Neutral Citation Number: [2021] EWHC 790 (Comm)

Case No: CL-2016-000553

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 31/03/2021

Before :

MR JUSTICE ANDREW BAKER

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Between :

(1) RECOVERY PARTNERS GP LIMITED **(2) REVOKER LLP**	**Claimants**
- and -	
(1) IRAKLI RUKHADZE **(2) IGOR ALEXEEV** **(3) BENJAMIN MARSON** **and others**	**Defendant**

- -

John Wardell QC & Tom Cleaver (instructed by **Brown Rudnick LLP**) for the **Claimants**
Stephen Cogley QC, Simon Birt QC and Edward Harrison (instructed by **Signature Litigation LLP**) for the **First to Third Defendants**

Hearing dates: 15, 16 March 2021

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Approved Judgment

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

Introduction

1. On 1 November 2018, following a 15-day trial in June/July 2018, Cockerill J gave judgment on liability in this Claim, [2018] EWHC 2918 (Comm). The claims tried arose out of the unexpected, sudden death in February 2008, leaving no will, of the Georgian billionaire Arkady Patarkatsishvili, known as 'Badri'. The claims concerned Salford Capital Partners International ('SCPI'), a company owned and controlled by a man called Eugene Jaffe. The claimant entities, Recovery Partners GP Ltd ('RP') and Revoker LLP ('Revoker'), were established by Mr Jaffe/SCPI as part of his plan to exploit a maturing business opportunity that the judge held to exist and to be owned by SCPI ('the MBO').

2. The MBO came about because of the trusted relationship Mr Jaffe/SCPI had with Badri in connection with the management and investment of his assets, the magnitude of Badri's wealth, and the informality and lack of record-keeping with which Badri held and dealt with it. The MBO, then, was the opportunity of seeking to contract with Badri's family ('the Family') for the provision of 'Recovery Services', which were defined by the judge to mean "*[working] to assist the family and to put together an arrangement for the recovery of Badri's assets and to perform that recovery*": *ibid* at [5]. The judge held at [370(iv)] that at the material time, "*all of SCPI, RP and Revoker [had] an interest in the business opportunity … 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.*"

3. Later in the judgment, at [213]-[216], Cockerill J put some flesh on the bones of her definition of Recovery Services, as follows:

> "*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 [the late Boris Berezovsky] (litigation in England between 2008 and 2012); [Joseph Kay] (litigation in England, Georgia, Gibraltar, Liechtenstein and the United States between 2008 and 2016); and the Georgian government (arbitral proceedings between 2008 and 2012).*
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> *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 [been] 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."

4. The judge held at [424] that each of the first to third defendants, Messrs Rukhadze, Alexeev and Marson, acted in breach of fiduciary duties owed by them in relation to SCPI's MBO. The other defendants in the Claim are a limited partnership and five limited companies incorporated by the first to third defendants. They are not the subject of the present application and did not take part in it; where I refer to 'the defendants' hereafter that is Messrs Rukhadze, Alexeev and Marson only.

5. More particularly, as the judge held, Mr Rukhadze broke fiduciary duties owed to all three of SCPI, RP and Revoker; Mr Alexeev broke fiduciary duties owed to SCPI and Revoker; and Mr Marson broke fiduciary duties owed to Revoker. They were each guilty of "*what was in essence a bad faith resignation. There was certainly a resignation with intention to compete [with SCPI/RP/Revoker], but the necessary element of disloyalty to give a liability in respect of acts done post resignation is provided by the preparatory steps which [they] 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*" (*ibid*).

6. RP sued in its own right and as assignee of SCPI, and at [454]-[464] the judge rejected a defence that the assignment failed the 'genuine commercial interest' test in *Trendtex Trading Corp v Credit Suisse* [1982] AC 679. RP is therefore entitled to pursue and recover such monetary relief as might properly have been claimed by SCPI in respect of the breaches of fiduciary duties owed to it.

7. By way of initial relief upon the liability judgment, Cockerill J by Order dated 1 November 2018:

   (i) pronounced as a "*judgment for the Claimants against the Defendants on issues of liability*" *inter alia* that:

      (a) Mr Rukhadze is liable to RP for breach of fiduciary duties owed to SCPI and to it, and to Revoker for breach of fiduciary duties owed to it;

      (b) Mr Alexeev is liable to RP for breach of fiduciary duties owed to SCPI, and to Revoker for breach of fiduciary duties owed to it; and

      (c) Mr Marson is liable to Revoker for breach of fiduciary duties owed to it;

   (ii) ordered that the claimants were to be entitled to elect between an inquiry as to equitable compensation or damages, or an account of profits; and

   (iii) directed disclosure of documents sufficient to give the claimants enough information to make a properly informed election.

8. By a further Order dated 29 March 2019, recording the claimants' election for an account of profits, Cockerill J directed an exchange of Position Statements accompanied by Initial Disclosure under the Disclosure Pilot, CPR PD51U, addressing the matters set out in Schedule A to that Order, and a CMC that took place, in the event, on 27 September 2019, also before Cockerill J. Pursuant to the Order on that CMC, a *quantum* trial was listed for 6 weeks (plus pre-reading) commencing on 13 October 2021.

9. The claimants now apply, under CPR 25.7(1)(b) and an Application Notice dated 13 November 2020, for an interim payment of US$95 million, or such other amount as the court may think fit, to be paid by the defendants within 14 days. The claimants say that from the Position Statements, even maximising any fair allowance in favour of the defendants for the possible impact of arguable defences raised by them, the court can see that the amount of the final judgment in the claimants' favour upon the taking of the account of profits is likely to be at least US$128.5 million. They seek an interim payment of 75%, rounded down to US$95 million.

