[2020] EWHC 440 (Ch) **HC-2016-002106**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4A 1NL

Wednesday, 26 February 2020

Before

HIS HONOUR JUDGE SIMON BARKER QC

Between

(1) LIBYAN INVESTMENT AUTHORITY
(2) LIA ADVISORY SERVICES (UK) LIMITED
(formerly Dalia Advisory Limited)
(3) MAPLECROSS HOLDINGS INVESTMENT COMPANY LIMITED

Claimants

-and-

(1) ROGER MILNER KING
(2) INTERNATIONAL GROUP LIMITED
(3) BEESON PROPERTY INVESTMENTS LIMITED
(4) STOKE PARK ESTATES
(formerly Beeson Investments)
(5) CHARLES MONTGOMERY MERRY
(6) CONRAD STRATEGIC PARTNERS LIMITED

Defendants

Representation

Andrew Onslow QC and **Kate Holderness** (instructed by **Hogan Lovells International LLP**) for the Claimants

Jonathan Adkin QC and **Rachel Tandy** (instructed by **Croft Solicitors Limited**) for the Defendants

Hearing dates : 21-22 May, 3 June and 19 July 2019

JUDGMENT

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript

HHJ Simon Barker QC :

Introduction

The Parties

1 The First Claimant, the Libyan Investment Authority ('the LIA'), is the Libyan sovereign wealth fund, which is based in Tripoli, Libya. The Second Claimant, LIA Advisory Services (UK) Limited ('LIA UK)', is registered in England and is the LIA's wholly owned UK representative entity; at the material time it was known as Dalia Advisory Limited. The Third Claimant, Maplecross Holdings Investment Company Limited ('MHICL'), is a special purpose vehicle which was registered in Guernsey on 15.7.10 and is beneficially owned and controlled by the LIA. At the material time Mr Rajab Layas ('Mr Layas') was the executive director of LIA UK but was not an officer of the LIA; and, Mr Kamal Rhazali ('Mr Rhazali') was a lawyer on secondment to the LIA and was based in Tripoli. At that time Mr Sami Rais was the chief executive officer of the LIA and Mr Ibrahim Khalifa, a qualified lawyer, was secretary to the LIA's board of directors; in 2018 they each made witness statements in which they candidly admit that their recollection of the relevant events is not detailed, in part because the relevant events had occurred 8 years earlier and in part because the transaction the subject matter of this action was relatively modest in value (£10.5m) and there were numerous other more important or higher value matters that they dealt with.

2 The First Defendant, Mr Roger King ('Mr King'), is an experienced property developer. He and other members of his family are the shareholders and directors of the Second Defendant, International Group Limited ('IGL'), through which they own and control the Third Defendant, Beeson Property Investments Limited ('BPIL'), and the Fourth Defendant, Stoke Park Estates ('SPE'), which at the material time was known as Beeson Investments and was and is unincorporated.

3 The Fifth Defendant, Mr Charles Merry ('Mr Merry'), is a chartered surveyor and a long-standing business associate of Mr King. Since 2014 Mr Merry has been employed as head of projects by an IGL group company. Mr Merry is the principal of the Sixth Defendant, Conrad Strategic Partners Limited ('CSPL'). Mr Merry and CSPL are alleged to have been involved in the relevant events acting on the instructions of and/or in conjunction with Mr King and his companies. The First to Sixth Defendants are referred to collectively as 'the Defendants'.

The material time

4 The material time so far as the relevant events are concerned is the period early 2010 to January 2011, with the critical period being 7.6.10 to 6.7.10, and in particular 15.6.10 to 27.6.10.

Background and the litigation so far

5 This litigation concerns the circumstances in which the LIA, acting through or with the assistance of LIA UK and through MHICL, (1) came to pay £10.5m for a 50% share in a venture ('the JV') for the proposed development of two plots of land at Maple Cross, Hertfordshire, near junction 17 of the M25 (respectively 'the hotel site' and 'the retail site', and collectively 'the Property') respectively as a Crowne Plaza Hotel and a retail village, and (2) subsequently came to invest a further £1.76m in the JV.

6 The JV was established by a subscription and shareholders' agreement dated 19.7.10 ('the JV agreement'). The other 50% interest in the JV was held by BPIL, with IGL being a party as guarantor of BPIL's obligations. The JV was to be conducted through other special purpose vehicles : Maplecross Properties Limited ('MPL'), Maplecross Hotel Limited ('MHL'), and Maplecross Retail Limited ('MRL') on the basis that MHICL would acquire one of MPL's two issued shares and BPIL would remain beneficial owner of the other share in MPL, and ownership of the hotel site and of the retail site and their development would be divested from MPL to MHL and MRL respectively. The detailed terms of the subscription and shareholders agreement are not relevant to the issues before me. The date of the JV agreement is relevant for limitation purposes. It is also relevant that £10.25m of the £10.5m consideration for a 50% share in the JV was, to the Claimants' knowledge, to be paid out to BPIL as a special dividend. The JV transaction completed; the £10.5m was paid on or about 19.7.10; the further investment of £1.76m was paid in three tranches over the period 23.9.10 to 15.1.11; and, BPIL received the £10.25m dividend. In the event, nothing was built and MPL, MHL and MRL are all in liquidation. Relations between the Claimants and Mr King and his companies broke down in or about 2013.

7 On 18.7.16, just within the limitation period, the Claimants issued a claim against the Defendants as Second to Seventh Defendants. The First Defendant to that claim was Warwick Street (KS) LLP ('KS'), which, in 2010, carried on business as surveyors and property valuers under the name King Sturge LLP. The essence of the claim was that a report in letter form issued by KS on 23.6.10 ('the KS Letter') contained fraudulent

misrepresentations and was used by KS and the Defendants to induce the Claimants to enter the JV and pay away £12.26m and/or was in breach of fiduciary duty on the part of KS, and, further or alternatively, that the Defendants or some of them had unlawfully conspired with one another and/or with others (specifically KS and/or Mr Layas) to induce the Claimants to enter the JV and pay out £12.26m and/or that the Defendants procured or induced KS to commit a breach of fiduciary duty.

8 The litigation came before this court in October 2018. By two applications the Claimants sought to amend the Claim Form and to re-amend the Amended Particulars of Claim in order to add KS as a Defendant to the unlawful means conspiracy claim. By a third application the Defendants sought an order striking out the Claim Form and the Particulars of Claim in whatever became their final form, alternatively summary judgment on the basis that the claims against the Defendants had no real prospect of success and there was no other compelling reason for a trial. I heard those applications over three days and gave judgment on 23.10.18. At that stage the Claimants were represented by Mr David Halpern QC.

9 On the Claimants' applications I gave permission to amend the Claim Form and to re-amend the Amended Particulars of Claim.

10 However, on the Defendants' application, which KS supported but did not actively argue, as against KS I struck out the Amended Claim Form and the Re-Amended Particulars of Claim and dismissed the action. In relation to the Defendants, i.e. the present First to Sixth Defendants, I made the following order ('the 23.10.18 order') :

> 3. As regards the claims advanced against the Second to Seventh Defendants:
>
> 3.1. The Re-Amended Particulars of Claim are struck out and the claims advanced in them are dismissed; and
>
> 3.2. Unless by 4pm on Tuesday 13 November 2018 the Claimants:
>
> (i) issue and serve an application seeking permission to amend the Claim Form and to advance further amended Particulars of Claim against the Second to Seventh Defendants; and
>
> (ii) pay a further sum of £80,000 into the Court Funds office to stand as security for the Second to Seventh Defendants' costs of any such amendment application,
>
> the Claim Form shall stand struck out and the action shall stand dismissed as against the Second to Seventh Defendants without further order.

3.3. In the event that the Claimants issue and serve an application for permission to amend and provide security in accordance with paragraph 3.2 above:

(i) the striking out of the Claim Form and dismissal of the action as against the Second to Seventh Defendants shall be stayed pending the determination of such amendment application;

(ii) if the amendment application is refused, the stay shall be lifted upon such refusal and the Claim Form shall stand struck out and the action dismissed as against the Second to Seventh Defendants without further order; and

(iii) the hearing of such application is reserved to HHJ Barker QC, sitting as a Deputy Judge of the High Court, subject to availability.

I set this paragraph of the 23.10.18 order out in full because there is a dispute between the Claimants and the Defendants as to what it means or, more precisely, as to what was required of the Claimants if they were to avoid dismissal of the action as against all the Defendants.

11 The Claimants sought permission to appeal the 23.10.18 order on at least 10 grounds. On 23.1.19 permission was refused on paper by a single Lord Justice who gave the following reasons :

> "It is not arguable that there is enough in the surrounding circumstances to say that it is realistic that [the Claimants] could succeed in a case of deceit or intentional breach of fiduciary duty against KS at trial. Whilst there is material against [the Defendants other than KS], that does not assist [the Claimants] in their case against KS. Equally there is material to suggest that KS were negligent, but that too is insufficient to establish deceit or intentional breach of fiduciary duty. The judge's conclusion that the Letter was not a property valuation is also obviously correct.
>
> Ground 10 does not appear to be challenging any conclusion which the judge actually reached.
>
> An appeal would not have a real prospect of success and there is no other compelling reason to hear it".

12 As to the reference to there being material against the Defendants, my judgment of 23.10.18 contained several passages in which I expressed some disquiet as to the conduct of the Defendants and Mr Layas. Passages now cited and relied on by the Claimants include [50] where I referred to :

> "(1) the role, conduct and motives of Mr Layas[1] (but he is not a defendant at the moment and is unlikely to put himself forward as a witness), (2) the role, conduct and motives of Mr Roger King, the second defendant, particularly in the context of the disinstruction of Savills on 17 June, the pressing need to raise £10 million to repay a bank loan on 30 June; and the lack of evidence, at least at present, as to any other source of £10 million than the half share of the Maple Cross venture, and (3) the concerted efforts of Mr Layas, Mr King and Mr Charles Merry, the sixth defendant, to secure the LIA board's approval on 27 June to investment in the venture",

all of which weighed in favour of there being scope for a claim being realistic or having substance. The Claimants also relied on further observations that I made, for example at [68], [69], [71], [72], [74] and [75] where I drew attention to written statements made by the Defendants which were inconsistent or at odds with the factual position as it appeared from available contemporaneous documents and which called for explanation. This was and remains relevant to the question of whether there is likely to be a cause of action, based on a case that the Defendants misled or were culpably involved in misleading the LIA, worthy of a trial.

13 In the meantime, the Claimants made the required payment into court on 8.11.18. On 13.11.18 the Claimants issued and served an application ('the 13.11.18 application') for permission to re-amend the Claim Form and to advance re-re-amended Particulars of Claim ('RRAPOC'). The reformulation of the claim shifts attention from KS and focuses on Mr King and Mr Merry as the alleged primary wrongdoers. However, the Claimants contended that the core facts and alleged circumstances relied upon remain very substantially as before.

14 Drafts of the Re-Amended Claim Form and the then proposed RRAPOC were exhibited to the application notice. The accompanying draft order sought an order that :

> "The Claimants have permission to amend the Claim Form and advance further amended Particulars of Claim in the form of the Re-Amended Claim Form … and Re-Re-Amended Particulars of Claim (the "RRAPOC") drafts of which are annexed to this Order".

