhadze (whether knowingly or not) to act in breach of those duties; (c) Salford had enforceable legal rights against the Family with respect to the Recovery Services; (d) Mr Jaffe had the right to determine how Mr Rukhadze could provide the Recovery Services and indeed whether he provided the services at all, and (e) without prejudice to its existing rights, Salford would shortly propose a modification of its relationship with the Family. He indicated that: "*Agreement with Salford/Revoker should be signed immediately (possibly, the Family could ask then that Irakli personal deal is agreed). This is your duty as Salford's partner and as Revoker's client*."

281. The assertion that there was an agreement with SCPI echoed an email sent on 25 March by Mr Blyumkin which stated that the Family taking decisions independently of Salford and with Mr Rukhadze was "*against the terms agreed in the Revoker term sheet or wider Salford rules.*"

282. On 3 April 2011, Mr Jaffe emailed the Family a term sheet proposing a "*restructuring of the relationship between Revoker/Salford and the Family".* That proposal appeared to proceed on the basis that there was

already a binding agreement with the Family for the provision of Recovery Services, and proposed a number of terms including that the Family would take over Revoker and Salford Georgia; that Salford would receive a success fee for recoveries; that the Family would write off Mr Jaffe's personal debts to Badri's estate; that the Family would pay Salford, inter alia, a break fee of up to US$50 million; that Salford's legal and security costs would be paid by the Family until 5 years after the litigation with BB was concluded; and that Salford would be granted veto rights over any settlement between the Family and BB.

283. Meanwhile on 1 April 2011, Mr Blyumkin sent an email instructing Mr Rukhadze and Mr Alexeev not to attend a meeting with a director of NWVF, who was seeking urgent funding from the Family. His stated basis for doing so was that Revoker was known to be a Salford entity and that their attendance at the meeting on behalf of the Family could expose SCPI to the risk of allegations by BB that it was acting in a conflict of interest between the investors in VDP.

284. Mr Rukhadze fairly quickly indicated that he would not comply because he did not understand the conflict and attended the meeting stating that it was in the Family's interest that he should do so. Mr Marson responded that he had always believed that Revoker and Salford were entirely separate and that he would now need to consider his position. That he was talking about resignation, and doing so with the Family appears indicated by the fact that a draft letter typed by Mr Rukhadze's PA apparently on behalf of Mrs Gudavadze refers to the disruption caused by Mr Marson's resignation. His own correspondence with Mr Blyumkin indicated that he was seeking sanction to transfer his employment to the Family.

285. On 1 April and 4 April 2011 respectively, Mr Alexeev and Mr Rukhadze sent emails to Mr Blyumkin and/or Mr Jaffe to request the formalisation of their interests in the shares of Revoker and associated structures.

286. On 4 April 2011 Mr Jaffe wrote to Mr Rukhadze on behalf of SCPI, and arranged for RP's director, Mr Ross Munro, to write to Mr Rukhadze and Mr Alexeev on behalf of the company. The letters flagged the question of fiduciary duties, required Mr Rukhadze to provide an account of the operations and activities carried out in respect of the Recovery Services, asserted that Mr Jaffe owned RP absolutely, through which he controlled Revoker absolutely and asserted that Mr Rukhadze and Mr Alexeev knew that they had no existing rights to any share of the profits from the Recovery Services and that RP was entitled to allocate profit shares as it saw fit.

287. Mr Rukhadze denied owing any duties to anybody and indicated that he was in a position to deny Mr Munro's fees for his actions. On 12 April 2011 he said: "*Don't bother me please any more with this nonsense*" and assigned the 'junk' label to emails from Mr Munro. Mr Alexeev's response was also to dispute the entitlement of Harneys to give

instructions to him or anyone else, and privately described the letter as "*a pile of gibberish*".

288. Mr Marson took a rather different approach. He initially responded to Mr Munro on 13 April 2011 asking a number of questions about the corporate arrangements and other matters, before reiterating the proposal he had made on 1 April 2011 that he simply be released from his duties in order to resolve the conflict. Mr Munro replied on 19 April 2011 expressing the view that there was no conflict as long as he complied with his duties under the Employment Agreement, but that to give advice *"to the AP Family (or to other Revoker employees) in relation to Revoker LLP or the pending dispute in relation to the position of Mr Rukhadze of which you are aware"* would put him in breach of his Employment Agreement.

289. Following further correspondence in which he indicated that he would remain in post, on 10 May 2011, Harneys wrote to Mr Marson asking him to confirm that, as Revoker's employee, he had not given and would refrain from giving advice to the Family in relation to "the pending dispute between Revoker LLP and the Family and/or Mr Rukhadze". Mr Marson in his response said he was not currently doing so. In fact, however on the same day he was advising Mr Rukhadze on the wording of an email to Mr Jaffe and the next day Mr Rukhadze was circulating him and Mr Alexeev with "another nonsense" received from Harneys.

290. Meanwhile Mr Rukhadze, in consultation with Mr Alexeev and Mr Marson, made the arrangements to set up Hunnewell, which it was anticipated would enable them to continue to provide services to the Family "seamlessly" in the event of a split. Exchanges between them around 11-12 April show them discussing the future, scrutinising Diana Miftakhova's contract, and speaking of themselves and Salford in binary terms, while indicating *"if we are going to be suspended we will have to continue the work."* In early May a tax structure based on three individuals had been notified to advisers, and Mr Marson was talking of "New Revoker", with him as an equity partner, in discussions with the Family. At around the same time Mr Marson was covertly advising on the strategy arguing that a transfer of Revoker undermined *"our argument … and take unnecessary exposure on ourselves"* suggesting that shares be transferred instead, but to Mr Rukhadze and Mr Alexeev only: *"Can't mention me*".

291. On 4 May 2011, the Family's solicitors emailed SCPI's solicitors setting out the Family's position including that there was no binding agreement in place in relation to the Recovery Services. On 10 May 2011, they emailed to SCPI's solicitors the Family's responsive term sheet. This rejected most of Mr Jaffe's proposals for an exit deal, in that it sought the transfer of Revoker and RP to the Family's control and would grant no veto rights in respect of any settlement with BB. However, it did propose that Mr Jaffe would be paid a lump sum, the amount of which would be the subject of further negotiation. SCPI were asked to identify

the amount of money that Mr Jaffe owed to the estate to facilitate the calculation of a settlement figure. Some discussion then occurred on a without prejudice basis; the evidence suggests that a figure of US$25 million was floated around 3 May 2011, though no formal offer was made.

292. Meanwhile on 11 May 2011 Mr Jaffe arranged for RP to suspend, or purport to suspend, Mr Rukhadze from his position as a consultant. On 16 May 2011 he then procured Revoker to suspend, or purport to suspend, Mr Rukhadze and Mr Alexeev from providing Recovery Services; and instructed Mr Marson from now on to report to Mr Blyumkin at SCPI.

293. RP then wrote to the Family to inform them that Mr Blyumkin and Mr Nagle would now provide the Recovery Services and to demand payment of US$1.587million, which was said to be contractually owing by the Family, to RP. The Defendants say that there were no real grounds for taking these steps, which were a complete pretext with the intent of trying to bring Mrs Gudavadze to heel by disrupting the Recovery Services.

294. This was the line which Mrs Gudavadze took at the time – writing to RP protesting that this was an attempt to interfere in the recovery work which would damage the Family and make it impossible for the Family to continue the relationship. The response from RP was that the suspension had been confirmed and that Mr Blyumkin would now be the Family's main point of contact. It also asserted that the Family owed US$1.5 million in management fees and warned of serious consequences if the Family sought to induce Mr Rukhadze, Mr Alexeev or any other Revoker employee to act in breach of duty.

295. After an exchange of argumentative correspondence, the Family's solicitors, Olswang, told RP by letter dated 25 May 2011, that there was no binding agreement for the provision of Recovery Services (alternatively if there were then the Family terminated it) and that the Family no longer wished RP and Revoker to be involved in providing Recovery Services.

296. After Revoker had passed its resolution on 16 May 2011, Mr Marson, who had been discussing the correspondence with Mr Rukhadze and Mr Alexeev, wrote again saying that his position was untenable: he could not be expected, as an employee of Revoker providing services to the Family, to report to Mr Blyumkin because that would create an irreconcilable conflict of interest. Mr Jaffe replied that Mr Rukhadze had been just as much an SCPI senior executive as Mr Blyumkin was, so there was no conflict of interest which prevented the agreement from being performed. On 23 May 2011 Mr Marson wrote saying that he considered his agreement *"no longer capable of being performed as its entire purpose is now frustrated"*.

297. Following a further exchange Mr Marson wrote on 25 May 2011 again expressing the view that his contract had been frustrated but that, if he was wrong about that, he purported to accept Revoker's conduct as a repudiatory breach.

298. On 26 May 2011, Mr Rukhadze and Mr Alexeev resigned as members of Revoker, citing Mr Jaffe's manipulation of the LLP for his own ends, the illegitimacy of their suspension, and their exclusion from the management of Revoker.

After the break-up

299. It appears that Mr Rukhadze and his team continued to provide Recovery Services to the Family for the next 18 months without any contractual commitment from the Family. They established their own UK Limited Partnership and BVI and Jersey company structure (the remaining Defendants being the entities within that structure) and pending agreement being reached the Family made loans from time to time as it had done previously.

300. In parallel with providing the Recovery Services on a non-contractual basis, the Individual Defendants began their own negotiation with the Family for a formal contract. The negotiations continued for well over a year and did not conclude until September 2012, when the Fourth to Ninth Defendants entered into a series of agreements and arrangements with the Family. Although not a great deal of time was spent in the evidence on this point, the negotiations appear to have proceeded largely as a seamless continuation from the negotiations before the break with SCPI. One of the sons in law, Mr Guniak, writing in September 2011, described the proposal as "a variant" and as "one and the same contract, constantly changed not in our favour".

301. Eventually in September 2012 a binding agreement for the provision of Recovery Services was entered into with the Family. It provided that the Defendant entities would provide Recovery Services in return for an annual management fee and a carried interest, calculated (in simplified terms) as 15% of the value of the recoveries in excess of the first US$500 million recovered. Although the agreement has plainly undergone considerable changes in the drafting process since the break with SCPI, it is notable that a number of changes are plainly referable to difficulties which were encountered in the process of negotiation with SCPI and appear to have been "custom-built" to deal with balancing the parties' interests on that point.

302. Mr Jaffe took no steps to enforce that alleged agreement or to pursue any claim in relation to the Recovery Services against the Individual Defendants or the Family.

303. He did however come into conflict with the Family through legal proceedings. There was an issue as to the entitlement of VDP to carried

interest which was brought by the liquidators of VDP. The Privy Council ended up that SCPI was not entitled to carried interests in assets that had been managed by SCPI. There was also an arbitration in relation to one of the loan agreements which had formed part of the wider negotiations.

304. Virosat and SCPI went into liquidation in March 2015 and July 2016 respectively due to unsatisfied judgment debts in relation to these two claims.