10. The application generated an Application Bundle of over 2,600 pages, for consideration alongside a CMC Bundle of over 1,000 pages, detailed Skeleton Arguments supported by Authorities Bundles extending to over 1,600 pages (some 49 authorities), 2 full days of oral argument, and a final exchange of written submissions, because there was not time at the hearing for a reply from the claimants. The defendants, claiming that the written note submitted by Mr Wardell QC on my direction to set out what he had been going to say in reply went beyond the proper limits of a reply, filed a written rejoinder. Considering the claimants' written note by way of reply submissions, I did not agree that it went beyond the proper scope of a reply, so I did not read the defendants' rejoinder, just as I would not have heard further from Mr Cogley QC if we had had time to take Mr Wardell QC's reply at the hearing.

Proper Case Management

11. The power to grant the interim remedy of a payment "*on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay*", is given by CPR 25.1(1)(k), and the procedure for applying is set out in CPR 25.6. So far as material, CPR 25.7 does two things:

    (i) firstly, CPR 25.7(1) fixes pre-conditions one of which must be satisfied before any interim payment can be ordered;

    (ii) secondly, CPR 25.7(4) requires any interim payment not to exceed "*a reasonable proportion of the likely amount of the final judgment*".

12. It is a matter of discretion whether to order an interim payment if one of the pre-conditions is satisfied. In this case, the argument proceeded upon the agreed basis that CPR 25.7(1)(b) is satisfied, i.e. that the claimants have obtained judgment against the defendants for a sum of money to be assessed. I am not sure that is strictly correct. I have described the material provisions of the Orders made so far upon the liability judgment. Neither of them orders any of the defendants to make payment of an amount to be assessed; the March 2019 Order recites the claimants' election in favour of an account of profits but does not order, which would be the normal form, that an

account of profits be taken and payment be made of such amount as may be held to be due upon the taking of that account.

13. Were the case considered by reference to CPR 25.7(1)(c), however, I can be certain because of the liability judgment that the claimants will obtain judgment for a substantial sum (other than costs). The parties are seriously at odds over whether, taken on a proper basis, an account of profits will generate for the claimants a judgment of the nine-figure order of magnitude they claim; but even on the defendants' best case on the proper scope of the account, it is fanciful to suppose that it would not result in at least a seven-figure judgment sum.

14. The first point taken by the defendants is that this application comes far too late for it to be appropriate to consider granting it. They say it runs a coach and horses through the careful case management of this litigation, asking the court now to engage in a process of summary determination of many significant issues that in September 2019 the parties agreed, and the court judged, required a trial, namely the trial now only seven months away. The claimants counter that, on authority, there is no rule precluding the court from entertaining even a very heavy and expensive interlocutory battle, relatively close to trial, for the purpose of considering whether an interim payment should be ordered (*Chiron Corp et al v Murex Diagnostics Ltd (No.13)* [1996] FSR 578, at 585); and that the prevailing strong interest, if their application were otherwise well founded, should be that of enabling them to start making some actual recovery when *ex hypothesi* the court will have decided it is only a matter of time before they will have a final judgment entitling them to a very large sum.

15. In *Chiron v Murex*, *supra*, a case pre-dating the CPR and the modern era of active case management to further the overriding objective in the interests of the parties and other litigants seeking access to the court, Robert Walker J was invited to dismiss the interim payment application summarily as inappropriate, if not abusive, despite having a month previously refused a cross-application to strike the application out on that basis. He decided that the application should not be refused on that basis, noting that:

    (i) the inquiry as to damages that was supposed to have been brought on quickly had been pending for 20 months, with judgment not likely for a further 8 months;

    (ii) "*Two days of court time (even recognising them to be the tip of an iceberg of preparation) does not seem an unreasonable or extravagant use of resources on an application for payment of £7 million.*"

    (iii) There was an open offer of £2.7 million by way of interim payment, against a claim for an interim payment of £7 million and a final claim said by the plaintiffs to be well in excess of £100 million.

    (iv) The plaintiffs had focused the application, by leaving out of the reckoning difficult areas of fact and law.

    (v) The litigation had already generated a wealth of prior judgments that gave "*more assistance from authority than can usually be obtained in relation to the*

very same case" to inform the court as to the likely (minimum) level of recovery.

16. Though there is a factual similarity here to the first of those considerations, in that the liability judgment came 28 months ago and the *quantum* trial is another 7 months away, it is a superficial similarity. There is in this case no material change of procedural circumstance since the September 2019 CMC; the *quantum* phase is proceeding as planned, on the timetable it required given what will be involved. In contrast to the third of the matters that weighed with Robert Walker J, here the claimants are seeking an extremely large interim payment, an order of magnitude larger than anything the defendants have indicated a willingness to contemplate. The claimants' application, as Mr Cogley QC submitted, asks the court in substance to rule in the claimants' favour on a number of important and difficult questions of law that will arise at trial, on which the defendants' position is properly arguable. There is nothing akin to the fifth factor that was present in *Chiron v Murex*.

