Neutral Citation Number: [2022] EWHC 383 (Comm)

Case No: CL-2018-000226

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2022

**Before** :

**MR JUSTICE FOXTON**

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**Between :**

**(1) HOTEL PORTFOLIO II UK LIMITED (in Liquidation)**
**(2) ELIZABETH ALEXANDRA AIRD-BROWN (as Liquidator of Hotel Portfolio II UK Limited (in Liquidation))**

**Claimants**

**- and -**

**(1) ANDREW JOSEPH RUHAN**
**(2) ANTHONY EDWARD STEVENS**

**Defendants**

**- and -**

**(1) PHOENIX GROUP FOUNDATION**
**(2) MINARDI INVESTMENTS LIMITED**
**(3) TANIA JANE RICHARDSON**

**Interested Parties**

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**James Pickering QC** and **Samuel Hodge** (instructed by **Spring Law Limited**) for the **Claimants**
**George Spalton QC** and **Carola Binney** (instructed by **Provenio Litigation**) for the **First Defendant**
**Sebastian Kokelaar** and **Stephen Ryan** (instructed by **Richard Slade & Company**) for the **Second Defendant**

Hearing dates: 22 to 26 November, 29 November to 2 December 2021 and 17 to 19 January 2022
Further submissions: 20 January 2022

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# Approved Judgment

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

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THE HONOURABLE MR JUSTICE FOXTON

**"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 on 23 February 2022."**

**Mr Justice Foxton:**

## A INTRODUCTION

1. In the decades following the Second World War, there were many owners of grand private houses who found their financial salvation in selling them for conversion into luxury hotels. The properties which have given rise to this trial followed a reverse trajectory, the disputes arising from the very significant profit realised through transactions involving the sale of luxury hotels for their subsequent conversion to and use as private residences.

2. The hotels in question were the Kensington Park, Kensington Palace and Lancaster Gate hotels in London (collectively "**the Hyde Park Hotels**"):

    i) They formed part of a portfolio of hotels which the First Claimant ("**HPII**"), then owned by the First Defendant ("**Mr Ruhan**"), acquired from Orb a.r.l. ("**Orb**") in May 2003 for a consideration of between £42 and £47m.

    ii) The Hyde Park Hotels were on-sold by HPII pursuant to a Business Sale Agreement dated 1 March 2005 ("**the BSA**") to a company ostensibly owned and controlled by Mr Stevens called Cambulo Comercio e Serviços Sociedade Unipessol LDA ("**Cambulo Madeira**") for a price which, by the time of completion, was £125 million ("**the Cambulo Madeira Transaction**").

    iii) On 4 April 2006, companies owned by Cambulo Madeira entered into a joint venture agreement with CPC Group Ltd ("**the CPC Group**"), a company owned by the Candy brothers (Mr Nicholas or Nick Candy and Mr Christian or Chris Candy), to re-develop the Kensington Park and Kensington Palace hotels ("**the Kensington Hotels**") on a 50:50 basis.

    iv) After planning permission had been granted, on 30 August 2006 the Lancaster Gate Hotel was sold for £67.5m.

    v) On 29 November 2007, the companies owning the Kensington Hotels were transferred to the joint venture company, Cambulo Property Holdings Ltd ("**CPHL**").

    vi) On 22 February 2008, CPHL agreed to sell the Kensington Hotels to De Vere Estates Ltd ("**De Vere**"), a company connected to the Abu Dhabi royal family, for £320m.

3. HPII contends that in the acquisition of the Hyde Park Hotels from HPII, and the subsequent on-sales, Mr Stevens was acting as Mr Ruhan's nominee, with the result being that Mr Ruhan was acting in breach of fiduciary and similar duties he owed to HPII. In addition to seeking personal and proprietary relief so far as Mr Ruhan is concerned, HPII seeks an account of profits, equitable compensation and damages from Mr Stevens, on the basis that he dishonestly assisted in breaches of fiduciary duty by Mr Ruhan and was a participant in an unlawful means conspiracy with Mr Ruhan.

4. The issues raised in this case constitute, to a very significant extent, the jumping off point for issues which have already been determined by me (subject to appeal) in

Serious Fraud Office and ors v Litigation Capital Limited and ors [2021] EWHC 1272 (Comm) ("**the Directed Trial Judgment**"). At the PTR in this action, I ordered that certain of the findings made in this action would also bind other parties who are involved in litigation in which the same issues arise and remain live: Ms Tania Richardson (formerly Mr Ruhan's wife) and Phoenix Group Foundation ("**Phoenix**") and Minardi Investments Limited ("**Minardi**"), companies in which Mr Stevens claims to be interested.

## B THE KEY ISSUES

### The nominee issue

5. As will be apparent, the foundation of HPII's case is that Mr Stevens was acting as Mr Ruhan's nominee on the purchaser-side of the BSA, both in concluding the transaction, and in realising and disbursing its benefits. HPII defines that relationship in terms taken from Professor (now His Honour Judge) Matthews' article "All About Bare Trusts: Part 1" (2005), 266, 273: an arrangement in which the nominee "holds on trust for the beneficiary absolutely, but also agrees to do whatever the settlor/principal asks, or at least whatever is asked within a certain range of possibilities".

6. In determining whether or not such a relationship existed on the facts, HPII directed me to the following guidance from the authorities:

   i) Evidence that A exercises substantial control over assets of which B holds the legal title "may be evidence from which the Court will infer that the assets are held as nominee or trustee for [A] as the ultimate beneficial owner": PJSC Vseukrainskyi Aktionsernyi Bank v Maksimov [2013] EWHC 422 (Comm), [7(5)].

   ii) Evidence that the alleged principal is in a position of superiority to the alleged nominee, giving them instructions or commands which are invariably complied with, may also support a finding of nomineeship: JSC VTB Bank v Skurikhin [2015] EWHC 2131 (Comm), [39] and [45].

7. I also addressed this issue in the Directed Trial Judgment, [604]-[605], where I summarised the effect of the authorities referred to me in that case as follows:

> "There are number of matters which may support the conclusion that the apparent owner of property in fact holds it as a nominee for someone else: whether someone other than the alleged nominee exercises control over the asset (Phoenix v Cochrane [2017] EWHC (Comm), [17(5)]); whether the apparent owner uses or allows the asset to be used in a manner which advances someone else's interests rather than its own (Prest, [52]); who paid for the asset, which may support a conclusion that it is held on constructive trust (*Lewin*, 10-019) and whether the person alleged to be the 'real' owner had a motive to disguise his or her ownership".

8. I have had regard to these observations when considering the evidence.

*HPII's nominee case in summary*

9. In support of its contention that Mr Stevens was acting as Mr Ruhan's nominee in relation to the acquisition, development and sale of the Hyde Park Hotels, HPII relies on:

    i) The circumstances in which Mr Stevens "came on the scene" in 2005 when the Hyde Park Hotels were up-for-sale.

    ii) Mr Ruhan's actions and communications both before and after the sale of the Hyde Park Hotels to Cambulo Madeira, including in the events leading up to the sale of the Kensington Hotels to De Vere.

    iii) The fact that the company holding what was ostensibly Mr Stevens' interest in the Kensington Hotels provided security for a loan made to fund investments by Mr Ruhan in Qatar and the terms in which that involvement was described contemporaneously, including within the lender.

    iv) Mr Ruhan's involvement in various investments made with funds realised through the sale to De Vere or with the proceeds of the repayment of what were said to be loans made by Mr Stevens to Mr Ruhan.

    v) The terms of the communications between Mr Ruhan and Mr Stevens.

    vi) The events leading up to, and the terms of, the settlement reached between Mr Ruhan and persons associated with Dr Gerald Smith in Geneva in April/May 2016 ("**Geneva Settlement**").

*Mr Ruhan's position in summary*

10. Mr Ruhan contends that the nominee case is entirely without merit, and is a construct which was originally dishonestly conceived by Dr Smith as part of his vendetta against Mr Ruhan to which others latched onto thereafter for personal or financial reasons, and to which Dr Smith has been able to impart ongoing momentum by manipulating both the liquidators and other individuals connected to Mr Ruhan.

11. Mr Ruhan contends that Mr Stevens was a successful businessman who "barely knew him" in 2005/2006. Mr Ruhan points to a number of features which are said to make it inherently unlikely that Mr Ruhan would enter into such an arrangement. These include the following:

    i) It is said that, had he wanted to, Mr Ruhan could have purchased the Hyde Park Hotels without the need for any secret arrangement with Mr Stevens.

    ii) It is said that if Mr Ruhan had wanted to act through a nominee, he would have used Mr Cooper and Mr McNally, who (at the relevant time) were trusted advisers and fiduciaries who held substantial assets on his behalf.

    iii) The transaction postulated by HPII involved Mr Ruhan undertaking very significant risk for what has proved to be limited upside.

12. Mr Ruhan contends that HPII has misunderstood or misinterpreted the documents which it contends support the nominee case, and has ignored a significant number of documents or events which are inconsistent with that case. Mr Ruhan says that in

considering those documents, it is necessary to have regard to the various roles he was performing at different points in time:

i) In the period up to the completion of the sale to Mr Stevens, Mr Ruhan played an active role in seeking to get the deal over the line (for the benefit of all the stakeholders in HPII), including conducting the key negotiations with Thistle Hotels plc ("**Thistle**") who presented a potential roadblock to a successful sale. In this period, Mr Ruhan was essentially acting as a middleman, not the protagonist on the purchaser side as HPII alleges.

ii) While Mr Ruhan did have an ongoing role with the Hyde Park Hotels in the period after they were sold to Mr Stevens, this was a paid role in which he was using his pre-existing relationship with Thistle for the benefit of the purchaser, and its joint venture partner, the CPC Group. On those occasions when Mr Ruhan's involvement strayed outside the scope of the management services his companies had contracted to provide, this reflected nothing more than his general way of doing business, which was to work with friends and connections, who might in due course be the source of useful business opportunities for him.

iii) Mr Stevens did subsequently invest in business projects in which Mr Ruhan was involved, but did so on an arms-length basis and not because the investments were being made by Mr Stevens on Mr Ruhan's behalf.

iv) The terms of the Geneva Settlement, as between Mr Ruhan and Mr Stevens, involved the resolution of a dispute between Mr Ruhan and Mr Stevens arising from loans made by Mr Stevens to Mr Ruhan, which Mr Ruhan had failed to repay in full.

*Mr Stevens' position in summary*

13. Mr Stevens also denies the nominee allegation in the strongest terms, on very similar grounds to those put forward by Mr Ruhan. Mr Stevens says that he was already a successful businessman with a substantial track record when he acquired the Hyde Park Hotels in 2005. Mr Stevens says that "there is not a single document which refers to the alleged arrangement or shows the alleged principal giving instructions to his alleged nominee".

14. Mr Stevens points, in particular, to:

i) The lack of any sufficient motive for Mr Ruhan and Mr Stevens to enter into such an arrangement.

ii) The fact that Mr Stevens had not had any business dealings in which Mr Ruhan was involved before the sale of the Hyde Park Hotels, and the inherent implausibility of the allegation that "Mr Ruhan entered into a secret nominee arrangement with a man he barely knew and entrusted him with assets worth millions without any form of documentation".

iii) The absence of any documents or evidence from others involved in the dealings with the Kensington Hotels – in particular the Candy brothers who owned the CPC Group – to the effect that Mr Stevens was acting as Mr Ruhan's employee.

*The position of corporate entities alleged to be under Mr Ruhan's control*

15. The only breaches of fiduciary duty pleaded by HPII are breaches by Mr Ruhan, and the only breaches of fiduciary duty which Mr Stevens is alleged to have dishonestly assisted are breaches by Mr Ruhan. There is, thus, no case that companies to whom assets or the proceeds of assets were transferred themselves owed fiduciary or equitable duties to HPII, and that Mr Stevens dishonestly assisted those breaches. Nor were such questions of analysis as might have arisen on that basis explored by the Defendants.

16. I can well understand why the case was conducted in this way. HPII's pleaded case was that the companies in question received and held the assets as nominees or bare trustees for Mr Ruhan (paras. 33 and 64 of the Re-Amended Particulars of Claim). In cases in which a company is used to hide the involvement of a fiduciary in a transaction with the beneficiary, a court may well conclude that the corporate entity was acting as nominee for the fiduciary (see for example Gencor ACP Ltd v Dalby [2000] 2 BCLC 734 and Trustor AB v Smallbone (No 2) [2001] 1 WLR 1177 as analysed by Lord Sumption in Petrodel Resources Ltd v Prest [2013] UKSC 34, [31]-[33]). To the extent that, for this reason, the findings and analysis below involve an element of simplification, that reflects the manner in which the case was argued by the parties at trial (which in turn, I am satisfied, reflected the reality of the position on the facts).

**The limitation issue**

17. In addition to denying the substance of HPII's claims, both Mr Ruhan and Mr Stevens contend that the claims are in any event time-barred or barred by the equitable doctrine of laches. For this purpose, they contend that HPII, acting through its liquidator at the relevant time, Mr Neil Chesterton, was aware by early 2008 of allegations on the part of Dr Smith that Mr Ruhan held a continuing interest in the Hyde Park Hotels, and, had HPII through its office-holder exercised reasonable diligence, it could have discovered the matters of which it now complains, so as to be able to plead its claims more than 6 years before this claim was issued.

18. In addition, there is an issue as to whether certain of HPII's claims fall within s.21(1) of the Limitation Act 1980, such that no period of limitation applies.

19. The limitation arguments raise issues which are legally, chronologically and evidentially distinct from those which arise in relation to the underlying claims. For that reason, I address the legal and evidential issues, and set out my findings, in relation to the substantive claims first, before considering the limitation argument.

## C PRELIMINARY OBSERVATIONS ON THE WITNESS EVIDENCE

**Overview**

20. HPII called four witnesses largely directed to the limitation defence:

    i) Mr Neil Chesterton, a Licensed Insolvency Practitioner in The MacDonald Partnership Limited ("**TMP**") who was the liquidator of HPII from April 2008 to February 2010 and again from July 2015 to March 2018, and of Cambulo Lancaster Gate Development Ltd ("**CLGD**"), an SPV on the Cambulo Madeira-

side which was involved in the purchase and sale of the Lancaster Gate Hotel, in 2006.

ii) Mr Douglas MacDonald, a Chartered Accountant and Licensed Insolvency Practitioner with TMP, who is the liquidator and former administrator of various companies which Mr Ruhan had acquired from Orb – Orb Estates Plc ("**Orb Estates**") and Mitre Property Management Ltd ("**Mitre**"), and their subsidiaries.

iii) Ms Elizabeth Aird-Brown, a Licensed Insolvency Practitioner with TMP who has been HPII's liquidator since 9 March 2018.

iv) Ms Lisa Jenkins, who worked for TMP as a case manager, including on the member's voluntary liquidation of CLGD in 2006.

I should state immediately that the evidence of Ms Aird-Brown and Ms Jenkins was of marginal relevance to the issues in the case, and not subject to any significant challenge.

21. So far as the substantive issues are concerned, HPII principally relied on the documentary evidence to make good its factual case. Its only factual witness was Ms Richardson, Mr Ruhan's ex-wife, who gave evidence in response to the service of a witness summons.

22. Mr Ruhan and Mr Stevens both gave evidence, and were subject to lengthy cross-examination. They gave their own account of their relationship, and their involvement in the various transactions which have featured in this case. They also offered their own observations on the documents or events on which HPII relied, and pointed to other documents which they say accurately reflected the reality of their relationship, and showed why it was very different to the relationship which HPII had sought to depict. Apart from the two principals, the only witness called by either Defendant was Mr Andrew Wilcox, who had worked for GMAC Commercial Mortgages Ltd ("**GMAC**"), who was appointed as the special servicer in respect of the loan securitisation which had funded Mr Ruhan's acquisition of the Thistle hotels, and who was involved in the background in the run-up to the sale of the Hyde Park Hotels by HPII to Cambulo Madeira. Mr Wilcox also gave evidence in response to the service of a witness summons.

23. Given the unusual balance of the evidence in this case, I have decided to adopt the following approach:

i) I will address the evidence of the HPII witnesses relevant to the issue of limitation, to the extent necessary, in that part of the judgment which addresses that issue.

ii) I make some general observations on the evidence of Ms Richardson and Mr Wilcox below, but, as will be apparent, I do not regard the evidence of either witness as of particular significance in the context of the case as a whole.

iii) It would, in my view, be artificial to undertake any generalised assessment of the evidence of Mr Ruhan and Mr Stevens independently and in advance of the detailed factual enquiry this case requires. For the same reason, I consider the

adverse inferences the parties invite me to draw from the absence of certain witnesses once that detailed factual enquiry has been undertaken.

iv) For the purposes of that factual enquiry, I have sought to deal with the events, so far as possible, in discrete phases, summarising the parties' submissions and my interim conclusions at the end of each phase, before standing back, having reviewed all the evidence, and setting out my final conclusions on the key issues.

## The evidence of Ms Richardson

24. As I have stated, Ms Richardson is Mr Ruhan's ex-wife. Their divorce has clearly been protracted and acrimonious, and the issue of what assets Mr Ruhan has and how they are held has featured prominently in the ensuing litigation. The principal issue raised in this case – whether Mr Stevens was acting as Mr Ruhan's nominee – arose in litigation between Ms Richardson and Mr Ruhan in the Family Division, and has been the subject of a judgment by Mr Justice Mostyn following a hearing at which Ms Richardson and Mr Ruhan, but not Mr Stevens, gave evidence (Richardson-Ruhan v Ruhan [2017] EWHC 2739 (Fam)). However, all parties to this trial accepted that the findings made in that case were not binding before me, and I should immediately acknowledge that the evidence available in this case is significantly more extensive than that available in 2017.

25. HPII relied on the evidence of Ms Richardson in support of the following contentions:

i) That in the course of their marriage, she had once remarked to Mr Ruhan that he should not trust Mr Stevens, to which Mr Ruhan had replied "Well I hope we can as he's got all our money". In a note prepared in 2015 (to record matters discussed at a meeting she had with Dr Smith in September 2014), she said that the conversation in question had taken place "a long time ago", and she later suggested that the conversation took place in early 2013.

ii) That she believed that Mr Stevens had acted as Mr Ruhan's nominee in relation to the Hyde Park Hotels sale, because on a number of occasions she had heard Mr Ruhan telling Mr Stevens what to do "and it was all to do with Cambulo and the hotel – the London Hotels".

iii) That in or around 2006, she had seen paperwork which showed Mr Stevens was acting as Mr Ruhan's nominee, which was kept in the safe at home. She could not remember the precise wording of the document but it was "an agreement between the two of them" and the gist of the agreement was that Mr Stevens was Mr Ruhan's nominee.

iv) That on a separate occasion, in 2013, she had seen another document confirming a nominee arrangement between Mr Stevens and Mr Ruhan. She said that Mr Ruhan had left this document in their dressing room when he had been packing his case to go on a business trip, and he had rushed back to get something. The document, which was in an A4 envelope, was one between Mr Ruhan and Mr Stevens and it was "the nominee agreement". She later described the document as "an agreement between two people to do with finances".

v) That various documents had been provided to her:

a) A handwritten document provided to her by Mrs Julie Sodzawiczny, whose husband Franek was in business with Mr Ruhan, which was said to show Mr Ruhan's involvement in negotiating the Geneva Settlement, and that it had involved more than simply a "drop hands" settlement with Orb, Mr Thomas and Mr Taylor ("**the Orb Claimants**") of the proceedings they had commenced against Mr Ruhan in 2012 ("**the Orb Proceedings**").

b) She had been provided with a document entitled "funds flow without prejudice settlement negotiations" (said to have been prepared by Dr Smith) by Mrs Sodzawiczny and also by Mr Philip Barton, Mr Ulrich Pelz and Mr Harry Harvey, who were business associates of Mr Ruhan. This document showed how the £92m paid to Legion Management in December 2012 had been spent.

c) She had been provided with a document recording Grenda Investments Ltd ("**Grenda**") funds movements which had been provided to her by Mr Harvey and also by Mr Barton and Mr Pelz, and which was said to show payments of £100,000 and £200,000 being paid to Mr Stevens for "fronting" for Mr Ruhan.

26. Ms Richardson was cross-examined with considerable skill and sensitivity by Mr Spalton QC. In considering Ms Richardson's evidence, it is important to distinguish between her evidence as to matters in which she had first-hand involvement, and what she was told by others. While that is a clear enough distinction to draw in theory, it is clear that a number of individuals in business disputes with Mr Ruhan have offered their own thoughts on Mr Ruhan's relationship with Mr Stevens to Ms Richardson (Dr Smith, Mr Harvey and Mr Barton, for example). I have also borne in mind that Ms Richardson has herself been involved in challenging and long-running divorce proceedings with Mr Ruhan, in the course of which there have been very live disputes as to what assets Mr Ruhan has, and how they are held.

27. I am satisfied that Ms Richardson's evidence was honestly given, and reflects the position as Ms Richardson now genuinely recollects it to be. However, I am concerned that there is a real risk that Ms Richardson's evidence may have been coloured by the dispute which has subsequently emerged about Mr Ruhan's relationship with Mr Stevens, and by the numerous statements made to her by others with their own interests in that dispute, which may have led to her recollecting what were ambiguous events in more categoric terms.

28. As to her evidence that in 2013, Mr Ruhan had told her he hoped he could trust Mr Stevens, "as he's got all our money":

i) The statement is, on its face, surprising, because in 2013 the greater part of Mr Ruhan's fortune was held by Messrs Cooper and McNally, rather than Mr Stevens, and Ms Richardson accepted that she was aware of this at that time, and of the fact that Mr Cooper was paid £250,000 to act as Mr Ruhan's nominee offshore.

ii) Nor did Ms Richardson ever approach Mr Stevens for money, as she approached Mr Cooper and Mr McNally, particularly in the period from September 2013

after she and Mr Ruhan had separated, and her access to funds became constrained.

iii) These matters would suggest that whatever may have been said in 2013, it was somewhat less categoric or broad-ranging than Ms Richardson now recollects.

iv) While it is entirely possible that Mr Ruhan did say something to the effect that Mr Stevens held assets for him, it is equally possible that he referred to some other form of significant business connection with Mr Stevens which was a reason why he hoped he could trust him. At this distance of time, and with all the turmoil of intervening events, it is very difficult to reach a view as to the significance of what was said.

29. As I have stated, Ms Richardson also gave evidence that she believed that Mr Stevens had acted as Mr Ruhan's nominee in relation to the Hyde Park Hotels sale, because she had heard her husband on a number of occasions telling Mr Stevens what to do "and it was all to do with Cambulo and the hotel – the London Hotels". As to this evidence:

i) There is no dispute that there was extensive interaction between Mr Ruhan and Mr Stevens at the time of the Cambulo Madeira Transaction, which continued over a prolonged period, including after the Cambulo Madeira Transaction had completed.

ii) However, the precise nature of that interaction, and whether it involved Mr Stevens acting as Mr Ruhan's nominee, is something which it would be very difficult to glean from hearing one side of a telephone conversation only, particularly by someone (as Ms Richardson accepted she was) with no involvement in Mr Ruhan's business.

iii) Ms Richardson's conclusion appears largely to have rested on what she perceived as "the dynamic" between Mr Ruhan and Mr Stevens, with her husband "in charge" and Mr Stevens in a subordinate position. However, that is an impressionistic basis for the conclusion that Mr Stevens was acting as Mr Ruhan's nominee in relation to the Cambulo Madeira Transaction, and one which is particularly susceptible to being coloured by hindsight.

iv) There is, as I explain below, extensive documentation relating to the Cambulo Madeira Transaction and Mr Ruhan's role in it, and I have decided that this is the most reliable guide to the true nature of Mr Ruhan's and Mr Steven's relationship for the purposes of that transaction. That does not mean that I reject Ms Richardson's account, merely that her evidence of itself is insufficiently cogent to add materially to the documentary record.

30. That brings me to Ms Richardson's evidence that she saw paperwork which showed that Mr Stevens was acting as Mr Ruhan's nominee, both in the safe at home in or around 2006 and again in their dressing room in 2013:

i) Ms Richardson's recollection of these documents appears to have featured in specific terms for the first time in oral evidence in October 2017 (although I accept that there is a reference to Mr Ruhan knowing that there is a document confirming the arrangement in notes she prepared in 2015). The reference to the

two occasions on which Ms Richardson saw nominee documents does not appear in statements in the divorce proceedings going back to April 2015, not even after Mr Justice Mostyn had informed Ms Richardson of the importance of setting out all her evidence on this issue in a witness statement, and the service by her of a detailed statement prepared with the benefit of legal advice in January 2017. That of itself raises the risk that this recollection has hardened in her mind as time has gone on.

ii) Ms Richardson's recollection of the terms of the two documents she saw in 2006 and 2013 was, understandably, very vague. She could not recollect the terms of the documents, or whether the word "nominee" had been used (indeed in relation to the 2006 document, she thought it had not been used), or much beyond the fact that they were agreements which were financial in nature and between Mr Ruhan and Mr Stevens.

iii) Once again, I accept Ms Richardson has a genuine recollection of seeing documents in which Mr Stevens' name (or perhaps Mr Michael Stevens' name) featured, but I am not persuaded that she has any sufficient recollection of the content or effect of those documents to provide a reliable basis for her evidence that these were nominee agreements.

iv) The suggestion that Mr Ruhan would record the nominee arrangement he is alleged to have had with Mr Stevens in a document seems unlikely. He does not appear to have documented the important nominee arrangement he had with Messrs Cooper and McNally in this way (had he done so, the document would no doubt have made an appearance when the dispute between Messrs Cooper and McNally and Mr Ruhan as to whether they were holding assets on his behalf, or for their own benefit, surfaced in 2014).

v) Whilst I accept that Ms Richardson may well have seen documents linking Mr Stevens and Mr Ruhan in business transactions, I do not feel able on the strength of her evidence alone to reach any conclusion as to the nature of the documents or the transactions they recorded.

31. I accept Ms Richardson's evidence as to the various documents provided to her by others, but, as she accepted, Ms Richardson is unable to give evidence about their provenance or meaning.

32. In this case, there is a wealth of contemporaneous documents. I have decided that these documents, and the evidence in relation to them, provides the most reliable guide to the nature of Mr Ruhan's and Mr Stevens' relationship.

## The evidence of Mr Wilcox

33. At the time of the sale to Cambulo Madeira, Mr Wilcox was employed by GMAC, who was appointed as the special servicer when the securitisation undertaken to fund Mr Ruhan's original acquisition of the Thistle Hotels went into default. Mr Wilcox has had no involvement in this transaction for a very considerable period, nor any real opportunity to refresh his memory from the contemporary documents, with the result

that his recollection of events was understandably sketchy. Mr Wilcox confirmed that the valuation of the Hyde Park Hotels was the subject of close attention and professional advice before the sale to Cambulo Madeira.

34. Mr Wilcox said that it was his understanding that it would not have been acceptable for Mr Ruhan to buy the Hyde Park Hotels himself, because "generally, as a matter of course, you'd want to be confident they are being sold to an independent third party". He confirmed that Mr Ruhan had been instrumental in conducting negotiations with Thistle in its capacity as the operator of the hotels to allow the sale to Cambulo Madeira to complete.

## D THE CHRONOLOGY

35. The opening submissions in this case comprised 237 pages from HPII, 84 pages on behalf of Mr Ruhan and 80 pages on behalf of Mr Stevens. HPII's closing submissions were 151 pages long, and the Defendants' joint appendix in closing on the nominee case was 166 pages long. Each of these documents referred to vast numbers of trial bundle documents in their footnotes, and I have followed up every reference given. Those submissions raise a vast number of points.

36. Jurors in criminal trials are often directed that they do not have to decide every disputed point that has been raised in the trial – only those that are necessary for them to reach their verdicts. In the findings of fact which follow, I have not sought specifically to address every document referred to by either party, or every suggestion made over the course of those submissions. However, I am satisfied that I have captured the essential documents relied upon by all parties, and all significant arguments advanced.

### The Period up to the Signing of the Business Sale Agreement

*HPII's acquisition of the Thistle hotel portfolio*

37. Orb acquired a portfolio of 37 hotels from Thistle in April 2002. The acquisition cost – £598.6m plus associated transaction costs – was part-funded by a loan of about £598m from Morgan Stanley Bank International Ltd ("**Morgan Stanley**") and in part by Thistle agreeing to defer payment of £45m of the consideration. Those 37 hotels included the Hyde Park Hotels. In July 2002, the greater part of the loan made by Morgan Stanley was taken over by an entity called Hoteloc plc ("**Hoteloc**") who took on some £531m of the loan, and funded it through a loan note issue. The remainder of the debt (which was retained by Morgan Stanley) related to five country house hotels owned by Sceptre Hotels UK Ltd ("**Sceptre**").

38. The group of which Orb formed part ("**the Orb Group**") got into financial difficulty in meeting the amounts due in respect of the Morgan Stanley loan, leading its controller, Dr Gerald Smith, to steal some £34.8m in cash from Izodia plc ("**Izodia**"), a company which the Orb Group had acquired. In an effort to acquire funds which would allow him to conceal that theft, in May 2003 Dr Smith arranged for the Orb Group to enter into a contract to sell various assets, including HPII (owner of 32 of the 37 hotels acquired from Thistle), to companies controlled by Mr Ruhan (and in particular Atlantic Hotels (UK) Ltd – "**Atlantic**"). The sale was for a consideration of between some £42m to £47m, on terms which Dr Smith and two associates of his, Mr Roger Taylor and Mr Nicholas Thomas, alleged included a hotly-disputed verbal side-agreement with Mr

Ruhan to share profits made from the subsequent sale of the Hyde Park Hotels. Mr Ruhan was appointed a director of HPII on 30 May 2003. Mr Ruhan accepted that one of the reasons for entering into the transaction was the development potential which had been identified if change of use planning permission was obtained for the Hyde Park Hotels.

39. On the evidence, I am satisfied that Mr Ruhan entered into the transaction working with Mr Alan Campbell as roughly equal partners, Atlantic being owned by Conway Assets Limited, of which Chester Hotels Limited (owned by Mr Campbell) owned 51%, and Atlantic Hotels Limited (an Isle of Man company owned by Mr Ruhan) owned 49%. However, Mr Campbell later signed a document dated "with effect from 14 May 2003" saying that he held his shares in a company called Shiarran Limited in the ownership structure of Atlantic "as nominee for Simon John McNally". The circumstances in which Mr Campbell's interest in the assets acquired from the Orb Group came to be transferred to Mr Ruhan are unclear. Mr Ruhan's evidence was that his partnership with Mr Campbell came to an end in 2004, but that the document recording that Mr Campbell had ceased to have such an interest "with effect from 14 May 2003" was signed in 2008. Mr Pickering QC suggested that the terms of the document were, and were intended to be, misleading, so far as the date of its creation is concerned. However, while it is fair to say that its terms left much unsaid, I am not able to find on the evidence that the document was deceptive in intent, nor am I persuaded that the circumstances of its creation are of real assistance in resolving the issues in this case.

40. Shortly after acquiring the Hyde Park Hotels, on 5 July 2003 Wellard Limited ("**Wellard**") – a company owned and controlled by Mr Stevens' elder brother, Mr Michael Stevens – lent £3m to Atlantic, Unicorn Management Ltd (another company associated with Mr Ruhan), Mr Ruhan and Mr Cooper in return for an option to acquire a 10% interest in the companies owning the hotel portfolio acquired from Orb. An email of 15 December 2003 sent by one of Mr Ruhan's Bridgehouse group of companies and headed "Michael Stevens is now in residence", stated "just to let you know that Michael Stevens, one of Andy's business partners, has now moved in and taken over Alan [Campbell's] room" as his main office. The description of Mr Stevens as "one of Andy's business partners", and the fact that he took up residence in Mr Ruhan's offices, suggests that there was a reasonably close relationship between Mr Ruhan and Mr Michael Stevens at this time, and the terms of the loan suggest that the hotels acquired from Orb were a significant element in that relationship.

41. That last conclusion is confirmed by the fact that on 18 December 2003, Mr Ruhan sent Mr Campbell a draft email he wanted to send to Mr Michael Stevens, which contained a draft of a letter he wanted Mr Michael Stevens to send to Thistle, ostensibly on Mr Michael Stevens' own initiative but in fact to serve Mr Ruhan's ends. The purpose of the letter was to persuade Morgan Stanley that there was genuine interest in the hotels from potential purchasers, and accordingly they should not act precipitously in taking enforcement measures in relation to the debt. The letter was to be sent by Artisan, a company of which Mr Michael Stevens' was chairman, and back-dated, showing "there is a real interest in this portfolio, but only on the basis that the litigation with Thistle and Izodia is resolved". It is not clear that any such letter was sent – the email was obtained by HPII from Mr Campbell using its powers under s.236 of the Insolvency Act 1986 and not disclosed by Mr Ruhan. The letter does demonstrate Mr Ruhan's willingness to orchestrate what was apparently a third party interest in the hotels for the

purposes of managing his relations with Morgan Stanley and Thistle, and, to that extentt, his willingness to mislead them. However, this type of manipulative activity is of a very different scale to that inherent in HPII's nominee's case.

42. In March 2004, Mr Ruhan arranged for the establishment of a discretionary trust in the Isle of Man through two Isle of Man-based solicitors, Mr Simon Cooper and Mr Simon McNally. That discretionary trust was known as the Arena Settlement. For reasons which I gave in the Directed Trial Judgment, and as was common ground at this trial, I am satisfied that Mr Cooper and Mr McNally acted as Mr Ruhan's nominees in so far as they appeared to have any entitlement to the benefits of the Arena Settlement. On 3 November 2004, Mr Ruhan was added to the class of potential beneficiaries of the Arena Settlement, and in December 2004, the shares of the company through which HPII, and hence the Hyde Park Hotels, were held were settled into the Arena Settlement.

*HPII seeks to dispose of the Hyde Park Hotels*

43. On 24 May 2004, in an email on which Mr Ruhan understandably placed reliance, Morgan Stanley contacted Mr Ruhan and stated that "we await your offer in respect of Sceptre hotels (and the redevelopment hotels) with interest". I accept that "the redevelopment hotels" is likely to be a reference to the Hyde Park Hotels, and that Morgan Stanley, at least, appear to have been contemplating an offer being made by Mr Ruhan to acquire the Hyde Park Hotels at that stage. However, the email was sent before Mr Ruhan's shareholding in HPII, which owned the hotels, had been diluted from 100% to one third, and it is noteworthy that Thistle (who, as will be seen, were particularly sensitive on the issue of any involvement on Mr Ruhan's part on the purchasing side) was not involved. I was shown no documents suggesting that this possibility was ever developed in exchanges between Mr Ruhan and Morgan Stanley, and, if it was not, the reasons why.

44. As I have stated, the potential of the Hyde Park Hotels for development into "premium residential property" had been identified at the time they were acquired from the Orb Group in 2002 (as evidenced, for example, by the terms of the offering circular for the loan notes issued by Morgan Stanley in relation to its funding dated 11 July 2002, and by Atlantic's "strategic & refinance plan" of September 2003). However, identifying such development potential, and realising it, are two very different things. A planning application was made for the Lancaster Gate Hotel which was approved on 27 May 2004, subject to agreement and signature of a s.106 undertaking. That had been provided by 7 July 2004. The applications for planning permission for the two Kensington Hotels were more complicated, and proceeded at a slower pace.

45. Under the terms of the Hoteloc financing, the grant of planning permission triggered an obligation on HPII's part to sell the Lancaster Gate Hotel (with the benefit of such planning permission) for the purposes of paying down the outstanding loan. The loan documentation provided that it would be an event of default if such a sale was not accomplished within 30 days, but the Morgan Stanley entity then acting as special servicer for the loan note holders agreed on 6 July 2004 to extend that period from 30 days to 90 days, provided certain conditions were complied with. The formal marketing of the Lancaster Gate Hotel triggered wide interest, with offers being received in relation to all three Hyde Park Hotels.

46. In July 2004, GMAC replaced the Morgan Stanley entity as the special servicer on behalf of the noteholders. An internal exchange between Steve Williams and Andy Wilcox of GMAC before their appointment refers to the possibility that Morgan Stanley might do something unhelpful in the period before they ceased to be the special servicer. Mr Williams replied "Like open up the property for offers? By whom? Ruhan? MS? It's a bunch of sh**!" Mr Spalton QC suggested that this reflected openness on GMAC's part to the idea of Mr Ruhan acquiring some of the hotels, and a view on GMAC's part that the hotels were not an attractive commercial proposition. However, opening up the properties to offers by Mr Ruhan appears to have been identified as an example of an unhelpful step Morgan Stanley might take in the period between their resignation and the appointment of GMAC rather than a neutral or positive development. It is also not clear to me whether Mr Williams' statement "it's a bunch of sh**" refers to the hotels, or the commercial position into which GMAC would be placed following Morgan Stanley's resignation at a stage when obtaining planning permission for the Lancaster Gate Hotel had triggered a sale obligation. The latter appears to me to be the more likely interpretation.

47. It is clear (for example from a document GMAC prepared entitled "Hoteloc Overview" on 12 August 2004) that extensive professional advice was obtained on the selling side as to the value of the hotel portfolio, both in their current use and following development for residential purposes. In particular two valuations were obtained by Morgan Stanley which were subject to "desktop" reviews by two further firms of expert valuers. The effect of those valuations was that there had been a substantial fall in the value of the hotels since they had been valued by Debenham Tie Leung Limited in 2002.

48. GMAC produced a further confidential memorandum following a meeting with Mr Ruhan on 17 September 2004, which recorded Mr Ruhan as having stated that he had originally acquired the hotel portfolio from Orb on the basis of the development upside in the hotels. The note states that Mr Ruhan said that he "would not necessarily look to bid" on the Lancaster Gate Hotel, and that he thought there was "limited potential for planning gain" for the Kensington Hotels over and above their value in their existing use.

49. In late October 2004, CB Richard Ellis ("**CBRE**") was appointed as agent to market the Lancaster Gate Hotel, and shortly thereafter, that marketing exercise was extended to the other Hyde Park Hotels. A communication of 7 December 2004 from CBRE to GMAC refers to Mr Ruhan being in receipt of offers for the hotels from third parties, including one from Starwood Capital Europe Ltd for all three hotels. I accept that Mr Ruhan made no attempt to hide these offers from the other HPII stakeholders, although I doubt it would have been realistic for him to do so, given the very high risk of the offers coming to Thistle, Morgan Stanley and GMAC's attention in any event.