15 The Defendants have filed witness statement evidence in answer to this application, namely a short witness statement by Mr Hertford King, a son of Mr King and a fellow director of IGL group companies, a short witness statement by Mr Merry, and a short witness statement from Mr Derek Rorrison ('Mr Rorrison'), an employee of IGL's

[1] A director of LIA UK reporting to the LIA

bankers at the relevant time who referred to Mr King and his companies as prestigious clients. These witness statements address some of the points to which I drew attention in my earlier judgment. The Claimants submitted that, on a fair reading, the statements did nothing to dispel the concerns I had expressed, rather they contained further untruths and raised even more concerns. The applications before me, both in October 2018 and now, were and are not a forum for final fact finding. That being kept in mind, my view, based on submissions from both sides, and acknowledging that the evidence filed on behalf of the Defendants is not as full as would be prepared for trial and neither tested nor further explained by oral evidence, is that the evidence filed on behalf of the Defendants leaves me with much the same concerns as I had when writing my earlier judgment. For example, the references to a non-existent company in the context of instructing KS were either glossed over (Mr Hertford King) or repeated (Mr Merry at [11] "both companies"); both Mr Hertford King and Mr Merry asserted that references in instructions they gave to KS to the JV being already agreed were correct on the basis that the agreement was "subject to contract", but that important and contradictory qualification was not included in the relevant contemporaneous instructions; also, Mr Merry's explanation of the instruction of KS was, justifiably, the subject of criticism by Mr Onslow QC in his submissions. Mr Onslow QC also drew attention to the absence of disclosure from the Defendants, in particular of internal email exchanges over the critical period, notwithstanding the opportunity to provide the same voluntarily in support of the Defendants' evidence in answer to the 13.11.18 application or in response to express requests from the Claimants' solicitors following receipt of that evidence.

16 Be all of that as it may, the thrust of Mr Adkin QC's submissions was not dependent on the evidence filed on behalf of the Defendants but was based on contentions that the claim advanced by the Claimants did not contain the required legal ingredients of or the factual allegations necessary to establish the torts and breaches of duty alleged. Mr Adkin QC further submitted that the application was limitation barred and, yet further, the action should now be stopped as an abuse of process.

17 During the course of the hearing before me the Claimants sought to revise the final form of the proposed RRAPOC and to make consequential changes to the proposed Re-Amended Claim Form. Formal permission to make those changes has been sought by an application dated 28.5.19 ('the 28.5.19 application'). The Defendants opposed consideration of that application for two principal reasons : first, it was not permitted by the 23.10.18 order; and, secondly, they were entitled to have a reasonable opportunity

to consider and respond to the further proposed amendments and should not be hurried into such consideration in the course of the hearing. I must return to and decide whether or not to consider the Claimants' revised Re-Amended Claim Form and revised RRAPOC in the light of the Defendants' objection and the submissions made over the course of the hearing, including in particular on 19.7.19. The Defendants' objections were supported by a witness statement made by their solicitor, Mr Rupert Croft of Croft Solicitors, in which he set out the procedural history and the Defendants' view of the relevance of that history, and he identified seven iterations of the Claimants' Particulars of Claim from the original version dated 16.11.16 to the version proposed on 28.5.19.

The factual allegations

18 Before addressing the 13.11.18 application and the 28.5.19 application, I summarise the essential background and story from the Claimants' viewpoint. This may be stated quite shortly. In so doing I bear in mind that at this non-fact-finding stage the court does not have to accept the Claimants' factual allegations at face value, rather it should assess or analyse the evidence for credibility, either by being supported by other apparently reliable material or by being inherently logical or likely.

19 The Claimants alleged, by way of background, that in 2007 BPIL obtained a bank loan of £10m for development of a hotel at Maple Cross; the loan was repayable on 30.6.10. The Claimants alleged that by early 2010 BPIL's finances were in a parlous condition and there was no prospect of raising £10m save by persuading the LIA to enter into the JV. As from October 2009 Mr King and Mr Merry, on behalf of Mr King and his companies, had been in discussions with Mr Layas of LIA UK, negotiating on behalf of the LIA, with a view to the LIA acquiring or investing in the Property and its development. Mr Layas had been provided with a letter from Strutt & Parker LLP to Mr King dated 11.12.09 ('the S&P Letter') which referred to an assumed hotel site cost of £18m and valued the hotel development following completion at circa £58m. By 12.5.10 the discussions had progressed to a subject to contract accord for the LIA to participate in the JV by acquiring a 50% interest for £10.5m "as advised by [S&P]". Although the Defendants challenged the contention as to BPIL's finances and referred to Mr Rorrison's witness statement, the accounting evidence, including BPIL's accounts, sufficed to support this contention as realistically made.

20 On the Claimants' case the critical factual events and circumstances occurred between 7.6.10 and 6.7.10. The Claimants alleged that : (1) in addition to the S&P Letter, the LIA wanted its own up to date valuation of the Property carried out by a reputable surveyor; (2) the LIA had a board meeting scheduled for 27.6.10 and a valuation of the Property was required for consideration at that meeting; (3) on 15.6.10 Mr Layas instructed Savills, which had given a fee quote on 14.6.10, with a view to receiving an executive summary by 23.6.10; (4) Mr Layas informed the LIA that Savills had been instructed to provide a market value of the Property; (5) on 17.6.10 Savills informed Mr Layas that their valuation would be materially less than S&P and that their valuation of the hotel site was £5.7m; (6) copying in Mr Merry, Mr Layas promptly disinstructed Savills; (7) Mr Layas conferred with Mr King and Mr Merry with a view to obtaining alternative valuation advice in line with the S&P Letter at short notice, failing which the LIA would not enter the JV; (8) on 18.6.10 Mr Merry approached KS on the basis that the JV with the LIA had been agreed and the LIA wanted a valuation letter similar to the S&P Letter; (9) meanwhile Mr King made an unsuccessful attempt to get Savills to reconsider and to support the content of the S&P Letter; (10) also on 18.6.10 Mr Merry met with and gave more detailed instructions to KS on the basis that the LIA was the instructing party and that, for the letter required, KS's fee was estimated at £20k, subject to the LIA's approval. The instructions included that the JV was in the final stages of being established and that it had an estimated value of £21m with £18m attributed to the hotel development and the remainder to the retail site, and that building work was estimated to start in the summer of 2010 and conclude by early 2012; (11) at or shortly after that meeting KS agreed to accept instructions, arranged by Mr Merry for the LIA, on the basis that a similar letter report to the S&P Letter, valuing the JV at £21m, was required and the fee of £20k would be approved by the LIA; (12) on 22.6.10 Mr King sent a detailed letter to KS in which he (a) confirmed that Beeson Investments Limited ('BIL') (a non-existent company) had agreed to form the JV with the LIA, (b) asserted that based on discussions and written advice from S&P the JV's value had been agreed at £21m, (c) expressly confirmed that KS were to provide a draft letter to BIL, for acceptance by BIL and, following detailed input from and review by Mr Merry and acceptance by BIL, readdressed and sent to the LIA, (d) confirmed that BIL would underwrite the LIA's payment of a £20k fee, and (e) anticipated receipt of KS's report later that day; (13) also on 22.6.10 Mr Layas dishonestly informed the LIA that Savills could not report in time and that he had instructed KS to produce a valuation report instead; (14) over the course of 23.6.10 (a) Mr King reminded KS that he and Mr Merry were to check the KS report before it was sent to the LIA and that it was required that day, (b) Mr Merry and Mr King, made

detailed revisions to the draft report to make it read more positively and favourably, including in particular the Summary and Conclusions[2], and (c) once Mr King and Mr Merry had signified their acceptance, KS addressed and emailed the report as the KS Letter to Mr Layas as director of LIA UK; (15) the KS Letter was written on the basis that LIA UK had instructed a review of the proposed development project at Maple Cross, i.e. the object of the JV; (16) Mr Layas provided the LIA with both the KS Letter and the S&P Letter in time for the LIA board meeting on 27.6.10 as a result of which the LIA resolved to and did invest £10.5m in the JV on the basis that that represented 50% of the value of the JV company, the assets of which were the Property; (17) BPIL received £10.25m as a special dividend and its bank loan was cleared; (18) Mr Layas subsequently sent a memorandum to the LIA stating that the Property had been valued by a chartered surveyor at £21m and that a bank loan for development would raise £26m but each partner in the JV would have to fund a further £1.6m[3]; and, (19) subject to any recovery through the liquidation of the JV vehicles (MPL, MHL, and MRL) the LIA's investment in the JV through MHICL has been lost.

21 Although not free from difficulty, for example the KS Letter as sent remained heavily caveated, the Claimants submitted that the above allegations have contemporaneous documentary support which either so state or provide a realistic basis for drawing inferences.

22 The Claimants' case has become that these alleged facts, substantiated by documentary evidence before the Court (mainly obtained by partial disclosure by KS of its file), reveal dishonesty on the part of Mr King, Mr Merry and Mr Layas individually and in combination; that Mr King, Mr Merry and, through them, the others of the Defendants or some of them, and, although not sued, Mr Layas acted in cahoots in an unlawful means conspiracy which caused the LIA to enter the JV through MHICL and suffer the loss of all or most of its £12.26m investment. Central to the Claimants' case now is the allegation that, notwithstanding that on 17.6.10 Mr Merry, Mr King and Mr Layas were all alerted to the fact or prospect that the value of the hotel was less than one third of what they might until then have believed, they suppressed this new

[2] From "Based on the limited information that we have been given we find little fault with the information provided and assumptions made. However, due to the high level nature of the appraisals and in particular the omissions on tenant incentives and details on construction costs and programme, we recommend that further work is commissioned prior to making any investment decisions" to "Based on the information that we have been given, including the valuation by [S&P], we support the assumptions made and we consider an enterprise value of £21million appropriate".

[3] Which presumably explains the further payments totalling £1.76m.

information and persisted in finding a way to persuade the LIA that the value was as previously stated and justified a £10.5m investment for a 50% share in the JV. On the case as now formulated KS were unwittingly involved (as opposed to being complicit) in the duping of the LIA. Mr King and Mr Merry have become the primary focus of the Claimants' allegations. The proposed RRAPOC alleged that they acted as agents for the Claimants in instructing KS and, when so doing, gave untrue and misleading instructions as to (a) the status of the JV, (b) the price at £10.5m having been agreed, (c) the reliability of S&P's views as to value, and (d) Mr King's and Mr Merry's role in relation to the content of the KS Letter. The Claimants contended on the present applications that this conduct, orchestrated and carried through by Mr King and Mr Merry, caused the LIA to authorise participation in the JV on 27.6.10 and, consequently, to suffer a loss of £12.26m.

23 As noted above, at this stage of the proceedings it suffices if there is a realistic factual basis for a case to go forward provided that it is realistically arguable that that case meets the legal requirements of one or more causes of action. Mr Adkin QC, for the Defendants, submitted that the facts and matters alleged in the proposed RRAPOC are insufficient and the Claimants have failed to identify any realistically arguable cause of action.

The Present Claims

24 By the 13.11.18 application the claim was recast against the Defendants under four heads (1) deceit, (2) breach of fiduciary duty, (3) dishonest assistance, and (4) unlawful means conspiracy.

The Claim Form

25 The brief details of the Re-Amended Claim Form, settled by Leading Counsel, Mr Onslow QC and Mr Halpern QC, are as follows (headings added by me) :

Deceit

"1 Damages for deceit in making, or causing to be made, false representations which (i) the Defendants intended the Claimants to act on; and (ii) the Claimants relied on:

(a) That the "enterprise value" of a joint venture relating to a proposed hotel and retail development at Maple Cross was £21m;

(b) That the value of the Hotel Site at Maple Cross was £18m; and

(c) That the Defendants honestly believed that valuations to that effect contained or referred to in:

(i) a letter dated 23rd June 2010 from [KS] to [LIA UK] (the "KS Letter"), which, as the Defendants intended, was forwarded to [the LIA] by Rajab Layas, executive director of [LIA UK]; and

(ii) an appraisal and project cashflow sent by [S&P] to [Mr King] on 11th December 2009 (the "S&P Letter"), which was sent by Rajab Layas to [the LIA] on 24th June 2010 as a valuation of the Hotel Site as the Defendants intended;

were accurate and reliable, and/or that the Defendants had no reason to believe the same to be inaccurate and/or unreliable".