17. Thus, even if the issue were simply one of comparing or contrasting the factors considered by Robert Walker J, in substance what can be said in favour of the claimants as a result is only that, in the abstract, two days of court time (plus preparation) may not be unreasonable or extravagant to deal with an application for a very large interim payment. Furthermore, consideration of the main part of the judgment in *Chiron v Murex* shows that, stripped of various complexities that could not sensibly be resolved without a full trial hearing, there was good enough evidence of the range of royalty rates fixed in default of agreement by the Comptroller of Patents under s.46 of the Patents Act 1977, and of sales figures, to enable the court to identify a likely minimum recovery at trial of £6.3 million (a little less than the £7 million suggested as an interim payment by the plaintiffs), leading to an interim payment order for £6 million.

18. But there is more to the issue than looking at the factors referred to in paragraph 16 above, and the question of what is a reasonable or extravagant procedure cannot be addressed in the abstract. Litigation in this court is now actively managed, primarily through the mechanism of the case management conference. What I am about to say is true in principle of all cases, but it is especially important for larger, complex or very high value cases like this one.

19. The purpose of proper case management in the modern era is to enable the court to deal with each case justly and at proportionate cost (CPR 1.1(1)). The preparation for, and dialogue with the court at, a case management conference, is (or should be) focused entirely upon ascertaining, agreeing where possible (subject to the approval of the court), and where there is a difference of view obtaining the court's informed determination as to, what procedural means, when and how deployed, will be appropriate to achieve the just resolution of the litigation, in the interests of the immediate parties and in the wider interests of the good administration of the civil justice system (including the interests of other litigants, as reflected in CPR 1.1(2)(e) in particular).

20. The Order for Directions resulting from a properly conducted CMC is more than just a list of particular tasks, with deadlines. What it does and does not provide for represents a considered conclusion of the court upon that question of the appropriate procedural means to deploy justly to resolve the particular case. That creates a

reasonable and legitimate expectation in the parties, and in the court, that absent a material change of circumstance, the case will be dealt with accordingly. Depending on how a case progresses, of course interlocutory applications may later come to be made in which no specific attention will need to be paid to that principle, because it will be self-evident that they arise out of subsequent developments. Not so this application.

21. It is pertinent to note some of the Case Management Information Sheet responses given by the claimants for the September 2019 CMC, four months after the defendants had served their Position Statement under the 29 March 2019 Order. Some of the material in the case produced since that CMC can be said to assist the claimants with the final quantification of what they contend is their minimum likely recovery; and the defendants' case for the *quantum* trial is now set out in an Amended Position Statement dated 5 November 2020, the Application Notice coming just over a week later. But if the defendants' case as pleaded justifies an interim payment application now, so also did it in September 2019.

22. The claimants proposed to the defendants and to the court that the *quantum* phase should be managed *inter alia* on the following basis, namely:

    (i) by their answer to CMIS Qu.(6), that "*... it will [not] be appropriate for any issues to be determined on a summary or preliminary basis*" (the question being 'Are any of the issues in the case suitable for trial as preliminary issues?');

    (ii) by their answers to CMIS Qus.(7)-(12) on disclosure, that Extended Disclosure under the Disclosure Pilot was appropriate, to be conducted in accordance with a Disclosure Review Document ('DRD') the parties had prepared – and the DRD provided for an extensive disclosure exercise by reference to the contested *quantum* issues;

    (iii) by their answers to CMIS Qus.(13)-(14), that the evidence of witnesses of fact and experts in the fields of forensic accounting and valuation would be required;

    (iv) by their answer to CMIS Qu.(19), that there was no way in which at that stage (i.e. at or about the time of the CMC) the court could assist the parties to resolve their dispute or particular issues in it prior to the proposed *quantum* trial;

    (v) by their answer to CMIS Qu.(23), that no provision needed to be made in the pre-trial timetable for any application or procedural step not dealt with in response to prior CMIS questions.

23. The defendants' CMIS answers were to like effect, so far as material, so the above was the parties' common approach, endorsed by the court in that the Order on the September 2019 CMC provided for a single, full *quantum* trial, with (and only with) the pre-trial processes provided for in the Order (subject, of course, as is generally implicit in matters of case management, to a material change of circumstance arising thereafter).

24. The contention upon which this interim payment application is now founded is, in substance, that a number of significant pleaded defences can be seen to be bad, in effect by way of summary determinations, *and* that, equally on a summary determination basis, the court can value certain assets acquired by the defendants as a result of carrying out Recovery Services after their bad faith resignations by reference to one particular document, so as to conclude that, prior to such of the allowances the defendants say should be made in their favour as the claimants have chosen not to contest for interim payment purposes, the profit for which the defendants are bound to have to account is at least US$199.4 million.

25. I agree with Mr Cogley QC's characterisation of the application, namely that by it the claimants "*effectively invite the Court – within the confines of a 2-day application – to consider and resolve many of the key disputed factual and legal issues that will be the subject matter of the Phase 2 trial later this year, and without [the defendants] having the proper opportunity to argue them at trial*"; yet, as I have demonstrated above, it was the parties' common cause, endorsed by the court, that those issues were unsuitable for any form of summary determination or preliminary evaluation with a view to assisting in the resolution of the litigation. It would be sophistry to contend otherwise on the basis that, strictly, any view I might form, sufficient to give me confidence that the claimants are right on any given issue, may not be binding and could be relitigated at trial. The assessment of the contentious issues I am asked to conduct in this instance, so as to conclude that I am satisfied the claimants are likely to be correct, is in truth indistinguishable as an intellectual endeavour from that I would conduct if asked to grant declaratory relief by way of summary judgment whereby to resolve certain pleaded lines of defence against the defendants and avoid the need for a trial of those defences.