*The offer from Cambulo Madeira emerges*

50. One of the parties who had made an offer at this time was a Mr Paul "Boom Boom" Bloomfield, an investor active in the United Kingdom property market who was known to Mr Ruhan. A memorandum dated 8 December 2004, prepared and sent by the Gibraltar law firm of Marrache & Co, refers to a meeting at Mr Ruhan's Global Switch premises attended by Mr Ruhan, Mr Bloomfield, Mr Isaac Marrache and another Marrache & Co lawyer. The memorandum records an offer by Mr Bloomfield for the three Hyde Park Hotels was to be made through a company called European Continental

Developments Ltd ("**ECD**"), which would be submitted through Mr David Cooper of the law firm Jones Day, for either one or all three of the Hyde Park Hotels. The note contains a very detailed account of the transactional history of the hotel portfolio and provides information as to the bids received to date. It seeks to position the terms of Mr Bloomfield's bid, providing "whatever bid was made was going to be unconditional but was in reality not going to go ahead until March/April 2005" and "the bid for [the Lancaster Gate] hotel was to go in at about £52/53m". The memorandum records:

> "PB to put forward an independent bid in respect of all 3 hotels. AR to fine tune (within the course of today) how the bid should be pitched. PB to put forward the bid tomorrow. PB will be interviewed by CBRE for about an hour this Friday. PB will be required to provide evidence of good financial standing and to show genuine interest in buying the hotels".

The description of Mr Bloomfield's bid as "an independent bid" is curious, but was not explored in cross-examination. A bid followed two days later which (optimistically) proclaimed that ECD had "done all their due diligence".

51. Mr Pickering contended that Mr Bloomfield was effectively acting as a front for Mr Ruhan in making this bid. There are a number of curious features about the proposal – for example the information provided to Mr Bloomfield as to the amount of other bids received, the extent to which Mr Ruhan was willing to assist in "fine-tuning" the bid, and the agreement that the bid would be "independent". However, on the limited information available, I do not feel able to reach the conclusion that this was the case, and I remain unclear as to precisely what Mr Bloomfield's role or motivation was. ECD duly submitted a bid of £57m for the Lancaster Gate Hotel or £130m for all three Hyde Park Hotels on 10 December 2004.

52. On the same day, Cambulo Madeira was incorporated. At one stage, HPII sought to suggest that this was no coincidence. However, a letter obtained by Mr Stevens for use in the Orb Proceedings in 2014 suggests that Cambulo Madeira was incorporated by corporate service providers as an "off the shelf" company which could later be sold to a client, rather than specifically for or on the instructions of Mr Stevens, and I accept that may well have been the case.

53. The holders of the loan notes held a meeting on 13 December 2004 to consider the bids, of which there are two notes. One note records Mr Ruhan reporting on the bids received. Mr Ruhan referred to the planning permission which had been granted for the Lancaster Gate Hotel, which had triggered the marketing exercise, but noted that planning permission had not been granted for the other Hyde Park Hotels and, according to Mr Ruhan, "it was unlikely that planning permission would be granted for these two hotels and, in the case of the Thistle Kensington Park, the application for planning permission had been withdrawn". The minutes also record Mr Ruhan confirming that he "was not associated with any of the bidders", which picked up a point raised by UBS on behalf of some of the noteholders in an email of 7 December 2004 complaining about the "completeness of the materials in terms of ... details on the potential purchasers and reassurance that the purchasers are not connected parties to any of the transaction parties, commissions to be paid etc".

54. Mr Ruhan recommended that:

> "he be given permission to accept any bid on Thistle Lancaster Gate above £56 million and on all three London Hotels above £125 million but only if he failed to achieve a sale of all three Hotels at that price should he revert to the sale of Thistle Lancaster Gate".

It is apparent from the other set of notes that GMAC reported that they had spoken to Jones Lang Lasalle ("**JLL**") about the value of the Hyde Park Hotels and that GMAC agreed with JLL's valuation. The note also records that the noteholders were told that they would be able to interrogate JLL directly as to the valuation in a subsequent conference call.

55. By a resolution of 17 December 2004, the noteholders granted Mr Ruhan the authority he had sought. I find that the noteholders were not in any sense dependent or reliant upon whatever views Mr Ruhan may have expressed as to the development potential of the Kensington Hotels when passing this resolution, and that the decision taken reflected the extensive professional advice received. While Mr Pickering QC advanced some criticisms of the views Mr Ruhan had expressed, and suggested that he was seeking to "force down expectations", I am satisfied that that the decision taken to accept an offer at the stated prices reflected the extensive professional advice received, and was consistent with an objectively reasonable market valuation of the hotels (with and without planning permission) at that time. I also accept Mr Ruhan's evidence that the highest unconditional bid which had been received for all three hotels was the ECD bid. By 21 December 2004, HPII had entered into a "lock out agreement" with ECD in respect of its £130m bid, which was to last until 5pm on 14 February 2005.

56. On 23 December 2004, Morgan Stanley, Thistle and Mr Ruhan finalised a restructuring of the ownership of HPII which had been under discussion since at least mid-2004, as a result of which the ownership of HPII was divided equally between them, and the indebtedness of HPII substantially reduced.

57. Jones Day for ECD and Bridgehouse Law for HPII took steps to progress the transaction, Jones Day serving a due diligence questionnaire on 1 February 2005, and provided comments on a draft sale contract on 9 February 2005. By that stage Mr David Cooper, who had previously been involved in the transaction for Jones Day, had established his own firm, David Cooper & Co, which remained involved on the purchaser side. However, on 10 February 2005, Ms Geday of Jones Day emailed Mr David Cooper referring to the fact that Mr David Cooper (who appears to have been the point of liaison between Jones Day and the purchasing interest) had told her in a telephone conversation that she should "take instructions from Michael Stevens in relation to the hotel deal and that it will be Michael Stevens rather than Paul Bloomfield who will be acquiring the hotel business". The email asked if Mr Michael Stevens would be using ECD as the acquisition vehicle, and a manuscript note (which appears to be from Mr David Cooper) replied "I imagine so. He [Mr Stevens] is supposed to be coming over at 12.00! With Paul Bloomfield".

58. The appearance of Mr Michael Stevens, in Mr Bloomfield's place, at this stage raises a number of questions. I have seen no evidence, documentary or otherwise, as to the circumstances in which Mr Michael Stevens came to stand in for Mr Bloomfield, nor why Mr Bloomfield should have agreed to Mr Michael Stevens using ECD as his bidding vehicle. Indeed there is no evidence at all as to the circumstances in which Mr Michael Stevens came to be involved in the transaction, or pointing to any due diligence

he may have carried out. In circumstances in which there were only days to run in ECD's exclusivity period, there seems no obvious reason for Mr Michael Stevens using ECD rather than his own vehicle. On 11 February 2005, the lock-out period agreed with ECD was extended to 28 February 2005. On 16 February 2005, an email from Mr Carrier of Bridgehouse Law (acting for HPII) enclosed a further draft of the BSA, stating "I have left the details of the purchaser blank as I understand this may have changed". A further email from Mr Carrier the same day stated, "I have left the overall price blank because I understand that there are further discussions going on regarding the price of the Kensington business and assets". An email of the same date from Mr David Smith to Mr David Cooper asked if he was happy for him to send out the draft reports on title "to the new purchaser", and a handwritten note from Mr Cooper answered "yes".

59. That "new purchaser" was Mr (Anthony) Stevens, an email from Ms Geday of Jones Day to Mr David Cooper stating:

> "As you may be aware, we are now acting for a new purchaser, Anthony Stevens, in respect of the acquisition of the three hotels. Could you please let me have a note of the fees you have incurred to date in acting for the previous purchasers, so I can pass the information onto Anthony".

There are no documents in the trial bundle which indicate that such a fee note was provided. However, a letter of 22 October 2014 solicited by Mr Stevens for use in the Orb Proceedings from the general member of Madeira Fiducia Management Lda (who had incorporated Cambulo Madeira as an off-the-shelf company on 10 December 2004) said that Mr Anthony Stevens had contacted him in February 2005 with a view to acquiring a Madeira company, and that "later that same month" Mr Stevens and Mr Eric Halff travelled to Madeira and acquired Cambulo Madeira (the beneficial interest in which was transferred to a company called Euro Estates Holdings Ltd ("**Euro Estates**") by a declaration of trust dated 23 February 2005).

60. I found Mr Ruhan's explanations for the decision to extend the exclusivity period for ECD when, on his own evidence, Mr Bloomfield had proved himself unable to follow-through on his 10 December 2004 offer, unpersuasive. On the picture of events as it emerges from the documents, the purchaser's side was in a position of disarray. While Mr Ruhan said he had lost confidence in Mr Bloomfield's ability to follow through, no attempt was made to explore the ability of those who are said to have stepped into Mr Bloomfield's shoes to do so, and Mr Stevens had to borrow the £5m deposit required on signing the contract, and had no funding in place for the balance. Against that background, I do not believe that there was a satisfactory commercial reason for locking other potential purchasers out (particularly when, as Mr Ruhan accepted, there had been another unconditional bid for the three hotels for £127 million, only £3 million less than the ECD offer and as to which, at least by 16 February, there was already a question mark over the price which would be paid).

*Introducing Mr Stevens*

61. At this point, it is necessary to say something about Mr Stevens, and his business record in the period before February 2005. Mr Stevens said that by February 2005, he had been "a successful independent businessman and entrepreneur for the better part of the last 35 years".

62. Mr Stevens relied in this connection upon a letter which Mr Michael Nouril, a solicitor and partner in Proskauer Rose (UK) LLP, had provided his then-lawyers, Akin, Gump, Strauss, Hauer & Feld LLP ("**Akin Gump**"), in November 2014 for use in the Orb Proceedings. Mr Nouril's exchanges with Akin Gump are not before the court, and Mr Nouril did not give evidence before me. However, it is right to record the statements in the letter that:

    i) He had first met Mr Stevens when he acted for him as one of a group of shareholders selling an investment on profitable terms in 2002. The size of Mr Stevens' shareholding or extent of his personal profit does not feature.

    ii) He acted for Mr Stevens in a number of subsequent transactions, including a transaction in Italy called Infracom, the transactions relating to the Hyde Park Hotels and the Jelmoli bid (which I address at [131] below). No details were provided of the scale or profitability of Mr Stevens' participation in the "Infracom" transaction (the Jelmoli transaction did not complete).

    iii) That the client for the transactions was Euro Estates which "the relevant AML/KYC checks" showed "to be wholly owned by Mr Stevens".

    iv) Mr Nouril's instructions came directly from Mr Stevens.

63. I accept that Mr Stevens had clearly had involvement in a number of businesses by February 2005, although he had no experience in the property development field. The documentary evidence of prior business enterprises on his part largely derived from press cuttings, which makes it difficult to assess quite what Mr Stevens' roles were, and how profitable his involvements proved to be:

    i) I accept that Mr Stevens was involved in the ParaFrance transaction, which was a significant transaction, together with his brother Mr Michael Stevens. Mr Michael Stevens features more prominently in the press coverage, but in the absence of documents directly relating to the investment, it is difficult to form any view as to the extent to which Mr Stevens played a leading or subordinate role, how significant his personal investment was or how profitable the involvement was for him.

    ii) There is nothing to suggest Mr Stevens invested significant value in or realised any significant return on his involvement in United Communications SA (which had $52m of debt by the time Mr Stevens' involvement with the business ceased), Beauveau Investissements SA/Kertel SA (which Mr Stevens described as "a disappointment" and which press reports suggested had incurred cumulative losses of Euros 132m between 1998 and 2001), the Alpha Telecom sale or his involvement in Infracom.

64. It is noteworthy that Mr Stevens produced none of the documents which must have been kept – accounts, tax returns, shareholdings, lists of assets, bank balances and the like – which would have provided evidence of his wealth at the time of the Cambulo Madeira Transaction and the sources of that wealth. In the absence of such material, it is difficult to determine how far Mr Stevens' account of his business history reflected the optimalisation which is a common feature of curriculum vitae. I accept that it cannot be said that at the time of the Cambulo Madeira Transaction, Mr Stevens had "risen

without trace". However, I was left with the distinct impression that, in concluding the Cambulo Madeira Transaction, Mr Stevens was punching distinctly above his weight, and (as I explain below) his cash position at the time of and following the Cambulo Madeira Transaction was surprisingly weak for someone entering into a £125m transaction.

65. It was Mr Stevens' evidence that in early February 2005, he had heard from his brother that Mr Bloomfield had been unable to close the deal during ECD's period of exclusivity. By 23 February, Euro Estates, a company linked with Mr Stevens, had become Cambulo Madeira's sole shareholder and I accept Mr Stevens' evidence that he acquired Cambulo Madeira for the purposes of acquiring the Hyde Park Hotels. On 24 February 2005, Cambulo Madeira had passed a resolution authorising Mr Stevens to enter into a contract to acquire the Hyde Park Hotels. On his evidence, Mr Stevens was able to acquire the benefit of the ongoing exclusivity period, the due diligence which had been done, a travelling draft of the BSA which (as Mr Stevens accepted) contained "outs" and "exits" for the benefit of the purchaser, and the ongoing involvement of the lawyers Mr Bloomfield had instructed by taking over responsibility for past fees, without any profit element for Mr Bloomfield at all (although there are no documents showing Mr Stevens agreeing to take over or discharging those fees).

66. There is a complete dearth of documentary evidence as to the circumstances in which Mr Stevens came to replace his brother or Mr Bloomfield as the putative purchaser of the Hyde Park Hotels for £130m, and absolutely no documents showing Mr Stevens' evaluation of the transaction or the terms on which he should participate in it. Mr Stevens does not appear to have put in place any steps to raise finance for the acquisition and had to take out an informal loan (to which I turn below) to meet the relatively small amount of the deposit. Nor are there any documents relating to the negotiations about the price referred to in Bridgehouse Law's email of 16 February 2005 (see [58] above). Further, far from dropping out of the picture, Mr Bloomfield attended meetings with Thistle on 10 and 24 February 2005. At the meeting on 24 February 2005 – on the very day on which Cambulo Madeira had authorised Mr Stevens to enter into a contract to acquire the three hotels – it is apparent from a letter Thistle sent to the directors of HPII dated 30 March 2005 that when Thistle asked Mr Bloomfield for information as to the purchaser's financial position, "Mr Bloomfield supplied … a copy of the annual report and accounts for the year-ended 2004 in respect of the Multiplex Group". In that letter of 30 March, Thistle also complained that Mr Ruhan had offered them very little information about Cambulo Madeira. It is clear from the letter that, on 14 March 2005, Thistle was still communicating with Mr David Cooper, who had acted for Mr Bloomfield, about planning issues and the involvement of Multiplex, after the point in time at which Mr Stevens says he had paid off Mr Cooper's outstanding bill to "take the benefit of some work Mr Cooper had done" (Day 8 page 31). The overall impression is one of calculated obscurity as to who was behind the purchaser and how the purchase was being funded.

67. The price reduction first mentioned in Bridgehouse Law's email of 16 February 2005 was raised by Mr Ruhan with the other HPII board members at a meeting on 21 February. Minutes of that meeting reveal real pressure from GMAC (as set out in a letter of 16 February 2005) to complete the sale of the property. The draft sale contract was reviewed at the meeting, and Mr Ruhan referred to a reduction in the price being offered (to £127m) "following negotiations with the prospective purchasers after details

of the JLL valuations and Noteholders' resolution became known to the purchaser". Mr Ruhan said that he had provided Mr Stevens with those valuations (which were lower than Mr Stevens' offer) to assist Mr Stevens in obtaining funding, and that "maybe that was naïve" (Day 6 page 22). I agree that would have been naïve, and that naivety does not sit well with Mr Ruhan's personality and obvious business acumen. Elsewhere, Mr Ruhan suggested that it was Mr Bloomfield who had negotiated the first reduction from £130m to £127m (Day 5 page 163), while Mr Stevens suggested that the reduction was negotiated by (or at least through) his lawyers (Day 8 pages 40-43). There was a further price reduction in January 2006 (see [92] below), the effect of which was that the price offered by Cambulo Madeira was reduced to the £125m floor of HPII's authority to contract as conferred by the noteholders, and Mr Ruhan has offered different explanations for those two separate reductions at different times.

68. The day before the meeting of 21 February 2005, Mr Ruhan had confirmed to Thistle and Morgan Stanley that he was not related to the proposed purchaser but it is apparent from a letter of 30 March 2005 that, at least at that point, he had refused to tell Thistle who the ultimate beneficial owner of the purchaser was. Correspondence from Mr Ruhan to Thistle (for example HPII's letters of 30 March, 24 May and 8 June 2005) and GMAC (on 4 August 2005) reveal Mr Ruhan being well-informed as to Mr Stevens' intentions, circumstances and concerns: information which Mr Ruhan said would have been communicated to him orally, and not in writing.

*The conclusion of the BSA*

69. The BSA between HPII and Cambulo Madeira was entered into on 1 March 2005, under which Cambulo Madeira acquired the Hyde Park Hotels for £127m, apportioned as £56m for the Lancaster Gate Hotel, £31m for the Kensington Palace Hotel and £40m for the Kensington Park Hotel. The BSA provided for payment of a deposit of £5 million, but clause 6.6 provided that the deposit and accumulated interest would be repaid if either party terminated the BSA. That amount was borrowed by Cambulo Madeira from Allied Commercial Exports Limited ("**Allied**"), a company associated with either Mr Jack Dellal or his son Mr Guy Dellal pursuant to a facility letter dated 1 March 2005, and paid to HPII on the same day.

70. Once again, there are no documents relating to the negotiation of this loan, save for the facility letter. This is surprising, not least because the Allied facility was more than a simple loan transaction. It carried 15% compound interest, there was no security and it gave Allied the option to acquire Cambulo Madeira for £1 if it decided not to proceed with the transaction, and a 15% share of any profits made by Cambulo Madeira from the Hyde Park Hotels. A draft of the facility letter, on the same terms but from an unidentified lender and providing for a loan to ECD, had been in circulation in February 2005 at a time when the sale price was still £130 million and signing of the BSA was scheduled for 18 February. That would suggest that when Mr Stevens entered on the scene, he not only acquired the lawyers who had been acting for ECD, and the legal work which had been done, but also the benefit of the arrangements put in place to fund the deposit, and Mr Stevens confirmed as much (Day 8 pages 55-56). That makes Mr Bloomfield's decision to transfer the deal as it stood over to Mr Stevens for nothing more than a contribution to sunk fees even more surprising.

71. The involvement of the Dellal family, who were connections of Mr Ruhan and with whom Mr Stevens was unable to point to any prior business history (Day 8 page 54) is

to be noted. Allied had previously provided a £4.6m loan to a company linked with Mr Ruhan (Sulby Investment Holding Limited) in relation to Mr Ruhan's data centre business in December 2004. It is clear that Mr Jack Dellal had had dealings with Mr Ruhan in relation to the possible acquisition of the Hyde Park Hotels in December 2004: a letter written by Mr Ruhan to Thistle of 8 June 2005 referred to Mr Ruhan having had "considerable discussion with Mr Dellal when we were contemplating a sale at the end of [2004]" and to Mr Dellal conducting "a lot of due diligence". Further, an internal document produced by Investec plc ("**Investec**") in November 2005, relating to an application by the CPC Group for funds to acquire all three Hyde Park Hotels from Cambulo Madeira, stated:

> "Initially, the hotel portfolio was being acquired by a group of investors made up of Guy Dellal, Andy Ruanne and Michael Stevens. They have subsequently decided to sell it to the CPC Group".

72. It was suggested by Mr Spalton QC in closing that the reference to "Andy Ruanne" may have arisen from a misunderstanding by Investec of a reference to Ruanne Dellal, Mr Guy Dellal's mother. I found that a rather improbable suggestion (and a rather remarkable coincidence).

73. I will return to the issue of Investec's understanding of Mr Ruhan's involvement in the purchase of the Hyde Park Hotels, and to the Candy brothers' involvement in the redevelopment of the Kensington Hotels, below. For present purposes, it is sufficient to note the following:

    i) Someone providing information to Investec in November 2005 – and that information is likely to have come from someone on the Candy-side – understood Mr Guy Dellal and Mr Michael Stevens to be involved with Mr Ruhan in the acquisition of the Hyde Park Hotels from HPII. Allied – a company associated with Mr Dellal – had a profit share option in relation to Cambulo Madeira's involvement and Mr Michael Stevens had an option agreement with one of Mr Ruhan's companies for 10% of HPII: see [40] above.

    ii) The terms of the deal between the Dellals/Mr Michael Stevens/Mr Ruhan's group and the CPC Group, as communicated by the Candy-side to Investec in November 2005, bore a number of similarities to the terms of the joint venture later agreed between Mr Stevens and the Candy brothers in relation to the Kensington Hotels, in that the CPC Group paid a £15m premium for their share of the investment.

    iii) The document clearly establishes an interest on the Candy's part in acquiring all three Hyde Park Hotels, as do other documents from late 2005 (for example Mr Nicholas Candy's email to Bank of Scotland of 5 November 2005). When Mr Stevens was presented with a suggestion to that effect emanating from Mr Peter Lukas in the course of his cross-examination in the Directed Trial, he denied it in the most emphatic terms:

        > "I know that is wrong. I was in partnership with the Candy Brothers. They never had any interest in Lancaster Gate. So that is completely wrong. You are saying false evidence, I say it is a lie, which I am not, I may not be use the right semantics on it. But that is completely wrong."

Given the emphatic terms of this answer, it seems improbable that this was the result of a failing in memory. Either, therefore, the Candy brothers misled Mr Stevens as to their interest in the Lancaster Gate Hotel or Mr Stevens misled the court as to his understanding of their position. It is difficult to identify a reason for the former, whereas the latter would have lent support to Mr Stevens' argument that he got into pole position to buy the Hyde Park Hotels because he was the only purchaser willing to make an unconditional offer for all three hotels.

*The position at this stage in summary*

74. The effect of the evidence in relation to this period can be summarised as follows:

i) I am not persuaded that Mr Ruhan gave information to the other shareholders in HPII as to the value or development potential of the Hyde Park Hotels which did not fall within the range of reasonable views held at the time, and I am in any event satisfied that the various stakeholders had access to independent professional advice on these subjects, and availed themselves of it. That does not mean, however, that Mr Ruhan did not believe that there was a sufficient prospect of developing the hotels to make an attempt to explore that opportunity a worthwhile commercial gamble.

ii) It is clear that Thistle, in particular, was keen to ensure throughout this process that none of the potential purchasers was related to Mr Ruhan.

iii) The circumstances in which Mr Bloomfield came to make an offer for the Hyde Park Hotels through ECD, Mr Michael Stevens then came to be involved on the purchasing side, to be followed in very short order by Mr Stevens, are obscure and raise a number of unanswered questions.

iv) There is a surprising lack of documentation in relation to Mr Ruhan's dealings with Mr Bloomfield and the Stevens brothers over this period, and also in relation to Mr Stevens' dealings with his brother or his involvement in the bid generally.

v) Mr Ruhan was reticent in his dealings with Thistle, at least, as to who was behind the proposed purchasing SPV.

vi) The involvement of Allied in funding Mr Stevens' payment of the deposit, and the fact that the draft facility for that loan was in circulation before Mr Stevens' apparent involvement in the transaction, are consistent with Mr Ruhan being involved in arranging this funding, and with the Dellals having an involvement with Mr Ruhan in the acquisition of the Hyde Park Hotels from HPII, but the evidence relating to this period does not provide a sufficient basis for reaching a conclusion on this issue.

**The Period between the Signing of the BSA and the On-sale of the Hyde Park Hotels**

*Completion and sale of the Lancaster Gate Hotel*

75. Completion of the BSA was postponed a number of times. I accept Mr Ruhan's evidence that one factor which contributed to this delay was the difficulties experienced with Thistle in relation to the three operating agreements it had concluded with HPII in relation to each of the Hyde Park Hotels. Cambulo Madeira wanted to acquire the hotels with vacant possession (to facilitate their on-sale), which required the termination of the operating agreements. Thistle appears to have been concerned that this might provide an opportunity for a rival hotel operator to take over the hotels, and may well have harboured its own desire to acquire the hotels at a favourable price. I also accept that Mr Ruhan took the lead in the negotiations with Thistle and that this, of itself, is not suggestive of Mr Ruhan having an interest on the purchasing side (indeed it was Thistle's preference that Mr Ruhan should be the intermediary between Cambulo Madeira and Thistle, as set out in Thistle's letter of 11 March 2005). There is evidence to suggest that Mr Stevens (and/or his legal representatives) also met Thistle to discuss certain commercial issues, although I was not taken to any material documenting the nature of those interactions. Finally, there are emails between Mr Ruhan and Mr Stevens in which requests Mr Ruhan has received from Thistle are passed on (for example on 8 February 2006).

76. In the event, completion proceeded in stages, with the acquisition and on-sale of the Lancaster Gate Hotel occurring first. Minerva plc ("**Minerva**") had expressed an interest in acquiring the Lancaster Gate Hotel as part of a joint venture with Northacre plc. For convenience, I will refer to the joint venture purchaser as "**Minerva**". Minerva's offer was communicated to Mr Ruhan (by Mr Cherry's email of 10 November 2005), following a meeting between Mr Cherry and Mr Ruhan. Mr Ruhan gave inconsistent evidence as to whether he had forwarded Minerva's first offer to Mr Stevens initially saying he had, and then saying he had not because the offer would not have been acceptable (Day 6 pages 7-8). There was no documentary evidence of Mr Ruhan forwarding Minerva's email offer to Mr Stevens, although Mr Ruhan did forward it to a Mr Peter Lukas and exchanged a number of emails with Mr Lukas about Minerva's interest in the Lancaster Gate Hotel.

77. Mr Lukas was a property agent who was involved in soliciting interest from potential purchasers of the Hyde Park Hotels, and later asserted an entitlement to commission for this work. He had extensive communications with Mr Ruhan on both of these topics. Mr Lukas' emails make it clear that he understood *Mr Ruhan* to be the decision-maker so far as the on-sale of the hotels was concerned. For example, in emails of January 2006, Mr Lukas sought Mr Ruhan's instructions about a press release relating to the sale of the Lancaster Gate Hotel by a Cambulo vehicle, and he received those instructions from Mr Ruhan without any apparent involvement by Mr Stevens. Mr Ruhan accepted that he was at the centre of the emails relating to the Lancaster Gate transaction, and said that this was because:

> "I was instructing the entire deal. I was constructing the entire deal with the knowledge of all shareholders … simply to achieve a completion"

(Day 6 pages 35-36).

78. I should record at this point that, in addition to the contemporaneous documents involving Mr Lukas, HPII sought to place reliance on a statement he had provided in the Orb Proceedings on 28 January 2016. On the evidence before the court, Mr Lukas lives overseas, is unwell and has stated that he is not willing to attend the trial. There is

a vast quantity of contemporaneous documentation involving Mr Lukas. Mr Lukas' witness statement was not put to either Mr Ruhan or Mr Stevens in cross-examination. Given the seriousness of the allegations made against the Defendants, the fact that, through no fault of their own, they have not been able to cross-examine Mr Lukas, and have had no direct opportunity to respond to his witness statement as opposed to his emails, I have concluded that I should attach no weight to the witness statement when making my findings of fact. That is in no way to endorse the (with respect) somewhat surprising assertion made in the Defendants' closing that "there is a distinct possibility (if not probability) that Mr Lukas was somehow bribed or suborned by Dr Smith into giving a witness statement".

79. The sale of the Lancaster Gate Hotel was effected as follows. On 16 January 2006, Cambulo Madeira entered into a contract with Minerva to sell it the shares in a subsidiary, CLGD. Exercising its rights under the BSA, Cambulo Madeira novated its right to acquire the Lancaster Gate Hotel to CLGD. Once again, the only record of Cambulo Madeira's intention to follow this course, and to terminate the Thistle operating agreement in relation to that hotel on completion, is to be found in communications between Mr Ruhan and Thistle, and I was shown no documents recording this information being passed from the Stevens-side to Mr Ruhan.

80. CLGD obtained a bridging loan from Investec of £58.5m to complete its acquisition of the Lancaster Gate Hotel from HPII, which would allow CLGD to complete the acquisition and give notice terminating the Thistle operating agreement for that hotel, putting it in a position to complete its sale to Minerva with vacant possession 12 months later. Mr Ruhan accepted that he had "architected the entire deal" including obtaining the bridging loan from Investec, and Mr Ruhan is certainly "front and centre" in the interactions with Investec. For example, it was Mr Ruhan who received an email from Mr Wilson of Investec on 20 February 2006 with an account opening form for CLGD, although it is right to record that, on receipt of that form and other requests for information, Mr Ruhan stated that he would "ensure it goes to Anthony Stevens immediately". It was Mr Ruhan who forwarded details of contracts, employees and termination costs to Investec on 8 March 2006. There are communications from Investec's lawyers where Mr Stevens is one of the addressees, but when queries were raised (for example as to CLGD's VAT status), Mr Stevens forwarded them without comment to Mr Ruhan to answer. There are also emails from Mr Stevens' lawyers, Jones Day, which, unsurprisingly, are copied to Mr Stevens but not Mr Ruhan (for example Mr Balleny's email of 15 December 2005). However, it is Mr Ruhan who looms large over the entire process. The prominence of the role which Mr Ruhan accepted he played was not apparent from Mr Stevens' witness statement in the Orb Proceedings.

81. Mr Ruhan acted as much more than a central co-ordination point so far as the Investec bridging loan was concerned. One of CLGD's directors, Mr Pilbrow (of whom more at [107] below), in an email exchange with Mr Austin of Investec of 2 March 2006, stated "Jones Day require a copy of the valuation. If you are sending a hard copy to [Mr Ruhan], please would you ask him to send one to Jones Day", to be told "a hard copy has been sent to AR". Documents obtained by HPII from Investec using the liquidator's power under s.236 of the Insolvency Act 1986 include a credit application form completed by Mr Derrick Beare and Mr Daniel Austin of Investec in relation to Mr Ruhan's application for funding to acquire the Sentrum data business. Mr Beare and Mr

Austin had both been involved in providing the bridging finance to CLGD earlier that year, and the form refers to the bridging loan transaction in the following terms:

> "This is Investec's second transaction with Andy Ruhan, the founder of Global Switch, with the first being a £58.5m 3-month bridging facility for the Lancaster Gate Development".

82. For the purposes of explaining the strength of Mr Ruhan's covenant, the form attached minutes of a meeting which Mr Beare and Mr Austin had had with Mr Ruhan so that he could explain his "complex tax structure". Those notes, which must have been produced on the basis of that meeting, refer to Mr Ruhan owning the "Bridgehouse hotels which have a NAV of £7m (£38m of debt with Anglo Irish)" and to Mr Ruhan having "£18m of personal cash invested in the HPII hotel deal" and expecting "to make at least £50m from this transaction which is highly confidential". While I accept that the notes may not be accurate in their finer detail, the clear message is that Mr Ruhan has a significant stake in the HPII hotels and expects to make a substantial profit on them. That can only have been a reference to the Hyde Park Hotels (there being no suggestion of any similar deal being in contemplation for other hotels). There are numerous subsequent internal Investec documents to the same effect. Mr Ruhan accepted that he had been responsible for bringing the bridging loan transaction to Investec and negotiating the facility, but denied that he had any beneficial interest in CLGD, the borrower. While it is (just about) possible to read the statements about Investec's understanding of the bridging loan in that sense, that is not their natural meaning, and on Mr Ruhan's evidence, the statements about his assets and wealth cannot conceivably have been correct, and were described by Mr Ruhan as "very sloppy language" (Day 6 pages 96-97).

83. Moving ahead a little, on 19 January 2008, Mr Ruhan had a heated exchange with Mr Beare of Investec about the terms of financing being offered by Investec for another project. In arguing his position, Mr Ruhan referred back to the Lancaster Gate bridging finance in the following terms:

> "In respect of Lancaster Gate, I paid a profit share even when the circumstances completed [sic] changed from the original terms agreed with you and I could have avoided any draw down".

Mr Ruhan made the same point to Investec on 27 January 2009:

> "I will remind you of our first ever deal which involved the Thistle hotel at Lancaster Gate. I agreed to a profit share of 2m GBP payable to the bank based on the uncertainty of getting vacant possession and an onward sale".

Mr Ruhan (Day 6 pages 95-96 and 103) suggested that in these emails, he was really referring to (and seeking to take the benefit of) his failure to negotiate better terms for Mr Stevens, but I do not accept the email can fairly be read in that way. It is of obvious significance that the position being taken by Mr Ruhan to Investec in January 2008 and 2009 accords with that set out in Investec's contemporaneous internal documents from the second-half of 2007. Neither of these communications emanating from Mr Ruhan were disclosed by him. Further, if Investec's alleged "misunderstanding" of the ownership position of Euro Estates had been corrected in October 2007, as Mr Ruhan and Mr Stevens contend (see [122]-[123] below), then it is difficult to see why Investec did not offer the obvious riposte that Lancaster Gate was not Mr Ruhan's deal. The

exchange is, therefore, revealing as to what Mr Ruhan knew, what Investec knew, and what Mr Ruhan knew Investec knew.

84. Norton Rose acted for Minerva in the sale transaction, and Jones Day for CLGD. On 10 May 2006, Jones Day forwarded an enquiry received from Norton Rose to Mr Stevens in relation to Thistle access rights, who in turn forward it to Mr Ruhan without comment. Mr Ruhan told Mr Stevens that "we should make a response on behalf of Cambulo" in particular terms, and Jones Day subsequently replied to Norton Rose on the basis of Mr Ruhan's draft. I accept that it is possible to explain Mr Ruhan's involvement in this issue because of his particular role in all Thistle-related matters. Further, there are communications in which Mr Ruhan clearly takes the position that he has no interest in the Lancaster Gate Hotel. When, on 2 June 2006, Mr Cherry of Minerva raised an issue with Mr Ruhan in relation to the hotel, he replied:

> "There is no point coming back to me as I don't own it either. I don't think Cambulo are going to be that interested as it has always been there [sic] position that there are no rights of easements".

In his email to Mr Stevens of 31 May 2006, however, Mr Ruhan had stated that "*we* should make a response on behalf of Cambulo … it has always been *our* position that thistle do not have any legal easements" (emphasis added).

85. The sale of CLGD completed on 30 August 2006 for £67.5m, realising a profit of some £7.76m. In November 2006, Cambulo Madeira advanced £1m from the proceeds of the sale of CLGD for the purposes of an investment to be made by a group of investors who included Mr Nicholas Thomas in the Beaver Brook Antimony Mine in Canada. The money was exchanged into Canadian dollars, but the investment did not go ahead, and in January 2007 the money advanced, less an exchange rate loss of £25,000, was returned to Cambulo Madeira. Mr Pickering QC placed considerable reliance on this investment, and it is convenient to consider it at this stage:

i) On 26 October 2006, Mr Thomas sent an email about the investment to Mr Ruhan asking when the funds for the investment would arrive, saying he was "still chasing Anthony and Michael" (which I understand to be a reference to the Stevens brothers). Mr Ruhan replied stating that the monies would be coming from Jones Day (who held the proceeds of the Lancaster Gate Hotel sale) and stated:

> "As I have previously mentioned the investor is to be Cambulo in Madeira. This company is controlled by Anthony Stevens. He is obviously aware of this investment. I have forwarded the relevant correspondence from Larry [Trachtenberg, who was also involved in the investment] to him and he will send it to Michael."

ii) On 1 November 2006, Mr Trachtenberg emailed Mr Ruhan, Mr Thomas and another investor, Mr Danny Langley. The email referred to the investment monies - £1m from Mr Ruhan and £1m from Mr Langley – being sent to Mr Thomas' lawyers, with personal guarantees being provided by Mr Ruhan and Mr Thomas for another £1m each. The email contains numerous references to Mr Ruhan, but none to Mr Stevens.

iii) Mr Ruhan appears to have spoken to Mr Thomas' lawyer, Mr Chris Wilkinson of Simmons and Simmons, who sent an email to Mr Trachtenberg on 2 November 2006 referring to a promise by Mr Ruhan to transfer £1,000,000 that day. Mr Trachtenberg replied:

> "Apparently Andy would like a brief note back from you confirming that you have received the money on behalf of Anthony Stevens and his vehicle Cambulo and that you understand that Andy will be investing separately".

I should record at this point that it is very difficult to see how Mr Ruhan could have invested separately and additionally to Mr Stevens, as the deal Mr Trachtenberg had outlined involved a split of 50% for Mr Thomas and 25% each for Mr Ruhan and Mr Langley. It is also clear from the email sent by Mr Trachtenberg on 16 November 2006 that Mr Ruhan and Mr Stevens did not make separate investments, but £1m was provided from funds belonging to Cambulo Madeira. Mr Trachtenberg's email identified this as a payment by Mr Ruhan.

iv) Mr Wilkinson then sent an email to Mr Stevens and Mr Ruhan asking them to confirm the terms of Mr Stevens' involvement, but there does not appear to have been any reply from Mr Stevens. Mr Ruhan did reply, giving his confirmation on 3 November 2006.

v) As I have stated, the deal did not proceed and on 4 January 2007, Mr Trachtenberg emailed Mr Ruhan with an account of the funds from which the exchange rate loss of £26,996.56 was apparent (due to a negative 5.8% exchange rate swing over a period of 26 days). Mr Ruhan responded by saying he was "obviously a bit pissed off that I lost 25k on a deal we didn't do", and the subsequent correspondence on this issue refers to a loss suffered by Mr Ruhan, with no reference to Mr Stevens at all.

vi) Mr Ruhan explained that he used this language because he had had to pay the difference "to Anthony because I had asked him to put it up in the first place". However, I find it surprising that Mr Ruhan would have felt obliged to make good an exchange rate loss to Mr Stevens for which he was in no way responsible, and I think it would have been out-of-character for Mr Ruhan, who was a hard-nosed businessman, to have done so, or Mr Stevens to have expected him to do so. Nor is there any evidence to support the suggestion that Mr Stevens expressed any unhappiness at the position, that Mr Ruhan agreed to cover the loss or that this amount was paid by Mr Ruhan to Mr Stevens.