Breach of Fiduciary Duty

"2 Further or alternatively: equitable compensation or damages for breach of fiduciary duty in deceiving the Claimants and/or in giving instructions to KS to prepare the KS Letter for the Claimants which the Defendants knew to be false and/or misleading and/or in taking steps to conceal from the Claimants the opinions of Savills, who had informed the Defendants on 17th and 18th June 2010 that the valuation and/or assumption as to value and/or other figures in the S&P 2009 Letter were not supportable, and that the value of the Hotel Site was very much less than £18m".

Dishonest Assistance

"3 Further or alternatively: equitable compensation or damages for dishonestly assisting Rajab Layas to breach his fiduciary duty as executive director of [LIA UK] by participating in the deceit of the Claimants, and/or concealing from the Claimants the opinion of Savills and/or procuring the KS Letter on the basis of false and/or misleading instructions".

Conspiracy

"4 Further or alternatively: damages for conspiracy with one another and with Rajab Layas to injure [the LIA] and [MHICL] by unlawful means as set out above".

Consequently

"The said misrepresentations and/or breach of fiduciary duty and/or dishonest assistance to Rajab Layas to breach his fiduciary duties and/or conspiracy caused the Claimants to decide to participate in [the JV]; and/or to arrange for [the LIA], by [MHICL], to participate in [the JV]; and/or to cause [MHICL] to enter into a Joint Venture Agreement dated 19th July 2010; and/or to make or fund payments under [the JV] totalling £12.26m. At the date of the agreement the Hotel Site and [the JV] were worthless or were worth substantially less than the values represented".

26 By the 28.5.19 application the Claimants seek to make two changes to the proposed Re-Amended Claim Form. First, in relation to the deceit claim, the Claimants wish to revise the last clause to read (revisions underlined) :

" … were accurate and reliable, and/or that <u>there was</u> no reason to believe the same were <u>or might be</u> inaccurate and/or unreliable".

Secondly, in relation to the breach of fiduciary claim, the Claimants wish to recast the claim by characterising the Defendants as agents of the Claimants rather than fiduciaries by rewording the first sentence of paragraph 2 and the consequential paragraph as follows :

"2 Further or alternatively: equitable compensation or damages for breach of <u>their</u> duty <u>as agents</u> in deceiving the Claimants …",

and

"The said misrepresentations and/or breach of <u>their</u> duty <u>as agents</u> and/or dishonest assistance to Rajab Layas to breach his fiduciary duties and/or conspiracy ….".

27 These proposed changes, and proposed changes to the RRAPOC, arose from consideration of the Defendants' written submissions served in the week before the hearing began and oral submissions and discussion during the course of the hearing, in particular Mr Onslow QC's opening submissions. The Claimants submitted that the first should be viewed as the sort of rephrasing that might arise during a trial as the evidence unfolded; the Claimants contended that it should be viewed as insubstantial tidying up. Mr Onslow QC submitted that the second reflected the Claimants' recognition that the Defendants, being counterparties in the negotiation of and counterparties to the JV, arguably did not owe all the duties of a fiduciary if or when purporting to act or give instructions for or on behalf of the Claimants but, when acting for or as if for the Claimants, must at least have owed a duty of honesty and honest dealing. Mr Onslow QC submitted that that was merely a refinement of the duties arising in the underlying relationship of agency between the Defendants and the Claimants already alleged in the proposed RRAPOC[4] the subject of the 13.11.18 application. He further submitted that just as honesty was an element of the hallmark of a fiduciary relationship, loyalty, so too it was an essential implicit element of any representative activity including agency. In other words, honesty was a fundamental implicit obligation of the Defendants when acting or purporting to act for or on behalf of the Claimants or any of them in their dealings with KS.

[4] RRAPOC [50.3] and [71]

28 Mr Adkin QC contended that the proposed revisions had a material effect on the first and second heads of the Re-Amended Claim Form and those proposed amendments and the proposed amendments to the RRAPOC were impermissible, falling foul of the sanctions under the 23.10.18 order and not being the subject of an application for relief from sanctions and, even if that was wrong, were misconceived and did not save an otherwise fatally flawed statement of case and had no real prospect of success. The Defendants also contended that the 28.5.19 application was out of time under the 23.10.18 order and Mr Adkin QC further submitted that the 28.5.19 application should be refused as a matter of discretion.

29 I shall return to this after outlining the way in which the claim is formulated in the proposed RRAPOC the subject of the 13.11.18 application and how the two changes filter through into the revised proposed RRAPOC the subject of the 28.5.19 application.

The 13.11.18 application RRAPOC

30 The factual allegations in the proposed RRAPOC included those summarised above as having occurred between 7.6.10 and 6.7.10. Pausing at and reviewing the lead up to the point when the KS Letter was sent to the Claimants, on 23.6.10, the Claimants made a series of assertions at [50] of the proposed RRAPOC as follows : (1) Mr King and/or Mr Merry and/or the other Defendants agreed with Mr Layas that KS would be instructed to replace Savills; (2) all instructions to KS were given only by Mr King and/or Mr Merry, no instructions were given directly by the Claimants, the letter instructing KS came from Mr King not the Claimants; (3) when giving instructions Mr King and Mr Merry acted as the Claimants' agents; (4) the instructions were, as Mr King and Mr Merry well knew, untrue and misleading (the JV had not been agreed, the price of £10.5m had not been agreed, the value of the Property or the JV had not been agreed at £21m, there was substantial reason to doubt the opinions expressed by S&P, it was dishonest to put forward S&P's opinions without reference to Savills' opinion, there was no agreement or arrangement with the Claimants for the Defendants or any of them to have a hand in the content of the KS Letter); (5) the actual changes made by the Defendants to the KS Letter were designed to make the JV more attractive as an investment and caused the KS Letter to be untrue and misleading; (6) in particular the insertion of an enterprise value of £21m was to induce the Claimants to part with £10.5m and enable the Defendants to repay the £10m bank loan; and (7) there was no honest reason for Mr King to guarantee that BIL would pay KS's £20k fee if the LIA did not. The Claimants' case included that the KS Letter had

been intended to and had induced the LIA to approve investment in the JV on 27.6.10 and to formally enter into the JV, which happened on 19.7.10.

The 13.11.18 application RRAPOC ~ Deceit

31 The claim in deceit was set out at RRAPOC [64] to [69].

32 At [64] the Claimants alleged that the Defendants represented and/or caused to be represented and/or adopted and approved representations that (1) the enterprise value of the JV was £21m; (2) the value of the hotel site was £18m; and (3) the valuations to that effect in the KS Letter and the S&P Letter were, and were honestly believed to be, true; and/or the Defendants had no reason to believe that those valuations were inaccurate or unreliable.

33 At [65] the Claimants alleged that the enterprise value representation was made expressly in the KS Letter by endorsement of that valuation; that the hotel site valuation was made expressly in the KS Letter and in the S&P Letter; and that the third representation was implicit in each letter. In relation to the S&P Letter the Claimants relied on it being sent to the LIA in about January 2010 and again, via Mr Layas allegedly with the knowledge and approval of the Defendants, on 24.6.10, and/or by incorporation in the KS Letter sent on 23.6.10.

34 At [65] and [66] the Claimants made clear that their primary case was that the Defendants caused and procured the making of the three alleged representations. The Defendants had not signed off as authors of the KS Letter and there was no allegation that the Defendants had been involved in the drafting of the S&P Letter in 2009. The Claimants' point about the S&P Letter was that in June 2010, if not before, it was no longer reliable, at least not without qualification or reference to Savills' opinion.

35 At [67] the Claimants alleged that the representations were false in that the enterprise value of the JV and the value of the hotel site were very materially overstated.

36 At [68] the Claimants alleged that the Defendants' involvement in the making of the representations was culpable, by actual knowledge or by recklessness, by reason of their knowledge of Savills' opinion and that the allegations as to Mr King and Mr Merry misleading KS and BPIL's urgent requirement for £10m served to reinforce the Defendants' dishonest intent.

37 At [69] the Claimants pleaded reliance on the representations when deciding to invest and when entering into or participating in the JV.

The 13.11.18 application RRAPOC ~ Breach of Fiduciary Duty and Dishonest Assistance

38 The claim in breach of fiduciary duty and dishonest assistance in breach of fiduciary duty was set out at RRAPOC [70] to [73].

39 At [70] the Claimants alleged that Mr King and/or Mr Merry themselves, and/or the other Defendants at their direction, agreed with Mr Layas that they (namely Mr King and Mr Merry) would instruct KS on behalf of the LIA and LIA UK.

40 At [71] the Claimants alleged that, in instructing KS to prepare advice for the LIA and LIA UK, the Defendants acted as their agents. The proposed RRAPOC pleaded that the Defendants owed a fiduciary duty of loyalty. The Claimants alleged that this duty gave rise to three particular obligations : (1) not to accept instructions from Mr Layas which they knew or believed to be dishonest and contrary to the interests of the LIA and LIA UK; (2) to act in the best interests of the LIA and LIA UK by giving honest instructions to KS; and (3) to forward to the LIA and LIA UK anything which came to their notice and cast doubt on the instructions given to KS.

41 At [72] the Claimants set out the alleged breaches of duty. The allegations were that the Defendants (1) accepted instructions from Mr Layas which they knew or believed to be dishonest; (2) gave false and misleading instructions to KS; (3) failed to inform the LIA and LIA UK of Savills' opinion and suppressed and concealed that opinion; (4) sought changes to the KS Letter in order to persuade the LIA and MHICL to enter into the JV; and (5) deceived the Claimants by the representations referred to at [64] to [69] of RRAPOC.

42 At [73] the Claimants alleged that Mr King and/or Mr Merry and/or the other Defendants dishonestly assisted Mr Layas to breach his fiduciary duties as a director of LIA UK and those of the Defendants who were primarily liable for breach of fiduciary duty to commit such breach.

The 13.11.18 application RRAPOC ~ Conspiracy

43 At RRAPOC [74] the Claimants set out their claim in conspiracy. The allegation was that Mr King, Mr Merry and/or the other Defendants conspired with one another and/or Mr Layas to injure the LIA and MHICL by unlawful means. The alleged combination said to give rise to the conspiracy was between Mr Layas, Mr King, Mr Merry and/or the other Defendants with a view to suppressing Savills' valuation opinion and obtaining a report from an alternative valuer which would support the JV value and hotel site value put forward by the Defendants to the Claimants. The unlawful means alleged were (1) the deceit by the Defendants by causing the making of false representations; (2) the breach of fiduciary duty by Mr Layas who concealed Savills' opinion and lied as to the reason for disinstructing Savills, arranged for the Defendants to instruct KS and be involved in writing the KS Letter, and concealed the role of Mr King and Mr Merry in the KS Letter and the Defendants' dishonest assistance of Mr Layas; and (3) the Defendants' breach of fiduciary duty by concealment of Savills' opinion, giving false and misleading instructions to KS, and requesting that the draft KS Letter be altered to induce the LIA and MHICL to enter into the JV.

The 13.11.18 application RRAPOC ~ Causation and Loss

44 At RRAPOC [75] the Claimants alleged that the matters complained of caused the LIA and MHICL to enter into the JV and part with £12.26m and at [76] the Claimants alleged that the loss thereby suffered was most, if not all, of that £12.26m.