26. The claimants invite the court to engage in that endeavour, again as Mr Cogley QC put it, "*despite the requirement to make such applications promptly, … only now – seven months out from the Phase 2 trial, and in the middle of the timetable for the exchange of evidence [for that trial] …*". As to that, firstly, it is correct to focus on the proximity of the *quantum* trial now, and not as of November 2020 when the Application Notice was issued. When choosing to prepare and issue the application, the claimants cannot have expected it might come on for hearing any sooner. Secondly, it is appropriate to consider the fact that the defendants have had to prepare and argue this very substantial application in parallel with the key pre-trial evidential phases. That is a real prejudice, beyond merely what will have been an unwelcome and unplanned escalation of the costs of the litigation, that it will be impossible to measure in financial terms, capable of generating a real sense of unfairness.

27. The court has been deprived of the essential opportunity that should have been provided to it in September 2019 to consider, as a matter of case management, whether, and if so when, the overriding objective was best served by making orderly provision for a heavy interim payment application, involving a request in substance that the court take some of the main contentious issues ahead of trial. It is possible the conclusion would have been that no such application would be appropriate, given what it would involve. It is possible the conclusion would have been that any such application should be brought on as soon as reasonably possible after September 2019, with serious consideration to narrowing the scope of, or extending the timetable

for, other main pre-trial stages so as, within reason, to minimise the time and cost burden of the litigation beyond the application itself, pending its determination.

28. It is in my view inconceivable that it might have been concluded that proper case management would be to do nothing with the proposal that there be an interim payment application for 14 months, then have a 2-day hearing in mid-March 2021, 7 months before trial, after a 4-month effort to get the application ready for that hearing that had to be conducted alongside the completion of disclosure and witness evidence for trial. I do not think it can be said even that the court would have directed, as it did at the September 2019 CMC, that the *quantum* trial should commence in October 2021, if this application had been in prospect. Allowing time for the orderly and reasonably self-contained conduct of the application, and contemplating the possibility of an appeal on at least some of the points of law on which the court would have to take a view to determine the application, it seems to me quite possible that the direction would have been for the *quantum* trial to be listed for January 2022 instead.

29. In those circumstances, I agree with Mr Cogley QC that as a matter of discretion, this application ought to be refused unless the claimants have shown good reason why it was only launched when it was, in November 2020. Indeed, in my judgment the application ought not to be entertained unless there has been a material change of circumstance since the claimants adopted the considered view that no such application was appropriate, and obtained the court's case management directions for the *quantum* phase on that basis.

Good Reason / Change of Circumstance?

30. The claimants respond with three points. To my mind none of them involves good reason why the interim application was not made when it should have been, or identifies any material change of circumstance between September 2019 and November 2020.

31. First, it is said that at the time of the September 2019 CMC the claimants were contemplating a *quantum* trial in November 2020, and that a 2-day interim payment application in those circumstances "*is a very different proposition from such an application when the trial is not listed until October 2021*". It is true that the claimants' CMIS for the September 2019 CMC proposed that they could be ready for trial in November 2020. But that appears to me to have been ambitious rather than realistic, at all events for a single *quantum* trial of all issues, which is what Cockerill J ordered. The defendants' CMIS proposed that for a single *quantum* trial of all issues the parties would be exchanging expert evidence still in October 2021. Therefore, the September 2019 CMC did not contemplate only November 2020 for trial, rather than October 2021 or possibly even later.

32. Moreover, the Order made at the September 2019 CMC was, in terms, for the *quantum* trial to be listed to commence in October 2021. So even if the claimants had approached the hearing, unreasonably, upon the basis that they would definitely come out of it with a November 2020 trial date, the hearing will have disabused them of that misapprehension. If as the claimants say a 2-day interim application at an appropriate juncture following the September 2019 CMC is a 'very different proposition' with trial set for October 2021 rather than November 2020, that was not reason to delay the application for over a year, it was reason to issue the application as soon as

practicable after the CMC. On analysis, the claimants by their first answer assert that it would have been inappropriate, in the particular circumstances of this case, to ask the court to deal with a heavy interim payment application like this if issued less than 14 months before trial, in support of their actual such application issued only 11 months before trial.

33. The claimants' second answer is to say that, as explained in her witness statement in support of the application by their solicitor, Ms Bischof of Brown Rudnick LLP, the claimants "*have experienced funding issues which meant that it was necessary to focus on the key litigation milestones rather than potentially expensive interim applications*" (to quote from their written reply submissions). That merely confirms that the claimants indeed made a considered decision, taking into account all of the circumstances of the litigation, that it would not be appropriate to launch an application such as this. It does not amount to a good reason for changing their mind, let alone evidence a material change of circumstance.

34. To be fair to the claimants, Ms Bischof's statement went further than the submission I quoted above. She said this (followed by an argument, which was not properly a subject for her witness statement, that when an application is made should not matter):

"*I anticipate that the Defendants will complain that the Application should have been made earlier. However, [(i)] … as a result of the limited funding available to them, the Claimants have to date sought to focus on meeting the litigation milestones. [(ii)] The point has already been made that what has prompted the Application now is the fact that another round of funding has recently been obtained and the realisation that the Claimants will need to raise more monies to get to the end of trial. [(iii)] The desire not to diminish further the amount of any recovery in their hands provides a powerful incentive for them to seek relief now. [(iv)] In addition, the Claimants have serious concerns about the risk of dissipation as well as their ability to enforce any judgment in due course. [(v)] Also, because of the way the Defendants have handled disclosure, it was only relatively recently that it has become possible to identify an appropriate sum to seek by way of interim payment.*"

35. Taking the matters mentioned by Ms Bischof in turn, using my added numbering:

(i) This is the point I considered in paragraph 33 above. From what Ms Bischof said about it in an earlier paragraph of her statement it may be the litigation funding the claimants had prior to October 2020 would not have afforded them this application as well as the general conduct of the litigation. However, for my present purpose, (a) that is a circular point, since it is not suggested that in 2019 the claimants sought but were denied funding sufficient to add this heavy interim payment application to the programme, and (b) it only reinforces the basic point that if the material available to the claimants suggested that such an application was justified and might be appropriate, that should have been raised with the court so it could be factored into the management of the case.