86. Finally, so far as the sale of CLGD is concerned, it was Mr Ruhan who, on 24 January 2007, informed Mr Beare and Mr Austin of Investec when CLGD was dissolved, which freed up funds to repay amounts due to Investec. The terms in which Mr Ruhan did so also give the impression that it was Mr Ruhan who had borrowed the bridging funds from Investec:

> "Just to let you know that the Lancaster Gate company [CLGD] was dissolved this morning which was the last condition before the outstanding monies could be drawn down from Minerva so should be paying you the remaining 500k early this week".

Mr Stevens was not copied into this email.

*Efforts to sell the Kensington Hotels*

87. While Mr Ruhan accepted that he "was absolutely involved in every aspect of the Lancaster Gate deal" he said "that's not the same with respect to the other two" Hyde Park Hotels. However, he was clearly seen by Mr Lukas as the decision-maker so far as the on-sale of the Kensington Hotels was concerned as well. Mr Lukas sent an email to Mr Ruhan and Mr Christian Candy on 23 August 2006 reporting on the fact that he was having face-to-face meetings with the principals of potential purchasers in relation to the Kensington Hotels. The email was neither copied, nor forwarded, to Mr Stevens. In an email of 15 November 2005, Mr Lukas referred to an offer received for the two Kensington Hotels of £115m and asked Mr Ruhan "what would you like me to do", to which Mr Ruhan replied, "I do not think we can say anything to them at this stage". There is no document in which Mr Ruhan forwarded this email onto Mr Stevens or sought his views on it. On 6 March 2006, Mr Lukas reported to Mr Ruhan on discussions with a potential purchaser of the Kensington Hotels, saying that the relevant documents (including the NDA agreement) relating to the purchaser would be with Mr Ruhan shortly. In an email sent in May 2006 to a potential purchaser of the Kensington Hotels, OEM Plc, Mr Lukas described the hotels as "owned by a syndicate (headed up by Andy Ruhan) which recently hived them down having owned three central London thistles", with the Candy brothers having a 30% shareholding. Whatever criticisms might be made of Mr Lukas' understanding of the terms of the commercial deal to which the Candy brothers were parties, it is difficult to see how someone who had such extensive correspondence with Mr Ruhan in relation to the potential on-sale of the Hyde Park Hotels should hold (or at least express) such a fundamental misunderstanding as to who owned the Hyde Park Hotels. Further, Mr Lukas clearly acted on that understanding himself, for example by submitting invoices in relation to his work on the on-sale to Mr Ruhan in August 2006.

88. Mr Ruhan and Mr Stevens understandably placed considerable reliance on an email from Mr Nicholas Candy to Mr Lukas of 12 August 2007 which, on the issue of commission, stated:

> "Please note Andy has no interest though in Cambulo and hence if in Ruhan you trust you have your trust in a place that can't pay".

89. The background to that exchange was some concern on Mr Nicholas Candy's part as to whether Mr Lukas has been acting in the joint venture's interests at all times, and Mr Lukas' request, for the first time, for a formally documented commitment to pay him 1% commission (in the form of a solicitor's undertaking), having worked to date on the basis of "trust with both Anthony and Andy. Hence the battle cry, `in Ruhan we trust'".

90. It is clear, however, that a decision was in the works to reduce Mr Lukas' commission from 1% to 0.5% as Mr Lukas was told by Mr Ruhan in an email of 15 August 2007 (and Mr Lukas' percentage was in due course so reduced). Mr Stevens said that the Candy brothers' "modus operandi is to renegotiate and re-trade fees and commissions" (Day 8 page 150). It may well be that the Candy brothers understood it to be Mr Ruhan's formal position that Mr Stevens was the owner, and that this provided Mr Nicholas Candy with an obvious means of seeking to walk away from whatever undocumented promises Mr Ruhan had already made about the level of commission which Mr Lukas

could claim from the joint venture between Cambulo Madeira and the CPC Group. I do not feel able to reach a conclusion on the basis of this email as to what the Candy brothers' impression of the reality of the relationship between Mr Ruhan and Mr Stevens was. From their perspective, the transaction was working well whatever it might be. Mr Ruhan continued to play a key role in dealing with Mr Lukas and in seeking to get the transaction over the line at this point. When Mr Lukas contacted Mr Ruhan to complain about the fee reduction on 15 August 2007, Mr Ruhan replied that "my mobile is not off, it is constantly engaged trying to sort out other issues or exchange cannot happen !!" Mr Christian Candy had earlier forwarded a claim to commission by another introducing agent, Andrew Langton of Aylesford International SA, directly to Mr Ruhan without copying Mr Stevens in (on 6 July 2007).

91. Other documents from interested purchasers – for example an email from Mr Stewart Knight of Stumpf & Co of 1 December 2005 – make it clear that they too understood Mr Ruhan to be the person who was in a position to do a deal on the on-sale of the properties, and that they dealt with Mr Ruhan, not Mr Stevens, on this issue, referring to a meeting they had had with Mr Ruhan where "Andy made the point that this will be a complicated deal involving big numbers and he would expect us to undertake some detailed due diligence". Mr Kevill of Lancer Property Asset Management (who on the evidence represented the interests of the Abu Dhabi royal family) addressed an offer to Mr Ruhan at his Albermarle Street address on 22 January 2008. Mr Stevens' absence from these exchanges, and Mr Ruhan's apparently central role, are noteworthy.

92. I have already referred to the reduction in the price payable for the Hyde Park Hotels from the £130m which Mr Bloomfield had offered on behalf of ECD, to the £127m provided for by the BSA. On 4 January 2006, Mr Ruhan sent a lengthy email to the HPII board informing them that Cambulo Madeira was seeking to reduce the purchase price in return for agreeing certain changes (favourable to Thistle) to the terms of the Thistle operating agreements, and stating that, after discussions with GMAC, Mr Ruhan had informed Cambulo Madeira that only a reduction to £125m could be contemplated. Once again, there are no communications in which the views and intentions of Cambulo Madeira which Mr Ruhan passed on were communicated to him, nor any documents produced by Mr Stevens showing any consideration or discussion of these issues on the Cambulo Madeira side. Given the level of detail communicated, this is surprising. Mr Ruhan said that Mr Stevens telephoned him regularly. The figure of £125m was, as set out at [54]-[55] above, the minimum figure which the noteholders had said that they would accept. On 31 March 2006, the board of HPII approved the reduction in the agreed price by approving completion of the Kensington Hotels at a price of £69m (Mr Ruhan having declared once again that he had no interest in the purchaser).

93. While the Lancaster Gate Hotel transaction was progressing towards completion, there were also ongoing discussions in relation to the Kensington Hotels. By February 2006, there were reasonably well-advanced proposals for the CPC Group to become involved in the acquisition and sale of the Kensington Hotels, through a joint venture with Cambulo Madeira and its two hotel-owning subsidiaries (Cambulo Kensington Palace Developments Limited or "CPal" and Cambulo Kensington Park Developments Limited or "CPark"). The proposed joint venture was given the project title "Trio". Mr Steve Smith, who held a senior position within the Candy brothers' organisation, summarised the proposed structure in an email to Mr Ruhan copied to Mr Christian Candy dated 21 February 2006 which was sent following a telephone conversation

between Mr Smith and Mr Ruhan. Mr Stevens was not party to and was not mentioned in the email, and Mr Ruhan does not appear to have forwarded it to him. Mr Ruhan said that "it wasn't my place to discuss this with Mr Stevens. Mr Smith should be discussing it with Mr Stevens" (Day 6 page 50), and, of course, if Mr Stevens was the beneficial owner of the Kensington Park Hotels, and Mr Ruhan had had no interest in them, that would be the position. However, the communications between Mr Smith and the Candy brothers on the one hand, and Mr Ruhan on the other, have the character of those between the key players, rather than with an informal and unpaid adviser, whatever Mr Ruhan might have claimed about his lack of interest in Cambulo Madeira. I found Mr Ruhan's explanation that this information (which was of obvious commercial significance and sensitivity, as it discussed the tax implications and risks of the proposed structure) had been provided to him to enable him to deal with Thistle over the operating agreements unpersuasive. In any event, that does not explain the absence of any documents showing the project originating in discussions between the Candy side and Mr Stevens, nor the absence of any reference to Mr Stevens in the email.

94. Mr Pickering QC also relied on an email in which Mr Smith of the CPC Group suggested that Mr Ruhan speak with Mr Bryan Pickup, the CPC Group's legal adviser, to which Mr Ruhan replied "Okay, presumably Bryan will not stick by lawyer protocol of not being willing to speak to the other sides client". Mr Pickering QC suggested that this was a reference to Mr Ruhan being on the other side of the CPC Group-Cambulo joint venture. However, I think the email is more naturally read as one in which Mr Ruhan was acting on behalf of HPII (and it is significant that it was HPII's lawyer, Mr Walmsley of Bridgehouse Law, who was later copied in). This email does, however, reveal the highly anomalous position Mr Ruhan had adopted, representing HPII, on his own and Mr Stevens' evidence advising HPII's contractual counterparty Cambulo Madeira, and providing information and advice to Cambulo Madeira's proposed joint venture party, the CPC Group.

95. Mr Ruhan corresponded directly with the Candy brothers as to the terms of a letter which Cambulo Madeira was to send to Thistle on 17 March 2006, without any apparent involvement of Mr Stevens. That letter was in due course sent to Thistle by Mr Emson, a director of the relevant Cambulo Madeira subsidiary (whose role is considered further at [107] below). However it is noticeable that Mr Emson forwarded Thistle's reply to Mr Ruhan for instructions, who in turn forwarded it to Mr Smith and Mr Christian Candy of the CPC Group. Mr Stevens does not feature.

96. On 4 April 2006, Cambulo Madeira and the CPC Group formally entered into a joint venture to develop the Kensington Hotels through a joint venture company, CPHL. The joint venture was on a 50:50 basis, but there was to be a preferential payment of £15m to Cambulo Madeira before any remaining profits were split equally (a provision which was consistent with the terms on which the CPC Group had indicated its intention to acquire all three Hyde Park Hotels from a group of investors including Mr Ruhan and Mr Michael Stevens (but not Mr Anthony Stevens) in November 2005 (see [71] above). Mr Ruhan was very well-informed as to the circumstances in which the Trio deal had closed, telling Mr Peter Lukas (see [77]) on 2 April 2006:

> "Just to let you know, although it was outside banking hours so money did not move, the deal did get done with the `bon bon [Candy] brothers'. I am away next week but would like to meet up the following week to progress our discussions. No press releases are being made for some time".

97. There are numerous communications involving the Candy brothers to which Mr Ruhan is party, but from which Mr Stevens is noticeably absent. The letter Mr Ruhan prepared in March 2006 to inform Thistle of Cambulo Madeira's intention to make planning applications for the Kensington Hotels once completion had taken place was cleared by Mr Ruhan with Mr Christian Candy, but not with Mr Stevens. Mr Ruhan said he had cleared it with Mr Emson (Day 6 page 117), but Mr Emson was operating considerably further down the hierarchy than Mr Candy (and there is no documentary evidence of Mr Ruhan's assertion). Emails from Mr Smith, Mr Christian Candy and Mr Lukas relating to the (ultimately unsuccessful) negotiations to sell the Kensington Hotels to Istithmar PJSC (a subsidiary of Dubai World) were sent to Mr Ruhan and Mr Christian Candy, without Mr Stevens being copied in or having the emails forwarded to him, and Mr Stevens disclosed no direct communications he had in relation to this potential purchaser. In one of those emails – from Mr Smith to Mr Ruhan copied to Mr Christian Candy and dated 13 September 2006 – Mr Smith put forward a proposal of obvious commercial importance to Mr Ruhan for Mr Ruhan's agreement ("we would consider guarantees further up the chain if your side would do the same"). It was Mr Ruhan, not Mr Stevens, who was the recipient along with Mr Christian Candy of an email from Mr Smith addressing the issue of asbestos in the property in October 2006. Mr Stevens suggested that this reflected Mr Ruhan acting (on what would have been an unpaid basis) as his "informal adviser and as a sort of go-between". In correspondence exchanged in October 2006, when dealing with a potential purchaser introduced by Mr Lukas and represented by Mr Richard Johnson, it was Mr Ruhan, not Mr Stevens, who was involved in the exchanges along with Mr Christian Candy and Mr Smith of the CPC Group, and Mr Candy's email made it clear that it was Mr Smith and Mr Ruhan who were to make the final decision as to whether the offer was viable ("either Andy and Steven get total comfort from the buyers that they are going to proceed … or … we withdraw papers"). It was Mr Ruhan, not Mr Stevens, with whom the Candys and Mr Smith corresponded in relation to the all-important planning applications (for example on 4 July 2007), or in relation to a judicial review challenge to that planning permission once granted (in November 2007).

98. It is not the case, however, that Mr Stevens was absent from all significant emails involving the Candys in relation to the onward sale of the Kensington Hotels, or that there were no communications which were sent just to him and not Mr Ruhan. Mr Christian Candy sent such an email to Mr Stevens and Jones Day on 21 February 2006. On 10 May 2006, Mr Ruhan emailed Mr Lukas about a meeting he and Mr Stevens were having with the Candy brothers in Guernsey "from which we should gauge the mood to sell or otherwise". Mr Smith of the CPC Group sent an email on 5 March 2007 asking Mr Stevens for comments on an option agreement to be entered into with a prospective purchaser (although Mr Stevens simply forwarded that email to Mr Ruhan without comment – one of many emails sent to Mr Stevens in relation to the Trio project at this time which were simply forwarded by him to Mr Ruhan). Mr Stevens was copied into exchanges between Mr Christian Candy and Mr Ruhan in April 2007 in relation to the costs of Thistle remaining in occupation, and discussing when notice of termination should be served under the Thistle operating agreements (albeit Mr Stevens did not contribute substantively to the exchanges). Mr Stevens, but not Mr Ruhan, featured in an email chain of 18 April 2007 relating to interest expressed in the Kensington Hotels by a purchaser represented by a French entity known as Centuria Real Estate Asset Management. Indeed, it was Mr Stevens who received an approach from the eventual purchaser representing the interests of the Abu Dhabi royal family on 21 April 2007,

but on receipt of that communication Mr Stevens simply forwarded it to Mr Ruhan without comment. When Mr Stevens later forwarded the offer to the Candys, with Mr Ruhan copied in, Mr Nicholas Candy said, "why have they come to you directly when most parties do not know of your involvement", as well as making a substantive point about the terms of the offer. Mr Ruhan and Mr Stevens can point to this email as a recognition on Mr Nicholas Candy's part that Mr Stevens had some involvement. It is, however, curious that he thought that people did not know of Mr Stevens' involvement (there seems no reason why it should have been kept secret), and that rather than reply to the email, Mr Stevens forwarded it to Mr Ruhan saying that Mr Ruhan and Mr Christian Candy really needed to meet. Mr Stevens was also involved, but almost always along with Mr Ruhan, in subsequent exchanges with the Candys relating to this offer.

99. When the deal appeared to fall through on 16 August 2007 due to the risk of a judicial review challenge to the planning permission which had been obtained, the terms of Mr Ruhan's reaction are consistent with him being one of the stakeholders rather than an unpaid advisor:

> "The arrogance to withdraw with no reason is difficult to take and has cost us a lot of credibility but hopefully not money".

Mr Stevens was copied into this email, but it did not form part of either Mr Ruhan's or Mr Stevens' disclosure. Mr Ruhan did not really have an explanation for his reference to losing money (Day 6 page 160).

100. There are documents or events to which Mr Ruhan and Mr Stevens can point which support the view that Mr Stevens, not Mr Ruhan, was the principal so far as Cambulo Madeira's dealings with the Candy brothers were concerned. For example, it was Mr Stevens (along with Mr Emson) who were the Cambulo directors of the joint venture vehicle CPHL, and minutes of a meeting on 23 June 2007 refer to Mr Stevens meeting with "his bankers" (presumably Investec) to discuss funding, and to Mr Stevens and Mr Candy discussing options on the site. There is, however, little if any documentary evidence of what Mr Stevens actually did. An email of 25 October 2007 from Mr Williams of the CPC Group to Mr Smith, Mr Christian Candy and Mr Ruhan referred to the fact that "Andy is preparing a report for Anthony re finance et cetera. He needs to know the status of the Bank of Scotland loan facility", which was understandably relied upon by Mr Kokelaar as evidence Mr Ruhan worked *for* Mr Stevens on this project, rather than the other way around. However there is no evidence of Mr Stevens considering and acting on any such report.

101. Mr Ruhan was also involved in the discussions with the CPC Group in January 2008 about the refinancing of the project. I accept that there is evidence that Mr Stevens also played some role in relation to this topic, but when Mr Smith of the CPC Group emailed Mr Ruhan on the subject on 21 January 2008 telling him:

> "I feel like I am now pestering Anthony to give me the green light. His phrase today was 'I'll get back to you when I am ready'. What is the problem: I thought we agreed everything before Christmas";

there is a distinct sense that Mr Smith has decided to go above Mr Stevens' head to Mr Ruhan because he was not happy with the lack of response.

102. Mr Ruhan's extensive involvement in the efforts of the Cambulo-Candy joint venture to sell the Kensington Hotels, which continued long after the Thistle sale by HPII had been completed, raises the further question of *why* Mr Ruhan was devoting so much of his time and energy to the project if he had no interest in it. The Defendants' joint appendix on nomineeship suggested that Mr Ruhan's "knowledge, skills and experience" were used (i) by Mr Stevens, for whom Mr Ruhan was "an informal advisor and a go-between with the Candy brothers"; (ii) by both Mr Stevens and the Candy brothers as "a go-between with Thistle" and (iii) by the Candy brothers as a "go-between with agents". Yet the only remuneration which Mr Ruhan received for all this "going" and "betweening" (which Mr Ruhan described as an "enormous amount of work": Day 6 page 161) and the resultant "pressure" (his email to Mr Lukas of 21 January 2008) was under three management service agreements (one for each Hyde Park Hotel) entered into on 10 March 2006 (as to Lancaster Gate) and 4 April (as to the Kensington Hotels). Pursuant to these, Mr Ruhan's company Atlantic was paid £2,500 per month per hotel to prepare monthly management accounts (the same amount Atlantic had been paid for performing the service when HPII still owned the Hyde Park Hotels). Mr Ruhan received no additional remuneration, therefore, for all of the work he put in after HPII's and his ostensible interest in the Hyde Park Hotels had ceased, nor can the Defendants rely on the amounts being received in respect of *different* hotels which were not being sold to Cambulo Madeira (as they attempted to in their closing submissions). However, during this period, Mr Ruhan was contributing a great deal more to the success of the project than, say, Mr Stevens, even though it was Mr Stevens who is said to have been the principal beneficiary.

103. It must also be noted that the Defendants' case that Mr Ruhan took on an extensive advisory and executive role for Mr Stevens in the period up to and after completion (the so-called "Team Stevens" argument) is difficult to reconcile with the evidence which Mr Stevens gave in the Orb Proceedings in November 2014. This was to the effect that Mr Ruhan provided assistance in obtaining vacant possession and producing the monthly management accounts but that this was "the extent of Mr Ruhan's involvement in the development project" and that "although Mr Ruhan participated on certain issues in relation to planning … he was not otherwise involved in the sale of the Hyde Park Hotels [or] the establishment of the joint venture with the Candy brothers".

*Mr Michael Stevens' acquisition of a 20% share in Cambulo Madeira*

104. On 21 December 2007, Euro Estates transferred a 20% share in Cambulo Madeira to Wellard, a company associated with Mr Michael Stevens. There are no documents exchanged between the Stevens brothers explaining the background or context to the transfer, or how much was paid for the 20% share. Mr Stevens described this as a "longstanding private family arrangement", he and his brother having "an informal family understanding that either of us can join the other in certain of our investments".

105. As I explain below ([125]), the transfer of 20% to Wellard came at a time when Euro Estates' shares were to be charged to Investec as security for money it was advancing in respect of investments being made by Mr Ruhan in Qatar. The effect of the transfer was that only the 80% shareholding in Cambulo Madeira retained by Euro Estates fell within the charge, which Investec was content with. It is difficult to resist the conclusion that the proposed charge by Euro Estates triggered the need to formalise a pre-existing understanding so far as Mr Michael Stevens' interest in the Kensington Hotels was concerned. Mr Stevens said that the understanding being formalised was the private

family arrangement he and his brother had long had. Mr Pickering QC submitted that the interest being formalised was that which derived from the option to acquire 10% of HPII's hotel portfolio under the terms of the loan made by Mr Michael Stevens to Mr Ruhan back in 2003: see [40] above. He points to the fact that a 20% interest in a company (Cambulo Madeira) owning half of the Kensington Hotels would put Mr Michael Stevens in broadly the same position, so far as those hotels were concerned at least, as if he had exercised his option to acquire 10% of HPII's 100% ownership of the hotels.

106. It was Mr Ruhan's lawyer and confidant, Mr McNally, who took the lead in negotiating the transfer to Wellard (see for example his email to Mr Stevens copied to Mr Ruhan of 27 November 2007). I was pointed to no evidence said to show how the obligations owed to Mr Michael Stevens in respect of the 2003 loan were otherwise satisfied.

*Mr Emson and Mr Pilbrow*

107. I have referred to the formation of various Cambulo Madeira subsidiaries incorporated to hold the Hyde Park Hotels: CLGD (see [79]), CPal and CPark (see [93]). I want to turn at this point to the position of Mr Colin Emson and Mr Nicholas Pilbrow, who were appointed directors of those subsidiaries. Mr Stevens maintained that these were his appointments, but he accepted for the first time in cross-examination – after Mr Ruhan had given evidence to this effect – that he had acted on Mr Ruhan's recommendation. On 1 March 2006, Mr Pilbrow emailed Mr Ruhan, copying Mr Emson in, under the heading "Cambulo", discussing the transaction. The email stated:

> "all the KYC matters are now dealt with for Anthony, Colin and myself. I am due to go through all the Jones Day documentation with Andrew Barker and Bryony Widdip this morning, I attach a draft pro forma balance sheet for CLGDL".

108. On the same day, Mr Pilbrow directed enquiries to Mr Ruhan about the conditions precedent on the transaction, and requested "the latest accounts for Cambulo Madeira" from Mr Ruhan (with Mr Stevens copied in). He also informed Mr Ruhan that "in relation to the Investec Facility Letter, they require a nominated contact. I am proposing to put Colin for this", which appears to be a request for Mr Ruhan's approval for this proposed course of action. Mr Pilbrow also gave Mr Ruhan a detailed update on the position so far as Cambulo was concerned on 3 March 2006, including how the transactions would be dealt with on the CLGD and Cambulo Madeira balance sheets, and sought Mr Ruhan's comments on a cashflow statement before it was sent to Jones Day, Cambulo Madeira's solicitors. There are numerous other emails between Messrs Emson and Pilbrow and Mr Ruhan to similar effect, including emails in which Mr Ruhan's approval was sought as to how the involvement of Bridgehouse Law as CLGD's solicitors should be explained, and as to who should be appointed as CLGD's tax accountants. Mr Ruhan was blind-copied to communications with the auditors on 19 July 2006, in which Mr Stevens does not feature. Drafts of agreements or letters were run past Mr Ruhan for his approval. Those emails give the strong impression that it was Mr Ruhan, rather than Mr Stevens, to whom Messrs Emson and Pilbrow were looking for instructions or decisions in their Cambulo roles. Mr Ruhan said that this reflected his role in "architecting" the Lancaster Gate deal with Minerva, but the documents suggest Mr Ruhan was not simply architecting the deal, but had a "hands-on" role in getting it over the line. Mr Stevens' involvement, by contrast, appears limited and essentially pro forma.

109. On 31 March 2006, Mr Emson gave Mr Ruhan an update on various projects, including the various Hyde Park Hotels. That email also referred to a business which Mr Ruhan accepts was his alone (Sentrum), and did so in terms which suggested that the timing of a transaction relating to Sentrum was linked to the progress of the sale of the Hyde Park Hotels:

> "Sentrum: Original syndication of investor-backers planned, but not needed (now shelved until CLG, KP and KP have been completed)
>
> …
>
> KP and KP: The position here is much the same as CLG, but with some international element. There is an expected long term involvement here".

110. There are communications involving Mr Emson and Mr Pilbrow which acknowledge Mr Stevens' involvement, and Mr Stevens was copied into some of the emails sent to Mr Ruhan. There are also emails in which Mr Emson or Mr Pilbrow seek confirmations from Mr Stevens without copying in Mr Ruhan (for example on 21 December 2009 in relation to signing off accounts). Further, on 12 July 2006, Mr Emson emailed Mr Ruhan saying:

> "Thank you for the introduction to Anthony Stevens and we are enjoying working with him. As we have not worked with him before I would appreciate your view on the attached email and draft invoice".

111. This email, however, raises some issues for Mr Ruhan and Mr Stevens. There is the curiosity that, while Mr Emson said that he and Mr Pilbrow were asking for Mr Ruhan's input because they had not worked with Mr Stevens before, Mr Stevens' evidence was that he had known Mr Emson for years and done business with him "in the mid-80s to mid-90s" before appointing him as a director of the Cambulo entities (Day 8 page 98). Further, it is surprising that Mr Emson and Mr Pilbrow should be seeking Mr Ruhan's views on the terms of the invoice they were submitting *to Mr Stevens* for their work for him. It is also difficult to see what input Mr Ruhan could usefully have offered by reference to his experience of working with Mr Stevens on:

i) A draft letter which did no more than ask for one third of the agreed fee now and two thirds later.

ii) A draft invoice which gave a pro forma description of the services provided.

112. It is certainly possible to read the email as, in effect, asking Mr Ruhan to approve the invoice for work done for *Mr Ruhan*, but doing so in terms which were consistent with an arrangement whereby Mr Stevens was fronting for Mr Ruhan so far as Cambulo Madeira was concerned. That interpretation would involve Mr Emson and Mr Pilbrow, from whom I have not heard, being both privy to a nominee arrangement and willing to a degree at least to play along with it. In June 2008, when Mr Emson and Mr Pilbrow issued further invoices for their work as Cambulo directors, Mr Ruhan was (for no obvious reason) blind copied into their communications with Mr McNally asking for payment, and the close involvement of Mr McNally (who was Mr Ruhan's fiduciary rather than Mr Stevens') is also suggestive of Mr Ruhan's close interest in this matter. I accept, however, that there are emails from 2009 in which Mr Emson criticises *Mr*

*Stevens* for the failure to pay the fees of Mr Harris, the professional Guernsey director of the Cambulo subsidiaries and a barrister. Mr Harris is copied into those emails. Mr Harris does not appear to have had any prior links with either Mr Ruhan or Mr Stevens, and I accept that there is nothing to suggest that his understanding was other than that Mr Stevens was the ultimate beneficial owner of the Cambulo Guernsey subsidiaries of which Mr Harris was a director. That leaves the issue, however, of whether the correspondence involving Mr Harris and relating to his outstanding fees was tailored to reflect that fact, or whether it also reflects the understanding of the other parties to those exchanges. I accept that Mr Emson sent an email to Mr Bottomley and Mr Pilbrow (on 16 March 2012) to which Mr Harris is not a party, and which is supportive of the position that the Cambulo Group Guernsey subsidiaries were Mr Stevens' and not Mr Ruhan's companies. That email, which manifests a surprising sensitivity on the subject, was sent to correct an email to Mr Emson saying that the fees in question were to be recovered from Mr Ruhan. It provides:

> "That is not correct and I do not understand why you have written this email. Your Having chosen to do so, I will now explain the position which I had understood was perfectly well known to you ….
>
> Your truncated message is therefore not correct and I trust this email clarifies the position".

113. However, complaints over unpaid fees for Mr Emson and Mr Pilbrow were still being sent to Mr Ruhan on 27 November 2012, in terms which requested Mr Ruhan to get Mr Stevens to pay the fees or arrange for Mr McNally to do so. Such a payment appears to have been made from the £92m paid in November 2012 (the status of which is considered at [156] and following below).

114. Mr Pickering QC argued that Mr Emson and Mr Pilbrow were in fact paid for their work as directors of the Cambulo companies by Mr Ruhan or companies owned by him (in particular Unicorn Worldwide Holdings Plc). Certainly when Mr Emson was approached in 2015 to repay a loan of £663,000 allegedly due to Unicorn Worldwide Holdings Limited, he suggested the loan had been made against the security of amounts due from Mr Ruhan to Mr Emson and Mr Pilbrow by way of directors' fees in relation to Cambulo. However, Mr Emson, when faced with a demand to repay a loan from what was at the time a Ruhan-vehicle, had every incentive to suggest that there were amounts due the other way. Mr Ruhan denied that he paid or agreed to pay these fees. Without the benefit of contemporary documents relating to the purpose of the alleged advances to Mr Emson and Mr Pilbrow, and without having heard from Mr Emson and Mr Pilbrow, there is an insufficient basis for reaching a conclusion on this particular issue.

115. In summary, the interactions of Mr Ruhan, Mr Stevens, Mr Emson and Mr Pilbrow support the view that it was Mr Ruhan, not Mr Stevens, who was the principal decision-maker on the Cambulo side, although the communications are not all to one effect. I return to the position of Mr Emson and Mr Pilbrow at [204(x)] below.

*Mr Ruhan's Qatar Project*

116. A key series of events in the case arises from a substantial investment which Mr Ruhan made in property developments in Qatar ("**the Qatar Project**").

117. On 21 December 2007, Mr Ruhan's company BTH1 obtained a loan of $141m from Investec to support the Qatar Project ("**the Mood Facility**"). The security which was provided for that facility included a charge over the shares of Euro Estates, through which interests in the Kensington Park Hotels were believed to be held. HPII contends that this reflected what it claims to be the reality of the position – that assets nominally held by Mr Stevens were in fact Mr Ruhan's, and it was for that reason that the assets were made available as security for a loan made in relation to one of Mr Ruhan's projects. HPII also points to various internal Investec documents which are said to show that this was also Investec's understanding. Mr Ruhan and Mr Stevens, by contrast, say that Mr Stevens provided security for the loan made to Mr Ruhan in return for a commercial return, and that the information provided to Investec and Investec's lawyers made it clear that Euro Estates was beneficially owned by Mr Stevens, and not by Mr Ruhan.

118. It is not clear when Mr Ruhan first approached Investec for funding in relation to the Qatar Project. However, a proposal to this effect was discussed at a meeting of the Investec Credit Committee on 19 June 2007 and approved subject to certain conditions after Investec personnel had undertaken a site visit. An internal Investec memorandum of 16 July 2007 referred to a link between Mr Ruhan and the Prime Minister of Qatar "due to the Cambulo deal" (which appears to be a reference to the fact that a company linked with an ex-Prime Minister of Qatar had made an offer for the Lancaster Gate Hotel), and stated that "AR's company Cambulo owned a portfolio of Thistle hotels and still retains Kensington Park & Kensington Palace".

119. I accept that the references in this document to Mr Ruhan's links with the Qataris may well have been exaggerated, and at this distance of time it is not possible to identify the origins of any overstatement. However, the suggestion that Mr Ruhan was a beneficial owner of the Kensington Hotels was of obvious importance to the worth of his covenant, and was a consistent theme of subsequent internal Investec documents. A memorandum of 7 September 2007 stated, "Andy Ruhan set up Cambulo which owned a portfolio of Thistle Hotels and still retains Kensington Park and Kensington Palace Hotel". It also suggested that "the Emir [of Qatar] is extremely keen to be involved in this deal. The Emir is negotiating with Andy to buy the Thistle Hotels, and is keen to have a good working relationship with him", although it is not clear whether there was any basis for that particular suggestion. On 18 September 2007, Mr Ruhan sent Mr Beare of Investec valuations of the Kensington Hotels, and a document prepared by Mr Beare and Mr Austin of that date refers to the fact that Investec is to hold a charge over the shares of Cambulo, noting (in what is clearly a reference to the 4 April 2006 joint venture agreement referred to at [96] above) that "AR has priority for the first £15m equity and 47.5% of the balance thereafter". Mr Ruhan referred to these internal documents as being "littered with mistakes", stating (Day 6 pages 157-158):

> "I had no idea how they got it so wrong. You should ask them. You should have brought them to court to ask them"

(Day 6 pages 156-157). It is, indeed, difficult to understand how Investec, who worked extensively with Mr Ruhan on a number of transactions, could have "got it so wrong".

120. There are no documents showing when Mr Ruhan first raised the prospect of shares in Euro Estates being charged in support of this loan. In re-examination, Mr Ruhan was taken to an email of 20 May 2007 from Mr Stevens which he said showed Mr Stevens

seeking all of the information about the Qatar Project. However, the terms of the email suggest that Mr Stevens wanted this information to show to potential investors in Paris rather than because he wanted to invest himself. In any event, Mr Ruhan said that he approached Mr Stevens to ask that the shares in Euro Estates be made available to provide security because "when their first sale of Park and Palace fell through in mid-2007" (which I understand to be a reference to the apparent failure of the De Vere Estates deal on 16 August 2007):

> "I was aware that Anthony was sitting on some asset value ... I approached him to see if he was interested in helping out. It looked like Park and Palace would be tied up for a couple of years before he could sell them, so I suggested that he might put them to use".

It should be noted that Mr Stevens' financial position at this time appears to have been surprisingly parlous, to the extent that he asked for and received what was described as a "second advance of £100,000" (for no obvious reason) from Mr Ruhan on 14 August 2007 (a payment which Mr Ruhan said he could not recall: Day 6 page 158). While it might be said that Mr Stevens was simply cash-poor, but asset rich, the request and response are not readily reconcilable with the depiction of Mr Ruhan as someone who was (in effect) working for Mr Stevens at this time. They present a picture very different from that given by Mr Ruhan in cross-examination as to his relationship with Mr Stevens (Day 7 page 59):

> "I often find that my investors, particularly when they are very wealthy, they tend to have people like me doing all the running around, whilst they can sit back and count their money".

121. Once again, I was not taken to any documents showing how the terms of Mr Stevens' involvement in the Qatar Project were negotiated. However, on 15 October 2007 Mr Stevens sent Mr Ruhan an email asking "do *we* want Nouril [the lawyer at Jones Day who acted for Mr Stevens] with us at meeting with Investec? When do we want conf call with CPC?". The request by Mr Stevens as to whether Mr Ruhan wanted *Mr Stevens'* lawyer present at a meeting with the intended chargee of Mr Stevens' shares is somewhat surprising, as is the suppliant tone of the communication. It is not clear when the meeting referred to took place, but an internal memorandum dated 17 October 2007 (the day after the meeting) but possibly finalised after that refers to Investec having "a charge over Andy Ruhan's shares in Cambulo" and records that "there is a strong likelihood that the client will either sell-down or refinance the hotels within the next 12 months. As of 18th October the partners have agreed to refinance the hotels with the current senior lender". There are a number of other internal Investec documents to the same effect.

122. Fried Frank LLP ("**Fried Frank**"), who advised Investec, understandably made enquiries as to the ownership structure of Cambulo Madeira, and Mr Ruhan made arrangements for Fried Frank to be sent certain documents. On 19 October 2007, Mr Heilpern of Fried Frank told Mr Ruhan that the documents "seem to cover comprehensively the 'bottom half' of the structure but we also need to see the 'top half' of the structure i.e. the shareholder arrangements at the Cambulo Madeira level and upwards through Euro Estates onto AS and so on - I have asked Simon [McNally] to provide details asap". Mr Ruhan replied stating that "there are no further shareholder agreements" and that Cambulo Madeira "only has one shareholder which is Euro

Estates" whose only shareholder was Mr Stevens. Mr Ruhan also referred to the fact that:

> "it is the intention … to split the ownership of Cambulo Madeira into 2 ownerships, between Euro Estates who will keep 80% and another entity owned by the interests of Michael Stevens who will own 20%".

(I deal with the position so far as the 20% share to be provided to Mr Michael Stevens is concerned in further detail at [125] below). Mr Heilpern said he would want Mr McNally to provide the corporate documents relating to Cambulo Madeira and Euro Estates, including Mr Stevens' shareholding.

123. Mr Ruhan and Mr Stevens argue that these exchanges show that Mr Heilpern and Fried Frank looked into the issue of who owned Cambulo Madeira, and that they were satisfied it was Mr Stevens. However, on 20 October 2007, Mr Heilpern sent an email to Mr Beare and Mr Austin asking:

> "Will Euro Estates be the borrower on the Mood transaction? I think so, but please confirm. If that is the case, and we also take full corporate security from Euro Estates, then KYC issues apart, we may be less concerned with the detail of Andy's deal with Anthony because the bank's interests should be satisfied ahead of any further distribution to them as Euro Estates shareholder(s)".

The terms of the email are interesting, because they suggest that, a day after receiving the information and communications from Mr Ruhan, Mr Heilpern had yet to get fully comfortable with the position. His reference to the possibility of there being "shareholder(s)" in Euro Estates, and "Andy's deal with Anthony", suggests that he understood there to be some form of arrangement between Mr Ruhan and Mr Stevens (and I do not accept Mr Ruhan's suggestion that this might have been a query about profit share arrangements), that he had not got to the bottom of the position as between Mr Ruhan and Mr Stevens, but that he might not need to. Mr Austin confirmed his understanding that Euro Estates would be the borrower, but said Mr McNally should be able to confirm. In the event, Euro Estates was not the borrower.

124. On or about 21 October 2007, someone at Fried Frank (quite possibly Mr Heilpern) produced a version of the deal memorandum showing Mr Stevens as the 100% owner of Euro Estates, and referring to the fact that Euro Estates' 100% interest in Cambulo Madeira was to be split 80:20 as between Euro Estates and Mr Michael Stevens. However, on the same day, Mr Heilpern sent an email referring to a proposal that "Anthony (or Michael?) Stevens take 20% of Cambulo Madeira", which does not suggest he had a clear or fixed understanding of the position at that time. On 30 October, Mr Heilpern said he would "amend the Trio structure diagram to delete references to the Stevens which will be done for the start of the morning". A version in this form appeared in the disclosure. After this date, documents continued to be circulated within Investec which stated that Mr Ruhan owned Cambulo Madeira:

i) On 2 November 2007, after reading the Fried Frank legal review, Mr Wohlman of Investec "Group Risk" referred to "Euro Estates (our client in Qatar)" and complained the client did not have a *majority* share in the joint venture (rather than no share at all, which Mr Ruhan and Mr Stevens say was the position).

ii) On 12 November 2007, an internal Investec memorandum stated that Investec's solicitors "have now confirmed that in the event that Investec wishes to enforce its security, a change of control will occur in the JVA *between Andy Ruhan and Candy and Candy"* (emphasis added).

iii) A document entitled "Qatar legal due diligence report" of 26 November 2007 referred to the Kensington Hotels being owned by a "JV Ruan & Candys", of which Mr Ruhan could charge 40% of the shares (i.e. 80% of Cambulo Madeira's 50%, the other 20% of that 50% being held by Mr Michael Stevens).