The 28.5.19 application RRAPOC

45 By the 28.5.19 application the Claimants sought to make changes to two of the particular claims which were opposed.

46 First, the Claimants sought to revise the deceit allegation at [64] under (3) from " … and/or the Defendants had no reason to believe that those valuations were inaccurate or unreliable"

to " … and/or there was no reason to believe that those valuations were or might be inaccurate or unreliable".

47 Secondly, the Claimants sought to revise the breach of fiduciary duty and dishonest assistance in breach of fiduciary duty claim at RRAPOC [70] to [73] to one of breach of agency duty and dishonest assistance in Mr Layas' breach of fiduciary duty. The Claimants sought to limit the scope of the duty as agent alleged at [71] to one of honesty. At [71] the Claimants alleged that the Defendants acted as agents for the LIA

and LIA UK in their dealings with KS. The precise revisions sought to be made were at [71] altering

"… the Defendants acted as their agents and owed a fiduciary duty of loyalty towards those Claimants"

to

"… the Defendants acted as their agents and owed a duty of honesty towards the Claimants";

and, consequentially, at [71.2] altering

"To act in the best interests of the Claimants by giving honest instructions to KS"

to

"To give honest instructions to KS";

at [72] altering

"In breach of that fiduciary duty,"

to

"In breach of that duty of honesty,";

and, at [73.2] altering

"Such of the Defendants as are primarily liable for breach of fiduciary duty …"

to

"Such of the Defendants as are primarily liable for breach of their duties as agents …".

Threshold issues ~ limitation and abuse of process

Limitation

48 The Claimants accepted that there is a reasonably arguable limitation defence to their claims as set out in the proposed RRAPOC. However, their case was that their claims were within the scope of s.35 of the Limitation Act 1980 and CPR r.17.4 and the court was entitled to, and should, permit continuation of the claims as if issued within time.

49 So far as relevant s.35 provides, inter alia, that, subject to certain conditions, rules of court may provide for the court to permit new claims made in the course of any action after the expiry of the limitation period to be deemed to be a separate action commenced on the same date as the original action. The conditions include that, in the case of a claim involving a new cause of action, the new cause of action arises out of

the same facts or substantially the same facts as are already in issue on any claim previously made in the original action. Giving effect to s.35, CPR r.17.4(2) provides :

"The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings".

50 The purpose of the qualification to the court's power to permit amendment of a claim has been explained, by Colman J in BP plc v Aon Ltd [2006] 1 Lloyd's Rep 549 at p.558 [52], as :

"…to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim".

Tomlinson LJ, giving the judgment of the Court of Appeal in Ballinger v Mercer Ltd [2014] EWCA Civ 996, referred, at [34], to the helpful guidance given by Colman J in BP plc v Aon Ltd at [52] to [54] of that judgment. At [54] Colman J referred to the observation of Hobhouse LJ in Lloyd's Bank plc v Rogers [1997] TLR 154 that :

"The policy of [s.35] is thus based on the assumption that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts".

Tomlinson LJ referred at [35] and [36] to a passage in the judgment of Glidewell LJ in Welsh Development Agency v Redpath Dorman Long Ltd [1994] 1 WLR 1409 at p.1418 and an observation thereon of Millett LJ in Paragon Finance Plc v Thakerar & Co [1999] 1 AER 400 at p.418. that whether or not a new cause of action arose out of substantially the same facts might be a matter of impression in borderline cases but was otherwise a question of analysis. Then at [37] Tomlinson LJ pointed out that ""the same or substantially the same" is not synonymous with "similar"". At [38] Tomlinson LJ observed that the judge's task involved analysing the extent to which the defendants would be required by the new claims to embark on an investigation of facts which they would not previously have been concerned to investigate.

51 Mr Adkin QC drew attention to Harland and Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd [2009] EWHC 1557 (Ch). In that case, at [67],

Warren J referred to Convergence Group plc v Chantrey Vellacott [2005] EWCA Civ 290 and to observations in the judgment of Jonathan Parker LJ, at [104], that the court's task was essentially to make a qualitative judgment. I note that at [105] Jonathan Parker LJ observed that it was more or less inevitable in a case of factual complexity that an amendment would seek to plead new facts, but it did not follow that the claim did not arise out of substantially the same facts as the claim already pleaded. In other words, the fact that new facts are alleged is not of itself fatal.

52 It was common ground between the Claimants and the Defendants that the burden rested on the Claimants, who sought a summary determination that a limitation defence should not be available, to satisfy the court that any new cause of action arose out of the same or substantially the same facts.

53 Mr Onslow QC first addressed a point raised in the Defendants' skeleton argument that there were no facts at all presently in issue because the Claimants Re-Amended Particulars of Claim were struck out in their entirety by the 23.10.18 order. Mr Onslow QC submitted that the Claimants' position (the Re-Amended Particulars of Claim having been struck out, the striking out of the Amended Claim Form having been stayed, and the new claim in the proposed RRAPOC pending until permission to amend is given or refused) nevertheless plainly came within the language and ambit of CPR r.17.4. The proceedings by the Claimants against the Defendants were alive. In the proceedings, the proposed new claim arose out of the same facts as the claim previously made. The causes of action (unlawful means conspiracy and dishonest assistance in breach of duty) were maintained and permission was sought to add new claims. Looking to the language of CPR r.17.4, the remedy previously sought against the Defendants was maintained and the 13.11.18 application sought to expand the remedy claimed from damages and interest to damages or equitable compensation and interest.

54 Mr Onslow QC submitted that the proposed new claim concerned, as it always had, the same events, facts and circumstances, and persons over the same short period of time. The matters central to both the previous and the proposed claim were the instruction and disinstruction of Savills, the instruction of KS, the KS Letter, and the presentation of the KS Letter and the S&P Letter to the LIA in order to induce the LIA to pay £10.5m for a 50% interest in the JV. The claim continued to concern the acts and states of mind of Mr King, Mr Merry and Mr Layas, albeit that they had been placed centre-stage and the spotlight had been turned to focus on them because the

claim against KS had been dismissed. The very same documents underpinned both the previous claim and the proposed claim. Indeed, the same chronological bundle of some 300 pages of documents spanning the period 30.9.07 to 9.8.17 (with the key documents being approximately 100 pages of mainly emails and other communications to, from or copied to one or more of the Defendants over the period mid-June to early July 2010) which had been central to the applications decided by the 23.10.18 order was central to the present applications. The Defendants had already addressed the factual basis of the Claimants' claim, having served a fully pleaded Defence to the Amended Particulars of Claim. Thus, as to the purpose of the court's power, the Defendants would not be required to investigate facts and obtain evidence of matters which were outside the ambit of or unrelated to those facts which they may fairly be taken to have investigated for the purpose of defending the claim previously made.

55 As to the policy underlying the power to permit amendment after the expiration of the limitation period, Mr Onslow QC submitted that the court deliberately did not bring the Claimants' claims against the Defendants to an end. Rather, it afforded the Claimants an opportunity to reformulate and redirect their claim because the court was of the view that, even though KS were not culpable participants in any deception of the Claimants, the evidence based pleas in relation to the Defendants were sufficiently troubling to warrant that opportunity. Mr Onslow QC submitted that that was precisely what the Claimants had done by reference to the very same facts with few, if any, additions.

56 Turning to the analysis of the proposed new claim in comparison with the claim as previously advanced, Mr Onslow QC pointed to the structure of the previous pleading and the proposed RRAPOC as being the same. The alleged facts in the proposed RRAPOC were, as were the alleged facts in the previous pleading, drawn from the same available contemporaneous documents with limited additional drawing of inferences.

57 Mr Onslow QC compared the facts alleged by the proposed RRAPOC[5] with those alleged in the Amended Particulars of Claim[6], to which the Defendants had responded with a detailed Defence, and also to the Re-Amended Particulars of Claim, both of which had been the subject of the 23.10.18 order. Mr Onslow QC drew attention to

[5] Paragraphs [18] to [63]
[6] Paragraphs [6] to [40]

some additions of detail; some detail had been added to the chronological account, for example a letter written by Mr Layas to Mr King on 12.5.10 and internal communications within the Claimants on 7.6.10 (to which the Defendants would not be expected to plead). The additions were plainly related to the facts and matters previously raised. The Defendants' Defence had set out detailed responses and allegations of fact and had included the Defendants' own explanation for their conduct, for example their involvement in the finalisation of the KS Letter had been stated to have been because KS had not followed the instructions given to them and had failed to make express reference to the "mutually agreed JV value of £21 million"[7]. As to that, Mr Onslow QC submitted that there had been no such mutual agreement although that was what the Defendants had told KS.

58 As to changes or new allegations, there were new allegations about the use made of the S&P Letter in 2010 but that was an adjunct to the principal allegations concerning the KS Letter. Further, at RRAPOC [30] the Claimants had set out the inferences to be drawn concerning the Defendants as to the disinstruction of Savills and the knowledge or understanding of Mr King and Mr Merry to be inferred from their involvement, through Mr Layas, in the instruction of KS. At RRAPOC [50] the Claimants had set out a series of inferences or conclusions to be drawn from the chronology of dealings by Mr King and Mr Merry with KS over the week in June 2010 from the initial approach to the finalisation of the KS Letter. At RRAPOC [58] the Claimants had set out more detail as to their knowledge of what became of the £10.5m paid for a 50% share in the JV. Mr Onslow QC submitted that the narrative was very substantially unchanged and, further, that the Defendants had already pleaded to that narrative in detail. On that basis it was appropriate to permit the amendment sought and to require the Defendants to answer it.

59 Turning to the second section of the Claimants' pleadings, which Mr Onslow QC termed the conclusory section, Mr Onslow QC handed up a schedule which he and Ms Holderness had prepared. The Schedule compared each element of each claim in the proposed RRAPOC to the Claimants' previous pleading and identified the corresponding paragraphs in the Defence.

60 Under the deceit claim, the subject matter of the representations was substantially the same; the identity of the representor had changed from KS to the Defendants, but in the previous pleading the Defendants had been behind KS and had been alleged to

[7] Defence [53]

have been conspirators including with Mr Layas; the means of making the alleged representations, intention as to reliance, allegations of reliance, allegations of falsity, and knowledge or recklessness were repeated in the proposed RRAPOC albeit they had been expanded to include direct and more extensive reference to the S&P Letter.

61 Under the breach of fiduciary duty and dishonest assistance claim, the Amended Particulars of Claim had primarily concerned the alleged duties of KS to the LIA, but not the duties of the Defendants or the assistance of Mr Layas. However, the facts that underlay the proposed allegations of the Defendants' duties and dishonest assistance, namely the dealings between Mr Layas and the Defendants and between the Defendants and KS, were pleaded to in the Defendants' Defence. Their Defence also included express averments that they

> "acted at all times and in all respects honestly and with an honest belief in the lawfulness of those actions and the actions of each other, KS and Mr Layas, including the means the Claimants allege were unlawful. The [Defendants] did not doubt, and had no reason to doubt, that the [KS Letter] represented KS' honest opinion"[8].

Mr Onslow QC submitted that that was a very broad assertion which should be taken to have followed and been based upon investigation of the events over the relevant period.

62 Under the conspiracy claim the Amended Particulars of Claim had alleged that the conspiracy was to deceive the Claimants by means of the KS Letter. In response the Defence had contended that the Amended Particulars of Claim failed to plead the essential elements of unlawful means conspiracy. It had then set out positive averments that there had been no conspiracy or shared common design with Mr Layas or that the Defendants or Mr Layas intended to injure the Claimants[9].