(ii) Ms Bischof's second point is rather unclear. It repeats the fact that as at November 2020 when the witness statement was signed, a further round of litigation funding had recently been obtained, but adds that there was then a 'realisation' that the claimants would need to raise yet further funding to get to the end of trial. It is not clear to me what that means, if anything, beyond

saying that the tranche of funding obtained in October 2020 was less than Brown Rudnick's then estimate of the cost of getting the claimants to the end of the trial. If that led anywhere, particularly when taken with the first point, it led to the conclusion that November 2020 was *not* the time to be adding the no doubt very substantial cost that has been incurred in this application to the costs burden of the litigation. I also agree with a submission by Mr Cogley QC that Ms Bischof does not say, nor does it follow from what she says, that the claimants do not expect to be able to fund this *quantum* phase through to the completion of the trial later this year in the absence of an interim payment.

(iii) The third point similarly, with respect, makes no real sense. It proposes that the claimants' net recovery from the litigation would be *increased* by the making of an interim payment application. But the cost of the application must mean *prima facie* that pursuing it could only serve to *decrease* the claimants' net recovery by (at least) irrecoverable costs incurred in the application if it succeeded. If a more complex equation lay behind Ms Bischof's evidence, by reference to whatever may be the terms and conditions of the litigation funding the claimants have raised, that was not set out. But if that was the real point, i.e. the claimants wanted to get an interim payment out of which to cover their remaining costs outlay to the end of the *quantum* trial so as to reduce their cost of litigation funding, it is completely answered by the fact that the defendants openly offered to pay the claimants up to £5 million on account, to give the claimants access to an ample cash fund for that purpose.

(iv) I am not in a position to say that the claimants do not, as Ms Bischof says they do, in fact harbour concerns about possible dissipation of assets. But the remedy for that lies in a different application, if there is a proper basis for it. An interim payment application should not be used as a means to avoid making out by evidence the requirements for a freezing order. More importantly, that is not a reason *for delaying* until November 2020 before issuing the application, and certainly it is not suggested to be something new that might amount to a material change of circumstance.

(v) Finally, Ms Bischof's reference to disclosure is, so far as material, to a single-page Annex to a Deed of Termination dated 20 April 2018 by which the Family and the defendants (or it may be strictly their corporate vehicles) terminated the Investment Recovery Services Agreement ('the IRSA') concluded on 30 September 2012 pursuant to which Recovery Services were provided to the Family from which the defendants (or their corporate vehicles) profited or were entitled to profit. That Annex is the quasi-determinative piece of evidence, as the claimants' argument on the application would have it, to which I referred in paragraph 24 above. The answer to this point, in my view, is the answer I gave in paragraph 21 above. There appears to be real room to contend that the defendants and their solicitors adopted a wrong-headed attitude towards their obligation to disclose the Annex; and it may be that with the Annex now to hand the claimants are able to advance a forceful argument at trial that certain assets transferred to them under the 2018 Deed, if their value is to be brought into the account of profits, were worth as much as US$90.4 million between them. But I am satisfied on the entirety of the material I was shown that the claimants were in a position by the time of the

> September 2019 CMC to propose that those assets had a very substantial value justifying, overall, an eight-figure interim payment, even if perhaps not as much as the US$95 million now sought, if an interim payment application were otherwise well-founded. Furthermore, there would have been no difficulty about obtaining the court's assistance to require disclosure of the Annex, within the application if made, so as to enable the claimants better to calculate and evidence what they would be saying was likely to be a realistic minimum final judgment sum.

36. The claimants' third answer is to assert that the September 2019 CMC "*should not have a preclusive effect on the parties' ability to make applications thereafter if their circumstances change and/or they consider it appropriate*". They submit that there is nothing in the rules providing that there is any such cut-off, and that "*in the interests of justice it is appropriate to allow the parties to change their minds and make an application as long as to hear that application would not be contrary to the overriding objective*". The first contingency (change of circumstance) is uncontroversial but inapplicable. The second (change of mind) I cannot accept, except as it is circumscribed by the qualification that a change of mind must not run contrary to the overriding objective. But then it must be understood that in general it *will* be contrary to the overriding objective to engage in fully considered, careful case management as in this case and then, over a year later, to launch an application turning aspects of that careful case management exercise on its head without good reason, in fact I would say without showing some material change of circumstance.

37. I would conclude, therefore, that this interim payment application should be refused, as a matter of discretion, unless there is some exceptional reason why either substantive justice to the claimants, in the vindication of their rights, or procedural justice, i.e. ensuring that the process adopted by the court is a just one for the resolution of the litigation, demands that it be entertained on its substance despite there being no material change of circumstances, or even any good reason, explaining why it was not brought at least a year earlier, when it could have been accommodated sensibly as a discrete phase within the *quantum* timetable and not be an unwelcome and burdensome distraction from the most important pre-trial phases.