305. It was after this, in September 2016 that Mr Jaffe launched these proceedings

The Issues

The Duties

306. Having established the facts, the first question becomes whether those facts translate into a breach of fiduciary duty claim. The first step within this is to establish which of the Defendants owed duties to whom, and when.

Mr Rukhadze

307. It is the Claimants' case that Mr Rukhadze owed relevant duties to SCPI, RP and Revoker. As to SCPI, they point to the fact that he was a director of SCPI from July 2004 until December 2009 and say that he consequently owed duties under sections 120 and 121 of the BVI Business Companies Act 2004: in summary, to act honestly and in good faith in the best interests of the company. He owed those duties for over a year during the period in which the Recovery Services were provided.

308. However, the Claimants submit that he owed fiduciary duties beyond this period based on his significance within the company in practice. They rely on the fact that the essential test for whether or not a person owes fiduciary duties is whether he has *"undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence"*: see Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18.

309. Mr Rukhadze, they say, met this criterion amply. Even on his own evidence he was a senior executive of SCPI, one of the top three most senior people in SCPI alongside EJ and PB. Further, he was given specific responsibility for the Recovery Services project from the very beginning, being looked to as a "key man" and putative CEO of the postulated "RecoverCo". His importance within the company and the degree of trust reposed in him (either in relation to the Recovery Services or generally) did not change when he resigned as a director, because the contemporaneous documents show that his resignation was acknowledged by other SCPI staff to be *"purely a technical matter and for UK tax considerations"*. It had no impact on his seniority within the

organisation and it did not indicate a reduction in the level of trust reposed in him.

310. For Mr Rukhadze it was argued that this resignation was a substantive resignation, not for tax reasons, and that he resigned in order to help with the Recovery Services, pointing to the fact that Mr Blyumkin stayed on the Board because he was not involved in the Recovery Services. He also relied on the fact that he ceased to attend SCPI Board meetings after his resignation. In his evidence he explained this further saying that he explained to Mr Jaffe that the resignation was necessary to help the Family recover the assets without conflicts of interest ie. that the Recovery Services should be provided by him independently of Salford due to Salford's potential conflict of interest. In any event it was submitted on his behalf there is no pleaded case or factual support for the proposition that he continued as a de facto director or shadow director.

311. Taking these two issues in turn, I do not accept that Mr Rukhadze's resignation was for reasons other than those given at the time. The letter to which he refers was a later letter in June 2011, after the dispute between the parties had erupted. There is no contemporaneous suggestion of this, and indeed such a suggestion sits ill with the surrounding correspondence generally as well as the Jamal Khan email. Further if this were right it would be to accept that Mr Khan, who appears to have been diligent – and about whose honesty no question has otherwise been raised – was deliberately creating a false document trail. And if Mr Khan were for some reason creating a false document trail it would be odd that he did so in an email sent only to Blyumkin and Mr Rukhadze. The reason for the resignation given by Mr Rukhadze also does not fit the facts: Mr Blyumkin was at the time involved in the Recovery Services – both he and Mr Jaffe were essentially "part time" on the project.

312. As to the existence of fiduciary duties after the resignation, I do not accept that a pleaded case as to his being a de facto or shadow director is necessary. The question, to be determined objectively, is whether or not Mr Rukhadze met the criteria for being a fiduciary vis a vis SCPI. The answer to this seems to me to be straightforward. Mr Rukhadze was a very senior person within SCPI. He was a director until he had to resign for tax reasons. When he resigned nothing changed about the level at which he was operating within SCPI. He continued to be one of the acknowledged top people within the company. He was charged with the day to day responsibility for a key project involving a key client relationship. He remained a director as regards Salford Georgia. In my judgment he plainly continued to owe fiduciary duties.

313. The Claimants also argued that Mr Rukhadze owed duties to Recovery Partners (i) under his Consultancy Agreement and (ii) as a fiduciary. As to the former they point to the fact that the Consultancy Agreement entered into on 30 January 2009 established wide-ranging duties

including (i) to liaise with and advise the Family in relation to Recovery *"for the sole benefit of [Recovery Partners]"* (Clause 3.1.3), and (ii) to act in the best interests of Recovery Partners in the event of any conflict of interest, including if necessary by disclosing the conflict (Clause 11.2).

314. The Defendants advance a variety of arguments as to why the Consultancy Agreement imposes no relevant duties.

315. The first is that there was an *"agreement or common intention"* that the Consultancy Agreement would be abandoned after Mr Rukhadze became resident in the UK for tax purposes, which happened in February 2010. That case did not appear to be pursued as such.

316. The second case pleaded was that *"the sole intended purpose of the Consultancy Agreement […] was not to regulate legal relations between D1 and Recovery Partners, but to provide the means for D1 to receive fees for such period as he was not resident in the UK for tax purposes"*. Again, however that case was not pursued as such. But the Consultancy Agreement could not have provided a legitimate means for him to receive fees unless it correctly reflected the legal relations between him and Recovery Partners. Either it was effective in accordance with its terms or it was a fraud on one or more tax authorities, which is not alleged.

317. Thirdly it was suggested that the duties delineated in the Consultancy Agreement made clear that Mr Rukhadze was acting as *"an independent contractor and not as its agent"*. That case also was not pursued in closing.

318. The way the case was put in closing for the Defendants was essentially a variation on the first point. It was said that in considering this point I should have close regard to the context, namely that the Consultancy Agreement was an innovation of Macfarlanes and intended only as a temporary solution until Mr Rukhadze became a UK resident and could be paid as a member in Revoker – a step which subsequently transpired in April 2009. Thus, it is said the purpose behind the Consultancy Agreement came to an end in April 2009 and, while the agreement was not terminated in accordance with its termination provisions, it was not being performed by either party, and it therefore could not be said that any duties were owed which arose out of it, after April 2009.

319. The problem with this case is that the document was signed and there was no agreement to abandon it. What is more the Consultancy Agreement required three months written notice for termination except in specified (inapplicable) circumstances, and Clause 13 provided *"This Agreement may only be varied with the written agreement of both parties"*. There was no such written agreement. In the light of that clause and *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2018] 2 WLR 1603, the answer must, it seems, be that the Consultancy Agreement remained in force throughout the relevant

period. The contrary was not really suggested. But in the light of that conclusion it would seem illogical if the duties which arose out of it ceased to be owed.

320. The question then becomes what those duties were. In answer to the Claimants' case on this the Defendants stress that the reality of the agreement cuts both ways. Accordingly, they say that I should conclude that the document meant what it said, including that Mr Rukhadze was not doing any more or less than was set out in that document; he was not, therefore to be regarded as the CEO of either Revoker or RP.

321. Further the Defendants say the terms of the Consultancy Agreement do not contain any express fiduciary duties and are inconsistent with the proposition that such duties were owed. The Defendants point in this connection to clause 11, 'Material Interests', which provided that Mr Rukhadze was permitted to provide his services in connection with matters in which he had a material interest which may conflict with his duties under the agreement, and envisaged, at clause 11.2, that due to his other interests there may be instances where he was unable to act in the best interests of RP. He was alsoentitled, under clause 11.3, to provide similar services to third parties.

322. Looking at the Consultancy Agreement as a whole and in its context, I cannot accept the Defendants' submissions on this. There is a "best interests" obligation. The parts of Clause 11 to which the Defendants point provide as follows:

> "11.1 The Consultant shall be permitted to provide his services in connection with matters in which the Consultants has, directly or indirectly, a material interest or a relationship of any description with another party, which may involve a potential conflict with the Consultants duties under this Agreement."
>
> 11.2 If the Consultant faces a conflict of interest he will endeavour to act in the best interests of the General Partner and the partnership and to the extent that he is unable so to act, he will disclose the conflict in writing to the General Partner.
>
> 11.3 The Consultant's services shall be provided on a non-exclusive basis and the consultant shall be free to render similar service to third parties, subject to the provision of service to the General Partner hereunder not being materially adversely affected thereby."

323. Looked at in context, these operate as a "carve out" effectively for any other consultancy work which Mr Rukhadze was doing, and only where

full disclosure was made. I accept the submission that absent such disclosure if he began to act for his own benefit, he would be acting in breach of contract. Further those "carve out" provisions are not applicable here. I therefore conclude that Mr Rukhadze did owe fiduciary obligations to RP in relation to the Recovery Services work.

324. I also accept the submission that quite aside from the exact effect of the Consultancy Agreement, Mr Rukhadze was discharging important and senior functions on behalf of RP and therefore owed fiduciary duties in equity, applying the *Mothew* principle.

325. As for Revoker, it is common ground that Mr Rukhadze became a member of Revoker on 17 April 2009. It is also common ground that he owed duties under the LLP Regulations as a result, including (i) a duty to render a full account of all matters affecting the LLP (Regulation 7(8)), (ii) a duty to account to the LLP for any profits made in competition with it (Regulation 7(9)), and (iii) a duty to account for any benefit derived without the LLP's consent from an LLP transaction or from its property, name or business connection (Regulation 7(10)).

326. Where the parties part company is as to what this means in reality. The Defendants submit that Regulation 7(9) relates to pre-resignation competition, which is not alleged here. As to Regulation 7(10) the Defendants contend that the first part is inapplicable because they are not accused of having benefited from any *"transaction concerning the limited liability partnership"* – indeed the basis for the claim is that they have benefited from a transaction that did not concern it.

327. As to the second part, ie. whether diversion alleged in this case could properly be described as the *"use by him of the property of the limited liability partnership"*, the Defendants do not accept that business opportunities are or should be treated as property, and submit that the natural reading of the wording of the Regulation favours their construction.

328. On this point it seems to me that the lines for what the Regulation should be seen as intended to cover is likely to have been intended to dovetail with the general law as to fiduciary obligations. That is the view taken by Whittaker and Machell in *The Law of Limited Liability Partnerships* (4th ed. 2016 pp 187-8). That would indicate that duties are owed in the case of pre-resignation conduct short of actual competition in the circumstances outlined above and that a business opportunity should be regarded as falling within Regulation 7(10).

329. As to a duty under Regulation 6(1) I have indicated above that I do not consider that Sales J was saying that all LLP partners will be fiduciaries and accept that whether they do so will turn on the role which they in fact perform. However, the equivalency sought to be drawn by Mr Rukhadze between the formal position and fiduciary duties is in my judgment a false one. If that were right all LLP members could avoid

fiduciary duties, whatever roles they played, so long as they avoided taking on a title. While Mr Rukhadze may have wished to avoid fiduciary obligations because of the risks involved, the fact that he was not formally CEO of Revoker does not matter. The question is whether, in addition to being a member of the LLP, he acted as the agent of the LLP.

330. This certainly appears to be how he was perceived. Mr Jaffe's contemporaneous description of his role was *"CEO of recover co"* and Mr Marson later saw him as *"MD of Revoker".* The business cards denoting him "Director" also appear to have been designed to hold him out to third parties as a person authorised to act for the LLP (ie as its agent). That also reflects the reality. He was and was seen as the senior partner or key player or, in his own words *"the most important member of Revoker"*. He also acted for Revoker, for example in relation to hiring Mr Marson, Ms Miftakhova and Mr Karadaghi.