63 Having regard to the previous pleadings, for both allegations and responses, the facts relied on in the proposed RRAPOC were almost identical to those previously alleged and gave rise to a remedy claimed in the proposed RRAPOC against the Defendants which had also been claimed previously. Further, whether analysed or considered as a matter of impression, the new claims each arose out of the very same, or very substantially the same, facts as had previously been alleged; and, importantly, the Defendants had pleaded a very full Defence to the previous claim from which it followed as obvious that the Defendants had already investigated the facts still relied

[8] Defence [106]
[9] Defence [104]

upon. Such, if any, facts and matters as might not have been investigated previously were closely related to those previously alleged.

64 Perhaps more with an eye to abuse of process than limitation, Mr Adkin QC's preliminary submissions in answer included that the claims sought to be introduced by the proposed RRAPOC were admitted to be or to include new claims but they were claims that could have been advanced at any time since the action was started because they had not arisen out of any new fact or matter that had belatedly come to the Claimants' attention in the meantime. Mr Adkin QC drew attention to Mr Onslow QC's observations that the new claims were obvious and asked rhetorically : that being so, why had the Claimants left it until now, three years into the action, to seek and raise them for the first time? Mr Adkin QC went on to provide the answer that they had been considered before and dismissed as meritless and were only revived because of the dire straits in which the Claimants now found themselves.

65 Addressing limitation generally in relation to amendment applications, Mr Adkin QC referred to the express provisions of CPR r.17.4(2), emphasised that the court had a discretion under that rule, and referred in detail to the judgment of Tomlinson LJ in Ballinger v Mercer at [33] to [38]. Mr Adkin QC submitted that the litmus test under CPR r.17.4(2) which had to be met for the discretion to become exercisable was whether the Defendants would be required by the new claims to embark on an investigation of facts which they would not previously have been concerned to investigate. If so, it could not be said that the new claims arose out of the same or substantially the same facts. Mr Adkin QC submitted that his primary argument was that whether or not investigation of new facts was required was binary, and further, that if the Defendants were going to have to investigate facts they had not previously been concerned to investigate, that was the end of it.

66 Mr Adkin QC submitted that, in fact, the proposed RRAPOC raised many new facts. The previous claim had been primarily against KS but was twofold. The first claim had focused on KS : the sending of the KS Letter had constituted a representation by KS that the Property was worth £21m, alternatively, the sending of the KS Letter had been an implied representation that KS regarded the assumptions made in the KS Letter as reasonable or the KS Letter had been a valuation on which the Claimants could reasonably rely. It had been alleged that those representations were false and KS had known that they were false. There had been further allegations that KS had assumed a fiduciary duty and breached that duty by sending the KS Letter. It had also been

alleged that the Defendants conspired with Mr Layas or KS to deceive the Claimants by means of the KS Letter and by inducing KS to breach its fiduciary duty. The second claim previously made had been that the Defendants induced or dishonestly assisted KS to breach its fiduciary duty and/or that the Defendants had been involved in a conspiracy; this had been pinned on allegations that Mr Merry knew that the valuation obtained from Savills was far too low to justify an investment of £10.5m and that Mr Merry had acted for the Defendants not for the Claimants.

67 Mr Adkin QC and Ms Tandy also produced, as an attachment to their skeleton argument, a schedule comparing the previous claims to the claims made in the proposed RRAPOC. Each head of claim was taken in turn.

68 In relation to the deceit claim, new points were that : the representations relied upon had changed from valuing the Property at £21m to valuing the JV at £21m and the hotel site at £18m; the identity of the representor had changed from KS to the Defendants; the representations were now said to have been made by the S&P Letter as well as the KS Letter; both Letters were now said to have been relied upon; as to falsity the previous allegation had been that the Property was only worth some £3m and the new allegation was that the JV and the hotel site were worthless or worth substantially less and further the Defendants had good reason to believe that the KS Letter and the S&P Letter were unreliable; and, the allegation of intention or recklessness had changed from the Defendants knowing or suspecting that the values in the KS Letter were unreasonable to the Defendants, knowing of Savills' opinion, thereby knowing that the KS Letter and the S&P Letter were likely to be inaccurate or unreliable.

69 In relation to the claims of breach of fiduciary duty, the allegations in the proposed RRAPOC that : the Defendants had acted as the Claimants' agents in instructing KS, the Defendants had owed a duty not to accept dishonest instructions from Mr Layas but nevertheless accepted such instructions, the Defendants had owed a duty to the Claimants to act in the Claimants' best interests and to forward to the Claimants anything casting doubt on instructions given to KS, the Defendants had breached their duty by accepting dishonest instructions from Mr Layas and giving misleading instructions to KS and suppressing Savills' valuation, were all previously unpleaded. The claim that the Defendants had dishonestly assisted Mr Layas in breach of his fiduciary duties was also previously unpleaded.

70 As to the conspiracy claim, the parties were now said to be only Mr Layas and the Defendants, KS had been dropped and the unlawful means had become the Defendants' wrongdoing, together with that of Mr Layas, in place of wrongdoing by KS.

71 Developing the schedule in oral argument, Mr Adkin QC submitted that in the deceit claim new allegations included that the Defendants did not honestly believe that the valuations in the KS Letter or the S&P Letter were accurate or reliable; that was an allegation concerning, as a fact, the Defendants' state of mind and contemporaneous beliefs. Mr Adkin QC further submitted, no doubt on instructions, that the Defendants' view of the Savills' valuation was that it was "total and utter garbage". Another new alleged fact was that the Defendants sent the S&P Letter to KS intending it to be included in their report. A further new allegation of fact relied on by Mr Adkin QC was the allegation that the Defendants knew and approved of the sending of the S&P Letter to the LIA on 24.6.10. A yet further new factual allegation for investigation by the Defendants was that the Defendants had deliberately concealed the Savills valuation from KS.

72 As to the breach of fiduciary duty claim, Mr Adkin QC referred to six, reduced to five during discussion, new factual allegations made by the proposed RRAPOC which the Defendants had not previously been required to investigate. The five allegations were or raised the following matters for investigation : (1) what, if anything, had been agreed between the Defendants or Mr King and Mr Merry with Mr Layas about instructing or providing information to KS, the point being that the role of Mr Merry and Mr King was alleged to have changed from having acted as agents for the Defendants to having acted as agents for the Claimants; (2) that the Defendants had accepted instructions from Mr Layas, to assist in finding a surveyor who would support a £21m valuation at short notice, that were known to be contrary to the LIA's interests and, therefore, dishonest; (3) that the Defendants had deliberately concealed the Savills' valuation from the Claimants; (4) that the Defendants' deceit of the Claimants had also been a breach of their fiduciary duty to the Claimants; and, (5) whether any alleged breach of fiduciary duty had caused the Claimants to enter into the JV. Central to the new claim of breach of fiduciary duty was the question whether the Defendants had assumed a fiduciary obligation of loyalty to the Claimants, which itself gave rise to investigations as to facts.

73 As to the dishonest assistance claim, Mr Adkin QC submitted that the plea that the Defendants had dishonestly assisted Mr Layas to breach his fiduciary duty was wholly

unparticularised and that had left the Defendants uncertain as to what facts required investigation. It was reasonable to expect the new claim to require investigation of how any such assistance had been provided, but that raised open questions.

74 Mr Adkin QC submitted that the conspiracy claim was itself consequential. However there was no clearly pleaded agreement or combination, rather the Claimants admitted that they did not know what to allege and therefore had asserted inferences required to be drawn[10]. Because it depended on the deceit, breach of fiduciary duty and dishonest assistance claims, which themselves had all raised new factual allegations for investigation, the conspiracy claim could not be brought within CPR r.17.4.

75 In my judgment, there is nothing in the point that, because there is no extant pleading to be compared with the proposed RRAPOC, there are no facts presently in issue in order to undertake a qualitative analysis. The language of CPR r.17.4 requires there to be ongoing proceedings, which there are, and the assessment of the new claim to be made by comparison of the facts in the new claim to the facts in respect of which a remedy has already been claimed. At one level, that that is something that may be done is demonstrated by the fact that both sides' legal teams have done it and expressed it, albeit somewhat differently, in schedules and detailed submissions. Further and importantly, the whole point of paragraph 3 of the 23.10.18 order was to permit the Claimants an opportunity to reformulate a claim focussed primarily against the Defendants and not KS because of, and therefore based on, the facts then pleaded. I note that the language of s.35 is rather different from CPR r.17.4, but the argument before me was as to the engagement of CPR r.17.4. On this preliminary point I agree with Mr Onslow QC's submissions.

76 The questions now are : whether or not the facts in the proposed RRAPOC are substantially the same as those previously alleged and whether or not the Defendants would be required to embark on an investigation of facts going beyond those that they might reasonably be assumed to have been concerned to investigate previously. Notwithstanding Mr Adkin QC's submissions, in my view, the latter question is not resolved by a binary answer; the need to investigate one or more new facts does not of itself have the effect of ruling out a new claim. The boundary between permissible and impermissible amendment should be drawn based on analysis of the extent or degree to which new investigation is required. The boundary line has been crossed when the facts to be investigated and evidence to be obtained call for investigation

[10] RRAPOC [30]

"completely outside" and "unrelated to" the facts to be investigated and evidence to be obtained previously. The closer the new claim is to the boundary line, the greater the likelihood that the judicial exercise of the discretion will be to refuse permission for the new claim. Impression is relevant, at least at or close to the boundary, and the court's task is to make an assessment as to the extent to which new or further investigation may be required as a result of the new claim and then decide whether that investigation would be likely to cause a defendant to undertake investigations completely outside the ambit of and unrelated to those that may reasonably be assumed to have been investigated in answering the previous allegations. This engages both claim by claim consideration and overall impression, always remembering that the cut off point is at least "substantially the same" and not merely "similar". Where there has been a pleaded defence, that sheds light on what might reasonably be expected to have been investigated but is not a substitute for objective assessment.

77 Having regard to the detailed comparison of the previous Particulars of Claim and the proposed RRAPOC as analysed by each of Mr Onslow QC and Mr Adkin QC, my view is that the facts alleged as central to the claim in the proposed RRAPOC are nearly identical to those previously alleged. This view is reinforced, as Mr Onslow QC submitted, by the very fact that the contemporaneous documents which underpin the proposed RRAPOC are those that were relied on and available previously and, yet further, that the Defendants were parties or privy to very many of those documents.

78 What has changed, as Mr Adkin QC's schedule highlighted, is that the Defendants have replaced KS as the Claimants' primary target. However, the underlying facts relied upon are very substantially the same. The central events occurred in the same short window and continue to focus upon the disinstruction of Savills, the instruction at short notice of KS, the content and finalisation of the KS Letter, the presentation of the KS Letter to the Claimants, and what the Claimants made of the KS Letter. The S&P Letter was an integral part in the instruction of KS and the content of the KS Letter; its new significance is its delivery to the LIA on 24.6.10. The involvement and states of mind of Mr King, Mr Merry and Mr Layas were all in issue previously. That the Defendants turned their minds to and investigated these matters is clear from the Defence to the Amended Particulars of Claim. For the purposes of this judgment one plea serves sufficiently to illustrate this – in the Amended Particulars of Claim at [14], the Claimants alleged (based on facts stated in solicitors' correspondence) that after receiving Savills' valuation Mr Layas contacted Mr Merry on 18.6.10 to ask for

assistance at short notice in obtaining valuation advice; in the Defence at [45] the Defendants pleaded that Mr Merry recalled that Mr Layas was then out of the country on business and that, regardless of his reasons for doing so, Mr Layas in fact asked Mr King to assist the LIA in approaching and briefing alternative valuers. Both Mr King and Mr Merry signed statements of truth to verify the Defence and the Defence contained sweeping positive assertions. Of course, my conclusion is based on the detailed comparison of the previous pleadings with the proposed RRAPOC the subject of the parties' counsels' schedules and submissions.