The Merits

38. No exceptional reason creating a just demand that the application be considered was identified by the claimants. But for completeness, I propose to assume in the claimants' favour that if it were clear, upon the relatively superficial exposure to the issues that would fall to be considered that the hearing of this application allowed, that there is no sensibly arguable defence to their proposition that at least some identifiable very large sum is liable to be awarded to them upon the *quantum* trial, then it might be just to determine the interim payment application on that basis and order payment of a reasonable proportion of that sum after all.

39. In that regard, I deal first with one particular feature of this case. The defendants made a Part 36 offer, on which some reliance was placed. By consent of the parties, strictly and only for the purpose of this application, and on terms preserving their confidentiality, I was made aware of the terms of the Part 36 offer and some other very limited information about it. To the extent that those matters were touched on at

the hearing (i.e. for all of about 10 minutes), I sat in private, having briefly stated for the record why the interests of justice required me to do so.

40. Amounts offered under Part 36 may be calculated in any number of ways. In any given case, they may or may not constitute evidence, or found some inference, that the claimants are liable to be awarded at least some particular sum at trial. Even if liability is admitted or established, a substantial Part 36 offer may say nothing of worth for an interim payment analysis (and I say nothing as to whether the Part 36 offer in this case should be characterised as substantial, either in absolute terms or relative to the sums claimed). If as to *quantum*, a claim in which liability was not in issue might sensibly be worth nothing or virtually nothing, £200,000, or £2 million, a Part 36 offer of (say) £500,000 might represent an assessment that there was probably no substantial liability but a real, if modest, prospect of being liable for either £200,000 or £2 million (e.g. 25% of £200,000 plus 20% of £2 million would give £450,000 that might be rounded up as an incentive for acceptance), in which case it would be of no assistance to the claimant on an interim payment application. Or that hypothetical offer of £500,000 might be made in a letter acknowledging that in all likelihood the argument for nominal damages would fail, i.e. the claimant would in all likelihood recover at least £200,000, but the defendant did not rate the claimant's prospects of hitting the £2 million jackpot. That letter would assist the claimant if it sought by way of interim payment a reasonable proportion of £200,000 (which in those circumstances might be almost all of that amount).

41. In this case, I say only that on what I was shown, no relevant inference arises that might assist the claimants for this application.

42. I turn to consider the major issues the claimants would have me determine that they are clearly likely to win at trial.

43. There is an overarching point to note, lest admissions in the defendants' Position Statement of profits made through Recovery Services might be misunderstood to be admissions of items that must fall to be credited to the claimants' side of any account taken at trial. By Schedule A to the March 2019 Order, the defendants were required to set out in their Position Statement "*the monies and/or other assets which [they] have received from or on behalf of or at the instigation or instruction of (or have been promised by) the Family … (or from entities owned or controlled by the Family [etc.]), or that [they] have otherwise received (or been promised) in relation to the "Recovery Services" (as defined at paragraph 5 of the Judgment dated 1 November 2018) or from assets the subject of the Recovery Services, from May 2011 onwards*" ('Responsive Receipts'). But that was qualified by this, namely that the defendants' Position Statement was also to set out their case as to (a) which of those benefits fall within the scope of the account to be taken and which fall outside it, (b) any further limitations that should be placed on the scope of the account, and (c) any other arguments of principle upon which the defendants intend to rely generally so as to limit the scope of the account or the sums they ought to be ordered to pay once the account has been taken.

44. It is the claimants' case for trial that, subject only to deducting expenses properly characterised as costs of generating those benefits to ensure it is an account of profits and not of turnover, the defendants will have to account to the claimants for the value of all their Responsive Receipts. Indeed, as I understood one element of their

argument on this application, they will say that is the effect, *per rem judicatam*, of Cockerill J's liability judgment. The qualification built into the March 2019 Order and described in the previous paragraph does not mean that Cockerill J has determined that point against the claimants. But it does acknowledge that the point was disputed, was fit for argument, and was to be an important issue for trial.

45. The defendants highlighted five assumptions they said were made by the claimants in calculating the US$128.5 million said to justify an order for a very large interim payment. The defendants accepted that the need to account, in their favour, for expenses, i.e. the costs of generating the Responsive Receipts, had been properly factored in for present purposes because the claimants' calculation allowed the full amount claimed by the defendants in that regard; and that the claimants' calculation did not attempt to extend the account to 'Responsive Investments', i.e. follow-on investments made by the defendants using Responsive Receipts and from which they may have generated enhanced value for themselves, since the claimants do not ask the court to take a view prior to trial on whether they are likely to be correct that such enhanced value will also fall into the account.

46. Firstly, the defendants say the claimants are assuming the outcome of a fact-sensitive question whether the court will say there is a sufficient link or nexus between the Responsive Receipts and their breaches of duty, as found. On that issue, at trial, the defendants will be contending not only that Responsive Investments are a step too far, but also that the IRSA and the substantial benefits obtained by the defendants from it should not be brought into the account. That does not strike me on initial acquaintance as an obviously strong argument for the defendants; but I could not do justice to it on the material and relatively limited argument (i.e. relative to a trial) on this application. I cannot find that the claimants are clearly likely to prevail on that argument.

47. This first point is the jackpot for the defendants, or rather its antithesis for the claimants, giving rise to the defendants' primary position for the *quantum* trial that the sum properly to be found due to them upon the taking of an account of profits in respect of their breaches of fiduciary duty may be no more than a few million dollars.