125. The existence of two shareholders in Cambulo Madeira raised issues as to how the rights which were to provide security to Investec could be exercised. Mr Heilpern was sent a draft of an agreement intended to regulate the relationship between Euro Estates and Wellard in this respect on 18 November 2007. In an email to Mr Ruhan and Mr McNally, he stated that the agreement "needs to ensure that Andy has complete control" (which once again suggests a continuing perception on his part that Mr Ruhan had some form of control over Euro Estates). Neither Mr McNally nor Mr Ruhan replied correcting that understanding. Mr Ruhan responded, without consulting Mr Stevens, saying the draft had been given to Fried Frank so that they could comment on it, and asking for those comments to be sent to him. That (obviously significant) email was not disclosed by Mr Ruhan. On 29 November 2007, there was an internal exchange within Investec about how to address the Wellard 20%, with a proposal that 100% of Cambulo Madeira be charged in the first instance, and Wellard's 20% interest removed from the scope of Investec's security at a later point. Significantly, Mr Beare of Investec stated "I don't think the Stevens brothers will allow a charge over their shares. They told me directly they wouldn't" – an email which strongly suggests that, even after meeting the Stevens brothers, Mr Beare was distinguishing between the 80% interest which was Mr Ruhan's, and the 20% interest of "the Stevens brothers". For completeness, I should note that later, on 17 January 2013, Mr Ruhan told Dr Smith that he was "not aware that Wellard were a shareholder of Cambulo. Is there a way of establishing when they became a shareholder or was it from the formation of the company?" That email may well have been sent by way of deliberate disinformation to Dr Smith, who held a very strong animus against Mr Ruhan, but it is not necessary to reach a view on this.

126. It is relevant to note that Mr Stevens entered into a charge in Investec's favour over the shares in Euro Estates, and that the terms of the charge warranted that Mr Stevens was the legal and beneficial owner. I am satisfied that a similar charge was executed for the purposes of the Mood Facility by Mr Simon McNally, the sole registered shareowner of the borrower BTH1, even though it is common ground that Mr McNally was not the beneficial owner of those shares, that Mr Ruhan was and that this was Investec's understanding at the time. In these circumstances, and given the continued references in Investec's internal documents to Euro Estates being in some sense "Mr Ruhan's", I do not accept that Investec's understanding of the position must have changed. I think it likely that, notwithstanding its continuing understanding, Investec was content to proceed on the basis of the transaction documents as drafted, and instructed Fried Frank accordingly.

127. Mr McNally, acting for Mr Ruhan, wrote to Mr Stevens on 27 November 2007 attaching the documentation relating to the arrangement, which Mr McNally said he was prepared to discuss with Mr Nouril of Jones Day, on behalf of Mr Stevens. Mr Ruhan and Mr Stevens rely on the fact that Mr McNally – who I accept was part of Mr Ruhan's "inner

circle" at this time – was proceeding on the basis that Euro Estates was Mr Stevens' asset to pledge, and I accept that HPII's nominee case requires either that Mr McNally was ignorant of the nominee arrangement (which, given his close relationship with Mr Ruhan, including the control of Mr Ruhan's off-shore assets, is unlikely), or that Mr McNally knew of and was prepared to "play along" with the nominee arrangement.

128. In return for allowing the shares of Euro Estates to be used as security for the Mood Facility, Euro Estates stood to gain a payment of £2m for each of the six towers being constructed if they were sold (but not, as was the business plan of the Qatar Project, if they were rented out), plus a 2.5% profit share. It was also the evidence of Mr Ruhan and Mr Stevens at this trial that Mr Stevens was paid a further £500,000, although that was not mentioned by Mr Stevens in his 2014 witness statement when explaining the terms on which Euro Estates provided security for the Mood Facility (it being Mr Stevens' evidence that he "forgot"), and only emerged because the invoice was disclosed in an arbitration involving Mr Franek Sodzawiczny, Mr McNally, Mr Cooper and Dr Smith. This amount was charged as an "advisory fee" by Mr Stevens' company Value Telecom Limited ("**VTL**"), rather than by Euro Estates, but Mr Ruhan said Mr Stevens provided no advice and that this was really an arrangement fee (Day 7 page 63). Mr Stevens agreed (Day 9 pages 22-23). Mr Stevens accepted that the arrangement involved him pledging "extremely valuable security" and the vast majority of his wealth in support of the loan to Mr Ruhan. However, while Investec had the benefit of a charge over the assets of the Qatar Project as well as over Euro Estates, Mr Stevens did not seek a second charge over the Qatar assets, nor did he conduct any due diligence in relation to the Qatar Project.

129. The terms of the Mood Facility provided that the loan would become immediately repayable if the Kensington Hotels were sold. The significance of that obligation so far as Mr Stevens is concerned should not be under-estimated. On his, and Mr Ruhan's account, he had agreed to provide the security because his funds were tied up pending a sale of the Hyde Park Hotels. The effect of this provision, however, was to create a real risk that the liquidity benefits Mr Stevens would otherwise have obtained from a sale of the Kensington Hotels would be lost, or diminished, because the funds would have to be used to pay down the Mood Facility debt. For someone whose cash position had been sufficiently parlous that, on 14 August 2007, it had been necessary to seek a £100,000 advance from Mr Ruhan, this would have been a severe imposition.

130. Finally, Mr Pickering QC referred to the fact that one of the attachments to the Mood Facility which was signed on behalf of BTH1 as borrower and Euro Estates as a party providing security was a business plan produced by Investec which referred to Mr Ruhan's ownership of Cambulo Madeira and the Kensington Hotels. Mr Stevens described himself as "amazed, absolutely amazed, that this annex … passed by without having been picked up" (Day 9 page 6), although it is unclear whether the version which was sent to Mr Stevens for signature included this annex. Nor was this picked up by Mr McNally (or anyone else) on the BTH1 side.

131. It is convenient at this point to deal with one issue relied upon by Mr Kokelaar. He points to evidence given by Mr Stevens that over the period April to September 2007, he was putting together a consortium, of which Euro Estates formed part, in an attempt to acquire a real estate portfolio held by subsidiaries of Jelmoli Holding AG. Mr Kokelaar contends that Mr Stevens' willingness to involve Euro Estates in this business

is inconsistent with him holding his shares in that company as nominee for Mr Ruhan. As to this:

i) The only document produced which refers to Euro Estates in this context is a non-binding Memorandum of Understanding produced prior to 29 May 2007, which envisages it holding a 12.5% interest in certain of the property portfolios to be acquired.

ii) However, none of the parties to that document were named parties to the "subject to contract" offer made on 16 July 2007. The parties involved included the Qatar Islamic Bank.

iii) In April and August 2007, offers were submitted for the Kensington Hotels with which the Islamic Bank and Mr Al Thani, the former Prime Minister of Qatar, were associated, as in at least one case was one of the individuals linked to the Jelmoli project, a Mr Limido. Mr Limido is also someone mentioned in an email between Mr Stevens and Mr Ruhan of 5 August 2008 in relation to the Qatar Project, with Mr Stevens awaiting feedback from him. Mr Limido is also mentioned in other emails referring to potential investments in which both Mr Ruhan and Mr Stevens feature, at least one of which also had a Qatari element.

iv) In these circumstances, I do not feel able to draw any conclusions as to the nature of Mr Stevens' involvement in this project, and who else may or may not have been involved.

v) The only documents relating to the equally unsuccessful Risanamento bid is a letter sent by Mr Limido on behalf of CEO GroupeFinanciere Centuria of 21 April 2009 and a pro forma email in response. It is not possible to tell whether or not Mr Ruhan had any involvement in this proposal, or the extent of Euro Estates' proposed investment.

vi) HPII's case that Euro Estates or Cambulo Madeira acquired the Hyde Park Hotels as Mr Ruhan's nominee (see [15]-[16] above) does not preclude the possibility of Euro Estates holding other assets in Mr Stevens' interest.

132. A similar argument was advanced by reference to Mr Nouril's letter stating that Euro Estates was involved in the Infracom transaction in 2003, at a time when there is no suggestion that Mr Stevens was acting for Mr Ruhan. I was taken to no evidence as to what other assets (if any) Euro Estates may have held in and after February 2005. However, it is sufficient, for present purposes, to note that HPII's case is limited to the involvement of Cambulo Madeira in the acquisition of the Hyde Park Hotels and the proceeds of that involvement. HPII has advanced its nominee case in sufficiently wide terms to encompass the possibility that Euro Estates held or could hold other assets in Mr Stevens' interest.

*The effect of the evidence as to this period*

133. The effect of the evidence in relation to this period can be summarised as follows:

i) Mr Ruhan's prominent role in the correspondence with Thistle can be explained by his lengthy relationship with them and Thistle's desire that the purchaser

communicate through him, and in any event, Mr Ruhan was not involved in all interactions with Thistle.

ii) The communications between Minerva and Mr Ruhan suggest that Minerva saw Mr Ruhan as the key decision-maker on the Lancaster Gate sale, and the interactions of Mr Ruhan and Mr Stevens in relation to the transaction lend support to that interpretation. However, on at least one occasion, Mr Ruhan informed Minerva that he had no interest in Cambulo.

iii) The communications involving the agent Mr Lukas also proceed on the basis that it was Mr Ruhan who was the decision-maker in relation to the on-sale of the Hyde Park Hotels.

iv) Mr Ruhan took the lead role in relation to the bridging finance provided by Investec, who clearly understood the borrower to be Mr Ruhan's vehicle, although Mr Stevens does feature in some of these interactions. Later correspondence from Mr Ruhan to Investec characterised the transaction in the same way – as a deal with Mr Ruhan, and the communications between Mr Ruhan and Mr Stevens in relation to this funding also lend support to that interpretation.

v) The use of £1m of the proceeds of the sale of Lancaster Gate in the Canadian investment strongly suggests that the profit was Mr Ruhan's, as do Mr Ruhan's contemporaneous comments about the exchange loss (which were not credibly explained in cross-examination).

vi) There are communications between the CPC Group and Mr Ruhan which strongly suggest that they saw Mr Ruhan as their effective partner and decision-maker. However, documents show Mr Stevens' involvement in the joint venture, and some emails expressly state that it is Mr Stevens, and not Mr Ruhan, who owned Cambulo Madeira.

vii) There are communications involving potential purchasers of the Kensington Hotels which lend support to the view that it was Mr Ruhan, not Mr Stevens, who was the decision-maker so far as Cambulo Madeira's share is concerned, and many (but not all) of the communications between Mr Ruhan and Mr Stevens about potential purchasers also lend support to that interpretation.

viii) Mr Ruhan's evidence as to how the price paid by Cambulo Madeira to HPII came to be reduced from the £130m offered by ECD to the £125m floor of HPII's selling authority was inconsistent and unsatisfactory.

ix) No satisfactory explanation was offered by the Defendants for the central role which Mr Ruhan played in realising the goal of selling the Hyde Park Hotels at very substantial profit, with the attendant volume of work and stress involved, on an essentially unremunerated basis, nor had Mr Stevens revealed the extent of Mr Ruhan's role in his 2014 witness statement.

x) There is a surprising dearth of documentation relating to the 20% interest in Cambulo Madeira formalised in Mr Michael Stevens' favour in December 2007,

and I was left with the clear impression that I was not being given anything like the full picture.

xi) Many of Mr Ruhan's interactions with Mr Emson and Mr Pilbrow in their capacity as directors of the Cambulo Madeira Guernsey subsidiaries support the view that he was treated, and acted, as the principal of those companies, although the correspondence is not exclusively to that effect.

xii) The fact, terms and circumstances of the security provided, and loans made, by Euro Estates in support of Mr Ruhan's Qatar Project provide very strong support for the view that the interest held through Euro Estates in the Hyde Park Hotels and the subsequent share of the development profits, was Mr Ruhan's, not Mr Stevens', and that was clearly Investec's understanding from its dealings with Mr Ruhan.

xiii) The legal documents prepared for the purposes of the Mood Facility provided that Mr Stevens was the beneficial owner of Euro Estates although exchanges on the Investec side of the line suggest a different understanding or (in the case of Fried Frank) some uncertainty as to the arrangements between Mr Ruhan and Mr Stevens.

xiv) The unsuccessful commercial activity in which Euro Estates was involved in 2007 does not assist on the issue of who was the beneficial owner of the interest in the Hyde Park Hotels.

## The Period from the On-Sale of the Kensington Hotels

*The sale of the Kensington Hotels to De Vere*

134. On 22 January 2008, Mr Ruhan received an offer to purchase the Kensington Hotels for £320m from Abu Dhabi interests which he forwarded to Mr Stevens and Messrs Cooper and McNally. Mr Lukas, who anticipated claiming commission from any resultant sale, clearly understood Mr Ruhan and the Candy brothers to be the key decision-makers, telling Mr Kevill of Lancer Property Asset Management on 14 February 2008 that he thought "they, and that unusually for this deal being collective they, being Ruhan and the Candymen etc, will be fairly unforgiving if the sell by date is reached and gose [sic] by".

135. On 22 February 2008, CPHL agreed to sell the Kensington Hotels to De Vere for £320m. Mr Ruhan had told Investec that the deal was imminent, and on 18 February 2008 Mr Beare and Mr Austin told the Investec Credit Committee that "Andy Ruhan has agreed to sell the Kensington Hotels to Abu Dhabi Investment Co."

136. Completion took place on 25 March 2008. CPHL used the funds to discharge its loan accounts with CPal and CPark, who then made dividend payments to CPHL. CPHL declared interim dividends, leading to payments of £100.2m to CPC Group and £115.2m to Cambulo Madeira. Receipt of the price was confirmed by email to Mr Stevens and the members of the CPC Group management committee (but not Mr Ruhan). Mr Stevens immediately forwarded the email to Mr Ruhan without comment. Mr Ruhan sent it on to Messrs Cooper and McNally, stating; "I think we can afford a small celebration!!"

137. Mr Ruhan explained:

> "I had brought Anthony into the deal and he had made a profit on me. That reflected well on me. That's how I've always felt; if someone backing me makes a profit it is good for me because it makes me look good. Then those people will invest in other projects with me".

138. However, on Mr Ruhan's account, he had approached Mr Michael Stevens, not Mr Stevens, and it was Mr Stevens who had then approached him. In any event, I find it unlikely that Mr Ruhan would regard someone else's profit as a cause for celebration for him, still less for Messrs Cooper and McNally who looked after his off-shore assets. It may be for that reason that, in cross-examination, Mr Ruhan offered a more complex (and, in my view, carefully thought through) answer, which identified a direct monetary benefit to him through a reduction in Investec's profit commission on the Qatar Project (Day 7 pages 45 to 47). I am satisfied, however, that this is an ex post facto analysis, which did not feature in any of Mr Ruhan's witness statements, and was not one of the reasons for his instinctive, and informative, communication of 25 March 2008.

*The repayment of the Mood Facility*

139. The sale of the Kensington Hotels triggered an obligation to repay the Mood Facility to Investec (see [129] above). The amount received exceeded the outstanding amount of the facility. Mr Ruhan had exchanges with Investec as to what would happen with the balance (as Mr Wilson confirmed in an email of 20 March 2008). Mr McNally informed Mr Heilpern of Fried Frank on 25 March 2008 that the funds "would remain [with Investec] to the account of Euro Estates which will then arrange for instructions to be provided to you in terms of where these funds should be sent". Mr Stevens – who, it will be recalled, had been sufficiently in need of cash in August 2007 to request a £100,000 advance from Mr Ruhan – does not appear to have been consulted. It was clearly the understanding of Mr Beare and Ms Toora of Investec that the surplus, which was to be paid into an account which Euro Estates was to open with Investec, was Mr Ruhan's money, and that it would be available to Investec to secure other borrowings Mr Ruhan had taken out. They produced a memorandum for the Investec Credit Committee on 25 March 2008 running through the recent history of Mr Ruhan's dealings with Investec which stated:

> "The total funds which Investec expect to see flowing in will be circa £100m of which Andy Ruhan's share is 80% - £80m. Of the £80m, £72m will be used to fully redeem the Investec Qatar Facility – leaving an amount of £8m which will sit on a deposit account. We have an 'all monies' charge over Euro Estates".

140. Mr Ruhan wanted to increase the loan facility available for the Sentrum data centre in Watford by £9.1m and the understanding within Investec (at least of Mr Beare and Ms Toora) was that the surplus cash would provide security for that increase. An Investec memorandum of 27 March 2008 stated:

> "We now have confirmation of the funds which AR is due for the sale of the UK security behind the Qatar transaction (Trio) - £91.75m. After settlement of the Qatar debt, £20.4m will sit on a `cash backed' deposit account and will form the security for the increase of £9.1m".

The fact that Investec understood that the "surplus proceeds" would be made available to secure further lending to Mr Ruhan is noteworthy, although it is unclear whether, and if so in what amount, any such further loan was provided. On 2 April 2008, Investec informed Mr McNally that the amount of the surplus was £19.9m which was held in a blocked account as security for Sentrum "for the time being". On 15 April 2008, Mr McNally asked Investec to transfer all the surplus funds save for £9m to Bridgehouse Law's client account.

141. So far as the Mood Facility itself is concerned, Euro Estates assumed Investec's position as lender to the Qatar Project, executing a new facility "as of" 2 April 2008 ("**the Euro Estates Facility**"), and by the end of April or May 2008, the security which Investec had enjoyed over the Qatar assets was renewed for Euro Estates' benefit. Writing to Mr Ruhan on 14 March 2010, Mr Stevens was unsure whether or not Euro Estates had taken over the benefit of the Investec security, writing "I believe that euro estates basically took over the security pack that had been put in to place for investec end 2007. If so then….

142. The parties are agreed that, in the event, there was some £19.9m left over from Euro Estates' share of the proceeds of sale of the Kensington Hotels after paying off the Mood Facility, and that this amount was not returned to Euro Estates but used for the purposes of Mr Ruhan's businesses. Mr Stevens gave evidence that this was by way of a further (wholly unsecured) loan by Euro Estates to the Qatar Projects ("**the Further Euro Estates Loan**"):

> "I was told [it] was needed for working capital … Beyond being used for working capital I do not know what specifically they were used for as that was something the borrower had done".

I was taken to no documents relating to the circumstances in which any such loan was sought, or what was said about what the funds were to be used for.

143. The effect of Euro Estates' discharge of the Mood Facility, and the Further Euro Estates Loan is that the entirety of Euro Estates' return from the Kensington Hotels was committed to Mr Ruhan's Qatar Project. It is convenient, at this point to turn to a communication of 30 September 2012 from Mr Ruhan to the Crown Prince of Qatar making exactly that point. Mr Ruhan wrote:

> "My family office invests globally and I recently sold off my data centre business in London for US$1,300,000,000. More relevant for Qatar, when I sold the 37 Thistle Hotels I owned in London to the Abu Dhabi Royal family, instead of investing in Abi Dhabi, I invested a substantial amount from this sale in Qatar. Frankly I believe in the opportunities and legal system in Qatar".

Mr Ruhan said that this communication was "completely misleading" and intended to mislead (Day 7 pages 77-78) so far as it concerned the ownership of the Hyde Park Hotels. The Defendants suggested that this email in fact supported their case because "if there really was a dishonest conspiracy which Ds had worked to keep secret for many years, it is highly improbable that Mr Ruhan would have let the cat out of the bag in a letter to a public figure". Taken to its logical extreme, that might suggest that the more documents which Mr Ruhan sent which were consistent with the nominee allegation, the more inherently improbable the allegation was. I am satisfied that that

"Through the Looking Glass" submission has no weight here. The letter was sent over 6 years after the Cambulo Madeira Transaction, delivered by hand to someone who might reasonably be expected to maintain stringent standards of privacy, and at a time when HPII had been dissolved.

144. Putting the sparsely documented background to the Further Euro Estates Loan aside, Mr Stevens' decision to commit a further £19.9m to support Mr Ruhan's business at this time is also very surprising. Mr Ruhan had explained Mr Stevens' decision to allow his share of Cambulo Madeira to be used as security for the Mood Facility because the funds were tied up, a potential sale of the Kensington Hotels was up to two years away and this offered an opportunity to get some return on what Mr Ruhan described as "stranded" assets (Day 6 page 173). However, on Mr Ruhan's and Mr Stevens' case, the £19.9m was very much afloat. The Further Euro Estates Loan becomes even more surprising when regard is had to the fact that Mr Stevens was sufficiently short of cash some 9 months before to have requested and received a £100,000 advance from Mr Ruhan (see [120]). Indeed in an answer in re-examination (Day 7 page 144) Mr Ruhan suggested that once the Kensington Hotels had been sold, Mr Stevens was reluctant to be required to use part of the proceeds to repay the Mood Facility:

> "I think they were looking for ways they could get out of it, initially. And there wasn't a way that they were going to get out of it, which we made clear to them, that's the document they'd signed".

If that evidence is correct, then it is difficult to identify a reason why Mr Stevens should have voluntarily agreed to lock in the remainder of Euro Estates' profit on the Kensington Hotels to Mr Ruhan's Qatar Project.

145. Further, exchanges between Mr Stevens and Mr Ruhan a year later do not suggest that Mr Stevens' financial position was so strong that he could lightly afford to increase his lending to Mr Ruhan and by such a significant sum. On 8 June 2009, Mr Stevens sent what might be thought to be a heartfelt email to Mr Ruhan in relation to sums due from one of Mr Ruhan's companies (BTH1) to Mr Stevens' vehicle, VTL:

> "Andy In Q4 2007 I agreed for VTL to participate in the Qatar BTH1 venture. My decision was based not only on the merits of the projected deal but mainly on my trust in you and what I believed to be the friendship and partnership that had come exist between us over the years. Quite frankly your attitude and actions towards me over the past year leave me dumbfounded. I have been obliged to chase you incessantly to get contracts signed (9 months), monies you cashed in for both of us (5 months) and the issues outlined below which are still outstanding".

Those issues included outstanding fees to VTL totalling under £200,000, and Mr Stevens also referred to an outstanding loan *Mr Ruhan had made to him* which had yet to be repaid ("with reference to the complaint you made about the delay in settlement of the loan you made to me, I would like to remind you that you cashed in the refinancing from Investec in May 2008 and chose to transfer VTL's share of $1 million only in September 2008"). Mr Stevens concluded:

> "Please prove me wrong by reverting to a behaviour in line with that of the friend I greatly respect".

146. The tone and content of this email do not fit easily into a commercial context in which Mr Stevens has allowed what, on his own evidence, was the overwhelming majority of his financial assets to be used to fund Mr Ruhan's business. Mr Stevens' reaction to Mr Ruhan's perceived failure to pay relatively small amounts (and the tone of an email of 2 November 2009 relating to a failure to provide information required by VTL) falls to be contrasted with the complete lack of any effort on his part to secure the repayment of these loans: see [147]-[151] below.

*The repayment of the Euro Estates Facility and the Further Euro Estates Loan*

147. It is common ground that, notwithstanding a number of considerable difficulties which beset the project, between 2007 and 2010, Mr Ruhan received $196,364,148 back from funds invested in Qatar Project. However, there are no documents passing between Mr Ruhan and Mr Stevens or their representatives from 2008 to 2011 in which the outstanding amounts under the Euro Estates Facility and the Further Euro Estates Loan were raised. In their joint annex on the nominee issue, the Defendants challenge this assertion, referring to six documents, all from 2009, in which it is said that "Mr Stevens expressed annoyance about the Qatar situation and/or in which he chased Mr Ruhan for information". However, those emails relied upon which can legitimately be described as containing complaints did not address the default on the sterling loan made by Euro Estates, but the failure to pay and provide signed agreements *for VTL* in respect of the instalments of £500,000 discussed at [128] above.

148. It was Mr Stevens' evidence that the loans fell into default in 2009 and 2011, but that he:

> "was unwilling for Euro Estates to enforce its rights as a lender and foreclose because I did not want to take on the burden of any eventual litigation in Qatar and I thought my interests were better served by rolling over the loans to enable Mr Ruhan and McNally and Mr Cooper to come up with a solution".

149. Mr Stevens gave evidence that it was in the first quarter of 2012 that Mr Ruhan and Mr Ruhan's advisers, Messrs Cooper and McNally, approached him about the outstanding debt "with a view to reaching a settlement on the outstanding loans under which Euro Estates would receive a return of its capital". That approach, if it took place, is undocumented. The Defendants also point to Euro Estates' participation in a transfer of assets from BTH1 to Legion Recoveries Limited on 2 April 2012. The only document referring to this event is the concluded debenture, and it is not, therefore, possible to test Mr Stevens' evidence that he insisted on this document being entered into. To the extent that his consent was in fact required, it is surprising that he did not attempt to leverage this to his advantage (for example by seeking payment of at least part of the allegedly outstanding debt). It is not possible to speculate why a new debenture was produced at this point, and whether it was for reasons connected with the ongoing disputes between the participants to the Qatar Project. The document does not appear to have been prepared with any great care: an Investec debenture appears to have been hastily adapted, with numerous references to Investec left in. There is no evidence of Euro Estates having taken any legal advice. Impressive as the tradition of outstanding law teaching at that institution undoubtedly is, neither this, nor the absence of any similar involvement of legal advisers on Mr Stevens' part in relation to the TSA (see [152]-[153] below) are adequately explained, as the Defendants sought to do, by the fact that "Mr Stevens studied law at Downing College, Cambridge".

150. While the amounts said to be due from Mr Ruhan's entities to Euro Estates remained unpaid, Mr Stevens received a loan from one of Mr Ruhan's companies – Unicorn Worldwide Holdings Limited – of £1 million on 15 August 2012. Mr Stevens picked up the associated legal costs of £1,500. The fact of that loan rather reinforces the sense of the precariousness of Mr Stevens' financial position. On 17 and 18 November 2010, Mr Stevens had made arrangements for Mr McNally to pay for the costs of liquidating Cambulo Madeira, which Mr McNally did. Mr Stevens said that he asked Mr McNally to pay this amount at a time when he was "extremely short of cash and … needed cash on a variety of fronts" (Day 9 page 26). If that is correct (rather than Mr McNally being asked to pay because Cambulo Madeira was really Mr Ruhan's company), then Mr Stevens' financial position must have been very difficult indeed. These events make Mr Stevens' failure to be more pro-active in recovering the very substantial sums said to be due to Euro Estates all the more surprising. Mr Stevens said that "the loan of £1m made to me personally, at that stage, by Unicorn was, in effect, an advance, which I needed to see me through, in financial terms, to the point at which I made a recovery", but, if so, it is difficult to see why it took the form of an interest-bearing loan at all, as opposed to a (very) partial repayment. In cross-examination, Mr Stevens said the £1m was in effect requested as a "litmus test" of whether Mr Ruhan would make good on promises to repay the Euro Estates funding, which was documented as a loan for Mr Ruhan's purposes (Day 9 page 30). However, given what was (on Mr Stevens' account) Mr Ruhan's long-standing failure to make good on the Euro Estates funding, it is surprising that Mr Stevens would have been willing to sign up to a document which, at least on its face, imposed significant repayment and interest obligations on him. Reliance is also placed on the fact that Mr Cooper expressed himself "reluctant" to make the payment in an email of 16 August 2012. It is not possible to determine, however, what the reason for any such reluctance was – the email could, for example, have related to unhappiness at the amount Mr Stevens was receiving for providing similar services to those Mr Cooper and Mr McNally were providing or that it was felt that August 2012 was the wrong time to make such a payment. For that reason, it cannot be said (as the Defendants do) that the email "makes no sense" on HPII's case.

151. Documents relating to the outstanding amounts do not appear until October 2012, and the first such document is sent by Mr Cooper to Mr Stevens on 21 October 2012. Mr Cooper stated:

> "I refer to our recent discussions regarding the Qatar Loan that EE made in 2008. As you know, our investment in The Pearl Development in Qatar has proved to be unsuccessful (disastrous is another way to describe them) and we are now in dispute with both of our partners. Litigation is ongoing and we are unsure whether we will make a recovery in whole or in part. As you know Simon and I are the owners of the Qatar investments. We are both concerned by the fact that we have been unable to pay you. Fortunately we are now in a position where we can give this consideration at least. As agreed I will have my office produce a redemption statement that calculates the outstanding capital which I hope to let you have early next week. After you have had that let's have another discussion on the way forward."

152. The statement that Mr Cooper and Mr McNally were "the owners of the Qatar investments" was obviously substantially false, and would have been known by Mr Ruhan, Mr Cooper, Mr McNally and Mr Stevens to be so. That statement did, however,

reflect the position which Mr Ruhan (on his evidence at Mr Cooper and Mr McNally's suggestion) was to take in his Defence served in the Orb Proceedings in April 2013. That suggests that the letter was written at least with one eye on what third parties might take from it, and there are other passages which, in the present context, might be regarded as indicia of a letter written to convey a particular impression for the benefit of third party readers (the two "as you knows" and the two references to recent discussions or agreements). On 27 October 2012, Mr Cooper sent another email to Mr Stevens referring, once again to "our discussions next week", and stating that Mr McNally would be drafting a settlement agreement. Mr Stevens was asked to identify the corporate vehicle which would be party to the settlement agreement, and he said he would. The draft was sent through to Mr Stevens on 29 October 2012, and on 8 and 9 November 2012 Mr Cooper sent Mr Stevens emails referring to a meeting on 8 November 2012 to explain the settlement. There is nothing to suggest Mr Stevens benefited from any legal input so far as the settlement is concerned.

153. On 14 November 2012, Messrs Cooper and McNally, Mr Stevens, and entities ostensibly connected to them, entered into a document called the "Termination and Settlement Agreement" ("**the TSA**"). Pursuant to the TSA, Mr Stevens (as the ostensible owner of Euro Estates) agreed to accept £92m in full and final settlement of the Euro Estates Facility and the Further Euro Estates Loan. Mr Stevens said that when agreeing to accept £92m, he was unaware that Mr Ruhan had made any recoveries from the Qatar Project (evidence which was important to the position of Mr Ruhan and Mr Stevens so far as the Geneva Settlement of April 2016 is concerned, it being suggested that Mr Stevens acquired further rights from Mr Ruhan at that point because he discovered that Mr Ruhan had made very substantial recoveries from the Qatar Project at the time of the £92m settlement which Mr Stevens had not been told about: see [168] below). However, Recital (F) of the TSA referred to the fact that "certain recoveries of funds" had been made from the Qatar Project but "used elsewhere by Unicorn and others in the control of the individuals".

154. The payment of the £92m was effected by Messrs Cooper and McNally paying this amount to a company under their own control, Legion Management Corporation ("**LMC**") on 15 November 2012, and LMC was then transferred into Mr Stevens' control, and ultimately his ownership. The fact that Mr Stevens was unable to point to a bank account of a company in his control into which the £92m could be paid is surprising, given his evidence as to his extensive and substantial business career. While the Defendants point to the fact that Mr Cooper informed Mr Stevens on 13 December 2012 that they intended to charge for their services for so long as the money remained with LMC, this may have reflected a desire by Messrs Cooper and McNally to extract further remuneration for work being done on Mr Ruhan's behalf or an email written (as the original email of 21 October 2012 had clearly been: see [152] above) with an eye to a third party subsequently reviewing these events.

155. HPII contends that the TSA was a concocted agreement intended to remove funds from the Arena Settlement in circumstances in which it was clear that the Orb Claimants had set their sights on them. Mr Pickering QC points to the fact that the correspondence relating to the Euro Estate loans originated after the commencement of the Orb Proceedings (see [165] below), which itself came after substantial sums had been paid into the Arena Settlement following the sale of Mr Ruhan's Sentrum business to Digital Stout Holdings LLC on 26 June 2012 (generating a surplus of £220m, of which some

£160m found its way into the Arena Settlement). Mr Ruhan said in response that if he had been looking to move money out of the Arena Settlement, it would have made sense for him to have paid Euro Estates the largest amount which could be justified. I have not found it necessary to reach a decision on this issue. There may have been any number of reasons why Mr Ruhan would not have wanted all of the money to pass from the Arena Settlement at that point.

156. The £92m paid to LMC was applied towards a number of projects, and HPII contends that it is clear that the funds, or a substantial portion of them, were applied to Mr Ruhan's purposes and benefit, not Mr Stevens'. I propose to limit my consideration of the use to which the £92m was put to those applications of funds raised in the course of cross-examination.

157. First, there is the commitment of funds made to the Lotus F1 racing team and its owner Gravity Motorsports SARL ("**Gravity**"). On 8 November 2012 – before the TSA was signed on 14 November – a Mr Mahne of a company called Genii Capital emailed Mr Ruhan, Mr Stevens and two gentlemen called Mr Lopez and Mr Lux with a summary of a deal which would involve a £35m loan being made by an "AES [Mr Stevens'] entity to be defined". That £35m was transferred by a company called Grenda, established in September 2012 and, which Mr Stevens says is his, to Gravity on 15 November 2012, the same day on which the £92m was paid to LMC under the TSA. A further £15m was paid on 20 March 2013 and £3.4m on 12 September 2013. Mr Stevens said he advanced the £35m for business reasons. He accepted that he had no interest in motor racing as such. Mr Ruhan, who had raced sports cars, did have such an interest (as Mr Stevens confirmed), and was described by Mr Lux as "passionate" about motor sport. However, I do not regard that of itself as of significant probative value. Mr Ruhan described the investment in Lotus as a very bad commercial decision, referring to the longstanding joke in motor-racing circles that Lotus was an acronym for "Lots of trouble – usually serious".

158. The same cannot be said of the correspondence relating to the investment, which gives the clear (albeit not wholly consistent) impression that it was Mr Ruhan who was, as it were, in the driving seat:

i) Communications from Mr Stevens to Mr Ruhan (for example an email of 15 November 2012) give a clear impression of Mr Stevens reporting to Mr Ruhan on the progress of Mr Ruhan's transaction so far as the investment in Gravity was concerned:

> "All points including tax have been resolved. We are slowly signing off all documents …. I will place the funds on deposit until Monday".

Mr Stevens continued to provide Mr Ruhan with regular updates throughout February and March.

ii) Mr Andrew Carrier of Bridgehouse Law sent an email to Mr Stevens seeking payment of invoices relating to legal work done for Grenda (the investing vehicle in Gravity) for £19,593.75 plus VAT and disbursements, with chasers on 27 February and 6 March 2013. Mr Stevens asked Mr Ruhan on 6 March whether he could "settle this which will be circa £21,000 in all?" to which Mr Ruhan replied "No". It is difficult to interpret this as anything other than a

communication from Mr Stevens as a subordinate seeking instructions from his principal. Mr Stevens' evidence that he sent this email "in frustration" because Bridgehouse Law were seeking to bill him for fees which were for Mr Ruhan's account (Day 9 page 96) is impossible to reconcile with an exchange in which Mr Stevens *asks* if he can pay the bill and Mr Ruhan says *no*.

iii) On 19 March 2013, a Ms Clements of the law firm Carey Olsen emailed Mr Park of Genii and Mr Stevens regarding the proposed incorporation of a Jersey company in connection with the Lotus investment. A request was made for "certified copies of Andrew J Ruhan's passport and utility bill from the past three months showing Andrew J Ruhan's permanent residential address", together with similar "Know Your Client" information for Mr Lux and Mr Lopez (but not for Mr Stevens). Far from saying "what on earth does this have to do with Mr Ruhan", Mr Stevens forwarded the documents to Mr Ruhan saying, "please see below they need your key kyc documents".

iv) On 26 March 2013, Mr Ruhan prepared an email (which was incomplete and not sent) to Mr Stevens stating, "As discussed, I would like to charge a fee for the very significant profit made by your interests in the recent ….." In what appears to be a second attempt at a communication to the same effect, on 4 April 2013 Mr Ruhan sent Mr Stevens an email which began "Further to our recent discussion in respect of the fees payable for advice I provided in respect of your recent investment in Gravity" in which Mr Ruhan said he had been offered 2.5% of £15m and asked for 3%. Mr Stevens accepted by return. Mr Ruhan and Mr Stevens can point to this exchange as a communication consistent with Mr Stevens being the investor and Mr Ruhan charging a fee for his assistance, albeit the correspondence could have been written to provide an ostensible (but untruthful) explanation for the transfer of funds from Grenda to Mr Ruhan.

v) It was Mr Ruhan, not Mr Stevens, who was placed on the board of directors of Gravity and Lotus F1 Team Limited, of which Mr Ruhan was ultimately co-chair.

vi) Mr Lux sent Mr Ruhan and Mr Lopez an email about Gravity on 10 February 2014 which clearly treats Mr Ruhan, not Mr Stevens, as the principal and investor:

> "We all work very hard however like to enjoy our lifes, we share the passion of motor-racing ..
>
> As discussed with Andy last night I believe that the real partnership will only work if interests are aligned …"

The email discusses what each of Mr Lux, Mr Ruhan and Mr Lopez can bring to their partnership, stating "From Andy's side he would bring his F1 shares as well as the debt" and a potential New York real estate project. The email also makes it clear that Mr Stevens was *not* one of the partners:

> "Why did I exclude Anthony into this partnership. Well I did not. I believe that Anthony is a great asset to Genii. The only negative point about Anthony is that he likes to put himself too much in the spotlight …. That's

> the reason I foresee to have founding partners, the 3 of us, and other partners (Anthony, Christian …) The founding partners have put up the money. We have taken the risk. Even if Andy's risk had been covered by PG … there was still a risk if everything going down".

The email does, however, refer to a proposal by "Andy and Anthony" to bring Euro 10 million to the table.

vii) Mr Ruhan did not challenge that characterisation of his or Mr Stevens' roles in his response, although he does use the first person plural when discussing the Grenda contribution:

> "Our loans to you represent a significant part of our portfolio. Its failure to be returned has caused massive issues which I have never moaned about".

viii) Mr Ruhan sent a copy of Mr Lux's email to Mr Stevens on receipt. Mr Stevens does not appear to have responded.