79 It is also the case that, as Mr Onslow QC submitted, the very same documents which underpinned the proposed RRAPOC were the platform for the previous claim. The S&P Letter was one of these documents and its use, for example in instructing KS, was expressly pleaded in the Amended Particulars of Claim and the Defence expressly referred to the obtaining of the S&P Letter and its provision to the LIA and KS; the Defence also pleaded the use by Mr King of the S&P Letter in his attempt to persuade Savills to reconsider their valuation; and, significantly, expressly neither admitted nor denied whether it was forwarded to the LIA on 24.6.10 or relied on by the LIA[11]. Far from being a new fact, it was alleged, investigated and expressly responded to previously.

80 Other important indicators of the ambit of the Defendants' previous investigations appear from their Defence.

81 First, in the Defence at [9] to [65] the Defendants set out the facts which they considered to be relevant before answering, paragraph by paragraph, the facts and matters alleged by the Amended Particulars of Claim. The topics covered by the free standing positive case were the JV agreement and its terms, the value of and steps towards developing the hotel site and the retail site, the information provided to the LIA, the Defendants' dealings with Savills on behalf of the LIA at Mr Layas' request, the instructions given to KS from 10.06 a.m. on 18.6.10 to KS signing off the KS letter on 23.6.10 and Mr Layas sending it to the LIA on 24.6.10, and subsequent Red Book valuations of the hotel site. Pausing here, and as to Mr Adkin QC's submission that the Defendants consider Savills' valuation to be "total and utter garbage", be that as it may and to the contrary, on the evidence presently before the court it appears that, at the time, Mr King took it seriously and made a determined, but unsuccessful, effort to persuade Savills to abandon its valuation.

[11] Defence [88]

82 Secondly, in the further paragraphs of the Defence, [67] to [110], the Defendants set out a detailed answer to the Amended Particulars of Claim which included a further detailed positive case. Mr King signed a statement of truth for himself and the Second, Third and Fourth Defendants and Mr Merry signed a statement of truth for himself and the Sixth Defendant. In the Defence, Mr Merry averred that the KS Letter was commissioned for the LIA and/or LIA UK "through" him and that he intended to provide assistance to Mr Layas as requested but did not intend to induce the Claimants to enter the JV or "in any particular way". This shows that matters the subject of the proposed RRAPOC were, or may be assumed to have been, under consideration and investigation by the Defendants previously. In the Defence at [101a], answering the Claimants' unlawful means conspiracy and dishonest assistance claims that they were deceived by the KS Letter and that the assumptions and valuations in the KS Letter were and were known to be unreasonable but would be relied on as reliable by the Claimants, the Defendants expressly averred that an enterprise value of £21m was reasonable and that it was supported by the S&P Letter. At [106] the Defendants averred that :

" … The [Defendants] acted at all times and in all respects honestly and with an honest belief in the lawfulness of those actions and the actions of each other, KS and Mr Layas, including the means the Claimants allege were unlawful".

Thus, the Defendants' involvement in the preparation and promulgation of the KS Letter and, because it was referred to therein, the S&P Letter, were both the subject of investigation by the Defendants, and the Defendants' considered position was that the documents were reasonable and that their conduct was not open to challenge as in any way less than honest and lawful. All of this may reasonably be assumed to have been investigated previously by the Defendants.

83 As noted above, Mr Adkin QC observed at the outset of his submissions, albeit possibly with a different issue in mind, that the claims did not arise out of any new facts; and, as the Defence made clear, the Defendants had looked very closely at their involvement in and their intentions as to the alleged facts and their consequences.

84 Turning next to Mr Adkin QC's list of new points by reference to the deceit claim : in the Defence the Defendants had already averred that an enterprise value of £21m was reasonable and may be assumed to have investigated that; they had also referred to the £18m hotel site value in the Defence; the change in the identity of the representor

is well within the scope of related facts and matters, for example the Defence dealt expressly with Mr King's and Mr Merry's role and involvement in the KS Letter; both the KS Letter and the S&P Letter were addressed in detail in the Defence; the Defendants had investigated falsity by reference to value and had commissioned, pleaded and relied upon more up to date valuations of the hotel site; and, dishonest intention and recklessness had been considered extensively and were the subject of an unqualified contrary averment of honesty and lawfulness. The Defendants' state of mind and intentions were expressly addressed in the Defence. In my judgment, Mr Adkin QC's oral submissions on the deceit claim do not come close to the boundary of CPR r.17.4.

85 In relation to the alleged new points as to breach of fiduciary duty, in the Defence Mr Merry and Mr King had pleaded a positive case as to the entirety of their involvement, including their dealings with Mr Layas and KS. The need to suppress Savills' valuation was the reason for seeking a new valuer at short notice and may be assumed to have been investigated before making a completely unreserved averment of honesty and lawfulness. Mr Merry pleaded expressly to his role in the instruction of KS as the person "through" whom the KS Letter had been commissioned for the LIA. The Defence also corrected the Amended Particulars of Claim by identifying Mr King, not Mr Merry, as the recipient of the request to assist the LIA. On analysis, the points referred to by Mr Adkin QC during his submissions were not new or unrelated to the facts and matters actually, or reasonably assumed to have been, investigated by the Defendants but were very closely related or intrinsic.

86 In relation to the pleas of dishonest assistance of Mr Layas and conspiracy, notwithstanding Mr Adkin QC's criticism that the claims lacked any particulars, the claim previously referred to the Defendants' dealings with Mr Layas. The Claimants' knowledge of those dealings was derived from documents which gave rise to the facts pleaded in the Amended Particulars of Claim and repeated in the proposed RRAPOC. The Defendants, Mr King and/or Mr Merry, were parties or privy to almost all those documents. All of this is well within the ambit of the investigation which the Defendants may reasonably be assumed to have undertaken when addressing the previous claim. Further, in the Defence at [104] the Defendants expressly denied any conspiracy at all with each other, KS, Mr Layas and/or unspecified others.

87 In my judgment, the proposed claim in the RRAPOC does not fall foul of CPR r.17.4, nor does it come anywhere near to the boundary line. On analysis the new claims

arise out of the same or substantially the same facts and the ambit of the investigation to be required of the Defendants is well within or related to facts they did investigate or could reasonably be assumed to have investigated for the purpose of defending the previous claim. The proposed RRAPOC does not offend the purpose or the policy of CPR r.17.4. In my judgment there is only one way in which the judicial discretion can properly be exercised and that is to hold that the claims in the proposed RRAPOC fall within CPR r.17.4 and, in principle (that is subject to consideration of whether each head of claim contains the required legal ingredients and has a realistic underlying factual basis), to permit the amendment as set out in the proposed RRAPOC.

Abuse of process

88 Mr Onslow QC submitted that any challenge to the proposed RRAPOC on grounds of abuse of process was precluded by the argument during the hearing on 23.10.18 and the order then made. The prospect of a new action being permitted had been the subject of submissions by Mr Adkin QC on 23.10.18 that such a course would be an abuse of process; he had made submissions then that it would be vexatious to the Defendants to require them to re-litigate the same thing time after time and, further, that affording the Claimants the opportunity to reformulate their claim engaged and offended the principle in Henderson v Henderson (1843) 3 Hare 100. Mr Onslow QC submitted that to raise this point again, it having failed on 23.10.18, was an attempted second bite at the cherry and was itself an impermissible attempt to re-litigate a matter which had been decided on 23.10.18. If dissatisfied with that decision, the Defendants should have appealed. The Claimants had to overcome the limitation hurdle and also had to demonstrate that the proposed RRAPOC raised one or more claims having a real prospect of success; subject to that, permission to amend should be given. For the court to do otherwise would be inconsistent with the overriding objective.

89 Mr Onslow QC submitted that the claims the subject of the proposed RRAPOC have not been litigated and the Claimants have made out a compelling case that the Defendants, in cahoots with Mr Layas, had set out to and had deceived the Claimants. On the previous occasion the court had decided that, subject to the Claimants being so advised, they should have an opportunity to formulate such a claim which, if it had a reasonable prospect of success, should go forward to trial.

90 Mr Adkin QC submitted that the proposed claim could have been pursued from the outset. Had the action been struck out in its entirety, the new claims and the RRAPOC would undoubtedly have constituted an abuse of process. This was clear from a well-

known passage in the speech of Lord Bingham in Johnson v Gore-Wood & Co Ltd [2001] 2 AC 1 at p.31A-D. Lord Bingham had drawn attention to the public interest in there being finality in litigation and in avoiding the vexation of a party twice in the same litigation. The public interest point was reinforced by the emphasis now placed on efficiency and economy in the conduct of litigation both subjectively at the level of the particular parties and more broadly in the interests of the public as a whole. The bringing of a claim in later proceedings might, without more, amount to an abuse; on that point it was for the party raising abuse to satisfy the court that the claim should have been raised in earlier proceedings if it was to be raised at all. There would rarely be a finding of abuse unless the later proceedings involved what the court regarded as unjust harassment of a party. Moreover, the raising of a matter in later proceedings which could have been raised earlier would not necessarily be abusive; that would be too dogmatic. What was required was a broad, merits-based judgment taking into account the private and public interests involved and all the facts of the case. The crucial question was whether a party was misusing or abusing the court's process by seeking to raise an issue which could have been raised before.

91 Mr Adkin QC then referred to other cases as illustrative of circumstances where the court decided to strike out as an abuse. These included a claimant's ability to fund wide-ranging litigation, the stress litigation placed on professional individuals, the additional enormous cost of pursuing two actions, the defendant's knowledge that further claims were likely, and the obligation not to put forward speculative or weak claims.

92 Mr Adkin QC submitted that in this case the Claimants sought to pursue an entirely new set of claims which could have been pursued from the outset. The passage of time (nine years since the relevant events and three years since the commencement of the litigation), the proliferation of pleadings, the delays in progressing the claim, the pressure on the Defendants of facing litigation affecting their reputations, the enormous cost from the Defendants' point of view, and the financial resources attested to by the Claimants were all relevant to the merits-based judgment to be made and pointed overwhelmingly to the abusive vexation of the Defendants by this litigation.

93 I agree with Mr Adkin QC that the Claimants could have formulated a claim along the lines of or in the terms of the proposed RRAPOC and included it in the claim in fact issued on 18.7.16.

94 I also accept as forceful Mr Adkin QC's submissions about the competing private interests including the respective resources of the Claimants and the Defendants, the duration of the litigation, and the pressure of the litigation on the individuals who are parties (here also I take into account that Mr King is not a young, or even middle-aged, man). On the question of resources, there is a counter-point that the Defendants have been awarded the costs of the action to date on the indemnity basis. This will include reimbursement to the Defendants of the costs of investigating the prior claim and preparing their very full response in what became their Defence. If the action proceeds, work undertaken on the Defence is likely to be relevant and carried over to, and may underpin, any defence to the new claim in the proposed RRAPOC and, even though now to be paid for by the Claimants, it may yet be shown to be flawed.

95 The public interests involved include the use of the court's resources and the expectation, supported by sanctions, that litigation is conducted proportionately, timeously and cost effectively. These interests may have been tested by this litigation, but, as I view it, not to the point that its continuation would be abusive.

96 The alleged facts of the case previously caused me to feel a sense of disquiet. My concern that there is material against the Defendants was endorsed when the Claimants were refused permission to appeal the 23.10.18 order. The relevance of the concern I expressed about the Defendants in this context is that, by their intermeddling in the independent valuations required by the LIA in order to decide whether or not to enter into the JV and pay £10.5m, the Defendants have brought this litigation upon themselves.