331. Certainly, in some respects therefore Mr Rukhadze acted as the agent of the LLP and would owe it fiduciary duties. However, liability under this head appears to me to be context dependent; just because he acted as agent in one context does not mean that he did so in others. In relation to this head one therefore has to look at the role played in the context of the actions said to constitute the breach to decide if liability follows.

Mr Alexeev

332. The first question in relation to Mr Alexeev is whether he owed any duties to SCPI. The Claimants submitted that he was effectively employed by SCPI and owed it duties. They pointed to the fact that before he began work in relation to the Recovery Services in February 2009 Mr Alexeev had drafted a document setting out the 'Indicative Terms and Conditions' of his employment by *"Salford Capital and associated entities and persons"* (defined as 'The Partners'). No substantial issue was taken with this by Mr Rukhadze. The Claimants contend that this document should therefore be treated as the basis on which he was hired: and that the natural reading of the reference to *"Salford Capital"* is that Mr Alexeev was hired by SCPI. They also point to the preamble to the Confidentiality Agreement that he later signed with SCPI which recorded his *"role as advisor to Salford Capital Partners Inc and its affiliates and associates."*

333. The Defendants dispute this analysis, very briefly saying that as the documentation was unsigned it is irrelevant; and that the Confidentiality Agreement is more consistent with his being seen as an outsider than a Salford employee.

334. Plainly the first point is not a substantial basis upon which to dispute the existence of a contract. Mr Alexeev, who commenced work in around February 2009 was employed by someone before he was admitted to membership of Revoker in mid-April 2009. The Defendants do not

suggest by whom Mr Alexeev was employed if not by SCPI. The most natural analysis is that Mr Alexeev, having tendered his indicative terms, and Mr Rukhadze having slightly amended them prior to Mr Alexeev commencing work, a contract came into effect on the terms of the Indicative Terms and Conditions as amended. I accordingly find that Mr Alexeev was employed by SCPI.

335. The Claimants submitted that the terms of the Indicative Terms and Conditions imposed fiduciary duties. They pointed in particular to:

    i) A provision that Mr Alexeev *"shall devote substantially all his business time to The Partners' business and affairs and shall use his best efforts to perform his responsibilities"* – equivalent in practice to a 'no conflict' duty; and,

    ii) A provision that Mr Alexeev "shall present to The Partners each business opportunity which falls within or is related to The Partners business and shall not, directly or indirectly, exploit any such opportunity for his own account" – a 'no profit' duty.

    iii) In addition, the document provided that he was to be entitled to a 'Partnership share participation' of *"10% of The Partners' total proceeds from Recovery stage projects."* In other words, he had a 10% stake in the proceeds from the Recovery Services, another strong indicator of a senior role.

    iv) The same is true of the description of his duties: *"At the 'Recovery' stage Executive's duties will involve managing efforts on select recovery projects, interaction with principals on both sides of the transactions, as well as organizing overall systematic coordination of recovery projects for The Partners."*. That role, a combination of management and agency, had the hallmarks of a classic fiduciary position, particularly as they related to a particular business opportunity which Mr Alexeev was being hired to manage and pursue (the Recovery Services).

336. The Claimants also pointed to Mr Alexeev's own understanding of his role as being a senior role, akin to being brought in as a partner to a partnership.

337. The Defendants did not address submissions to counter these points, and it is indeed hard to imagine what could sensibly be said in this context.

338. I accordingly do conclude that Mr Alexeev owed fiduciary duties to SCPI in respect of the Recovery Services and that those duties included a 'no conflict' and 'no profit' duty.

339. There was suggested to be an issue as to whether this arrangement should be treated as having been supplanted by a formal consultancy agreement drawn up between Mr Alexeev and RP in March 2009.

However, in closing the Claimants did not suggest that anyone other than Mr Rukhadze had an agreement with RP. Were the issue live I would conclude that no such transfer took place; Mr Alexeev's evidence was to the effect that not only did he not sign the agreement, he was not even sure that he had seen it. Had it come into effect its contents which included a number of more specific obligations, including to *"Act at all times in the best interests of the Company and Group Undertakings"* and *"provide the Services exclusively to the Company."* would simply have the effect that Mr Alexeev would have owed fiduciary duties to RP instead of SCPI.

340. As to Revoker, it is not in issue that Mr Alexeev became a member of Revoker on 17 April 2009. Similar conclusions therefore follow as to his duties under the LLP Regulation. As to any further fiduciary duties, he had a senior role, though obviously less so than Mr Rukhadze. He worked full time on the Recovery Services. It is quite possible, depending on the factual context, that he could have acted as the agent of Revoker so as to attract fiduciary duties at common law.

Mr Marson

341. Mr Marson was not a partner in Revoker. He was employed by Revoker as its chief legal counsel under an employment contract dated 5 October 2009. Under that contract:

    i) Mr Marson was obliged not to *"be employed, engaged, or retained by or interested or concerned in any manner in any business other than the business of the Group"* (i.e. Revoker and its Affiliates) (Clause 13.1);

    ii) He was obliged for one year after the termination of his employment not to *"canvass, solicitor or endeavour to entice away from Revoker, Salford or any Affiliate any Investor or Investee or Prospective Investor or Prospective investee or Client with whom you had personal contact or in whose dealings with the Group you were directly involved in the course of your employment during the Relevant Period"* (Clause 19.2). The definition of 'Client' included the Family (as a *"person to whom or which […] Revoker […] provides services in the course of the Group's business"* (Clause 1).

342. The Claimants submit that in addition to these clauses Mr Marson's role as Chief Legal Counsel was a senior and important one involving a level of trust which gives rise to fiduciary duties. They submit that he was both (a) acting as a solicitor, with all the duties and trust that that entails, and (b) being given specific responsibility for providing legal services to the LLP's most important client, trust having been placed in him to do so with minimal supervision (there being no other in-house lawyers at Revoker except to the extent that Mr Khan, discharging his role from the Pall Mall office, was involved in administration).

343. The Defendants submit that Mr Marson was simply an employee, and owed the duties that were contained in his contract of employment, including an implied contractual duty of fidelity, but that he did not owe fiduciary duties giving rise to a duty to account. They submit that there is nothing in the terms of his contract to suggest that it was intended to give rise to fiduciary duties, and there is no other reason to superimpose them on the contractual relationship.

344. I cannot accept the Defendants' submissions. While the terms of the contract of employment are not entirely clear, those terms, taken in conjunction with Mr Marson's senior and professional role are in my view sufficient to compel a conclusion that he was indeed under fiduciary duties to Revoker.

345. Mr Marson's evidence was also such as to leave me under the impression that he considered that he had been in such a position. In particular his evidence as to by whom he was employed manifested a determined attempt to suggest that he was hired to provide duties to the Family and was therefore under no duties to Revoker – a position flatly at odds with his own pleaded case, which admitted that he entered into an employment contract with Revoker and (by amendment) admitted that he owed at least the contractual duties of fidelity owed by an employee.

346. Mr Marson's evidence in this regard was one of the least impressive passages of his evidence. He was manifestly reluctant to accept the fact (not in issue on the pleaded case) that he had been hired by Revoker, not by the Family. Even when actually looking at the Contract of Employment he remained reluctant to accept that he had entered into a contract with Revoker and sought to argue his way around this. That he, a lawyer and with a compliance background, should claim to be in any doubt as to the fact of his employment by Revoker seemed to me to be little short of incredible and drives a conclusion that his evidence in this respect was not honest.

347. This raises the question of what point there was to this hopeless line of argument. One obvious answer is that Mr Marson sought to resist the conclusion that he was employed because he well understood that if he was employed in this role by Revoker he must be found to owe fiduciary duties. This is echoed in his email to Mr Rukhadze and Mr Alexeev at the time when he indicated to them that they "can't mention me" and in his attempt to denote an email referring to his new plans in April as privileged.

348. I turn next to evaluating in the light of the principles and the findings of fact whether there was a breach of the fiduciary duties which I have found to exist.

The Application of the principles

Whose was the original business opportunity? and the relevance of "the Salford Group"

349. I will start with the question of "the Salford Group". The Defendants say that the Claimants' case founders on the fact that it was decided that SCPI would not pursue the opportunity and no relevant duties can therefore have been owed by Mr Rukhadze and the other Individual Defendants to RP or Revoker in relation to the opportunity. They submit that in order to get around this problem the Claimants deploy the definition "the Salford Group", which they say is misleading. The Defendants say that there was no corporate group, and that once the construct of a corporate group is dismissed the Claimants' case as to fiduciary duties makes no sense.

350. They submit that it is not enough to say that the companies are all in common ownership because whilst it is common ground that Mr Jaffe was the sole owner and controller of SCPI, it is clear they say that he was never intended to be the sole owner and controller of RP. In any event they submit that common ownership is irrelevant.

351. On this issue I am persuaded that the Defendants' case effectively attacks a straw man. The case advanced by the Claimants does not in fact depend upon any elision of the corporate personality of Salford entities. What is said is that the opportunity was that of SCPI and that RP and Revoker came to partake in that opportunity. That may lead to issues as to who was interested in the opportunity at any given time, but the case is, despite some occasionally loose wording, run as a case dependent on the rights of each of the three companies. There is no short cut via the Salford Group.

352. The question then becomes one as to whether SCPI ever had any interest in the business opportunity – an opportunity which included a range of individual opportunities: to provide the Recovery Services for a fee, to negotiate a success fee and/or carried interest in recovered assets and/or a private equity fund and/or a break fee. I am entirely persuaded that on this point the case advanced for the Claimants is correct. SCPI was the entity which originated the opportunity.

353. The position as to whose was the original opportunity appears to me to be quite clear on the evidence which I have considered above. SCPI plainly had involvement before Mr Hauf came into the picture, intended to take advantage of the opportunity, as indicated by the presentations, and the events around the time of Mr Hauf's involvement, as well as the revived proposal in September.

354. My conclusion is perhaps supported by the existence of the Salford Group argument; which is a way of sidestepping this uncomfortable starting point. It is also reinforced by a consideration of the pleaded

case. Put shortly, until shortly before trial the Defendants denied that the Claimants ever provided the Recovery Services, apostrophising them as companies of no substance; that was changed to an admission that they provided Interim Recovery Services, essentially on behalf of the Salford Principals. However, it appeared to be common ground on the pleadings that the initial opportunity was an SCPI opportunity. At the very least it was agreed (even in opening) that the *"initial proposal … was that the recovery services would be provided by SCPI or a specially formed subsidiary of SCPI."* The move towards denying SCPI ever had an opportunity was a later development.

Did SCPI remain interested in the opportunity after 2008 and did RP and/or Revoker have an interest in that opportunity?

355. Perhaps the key dispute was whether SCPI remained interested in the opportunity by the time of the breach. The Defendants say that it is clear from the documents that SCPI was by the end of September 2008 dropped as the proposed vehicle for the provision of the Services. The Claimants assert that the opportunity remained one in which SCPI and the Claimants had an interest.