48. There is a particular variant on this first theme, or rather an alternative version of the defendants' IRSA argument, namely that even if benefits earned from the IRSA are 'in', benefits under the 2018 Deed of Termination will be 'out'. That seems at first blush a surprising notion, given that the Deed of Termination appears essentially to have provided for an agreed form of termination and settlement of accounts in respect of the IRSA; but I do not need to consider whether on further consideration the argument may become stronger, given my conclusion on the primary version of the IRSA argument.

49. Secondly, the defendants say that the claimants assume in their favour that the account will not be limited by an antecedent 50:50 profit share agreement the defendants say existed between Mr Jaffe and Mr Rukhadze in respect of any eventual earnings from providing Recovery Services. I do not find it easy to see how any such antecedent profit share agreement could avail the defendants – if it existed at all (which the claimants dispute, and as to which they again say the point is *res judicata* anyway), it was presumably an agreement for a world in which Mr Rukhadze stayed loyal. As one part of this aspect, the defendants say the claimants' case depends upon a "*commercially implausible position that Mr Jaffe retained at all times an apparently*

unfettered discretion to alter economic interests in the Recovery Services project". Whether commercially implausible or not, all things being equal, it is not obvious to me that that is not what Cockerill J held in the liability judgment the position to have been.

50. Given my conclusion on the first assumption, I draw back from expressing any firm view on whether I would have denied or limited a payment on account by reference to this 50:50 profit share contention. I would however agree that it would be impossible double-counting to allow for both this contention and the final point considered below, the defendants' claim for an equitable allowance (effectively for a share of the profit to be retained by them even though it is properly to be regarded as net profit with a sufficient nexus to their breach so as *prima facie* to fall into the account).

51. Thirdly, the defendants identify that the claimants' calculation assumes in their favour that certain factors relied on by the defendants will not be held at trial to limit the scope of the account, in the exercise of the court's equitable discretion, as follows:

(i) The defendants contend that their acts of disloyalty, as found against them, "*were minor in nature and did not themselves cause the loss of the opportunity*", and did not involve dishonesty. That seems an ambitious argument, considering the liability judgment, but in any event not one in my view that could cause the scope of the account of profits to be restricted.

(ii) The defendants next contend that there is a serious case on the facts to the effect that the claimants chose to 'wait and see', delaying taking action to vindicate their rights as beneficiaries of the defendants' fiduciary duties, in effect watching as the defendants laboured and put their time, reputations and capital at risk, only suing when it was clear those efforts had been very successful. They referred me to *Snell's Equity*, 33rd Ed. at 7-055, and *Edmonds et al. v Donovan et al.* [2005] VSCA 27 (Victoria Supreme Court, Court of Appeal). The claimants pointed out that the 'wait and see' doctrine summarised by *Snell* and considered in *Edmonds* has not to date been used to affect the scope of an account of profits that has been ordered, as distinct from the question whether to order an account of profits at all. But that brings me back to the position here to which I referred in paragraph 12 above. Strictly, there has not yet been an order that an account of profits be taken, and the case management of the *quantum* phase has been on the basis that there is or may be a question still to be determined of what scope of account should ultimately be ordered. I do not regard this interim application as an appropriate vehicle for determining the novel and important question whether the 'wait and see' principle is material only to a threshold question whether an account of profits as a type of remedy is to be allowed to the claimant, and cannot be relied on within the process of taking the account (depending always on what may have been said by the court, if anything, to fix the scope of the account when ordering it), or for determining now, it being one of a number of such questions that will arise at trial, whether what has been ordered to date in this case precludes any such argument, let alone on the facts and as a matter of the court's discretion what might be made of the 'wait and see' defence at trial, if it be available to the defendants. This point, like the first main point considered in paragraph 46 above, is fatal to the proposal that an interim

payment should be ordered by reference to the claimants' US$128.5 million calculation or anything like it.

(iii) Finally, in this part of the argument, the defendants refer to their pleaded defence that improper conduct on the part of or instigated by Mr Jaffe, as alleged by the defendants, ought to limit what falls to be taken into the account. I was unimpressed by that as an argument, unless it be that Mr Jaffe through improper means effectively generated the need for certain Recovery Services and that the court might in those circumstances disallow to the claimants an account of any profits made by the defendants that are attributable to those particular services. The example considered in argument was if Mr Jaffe wrongfully sought to keep Badri's assets out of the Family's hands, i.e. effectively became one of the antagonists whose predatory behaviour generated the Family's need for Recovery Services. It would be unconscionable, the argument proposed, to grant to the claimants the profits earned by the defendants through helping the Family see Mr Jaffe off. I am not prepared to say that such an argument might not be sound in principle. Mr Wardell QC's reply demonstrated, however, that (a) no such defence has in fact been pleaded and (b) the high water mark, of the possible case towards which Mr Cogley QC may have been trying to work his way on his feet, appeared to be a suggestion that c.US$55 million in receipts by the defendants might be said to be affected by Mr Jaffe's alleged conduct, but that may not mean it could suppress the profits for which the defendants might be ordered to account to the claimants by US$55 million. I would have been minded to agree with Mr Wardell QC that it seems unlikely that this line of defence, if pleaded, if sound in principle, and if made good at trial on the facts as to Mr Jaffe's alleged conduct and its consequences, would strip out of the claimants' US$128.5 million calculation more than c.US$8 million, being the total admitted Recovery Service Fees for 2011-2013 inclusive used in that calculation.