97 It is also relevant, at least as part of all the circumstances, and to the broad merits-based judgment to be made, that on 23.10.18 an abuse of process argument was raised, dismissed and not appealed.

98 Bearing in mind all of the circumstances to which I have been referred, and assessing the merits of the argument that permitting the action to continue would be an abuse of the court's process on a broad basis, my conclusion is that the continuation of the claim by the proposed RRAPOC falls well short of unjust harassment of the Defendants or any of them and would not be an abuse of the court's process. I also consider that my rejection of this challenge, when made and dismissed on 23.10.18, could and should have been appealed then rather than revived now.

Approach to the 13.11.18 application and the 28.5.19 application

99 The test for permitting further amendment of the Amended Claim Form and service of the proposed RRAPOC is that there is a real prospect of the claim succeeding. To proceed further, each head of claim must pass this test and the burden of proof is on the Claimants. A summary of the relevant principles appears in the notes to CPR Part 24 at 24.2.3[12]. The court considers (1) whether the claim has a realistic, as opposed to fanciful, prospect of success; (2) the claim must carry some degree of conviction, i.e. be more than merely arguable; (3) the court must not conduct a mini-trial; (4) factual assertions need not be taken at face value, (5) weight should be given to (apparently authentic) contemporaneous documents; (6) in addition to the evidence before the court, regard may be had to evidence reasonably expected to be available at trial; and, (7) it does not follow that an apparently uncomplicated case should be decided summarily without full investigation of the facts, and the court should hesitate about making a decision summarily, even where there is no obvious factual conflict, if reasonable grounds exist for believing that a fuller investigation at trial would add to or alter the available evidence and may affect the outcome of the case; but, (8) where there is a short point of law or construction and all the evidence necessary for proper determination of the issue(s) is available, and the parties have had a reasonable opportunity to address the issue(s) in argument, the court should dispose of the action.

100 In this case, the claim is built upon contemporaneous documents and, to a limited extent, inference. The question is whether the alleged facts, based on documents and realistically drawn inferences, realistically give rise to one or more heads of claim recognised in law. If it is arguable with some degree of conviction, and not fanciful, that the alleged facts and inferences do satisfy the elements or ingredients of an alleged head of claim, that claim should be permitted to proceed.

101 The 13.11.18 application raised four heads of claim, deceit, breach of fiduciary duty, dishonest assistance, and conspiracy. The 28.5.19 application sought to modify the claim in deceit and revise the breach of fiduciary duty claim to one based on a duty of honesty.

Deceit

[12] 3rd Cumulative Supplement to 2019 White Book p.49

102 Both Mr Onslow QC and Mr Adkin QC referred to the speech of Viscount Maugham in Bradford Third Equitable Benefit Building Society v Borders [1941] 2 AER 205 at p.211 for the main facts or matters to be established in an action for deceit :

(1) there must be a representation of fact made by words or by conduct. This will include the case where a defendant has approved and adopted a representation made by some third person, but mere silence, however morally wrong, will not suffice;

(2) the representation must be made with knowledge that it is false. It must be wilfully false, or at least made in the absence of a genuine belief that it is true;

(3) the representation must be made with the intention that it should be acted upon by the claimant in the manner which results in damage to him;

(4) the claimant must act upon the false statement; and,

(5) the claimant must sustain damage by so acting.

At p.220H-221A Viscount Maugham observed that :

"… fraud may assume many disguises and wrappings, but the court will always look at the substance, and, if it finds the wicked intent and consequent damage, will give effect to its findings".

It is not in dispute that the onus of proof rests on a claimant. On the application before me, the Claimants must establish that the claim carries some degree of conviction so that there is a realistic prospect that they will succeed on their claim.

103 As to the first element, a representation of fact, Mr Onslow QC submitted that a representation might be made by conduct and referred to MacDonald Eggers, Deceit the Lie of the Law, 2009, at 3.2-3.4. Important considerations when considering alleged representations included whether a defendant was capitalising on a claimant's expectations, viewing the alleged misrepresentation in its full context, and the power - as an instrument of deception - of a cocktail of truth, falsity and evasion. Mr Onslow QC referred to Arkwright v Newbold (1881) LR 17 ChD 301 and the judgment of James LJ referring back to the speech of Lord Cairns in Peek v Gurney Law Rep 6 HL 377 at 403 for the proposition that it sufficed if there was a partial and fragmentary statement of fact where what was withheld rendered that which was stated false. Mr Onslow QC expanded on this point by reference to the paragraph on half-truths in Clerk & Lindsell on Torts, 22nd at 18-07 and submitted that the unqualified promulgation of the KS Letter, and also the S&P Letter, in June 2010, without any reference to Savills' valuation was closely analogous.

104 Mr Onslow QC submitted that it did not matter that the false representation relied on had not been made by the Defendants but had been made by an innocent third party. Similarly, where a representation had been made indirectly to a third party with the intention that it would be passed on to the claimant to be acted on by him, the representation was no less an actionable representation. This was clear from the passage cited above and the commentary and authorities referred to in Clerk & Lindsell at 18-31, and also in MacDonald Eggers at 6.6. The latter work cited a passage from the speech of Lord St Leonards in The National Exchange Company of Glasgow v Drew (1855) 2 Macq 102 at p.145

"If a principal, with knowledge of a fact which was material to the value of the property, employed an agent whom he knew to be ignorant of the fact, for the purpose of concealing it, he could not avail himself of that concealment, and he would be responsible …".

Mr Onslow QC submitted that the circumstances in which Savills' opinion as to value was kept from the LIA was closely analogous. Referring to MacDonald Eggers at 6.8, Mr Onslow QC submitted that procuring a fraudulent misrepresentation was a recognised sub-category of deceit for which the procurer was liable.

105 Mr Onslow QC submitted that where a defendant was responsible for putting documents containing representations into the hands of a claimant and intended that they be relied upon, there was an additional implicit representation that they were accurate and reliable and honestly believed to be so. Mr Onslow QC referred to the decision of Moore-Bick LJ, sitting at first instance, in Man Nutzfahrzeuge AG v Freightliner Ltd [2005] EWHC 2347 (Comm) at [78]-[79]. In that case accounts, including a budget for the year ahead, had been altered and the judge found that it was implicit that the claimant had relied on the underlying fact that they had been prepared honestly by reference to underlying accounting records which were themselves honest and that reliance on honesty was fundamental to the claimant's approach.

106 Mr Onslow QC submitted that the claim advanced by the Claimants was a classic case of deceit being based, as it was, on the provision of a valuation deliberately rendered materially false or misleading by the suppression of information. That someone other than the Defendants - Mr Layas - had made the false representation by passing on the KS Letter to the Claimants was not fatal. The Defendants remained culpable because

they had procured, instructed, encouraged, authorised and/or adopted and approved the representations and that sufficed for liability in the tort of deceit.

107 One example of such a case was Ludgater v Love (1881) 44 LT 694 in which a father, knowing his sheep had rot, had used his son as agent to sell the sheep and the son, being ignorant of the true position, had represented that they were all right; the father was held liable for the fraudulent misrepresentation by reason of his own fraudulent mind, notwithstanding the want of fraud in his son. Another example was Pilmore v Hood (1838) 5 Bing (N.C.) 97 in which a third party had made representations as to the turnover of a pub being sold by the defendant and the defendant had known of the communication and that it was false, and was liable; the defendant in that case had known that the claimant was labouring under a delusion materially affecting the contract between them and had stood by and allowed the contract to be completed. Mr Onslow QC also referred to the decision of Fry J in Cargill v Bower (1878) 10 Ch D 502 at pp.513-514 and submitted that the Defendants were caught as actual perpetrators because they

"[did] something to produce the fraudulent result" or, if they were at least arguably the Claimants' agents, by "abstain[ing] from doing something which they [were] under an obligation to the deceived person to do in order to prevent fraud".

108 Mr Onslow QC submitted that the Defendants could not avoid liability by distancing themselves, through Mr Layas and KS, from presentation to the Claimants of the false representations as to value of the JV enterprise and the hotel site. The Claimants' ignorance of the Defendants' involvement in the KS Letter reinforced rather than detracted from the Defendants' liability.

109 Mr Onslow QC submitted that the valuations in the KS Letter and the S&P Letter were representations of existing fact not opinion because they were statements expressing or endorsing values which values were capable of proof or disproof. Alternatively, if the valuations were merely opinions, they were nevertheless representations if the Claimants established that the Defendants, as representors, did not hold such opinions or beliefs or, having the knowledge that they in fact had, could not honestly have held such opinions or beliefs. The Claimants' point, Mr Onslow QC submitted, was that the misrepresentation came about as the product of what the Defendants said and did, in a series of steps, to cause the Claimants to believe that assets (the JV enterprise and the hotel site) had particular values (£21m and £18m). To achieve this, they mixed a

cocktail of truth, falsity and evasion which, as the Defendants intended and procured, someone else served.

110 All of this supported the implication of a misrepresentation that the true state of facts did not exist and that had it existed they, the Claimants, would have been informed of it. Applied to the Claimants' circumstances, they had naturally assumed that there was no reason to believe that the valuations presented to them were very materially inaccurate and that the JV enterprise and hotel site were worth very much less than £21m and £18m respectively. Importantly, the Defendants knew that the Claimants wanted up to date independent valuations for the obvious reason of relying on the same; rhetorically, why else were the Defendants involved in the content of the KS Letter?

111 That was important context when considering what the Claimants had expected and whether there had been an implied representation that the contents were reliable.

112 Mr Onslow QC summarised the Claimants' case as an example of the tort of deceit based on an intentional false representation which induced the Claimants to act in a way which caused them loss and submitted that, on the alleged facts as supported by the available contemporaneous documents, the Claimants had, and had set out, a strong realistically arguable case against the Defendants in deceit.

113 As to reliance, Mr Onslow QC submitted that the fact that the Claimants and the Defendants were counterparties was not, of itself, a basis for the court to reject the proposition that, in so far as representations had been made by the Defendants, the Claimants had relied on them. It was important that the Defendants were not at arm's length but had chosen to involve themselves at every stage in the procuration, content and promulgation of what was supposed to be, and must have been understood by the Claimants to have been, an independent professional report. This went to the actual representations, knowledge of their falsity, intention as to how the Claimants should act, and reliance by the Claimants. That the Claimants had sustained damage was supported by expert evidence.

114 Mr Adkin QC began his submissions by outlining the legal framework. He referred first to the ingredients required to establish a case in deceit as identified by Viscount Maugham in Bradford v Borders. He also drew attention to a passage in the judgment of Soole J in Barley v Muir [2018] EWHC 619 (QB) at [173]-[178]. Reviewing authorities to which he had been referred, Soole J summarised the elements of the tort

of deceit; noted that a claimant had to clearly identify the dishonest representation; noted that the standard of proof was the civil standard; noted, in the context of opinions as representations by reason of not being honestly held, that a representation by a professional person expected to have expertise would carry an implied representation that the representor had reasonable grounds for making the statement; noted that whether any, and if so what, representation had been made had to be judged objectively according to the impact that what had been said would be expected to have had on a reasonable representee in the position and with the characteristics of the actual representee; and, observed that, in a case where the representation was implied, the court's task was to ascertain what a reasonable representee would have inferred was being implicitly represented by the representor's words and conduct in context.