356. As will appear from what I have said above, I accept the Claimants' case in part. I cannot accept Mr Jaffe's evidence that the effect of the advice that the parties received was that there was no problem at all with SCPI providing the services. The legal advice was far more cautionary than that. I also accept that it was for this reason that the decision was taken that (provisionally at least) SCPI itself should not provide the Recovery Services. This is why RP and Revoker were brought into being.

357. As I have found above, RP and Revoker were put in place as part of the plans created by SCPI for the exploitation of the opportunity. RP was solely owned by Mr Jaffe and I am not persuaded, as I have indicated above, that there ever was an intention for the shareholding to be changed to reflect Mr Jaffe's agreements with other SCPI executives as to their interests in the Recovery Services project. RP and Revoker were effectively companies created for this opportunity, which was, at least initially, an SCPI opportunity. The fact that the structure was separate from SCPI and embodied (at least) two further companies did not stop the opportunity for which the structure and the companies were created being an SCPI opportunity.

358. However, I do accept the Claimants' case to the following extent. I accept that Mr Jaffe (and Mr Rukhadze) were not personally very worried about Salford's involvement; the former because of his optimistic view of future possibilities, and the latter because he had relatively little interest in such matters. I also accept that the intention moving forwards after October 2008 was that the Recovery Services would be provided in some way in association with and under the umbrella of SCPI. This is clear from Mr Rukhadze's own emails which I have cited above.

359. The Defendants' case (which I have not accepted) was that this changed in around October 2008 when the terminology "Salford Principals" emerged and when RP and Revoker came into existence as entities to form part of the structure for providing the Recovery Services and began to have a role on the ground.

360. So far as this argument is dependent on the Macfarlanes Steps Papers, as I have already indicated these were not documents which reflected any agreement as to any change in SCPI's position vis a vis the opportunity. In the light of the advice taken it appears to have been intended that care would be taken so far as possible to steer clear of the problems identified by HFW and Macfarlanes (pending any resolution of those problems), and it was for this reason that the term "Salford Principals" came to be used. But the very identity of the Salford Principals named, in particular the inclusion of Ms Gabbert, Mr Khan and Mr Nagle who were substantially outwith the active Recovery Services and whose actual agreement was never even posited but were key personnel at SCPI, indicates that this was a window dressing of an SCPI opportunity. This is also reflected in the correspondence at the time and for some time afterwards, most notably Mr Rukhadze's own correspondence, noted above, in sending the draft Term Sheet onwards and in the "IKA Recovery" email of 2 October. As the Claimants pointed out, it was also Mr Rukhadze's evidence in proceedings in Gibraltar where he said in terms that SCPI had been engaged in providing the Recovery Services.

361. But in my judgment, none of the detail in the Steps Papers and the exchanges after October 2008 affects SCPI's position as regards the business opportunity. In this regard I consider that the potential contractual position is something of a red herring. Just because at a particular date it was contemplated that someone other than SCPI might be the contracting party does not mean that the business opportunity ceased to be that of SCPI. For it to do so would require a surrender of the business opportunity to another entity. Absent the agreement contended for by the Defendants to "change horses" to the Salford Principals there is nothing in the evidence which leads me to conclude that this was the case.

362. The idea (contended for in closing, perhaps as a result of the difficulties of establishing any such agreement) that there could be an abandonment of the SCPI opportunity without there being an agreement of whose the opportunity is not realistic. Nor do the Steps Papers assist. The Steps Papers, like the presentations, reflected a consideration of a possible structure. They do, in the event, reflect benefits flowing to individuals as would have happened if an agreement had been reached; but as I have noted above that fact cannot provide the requisite agreement. There was in fact no surrender of the opportunity by SCPI.

363. The same goes for the Defendants' argument that the Framework Agreement effectively establishes that the business opportunity became

that of the Salford Principals. Once it has been established that the original opportunity was that of SCPI that opportunity could only become that of the Salford Principals if SCPI agreed that this should be so, which I have concluded it did not, or if SCPI abandoned the opportunity, which realistically would be by agreement.

364. I also do not accept the Defendants' submission that after October 2008 SCPI was not actively involved in the project. There was no real day to day involvement, except via Mr Rukhadze and his team, it is true. However, Mr Jaffe continued to be involved at a strategy level and the Pall Mall office did provide ongoing backup services in relation to expenses, payroll taxation and legal issues, primarily through Ms Gabbert and Mr Khan.

365. So far as concerns RP and Revoker, the Defendants also deny that RP and Revoker had any part in the business opportunity, saying that the corporate structure was being prepared and designed for use if and when a binding agreement was concluded with the Family, and remained inchoate given the fact that there was no finalised LLP agreement, and the full Macfarlanes structure, which the Salford Principals had agreed would be implemented before any binding agreement with the Family was signed, was only partially established and had not even been conceptually fully finalised.

366. The Defendants also submit that if the business opportunity was that of SCPI it cannot at the same time be that of RP or Revoker or both. They submit that the real value was in the success fee and carry, neither of which was intended to go to either RP or Revoker; the management fees were simply structured to go through them for regulatory reasons. RP and Revoker did not constitute a "shadow SCPI" owned by Mr Jaffe.

367. It was also submitted for the Defendants that the specific business opportunity (that of entering into a binding contract for the provision of the Recovery Services) could not conceptually be that of all the Claimants, and could not logically and on the evidence, be that of RP and/or Revoker.

368. In relation to the last point they pointed to the fact that the companies had no will or identity independent of the Salford Principals and submitted that on the evidence the fact that the *ad hoc* services were being performed on behalf of RP and Revoker does not mean that the negotiations with the Family must therefore also have been carried out on behalf of those companies.

369. The Claimants submit that each of the entities was entitled to say that it had an interest in the business opportunity and that the owing of parallel fiduciary duties in respect of parallel business opportunities should create no difficulty. SCPI had and retained the business opportunity (not least because otherwise what would have happened if Revoker or RP had become unable to pursue it?), but RP and Revoker

became parties to the opportunity by the fact of being chosen as SCPI's vehicle and actually pursuing the interim Recovery Services. It was plain, the Claimants submitted, that Revoker, which was actually doing the work which would ultimately be remunerated under the projected agreement must have an interest in the business opportunity. But in any event at no point could the Individual Defendants, free of obligations, take advantage of the opportunity.

370. I have found the question of whether RP and Revoker had an interest in the business opportunity to be less than straightforward. Ultimately, I have come to the following conclusions:

i) The business opportunity was originally SCPI's, and remained SCPI's. The bringing into being of RP and Revoker and their commencement of performing services did not mean that the opportunity ceased to be that of SCPI, in part because of the inchoate nature of the structure at the relevant times. At all points SCPI could have directed the opportunity to another company. As Mr Girolami QC put it in closing, the structure was subordinate to the will of the primary owner of the business opportunity. So equally if negotiations were pursued for an agreement with (say) RP, at any time up to agreement of terms by both parties SCPI could have directed the business opportunity elsewhere – to a different structure and entities. The opportunity was that of SCPI until it either took it, abandoned it, or redirected it.

ii) However, this does not mean that RP and Revoker did not have an interest in the business opportunity. As I have also found above, RP and Revoker were put in place as part of the plans created by SCPI for the exploitation of that opportunity.

iii) Their interest, or the opportunity which it represented as a separate business opportunity for them, might or might not be identical with SCPI. For example, if SCPI was uncertain as to whether the Recovery Services would be provided via a contract to which it was a party or via a contract to which RP was a party, both SCPI as originator and RP as nominee would have that business opportunity. If, however, SCPI planned to enter into the contract itself (or via some other controlled company as yet unborn) but to provide the Recovery Services via Revoker, Revoker would have an interest in the opportunity which that represented to it, which would not be the contract, but the appointment pursuant to the contract to provide the services. The reality of this is reflected in Mr Rukhadze's statement *ex post facto* that Revoker *"lost its principal business as a result of my departure"*;

iv) As matters stood between 2008 and 2011, with the structure for provision of services in flux, I would therefore conclude that all of SCPI, RP and Revoker did have an interest in the business opportunity represented by the chance to negotiate a contract for

the provision of the Recovery Services. For SCPI that interest extended to the full extent of the opportunity. For RP and Revoker it was limited to the interest denoted by the roles which they were, by the plans formulated, slated to play.

Did the Defendants become aware of the opportunity to provide the Recovery Services by virtue of their positions in SCPI, Revoker or RP?

371. Once the prior points are concluded as I have concluded them, the answer is as regards Mr Rukhadze and SCPI plainly yes, despite Mr Rukhadze's determined attempt to argue via his oral evidence that he was closer to Badri and his family from the start and that the Recovery Services project was always more his than that of Mr Jaffe. Even if that were true (and I consider that it is not), his original opportunity to meet Badri and his family flowed from his position with SCPI. Accordingly, on either analysis Mr Rukhadze's awareness of the opportunity came to him by reason of his position with SCPI.

372. Similarly, Mr Alexeev only gained the opportunity to be involved in the Recovery Services via his initial recruitment by and employment by SCPI. Indeed, this position was effectively recorded in his own unsigned Indicative Terms.

373. Mr Marson too obviously only gained the opportunity to be involved via his own recruitment to be employed by Revoker.

374. As regards RP and Revoker the Defendants seek to argue that the opportunity cannot have come to them by virtue of their positions in relation to RP or Revoker, because those companies were not incorporated at the time when the opportunity arose.

375. As to this the answer to this argument lies in the conclusions which I have reached as regards firstly the duties owed and secondly as regards RP and Revoker's interests in the business opportunity. For those (Mr Rukhadze and Mr Alexeev) who were employed by SCPI, the opportunity came to them from SCPI. Mr Marson was not employed by SCPI or RP, but the opportunity did come to him from Revoker, which did exist and have an interest in the business opportunity at the time when he was employed.

Was there a maturing business opportunity which the Claimants were actively pursuing?

376. The Defendants' next line of attack was as regards the nature of the opportunity. This argument had two limbs, reflecting the authority considered earlier in the judgment. The first was the simple one – that given that it took over a year after the break up for an agreement to materialise it was submitted that there was no maturing business opportunity.

377. As to this, the Defendants say that it is common ground that by the time the break-up negotiations began, negotiations between Revoker and the Family had stalled. In particular they pointed to two "insuperable obstacles": corporate governance and the private equity fund. Prima facie, therefore, it is argued that by the time the relationship with the Individual Defendants ceased, the opportunity was "not maturing" in the hands of it or RP.

378. I am satisfied that the approach which the Defendants urge me to take is too rigid. This is not a case like *Island Export Finance* where an opportunity had matured and there was a new opportunity.

379. If I am correct that the line which the authorities indicate is that a business opportunity may be regarded as maturing so long as there is contact between the principal and a third party with regard to future business and that contact has progressed to the stage where some outlines of future contractual relations are in play, these circumstances amply satisfy the requirements. Here there was plainly sufficiently mature contact – there were presentations, there was an initial term sheet which was signed and there were ongoing discussions. Here negotiations remained a continuum, and it is artificial to see there as being a hiatus or insuperable obstacles until the agreement was signed.