159. Second, an investment relating to the New York property market through a vehicle known as Atlantic 57 LLC. It was Mr Ruhan's and Mr Stevens' evidence that this deal, in which a New York businessman called Mr Arthur Becker was also involved, was an investment by Mr Stevens through Grenda, and not by Mr Ruhan, whose role was limited to introducing Mr Stevens and Mr Becker. The correspondence suggests otherwise. On 15 February 2013, Mr Stevens emailed Eric Lux and Gerard Lopez in relation to the Atlantic 57 investment stating, "Andy and I … are minded to commit $25m+". On 7 March 2013, Mr Stevens emailed Mr Ruhan in relation to the investment with a suggestion as to where Phoenix (on Mr Ruhan's and Mr Stevens' evidence, Mr Stevens' company) should send funds, and that the funds should be transferred to the 57th Street deal (on Mr Ruhan and Mr Stevens' evidence, Mr Stevens' deal). Mr Ruhan passed that communication onto Mr Becker saying, "he is thinking the same as me". Mr Ruhan said he had been involved in the deal "insofar as I've sort of connected Mr Becker and Mr Stevens" (Day 7 page 120).

160. Mr Ruhan contacted Mr Nicholas Candy on the subject of the New York investment on 25 March 2013 ("I have just engaged on the New York project which may be of interest to you"). Mr Christian Candy reverted to Mr Ruhan on the proposal, saying Mr Dan Smith of his team would take a look at the project. Mr Ruhan informed Mr Candy that Mr Smith should "speak with Torsten Hartmann in my office … who is fully versed on the subject". While Mr Stevens is involved in a later email with the Candys about the New York project, he got Mr Ruhan to approve its terms first. Mr Stevens later wrote to Mr Ruhan about the project in May 2013 asking, "on what terms do you want to syndicate the $25m?" Mr Ruhan replied, "Yet to decide. Need to get the Chinese done first". I accept that the $25m to be syndicated may well have been a reference to something other than the $25m invested by Grenda (it would appear that there was a $100m investment, of which $25m had come from Grenda, $50m was to come from the Chinese leaving $25m to be syndicated). I am unable to accept Mr Stevens' evidence that this email was referring to a "completely different part" of the investment to that in which Grenda had invested just under $25m (Day 9 pages 90-91). The $25m equity referred to as having been contributed by Mr Ruhan's company Atlantic is clearly that funded by Grenda. Further, the email from Mr Stevens to Mr Ruhan of 23 June 2013 in relation to 57th Street referred to syndicating "our $25m position". All

these emails strongly suggest that, contrary to Mr Ruhan's and Mr Stevens' evidence, Mr Ruhan was an investor in this project, not simply someone who had introduced an investment opportunity to Mr Stevens. Finally, Mr Ruhan described himself in an email of 20 May 2014 as having "a deep understanding of the project having been involved since its inception two years ago", and described the structure of the deal as "we lent monies into the project through our US vehicle Atlantic". This is not consistent with Mr Ruhan's evidence that he had a limited introductory role at the outset.

161. In opening and closing submissions Mr Pickering QC relied upon certain other applications of the £92m, some of which were only explored in cross-examination with Mr Stevens, and others, not at all. So far as those matters put to Mr Stevens are concerned, it is appropriate to consider Mr Stevens' evidence as to his reasons for entering into those transactions (something of which only he and not Mr Ruhan, could speak). Despite, on his own evidence, having waited nearly 4 years to recover the Euro Estates funding from Mr Ruhan:

i) On 29 November 2012, a few days after the TSA was signed, Mr Stevens says that he agreed to lend several million pounds to Mr Ruhan so he could acquire shares in a German bank. The unsatisfactory nature of Mr Stevens' explanation as to why he should make such a loan requires no further comment:

> "He was a very wealthy gentleman so he asked me if I could lend him the money" (Day 9 page 45).

ii) On 19 December 2012, a month after receiving the £92m, Mr Stevens lent £32m on a short-term basis back to Mr Ruhan for the purposes of a transaction with BAE which was entered into at very short notice and without the involvement of independent legal advisers on Mr Stevens' side, on the basis of documents drawn up by Mr McNally.

162. The Defendants contended that it is not open to HPII to advance any case in relation to the use made of the £92m because:

i) It only put the Lotus (£54.5m) and New York investments ($25- $24.7m) to both witnesses.

ii) The allegations relating to the investments in NordFinanz (£5.36m), BAE (£32m) and Greensill (A$ 5.6m) were only put to Mr Stevens.

iii) It did not put the pleaded allegations relating to Hawaii Biofuels/ Emery Refinement (£5m and $6.5m), Rurelec (some £6.8m) and miscellaneous small investments at all.

iv) The allegations concerning Capcom, which were put only to Mr Stevens, had not been pleaded.

163. However, there was no suggestion by either Defendant that those transactions which were put to both Defendants stood in a special position, such that any findings in relation to those transactions had no evidential implications for the status of the £92m as a whole. The investments put to both Defendants were substantial investments and I am satisfied were sufficient, in a manner proportionate to the time available, fairly to test

and respond to HPII's case as to the £92m as a whole. It is clear that a party alleging fraud is not required to put every ground for disbelieving a witness's evidence in cross-examination (Chen v Ng [2017] UKPC 27, [52]). In any event, in reaching my conclusions in this case, I have only considered those matters which were put.

*The effect of the evidence as to this period*

164. The effect of the evidence relating to this period can be summarised as follows:

i) Mr Ruhan's involvement in the immediate run-up to and aftermath of the sale of the Kensington Hotels to De Vere provides some support for HPII's nominee case.

ii) The treatment of Euro Estates' share of the profits, and in particular the amount in excess of the sum required to repay the Mood Facility, provide very strong support for HPII's case.

iii) Mr Ruhan's letter to the Crown Prince of Qatar also strongly supports HPII's case, and Mr Ruhan was unable to offer a credible explanation for it.

iv) The contrast between Mr Stevens' actions in relation to the (relatively small) amounts due to VTL, and the very substantial amount which, on the Defendants' case, was due to Euro Estates, provides very strong evidence in support of HPII's case, and Mr Stevens had no satisfactory explanation for his inactivity in relation to the sums allegedly outstanding under the Euro Estates loans.

v) The documentation and evidence relating to the conclusion of the TSA suggests that it was not an arms-length agreement between two principals to settle a commercial dispute (as the Defendants contend), although there is not sufficient evidence for me to conclude that the timing of the arrangement was motivated by the Orb Proceedings.

vi) The payment of the £92m to LMC, and the subsequent use of those funds in relation to the Lotus and New York investments, provide very strong support for HPII's case that the £92m was treated as Mr Ruhan's asset, not Mr Stevens'.

**The Orb Proceedings and the Geneva Settlement**

165. Dr Smith was sentenced to imprisonment for the theft from Izodia, and made subject to a confiscation order of £41m. He was released from prison in 2010, and thereafter began to take steps with a view to bringing a claim against Mr Ruhan arising out of an oral profit-sharing agreement alleged to have been reached with Mr Ruhan in 2003 in relation to the Orb hotel portfolio. The Orb Claimants sent a letter before action to Mr Ruhan on 28 June 2012 and commenced proceedings against Mr Ruhan on 29 October 2012. Particulars of Claim were served on 12 November 2012.

166. As outlined in the Directed Trial Judgment, Mr Ruhan had initially served a defence denying that he held any beneficial interest in the Arena Settlement. Mr Ruhan gave evidence that he had advanced this plea on the basis of advice from Mr Cooper and Mr McNally, and that he believed "beneficial interest" was a legal term of art (Day 7 pages 90 to 92). He denied that he was attempting to mislead anyone through this defence,

although he accepted it was "potentially misleading", and apologised for it in his witness statement served in the action. Based on my assessment of Mr Ruhan, who is a shrewd, knowledgeable and tactically aware individual, I am satisfied that he fully appreciated that this defence gave a misleading impression of his relationship to the Arena Settlement, and that he was content to do so for strategic purposes. In short, that part of the Defence in the Orb Proceedings was advanced on what Mr Ruhan knew to be a dishonest basis.

167. However, after he became aware of the Isle of Man Settlement, pursuant to which Messrs Cooper and McNally transferred a large number of assets held in the Arena Settlement or otherwise held on trust for Mr Ruhan to the control of Dr Smith, Mr Ruhan sought to serve an amended defence in which he admitted his interest in the (now transferred) assets, and counterclaimed for their return. For their part, the Orb Claimants sought to bring proceedings and obtain freezing order relief against Mr Stevens on the basis that his dealings with the Hyde Park Hotels were undertaken as Mr Ruhan's nominee, and that the £92m paid to LMC on 15 November 2012 represented the traceable proceeds of profits made from the sale of the Hyde Park Hotels. An initial attempt to bring those claims against Mr Stevens in the Isle of Man was not pursued, and an application was made to join him to the proceedings between the Orb Claimants and Mr Ruhan. The Orb Claimants served their evidence in support of that application on 4 June 2014, and Mr Stevens served a lengthy statement in response in November 2014. That application, together with Mr Ruhan's application to amend his defence and to bring his counterclaim, was heard by Mr Justice Cooke in February 2015. He rejected the Orb Claimants' application to join Mr Stevens, and permitted Mr Ruhan to make the amendments.

168. It is the evidence of Mr Ruhan and Mr Stevens that at some point, Mr Stevens came to learn that he had been misled by Mr Ruhan in the run-up to the TSA (see [153]), and that, far from having received no, or no significant, return from the Qatar Project as Mr Stevens had been led to believe, Mr Ruhan had made very substantial recoveries. That revelation is said to have culminated in a further settlement between Mr Ruhan and Mr Stevens, which had the effect that such rights as were obtained from the settlement of the ongoing dispute between Mr Ruhan and the Orb Claimants (the so-called Geneva Settlement addressed at [180] below) went to Mr Stevens, not Mr Ruhan.

169. Initially, Mr Stevens' evidence was not entirely clear as to when he says that he found out that Mr Ruhan had misled him as to the amounts he had recovered from the Qatar Project. His first witness statement (of 8 January 2021) suggested January 2015. However, the difficulty Mr Stevens faced was that in November 2014, he prepared and filed a witness statement for the purposes of the hearing before Mr Justice Cooke referred to at [167] above in which he described Mr Ruhan as a "shrewd businessman, someone who seeks to honour his commitments". That evidence was not corrected and formed part of Mr Stevens' case at the February 2015 hearing. When cross-examined about this at the Directed Trial in February 2021, it became Mr Stevens' evidence that while the documents containing the information as to Mr Ruhan's recoveries from the Qatar Project came into the possession of his legal team in 2014 and January 2015, that information was not read or absorbed until *after* the February 2015 hearing before Mr Justice Cooke at which his November 2014 witness statement was relied upon:

> "So after those February hearings and on the back of going through the documents and everything else, that is when I came to find out, drilling down and reading

> Dawna Stickler's … witness statements and exhibits et cetera. That is when I found out".

170. Mr Stevens was very effectively cross-examined by Mr Hodge on this issue:

i) It was suggested that Mr Stevens must have read the material filed by the Orb Claimants (both in the English proceedings in June 2014 and in the Isle of Man application when those papers reached Mr Stevens' lawyers in January 2015) very carefully (not least, in the case of the former, when preparing his own lengthy responsive statement), from which it was apparent that more than $100m had been returned to Mr Ruhan from the Qatar Project. Mr Stevens said neither he nor his legal team had picked this up, their attention being focussed on other issues.

ii) Mr Stevens confirmed he had read his counsel's skeleton for the February 2015 hearing (Day 9 page 113 to 114). That skeleton set out in terms the fact that Mr Ruhan had made substantial recoveries from the Qatar Project when complaining about the Orb Claimants' failure to bring relevant matters to the court's attention:

> > "Equally the court has not been informed, although this formed part of the evidence in the Isle of Man, that Unicorn, the company which the claimants now control, in fact recovered $157.364 million for the Qatar project between 2009 and 1 March 2011, in other words the traceable proceeds of the assets acquired in Qatar were transferred to Unicorn which the claimants have in their control".

> When questioned about this passage, Mr Stevens said this didn't "click" with him at the time.

171. There were no documents in the trial bundle in which Mr Stevens complained to Mr Ruhan about misleading him as to the recoveries made from the Qatar Project in the period running up to the TSA, and in which he sought (as he put it in evidence) to "set aside" the TSA. Such documentation as is before the court was generated for the purpose of the negotiations which took place between the opposing sides of the Orb Proceedings to settle the dispute. It is HPII's case that Mr Stevens was acting as Mr Ruhan's nominee in so far as he or entities connected with him acquired any rights as part of the eventual settlement of the Orb Claimants-Ruhan dispute.

172. On 25 April 2015, Mr Stevens' then-lawyers, Akin Gump, sent a "without prejudice" email to Stewarts, the solicitors for the Orb Claimants. That email was disclosed by Phoenix and Minardi and included within the trial bundles in the Directed Trial, although I was not taken to it in evidence or submission. It was also disclosed by Mr Ruhan in these proceedings. Mr Stevens referred to the email in his evidence in this case, when challenged that there was no document in which his supposed disputes with Mr Ruhan about the TSA had featured. After the conclusion of the evidence, Mr Stevens' legal team put the email into the trial bundles. HPII made it clear that they did not object, but notified the Orb Claimants, two of whom (Messrs Thomas and Taylor) objected to any attempt to refer to the document.

173. I concluded that, in the circumstances of this case, it was appropriate for me to consider that part of this communication which records what Mr Stevens was saying was the basis of his claim against Mr Ruhan, but to do so on a basis which would allow Messrs

Thomas and Taylor the opportunity to object to any reference to the material before any final judgment was handed down:

i) In terms of its immediate *subject-matter* (purported claims by Mr Stevens against Mr Ruhan), this is material in which the Orb Claimants had no right of confidentiality.

ii) There is a later email between Mr Stevens and Mr Ruhan, which is not itself "without prejudice", which attaches and seeks to incorporate that summary of the purported claims.

iii) It is not clear to me whether, the document having been in the trial bundles for the Directed Trial and accessible to all those able to access the trial bundle (which included persons who were not party to the original communication) it is possible now to assert that the document remains subject to without prejudice privilege.

iv) The allegations made against Mr Stevens and Mr Ruhan are very serious, and on an issue such as this, where a lack of prior complaint is relied upon against them, the interests of justice weigh in favour of them being permitted to take the court to a document said to constitute such a complaint.

In the event, having been provided with the relevant section of the draft judgment, no objection was made by Messrs Thomas and Taylor.

174. I must record, however, that the very late stage at which Mr Stevens' legal team have sought to deploy this document has had the effect that neither Mr Ruhan nor Mr Stevens have been cross-examined as to its contents.

175. For present purposes, it is sufficient to note that the communication in question asserts a fundamentally different basis for a claim by Mr Stevens against Mr Ruhan to that relied upon now. Instead of seeking to set aside the TSA by reason of misrepresentations made by Mr Ruhan as to the recoveries received from the Qatar Project, it was asserted that the consideration under the TSA for releasing Mr Stevens' full claims had not been paid, leaving Mr Stevens entitled to make a full recovery. As the £92m provided for by the TSA was paid, the only consideration potentially payable which it might be said had not been paid was the additional consideration which the TSA provided would become payable in the event of further recoveries being made from the Qatar Project *after* the date of the TSA. The amounts recovered by Mr Ruhan from the Qatar Project before the signing of the TSA were of no conceivable relevance to these sums.

176. On 4 August 2015, following a round of settlement discussions between the Orb Claimants and Mr Ruhan, Stewarts (for the Orb Claimants) wrote to Memery Crystal (acting for Mr Ruhan) saying that "Mr Ruhan's pre-condition/requirement to settlement is that it be structured in a manner that transfers the majority of any cash sum to Mr Stevens … Leaving aside whether this is commercially acceptable, it is structurally unworkable and possibly illegal. Our clients have sought and received advice that a settlement on this basis, where a payment is demanded by Mr Ruhan to go to Mr Stevens which is not commensurate with Mr Stevens' claims, is potentially criminal".

177. On 24 March 2016, texts were exchanged between Dr Smith and Mr Ruhan which led to the resumption of settlement negotiations. On 26 March 2016, Mr Stevens sent Mr Ruhan an email enclosing the Akin Gump email referred to at [172] above and stating that the email was "explaining my claims to the £88.5m".

178. On 4 April 2016, Mr Ruhan emailed Dr Smith referring to various cash schedules Dr Smith had provided to him, and making detailed observations about them.

179. On 8 April 2016, Mr Stevens sent an email to Mr Ruhan referring to three emails sent by Dr Smith and stating;

> "I have skimmed over [the emails] and am convinced that if GS really wants to achieve a settlement he is going to have to demonstrate it next week by a full and frank disclosure on the intricate web of side/hidden deals he has constructed over the past 2 ½ years with the clear goal of sucking all cash out of the system and making tracing/recovering a herculean challenge…
>
> Realistically with all requisite parties focussed on achieving a settlement it will take at least 30/45 days …. From our perspective we should have some sort of 'idiots insurance' in the event the Court ordered disclosures reveal facts/numbers not disclosed by GS during the WP discussion".

180. Draft agreements were produced by Akin Gump on 21 April 2016 and the various settlement agreements which constitute the Geneva Settlement were executed in Geneva on 29 April 2016. A signed consent order dismissing the Orb Proceedings with no order as to costs was sealed on 6 May 2016. The documents included a loan note issued by Dr Cochrane under which Dr Cochrane agreed to pay £73,750,000 to Phoenix by 31 December 2017 and a document entitled the "Liquidation Inter-Creditor Settlement Agreement" (the "**LICSA**") which was entered into between a company called SMA, Phoenix, Minardi and Dr Cochrane. There was also a Confidential Settlement Deed. Mr Stevens accepted that none of these documents referred to the settlement of a dispute between himself and Mr Ruhan, which he said was "intentional" (Day 9 pages 121-122).

181. The nature of Mr Ruhan's involvement in the negotiations which culminated in the Geneva Settlement, and the true beneficiary of the rights acquired under the Loan Note and the LICSA, were issues in the proceedings between Ms Richardson and Mr Ruhan in the Family Division. In his skeleton argument for that hearing, Mr Ruhan said that the rights acquired by Mr Stevens or his companies through that settlement reflected his entitlement to 10% of any further recoveries made by Mr Ruhan from the Qatar Project pursuant to the terms of the TSA.

182. Mr Ruhan was cross-examined about these subjects in the course of the Family Division proceedings before Mr Justice Mostyn. As Mr Justice Mostyn records at [2017] EWHC 2739 (Fam), [55], Mr Ruhan said that he had not been involved in negotiating the figures which appeared in the Loan Note. Mr Ruhan's account was challenged by reference to documents which appeared to show Mr Ruhan commenting in detail in an email to Dr Smith of 4 April 2016 on a schedule; an email from Akin Gump to Dr Smith copied to Mr Ruhan attaching a copy of the Loan Note and an email from Mr Stevens to Mr Ruhan the same day attaching a copy of the LICSA (both of which emails Mr Ruhan told Mr Justice Mostyn were forgeries). As I have noted, before Mr Justice

Mostyn, it was Mr Ruhan's case that the rights acquired by Mr Stevens under the Geneva Settlement reflected his 10% entitlement under the TSA to further sums recovered in relation to the Qatar Project, and he gave oral evidence to that effect.

183. The Defendants suggest that it is inherently improbable, after his experiences with Mr Cooper and McNally, that Mr Ruhan would have used a nominee to receive any proceeds of a settlement with the Orb Claimants. However, if Mr Stevens had been acting as Mr Ruhan's nominee up to 2015, then the die was essentially cast so far as he was concerned. In any event it is not suggested that Mr Stevens (unlike Mr Cooper and Mr McNally) had done anything to show he was not worthy of Mr Ruhan's trust. Further, by this time Mr Ruhan was heavily involved in matrimonial proceedings, in which context the question of what assets Mr Ruhan had was very much a live issue. If HPII's case is made out, Mr Ruhan and Mr Stevens were essentially "bound together" by this point.

184. On 6 May 2016, Mr Greenstone – a long-term associate of Dr Smith – submitted a Suspicious Activity Report to the National Crime Agency in relation to the Loan Note, stating:

> "Mr Stevens is believed to act as nominee for Mr Ruhan and on 29 April 2016 the legal proceedings were settled against Mr Ruhan on the basis that a loan note for £73,750,000 was issued to Phoenix … It appears that this payment is a sham and has been structured by Mr Ruhan so that he will evade liabilities he may have to HMRC and others. Since the primary claim was against Mr Ruhan the payment to Phoenix … appears to have been directed by Mr Ruhan."

185. The National Crime Agency responded on 17 May 2016, refusing permission for Dr Cochrane to pay the first instalment of £3m due under the LICSA on 31 May 2016, and Dr Cochrane did not do so. In response, in June 2016 Phoenix commenced proceedings against Dr Cochrane and obtained worldwide freezing relief. The issue of whether Mr Stevens had been acting as Mr Ruhan's nominee was the subject of specific discussion in the course of that application, Mr Stevens (through his counsel) assuring the Court that he was not. It had also been raised in Dr Cochrane's defence to Phoenix's claim.

186. On 16 November 2016, Mr Ruhan was contacted by a Mr Richard Hayward in relation to an investment known as the Alymere portfolio. Mr Ruhan forwarded the email to Mr Stevens saying, "FYI and discussion". The email had asked for Mr Ruhan's consent on behalf of Grenda in respect of an additional loan of £1.5m. Mr Stevens said:

> "Will review. Very important that the request for consent goes through the proper channels i.e. his solicitors to akin gump for Grenda. I do not want `Can we please have your consent, on behalf of Grenda, in respect of these additional loan monies of £1,549,541'. Your role is purely advisory and do not have authority to bind Grenda".

Mr Ruhan responded in what, for him, were uncharacteristically meek terms, "That is fully understood and I will make clear to him".

187. Mr Ruhan and Mr Stevens understandably relied upon this email as evidence of their true relationship. However, it was sent at a time when the issue of whether Mr Stevens

had been and was acting as Mr Ruhan's nominee must have been absolutely at the forefront of their minds.

*The effect of the evidence as to this final period*

188. The effect of the evidence so far as it relates to this final period can be summarised as follows:

i) Mr Ruhan's Defence in the Orb Proceedings up to June 2014 was advanced on a dishonest basis so far as his interest in the Arena Settlement was concerned, and his readiness to proceed on that basis demonstrates the need for caution in approaching his evidence.

ii) Mr Stevens' evidence as to when and how he came to learn of the substantial recoveries made by Mr Ruhan from the Qatar Project was untruthful. That not only requires me to approach Mr Stevens' evidence generally with caution, but itself raises serious issues as to the truth of the suggestion that the Geneva Settlement took the form it did as part of a settlement of a dispute which emerged between Mr Ruhan and Mr Stevens when Mr Stevens discovered that Mr Ruhan had misled him at the time the TSA was concluded.

iii) That suggestion is also inconsistent with the documents which are available and the evidence given by Mr Ruhan in the Family Division proceedings, and I am satisfied that it is false. The Defendants have offered no other explanation for the fact that, on the face of things at least, it is Mr Stevens and not Mr Ruhan who acquires the benefits of such rights as are obtained from the Orb Claimants or their associates under the Geneva Settlement.

iv) From 2014 onwards, Mr Ruhan and Mr Stevens were aware of the allegations made by the Orb Claimants and their associates that Mr Stevens was acting as Mr Ruhan's nominee. For that reason, any communications between them in this period which are said to be inconsistent with such a state of affairs must be approached with particular care.

## E MY FACTUAL FINDINGS ON HPII'S NOMINEE CASE

### The inherent probabilities and motive

189. In an oft-cited passage, Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1, 57 noted that it is "essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities". Mr Ruhan and Mr Stevens point to a number of reasons why it is said the allegations made by HPII are inherently improbable, including an alleged lack of motivation. I accept that these are relevant considerations when assessing the overall effect of the evidence. However, I would note that there can be issues on which the court's ability to assess the inherent probabilities is constrained because the full factual picture cannot be ascertained from the evidence before the court. Further, while the lack of any realistic motivation for a defendant to have acted in a particular way can be a powerful reason for concluding that they did not do so, that does not entail that the court

must be able to make a positive finding as to the defendant's motivation before it can safely make findings as to what the defendant did or did not do. There may be a number of potential reasons why someone might behave in a particular way, and the evidence before the court may well not be sufficient for it to decide which of them was significant or determinative.

*Mr Ruhan's motivation*

190. HPII contends that Mr Ruhan's motivation was the desire to obtain all (or at least a greater share) of any profit to be made from the re-development of the Hyde Park Hotels, rather than being limited to any share of profit attributable to the one third share of HPII which he held following the December 2004 restructuring. Mr Justice Cooke summarised this potential motivation in the course of argument in February 2015 in the Orb Proceedings:

> "Had HPII done the deal or the deals Cambulo did, the end result would have been that there would have been one-third of those profits coming back to Mr Ruhan's interests …. What [Mr Ruhan] achieves by what takes place, the transfer to Cambulo, on your case is that he manages to see off Morgan Stanley and Thistle with repayments of the loans and nothing else, and then gets 100% of the profits for himself".

191. Mr Ruhan has advanced a number of answers to that point.

192. First, that it was "by no means obvious" that Mr Ruhan would be worse off by diluting his equity in HPII in a return for the reduction of Morgan Stanley and Thistle's debt, even at the loss of the development opportunity. However, a nominee arrangement of the kind that HPII alleges gave Mr Ruhan both the benefit of a debt reduction so far as his share in HPII is concerned, and the potential upside of a significant development profit. I accept that, in February 2005, the prospect of such a profit being realised was speculative. However, it is clear that Mr Ruhan had long believed in the development potential of the Hyde Park Hotels, having identified this possibility in an interview with the *Estates Gazette* in July 2003. While I accept that pulling off a profitable redevelopment was a much more speculative proposition in February 2005 than HPII was willing to recognise, with a number of obstacles to be overcome, it was the sort of high risk/high reward proposition which would have been very attractive to Mr Ruhan. Adopting the words of his own closing submissions, he was someone who built his career on his "willingness to take significant risks in the hope of high returns".

193. Second, it was said that if Mr Ruhan had wanted to try exploiting that commercial opportunity, there was no reason why he should have done so secretly, because the evidence establishes that the other stakeholders would have been open to a bid by him. The Defendants point to the email from Mr Merchant of Morgan Stanley of 24 May 2004 which indicates that he would have read any bid from Mr Ruhan for the Hyde Park Hotels "with interest", and the fact that Mr Ruhan did acquire the Sceptre Hotels (which had not formed part of the Hoteloc note issue) as part of the equitisation. It is also the case that before the equitisation, the fact that Mr Ruhan had not ruled out a bid for the Lancaster Gate Hotel had been mentioned to GMAC (and is referred to in an email of 17 September 2004).

194. However, I do not think that Mr Ruhan derives much assistance from discussions before the equitisation agreement reducing his equity in HPII to 33.33% had been agreed, nor to communications with Morgan Stanley alone. I am satisfied on the evidence that there was real sensitivity on the part of both Thistle and some of the noteholders as to any bid involving Mr Ruhan:

    i) I have referred at [53] above to the concerns expressed by UBS on behalf of some of the noteholders on 7 December 2004, and the confirmation Mr Ruhan then gave at the meeting on 13 December 2004 that he was not associated with any of the bidders.

    ii) Mr Ruhan felt it necessary to confirm the position again in emails to Thistle on 11 and 12 February 2005.

    iii) Mr Cattermole of Thistle raised this issue on 20 February 2005 and a similar issue with specific reference to Cambulo on 30 March 2005. Given Thistle's clear concern on this issue, the Defendants' submission that "it is unclear why it is said that Mr Ruhan … kept his supposed interest in Cambulo secret from Thistle or why there was any need to do so" is surprising.

    iv) The evidence of Mr Wilcox of GMAC on this issue, representing an instinctive reaction of an experienced professional, was clear. He said an offer from Mr Ruhan would not have been acceptable because "generally you'd want to be confident that they are being sold to an independent third party" (Day 7 page 154) and that an offer from Mr Ruhan "would have given concern" and led to caution (Day 7 page 183 and see also Day 7 pages 197-198). I accept that evidence.

195. It is clear, therefore, that any bid from Mr Ruhan would have attracted considerable scrutiny. That, of itself, would at best have prolonged or complicated the transaction, and might have led to the inclusion of terms adverse to Mr Ruhan's interests (such as a profit commission for the other stakeholders). It would have led to close scrutiny of Mr Ruhan's financial position (rather greater scrutiny than the ECD and Cambulo Madeira bids appear to have received) and how quickly he could complete on any bid. And it would have taken Mr Ruhan out of his central role in receiving and commenting on (what would on this hypothesis have been) rival bids, leading to a loss of information, control and influence.

196. For these reasons, I am satisfied that if Mr Ruhan was interested in acquiring the Hyde Park Hotels in an attempt to exploit the risky but potentially highly rewarding development opportunity they presented, he had ample motivation not to approach HPII and the noteholders bidding in his own name. The suggestion that this argument is not open to HPII because it was not put in terms to Mr Ruhan and Mr Stevens, to elicit the inevitable denial, is without merit. Mr Ruhan and Mr Stevens were fully alive to and had ample opportunity to respond to HPII's case.

*Mr Stevens' motivation*

197. The Defendants also submit that Mr Stevens had no motivation to agree to act as Mr Ruhan's nominee in relation to the Hyde Park Hotels. The matter was summarised as follows in the Defendants' joint annex on the nominee case:

> "Contrary to C's closing, Mr Stevens is no fool – far from it. He is a Cambridge law graduate with a history of investing as an entrepreneur/financier. He would not have signed up to years of acting as Mr Ruhan's lackey and would not have entered into a transaction such as this without a clear role and properly documented upside".

198. Passing swiftly over the reliance on Mr Stevens' educational background, the motivation HPII points to is financial: it is said that Mr Stevens received financial benefits for performing the role. The specific benefits pointed to are the £500,000 paid to VTL and the £1m "loan" made to Mr Stevens in August 2012 and "repaid" from the £92m. HPII says that there may well have been other financial benefits – and I accept that, in circumstances in which the VTL payment only emerged from documents obtained by another party in arbitration proceedings rather than disclosure in this case, I may not have a complete picture of payments passing between Mr Ruhan and Mr Stevens or their respective vehicles.

199. So the potential motivation for Mr Stevens' involvement is clear enough. It is then said that the potential gains were far outweighed by the risks for someone of Mr Stevens' status. However, not only it is unclear whether I have full visibility of all payments from Mr Ruhan to or for the benefit of Mr Stevens which might form part of any such gain, but the evidence before me comes nowhere close to establishing that Mr Stevens' financial position was sufficiently strong that the prospect of a financial reward could not have motivated him. As I have said (see [63]-[64]), the evidence of his asset position and exposures as at February 2005 is distinctly thin, and subsequent documents show him surprisingly short of cash on a number of occasions. In short, I am unable to conclude that Mr Stevens had no realistic motivation to agree to act as Mr Ruhan's nominee in the Cambulo Madeira Transaction.

200. Finally, it was said that Mr Ruhan did not know Mr Stevens well enough to use him as his nominee, and that, had he wished to follow this course, he would have used Mr Cooper and Mr McNally. I accept Mr Pickering QC's submission that if Mr Ruhan had wanted to keep his involvement secret from the other shareholders in HPII and the noteholders, that last course would have been hopeless. Not only were they individuals known to be fiduciaries rather than businesspeople, but they were solicitors in Bridgehouse Law who had acted for Mr Ruhan in the equitisation. Mr Stevens was the brother of someone, Mr Michael Stevens, who (on Mr Ruhan's own evidence) was well-known to Mr Ruhan, regarded by Mr Ruhan as someone of substance and who himself had some form of interest in the Hyde Park Hotels.

*The position of third parties*

201. Both Mr Ruhan and Mr Stevens submitted that it was inherent in HPII's case that numerous third parties, including regulated professionals, must have been complicit in the dishonesty alleged against them. It was said both that this made the claims inherently improbable, and that the findings which HPII asks the court to make would necessarily impugn the reputations of a number of individuals who have been given no opportunity to defend themselves.

202. It is frequently argued by defendants in dishonesty cases that if the fraud alleged took place, various other persons not before the court must have been complicit in it. This can be a very effective means of bringing out the inherent improbability of a claim (see

for example the comments of Mr Justice Tomlinson in Three Rivers DC v Bank of England [2006] EWHC 816 (Comm), [6]-[7]). I also accept that there are cases in which the success of the claimant's case necessarily involves a finding of dishonesty against a third party, and that, in such circumstances, the court may well take a view that it is appropriate to give that third party notice of the allegations being made and an opportunity to answer them (as Mr Justice Ackner did in Rustenburg v Pan Am [1977] 1 Lloyd's Rep 564, 570).

203. However, it is necessary to approach arguments of this kind with some care, particularly in cases where the claimants makes no direct allegation of dishonesty by the third party, and in which the claimant's case does not necessarily entail any such dishonesty. To do otherwise would involve the risk of already complicated litigation being expanded beyond manageable bounds, with judges asked to make findings about the conduct of a broad range of individuals in litigation in which only the parties will have given disclosure and adduced witness evidence. In very many cases, a claimant is entitled to be agnostic as to the position of a non-party who the defendant says would be implicated by the allegations of fraud advanced. That is likely to be the case when upholding the case advanced against the defendant(s) would not necessarily entail any dishonest activity on the part of someone not participating in the case (not least because the full evidential position in relation to that person will not be before the court). Thus, in Boreh v Djibouti [2017] EWCA Civ 56, [44], an allegation that the substance of the judge's findings as to the conduct of a solicitor in a case applied "by parity of reasoning" to a barrister against whom no such findings were made was rejected by the Court of Appeal because:

> "The judge was perfectly entitled to reach the conclusion that [the solicitor] had behaved dishonestly, and that, as a result, the freezing order should be set aside, irrespective of any need to make any findings to similar, or different, effect in relation to [counsel], whose knowledge and state of mind had not been investigated. The judge was entitled to conclude that the latter's state of mind had not necessarily been the same as the former's".