52. Fourthly, and a point raised only on behalf of Mr Marson, the defendants say the claimants' calculation assumes that his liability to account extends beyond his net share of asset management fees connected to Recovery Services even though he owed fiduciary duties only to Revoker whose 'slated role' (to echo the liability judgment) was apt only to generate such fees. For my part, I cannot see how the defendants' defence contending that Mr Marson's duty to account is limited to asset management fees can succeed. As Cockerill J said in the liability judgment at [50], in turn quoting *Chan v Zacharia* (1984) 154 CLR 178 at 198, a fiduciary is obliged "*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*". That is not limited to benefit or gain of a kind or in an amount that the principal or beneficiary would or could have obtained or received for itself but for the breach of fiduciary duty: see *Boardman v Phipps* [1967] 2 AC 46, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, *Keystone Healthcare Ltd et al. v Parr et al.* [2019] EWCA Civ 1246.

53. Fifthly and finally, the defendants note that the claimants' US$128.5 million calculation assumes against the defendants that their defence will fail in which they contend for a very substantial allowance to reflect the skill, effort and risk they undertook to generate the rewards the claimants now wish them to disgorge. An

aspect of this may be to challenge the bright line distinction the claimants have drawn between earnings labelled, as between the defendants and the Family, as fees or remuneration, and 'carried interest' profits (the value of interests in assets resulting from being allowed by the Family to have skin in the game, not just income from playing). The claimants will dispute at trial whether any, or any significant, allowance should be granted to the defendants at all, but they seek to neuter the issue for present purposes by allowing the defendants, in their US$128.5 million calculation, all receipts said to have been by way of fees or remuneration rather than carried interest.

54. I have said that, as I see it, this point only arises if the defendants are wrong in their prior 50:50 profit share defence (see paragraph 50 above). But in that case, I could not sensibly take a view on this application, as it requires a trial for a proper exploration of the facts and a consideration of the legal principles by reference to those full facts, whether this line of defence may find favour with the court.

Conclusion

55. For the reasons set out in the previous section of this judgment, I cannot say it is clear that the defendants will not make out at trial lines of defence that will limit the account of profit very heavily, such that any judgment will be for a seven-figure sum rather than something in the tens or hundreds of millions. To be clear, that is not a finding, even provisionally, that their liability will *not* prove to be an order or orders of magnitude greater, as contended by the claimants.

56. In those circumstances, in view of the case management history of the matter and the absence of any good reason why this application was not brought when it should have been (if at all) at least a year earlier, let alone any material change of circumstance since September 2019 when the claimants took a considered decision that it was not appropriate, the claimants could not complain if the application were simply refused as a matter of discretion.

57. That said, the defendants have offered in principle to pay up to £5 million, in recognition that even on their best case there is likely to be a seven-figure judgment sum (e.g. they acknowledge receipt of (gross) Recovery Service fees of US$4.7 million up to September 2012, when the IRSA was concluded and after which, they will say at trial, the account should not run), and as a means of ameliorating the claimants' asserted concerns over litigation funding, to the extent those are said to have motivated the application. The defendants' offer was not an unconditional offer to pay £5 million, so that whilst I encourage continued dialogue between the parties if the willingness in principle to go that far remains, I could not conclude within the confines of CPR 25.7(4) that an order for payment of £5 million was proper. I am however comfortable that an interim payment of US$4.5 million would be not more than a reasonable proportion of the likely amount of a final judgment.

58. The defendants were content to agree for the purpose of this application that any interim payment held to be appropriately paid by them, in aggregate, should be regarded as their responsibility in the proportions of their interests in the Family project as suggested by a table in their Amended Position Statement, i.e. 60% Mr Rukhadze, 26% Mr Alexeev, 14% Mr Marson. Therefore, the order will be that the following interim payments be made, each within 28 days:

(i) by Mr Rukhadze, a payment of US$2.7 million;

(ii) by Mr Alexeev, a payment of US$1.17 million;

(iii) by Mr Marson, a payment of US$630,000.

Coda – Payment Difficulties

59. I have reached the conclusion that the claimants' interim application fails, except to that extent, without reference to a further argument advanced by the defendants, because that argument would arise only if the decision without it would be for payment of something substantially in excess of £5 million. The argument was that, on the defendants' evidence for the application, it would be difficult, time-consuming and possibly seriously prejudicial to the businesses in which they say their (illiquid) wealth is tied up if they had to raise tens of millions of dollars in the short term.

60. The claimants' primary response was to contend that it was irrelevant to the exercise of the court's discretion. The argument logically plays no part in any assessment of the likely (minimum) judgment sum in the case. If it were held that, say, US$100 million at least is likely to be recovered, then (so the claimants' response went) the approach on an interim payment application, bearing in mind the limit imposed by CPR 25.7(4) for the purpose of avoiding any material risk of over-payment, should be no less strict than if there were a final judgment for the amount being awarded and a plea for a stay of execution on grounds of impecuniosity, or than if (as in *MV Yorke Motors v Edwards* [1982] 1 WLR 444) summary judgment were being avoided by a shadowy or very thin defence and the defendant resisted on such grounds the imposition of a requirement to pay into court as a condition of defending the merits.

61. If the claimants' responsive argument be right, then I would agree with them that the defendants' evidence, substantial and detailed though it is so far as it goes, did not go far enough. Most pertinently, it did not seem to me to negative an inference naturally available on the facts of the case taken as a whole that the Family would be likely to support the defendants if required, in return for security the defendants would be in a position to offer.

62. Since the defendants' argument therefore doubly does not arise, I prefer to say no more about it, and thus to express no view on when and how, if at all, a contention that a defendant will have difficulty paying, but not that the order sought will stifle the continued defence of the proceedings, might affect the outcome of an interim payment application.