380. As Mr Rukhadze indicated during his evidence, more than once agreement seemed close. At the time of the January 2010 Term Sheet, for example agreement was, as I have found, genuinely very close, though not as close as Mr Jaffe thought. There was, for example, agreement in principle to a new private equity fund (identified by the Defendants as one of the insuperable obstacles to a deal). It is not the case, as Mr Girolami QC submitted in closing, that at the time that Mr Jaffe was involved the family were never anywhere near to reaching agreement. One may also perhaps look forward. These problems did not go away after SCPI left the field; Mr Rukhadze characterised the later negotiations as "fierce". But ultimately, albeit under the Hunnewell banner, the issues of corporate governance and private equity fund were finessed to both sides' satisfaction; and they were finessed on the basis of the groundwork put in place and stress tested by the earlier negotiations.

381. The second point made by the Defendants is as to active pursuit. It is the Defendants' case that it cannot be said that this hurdle is met because by mid-2010, Mr Jaffe had repeatedly made clear, in unequivocal terms, that he no longer wished to be involved in the project; he wanted to achieve his personal exit from the project on the best terms he could obtain.

382. The Defendants submit that nothing can be made of the fact that Mr Jaffe wanted to retain veto rights over any settlement between the Family and BB because that was nothing to do with any interest in the project, or Revoker, but rather related to Mr Jaffe's concern to protect

SCPI against the Family agreeing a deal with BB which would be damaging to VDP. They submit that this approach was more to do with Mr Jaffe seeking to further his own personal interests, and those of SCPI, rather than those of Revoker.

383. Again, I am unable to accept the Defendants' argument. First, I would reiterate that on the law, as I have concluded earlier in the judgment, in order to find that active pursuit has ceased there would need to be a clear dissociation of the principal from the opportunity. Ambivalence or posturing will not suffice. Secondly, I do not consider that there was any such clear dissociation. Although negotiations between the Family and Revoker were stalled, there was at no time a shut door until the break up in May 2011. On the contrary SCPI was emphatic about asserting its rights in relation to the opportunity, sometimes overly so.

384. It is true that the context for much of the negotiation at this time was Mr Jaffe discussing his effective withdrawal from the project and on occasion he (particularly in documents for internal consumption) took an exasperated tone and spoke about finality; however, in essence the nature of this position was clear. Mr Jaffe was negotiating with Mr Rukhadze (and to an extent the Family) the terms on which he would either allow Mr Rukhadze to take over what was essentially an SCPI opportunity or keep the opportunity. He was not actively pursuing it as a sole goal on the same basis as had been done originally, but he was pursuing it in the sense of trying to monetise the value of the opportunity. He intended to keep it if he could not monetise it. That is clear from the correspondence in May 2011, including Mr Munro's statement: *"Revoker still intends to pursue this opportunity"*. The Claimants had emphatically not abandoned their interest in that opportunity; even if the way in which it was being actively pursued was different to how it had originally been anticipated.

385. The final point with which I should deal here is the flip side of the coin; the possibility of the opportunity disappearing because of the Family's withdrawal. This argument was certainly floated by the Defendants, particularly Mr Rukhadze, though it was not the central point of their attack as regards the subsistence of the opportunity.

386. On the facts I similarly do not consider that it can it be said that the opportunity was over by reason of the Family's withdrawal. The Family did not say prior to May 2011 that they did not want to do business with Mr Jaffe and SCPI. Mr Rukhadze's attempts to turn the argument in this direction were not borne out by the documents and were emphatically contradicted by Mrs Gudavadze in cross examination. She said that she hoped that everything could be settled and had no objection to doing business with either; but it seems that the Family's position was that there would be no progress for anyone until Mr Jaffe and Mr Rukhadze ironed out their differences.

387. But in any event, even if there had been an earlier refusal by the Family, I am not persuaded that this would assist the Defendants. This is because of the authorities such as *IDC v Cooley* and *Boardman v Phipps* which state that a profit must be disgorged even if it was not open to the company to participate in the transaction and the authorities, cited earlier, which reach the same conclusion in cases where it was unlikely that the principal would be able to secure the opportunity.

Was there a release of the Defendants from their fiduciary obligations?

388. As an alternative to the second case on active pursuit the Defendants also suggested that from September 2010, none of the parties were seeking to conclude a deal on behalf of Revoker, indeed none of them were acting in its interests at all. Accordingly, the Defendants contend that any duties previously owed must have ceased to be owed by that point, just as the breakdown in relations caused duties to cease in *In Plus v Pyke* and *Halcyon* above.

389. They point to the frustrations which Mr Jaffe experienced in dealing with the Family and the increasing friction between them in 2009 including the focus on the possibility of a break fee if the Family were not minded to set up a new private equity fund from the recoveries and focussed particularly on the communications from July onwards in which Mr Jaffe indicated an intention to separate himself from the Family, Revoker and the Recovery Services – the "friendly divorce".

390. The Claimants, aside from pointing to the imprecision with which this case had been advanced, in particular as to the question of when the "clean break" decision was taken, point to the fact that Mr Jaffe's proposals in this period almost invariably involved him and Salford continuing to be involved in some way in the Recovery Services, albeit less directly. They also highlight the fact that Mr Rukhadze does not seem to have seen things this way at the time. Thus, on 13 September 2010: "*I will procure financing for the recovery effort through Revoker (if I take it over from you) or another company"*.

391. I accept these submissions. In order to find a release, I would expect to find clear unequivocal statements embodying a consensus with a clean break. However, while divorce, or break or change is frequently referenced there is nothing unequivocal. The documents are far more consistent with people in a messy situation trying to find a way forward than any release or break. Furthermore, Mr Jaffe continued to act as though he had a valuable bargaining chip, and to seek a price for his withdrawal which is fundamentally inconsistent with a walking away, or waiver. Thus, his statement in May 2010 that Mr Rukhadze could not *"hijack now what is not yours"*.

Did the Defendants' obligations cease by reason of exclusion?

392. It might seem that the next question should relate to whether the Defendants breached their obligations prior to or by their resignation, but in this case, there is a still further question to consider. This is because the Defendants say that the Individual Defendants did not resign – they were wrongfully excluded and to all intents and purposes dismissed by Mr Jaffe. There could therefore be no resignation with a view to taking up the business opportunity.

393. This issue is based on an analogy which the Defendants seek to draw between *In Plus v Pyke* and the facts of this case.

394. The Defendants say that the backdrop to the suspension is that if the Defendants are right as to what had been agreed in relation to the shareholdings in RP, this was an act that Mr Jaffe was not authorised to take even if by happenstance he remained the legally registered shareholder.

395. The Defendants point to the fact that Mr Jaffe's sole express reason for doing so was not any diversion of a business opportunity, but rather that there had been a failure to report to Mr Jaffe as to the progress of the project – which the Defendants say is an allegation without substance.

396. By suspending them, the Defendants therefore say that Mr Jaffe was endeavouring to exclude them from the management of the company and also from the substantive provision of the Recovery Services themselves, in order to take the opportunity for himself and kickstart negotiations with the Family. The suspension was, in reality, effectively a dismissal, and it was Mr Jaffe's actions which were the operative cause of the subsequent resignation.

397. The Claimants submit that there is no relevant exclusion which could arguably trigger an *In-Plus* type decision. They submit that the Revoker resolution is one which Revoker was perfectly entitled to make, that it did not exclude the Defendants from participation in Revoker, but rather sought to get them to render a full account of the Recovery Services and to confirm that they would comply with their duties to act in the best interests of Revoker; it suspended them only until they did those things (which the Claimants submit they were plainly obliged to do). Further the Claimants say that the reality is that the Defendants were not excluded from participation in Revoker in the sense that they continued to perform the only real business of Revoker – the Recovery Services. The Claimants also pray in aid the back story to the suspension and argue that the resolution was based on genuine concerns about reporting.

398. Although I do not (as will be apparent from my conclusions above) accept all the Claimants' points, I am unpersuaded by the Defendants' case on this issue. The answer to this question depends in part on the timeline. The suspension and its circumstances are therefore key to

ascertaining if there was an exclusion such that the fiduciary duties which I have found to exist had been effectively extinguished.

399. It is therefore worth reiterating the basic facts relating to the suspension:

i) In early April 2011 Mr Jaffe caused letters to be sent to Mr Rukhadze and Mr Alexeev setting out duties said to be owed to Revoker and RP.

ii) On 11 May 2011, Mr Jaffe took steps to suspend Mr Rukhadze and Mr Alexeev temporarily from their roles in Revoker (and, in Mr Rukhadze's case, RP).

iii) The Defendants resigned later in the same month.

400. Looking at all the circumstances of the case, this is not, in my judgment, a case which is analogous to or even particularly close to the circumstances of *In Plus*. The suspension here was a short-term suspension, not the six month suspension involved in the *In Plus* case; and it occurred not in the context of a clear attempt to oust the Defendants, but an attempt which was primarily one to negotiate a way forward, albeit using somewhat aggressive tactics. As for the duality noted in *In Plus* the suspension here specifically referenced and asserted the continuing existence of the relevant duties.

401. The reality is that the suspension is not the start of a timeline but a point some way along another timeline. That timeline did indeed relate to what was perceived as a failure to report, giving rise to concerns about the Defendants' intentions vis a vis the Recovery Services, albeit that the focus on reporting may have been opportunistic. Nor was there an effective exclusion from the business (as the first instance judge found there was on less extreme facts than *In Plus* in *Foster Bryant*) given that the Defendants were the ones with day to day knowledge of the business of Revoker and that they continued to perform the Recovery Services.

402. The *In Plus* line of authority is a narrow one. I do not consider that the circumstances of this case justify its application in the present case. This is not a case where one could say with any degree of realism that *"for all the influence Mr Rukhadze/Mr Alexeev/Mr Marson had he might as well have resigned"*. I therefore conclude that the Defendants' fiduciary duties did not come to an end before their resignation from Revoker.

Resignation with a view/an ulterior purpose

403. This then brings one to the question of whether the Defendants resigned with the intention of taking up the business opportunity. Or referencing Rix LJ in *Foster Bryant*: Did the resignation have an ulterior purpose? I ask this question essentially for completeness, given that it

was the Claimants' primary case, even though I have concluded earlier that it should not on the authorities be regarded as a safe test for breach. The answer to this question should not therefore be regarded as determinative of the question of breach.

404. The question of resignation with a view is, it seems to me, scarcely capable of dispute. Indeed, it is this fact which fuels the debate about the correct test. It was plain from the evidence of all three Defendants that they intended to continue with the Recovery Services. That is reflected in the documents discussed above, including the arrangements being made by the Defendants in April/May 2011 to ensure a seamless takeover of the business if a split happened.

405. This is also consistent with the evidence relating to the Defendants' internal discussions. The fact of internal discussions taking place is clear from as early as Mr Rukhadze's email of 13 September 2010 which shows that he was having discussions with Mr Marson and Mr Alexeev in relation to their personal positions. That it was a hot topic is reinforced in the email of 16 September 2010 *"Igor and Ben know the situation obviously as they have been asking me about their position few times a day"*.