204. Turning to the various third parties identified by the Defendants:

i) Mr Bloomfield. As I have explained at [51] above, I do not have sufficient evidence to make a finding as to whether Mr Bloomfield was acting for Mr Ruhan, or in his own interest but with assistance from Mr Ruhan, or perhaps on some other basis. The available documents relating to his involvement are few and far between. I do not accept, however, that HPII's case necessarily requires Mr Bloomfield to be party to any dishonesty. I have no information as to what knowledge or belief Mr Bloomfield may or may not have had as to the extent of Mr Ruhan's interest in HPII or what Mr Ruhan had told the other shareholders about any bid. Further, if Mr Bloomfield's bid was independent, that would not preclude Mr Ruhan from asking Mr Stevens to front a bid on his behalf once it became apparent to him that Mr Bloomfield's bid was going nowhere.

ii) I accept that, if HPII's case is correct, it would be unrealistic to suggest that Mr Michael Stevens could have been unaware that his brother was acting as Mr Ruhan's nominee. That is so both because of his own claim to an interest in the Hyde Park Hotels, which crystallised in Wellard's 20% of Cambulo Madeira in December 2007, and because he was clearly involved in the transaction at or

around the time when his brother came on board in February 2005. There is no evidence, however, which enables me to reach a conclusion as to what knowledge or belief Mr Michael Stevens had as to the extent of Mr Ruhan's interest in HPII or what Mr Ruhan had told the other shareholders about the bid. Certainly it cannot be said that HPII's case *necessarily* entails dishonesty on Mr Michael Stevens' part. Had Mr Michael Stevens been called to give evidence (something which, as I explain at [208(i)] below, the Defendants could reasonably have expected to do), those issues could have been explored with Mr Michael Stevens.

iii) The Defendants suggest that because HPII relied on the involvement of Allied in providing funding for the bids by ECD and Cambulo Madeira, HPII's case necessarily requires that "Jack Dellal and/or his son Guy Dellal … must have known of the alleged nominee relationship". However, I do not accept that this necessarily follows from HPII's case. In the absence of any documents relating to Allied's interactions with Mr Ruhan, Mr Bloomfield and Mr Stevens, it would be wholly speculative to try to work out what Mr Jack Dellal or Mr Guy Dellal's state of mind was as to the relationship between Mr Ruhan and Mr Stevens, or indeed whether they gave any consideration to that issue at all.

iv) Individuals acting for Minerva. I accept that those acting for Minerva regarded Mr Ruhan as the person in the "driving seat" so far as the transaction is concerned, but the Defendants' suggestion that "HPII's case with respect to the Lancaster Gate transaction is only possible … with a finding that Minerva …. was aware of the alleged fraud" is without merit. Mr Ruhan gave conflicting impressions during his communications with Minerva, who were, of course, blind to whatever communications were going on between the Defendants behind the scenes. The court has no material which would enable it to form a view as to what the relevant individuals at Minerva thought (if they formed any views on the subject) about the nature of the arrangement between Mr Ruhan and Mr Stevens or what the stakeholders in HPII had or had not authorised.

v) I accept that it is inherent in HPII's case that Mr Beare and Mr Austin of Investec believed the substance of the statements they repeatedly made to the Credit Committee and to decision-makers at Investec: that Mr Ruhan was the effective owner of Cambulo Madeira, and not Mr Stevens. It is also necessary to consider the consequences of the Defendants' case: that Mr Beare and Mr Austin made repeated misstatements for the purpose of obtaining internal approval within Investec of very significant loans as to the scale of Mr Ruhan's assets and the value of his covenant. While Mr Kokelaar disclaimed such a case, saying that Mr Beare and Mr Austin had simply misunderstood the position or been "sloppy" in their language, the extent of their interaction with Mr Ruhan, the importance of the issue, and the number of documents relating to different transactions over many years in which the assertion that it was Mr Ruhan who owned the Hyde Park Hotels was made, precludes this is as a realistic possibility. While the Defendants' case may well, in my view, involve serious imputations against Mr Beare and Mr Austin, the same is not true of HPII's case. Mr Beare was clearly given to understand that Mr Ruhan had a "complex tax structure". It does not necessarily follow from HPII's case that Mr Beare and Mr Austin knew or believed that the arrangements relating to Cambulo Madeira were

anything other than part of that structure, still less that they knew or believed that it had been adopted to deceive others, and that they were willing to play along with this. That is an issue which would require its own trial to resolve.

vi) The suggestion that HPII's case necessitates that Fried Frank were aware of or privy to dishonest behaviour has nothing in it. It was for Fried Frank to advise their client Investec, and having done so to seek to prepare and execute the transaction in accordance with Investec's instructions. It was not inherent in that task that Fried Frank would have ascertained the reality of the relationship between Mr Ruhan and Mr Stevens (as to which they had only limited visibility), or even that they should have reached a concluded view on that question.

vii) Mr Nouril of Jones Day. I have referred at [62] above to Mr Nouril's statement that he acted for Mr Stevens in relation to the various transactions relating to the Hyde Park Hotels, that "the relevant AML/KYC checks" showed Euro Estates to be "wholly owned by Mr Stevens" and that he received his instructions from Mr Stevens. I am quite sure that was the case. But a search of the registry to ascertain Euro Estate's shareholder(s) would not reveal any nominee arrangement in relation to the Hyde Park Hotels, something which would only have been apparent to Mr Nouril if Mr Ruhan or Mr Stevens had told him. It is highly improbable that they would have done so. I accept that Mr Nouril's interactions were with Mr Stevens as his client, but once again Mr Nouril would not have been privy to any exchanges between Mr Stevens and Mr Ruhan in relation to the subject-matter of those instructions. The result is that the matters set out in Mr Nouril's letter, which I am willing to accept, do not take Mr Stevens very far.

viii) The Candy brothers and Mr Smith. The Candy brothers appear to have been told at some point that it was Mr Ruhan's position that Mr Stevens owned Cambulo Madeira and he had no interest in it, and there is at least one communication in which they assert that to be the case themselves (see [88]). It would be a matter of speculation as to whether or not they believed that suggestion, or indeed whether they took the view that they did not need to trouble themselves with that issue because the transaction was proceeding smoothly, whatever the position might be. They were not privy to the private communications of Mr Ruhan and Mr Stevens, nor, on the material before me, am I able to form a view as to what knowledge or understanding they had as to the position as between HPII and Mr Ruhan. Getting to the bottom of those questions would require a substantial trial in itself, and the fact that this cannot properly be done at this trial does not provide an answer to HPII's case.

ix) I accept that Mr Cooper and Mr McNally's relationship with Mr Ruhan at the relevant time was so close that it is highly improbable that they could have been unaware of an arrangement whereby Mr Stevens acted as Mr Ruhan's nominee in relation to the Cambulo Madeira Transaction. It is right to record that it is Mr Ruhan's own case that Mr Cooper and Mr McNally were fundamentally dishonest, and findings to that effect have already been made by me in the Directed Trial Judgment and by the arbitrator in an LCIA arbitration brought against them. Further, Mr McNally swore an affidavit on 3 June 2014 in support of the Orb Claimants' case that Mr Stevens acted as Mr Ruhan's nominee, stating that it was at all times his understanding that Mr Ruhan was the majority

beneficial owner of Cambulo Madeira and that Mr Ruhan's instructions to him proceeded on that basis.

x) Messrs Emson and Pilbrow. Mr Emson has (at least at times) accepted that it was his understanding that Mr Ruhan was the principal of Cambulo Madeira, in his interview with Mr Chesterton and Ms Aird-Brown in 2016. While the Defendants suggested that Mr Emson may have said this to further Dr Smith's ends, it was clear that the hold which Dr Smith had at one point had over Mr Emson had been removed by the time of this interview, and during the course of that interview Mr Emson was highly critical of Dr Smith. The effect of Mr Emson's interview was not that he was told that Cambulo Madeira belonged to Mr Ruhan, but that this was the conclusion Mr Emson had drawn, including from the fact that Mr Ruhan was "the ringmaster". On the basis of the statements in his interview with Mr Chesterton, Mr Pilbrow does not appear to have drawn the same conclusion (although he does say he only met Mr Stevens "three or four times", that he was "less involved in Kensington Park and Kensington Palace Hotels", that he did not have "much dealings" with Mr Ruhan, that Mr Ruhan's role was "not made clear to him" and that Mr Ruhan was Mr Emson's contact). Taking those statements at face value, it is clear that HPII's case does not in any way require that Mr Emson and Mr Pilbrow were part of what the Defendants termed "the ever-growing list of co-conspirators".

## Adverse inferences

205. I was referred to various authorities on the circumstances in which it is appropriate to draw an adverse inference against a party from its failure to call evidence from a particular witness, including the more recent decisions in Magdeev v Tsvetkov [2020] EWHC 887 (Comm) and Ahuja Investments Limited v Victorygame Limited [2021] EWHC 2382 (Ch).

*HPII's case*

206. HPII pointed to the evidence given by Mr Stevens' solicitors at a security for costs application that Mr Stevens would potentially have "statements from a further 24 witnesses" because "the allegations of nomineeship … will be met by calling many of his previous business partners". In the event, Mr Stevens did not call any other witnesses.

207. HPII asks me to draw an adverse inference against Mr Ruhan and Mr Stevens from the absence of the following witnesses:

i) Mr Michael Stevens.

ii) The Candy brothers and Mr Smith of the CPC Group.

iii) Messrs Emson and Pilbrow.

iv) Messrs Lux and Lopez in relation to the Lotus investment.

v) Various individuals involved in investments made with the £92m, including Mr Arnold Becker in relation to the New York deal.

208. As to these suggestions:

i) I do regard the absence of Mr Michael Stevens as significant. He was involved in funding Mr Ruhan's initial acquisition of the Orb hotels; with Mr Bloomfield and Mr Stevens in the key period of February 2005; he is identified in some Investec documents as having an interest in the Kensington Hotels and he formalised a 20% interest in Cambulo Madeira at the time the Mood Facility was concluded. He is, moreover, Mr Stevens' brother, and on Mr Stevens' evidence, they have a record of doing successful business together which went back long before the Cambulo Madeira Transaction. I do not accept the Defendants' suggestion that the significance of Mr Michael Stevens to HPII's case only became apparent at trial. He features in the statements of case and in the Defendants' own evidence. Significantly, his own interactions with the Defendants are largely undocumented.

ii) I can well understand why the Defendants may have decided not to call either the Candy brothers or Mr Smith. I can see no reason why these individuals would have wished to involve themselves in the litigation, and they were well-placed to resist, to the fullest extent possible, any attempts to force them to participate against their will. In any event, I have the benefit of extensive documented interactions between Mr Ruhan, Mr Stevens and these individuals. That is the best evidence of what happened between 2005 and 2008 so far as these individuals are concerned.

iii) As to Messrs Emson and Pilbrow, I accept that Mr Emson has, at least at times, taken a position which was hostile to that of Mr Stevens. That does not appear to be true of Mr Pilbrow who, when interviewed by Mr Chesterton of TMP, was supportive of the Defendants' account. However, I do not believe it would be appropriate to draw any adverse inference against the Defendants from Mr Pilbrow's absence. I have no reason to suppose that Messrs Emson and Pilbrow would voluntarily have involved themselves in this litigation (in which allegations of various kinds might have been made against them), and in any event, I have extensive documentary evidence as to the nature of their interactions at the relevant time.

iv) Messrs Lux and Lopez's principal involvement relates to the financing of Gravity. That is not, however, a central issue in this litigation. There is no material to suggest Messrs Lux and Lopez would have willingly involved themselves in the litigation, nor that they could have been compelled to attend to give evidence. The same points arise in relation to Mr Becker and the New York investment.

*The Defendants' adverse inference case*

209. The Defendants ask the court to draw an adverse inference against HPII for its failure to call:

i) Mr Michael Stevens;

ii) the Candy brothers;

iii) Mr Guy Dellal;

iv) Mr Beare and others from Investec; and

v) Mr Emson and Mr Pilbrow.

210. It is important to note that none of these individuals acted on the HPII-side of the transactions in issue. Instead, they are all individuals who had significant business dealings or involvements with Mr Ruhan or Mr Stevens. Further Mr Michael Stevens, the Candy brothers and Mr Dellal were all individuals who, on HPII's case, were involved in transactions with Mr Ruhan which involved breaches of fiduciary duty on his part. In these circumstances, I do not accept that HPII could reasonably have been expected to adduce evidence from these witnesses, nor do I think it likely that they would have been willing to co-operate voluntarily with a claim brought by a non-trading company for the benefit of its creditors and litigation funders. The tension in the Defendants' case on this issue is captured in the following passage in their joint appendix on the nominee case:

> "The scale of the alleged conspiracy and the findings it would require the court to make about the misconduct of a large number of individuals (none of whom were called by HPII as witnesses) is itself a factor which militates against a finding of fraud against Mr Stevens and Mr Ruhan".

211. In any event, so far as the Candy brothers, Mr Beare or others at Investec, Mr Embrow and Mr Pilbrow are concerned, I am satisfied that the documents before the court provide the best evidence as to their contemporaneous involvement and understanding, and evidence in cross-examination from witnesses compelled to attend as to events occurring so many years ago would have been of only very limited further assistance.

*The Defendants' pleading point*

212. Finally both Defendants argued that the only nominee case open to HPII was one which involved Mr Stevens incorporating Cambulo Madeira on 10 December 2004 as part of a conspiracy with Mr Ruhan in existence by that date, and that it was not open to HPII to argue for (or presumably the court to find) that the nominee arrangement came into existence at some later point in time.

213. There is nothing in this argument. The issue of whether HPII's case is open at trial cannot depend on whether Mr Stevens incorporated Cambulo Madeira for the purposes of a nominee arrangement in December 2004 or acquired it "off-the-shelf" for that purpose in February 2005. The Defendants recognise the reality of the position in their joint appendix in closing, in which they suggested that "the only question for the court in the present context is whether, when the BSA was entered into on 1 March 2005, Mr Stevens acted as Mr Ruhan's nominee in relation to the transaction".

## Conclusion

214. On the basis of the materials set out above, and having in mind the seriousness of the allegations made against the Defendants, I am amply satisfied that HPII's nominee case is made out, and that in acquiring the Hyde Park Hotels through Cambulo Madeira, in

the subsequent sale of those hotels, and in the investment of the profits, Mr Stevens was acting at all times as Mr Ruhan's nominee in the sense defined at [5] above. The precise form of declaration necessary to give effect to that conclusion, and which entities or assets should be the subject of declarations, can be addressed at the consequentials hearing.

215. That is the conclusion to be drawn from the clear preponderance of the documents before the court, and the sheer number of events to which HPII can point over the period from 2005 to 2016. The accumulated weight of this evidence is overwhelming and it is further supported (although in no way dependent on) the adverse inference I draw as to the lack of evidence from Mr Michael Stevens. HPII's case is in no sense inherently improbable, whether by reason of the alleged lack of motive on the part of Mr Ruhan and Mr Stevens to act in this way, or otherwise. I am unable to accept Mr Ruhan's and Mr Stevens' evidence to the contrary, not only because (for the reasons I have explained) it is clear that their evidence must be approached with considerable caution and has changed at significant points, but because for many of the key issues or documents supporting HPII's case, they simply had no (or no adequate) explanation.

216. I accept that it is far from the case that *every* document is consistent, or only consistent, with HPII's nominee case (although that is the preponderant effect of the documentary evidence). But on an issue such as this, two documents pointing in inconsistent directions do not cancel each other out, still less do two documents in one direction destroy the evidential force of twenty in the other. HPII's case theory can accommodate the documents which the Defendants point to in support of their case, either as documents written with the intent they should appear consistent with the appearance the nominee arrangement was intended to give, or because it suited Mr Ruhan's purposes to distance himself from the transaction at particular points in time, or because all relevant communications are not before the court. That is not equally true for the Defendants' arguments in response and, as I have stated, a great many of the matters relied upon by HPII could not be and were not explained.

217. It follows from these conclusions (and I am fully satisfied) that Mr Ruhan and Mr Stevens have consistently lied about this issue:

    i) So far as Mr Ruhan is concerned, in addition to the lies told to HPII's shareholders and the noteholders in 2004/2005, he lied in his evidence before Mr Justice Cooke in the Orb Proceedings, in his evidence before Mr Justice Mostyn in the Family Division proceedings and in his evidence before me.

    ii) So far as Mr Stevens is concerned, he too lied in his witness statements in the Orb Proceedings, as well as before me in the Directed Trial, and in these proceedings.

218. Mr Ruhan told those lies before me with considerable tactical acuity and, at times, controlled aggression. Mr Stevens' dishonest evidence involved rather more in the way of bluster, but also rather more in the way of affability. Any observer of their evidence in this case would have been left in little doubt that it was Mr Ruhan who had at all times been the dominant figure and decision-maker in their relationship, with Mr Stevens playing an essentially supporting role.

219. It is now necessary to address the legal consequences of these findings.

# F HPII'S CLAIM AGAINST MR RUHAN

## Breach of fiduciary duty

220. There was no dispute that if Mr Ruhan had an interest in Cambulo Madeira or the Hyde Park Hotels following their acquisition by Cambulo Madeira (as I have found he did), and he did not disclose that interest to HPII before the Cambulo Madeira Transaction (as it is common ground he did not), then he was in breach:

    i) of the fiduciary's duty not to place themselves in a position where their interest and duty conflict, by dealing with the company in their own interest: Boardman v Phipps [1967] 2 AC 46 and Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134; and

    ii) the fiduciary's duty not to make an unauthorised profit from property which is subject to the fiduciary relationship: Gwembe Valley Development Co Ltd v Koshy [2004] 1 BCLC 131.

221. Mr Ruhan did not pursue in closing the argument that, if the nominee case was made out, the case involved exceptional circumstances in which the purchase of the Hyde Park Hotels by Cambulo Madeira did not involve any (or any actionable) breach of Mr Ruhan's duties as fiduciary (by reference to the principles considered in cases such as Peso Silver Mines v Cropper [1966] SCR 673, Caldicott v Richards [2020] EWHC 767 (Ch) and Magdeev v Tsvetkov [2020] EWHC 887 (Comm)).

*HPII's claim for an account of profits*

222. Mr Ruhan does, however, contend that the court should not, in the exercise of its discretion, order an account of the profits he made as a result of these breaches of fiduciary duty. Mr Ruhan submits:

    i) That an account of profits is discretionary relief.

    ii) In particular, the Court may refuse to order an account of profits when it is satisfied that to do so would be a disproportionate response to the breach of fiduciary duty: Satnam Investments Ltd v Dunlop Heywood [1999] 3 All ER 652.

    iii) Whilst, at least on the basis of the authorities as they stand (Mr Ruhan reserving his position at a higher level), it is not necessary for the impugned transaction to have caused the beneficiary a loss before an account of the profit made by the fiduciary from it will be ordered (Murad v Al Saraj [2005] EWCA Civ 959, [80] and [83]), the fact that HPII suffered no loss as a result of the conclusion of the Cambulo Madeira Transaction itself strongly militates against ordering an account of profits.

223. I am unable to accept this submission. On the findings I have made, Mr Ruhan committed dishonest and sustained breaches of fiduciary duty, and did so to at least keep open the opportunity to make a very substantial profit for himself. By way of further findings:

i) I accept on the evidence before me that the price Cambulo Madeira paid for the Hyde Park Hotels cannot be said to have been for less than the market rate, and HPII did not seek to contend otherwise.

ii) HPII has not advanced a case that, if the Hyde Park Hotels had not been sold to Cambulo Madeira, HPII would have realised a greater price selling them elsewhere (and, on the evidence I have heard, I would not have been able to make the factual findings necessary to support such a case).

iii) Equally, however, the evidence before me does not enable me to conclude that, if Mr Ruhan had disclosed his interest in Cambulo Madeira to HPII, the Cambulo Madeira Transaction would have proceeded on the same terms as it did. As I have indicated, there are a number of possible issues which might easily have arisen in that counterfactual, which Mr Ruhan's decision to act through a nominee was designed to avoid (see [195]). The reality is that it is simply unclear on the evidence what would have happened if Mr Ruhan had acted as he was obliged as a fiduciary to act. That lack of clarity is not something which provides a basis for refusing to order Mr Ruhan to account.

*Proprietary claims*

224. I accept that when a director receives or disposes of the company's property in breach of fiduciary duty, the company is in principle entitled to trace the asset or its proceeds for the purposes of asserting a proprietary claim: JJ Harrison (Properties) Ltd v Harrison [2002] BCC 729, [25]-[28]. This case has been argued on the basis that, if the nominee case succeeds, there was beneficial receipt by Mr Ruhan: see [15]-[16]. Any proprietary claim by the beneficiary might be defeated because it ceases to be possible to identify the proceeds of the trust property and/or because the trust property (or property which represents it) is acquired by a bona fide purchaser for value.

225. Parts of HPII's written opening appeared to be raising issues at this trial as to the state of mind of certain recipients of the proceeds of the Hyde Park Hotels or their officers (for example as to the knowledge of the Candy Brothers and/or Messrs Emson and Pilbrow). These issues may have been raised because, while the opening was in the course of preparation, there were live issues as between HPII and the Settlement Parties in this context (which are referred to at paras. 654 to 660 of HPII's opening). However, I am not in a position to make any findings in this judgment as to the state of mind of these individuals or entities for tracing purposes, and HPII advanced no argument to this effect in closing.

226. Following the settlement between HPII and the Settlement Parties, HPII confirmed in oral opening that the scope of the proprietary claims had been reduced. There may be issues as to the scope of any declarations or consequential orders to be made in respect of those proprietary claims which remain live, their interaction with the findings in the Directed Trial Judgment and their impact on third parties. I propose to leave those questions to be dealt with, as necessary, when issues consequential on the judgment are addressed.

227. HPII also claims equitable compensation for loss caused by the breaches of fiduciary duty pleaded, on the basis that the proceeds of the Hyde Park Hotels, including the profits realised from them, were themselves trust property, and it is entitled to equitable

compensation for the loss it suffered by reason of Mr Ruhan's failure to account to them for those profits and their subsequent disposal. I address this issue when considering HPII's claim against Mr Stevens for dishonest assistance at [270] and following below.

**Breaches of s.317 and s.320 of the Companies Act 1985**

228. S.317 of the Companies Act 1985 provided:

> "(1) It is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company.
>
> …
>
> (3) A director who fails to comply with this section is liable to a fine".

229. Mr Ruhan was a director of HPII at the time of the transactions between that company and Cambulo Madeira and its subsidiaries, and I have found he had an interest in those contracts. It is not disputed that no such interest was declared. Accordingly Mr Ruhan breached s.317.

230. There was a dispute between the parties as to whether a breach of s.317 gives rise to civil, in addition to criminal, liability, and if so, what civil remedies are open (e.g. are they limited to a right of rescission or do they include claims for compensation and/or an account of profits). Fortunately, it is not necessary for the court to resolve this dispute:

i) Neither HPII nor Mr Ruhan contend that any different principles of limitation applied to a claim for breach of s.317 as against a claim for breach of fiduciary duty.

ii) Mr Spalton QC helpfully accepted that the matters on which HPII relied for the purposes of making out its civil claims for breach of s.317 would also give rise to a breach of fiduciary duty by Mr Ruhan.

iii) Mr Ryan for Mr Stevens helpfully accepted that a breach of s.317 was capable of constituting unlawful means for the purposes of the tort of unlawful means conspiracy, whether or not s.317 itself gave a civil claim (and for that reason also, Mr Ryan confirmed that it was not necessary to decide another issue raised by Mr Stevens, whether a claim for breach of fiduciary duty was capable of constituting unlawful means for the purposes of that tort).

231. I was grateful to the parties for their willingness to identify which issues fell on the critical path in this case, and to confine their submissions accordingly. This serves not only to shorten hearings, but (at least to an extent) to shorten judgments as well.

232. S.320 of the Companies Act 1985 provided:

> "(1) With the exceptions provided by the section next following, a company shall not enter into an arrangement:

(a) Whereby a director of the company or its holding company, or a person connected with such a director, acquires or is to of acquire one or more non-cash assets of the requisite value from the company:

unless the arrangement is first approved by a resolution of the company in general meeting …."

233. S.322 of the Companies Act 1985 provided:

"(3) If an arrangement is entered into with a company by a director of the company … or a person connected with him in contravention of section 320, that director and the person so connected …. is liable:

(a) to account to the company for any gain which he has made directly or indirectly by the arrangement or transaction; and

(b) (jointly and severally with any other person liable under this subsection) to indemnify the company for any loss or damage resulting from the arrangement of transaction".

234. On the basis of the findings I have made, Mr Ruhan breached s.320, because Cambulo Madeira and the subsidiaries which contracted with HPII were connected to him, but he did not obtain the required approval for the transaction(s) by way of a resolution of the company in general meeting.

235. Mr Ruhan contends that, nonetheless, no relief should be granted to HPII under s.322 because the transaction(s) between HPII and Cambulo Madeira/its subsidiaries has not been shown to be disadvantageous to the company. Mr Ruhan relied in this regard on NBH Ltd v Hoare [2006] EWHC 73 (Ch). In that case, an offshore company in which Mr Hoare was interested had purchased assets in 1992 for £400,000. By 1997, when the assets were worth £5.5m, that offshore company sold them to NBH Ltd, of which Mr Hoare was a director, for £4.4m. NBH Ltd then sold the assets on as part of a deal which valued the assets at £5.5m. NBH Ltd sought to claim against Mr Hoare for the profit made by the offshore company representing the difference between the 1992 cost of acquisition (£400,000) and the 1997 sale price (£4.4m). Mr Justice Park rejected the argument. He held that the requisite approval had in fact been obtained for the sale, albeit informally, but he went onto consider the relief available if that was not the case. At [45], Park J held:

> "The next question is whether the £4m for which the claimants contend that Mr Hoare is liable to account to HWM is indeed a 'gain' of the type to which the section applies. In my judgment it is not. Arithmetically it is of course true that, if Celet or a predecessor acquired the J and W assets for £400,000 in 1992 and sold them for £4.4m in 1997, there was a gain of £4m in one sense of the word. But in my judgment it is not a sense which should apply in this context. The question is whether Celet made a gain 'by' the transaction, and the transaction was only the sale. The question is not, for example, whether a gain of any amount accrued to Celet on an acquisition and disposal where the disposal was the sale to HWM. I agree with Mr Chivers that, on a realistic analysis, Celet suffered a loss 'by' the transaction. Previously it had assets worth over £5.5m. By the transaction it ceased to have those assets and had £4.4m instead. It would be unreal, and

> would be wholly out of line with the statutory purpose, to say that Celet made a gain of £4m by the transaction.

236. At [46], he continued:

> "It is true that in re Duckwari [1999] Ch 253 , a case where a director had sold an asset to a company at a fair value but the asset fell in value and the company sold it at a loss compared to the purchase price which it had paid, the director was held to be liable to indemnify the company under s.322(3)(b). The Court of Appeal did not agree with the judge's analysis that, because the asset had been worth what the company paid for it at the time of the purchase, there was no 'loss' within the meaning of paragraph (b). Thus the court took account of movements of value after the purchase. In my view, however, it does not follow that, in a case where the company does not make a loss after the purchase, the court should take account of changes in the value of the asset in the period when it was owned by the vendor before the sale to the company. In any case it is worth noting that, whereas s.320(1)(b) applies to a gain 'by' the arrangement or transaction (by the sale to the company), s.322(3)(b) applies to a loss 'resulting from' the arrangement or transaction (resulting from the purchase by the company). The two provisions do not use matching wording, and in my judgment do not apply in the same way as each other. HWM then sold them on for much greater profit.

237. On the face of things, a company in which a director is interested which sells assets worth £5.5m for £4.4m has not made a "gain directly or indirectly by the arrangement of the [sale] transaction", but a loss. It can also be said that the "gain" which followed from the rise in the value of the assets between 1992 and 1997 was not made "directly or indirectly" by their subsequent sale but had arisen prior to the sale. In those circumstances, I can understand why Mr Justice Park reached the decision he did on the facts before him, although it is not necessary for me reach any view on this issue. However, I do not accept that decision provides any assistance in a case such as this, in which a company in which a director is interested acquired assets from the company of which he was a director without the requisite disclosure, and then proceeds to make a profit from selling those assets on. In these circumstances, the gain in question has been made "directly or indirectly by the arrangement of the transaction".

238. I am unable to accept any argument that s.322(3)(a) only applies when the transaction itself is immediately profitable for the connected purchaser (not least because of the words "directly or indirectly"). That conclusion is supported by the decision of the Court of Appeal in in re Duckwari Plc [1999] Ch 253. In that case, Duckwari had purchased property from a company linked to one of its directors, without the requisite approval being obtained. The price paid for the property was the market value, but the acquiring company incurred certain borrowing costs in funding its acquisition, and the property fell in value thereafter. Duckwari sought an indemnity under s.322(3)(b) in respect of the subsequent fall in value of the property, and the issue which arose was whether this was recoverable (because the indemnity was to be calculated on a similar basis to a claim for equitable compensation against a trustee) or whether only the difference between the price paid and the value of the property acquired at the point of acquisition could be recovered.

239. One part of Duckwari's argument (advanced by Mr David Richards QC) in favour of the former argument, was as follows:

> "Liability under section 322(3)(a) to account to the company for any `gain' made directly or indirectly by the arrangement or transaction, a liability which in practice can only be quantified at the date of judgment, confirms the view … propounded of section 322(3)(b)".

240. Nourse LJ upheld Mr Richards QC's submissions, stating at p.264 that the Judge had been wrong in "restricting the mischief addressed by the provisions to acquisitions at an inflated value or disposals at an undervalue". Nourse LJ also specifically approved Mr Richards QC's analogy with s.322(3)(a) (and, thus, his assertion that s.322(3)(a) did not involve a determination of the position solely at the point of the transaction), stating at p.265 that "this broad approach to section 322(3)(b) is entirely consistent with the provisions of section 322 …(3)(a)" and that he accepted "Mr Richards's submission as to the confirmatory effect of section 322(3)(a)".

241. It follows that I am satisfied that Mr Ruhan is liable to account for any gain he has made from the Cambulo Madeira Transaction. HPII also argued that it was entitled to recover the same amount from Mr Ruhan under s.322(3)(b), submitting:

> "The company did not receive the profits it was entitled to, which were its property; the profits were instead paid away to the defendant's order. If the Hyde Park Hotels (and thus the relevant part of the profits at the time they were made in the hands of Mr Ruhan/EE/Cambulo Madeira) was HPII's property (as we invite the Court to conclude) the indemnity for loss analysis applies equally."

242. However, I am satisfied that no such claim can be brought:

i) S.322(3)(b) gives an indemnity against "loss or damage" resulting from the transaction (namely the sale by HPII to Cambulo Madeira).

ii) If that transaction had not taken place, there would never have been any profits from the on-sale to be accounted for to HPII (for reasons explained further at [249] below).

iii) The transaction itself did not cause the failure to account for the profits. It is clear from In re Duckwari Plc (No 2) [1999] Ch 268 that the causal test imposed by s.322(3)(b) is a relatively tight one, such that losses incurred not under the transaction itself, but by reason of loans taken out to fund it, do not fall within the scope of the statutory indemnity.

## G THE UNLAWFUL MEANS CONSPIRACY CLAIM AGAINT MR RUHAN AND MR STEVENS

### The requirements

243. The parties were content to adopt the following summary of the requirements of the tort of unlawful means conspiracy from Kuwait Oil Tanker v Al Bader [2002] 2 All ER (Comm) 271, [108]. HPII must establish:

i) An agreement or combination between Mr Ruhan and Mr Stevens.

ii) An intention to injure HPII.

iii) Unlawful acts carried out pursuant to the agreement as a means of injuring the claimant.

iv) Loss suffered as a consequence of those acts.

244. The Defendants accept that if HPII's nominee case is upheld, the necessary agreement or combination is established. The Defendants also accept that the breaches of ss.317 and 320 of the Companies Act 1985 are sufficient to constitute unlawful means (with the result that it is not necessary to determine whether a breach of fiduciary duty can itself constitute unlawful means for this purpose, although I note that Mumford and Grant, (eds), *Civil Fraud, Law, Practice and Procedure* (2018), [2-060] suggest that the effect of recent first instance authority is that it can).

**Intention to injure**

245. Both Defendants deny that the necessary intention to injure is made out. They contend that, in the absence of evidence that the price paid for the Hyde Park Hotels under the Cambulo Madeira Transaction was less than their market value, or that HPII could have realised the development opportunity itself, there is no basis for concluding that they intended to cause any harm to HPII, as opposed to gain for themselves.

246. In the present case, I am satisfied that the purpose of the agreement or combination between the Defendants was to use unlawful means for the purposes of avoiding a potential obstacle to the acquisition of the Hyde Park Hotels from HPII, and to deprive HPII (and its stakeholders, acting through it) of the opportunity to seek more advantageous terms on the sale. To this extent, I am satisfied that the object of the conspiracy was to interfere with HPII's rights in and relation to the Hyde Park Hotels, but I am unable to find that, in so doing, the Defendants intended that HPII should be paid less for the Hyde Park Hotels than they were then worth, or that they had concluded that HPII would be able to realise the development opportunity itself but for their intervention.

247. The decision of the Court of Appeal in Emerald Supplies Ltd v British Airways (No 1) [2015] EWCA Civ 1024, [167]-[168] provides support for the view that there is no intention to injure in these circumstances. The issue in that case was whether the requisite intent to injure could be established, in circumstances in which the defendants had operated an unlawful cartel for airfreight services, but any increased costs might well be passed on by the claimants to their customers. The Court observed:

> "167. The critical point, in our view, is whether Mr Milligan is right to say that the possibility of laying off the cost goes solely to damage and not to intent … As to the legal merit of the submission, in our judgment the authorities demonstrate clearly that the possibility of passing on the loss goes to intent … An intention to harm the claimant cannot properly or sensibly be described as a cause of the defendant's conduct if the defendant is not even sure that the claimant will suffer loss at all".

248. However, in Lonrho Plc v Fayed the claim advanced by Lonrho Plc was that the defendants' unlawful actions were "directed as the plaintiff's business by depriving the plaintiff of the business asset of the opportunity to bid for House of Fraser" ([1990] QB, 495) or "the right to bid for House of Fraser undisturbed by wrongdoing" (ibid, 497),

and the action was permitted to proceed to trial once the House of Lords had confirmed that it need not be the defendant's predominant intention to injure the claimant if unlawful means were used ([1992] 1 AC 448). The argument that someone who wishes to obtain an asset from the claimant, and who uses unlawful means to keep the claimant in ignorance of a basis for refusing to entertain the offer or asking for more favourable terms, does not intend to injure is one which I do not find attractive, particularly given the recognition that "negotiating damages", when awarded, represent compensation for a real loss in One Step (Support) Ltd v Morris-Garnier [2019] AC 649. In the present case, however, there is an element of artificiality in considering the issue of intention to injure independently of the issue of whether HPII has suffered loss as a result of the unlawful means conspiracy alleged. I turn to that issue now.

## Loss

249. The difficulty with HPII's case on loss is that it has not sought to advance any case that:

i) it was paid less than the market value of the Hyde Park Hotels;

ii) if it had not sold the Hyde Park Hotels pursuant to the terms of the Cambulo Madeira Transaction, it would have sold the Hyde Park Hotels on more favourable terms; or

iii) it would have exploited the development opportunity presented by the Hyde Park Hotels itself.

250. As a result, the loss which HPII seeks to claim is the loss of the profit made by Cambulo Madeira after its acquisition of the Hyde Park Hotels, by on-selling them. HPII's case, as explained in opening, was as follows:

> "667 Mr Ruhan and Mr A Stevens are, we submit, liable to compensate HPII for the loss that they have caused HPII. As regards Mr Ruhan, this is an alternative analysis to the account of profits analysis above, applying in respect of his breaches of fiduciary duty, breaches of statutory duty, and to his part in and liability for unlawful means conspiracy. As for Mr A Stevens, this applies in respect of his dishonest assistance in Mr Ruhan's breaches of fiduciary duty, and his part in and liability for unlawful means conspiracy.
>
> 668 Cs allege that the nominee arrangement (whether by Mr A Stevens, or his associated companies) was set up so as to conceal the true position from HPII – that Mr Ruhan had an interest in the Cambulo Group and would stand to benefit from the Cambulo Group Sale – in such a manner that Mr Ruhan and/or Cambulo Madeira/EE would be in a position to make substantial gains without having to account to HPII for the same, such that Mr Ruhan would be able to exploit that traceable trust property to further his own private ends and ventures. What occurred constituted a number of serious, dishonest, fraudulent breaches of duties which Mr Ruhan owed to HPII, in which Mr A Stevens also dishonestly participated and assisted by knowingly playing a key part. Further, Mr Ruhan failed to inform HPII about the profits being made by him in breach of duty, failed to seek HPII's

informed consent to the profits' retention, and, of course, failed to provide any form of account. Instead, the profits were applied to his ends.

669 As we set out above, the Hyde Park Hotels profits were HPII's traceable trust property when they were made and should have been accounted to HPII. Rather than account for and pay the profits to HPII, they were otherwise dispersed by Mr Ruhan (through the use of Mr A Stevens and the companies he ostensibly controlled).

670 Accordingly, HPII's loss, caused by the Defendant's actions, is the value of its trust property as at the time the profits were made that should have been paid to HPII. That is £7.76m for the Lancaster Gate Hotel, and £94.5m for the Kensington Hotels."

251. The difficulty with this formulation, however, is that it is premised on Mr Ruhan and Mr Stevens carrying out the conspiracy to the point of realising the profits, but then causing loss to HPII by not accounting for those profits to HPII. However, the conspiracy pleaded against the Defendants is as follows (with the additions made at the Pre-Trial Review underlined):

> "Further, in all the circumstances, Mr Ruhan and Mr Stevens conspired to defraud HPII by together agreeing to <u>enact the self-dealing arrangement set out above and/or</u> to divert (and/or agreeing to enter into arrangements which would procure and/or materially assist in the diversion of the Development Opportunity away from HPII to other entities which, on their face, appeared unconnected to Mr Ruhan but of which he was in fact the UBO ('the Unlawful Means Conspiracy')".

The "Particulars of Conspiracy" which follow are focussed on the original transaction between HPII and Cambulo Madeira, and while they allege that, but for the unlawful means conspiracy, HPII would have "taken steps to ensure that … Mr Ruhan committed no breaches of duty or acts of misfeasance or fraud against HPII … or, to the extent that Mr Ruhan did so, that Mr Ruhan would account to HPII for such", HPII has never sought to develop or support a case as to what steps of this kind would have been taken, and with what effect.

252. HPII contends that the words "set out above" enlarge the scope of the pleaded conspiracy to include the allegations at para. 76(1) that Mr Ruhan exploited the Development Opportunity himself for a "secret profit to his own benefit"; at para. 76(1A) that Mr Ruhan failed to inform HPII of the profits he had made or seek its informed consent as to the retention of that profit; and at para. 76(3) in which it sets out its case as to why those breaches were fraudulent, which includes the plea that matters were set up so that Mr Ruhan would "be in a position to make gains without having to account to HPII for the same". However:

i) It is in the "Particulars of Conspiracy" that the terms and scope of the alleged conspiracy are to be found, not in the particulars of breaches of fiduciary duty against Mr Ruhan.

ii) The self-dealing breach, to which the cross-reference "as set out above" was made, was defined by reference to Cambulo Madeira's acquisition of the Hyde Park Hotels only, not the subsequent failure to account for profit (para. 38(3)).

iii) It remains the case that a single conspiracy is pleaded (and in fairness to HPII, it has at no point suggested otherwise).

253. The plea of loss and damage provides (with the additions made at the Pre-Trial Review once again underlined):

> "By reason of the above, HPII has suffered loss and damage:
>
> PARTICULARS OF LOSS AND DAMAGE
>
> No less than £102.26 million, being the loss of profits or gains arising from the self-dealing and/or diversion of the Development Opportunity which ought to have been accounted to HPII".

254. However, once again, no causation case was pleaded as to the circumstances in which, but for the unlawful means conspiracy pleaded, the £102.26 million profit would have been paid to HPII.

255. Against that background, as Mr Ryan for Mr Stevens put it in his helpful closing submissions on this topic, HPII's seeks damages to put it in the position it would have been in had the pleaded conspiracy started, but then stopped half-way through. I accept that it is not open to HPII to claim damages on this basis. Having pleaded a single conspiracy, the unlawful means of which involved entering into the Cambulo Madeira Transaction, it cannot claim "but for" damages for that tort on a basis which assumes that the transaction went ahead nonetheless. Nor can it point to some separate conspiracy which can support a measure of damages on this basis, because none has been pleaded, and the complex causation issues which it would have raised have neither been pleaded nor addressed in the evidence.

256. For these reasons, the claim in unlawful means conspiracy fails against both Defendants. There is a separate issue, which I deal with below, as to whether the position is different so far as the claims for compensation for breach of fiduciary duty and dishonest assistance are concerned.

## H MR RUHAN'S APPLICATION FOR RELIEF UNDER S.727 COMPANIES ACT 1985 OR OTHER FORMS OF RELIEF

257. On the basis of my findings, Mr Ruhan acted dishonestly in acquiring the Hyde Park Hotels through Cambulo Madeira, with Mr Stevens acting as his nominee, and he lied when he told the other directors of or stakeholders in HPII that he had no interest in the purchaser. In these circumstances, there can be no question of Mr Ruhan being entitled to relief under s.727 of the Companies Act 1985.

258. Mr Ruhan also seeks an equitable allowance in respect of any amount for which he is required to account to reflect his skill and effort in selling the Hyde Park Hotels.

259. As the Court of Appeal made clear in Imageview Management Ltd v Jack [2009] EWCA Civ 63, the power to order such an allowance in favour of a defaulting fiduciary is "to be exercised sparingly" ([60]). The Court approved a passage from Wilberforce J in Phipps v Boardman [1964] 1 WLR 933, 1018 that the power is so exercised "out of concern not to encourage fiduciaries to act in breach of fiduciary duty. It will not lightly

be used where the fiduciary has been involved in surreptitious dealings or has acted dishonestly or in bad faith". The facts of this case are very far from those of the honest, but mistaken, fiduciary considered in cases such as Boardman v Phipps.

260. Given Mr Ruhan's conscious, calculated and sustained breach of fiduciary duty in this case, which has involved dishonesty on his part throughout, I am satisfied that no allowance is appropriate.

## I HPII'S CLAIM AGAINST MR STEVENS

### The ingredients of a claim in dishonest assistance

261. I gratefully adopt the summary of the ingredients of a claim in dishonest assistance in the judgment of Mrs Justice Cockerill in FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm), [82]:

> "The ingredients of liability in dishonest assistance are:
>
> i) There must be a trust or fiduciary obligation owed by the trustee/fiduciary to the claimant. It suffices if the trust in question is a constructive or resulting trust .
>
> [I shall return to the issue raised by the last sentence of this sub-paragraph below].
>
> ii) Because dishonest assistance is a type of accessory liability, there must be a breach by the trustee/fiduciary: Royal Brunei Airlines v Tan [1995] 2 AC 378, 382; Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, …
>
> iii) The breach by the trustee/fiduciary need not be dishonest: because liability of the third party is fault-based, what matters is the nature of their fault, not that of the trustee/fiduciary: Royal Brunei Airlines, 384-5, 392, Twinsecrtra Ltd v Yardley [2002] UKHL 12 … at [109].
>
> iv) The third party must have assisted in, induced or procured the breach. It is necessary to show that the relevant assistance played more than a minimal role in the breach being carried out, but there is no requirement to show that the assistance provided would inevitably have resulted in the beneficiary suffering a loss: Baden v Société General pour Favoriser le Development du Commerce at de l'Industrie en France SA [1993] 1 WLR 509 at [246].
>
> v) The third party must have acted dishonestly in providing the assistance. The test in its modern incarnation derives from Royal Brunei Airlines at 386-7 and is now set out in Ivey v Genting Casinos (UK) t/a Crockfords [2017] UKSC 67 at [74]:
>
> > 'When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to

> whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.'

vi) However, the standards in question are those of an ordinary honest person in the circumstances of the defendant. Thus, in applying the test of dishonesty, the Court must have regard to all the circumstances known to the defendant at the time, and have regard to the defendant's personal attributes, such as their experience and the reason why they acted as they did: Royal Brunei Airlines v Tan at 391."

262. On the basis of my findings on the nominee issue:

i) Mr Ruhan was in breach of fiduciary duty in acquiring the Hyde Park Hotels.

ii) By agreeing to "front" for Mr Ruhan and hide his interest in Cambulo Madeira, Mr Stevens provided more than minimal assistance in that breach. His role was essential to ensuring Mr Ruhan's interest did not come to the attention of HPII and its stakeholders, with all of the attendant issues to which that could have given rise (see [195]).

iii) I am satisfied that the assistance was provided dishonestly, in that Mr Stevens knew that the purpose of the nominee arrangement was to enable Mr Ruhan to conceal the true position from and present a false picture to HPII and its stakeholders, and it involved Mr Stevens himself providing HPII and its stakeholders with a false account of his role. The arrangement which Mr Stevens entered into with Mr Ruhan was clearly dishonest, being undertaken to deceive HPII and thereby facilitate Mr Ruhan's attempt to profit from the Hyde Park Hotels without facing any obstacles from HPII or having to share any profit.

iv) Any honest person in Mr Stevens' position would have realised that this was dishonest.

In closing, Mr Kokelaar and Mr Ryan accepted that if the nominee case was made out, then it followed that Mr Stevens had the requisite state of mind for liability in dishonest assistance.

263. The remedies available against a dishonest assistant are, at the beneficiary's election, an account of the profits made from the dishonest assistance, or equitable compensation for the loss caused by the breach of fiduciary duty which was dishonestly assisted.

**The dishonest assistant's liability for an account of profits**

264. In principle, there are three possible approaches to the question of whether the remedy of an account of profits should be available against a dishonest assistant:

i) to hold that the dishonest assistant should be liable to account for all profits made by reason of the breaches of fiduciary duty in which they dishonestly assisted, whether made by the assistant or the fiduciary;

ii) to hold that the dishonest assistant should be liable in equitable compensation only, and not for an account of profits; or

iii) to hold that the dishonest assistant should be liable to account for the profits they themselves made from the breach of fiduciary duty in which they dishonestly assisted, but not those made by the fiduciary.

265. The first of those possibilities gained limited support in Australia and Canada, but no real traction in this jurisdiction (see Pauline Ridge, "Justifying the Remedies for Dishonest Assistance" (2008) LQR 445, 459-461 and Professor Paul S Davies' helpful case note on Novoship, "Gain-based Remedies for Dishonest Assistance" (2015) LQR 173). The Court of Appeal in Novoship (UK) Limited v Mikhaylyuk [2014] EWCA Civ 908 had to decide between the second and third alternatives, and found in favour of the latter. The reasoning of the Court in reaching its conclusion was as follows:

i) The Court of Appeal held that a dishonest assistant could only be made to account for profits which were caused by the dishonest assistance ([93]).

ii) The Court then considered what test of causation should be applied. The Court noted that the fiduciary's obligation to account for profits "did not depend on any notion of causation" ([96]).

iii) The Court also noted that where the dishonest assistant is sued for compensation for loss suffered, "the cases do show a causal connection is required" ([103]).

iv) The Court noted that in a claim for equitable compensation for breach of fiduciary duty against a fiduciary, there is a requirement of "but for" causation, albeit the common law rules of causation and remoteness do not apply ([105]).

v) In a passage which can be read as applying as much to claims for equitable compensation as to those for an account of profits, the Court then held at [107] that:

> "Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that, as in the case of a fiduciary sued for breach of an equitable (but non-fiduciary) obligation, there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy. We recognise that these rules do not apply to the case of a fiduciary sued for breach of a fiduciary duty; but that is because the two cases are different."

(I note here that the Australian courts have followed a different course, applying the same test of causation as for breach of fiduciary duty: Ancient Order of Foresters in Victoria Friendly Society v Lifeplan Australia Friendly Society Ltd [2018] HCA 43).

vi) The Court also emphasised the discretion which the court has when determining whether, or not, to order the assistant to account. At [119] the Court held:

> "We consider that where a claim for an account of profits is made against one who is not a fiduciary, and does not owe fiduciary duties then, as Lord Nicholls said in Blake, the court has a discretion to grant or withhold the remedy. We therefore agree with Toulson J in Fyffes that the ordering of an account in a non-fiduciary case is not automatic. One ground on which the court may withhold the remedy is that an account of profits would be disproportionate in relation to the particular form and extent of wrongdoing".

While all equitable relief can be described as discretionary in some sense (for example because the court can refuse relief to those whose hands are unclean or where the doctrine of laches applies), the discretion referred to here appears to be something approaching what Professor Birks would have regarded as a "strong" discretion ("Rights, Wrongs and Remedies" (2000) 20 OJLS 1).

266. Mr Stevens argues that no account should be ordered of the profits he made in dishonestly assisting Mr Ruhan's breach of fiduciary duty for two reasons.

267. First, it is said that there was an insufficient causal connection between the dishonest assistance or the breach, and any profits Mr Stevens may have made:

i) This submission appears principally to have been aimed at a claim that Mr Stevens be required to account for the profits made by Mr Ruhan from the on-sale of the Hyde Park Hotels. However, no such claim is, or can be, advanced against Mr Stevens. The whole premise of HPII's case, which I have accepted, is that those profits were received beneficially by or for the benefit of Mr Ruhan.

ii) However I am satisfied that no similar argument can be advanced in relation to the sums of £500,000 and £1,000,000 which I am satisfied were paid to Mr Stevens in return for acting as Mr Ruhan's nominee. As the *quid pro quo* for the dishonest assistance, which on the evidence before me were not paid for any service of value to HPII, the necessary connection with the dishonest assistance is clear.

268. Second, it is suggested, as a matter of discretion, I should not order an account against Mr Stevens:

i) Once again, this submission appears to have been principally aimed at a claim by HPII for an account from Mr Stevens of the profits made from the on-sale of the Hyde Park Hotels. I need say no more about this formulation.

ii) In oral closing, Mr Ryan refined the argument to suggest that there should be no account in respect of the items in [267(ii)] because they were not amounts "that HPII ought to have received". However, I am satisfied that these profits made by Mr Stevens in the form of payments for the dishonest assistance ought properly to be accounted for to HPII. The policy reasons outlined in Novoship for recognising the dishonest assistant's potential liability to account (at [76])

apply with particular force to the reward paid by the fiduciary to the assistant for their dishonesty.

269. I am far from satisfied that I have the full picture as to the benefits Mr Stevens derived from agreeing to act as Mr Ruhan's nominee in relation to the Hyde Park Hotels. However I am satisfied that it includes at least:

i) The sum of £500,000 paid to VTL, which even on the Defendants' own case, was paid in connection with the use of Euro Estates' shares as security for the Mood Facility.

ii) The sum of £1,000,000 "lent" to Mr Stevens in August 2012 and "repaid" from the £92m paid to Mr Stevens for the benefit of Mr Ruhan in November 2012. As a matter of substance, this involved Mr Stevens receiving this sum from the proceeds of the sale of the Hyde Park Hotels, which I am satisfied was in return for the assistance he provided Mr Ruhan in hiding his interest in the Hyde Park Hotels and their proceeds.

## HPII's claim for equitable compensation

*Introduction*

270. As will be apparent, the difficulty HPII faces is that (consistent with the evidence before me) it advanced no case that, but for Mr Ruhan's breach of fiduciary duty, it could have realised the profits made from the on-sale of the Hyde Park Hotels itself or sold the Hyde Park Hotels for a higher price or on better terms. Its compensation claim is premised on the loss of profits which Mr Ruhan was in a position to accrue by reason of his undisclosed self-dealing with HPII, but for which he did not account to HPII.

271. HPII says that those profits are themselves trust property, being the traceable proceeds of the Hyde Park Hotels sold to Cambulo Madeira in breach of trust. I accept that, in the absence of any defence of bona fide purchaser for value in relation to the acquisition by the Cambulo entities, the profits received from the on-sale of the Hyde Park Hotels are themselves trust property, in which HPII's existing beneficial interest continued: Foskett v McKeown [2001] AC 102, 127. In these circumstances, as against Mr Ruhan, those proceeds stand in the same position as the interests in the hotels did before them. It is well-settled that a director who acquires the company's property in breach of fiduciary duty holds that property on trust for the company (JJ Harrison (Properties) Ltd v Harrison [2001] EWCA Civ 1467, [27]). As Chadwick LJ explained, this trusteeship is described as a constructive trusteeship, but it is what has been referred to as a "type one" constructive trust because it arises by reason of a pre-existing fiduciary duty owed to HPII (adopting Millett LJ's categorisation in Paragon Finance plc v Thakerar [1999] 1 All ER 400, 408-409). If that is true of the hotels themselves, then I accept that is also true of their traceable proceeds in Mr Ruhan's hands.

*Is this claim open to HPII on its pleadings?*

272. Following amendments made in October 2021, HPII's claim against Mr Ruhan alleged the following:

i) The on-sale of the Hyde Park Hotels, and Mr Stevens' role in the same as Mr Ruhan's nominee, has been pleaded throughout (paras. 41 to 43).

ii) The amendments advanced in October 2021 alleged that the making of the profit from the on-sale involved a further breach of fiduciary duty by Mr Ruhan (para. 43). However, on the facts I have found, the making of the profit did not itself cause HPII any loss (whatever its significance for HPII's claims for an account).

iii) The disbursement of the profits by Mr Stevens for Mr Ruhan's purposes has been pleaded throughout (para. 44 and in more detail in paras. 48 and following), as has Mr Ruhan's obligation to account to HPII for the same (para. 45).

iv) The allegation of breach of fiduciary duty pleaded at paragraph 76 was expanded in October 2021 to include reference to the fact that in breach of fiduciary duty, Mr Ruhan failed to tell HPII about his interest in Cambulo Madeira, or to disclose to HPII the profits "ultimately made" or seek its informed consent to them (para. 76(1A)). Those paragraphs appear to be particulars of the Self-Dealing Breach, Conflicts Breach and Profits Breach, by setting out the circumstances in which those matters occurred so as to make the relevant conduct actionable, rather than independent allegations of breach in their own right. They are not capitalised as breaches, nor are they carried through to the causation section.

v) HPII throughout alleged that Mr Ruhan had failed to disclose the breaches of trust which took place at the time of the Cambulo Madeira Transaction, which was expanded in October 2021 to include failing to disclose the profit made to HPII (para. 76(2)).

vi) This is followed by particulars of why it is said the breaches were fraudulent breaches (something of obvious significance for limitation purposes) at para. 76(3).

vii) At paragraph 77, it is alleged that "by reason of the matters pleaded at paragraphs 65 to 76 above" (which would include the breaches in paragraph 76), Mr Ruhan was liable to compensate HPII for any loss suffered "as a result of the Diversion Breach, Self-Dealing Breach, Conflicts Breach, Profits Breach and/or ~~Diversion~~ Non-Disclosure Breach" (amendments made in October 2021 underlined). By way of summary, the breaches here pleaded are:

    a) "The Diversion Breach": diverting the "Development Opportunity" away from HPII (para. 76(1). On my findings, this caused no loss.

    b) "The Self-Dealing Breach" and the "Conflicts Breach": participating in the Cambulo Madeira Transaction through a nominee without approval of such an interest (para. 37(3)). On my findings, this did not cause HPII any loss.

    c) "The Profits Breach": "secretly making a profit … without declaring the same and without obtaining HPII's informed consent as to the profit's retention (contrary to the rule against directors making undisclosed profits from the use of company property)" (para. 43). That does involve

a complaint that Mr Ruhan failed to declare the profit to HPII and was not entitled to retain it.

d) "The Non-Disclosure Breach": failing to disclose his breaches to HPII (para. 2). No causation case was advanced at trial as to what would have happened had such disclosure been made, including, for example, what if any recovery HPII might have made at the relevant time.

viii) The claim against Mr Stevens for dishonest assistance was advanced throughout on the basis of his having "assisted in" "the several breaches by Mr Ruhan (as pleaded above)" (albeit what was "pleaded above" was necessarily expanded by the October 2021 amendments). The acts of dishonest assistance pleaded throughout included "receiving the profits and gains earned by Mr Ruhan" from the various breaches alleged (para. 82(3)).

ix) The loss claim advanced against Mr Stevens is simply:

> "By reason of the above, Mr A Stevens is liable … to compensate HPII for any loss suffered as a result of his … dishonest assistance".

273. Given the conceptual complications of this point (as I explain below), it is necessary to examine the statements of case with some care. Having done so, I have concluded that:

i) There is no plea explaining how the Non-Disclosure Breach caused loss, nor how Mr Stevens dishonestly assisted in that particular breach.

ii) The pleading alleges in terms that Mr Ruhan did not declare the profit to HPII and the pleading of dishonest assistance made against Mr Stevens extends to all breaches pleaded.

iii) While the pleading does not expressly formulate a breach of Mr Ruhan's obligation to account for that profit and Mr Stevens' dishonest assistance in breaching that duty, it does plead HPII's proprietary interest in the profits (paras 40A and 45(2)), that Mr Ruhan was in breach of fiduciary duty in retaining the profit (paras. 43, 74(4) and 76(1A)(iii)) and Mr Stevens' involvement in applying and transferring the profits for Mr Ruhan's benefits (para. 44 and following and para. 64(8)).

274. In these circumstances, if it is open to HPII as a matter of law to advance a claim in equitable compensation for loss caused by Mr Stevens' dishonest assistance in Mr Ruhan's retention, disbursement and failure to account for the profits (i.e. a claim for equitable compensation for the loss of profits which would never have been earned but for Mr Stevens' original assistance in Mr Ruhan's breach), I am satisfied that such a case is fairly open to HPII on its pleading.

*Can you dishonestly assist in the breach of a constructive trust?*

275. At common law, there appears to be no tort of procuring or inducing breach of a secondary obligation (i.e. one which arises as a result of, and as remedy for, the breach of a primary obligation) – that appears to be the effect of Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd [1995] Ch 152. That might cease to be the position if the

secondary liability merges in a judgment for damages (c.f. the position where a primary liability merges in a judgment considered in Lakatamia Shipping Co Ltd v Nobu Su [2021] EWHC 1907 (Comm), [116]-[131]). If there were a similar rule in equity, that would offer a relatively short answer to this part of HPII's case. However, the division between primary and secondary obligations is more difficult to draw in the fiduciary context, in particular when the obligations arise against someone who receives trust property as a "type one" constructive trustee.

276. In any event, any attempt to limit the equitable wrong of dishonest assistance such that it could not apply to equitable obligations arising as a result of and in response to wrongs would be inconsistent with authority. Reverting to the requirements for dishonest assistance set out at [261] above, in FM Capital Partners Ltd v Marino, [82(i)], Mrs Justice Cockerill referred to the following passage in Paul McGrath QC's *Commercial Fraud in Civil Practice* (2nd), [9.34]-[9.35]:

> "It is clear that a dishonest assistance claim may well arise in the context of a constructive or resulting trust. It is irrelevant that the trust imposed is no more than a bare trust simply to hold and restore to the rightful owner the property taken by theft, fraud or mistake. If the third party provides assistance to the trustee resulting in the trustee failing to restore the property to its rightful owner, then so long as the third party was acting dishonestly, a claim for dishonest assistance is made out …
>
> This conclusion provides some support for those commentators who maintain that liability for dishonest assistance does not require breach of fiduciary duties and that breaches of an equitable duty will suffice. It is said that a resulting or constructive trustee owes no fiduciary duties to the beneficiary as such but is subject only to an equitable duty to transfer over the relevant asset or assets. Whatever the merits of the contention that resulting or constructive trustees owe no fiduciary duties at all but are simply subject to an equitable duty, what is clear is that a party can be liable for dishonestly assisting in a breach of a resulting or constructive trust".

277. That statement of the law is also endorsed by *Goff and Jones: The Law of Unjust Enrichment* (9th), [38-15]. The authorities cited in support include Bank Tejerat v HSBC [1995] 1 Lloyd's Rep 230, 247, Fitzalan-Howard v Craig Michael Hibbert [2009] EWHC 2855 (QB) and Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511 (in respect of the claim against Mr Heinl), all of which accepted there could be liability for dishonest assistance in relation to a (type 2) constructive trust which arose as a result of the receipt of an unauthorised or mistaken payment, although without any real argument on the point. The arguments in favour of recognising a claim for dishonest assistance of a type 1 constructive trust seem stronger. Nor was there any argument before me that the equitable wrong of dishonest assistance could not apply to breach of a fiduciary or equitable duty arising under a constructive trust (of whatever type). Finally, it is not hard to find strong policy arguments in favour of the recognition of such a liability. In these circumstances, I accept the argument implicit in this part of HPII's case that it is possible dishonestly to assist the breach of fiduciary or equitable duties arising under a constructive trust (of either type).

*Can HPII claim compensation for loss on the basis that it is entitled to be put into the position it would have been in had the Hyde Park Hotels been acquired and sold-on by Cambulo Madeira, and Mr Ruhan had then accounted to HPII for the profit?*

278. I noted, when considering the claim for unlawful means conspiracy at [251]-[256] above that, in that context, HPII had advanced a single cause of action in conspiracy embracing both the acquisition of the Hyde Park Hotels from HPII and their subsequent disposal and use, with the result that the "but for" causation test had to be applied by reference to the position in which Mr Ruhan had never acquired the Hyde Park Hotels. But what is the position if HPII has more than one cause of action for breach of fiduciary duty against Mr Ruhan, one relating to Mr Ruhan's acquisition of the Hyde Park Hotel, and another (or others) relating to the failure to account for or the use of the profits made from their disposal, and Mr Stevens had dishonestly assisted both breaches? In that scenario, would it be open to HPII to sue on the second breach, without bringing the first into account when arriving at the counterfactual position?

279. This is an issue which has occasionally troubled the courts in other contexts. In Brown v KMR Services [1995] 2 Lloyd's Rep 513, the issue arose because a negligently constructed portfolio of Lloyd's syndicates, recommended to an underwriting name, produced profits in some years and losses in another. The majority of the Court held that it was open to the claimants to assert only those causes of action which resulted in underwriting losses, without giving credit for the profit. At p.553 Hobhouse LJ (with whom Peter Gibson LJ agreed) held:

> "The correct analysis is that there have been a series of separate breaches of contract on the part of the Defendants. In each year it was the contractual duty of the Defendants to advise the Plaintiff on his allocations for the following year. The Plaintiff therefore has an independent and separate cause of action in respect of each year. His cause of action in respect of an earlier year might become time-barred when that in respect of a later year was not. The cause of action in respect of the underwriting year 1990 is under a different contract to that covering the previous years.
>
> The Plaintiff is entitled to sue in respect of each distinct cause of action. Each cause of action gives rise to a right in law to recover the damages which the Plaintiff has suffered by reason of the breach which constitutes that cause of action. The cause of action is a legal one arising under contract and is not dependent upon any equitable or restitutionary principle … It was not an action for an account.
>
> …
>
> Where a plaintiff has distinct legal causes of action he is entitled to choose in respect of which causes of action he sues. Other potential causes of action are irrelevant just as it is irrelevant in the present action whether the Plaintiff made a profit or a loss on the underwriting year 1991."

280. Dissenting on this point, Stuart-Smith LJ held (at p.543):

> "The principle of damages is that the plaintiff should be restored to the position in which he would have been but for the breach of duty; he should recover no

> more and no less. The Plaintiff should have been given the warning and advice at the time the relevant syndicate was recommended to him: that was in relation to the 1986 allocations or in some cases earlier. Once the warning and advice is given in relation to a particular high risk syndicate it is unrealistic to suppose that it needs to be repeated each year, unless there is a change of circumstances which increases the risk. The Plaintiff's damages are to be quantified on the basis of the loss resulting from the failure to warn. To say that the Plaintiff is entitled to disregard the profits in 1986 and 1987 is quite inconsistent with his case that given the warning he would have acted differently. He cannot have it both ways. As the Judge put it in argument, he cannot take the plums and leave the duff. Suppose 1988 and 1990 had been years of loss attributable to the high risk syndicates but 1989 had shown a profit on those syndicates equal or greater than the losses of the other two years, it would be contrary to sense to allow the Plaintiff to recover the losses but ignore the profit. The fact is that in such a case as a result of the breach he would have suffered no loss. I can see no difference in principle between that case and this. A similar approach was adopted by Brightman J. in Bartlett v Barclays Trust Co (No 1) [1980] Ch 515 at 538. Similar breaches of trust had resulted in losses on one property transaction and profit on another. The trustee was allowed to set off the profit against the loss and so reduce his liability".

281. In Charles Villeneuve Kyoto Securities Limited v Joel Gaillard H Goldings Limited [2011] UKPC 1, the Privy Council observed at [93] that:

> "There is no general principle that in assessing either common law damages or equitable compensation for breach of fiduciary duty, losses should be reduced by adventitious gains in separate transactions between the same parties".

282. To similar effect, *Halsbury's Laws of England, Trusts and Powers* (Volume 98 (2019) [660] provides:

> "Where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set-off the gain against the loss, but is liable for the whole loss occasioned by the one breach, while the estate is entitled to the whole gain realised by the other."

283. While these authorities are not concerned with a position in which the first breach occasions the gain which is then lost by the second, they do support a principle that a claimant with more than one cause of action, some of which caused loss and some gains for the claimant, is ordinarily permitted to advance its claim and its "but for causation" case only by reference to those breaches which caused loss.

284. This makes it necessary to consider whether Mr Ruhan committed separate breaches of fiduciary duty, in relation to the acquisition of the Hyde Park Hotels, and in disbursing and failing to account for the proceeds of sale, such that it can be said that HPII has separate claims against Mr Stevens for dishonestly assisting in those breaches.

285. I have not found the answer to that question straightforward, and I suspect it raises a number of complex issues about the nature and proper characterisation of the obligations of a fiduciary (whether a trustee or company director) with which I have not engaged. However, I have come to the conclusion that Mr Ruhan did commit separate breaches of fiduciary when acquiring the Hyde Park Hotels, and in applying the profits

for his own purposes, and that there are separate causes of action against Mr Stevens for dishonestly assisting in those breaches.

286. First, the beneficiary's ability to trace into profits made by the trustee through unauthorised dealings with trust assets is often rationalised on the basis that the beneficiary has a right of election between treating such an unauthorised act as a wrong causing loss for which equitable compensation can be claimed, or adopting the act and treating the proceeds as trust property (see for example Lord Millett in Foskett v McKeown [2001] 1 AC 102, 130-131, citing Professor Williston's statement that "the cestui que trust should be allowed to regard the acts of the trustee as done for his benefit"). It can be argued that if the beneficiary takes this course, then there can be no dishonest assistance in respect of acts of the fiduciary which are so adopted, leaving only such breaches as the beneficiary does not choose to adopt, which can be the subject of a claim in dishonest assistance.

287. Second, the fiduciary does appear to commit a separate breach of duty when it applies the proceeds of trust property (in this case the profits of the sale) for its own purposes, and if there is a separate and significant act of dishonest assistance by the original assistant at that stage, there should be a separate cause of action against the assistant at that point. The issue can be tested by considering the position of a fresh assistant, who arrives after the fiduciary has realised a profit from trust property acquired in breach of the self-dealing rule. It seems clear that someone who dishonestly assists the fiduciary in moving or dissipating the profits held by the fiduciary on constructive trust is liable for that dishonest assistance: see [277] above and also Lord Millett's comment in Twinsectra Ltd v Yardley [2002] 2 AC 164, [107], that liability for dishonest assistance:

> "extends to everyone who consciously assists in the continuing diversion of the money. Most of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money".

If the actions of the new assistant give rise to a cause of action at that point, I have struggled to see why a further act of assistance by the original dishonest assistant has a different status.

288. Third, if the position of the corporate recipient of the property (Cambulo Madeira) is brought into the analysis at this point, and it is treated as having received the property beneficially but with the fiduciary's notice attributed to it (cf [15]-[16] above), then the payment of the profits away by the corporate body would be a breach of the type-2 constructive trust which arose by reason of its knowing receipt, and if the dishonest assistant assisted that breach, it would be liable: see [277] above. I cannot see why a different result follows if (as is the assumed position here) the corporate vehicle receives as nominee for the fiduciary, who committed a breach of fiduciary duty in acquiring trust property, and then uses the profits for their own purposes, the dishonest assistant assisting at both stages.

289. If, by contrast, I had concluded that there was a single breach of fiduciary duty by Mr Ruhan, in which Mr Stevens committed two distinct acts of dishonest assistance, then HPII's claim would have run into greater difficulties. This is because the authorities hold (see [293] below) is that the causal test to be applied when assessing a claim for equitable compensation for the equitable wrong of dishonest assistance is the loss caused by the breach of fiduciary duty which has been assisted, rather than by the acts

of dishonest assistance themselves. Given my conclusion that there were distinct breaches of fiduciary duty by Mr Ruhan, I do not need to consider those difficulties further.

*If the case is open to HPII and good in law, has it been made out on the evidence?*

290. Finally, Mr Stevens argues that HPII has failed to show any effective assistance by Mr Stevens in Mr Ruhan's failure to account for the profit to HPII and/or his application of that profit for his own use.

291. When damages are claimed against a dishonest assistant, there is a causal requirement which must be satisfied. The position established by appellate authority is as follows:

i) In Grupo Torras AS v Al-Sabah [2001] CLC 221, [119], the Court of Appeal stated:

> "Paragraphs 13 and 14 of the notice of appeal criticise the judge's approach to causation, arguing that GT failed to establish a causal link between any acts or omissions on the part of Mr Folchi and the loss which the judge found GT to have sustained. However, we think the judge was right when he said:
>
> > 'the requirement of dishonest assistance relates not to any loss or damage which may be suffered but to the breach of trust or fiduciary duty. The relevant enquiry is … what loss or damage resulted from the breach of trust or fiduciary duty which has been dishonestly assisted. In this context, as in conspiracy, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss.'
>
> This is the essence of accessory liability clearly spelled out by Lord Nicholls in Royal Brunei."

ii) In Casio Computer Co Ltd v Sayo [2001] EWCA Civ 661, [15], the Court of Appeal stated:

> "… in a claim for dishonest assistance it is not necessary to show a precise causal link between the assistance and the loss …. Loss caused by the breach of fiduciary duty is recoverable from the accessory. That is the relevant causal connection for this purpose".

292. The current state of the law with regard to the causal test applicable to claims in dishonest assistance gives rise to certain curiosities:

i) The combined effect of Novoship, Grupo Torras and Sayo would appear to be that the dishonest assistant is liable for loss caused by the fiduciary's breach of fiduciary duty, but the causal test to be applied when determining what loss the breach of fiduciary duty has caused may differ as between the fiduciary and the dishonest assistant.

ii) If that is not the case, then the effect of Novoship is that a different test of causation applies to determining what profits the dishonest assistant has made from the dishonest assistance than apples to determining what losses have been caused by the breach of fiduciary duty which they have dishonestly assisted, and for which the assistant must pay compensation.

293. Both Grupo Torras (which was cited with approval in Novoship) and Novoship are binding on me, and on the facts of this case, the potential complications considered in the preceding paragraph do not present any difficulties. Here:

i) As the individual in whose name and under whose nominal control the profit was held, and who applied that profit for Mr Ruhan's purposes on Mr Ruhan's instructions, I am satisfied that Mr Stevens played a sufficient role in relation to the acquisition, retention and disposal of those profits to meet the causal requirements of the equitable wrong of dishonest assistance at that stage.

ii) If that is the case, whatever causal test is to be applied, Mr Stevens is liable for the loss caused by the failure to hand-over the profits, those being losses which necessarily flow from the breach of what is sometimes referred to as the "custodial" duty of the constructive trustee (whether properly characterised as fiduciary or equitable).

iii) If, by contrast, the breach of fiduciary or equitable duty relied upon by HPII at this stage had been something other than the custodial duty (for example a breach in failing to provide information to HPII), then there was no attempt at trial to explore what the consequences of performance of that duty would have been, and this part of HPII's claim would have failed.

*Conclusion*

294. For the reasons I have set out, HPII's claim for equitable compensation succeeds both against Mr Ruhan and against Mr Stevens.

295. In Howard v Le Duc de Norfolk (1682) 3 Cases in Chancery 40, 52 (22 ER 955, 962), Lord Nottingham (LC) observed of his own judgment:

> "I have made several Decrees since I have had the Honour to sit in this Place which have been reversed in another Place, and yet I was not ashamed to make them, nor sorry when they were reversed by others. And I assure you, I shall not be sorry if this Decree, which I do make in this case, be reversed too, yet I am obliged to pronounce it by my Oath and by my Conscience".

296. I cannot claim that the answer to which my application of the relevant legal principles has led me in this case has provoked quite that reaction. Mr Stevens' acts of dishonest assistance in relation to the retention and disposal of the profits were significant, and distinct from those which had enabled Mr Ruhan to acquire the Hyde Park Hotels. Nonetheless, I have not found the answer entirely satisfactory or wholly intuitive:

i) It might be said that the success of the argument elides many of the distinctions between claims for an account of profits and claims for equitable compensation,

despite the very different nature of those two remedies and the legal regimes which govern them.

ii) In substance, HPII's complaint here is that Mr Ruhan abused his position as a fiduciary to make a profit which HPII would not have made for itself, and that Mr Stevens dishonestly assisted him in that. It might be said that, as a matter of substance, that is a claim for an account, and it should carry whatever legal consequences follow from that categorisation.

iii) In certain factual scenarios, including this one, the argument might be said to come close to rendering the dishonest assistant liable for the profits made by the fiduciary even though English law has not chosen to render dishonest assistants directly so liable, and to permit such a claim "as of right", notwithstanding the "strong" discretion which exists in determining whether to order the dishonest assistant to account for *their* profits and (perhaps) without the benefit of the more exacting causation test which would have applied to such a claim.

iv) The result might be thought particularly strict, because of the consequences which follow from applying the causation test set out in [293] above to claims for dishonest assistance in the breach of purely custodial duties (as opposed to a test considering the effect on the beneficiary of the acts of dishonest assistance).

## J LIMITATION

297. HPII accepts that its claims have been brought more than 6 years after the breaches complained of (para 674 of HPII's opening submissions). So far as its claims against Mr Ruhan for breach of trust and breach of fiduciary duty are concerned, it relies on s.21 of the Limitation Act 1980 ("**the 1980 Act**"). So far as all other claims are concerned, it relies on s.32 of the 1980 Act. HPII accepts that the effect of the decision of the Supreme Court in Williams v Central Bank of Nigeria [2014] AC 1189 is that it is not open to it to rely on s.21 of the 1980 Act as against Mr Stevens.

### The issues as to s.21 of the 1980 Act

298. S.21 of the 1980 Act provides:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust being an action:
>
> (a) in respect of any fraud or fraudulent breach of trust; or
>
> (b) to recover from the trustee trust property in the possession of the trustee or previously received by the trustee and converted to his use.
>
> …
>
> (3) Subject to the preceding provisions, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation s prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued".

299. Mr Ruhan says that s.21 does not apply to the claims made against him for breach of fiduciary duty.

*Are the fiduciary duty claims against Mr Ruhan "in respect of any fraud or fraudulent breach of trust"?*

300. On this issue, Mr Ruhan referred me to the judgment of Adam Johnson QC in Davies v Ford and ors [2020] EWHC 686 (Ch), [333]-[337]:

> "333. As to my second preliminary point, it is useful to ask: what amounts to fraud for these purposes?
>
> 334. A useful starting point is the dictum of Millett LJ in Armitage v Nurse [1998] Ch 241 at p. 251, that it 'connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing it is contrary to the interests of the beneficiaries or being recklessly indifferent as to whether it is contrary to their interests or not.' He went on:
>
> > 'It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly. It does not matter whether he stands, or thinks he stands, to gain personally from his actions. A trustee who acts with the intention of benefiting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself.'
>
> 335. In First Subsea v Balltec [2018] Ch 25, Patten LJ put essentially the same point pithily, as follows at [64]:
>
> > 'For a breach of trust to be fraudulent it is not enough to show that it was deliberate. There must be an absence of honesty or good faith. This can include being reckless as to the consequences of the actions complained of.'
>
> 336. It follows that the touchstone for identifying a fraudulent breach of trust is dishonesty."

301. Mr Spalton QC argues that what Mr Johnson QC described as "a useful starting point" in fact imposes a requirement that a breach of trust will only be fraudulent for the purposes of s.21(1)(a) if the trustee believes the action is contrary to the interests of the beneficiaries (or is reckless as to that fact). He further submits that Mr Ruhan believed that entering into the Cambulo Madeira Transaction was in HPII's best interests.

302. This submission fails on the law and on the facts.

303. It fails on the law because Millett LJ was not purporting to lay down a requirement which had to be satisfied before a breach of trust could be fraudulent for s.21(1)(a) purposes, but identifying a test which would assist in answering that question for certain types of breach of trust. I put to Mr Spalton QC the example of a director who knows that the shareholders are resolutely opposed to selling them company property but believes it is in the company's best interests to do so, and who therefore deceives the

shareholders to permit the transaction to proceed. Mr Spalton QC suggested that this would not constitute a fraudulent breach of trust. I cannot accept that this is so. Such a transaction (which is effectively the position in this case) is plainly dishonest. I note that Lord Briggs in Burnden Holdings (UK) Ltd v Fielding [2018] UKSC 14, [16] observed that "the deliberate use of a corporate vehicle to distance a defaulting trustee from the receipt or possession of misappropriated trust property … would in most cases justify a finding of fraud within the meaning of section 21(1)(a)". In this case, a nominee was used to hide Mr Ruhan's interest, and Mr Ruhan dishonestly denied that he had such an interest.

304. It fails on the facts because I do not accept on the evidence that Mr Ruhan had positively concluded that the Cambulo Madeira Transaction was in HPII's best interests, still less that this was the reason why he entered into the transaction. Mr Ruhan was at all times concerned only with his own interests, and did not care whether the transaction was in HPII's best interests or not.

*Does s.21(1)(b) apply to a claim for an account of the profits made by Mr Ruhan?*

305. Mr Ruhan contends that s.21(1)(b) does not apply to HPII's claim for an account of the profits made by Mr Ruhan from the on-sale of the Hyde Park Hotels. For this purpose, he relies on the following statement by David Richards LJ in Burnden Holdings (UK) Ltd v Fielding [2016] EWCA Civ 557, [38]:

> "Mr Chivers also objected that an account of profits is not within section 21(1)(b). I am inclined to agree, but the remedies sought by the claimant include equitable compensation and that appears to me to be an appropriate remedy falling within section 21(1)(b), particularly where, as in the case of Mrs Fielding, the trustee's indirect interest in the trust asset has been converted to the use of the trustee."

306. In the Supreme Court, Lord Briggs stated at [13]:

> "Section 21(1)(b) is about actions 'to recover from the trustee trust property or the proceeds of trust property …' A preliminary objection was taken in the Court of Appeal by Mr David Chivers QC (who appears also on this appeal for the defendants) that a claim such as the present, for an account of profits or alternatively equitable compensation, did not fall within section 21(1)(b) at all. This was rejected by the Court of Appeal, at para 38, upon the basis that a claim for equitable compensation, in a case where the trustee's indirect interest in the trust asset had been converted to the use of the trustee, was an appropriate remedy to seek in an action falling within section 21(1)(b). That analysis of David Richards LJ has not been challenged on this appeal."

307. Burnden was a case in which, as part of a co-ordinated transaction: (i) the claimant company transferred its shares in certain subsidiaries to a new holding company (HCo1) by way of a distribution; (ii) HCo1 then went into voluntary liquidation, its shares in the subsidiaries passing to a new company, HCo2; and (iii) the shareholders in the claimant (which included two directors, Mr and Mrs Fielding) were given shares in HCo2 and in a new holding company, HCo3 (which owned the claimant company). Mrs Fielding then sold her shares in HCo2 for a profit. The liquidator of the claimant company commenced proceedings against the Fieldings, alleging that the distribution

by the claimant of the shares in the subsidiaries to HCo1 had occurred through breaches by the Fieldings of their duties as directors. A claim was made for an account of profits or equitable compensation. It is not clear from the judgment itself the basis on which the argument about the status of an account for s.21(1)(b) purposes was advanced. However, I note that the extract from the pleading set out at the end of the judgment provides:

> "In breach of their duty to avoid conflicts of interest, the first and/or second defendants:
>
> …
>
> 34.2.3 made a secret profit by transferring the issued share capital in Vital to a company which they control [HCo2] and/or then selling 30% of that shareholding for … £6.3m".