406. This can also be seen in the exchanges between Mr Marson and Mr Rukhadze which resulted inMr Rukhadze offering him *"some kind of fixed figure bonus style arrangements"* of a "meaningful" size, which would only be feasible if the Recovery Services went with Mr Rukhadze in some future split.

407. Such discussions are also evident in March 2011 when Mr Marson was asking Mr Alexeev about progress "*on rearranging Revoker"* and wanting to discuss *"things"*. In this context ("rearranging") it is also notable that Mr Alexeev had in January sought documents relating to the Revoker Members' Agreement. That discussions by this stage had moved on from being discussions *simpliciter* and become discussions with a view to a post-Revoker world is also strongly suggested by the email of 17 March 2011 in which Mr Marson suggested that he should resign from Revoker and join Bili Management *"to avoid future professional conflict issues (given I am an employee of revoker and have potential privilege issues with revoker/family members)"*.

408. Clear evidence of discussion and cooperation can also be seen in the events of 1 April 2011. There are Mr Rukhadze and Mr Alexeev's letters – sent within an hour of each other and asking for a formal share of Revoker to be assigned to them; this could not have happened without discussion between them. There are also the actions of Mr Marson on that day, where his discussions with Harneys immediately become reflected in a letter for Ms Gudavadze to send.

409. That a new structure going forward under Mr Rukhadze's and Mr Alexeev's control was already in discussion is apparent from the fact

that by 12 April 2011 Mr Marson was reporting that he had been offered a *"junior partner/member type arrangement"* as well as from his oral evidence that admitted that he was planning for *"life after the split"*.

410. This reflected Mr Marson's oral evidence that by 12 April Mr Rukhadze and Mr Alexeev had offered him a deal in principle on the basis that *"Look, we're going to continue with the Recovery Services, the family want us to do that … you will be part of that."*. So too can one see forward planning in Diana Miftakhova's bringing her contract in (apparently for discussion) in early April.

411. This evidence tells a clear story in my judgment. If the question as a matter of law is simply one of whether there was resignation with intent to compete in relation to a specific opportunity, there plainly was. However, given the view which I have taken on the law above what is more significant is the answer to the question whether there was a "bad faith resignation" tainted by disloyalty or conflict of interest, and in particular whether this can be discerned from the taking of preparatory steps.

Did the Defendants take preparatory steps to divert the business opportunity before their resignation?

412. Under this heading I shall consider not just the question of more concrete preparatory steps (which becomes relevant if I am wrong on the application of the law in the section above) but also the question of disloyalty, bearing in mind the approach adopted by Rix LJ to categorisation in *Foster Bryant*. I shall also cover the issue of active diversion.

413. The question of preparatory steps has to be considered in a sense in harmony with the internal discussions evidence considered above. The Claimants submitted that even without further evidence it would be a permissible inference that the Individual Defendants had made preparations in advance of their departure to take the Recovery Services with them given that evidence and (a) the co-ordinated manner of the Individual Defendants' departures; (b) the seamless manner in which they continued to provide their services.

414. In terms of timing they also pointed to Mr Rukhadze's email of 12 April 2011, *"If we are going to be suspended, we will have to continue the work"* and his evidence that *"There is no way from this point on that somehow we are going to continue to work with Mr Jaffe"*. On that basis, they submitted the Defendants must have begun to take preparatory steps from at least that moment.

415. The Claimants however submitted that an earlier date could and should be put on such steps by reference to the following:

i) The failure to send the BTG tax structure documents to the Pall Mall team in August 2010 and subsequent independent liaison with BTG, including ambivalent instructions as to the way forward.

ii) Mr Alexeev's instruction to the US tax advisers (Morgan Lewis) in October 2010 to leave the letter of engagement unspecific as to what they actually needed to do.

iii) The canvassing of the name "Hunnewell" from as early as March 2011.

iv) The April letter anticipating Mr Marson's resignation and the correspondence, including Mr Marson's remark in the context of Diana Miftakhova's contract in indicating a separate future.

v) The May correspondence looking to a seamless transition to New Revoker.

vi) The fact that some time after the split, Mr Guniak of the Family was saying in a document referred to as "the Guniak email": *"Hunnewell persuaded Family that we don't take any additional risks at all having Salford on 'no friendly terms'"*.

vii) Mr Marson's secret advice to Mr Rukhadze and Mr Alexeev in relation to the approach that should be adopted to taking over Revoker and Recovery Partners.

viii) To the extent that a date had to be put on it, the date of 16 April was suggested as representing a date when agreement was reached with the Family, by reference to an email which referred to something which had been suggested in Mr Alexeev's office on that date.

416. The Defendants submitted that a case based on preparatory steps (in the sense of an illegitimate competition case prior to resignation) was not open to the Claimants, since it had not been pleaded or put to the witnesses. But in any event in closing they disputed the factual basis for the case in some detail. In particular:

i) The failure to send the BTG tax structure documents was said to be a false point since BTG were engaged with the full knowledge of Mr Jaffe and the documents were sent in September 2010. As to the independent liaison in December 2010, this was said to be irrelevant because the Claimants could have participated.

ii) As for the tax structure diagram, it was contended that it is equally likely that the three LPs have been shown there just as an illustration. The Defendants also rely on the fact that Mr Rukhadze sent Mr Blyumkin the final version of the report, together with final structure diagrams.

iii) On the subject of Hunnewell the Defendants submitted that this was not significant, being intended most immediately as a replacement for Salford Georgia given Mr Jaffe's suggestions that as part of the break-up Mr Rukhadze would take Salford Georgia and rename it. It was also said that while Mr Rukhadze may well have had in mind that any new company could in the long term be used to take over the recovery project if a deal could be done with Mr Jaffe that would have been entirely consistent with the separation that was under negotiation.

iv) As regards the Luisa West email, the Defendants submitted that explanation of its genesis (that it was not drafted by Mr Marson) was not challenged in cross-examination and should now be accepted.

v) So far as the Guniak email is concerned the Defendants submitted that little weight should be placed on this later document written by a person with a very imperfect command of English. They submitted that it was best treated as being confusing and ambiguous with no real justification for treating it as referring to the key period.

vi) The remainder of the pieces of evidence were said to be (1) reactive to proposals that had been put forward, and, later, action that had been taken (in the form of correspondence from Ross Munro and ultimately the suspension) by Mr Jaffe, and (2) consistent with the Defendants preparing in anticipation of what they thought was an imminent and inevitable break up.

vii) The indication by Mr Rukhadze and Mr Alexeev that Mr Marson would have an equity interest in any structure which provided the services following a break-up, and that this would be a double digit million figure, was used to suggest that he had an incentive to ensure that the Claimants did not get the deal. Even if Mr Marson saw that as an incentive it does not follow that he acted in the manner alleged. Indeed, when Mr Marson reported the offer to Mr Guniak he referred to it being expressly contingent upon an agreement being reached with Mr Jaffe.

viii) As for the suggestion in the meeting in Mr Alexeev's office on 16 May 2011, it was contended that I should accept the evidence of all of the Defendants that this was not a meeting attended by the Family, that it was just the three of them, and that at the meeting Mr Rukhadze was simply speculating as to what the Family would do in response to Mr Jaffe's actions. It is said that there was nothing wrong with this, in that it was very clear by this point to all concerned that the individuals involved via Salford were, by one means or another, going to cease working together, and Mr Jaffe had made very clear that he no longer wanted to be involved in the recovery project.

417. I do not by any means accept that weight or any significant weight can be given to all of the points relied upon by the Claimants in this regard. In particular the early BTG liaison seems to be insignificant, and I likewise do not find much to take from the Luisa West email in terms of preparatory steps. As for the Guniak email, although it on its face naturally fits with the case put forward by the Claimants, its lack of context and its very genuine lack of clarity leads me to conclude that it is an unsafe document upon which to rely. As for the 16 April meeting, the evidence was that Mr Alexeev's office would not be big enough for a round table discussion with the Family. However, I do conclude that there is sufficient material in the other points relied upon to indicate that the Defendants were indeed taking preparatory steps, not merely in relation to a post Revoker future on the basis of an agreement, but with a view to their own plans in the absence of any such agreement.

418. Mr Rukhadze's 12 April 2011 email and Mr Marson's covert advice set the tone. Although the Hunnewell preparations could, as the Defendants suggested, have been brought into being for future business which did not include the Recovery Services, that reading seems strained when read in the light of the other documents. There was structural and business planning going on on two bases, "deal" and "no deal". It appears very possible that it was ongoing from as early as when Mr Alexeev sought the Revoker documents in January 2011. But certainly from mid-April the primary focus was on preparing to take over the Recovery Services "seamlessly" in the event of "no deal"; which was anticipated as the only realistic outcome. What was being done was preparation for continuation of the Recovery Services in a world where Mr Rukhadze's team and SCPI/Revoker were at odds. This is what one sees in the correspondence positing an equity interest and a multi-million value for Mr Marson. That is also inherent in the discussion of Diana Miftakhova's contract. This, in my judgment, goes further than resigning in order to compete; it is resigning once sufficient steps have been taken to enable competition to take place at once, or smoothing the path to effective competition. The Defendants therefore in essence did take preparatory steps.

419. On disloyalty and turning the Family against SCPI, the Claimants submitted that the following evidence permits or indeed compels the inference that the Defendants turned the Family against the Pall Mall team over time. They contended that:

    i) Mrs Gudavadze accepted that she and the Park Street team would have *"had a moan together"* about Mr Jaffe's attempts to enforce a decision-making process within the Recovery Services.

    ii) She also accepted that she would have overheard disparaging comments made by the Individual Defendants from the second half of 2010. They remind me that Mr Rukhadze recorded on 16 September 2010 that Mrs Gudavadze "*was asking around what*

was going on after they overheard our discussion yesterday morning".

iii) In relation to the comment that *"Inna said … the split may be unfair as she sees Irakli, Igor and Ben working, but EJ not"* it was submitted that this must have been based on discussions with Mr Rukhadze or Mr Alexeev whose only reason can have been to try to pull the Family away from loyalty to the SCPI team.

iv) It was submitted that the contemporaneous documents show that Mr Rukhadze had disparaged Mr Jaffe in front of Mrs Gudavadze on at least one occasion in September 2010: and in the result Mrs Gudavadze had been on Mr Rukhadze's side.

v) On 3 April 2011, Mr Alexeev sent an email to the Family describing Mr Blyumkin's approach to the Nick Keeling meeting as *"uncomfortably close to blackmail"* and that *"giving into any form of blackmail is unwise"*.

vi) The Defendants accepted that they assisted the Family in considering the proposal sent by Mr Jaffe to Mrs Gudavadze on 3 April 2011.

vii) In respect of April-May 2011, it was submitted that the letter of 16 May 2011 should be concluded to have been procured by the Defendants and that the Family's selection of Olswang to act for them following a mention by Mr Marson of them was one advised by, and encouraged by the Defendants.

420. The Defendants took issue with the accuracy of some of the points made and submit that any case on undermining the Family's loyalty is hampered by the Claimants' failure to put numerous elements of it to Mrs Gudavadze. They also submit that in the context of Mr Jaffe's limited involvement on the ground and his apparently limited interest in the Recovery Services as opposed to the private equity fund there was no basis for suggesting the Family needed persuasion to move away from him. They also denied both that Mr Jaffe was belittled or derided to the Family and that any such belittling would be relevant either as a matter of law or in the light of Mr Jaffe's own actions, which they say were such as to lose the Family's esteem.

421. In the light of the conclusions to which I have come this issue may be something of a side issue. But to the extent that it does or might become relevant, I find that:

i) The Park Street team were embedded with the Family, working very closely together on a day to day basis, and with their work very visible (and often audible) to the Family;

ii) Their arrangements in Park Street were such that keeping the Park Street Team's feelings and views from the Family was always going to be very difficult;

iii) The Park Street team did become unhappy with the position and did complain at least about Mr Jaffe and Mr Blyumkin's attempts to impose reporting practices and to exclude them from the Nick Keeling meeting;

iv) They also did express their dissatisfaction with Mr Jaffe's approach, particularly towards the end of 2010 and early in 2011;

v) As part of the dispute the Family became aware of the hostility which was developing between Mr Rukhadze and Mr Jaffe and the dislike which Mr Alexeev had for Mr Jaffe;

vi) They also became aware at least by late 2010 of the low opinion which Mr Rukhadze and Mr Alexeev had of the remaining SCPI individuals;

vii) By late 2010 Mr Rukhadze, whose views were influential with Mr Alexeev and Mr Marson, had come to regard the business of the Family (including the Recovery Services) as his. This is reflected in his angry exchange with Mr Jaffe in which he said something along the lines of "Inna is mine";

viii) By mid-April 2011 the Park Street team had actively or passively made clear that they were prepared to continue providing the Recovery Services if the Family severed ties with SCPI; this was inherent in the fact that they involved themselves in assisting the Family to evaluate SCPI's proposal and that the evidence strongly suggests that Mr Marson assisted them to retain legal advice.

422. Whether this amounts to an active diversion in the sense of being causative of the decision to pursue the Recovery Services with Mr Rukhadze's new team may be questionable. I do not consider that I need to reach a conclusion on this issue, which was as Mr McQuater QC agreed in closing, essentially an "add-on" to his main case. However, there is no doubt in my mind that, in the context of the fiduciary duties owed these actions amounted to disloyalty, particularly when taken together with the actions which the Defendants were taking to make themselves ready to continue the Recovery Services in a post SCPI world. This is not a case where one could say (as was said in *Foster Bryant*) that "*the resignation was innocent of any disloyalty or conflict of interest*".

423. I would add that in this context Mr Marson's actions, in particular the text message warning his colleagues to keep his involvement under wraps, and his attempt to cover one piece of correspondence with a manifestly inappropriate "without prejudice" veil do suggest that some sense of disloyalty was alive within the Park Street team as they made their preparations.

Conclusion on breach of fiduciary duties

424. It follows from the above that I conclude that each of the Individual Defendants breached their fiduciary duties: Mr Rukhadze to SCPI, RP and Revoker, Mr Alexeev to SCPI and Revoker and Mr Marson to Revoker alone. That breach consisted of what was in essence a bad faith resignation. There was certainly a resignation with intention to compete, but the necessary element of disloyalty to give a liability in respect of acts done post resignation is provided by the preparatory steps which the Defendants took before their resignation and the disloyalty involved in their failing, while notionally acting for SCPI/RP/Revoker, to support the entities to whom they owed fiduciary duties, and in actively aligning themselves with the Family and away from their respective companies at the key point in the timeline.

425. For the reasons given above it follows from this conclusion that Mr Rukhadze and Mr Alexeev also breached their LLP duties to Revoker.

426. In the Legal Issues section I stated that the question of whether there was a breach of fiduciary duties arising otherwise than under Regulation 7 of the LLP Regulations to Revoker turned on the question of whether, when the acts were taken which are said to constitute the breach, the relevant person was acting as the agent of Revoker. As to Mr Rukhadze, looking at his role and the acts of preparation and disloyalty, in which he was the moving spirit and team leader, I conclude that he owed (and breached) fiduciary duties. Similarly as regards Mr Alexeev, whose role was less in terms of leadership but integral both in terms of supporting Mr Rukhadze and being the second "active principal" day to day and who also took the lead in the 3 April letter in advising the Family effectively against SCPI and Revoker. I therefore conclude that he too owed and breached fiduciary duties to Revoker.

The other causes of action

427. The Claimants pursue three other subsidiary claims: breach of confidence, conspiracy and breach of a restrictive covenant. The claim against the Corporate Defendants is knowing receipt.

Breach of confidence

428. The claim in breach of confidence is put on two bases. The first is essentially derived from their contractual obligations. It is said that all three owed duties of confidentiality in respect of information obtained in the course of the Recovery Services: Mr Rukhadze to Recovery Partners, under the Consultancy Agreement; Mr Alexeev to SCPI, under the Confidentiality Agreement; and Mr Marson to Revoker, under his Contract of Employment. In addition, it is said that all three owed similar duties in equity as a result of the nature of the information and the circumstances. The Claimants submit that the information which they used had the necessary quality of confidence and was imparted in

circumstances imposing an obligation and that the use made of the information was unauthorised.

429. In terms of what was the information which was said to be misused, the Claimants submitted that SCPI and its related entities held a large amount of information about the Family's assets, which was all information capable of being of considerable value in the Recovery Effort as well as details of strategies devised by SCPI and the Claimants for recovering the assets and dealing with attacks on them. They also point to misuse of information created for the companies, such as the trust structure devised by BTG Tax to hold their economic interests in the proceeds of the Recovery Services which was commissioned by Revoker and at least in part paid for by it.

430. The central item of information relied upon was the Individual Defendants' knowledge of the progress that had been made in negotiating terms of remuneration. Essentially it is said this information was the material which the Defendants used to pitch their own offers to the Family; without it they would not have known where to begin.

431. The Claimants also submit that the Individual Defendants used information about the Claimants' and SCPI's successes in the preceding years for example in proposing a rationale for reaching a number that was acceptable to them in their negotiations with the Family.

432. The Defendants did not take issue with the principles underpinning the claim, but submitted that the claim was inadequately pleaded.

433. The Defendants submitted that it is essential in a claim for breach of confidence that the claimant should give full and proper particulars of all of the confidential information on which he intended to rely. They point to the dictum of Aldous LJ in *Scully (UK) Ltd v Lee* [1998] IRLR 259 at [23]:

> "[T]he confidential information must be particularised sufficiently to enable the court to be satisfied that the plaintiff has a legitimate interest to protect. That requires an inquiry as to whether the plaintiff is in possession of confidential information which it is entitled to protect… Sufficient detail must be given to enable that to be decided but no more is necessary."

434. The Defendants say that the only particulars that the Claimants have provided of the information that is the subject of the breach of confidence claim are the broad categories of information referred to in [105] of the Particulars of Claim and as to the misuse of the information, in [106] the Claimants said that they would provide particulars following disclosure, but never did so.

435. The Defendants submit that the information relied upon was information relating to the Family's assets and business relationships which was obtained at the Family's request in exchange for payment by the Family. As such, that information, and any confidence in it, belonged to the Family and, if it did not otherwise constitute a breach of fiduciary duty for the Defendants to provide the Recovery Services to the Family having left Revoker, there was no reason why they could not use that information in order to do so.

436. As regards the BTG information specifically the Defendants submitted that insofar as it related to the Family's position, the confidence was theirs and insofar as it related to the individuals' position, in the event Hunnewell ended up using an entirely different structure. All this point would appear to go to is the cost of the fees of instructing BTG.

437. Though it is unlikely to add much in practical terms, given the conclusions which I have already reached, I am satisfied that the claim in breach of confidence is made out. Each of the Individual Defendants was subject to a confidentiality obligation. Each acquired information which had the quality of confidence in circumstances where one would expect it to be subject to an obligation of confidentiality. One might test the proposition this way: would SCPI have objected to the Individual Defendants revealing this sort of information to the Individual Defendants' friends over dinner? It is self-evident that they would as regards the progress of negotiations in which was a major deal. The contrary was not really argued, as can be seen from the points taken by the Defendants.

438. As regards those points, I do not regard the pleading point as a good one. Aldous LJ's judgment indicates that it is necessary to know what information is said to be confidential to enable the Court to decide the point. It is not a formalistic point about pleadings. It cannot be said that the material was not before me, or that the absence of pleadings prejudices the ability to decide this point.

439. As for the Family vs SCPI/Claimant confidence, while it certainly the case that confidential information regarding the Family was communicated, it cannot be said that the confidential information was so limited. The Individual Defendants became party to (in essence) the cards held by SCPI/the Claimants in their negotiations with the Family. That involved material confidential to SCPI/the Claimants. In particular the structure of the deal sought and the various values put on the elements, as well as the Family's reactions to them were known. That they were used is indicated by the later history of the negotiations. As I have indicated above, Mr Guniak criticised Hunnewell's position in late 2011 by calling it a "variant" or "the same" agreement. Further my own reading of the Hunnewell Agreement left the impression that one would be hard put to understand why a number of clauses read as they do without a knowledge of the SCPI discussions.

440. I do not consider that the fact that the Family knew the contents of the draft contracts is an answer. First, that is irrelevant to the Defendants being able to join the negotiation process seamlessly; which they could not do without using information they should not have used. Second even if that were not so as regards the drafts shared with the Family, it is so as regards the knowledge which surrounded the drafts, the background of discussions in SCPI which informed the development of the draft and gave the Defendants a head start in their negotiations.

441. As for the BTG information there does likewise appear to have been a misuse of this work, which was plainly initially commissioned by Revoker. However, the relevance of this breach to any real loss seems hard to draw.

Conspiracy.

442. The Claimants also invite the Court to find the Individual and Corporate Defendants liable in the tort of unlawful means conspiracy having, it is said, conspired to secure the business opportunity for themselves in circumstances where the Claimants/SCPI would thereby be harmed. They rely on the various other claims as establishing the requisite unlawful means. It was (rightly) not in issue that if liability is established in breach of fiduciary duty or breach of confidence those torts would be sufficient to establish the unlawful means, if the other requirements of the tort were made out.

443. So far as the requirement of combination is concerned, the Claimants submit that there is no requirement to show an express agreement – the possibility of so doing being rare: *Baldwin v Berryland Books* [2010] EWCA Civ 1440 at [46]-[47], Clerk & Lindsell 24-95.

444. As for the requirement to prove 'intention' to cause harm the Claimants submit that this does not require them to show that harm was the main or predominant purpose of the combination; it is sufficient that the harm was a necessary consequence of something the conspirators wished to achieve: Clerk & Lindsell, 24-98. The Claimants point to Mr Rukhadze's message to his tax advisor in late 2012 as evidencing the fact that he knew/intended that damage would result*: "I did hold shares in Revoker in the beginning of 2011. However, we had a conflict with my partners in April and as part of the conflict, my shareholding was challenged and I abandoned it (actually the company lost its principal business as a result of my departure)."*

445. The Defendants remind me that it is necessary to show both combination and a common intention on the part of all those said to be part of the conspiracy. They submit that there is no evidence to support a case in unlawful means conspiracy. Liaison in co-ordinating emails or letters would not be enough. Nor, they submit, could these be evidence of common design in circumstances where Mr Jaffe had begun to deploy strategies against the Defendants.