308. In the present case, the profit for which Mr Ruhan is (absent a limitation or laches defence) obliged to account is the proceeds of sale of the Hyde Park Hotels, received in exchange for the trust asset. Whatever might be the position on the facts in Burnden, or other claims for accounts of profits which do not derive from the sale of trust property, I have concluded that a claim for an account of the profits of the Hyde Park Hotels does fall within s.21(1)(b). I am fortified in this conclusion by the following:

i) Following Burnden, there is no doubt that Mr Ruhan was in possession of the Hyde Park Hotels (which his corporate vehicle held on his behalf), that he sold them and that he applied the proceeds of that sale to his own use. In my view, a complaint of that kind falls four-square within the purpose of s.21(1)(b), as identified in respect of a predecessor section, by Mr Justice Kekewich in In re Timmis, Nicon v Smith [1902] 1 Ch 176, 186:

> > "The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, i.e. money of the trust received by him and converted to his own use."

ii) My conclusion is on all-fours with the decision in JJ Harrison (Properties) Ltd v Harrison [2001] EWCA Civ 1467. In that case, a director (Mr Harrison) had purchased land from the claimant company in breach of fiduciary duty for £8,400 on 12 February 1986. Planning permission was then obtained and further work done on part of that land, and Mr Harrison sold that part for £110,000 in December 1988. The Judge held that the claimant was entitled to equitable compensation or an account of the profit made on the sale of the land, and the claimant elected for the latter. Mr Harrison's argument that s.21(1)(b) of the 1980 Act did not apply to the account claim was rejected by the Court of Appeal, who held that Mr Harrison was obliged to account for the £110,300 he received in December 1988, less acquisition costs and the costs of work done.

iii) In Gwembe Valley Development Co Ltd v Koshy (No 3) [2004] 1 BCLC 131, Mummery LJ held that the claim for an account of profits in that case did not

fall within s.21(1)(b). He did so not because claims for an account of profits can never fall within that provision, but because the claims against Mr Koshy "did not depend on any pre-existing responsibility for any property of the company" ([119]-[120]). Here, by contrast, Mr Ruhan's obligation to account arises precisely because of his receipt and sale of trust property for which he had a pre-existing responsibility.

iv) To similar effect, in First Subsea Ltd v Balltec Ltd [2017] EWCA Civ 186, Patten LJ noted at [59] that s.21(1)(b) had no application in a case "which gives rise to a constructive trust over (for example) the secret profit" because "in such cases the director … has no proprietary relationship with what he acquires other than as the recipient of the proceeds of his breach of duty."

v) Applying these authorities, in Novoship v Ford [2020] EWHC 686 (Ch), Mr Adam Johnson QC at [313]-[315] distinguished between cases involving the "misapplication [of] pre-existing corporate assets", when s.21(1)(b) would apply, and cases where the agent receives a bribe or secret commission, when it would not.

vi) The editors of *Palmer's Company Law* [8.3321] draw a similar distinction when discussing Burnden, between "disloyal profits" generated from the receipt of property which was originally the company's, to which s.21(1)(b) applies, and those arising "from other sources (e.g. corporate opportunities and presumably bribes)" to which it does not.

vii) Finally, I would note that in cases in which a trustee or director impermissibly acquires trust property, and then sells it, the beneficiary or company will ordinarily be entitled to elect between a claim for equitable compensation and an account of profits (as in JJ Harrison). Given that right of election, it might be surprising if s.21(1)(b) applied to one claim, but not the other.

## S.32 of the 1980 Act

*Introduction*

309. S.32 of the 1980 Act provides as follows:

> **"Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) Subject to subsections (3) , (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake.

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

**Is s.32 engaged?**

310. HPII contends that s.32 of the 1980 Act is engaged against both Mr Ruhan (if necessary) and Mr Stevens:

i) because the action is based on their fraud; or

ii) because fact(s) relevant to HPII's right of action has (or have) been deliberately concealed, having regard (in particular) to s.32(2).

311. So far as s.32(1)(a) is concerned, the Defendants contend that HPII's claim is not "based on the fraud of the defendant". In Cunningham v Ellis [2018] EWHC 3188 (Comm), [87], Mr Justice Teare approved a statement in McGee, *Limitation Periods* 8th [20-009] that "for the purposes of section 32(1)(a), an action is `based upon a fraud' if fraud is an essential element of the cause of action", although in that case he held that in a case of unlawful means conspiracy, it was sufficient for the unlawful means relied upon to require fraud. However, in Attorney-General of Zambia v Meer Care & Desai [2007] EWHC 952 (Ch), Mr Justice Peter Smith held that s.32(1)(a) applied to any claim of which fraud was an integral element.

312. Taking the position of Mr Ruhan first, it is not necessary to resolve any conflict between these authorities (which was the subject of consideration by Peter MacDonald Eggers QC in Sixteenth Ocean GmbH & Co KG v Société Générale [2018] EWHC 1731 (Comm)). Had the point arisen, I would have inclined to the view that, even on Mr Justice Teare's approach, a claim for fraudulent breach of trust or fiduciary duty is one "based on the fraud of the defendant" because fraud is an essential ingredient of what is a distinct cause of action (Madoff Securities International Ltd v Raven and ors [2013] EWHC 3147 (Comm), [323]).

313. The claim against Mr Stevens for dishonest assistance is clearly "based on the fraud of the defendant" (Madoff Securities International Ltd v Raven and ors, [387]): it involved presenting a false picture to HPII as to the independence of Cambulo Madeira from Mr Ruhan.

314. So far as s.32(1)(b) is concerned, the Defendants accept, on the basis of the decision in Giles v Rhind [2009] Ch 191, that if the nominee case is upheld and a finding of dishonest assistance made, s.32(1)(b) will apply. In these circumstances I will take this issue very shortly:

i) Both Mr Ruhan and Mr Stevens clearly deliberately concealed Mr Ruhan's interest in Cambulo Madeira and Mr Stevens' role as nominee (not simply by not revealing these matters, but by Mr Ruhan denying he had such an interest and Mr Stevens presenting himself to HPII as the beneficial owner of Cambulo Madeira when he was not). These facts were the very essence of HPII's claims, and therefore s.32(1)(b) is engaged.

ii) Mr Ruhan's breach of fiduciary duty was deliberate as was Mr Stevens' dishonest assistance, and their actions took place in circumstances in which they were unlikely to be discovered for some time. Indeed that was the very purpose of the secret nominee arrangement.

**The reasonable diligence test**

315. There was limited dispute between the parties as to the applicable principles:

i) The claimant is not immediately presumed to be on enquiry as to the need to investigate potential wrongdoing. Rather there must be an event (referred to in the authorities as a "trigger") which, objectively, puts the claimant on notice as to the need to investigate a potential claim: DSG Retail v Mastercard [2020] Bus LR 1360, [65-66] and OT Computers Ltd v Infineon Technologies [2021] QB 1187, [35].

ii) The issue is when the claimant *could*, not would, with reasonable diligence, have discovered sufficient facts to enable it properly to advance the claims brought, and the burden lies on the claimant to establish that it could not, acting with reasonable diligence, have made the relevant discovery: Paragon Finance plc v D B Thakerar & Co [1989] 1 All ER 400, 418.

iii) The test is objective, although "what reasonable diligence requires in any situation must depend on the circumstances" (Males LJ in Infineon, [29]).

iv) Discovery for this purpose occurs no later than when the claimant is able properly to plead the allegations: Allison v Horner [2014] EWCA Civ 117, [46] and Law Society v Sephton & Co [2005] QB 1013, [110].

316. There was some debate before me as to whether the fact that HPII was under the control of a liquidator for part of the relevant period had any effect on what constituted "due diligence", it being the Defendants' submission that the liquidator's statutory duty to make enquiries as to what claims the company may have effectively imposed a higher standard. I observed in Granville Technologies Ltd v Infineon Technologies Ltd [2020] EWHC 415 (Comm), [56] that the fact that a company was in liquidation, and hence no longer trading, might well be relevant in some cases to the issue of whether it was put on enquiry as to the possibility of a claim (because, as in that case, the existence of potential claims of the relevant kind were a matter of discussion among those active in the relevant industry). The argument in this case was the rather different one that the liquidator (in effect) had to do more to reach the "reasonable diligence" standard. Whatever the position might be in a case in which the liquidator's special powers offered avenues of investigation not open to ordinary litigants, I am not persuaded on the facts of this particular case that the liquidator's statutory duty to investigate claims

makes a meaningful difference to the issue of whether HPII was reasonably put on notice of something which merited investigation (by whatever means).

**When should HPII have started investigating?**

*The witnesses*

317. The only witnesses of any real relevance to the s.32(1) due diligence issue were Mr Chesterton (HPII's liquidator from 17 April 2008 to 16 February 2010, and (after HPII's restoration) from 13 July 2015 to 13 March 2018) and, to a lesser extent, Mr MacDonald (the current liquidator, and former administrator, of Orb Estates and Mitre). Perhaps reflecting the fact that the Defendants' cross-examination energies had to be vented somewhere, they were both cross-examined forcefully for a significant period. In the event, the issues raised by the s.32(1) issue essentially involve an objective evaluation of underlying facts which are largely not in dispute, and the evidence of Mr Chesterton and Mr MacDonald had only a limited impact on that issue. For that reason, I intend to address the points put to them, and their evidence, briefly.

318. As to Mr MacDonald:

i) I do not accept the suggestion that Mr MacDonald sought to prioritise the interests of Mr Ruhan and Mr Campbell over those of the creditors of Orb Estates and Mitre in the Orb Estates administration. In part this allegation stemmed from a misunderstanding (resolved by the late introduction of a document into the trial bundles) that Mr MacDonald had not shared his proposals set out in draft slides sent to Mr Ruhan and Mr Campbell with other creditors. Reliance was also placed on the fact that the slides referred to what Mr Ruhan's and Mr Campbell's objectives should be in that restructuring. However, the slide deck also made it clear that the objective of the restructuring should be to "maximise the interests of creditors" alongside other objectives. This was, with respect, a typical piece of "win, win" business promotion in which TMP were keen to suggest that its involvement would be good for everyone, and it does not bear the weight the Defendants sought to place on it.

ii) Nor do I accept that Mr MacDonald surrendered his independent judgment to the interests of Dr Smith or Mr Ruhan. Mr MacDonald clearly had close and friendly relations with Mr Ruhan, who had been a source of valuable business. At times, the communications between Mr MacDonald and Mr Ruhan may have been a little too close (for example Mr MacDonald's email of 14 July 2014 discussing the provision of Isle of Man court documents). I also accept that Mr MacDonald held a positive view of Mr Ruhan, which is likely to have been factored into any assessment of Dr Smith's allegations against him. However, I reject any suggestion that TMP's decision not to investigate those allegations was taken in an effort to assist Mr Ruhan or preserve TMP's relationship with him rather than because in TMP's view that there was nothing in the allegations.

iii) Mr MacDonald kept in touch with a number of individuals involved in these events, including Mr Campbell who had also been the source of a number of business introductions, and who became a close associate of Dr Smith. I accept that Mr MacDonald saw this as a useful means of acquiring market intelligence, in a dispute which involved a number of competing players, many of whom

were known to him. However, almost inevitably those who seek to obtain useful intelligence in this way end up providing it as well, and this was the case so far as some of Mr MacDonald's communications with Mr Campbell were concerned. While at times Mr MacDonald may have been insufficiently alive to the need to compartmentalise information, that is of no significance to the issues in this case.

319. Turning to Mr Chesterton:

i) He (like Mr MacDonald) was naturally concerned to defend the conduct of TMP in the HPII insolvency, and in particular any suggestion that he had failed to investigate something which ought to have been investigated. That made his evidence appear a little defensive at times.

ii) I accept that there was a commercial relationship between TMP and Mr Ruhan. While Mr Chesterton's statement identified important sources of work Mr Ruhan had introduced, he only listed cases in which he had been appointed as an office holder. As a result, some commercial interactions were omitted, with the result that the statement was not as comprehensive as its terms suggested.

iii) I also accept that his positive experiences of Mr Ruhan in those contexts is likely to have been a factor influencing Mr Chesterton's assessment of the credibility of Dr Smith's allegations against Mr Ruhan.

iv) For the same reasons as with Mr MacDonald, I reject any suggestion that Mr Chesterton's decision not to investigate the allegations was taken in an effort to assist Mr Ruhan or preserve TMP's relationship with him, rather than by reason of Mr Chesterton's view (right or wrong) of the merits of the allegations.

v) I accept that the witness statement signed by Mr Chesterton in support of the restoration of HPII to the register in 2015 was inaccurate in its account of when allegations against Mr Ruhan first came to his attention. That suggests that, perhaps as a result of the "ticking clock", insufficient care was taken in preparing it. I do not accept, however, that there was any attempt by Mr Chesterton to mislead the court (not least because I am unable to discern any sufficient motivation for an office-holder to have adopted such a course).

vi) I accept that Mr Chesterton's witness statement in this action, when addressing the documents acquired from the Serious Fraud Office ("**the SFO**"), paid insufficient recognition to the fact that a nominee allegation had been made in a letter of 27 November 2007 which I discuss below, something Mr Chesterton was reluctant to accept in cross-examination. However, what matters is the objective position in 2008 on which I have reached my own view.

*The facts*

320. On 19 May 2006, Mr Chesterton was approached by Mr Ruhan (who he knew from a previous insolvency appointment) in relation to his potential appointment as liquidator of CLGD in a possible solvent members' voluntary liquidation. A note of that contact, which is the best evidence of what occurred, refers to a sale of the Hyde Park Hotels to Mr Stevens, who had acquired them through three SPVs, that Jones Day had acted for

Cambulo Madeira, that Mr Stevens had retained Mr Ruhan to collect monies due and that a well-known bank, Investec, had provided financing. On 28 July 2006, Mr Chesterton and Ms Jenkins of TMP met Mr Ruhan and Mr Pilbrow. A note taken by Ms Jenkins confirms that similar information was provided at that meeting. Mr Chesterton was then contacted by Mr Pilbrow, in an email copied to Jones Day and Mr Stevens, asking him to prepare for the liquidation. Mr Ruhan was not party to either this communication or Mr Chesterton's reply, although Mr Pilbrow forwarded him the exchange in a separate private email (Mr Chesterton not being copied in). Mr Chesterton had a further meeting with Mr Pilbrow on 31 August 2006, in which Cambulo Madeira was once more referred to as Mr Stevens' company, and on 12 September 2006 Mr Chesterton was sent papers signed by Mr Stevens approving his appointment as liquidator the previous day. The liquidation proceeded quickly and without incident, Mr Chesterton resigning on 16 October 2006 and CLGD being dissolved on 20 January 2007.

321. In early August 2007, Mr Johnstone of Mr Ruhan's company Bridgehouse Capital approached Mr Chesterton in relation to the potential creditors' voluntary liquidation of HPII.

322. Mr MacDonald, TMP's principal, had been appointed the administrator of Orb Estates and Mitre (companies acquired by Mr Ruhan from Dr Smith) on 11 July 2003, and that administration was ongoing (indeed, in the form of a liquidation, it still is). That administration had been prolonged by a potential claim against the Royal Bank of Scotland International arising from the fraud which Dr Smith had perpetrated (which eventually settled for £2.1m on 15 August 2008).

323. It was as the administrator of Orb Estates and Mitre that on 1 April 2008, the SFO sent Mr MacDonald two lever-arch files which the parties have referred to as "**the SFO Documents**". There were 939 pages covering a range of issues arising out of the confiscation proceedings which the SFO had brought against Dr Smith. The assiduous reader of those documents, who sought to piece the events as they emerged from that material together, would have reached the following conclusions:

i) A witness statement made by Dr Smith on 5 May 2005 containing his account of his assets did not mention any assets held by Mr Ruhan.

ii) A witness statement of 20 September 2005 from a Mr Stephen Sinclair suggested that Mr Ruhan owed Dr Smith or Orb contractual obligations arising from the 2003 transactions between Orb and Atlantic.

iii) The investigations performed by the Asset Recovery Agency as recorded in statements dated 26 June and 21 September 2006 into the location of Dr Smith's assets made no reference to any assets held by Mr Ruhan, although reference was made to the suggestion that there might be a claim for breach of contract against Mr Ruhan under the 2003 sale agreement.

iv) A lengthy statement served by Dr Smith under cover of a letter from his solicitors of 13 November 2006 made no reference to assets held on his behalf by Mr Ruhan, and on the contrary asserted that there were "no hidden assets". Dr Smith's solicitors said that they were "seeking to obtain additional evidence from other parties to support the matters to which Dr Smith refers".

v) On around 6 November 2007, Bankside Law sought an order requiring production of all documents held by Chestergate Asset Management Limited (a company associated with Mr Ruhan) in relation to the acquisition and disposal of the Orb assets acquired from Dr Smith. The witness statement made in support of that application was not included in the bundle, but a careful reading of other documents would have shown that it advanced allegations that Mr Ruhan was holding assets belonging to Dr Smith.

vi) On 8 November 2007, Chestergate Asset Management Limited replied stating that the request for documents had been passed onto Messrs Cooper and McNally.

vii) On Friday 9 November 2007, with the hearing of the SFO's application for a confiscation order against Dr Smith scheduled for Tuesday 13 November, Dr Smith served a statement which addressed the suggestion that Mr Ruhan was holding assets for him. The statement said:

> "When Orb was sold to Atlantic Hotels, all of the assets were transferred to Mr Ruhan, a man I had met through a mutual friend. There are no and never have been any 'hidden' assets – they have throughout been in the hands of Mr Ruhan following completion of the sale of Orb".

There was reference an oral agreement between Dr Smith and Mr Ruhan to share profits made from the assets Mr Ruhan had acquired from Orb including the Hyde Park Hotels. There was also an assertion that Mr Ruhan had sold the hotels at a substantial increase in value. Dr Smith also stated:

> "I am uncertain as to the current ownership of any of these assets".

There were also various allegations to the effect that Mr Ruhan had not fulfilled promises made when the Orb assets were acquired.

viii) The cover letter from Bankside Law recorded:

> "You will be aware from the contents of the witness statement made by the writer …. that we consider considerable value was transferred by our client to Mr Andrew Ruhan in about May 2003. The witness statement enclosed amplified this point … We understand Mr Ruhan is based in this country although he operates through various offshore companies and trusts. On the face of it there is a credible case that he is holding in one guise or another very valuable assets or monies representing the value of such assets which were transferred to him by our client at an undervalue".

The letter expressly invited the SFO to apply for a restraint order against Mr Ruhan, who was said to be on notice of the potential claims against him, and the SFO was asked to raise the matter with Mr Talbot QC (the SFO's leading counsel) urgently.

ix) On 13 November 2007, a hearing took place before His Honour Judge Roberts as to the terms on which a confiscation order should be made against Dr Smith. A transcript of the hearing records Mr Talbot QC for the SFO telling the Court

that "although the defendant's position is that he asserts that all his assets are held by a particular person, Mr Ruhan, we do not accept that position at all, and all litigation rights in respect of that are reserved". When Mr Newman (for Dr Smith) referred to the need for a degree of co-operation between Dr Smith and the prosecution in bringing proceedings against Mr Ruhan, Mr Talbot QC described the suggestion that the Crown would bring proceedings against Mr Ruhan as premature, stating:

> "The prospect of doing that was raised positively by the defendant for the first time on Thursday of last week and the Crown are certainly not going to commit itself to a High Court application on the basis of what he says for the first time on the eve of this hearing without considering it very carefully".

It would have been apparent, therefore, that the suggestion that Mr Ruhan held assets for Dr Smith had been raised very late, in the immediate run-up to the confiscation hearing and had met with some scepticism on the part of the SFO.

x) The Confiscation Order made at that hearing asserted in a recital that Dr Smith had asserted "that Andrew Ruhan, whether directly or through companies under his direct and/or indirect control, holds realisable property of the Defendant to a value in excess of £40,956,911" and that Dr Smith had no other funds. The Confiscation Order recorded that the Crown neither accepted nor denied Dr Smith's various assertions.

xi) On 14 November 2007, Bankside Law informed the SFO that Mr Ruhan would be obtaining some money as a result of a settlement recently concluded by Izodia, and that the SFO should seek a restraint order against Mr Ruhan.

xii) On 19 November 2007, Bankside Law informed the SFO that it had obtained two boxes of documents pursuant to its application. The SFO was asked once again to seek a restraint order against Mr Ruhan. Bankside Law informed the SFO that it understood Mr Ruhan would be collecting those files and moving them to the Isle of Man.

xiii) On 26 November 2007, Bankside Law wrote to the SFO again saying that Mr Ruhan was moving his business from the Isle of Man to Switzerland, that steps needed to be taken to prevent Mr Ruhan moving assets beyond the SFO's reach and that "our client is very disappointed that you have made no attempts yet to interview him. He remains in Brixton".

xiv) On 27 November 2007, on a date when Dr Smith was still in prison, Bankside Law wrote to the SFO stating "our client, through his contacts, has found out that Mr Ruhan retains a profit share interest in the redevelopment of the three London Hotels" ("**the 27 November Letter**"). This is an important letter which I return to below. For present purposes it should be noted that:

a) Dr Smith asked the SFO to come and see him (in Brixton) as soon as possible for a day's meeting, but there is nothing to suggest that this ever happened.

b) The letter stated, "Dr Smith is preparing a detailed background statement". There is nothing to suggest any such statement was ever provided to the SFO – had it been, it would have appeared in the bundle of documents prepared for the application for the appointment of the Enforcement Receivers (as Dr Smith's other witness statements were).

c) The letter re-emphasised the need for expeditious action by the SFO against Mr Ruhan.

xv) On 1 February 2008, Bankside Law wrote to His Honour Judge Roberts at Inner London Crown Court complaining that the SFO had done nothing to investigate the allegations against Mr Ruhan.

xvi) A hearing took place on 19 February 2008 before His Honour Judge Roberts at which the SFO applied for an extension of the time period referred to in the Confiscation Order in which an application for the appointment of the Enforcement Receivers was to be made. Dr Smith's counsel said at that hearing:

> "You will see from the witness statement that the SFO appear to regard Mr Smith's assertions regarding Mr Ruhan as so much nonsense and they are essentially reverting back to their case before we attended for three days before you".

The Judge held that he had no jurisdiction to extend time.

xvii) The SFO made its application to appoint the Enforcement Receivers on 7 April 2008 (which was served on Mr MacDonald as the administrator of Orb Estates and Mitre). The draft order identified various assets in the name of third parties over which the Enforcement Receivers' appointment took effect, to the extent of any interest which Dr Smith might have in them, but there was no mention of Mr Ruhan or HPII.

xviii) The application was supported by a witness statement from Tanvir Tehal, an SFO lawyer. That statement expressed considerable doubts as to the accuracy of the asset disclosure Dr Smith had provided. It included a section headed "Assets / Andrew Ruhan / Third Parties" which recorded Dr Smith's assertion that Mr Ruhan held assets belonging to him with a value in excess of £40.9m and observed that "little if anything is known about this individual in regards to his links to Smith and his assets and this investigation", albeit he had been identified as being the subject of possible breach of contract claims by Izodia.

xix) The witness statement recorded:

> "post the confiscation hearing Bankside Law on behalf of Smith in their various letters … also referred to Mr Ruhan and his alleged current movements and affairs. Unfortunately they have not been able to set out their reasons and sources of their information for how this assists Dr Smith with his confiscation order. We submit that if Smith felt Ruhan was a critical component in the explanation of sources of monies, it is odd that this has not been more vigorously ventilated earlier and consistently up to and including the confiscation hearing

> … We understand from Messrs Bankside Law that Smith is currently preparing a statement directed towards explaining Smith's arrangements with Ruhan. If this is the case, the Receiver may find this useful and may explore it further with Smith".

xx) The statement identified as one reason for the appointment of the Enforcement Receivers that:

> "It is envisaged that the receiver will have to investigate further the assertion made by Smith in the Confiscation Order that Andrew Ruhan has control over all his realisable assets. The SFO does not and did not at the confiscation hearing accept Smith's position in this regard and all litigation rights were reserved".

xxi) Notwithstanding Bankside Law's repeated assertions, no restraint order had been sought against Mr Ruhan.

324. As I have stated, these papers reached Mr MacDonald as the administrator of Mitre and Orb Estates on 1 April 2008. The creditors meeting at which HPII was placed into insolvent liquidation took place on 17 April 2008 and Mr Chesterton was appointed liquidator at that meeting. Mr Chesterton accepts that he reviewed the files at some point shortly after their receipt and I accept his evidence and that of Mr MacDonald that the material was discussed with Orb Estates creditors' committee, whose members gave no credence to the allegation. While there are no minutes of such discussions, the close interest of the creditors' committee is apparent from, for example, the attendance of Mr Coulson of the committee at a meeting between TMP and the Enforcement Receivers in May 2008 (see [325] below). It should be noted that Orb Estates had a strong creditors' committee, including representatives of both Thistle (Mr Cattermole, who knew a thing or two about the Hyde Park Hotels and Mr Ruhan) and Mr Coulson of Izodia (who knew a thing or two about Dr Smith). The report to creditors prepared by Mr Chesterton noted that "in 2006 [the Hyde Park Hotels] were sold for £125m and the proceeds were used to repay a part of the Morgan Stanley debt".

325. On 8 May 2008, Mr Chesterton and Mr Coulson, in the context of the Orb Estates administration, had a conference call with the Enforcement Receivers. Various issues were raised in relation to Dr Smith's assets. Mr Ruhan was not discussed. KPMG referred to funding issues, and said that they were two months away from being able to expand their work beyond the specific assets referred to in the receivership order and being able to speak to TMP.

326. On 27 May 2008, questionnaires were sent by TMP to HPII's former directors, pursuant to the duty imposed by s.235 of the Insolvency Act 1986 on former directors of an insolvent company to provide relevant information to the office holders. The former directors included Mr Cattermole of Thistle, Mr Merchant of Morgan Stanley and Mr Ruhan. Replies came in between 12 June and 1 October 2008. The questionnaires elicited no relevant information and no expressions of concern about the Cambulo Madeira Transaction.

*Conclusion*

327. The Defendants contend that the 27 November 2007 Letter was an event which required HPII, acting reasonably, to begin investigations into the claim Dr Smith had outlined. In considering that argument, it is important to have regard not simply to the contents of the 27 November 2007 Letter, but also the context in which it was sent:

i) Mr Ruhan, against whom the allegations were made, was someone known to TMP as a business contact, and someone whose propriety TMP had no reason to doubt.

ii) TMP was aware, from Mr Chesterton's role as liquidator of CLGD in 2006, of the apparent identity of the buyer of the Hyde Park Hotels, namely Mr Stevens, of the involvement of Jones Day on his behalf and of Investec in providing funding, and of the sale having taken place in 2006. That of itself made the suggestion of urgent efforts on 27 November 2007 to "re-arrange the terms of the option" unlikely.

iii) The information was said to derive from information recently obtained by Dr Smith "from his contacts" at a time when Dr Smith was in prison, and the source was not identified.

iv) The source of the allegations, Dr Smith, was a twice-convicted fraudster, who had raised the allegations late in the day, faced with the imminent prospects of a Confiscation Order, having previously produced witness statements denying the existence of any hidden assets.

v) Dr Smith had not provided the SFO with the promised witness statement to support the allegation, nor pointed to any material (e.g. that obtained from Messrs Cooper and McNally) doing so.

vi) The SFO had not responded to Dr Smith's requests to interview him, nor sought any form of restraint order against Mr Ruhan despite numerous requests.

vii) It was Dr Smith's perception as at February 2008 that the SFO gave no credence to the application and had done nothing about it.

viii) That appeared to remain the position as at April 2008 when the Enforcement Receivers were appointed (the SFO having sought to postpone the making of that application).

ix) The order appointing the Enforcement Receivers made on 7 April 2008 and served on Mitre and Orb Estates was directed to a number of entities which might hold assets belonging to Dr Smith, intended to preserve any such assets, but not Mr Ruhan or entities associated with him.

x) The 27 November 2007 Letter formed part of a rapid succession of letters from Bankside Law to the SFO seeking to promote Dr Smith's interests. The letter was a two paragraph letter, with the relevant section comprising two sentences, to which the SFO had not responded, and which Bankside Law had not followed up.

328. Against this background, I have concluded that the exercise of reasonable diligence on the part of Mr Chesterton as HPII's liquidator did not require him to begin investigating Dr Smith's allegations:

i) The source of the allegations was too tainted.

ii) The allegations themselves were obviously self-serving.

iii) The allegations had emerged very belatedly and were inconsistent with what Dr Smith had said before.

iv) There was a complete lack of any verifiable detail or source.

v) The allegations related to a transaction which, based on Mr Chesterton's own professional experience and involvement, appeared to be entirely above board, with the sale made to companies owned by a third party, Mr Stevens and with Mr Chesterton having interacted both with Mr Stevens and with the officers and the solicitors of one of the acquiring companies.

vi) The allegations were against an individual known to TMP whose propriety they had no reason doubt.

vii) While Mr Stevens, in particular, sought to show how much knowledge of HPII Mr Chesterton brought to his appointment, there was no attempt to suggest that any of that involvement ought to have raised any form of red flag.

viii) Based on the materials provided to TMP, the SFO had treated the allegations with similar disdain.

329. The Defendants point to HPII's admission that TMP did begin investigations after seeing an article in *The Sunday Times* on 22 July 2012, and argue that the article contained no information which does not appear in the 27 November 2007 Letter. As to this:

i) That contention assumes something which it is not necessary to decide, namely that *The Sunday Times* article was, objectively, sufficient to require TMP to undertake investigations with a view (if necessary) to the restoration of HPII to the register to pursue any claims,

ii) In any event, the article was significant in identifying that the allegation that Mr Ruhan had an interest in the Hyde Park Hotels was being made not only by Orb (where the allegations were likely to have come from Dr Smith) but also by two other named individuals, Messrs Thomas and Taylor.

iii) Further, the article specifically mentioned that Mr Ruhan had a share in a partnership to develop the Hyde Park Hotels with the Candy brothers. Mr Nicholas Candy had clearly been contacted by *The Sunday Times* and had denied that allegation, but the story had been run, nonetheless.

iv) A verifiable link had been made between Mr Bottomley and Mr Emson, directors of the Cambulo companies, and Mr Ruhan, through the Independent Power Company.

v) It referred to a High Court claim having been issued, with the involvement of three barristers, in which serious allegations were being made against Mr Ruhan.

330. The Defendants also allege that TMP only began investigating Dr Smith's allegations because of pressure applied by Dr Smith, in particular in a letter sent by Stewarts on behalf of the Orb Claimants on 21 November 2014. It is quite possible that this letter raised the profile of Dr Smith's allegations against Mr Ruhan within TMP, but if so, any effect was soon overtaken by Mr Justice Cooke's judgment of 11 February 2015 finding that the nominee allegations against Mr Ruhan and Mr Stevens were arguable.

331. The Defendants also submit that the Enforcement Receivers did take the 27 November 2007 Letter seriously enough to carry out their own investigations. It is important to note that the issues raised by Dr Smith – that, in effect, Mr Ruhan was holding assets sufficient to meet the Confiscation Order – were of rather wider potential import to the Enforcement Receivers and did not depend on Mr Ruhan retaining an interest in the Hyde Park Hotels. In any event, the Enforcement Receivers' engagement with this issue appears to have been of the most perfunctory kind. A letter was sent to Mr Ruhan on 3 July 2008 from which it is apparent that the statements of Dr Smith remained the sole basis for the allegations. Bridgehouse Law, responding for Mr Ruhan on 28 October 2008, had little difficulty in batting them back. It is striking that the Enforcement Receivers never sought any information, books or records from TMP as the liquidators of HPII, even though such material would have been of obvious relevance to any serious engagement with the allegations. Nor did the Enforcement Receivers ever raise the allegations with TMP in meetings they had in May and July 2008 and February 2009.

332. Finally, various criticisms were also made of TMP for lack of diligence in investigating these allegations after *The Sunday Times* article. Those criticisms have no relevance to the s.32 issue, and I therefore consider them in the context of the Defendants' laches defence below.

## K LACHES

333. If (as I have found) the equitable claims against Mr Ruhan are not statute-barred because no limitation applies period, he raises a separate defence of laches. As Baroness Hale noted in Betterment Properties Ltd v Dorset CC [2014] AC 1072, [31], for the defence of laches to succeed:

> "[T]he general principle is that there must be something which makes it inequitable to enforce the claim. This might be reasonable and detrimental reliance by others on, or some sort of prejudice arising from, the fact that no remedy has been sought for a period of time; or it might be evidence of acquiescence … in the current state of affairs".

334. Lord Neuberger in Fisher v Brooker [2009] 1 WLR 1764, [64] noted that some sort of detrimental reliance is usually an ingredient of laches.

335. What is the evidence of detrimental reliance here? Generally, cases of detrimental reliance will arise where the defendant acts on a belief, induced by the claimant's inactivity, that the claimant either has no relevant right (*Snell's Equity* (34th) [5-011]) or has waived it (The Lindsay Petroleum Company v Hurd & Ors (1873-74) LR 5 CP 221, 239-234). That is a very different thing from a lapse of time which leads a dishonest

party to believe they have "got away with it". On the facts of the present case, in which Mr Ruhan acted in fraudulent breach of trust, Mr Stevens dishonestly assisted those breaches, and both took steps to hide those breaches and keep them concealed, I am not persuaded that they could legitimately draw any conclusion from the absence of the assertion of a claim other than that their dishonest behaviour had yet to be discovered.

336. In closing, Mr Ruhan relied upon delay in the raising the allegation in 2008 and 2009, but the allegation of delay by HPII in pursuing the claim at that time cannot stand with my findings under s.32 of the 1980 Act. He also relied on the fact that Mr Stevens had lost relevant emails, and that Mr Bloomfield (who died in April 2016) was not available as a witness, to suggest the delay had impacted on his ability to have a fair trial. There is absolutely nothing in the suggestion that Mr Ruhan's (or Mr Stevens') ability to defend themselves has been compromised by lapse of time, still less delay during the period when HPII ought objectively to have been investigating the claims. There is ample contemporaneous documentation, very little of it of assistance to the Defendants. The complaint about the inability to call Mr Bloomfield has a particularly hollow ring, given the failure to call Mr Michael Stevens.

337. Mr Ruhan also relies on the Geneva Settlement of April 2016, by which he came to give up his claims against the Orb Claimants and Dr Smith, as an act of detrimental reliance. However:

    i) Mr Ruhan had been interviewed by TMP about these allegations in November 2014 (and lied about his lack of involvement in Cambulo Madeira and the on-sale of the Hyde Park Hotels).

    ii) From February 2015, Mr Ruhan knew that Mr Justice Cooke had found in a public judgment that the nominee case was arguable.

    iii) It was clear that the Orb Claimants were looking to pursue the nominee allegations. Mr Ruhan must have been aware of a real risk of a claim being brought by HPII.

    iv) The structure of the Geneva Settlement – under which all rights went to companies notionally controlled by Mr Stevens under what I have found to be a continuation of the nominee scheme – reflected these concerns.

338. In these circumstances, I cannot accept that Mr Ruhan's decision to enter into the Geneva Settlement in its final form reflected any belief on his part that any exposure to HPII had gone away – quite the contrary. In any event, it is not clear whether Mr Ruhan knew that HPII had been restored to the register in 2015. If he did not, the absence of a claim was even more equivocal. If he was aware, that would only have reinforced his view that a claim might well be coming.

339. Finally, Mr Ruhan was the principal mover in a major fraud from which he made very substantial profits. Even if there might be exceptional circumstances in which a defence of laches could successfully be advanced to a claim of this kind, the matters relied upon here do not come close to making it inequitable for HPII to pursue its claims. The complaints against TMP are largely over-stated (for the reasons set out in my findings in relation to Mr MacDonald and Mr Chesterton at [318]-[319] above), but even taken

at face value, they would not make it inequitable to hold Mr Ruhan to account for his dishonest breaches of the duties he owed HPII as its fiduciary.

340. Mr Stevens only advanced a defence of laches if the case against him was held to fall within s.21(1)(a) and (b) of the Limitation Act 1980 (Mr Kokelaar accepting that "where the is an express statutory provision providing a period of limitation, there is no room for the equitable doctrine of laches": Re Pauling's Settlement Trusts [1962] 1 WLR 86, 115 and Patel v Shah [2005] EWCA Civ 157, [22]). I have not applied ss.21(1) to the claims against Mr Stevens.

341. In any event:

i) The only detrimental reliance pointed to by Mr Stevens (in opening submissions rather than his Defence, but I am willing to treat this point as open to him nonetheless) is the decision to enter into the TSA and to invest £92m in various unsuccessful projects. However, on the basis of my findings, the £92m was held by Mr Stevens only as nominee for Mr Ruhan, who held it on constructive trust for HPII. There can be no detrimental reliance in these circumstances.

ii) Nor was any attempt made to develop the argument that Mr Stevens took these steps in reliance on HPII's failure to advance a claim.

iii) In so far as Mr Stevens adopted Mr Ruhan's arguments in closing, they fail for the reasons set out at [335]-[339] above.

## L CONCLUSION

342. For these reasons:

i) HPII's claim against Mr Ruhan for (at its election) an account of profits or equitable compensation for breach of fiduciary duty succeeds (as does its claim against Mr Ruhan for breach of s.320 of the Companies Act 1985 for an account under s.322(3)(a) only).

ii) HPII's claim against Mr Stevens for (at its election) an account of profits or equitable compensation for dishonest assistance in breach of fiduciary duty succeeds.

iii) HPII's claims against Mr Ruhan and Mr Stevens in the tort of unlawful means conspiracy fail.

iv) There will need to be further submissions from the parties as to:

a) the quantification (on the evidence already before the court) of the liabilities in (i) and (ii); and

b) the directions and further orders required so far as HPII's claim for proprietary relief is concerned.

343. I would like to conclude this judgment by expressing my thanks to the parties' legal teams for their work in ensuring the smooth progress of the trial, and for the high quality of the submissions.