446. Again, the claim in conspiracy may well not add much to the claims already considered. That is certainly suggested by the relative lack of focus on this point in the submissions. The case is certainly not very clearly put on behalf of the Claimants. Having done the best I can in the absence of full submissions, the conclusions I reach are as follows:

    i) Any conspiracy must logically predate the split with SCPI;

    ii) This would seem, on the materials before me, to exclude the Corporate Defendants, which were not incorporated until after the split;

    iii) The findings which I have made above indicate an agreement at least on the part of the three Individual Defendants to continue with the Recovery Services and to attempt to acquire a contract for those services with the Family. That is in my judgment sufficient to amount to a combination for the purposes of conspiracy. I do not consider that the co-ordinating emails add anything to the picture in this regard.

    iv) As to intent, while I accept that this is not a case where the primary purpose of the combination was to injure SCPI and the Claimants, it is a case not dissimilar to *Tarleton v M'Gawley* (1794) Peak 270 and those referred to by Lord Nicholls in *OBG v Allan* [2007] UKHL 21; [2008] 1 A.C.1 at [167] as "*the obverse side of the coin*". But the analogy with the *Tarleton* case is very apt. In that case the master of the vessel Othello was intent on defending his trading interests off the coast of West Africa and did so by firing a cannon at the launch of another vessel which was attempting to target the same business. As Lord Hoffman noted at [63] of his judgment in *OBG*, the master of the Othello wanted a monopoly of trade and to that extent it was inevitable that he wished and intended to cause the other trader loss then and there. So too Messrs Rukhadze, Alexeev and Marson wanted the Recovery Services and were prepared to scupper any lingering chance of an SCPI deal by letting the Family know that they would do the business if SCPI were sent packing. Mr Rukhadze, at least, may not have wished Mr Jaffe and his business harm per se; but he wanted the business and if SCPI suffered loss, so be it.

    v) As to loss, the loss of the business opportunity supplies this element; although its value will obviously be open to debate.

447. In the circumstances I conclude that the requirements of conspiracy are made out as between the Individual Defendants.

The restrictive covenant issue

448. Both parties appeared to apprehend that the other took a point on restrictive covenants. Mr Marson apprehended that a separate claim was made against him for breach of such covenants after he left SCPI.

Meanwhile the Claimants saw the restraint of trade point as being a defence to the claims made against Mr Marson; that he was allowed to work for the Family because the restrictive covenants were in restraint of trade.

449. In the circumstances, and given my findings above, I do not consider that there is a real point here. That is reflected in the facts that:

i) The detailed submissions on the law relating to restraint of trade made by the Claimants in their written opening were not dealt with in closing by the Defendants, who simply referred back to their written opening.

ii) The Claimants for their part never advanced their legal analysis into the factual realm so as to deal with questions such as the reasonableness of the restriction.

The Hunnewell Defendants – Knowing Receipt

450. The Claimants invite me to infer that each of them had all the relevant knowledge of the Individual Defendants and that in those circumstances, any proceeds of a breach of fiduciary duty transferred to the Hunnewell Defendants will be recoverable by the Claimants: *El Ajou v Dollar Land Holdings plc* [1994] BCC 143 (CA).

451. No specific issue was taken as to the knowledge of the Hunnewell Defendants and the question of knowing receipt was not addressed in closing for the Defendants.

452. I have however considered the matter, and conclude that the Claimants submission is well founded. The Hunnewell Defendants are essentially the creation of and the corporate alter egos of the Individual Defendants, created essentially for the purpose of the transactions in issue in these proceedings. It follows that the Individual Defendants knowledge is attributable to them, and that subject to it being established that the Hunnewell Defendants received monies that resulted from a breach of fiduciary duty they would be liable in knowing receipt.

453. A claim in dishonest assistance was also pleaded against the Hunnewell defendants, but was not pursued in closing.

The Assignment

454. A further issue arises as regards SCPI's claim. The Defendants submit that even if SCPI *did* have a valid claim, it is not one that can now be pursued by RP (which sues as the assignee of SCPI's claims pursuant to a Deed of Assignment executed in 2016, shortly before the claim was commenced).

455. The Defendants contend that the assignment fails the "genuine commercial interest" test set out in *Trendtex Trading Corp v Credit Suisse* [1982] AC 679.

456. They say that the answer given by RP as to their interest was was that they wished to avoid a defence to the claim along the lines that the proper claimant was SCPI rather than RP or Revoker. That, the Defendants say, is the very definition of champerty, because *ex hypothesi* if that defence were successfully run, the claim would properly be that of SCPI, not of RP, which would have no interest of its own, but would merely be handling the claim of another in exchange for a share of the profits. They say that the fact that RP and Revoker also have claims cannot assist because the claims, and the interest in them, is distinct.

457. The Claimants say that this argument is misconceived. They say that the genuine commercial interest test is satisfied in circumstances where RP had a commercial interest in the acquisition and pursuit of SCPI's claims against the Defendants, because it already possessed its own claims against them based on the same facts which it wished to pursue and which might otherwise be met with the argument that the claim was not RP's but that of SCPI.

458. They point me to the (strangely still unreported) decision in *Massai Aviation Services v Attorney General* [2007] UKPC 12 as saying that while the law will not recognise the assignment of a "bare right of action" on the ground that such a transaction savours of maintenance or champerty, the law has become more liberal in its approach to lawful maintenance and to the circumstances in which it will strike down an assignment as being a transfer of a bare right of action. In essence, the courts will not interfere if the assignee can show that he had a genuine commercial interest in taking the assignment: *Massai* at [15]–[17]. Where an assignee has such an interest, the fact that he makes a profit on the assignment does not render it champertous or void: *Massai* at [17]. They also, in support of a broad approach to the question, rely on *Giles v Thompson* [1994] 1 AC 142 and *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499.

459. I am unable to accept the Defendants' submission, which seems to me to run contrary to the tide of recent authorities. That there has been a considerable relaxation of the approach to questions of assignment and champerty is beyond doubt. That is reflected in the authorities which do not encourage a narrowly focussed view of the commercial aspects but are clear that it is necessary to look at the transaction as a whole. See for example *Massai* at [19] *Giles v Thompson* at 164B and *Brownton* at 509(iv).

460. It appears that the court should not be looking to find the absence of commercial interest, but be more focussed on ensuring that

transactions which are genuinely contrary to public policy are weeded out: *Massai* at [19] and *Brownton* at 510.

461. What is being sought to be excluded is what is sometimes called "wanton and officious intermeddling". Thus, in *Massai* at [21]: "*This was not wanton and officious intermeddling in another person's litigation for no good reason. It was simply the original owners retaining part of what they owned while disposing of the rest. There is nothing contrary to public policy in allowing Aerostar to pursue the claim against these defendants and no good reason why these defendants should be permitted to escape any liability that they may have.*"

462. Similarly in *Giles v Thompson* Lord Mustill cited with approval the dictum of Fletcher Moulton L.J. in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908] 1 K.B. 1006, 1014: "*It is directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse.*"

463. It seems to me that the approach adopted by the Defendants does not really grapple with this essential aspect, but is instead geared to the kind of narrow focus on commercial interest which is disapproved in the authorities.

464. Even if one looks at the question of interest alone it is hard to see why the Claimants' reason for taking an assignment, which essentially closes off a defence otherwise available to the Defendants, is not one which gives a genuine interest. This is the more so when one bears in mind that:

    i) *Trendtex* itself is authority for the proposition that where a party seeks to support and enlarge its existing rights, this is likely to be commercial interest sufficient to mean that public policy is not breached: 703.

    ii) The factual circumstances in which claims have been upheld differ very little from the present. Thus, in *Massai* shareholders of a company set up a company to retain a valuable claim when they sold the rest of the business, in *JEB Recoveries LLP v Binstock* [2015] EWHC 1063 (Ch) an SPV was set up by four people who had claims against Mr Binstock .... The distinction, and the reason for failure in *Trendtex* comes down to the potential for making a business out of dealing in litigation commercially.

Limitation

465. Limitation was another dog which threatened to bark, but never really did so.

466. A case on limitation was pleaded by the Defendants. However, given that the Claim Form was issued on 12 September 2016 any breach dating from the "ultimatum" email of 13 September 2010 would be within the limitation period. The issue was accordingly not addressed by the Defendants. And, as matters transpire, my conclusions would render any consideration of limitation unnecessary.

Relief

467. The Defendants submitted that issues of relief should be stood over to a further hearing, in particular because, if successful in establishing a breach of fiduciary duty then, before moving to the quantum stage a number of further questions will require to be answered. These include election between an account of profits and equitable compensation. *Tang Man Sit v Capacious Investments Ltd* [1996] 2 A.C. 514 at 521. This itself would give rise to issues as to the basis upon which the account should be taken, to ensure that it was limited to profits which resulted from the breach. There would also be issues as to the period for any account.

468. The Defendants would also suggest that they are entitled to any allowance to be set off against such profits, in respect of profits which were earned by the Defendants' own efforts, and that it is equitable for the court to do so.

469. The Defendants note that if the Claimants were to choose equitable compensation or if it were to succeed in the claim for breach of contract, it would need to show that it would have entered into a contract for the provision of the Recovery Services had the breach not occurred and, if so, what profits it would have made.

470. The Claimants submit that I should proceed to hold that there is a duty to account. It notes that this duty arises even if the principal could not have or might not have been able to exploit the opportunity itself and whether or not the fiduciary's conduct has caused any loss to the principal.

471. They also indicate that as regards set off they will argue that the Court should not exercise the discretion to grant such an allowance because it cannot here be said that it could not have the effect of encouraging fiduciaries in any way to put themselves in a position where their interests conflict with their duties as fiduciaries: *Guinness Plc v Saunders* [1990] 2 AC 663 at 701E.

472. It seems to me that at present the parties are not asking me to make any positive findings in this regard, and I therefore will not do so at this stage. It may be that in the light of my findings in the body of this judgment the parties would wish me to narrow the field for debate by one or more rulings on the floated issues at a consequentials hearing. This strikes me as a potentially sensible result. However, and in the

absence of detailed submissions on the points, I am not prepared to anticipate that point in this judgment.

473. This position extends too, to the question of whether a contract substantially on the terms of the January 2010 Term Sheet would have been concluded. As will be apparent from the main body of the judgment I consider that there was no agreement to the term sheet at the time, and that the Family had issues with certain portions of it including the question of veto and the arrangements for a further fund. The question of a later hypothetical entry into a contract on these or similar terms, though pleaded, was not addressed in detail in closing. The parties may however wish to address submissions as to what conclusions I should draw from the evidence on this point insofar as it pertains to relief and I therefore go no further at this point.