115 On the topic of implied representations, Mr Adkin QC also referred to the decision of the Court of Appeal in Property Alliance Group Ltd v Royal Bank of Scotland PLC [2018] EWCA Civ 355 and the judgment of the court at [128]-[132]. After reviewing earlier first instance authorities the judgment continued :

"We do think it is a helpful test, in relation to the existence of an implied representation, to consider whether a reasonable representee would naturally assume that the true state of facts did not exist and that, if it did, he would necessarily have been informed of it. … but that is not to water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied".

116 Mr Adkin QC submitted that the Defendants had not made (not said or written) any of the three representations alleged in the proposed RRAPOC at [64][13], nor were the alleged representations implied representations which could be attributed to the Defendants or any of them. In fact, none of the alleged representations had actually been made. As to the first alleged representation, KS had supported assumptions made and merely expressed an opinion that a JV enterprise value of £21m was appropriate and that opinion was heavily qualified by disclaimers in the KS Letter. As to the second, the S&P Letter had merely assumed a hotel price site of £18m, which fell short even of expressing an opinion. Reference had been made in the KS Letter to the S&P Letter but that was not a representation by KS as to the value of the hotel site.

117 The third alleged representation was in several parts. No representation had been made that the said valuations were accurate and reliable. That the said valuations

[13] Referred to above at [32]

were honestly believed to be accurate and reliable was no doubt true of KS, and although more difficult in relation to S&P (because S&P had merely stated an assumption) it was arguable that S&P had made an implied representation that the assumption was reasonable and there was no allegation or evidence to suggest that S&P did not honestly hold such a belief. Further, if the allegations were to be understood as a reference to the Defendants having represented that they honestly believed the valuations said to have been contained in the KS Letter and the S&P Letter, the clear fact was that the Defendants had made no such representation. As to whether the Defendants had had no reason not to believe those valuations, if the allegation had not been abandoned by the Claimants as hopeless, it was bound to fail because they had not made any representation to the Claimants as to the valuations. In short, the first and second alleged representations had not been made by anyone; the third alleged representation had not been made by the Defendants nor was there a basis for implying that the Defendants had made such a representation.

118 As to the means by which the representations were made, alleged at RRAPOC [65], if the KS Letter and the S&P Letter might have been said to contain express or implied representations by KS and S&P, that was nothing to the point. As to the point, whether it was realistically arguable that the representations were made by the Defendants, Mr Adkin QC submitted that it was unarguable. The KS Letter had been sent directly by KS to Mr Layas and then onwards by him to the LIA; the Defendants had had no involvement in making any representation by means of the KS Letter. The sending of the S&P Letter in January 2010 was irrelevant because it preceded Savills' involvement, and the retransmission of the S&P Letter on 24.6.10 had been by Mr Layas again. Neither Letter had been, or had been understood by the Claimants to have been, sent by or on behalf of the Defendants. Thus, there was no scope for arguing that the Defendants were responsible for making or causing the making of representations. It followed that any allegation of inducement was also bound to fail.

119 The authorities relied on by Mr Onslow QC were of no assistance. For instance, in Ludgater v Love, the son had been agent for his father in the sale of his father's livestock. That was a critical distinguishing feature and there could be no argument in this case that KS were acting for or representing the Defendants.

120 Finally, Mr Adkin QC submitted that in fact no reliance could have been placed on representations which had not been made expressly or impliedly, which was this case. Even if that was wrong, and it was somehow arguable that the Defendants had made

representations, there was no real prospect of any court accepting that the Claimants had relied upon the same because they were the representations of the commercial counterparty to the JV agreement under negotiation.

121 The question for me is whether there is a realistically arguable case that the facts alleged, if proven, would address and satisfy all the elements of the tort of deceit. At the heart of the Claimants' case, as I read it, is the allegation that the Defendants procured the making of the alleged representations intending that the Claimants would act upon them and invest £10.5m in the JV; that is at RRAPOC [66], a paragraph not expressly addressed by Mr Adkin QC.

122 In my view, and considered in the context of the KS Letter itself and the available evidence as to the instructions and information given to KS, (1) the summary and conclusion in the KS Letter constituted a statement of professional opinion that there was evidence which supported an enterprise valuation of £21m and, further, that, in the light of the S&P Letter, it was reasonable to attribute £18m to the value of the hotel site, and (2) that valuations to that effect were, and were honestly believed to be accurate and reliable by independent professional valuers, KS and S&P. I note that KS expressly stated in its disclaimer that "our findings and reactions should be regarded as valid for a six month period"; there were qualifications and caveats expressed in the KS Letter, but their (in)significance is not a matter for summary determination. I accept Mr Onslow QC's submission that it is realistically arguable that the alleged representations (other than the abandoned representation that "the Defendants had no reason to believe that those valuations were inaccurate or unreliable") were representations of existing fact, being either capable of proof or disproof, or on the basis that the Defendants had sought to capitalise on the Claimants' expectations by concocting a cocktail of truth, falsity and evasion.

123 In my view, it is realistically arguable, with no small degree of conviction, that the Defendants, in particular Mr King and Mr Merry, should be regarded as makers of the statements and holders of the underlying implicit beliefs. Of course, the Claimants had no idea that such was the case. However, the Defendants put themselves in the shoes of representors by consciously taking steps to select and instruct KS, then taking an active and apparently persuasive role in rewording the KS Letter from draft to final form, and - only once satisfied themselves as to the content - authorising its onward transmission to the LIA via LIA UK.

124 There may be no decided case with closely comparable facts but the facts of this case resonate with the authorities and texts cited by Mr Onslow which drew attention to focussing on the substance of what occurred, the Claimants' expectations, and the withholding of an important ingredient when mixing the cocktail.

125 At this stage that suffices for a conclusion that a claim alleging that the Defendants represented (indirectly but culpably), and/or caused representations to be made, and/or adopted and approved representations, to the Claimants that the JV enterprise value was £21m, the value of the hotel site was £18m, and the valuations contained in the KS Letter (including the endorsement of the S&P Letter) and the S&P Letter were, and were honestly believed to be, accurate and reliable, has a real prospect of success. It is unquestionably arguable that the Defendants were at the heart of procuring the KS Letter and determining (including by editing and re-writing) its final content, all the while intending that the Claimants would rely on the same.

126 As to the making of the representations, the facts alleged as supported by documentary evidence make out a realistically arguable case that the Defendants controlled the sending of the KS Letter and therefore made the representations or caused them to be made to the LIA, albeit in the name of KS, via LIA UK as express and implied representations in the KS Letter. It may well be that the Defendants were not involved in the re-transmission of the S&P Letter to the LIA on 24.6.10, but at this stage, and notwithstanding Mr Adkin QC's analysis of the real time line, I cannot safely conclude that that is fanciful or unarguable with at least some degree of conviction. Rather, and reminding myself that the burden of proof is on the Claimants, I can properly conclude that, although doubtful, it is at present realistically arguable.

127 On the available evidence, it is realistically arguable that the Defendants knew that the valuations were excessive or false, or were reckless as to whether they were so and, notwithstanding that knowledge, the Defendants suppressed Savills' valuation intending to induce the LIA to enter the JV and pay upwards of £10.5m.

128 It is also realistically arguable that a reasonable representee would have been, and on the facts alleged that the Claimants were, so induced. Put another way, suppose a recipient of the KS Letter in the position of the LIA had been told that the Defendants, in particular Mr King and Mr Merry, had been responsible for, or even involved in, the selection, engagement and instruction of KS, had reviewed and vetted the KS Letter, and had been authors or co-authors of passages including the summary and conclusion, it is enough to ask rhetorically (1) how much weight would that reasonable

representee have attached to the contents of the KS Letter? (2) On 27.6.10 would that reasonable representee, having been furnished with the KS Letter and the S&P Letter as the independent evidence of values and being about to decide on whether to proceed with the JV, have resolved to proceed?

129 As to the final element, resultant damage, there is evidence to support the Claimants' proposition that they have sustained material damage.

130 I do not accept Mr Adkin QC's submissions that there were no representations as alleged or that it is not arguable that the Defendants were representors. I agree that the facts of Ludgater v Love were quite different, but the point made by Mr Onslow QC was that there have been a number of cases where the representor stands behind the making of the representation by a third party as representor and those cases all establish that the background representor, knowing the true state of affairs, is nevertheless culpable. In my view, the alleged facts of this case are realistically open to such a finding in deceit.

Breach of fiduciary duty

131 The breach of fiduciary claim against the Defendants, principally Mr King and Mr Merry, was based on the allegation that they were the Claimants' agents. This allegation first appeared expressly in the proposed RRAPOC at [50.4] (that when giving instructions to KS the Defendants did so as the Claimants' agents) and was developed in the proposed RRAPOC at [70]-[72]. The allegation at [70] was that the Defendants derived their authority to act for the LIA and LIA UK in instructing KS from Mr Layas. The particular facets of the duty relied upon were specified at [71] and were :

"71.1 Not to accept instructions from Mr Layas which they knew or believed to be dishonest and contrary to the interests of LIA UK and the LIA, for whom LIA UK was acting;

71.2 To act in the best interests of those Claimants by giving honest instructions to KS; and

71.3 To forward to those Claimants anything which came to their notice and which cast doubt on the instructions given to KS".

Then, at [72], five breaches of those duties were alleged : (1) accepting instructions from Mr Layas which were known or believed to be dishonest; (2) knowingly giving false and misleading instructions to KS; (3) concealing Savills valuation from the Claimants; (4) requesting changes to the draft KS Letter; and (5) deceiving the Claimants as alleged in the deceit claim.

132 Both Mr Onslow QC and Mr Adkin QC based their analysis of this part of the proposed RRAPOC on the well known passage in the judgment of Millett LJ in Bristol and West Building Society v Mothew [1998] Ch 1 at p.18A-C :

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977), p.2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".

133 Mr Onslow QC submitted that when Mr Layas, having been charged with obtaining independent valuation advice for the forthcoming LIA board meeting at which investment in the JV was to be considered, enlisted the assistance of the Defendants, Mr Layas was acting consistently with his authority and had authority to appoint the Defendants as agents to assist with the task of identifying and engaging an appropriate professional. From the Defendants' standpoint, they should have appreciated that they had been instructed to do something for the LIA. That the Defendants had so appreciated was clear from the documents (for example, see the averment in the Defence at [45] that Mr Layas had approached Mr King to assist the LIA in approaching and briefing firms, the reference in the attendance note of Mr Merry's first meeting with KS to the service required being a letter addressed to the LIA, Mr Merry's email to KS after the meeting confirming that a letter of instruction would be sent by the LIA, and the actual letter of instruction which, in fact, was written and sent by Mr King). The Defendants had accepted a role in the chain of authority from the LIA by which KS had been engaged and instructed to provide a valuation report. In short, the Defendants had agreed to act and had acted on their principals' (the LIA and LIA UK) behalf so as to affect the principals' relations with a third party (KS); that fell within the definition of Agency in Bowstead & Reynolds on Agency 21st edition at 1-001.

134 The Claimants' complaint was about the Defendants' performance of their duties as agents. As also made clear in the opening paragraph of Bowstead & Reynolds, agency is a classic example of a fiduciary relationship. Mr Onslow QC submitted that the simple point was that the Claimants had trusted the Defendants to do the job honestly. Mr Onslow QC submitted that it was enough for the Claimants' purposes that the Defendants had a duty to act honestly. That was the essence of the plea at [71.1] and [71.2] of RRAPOC and it underpinned the duty pleaded at [71.3].

135 Mr Onslow QC drew attention to the comment in Bowstead & Reynolds at 6-034 that actual disloyalty may take a "myriad of forms" and could "also found the illegality necessary for liability in conspiracy". Mr Onslow QC also referred to a passage at 6-037 that the extent of an agent's duties varied from situation to situation so that :

"… a person otherwise at arm's length with a claimant with whom he is proposing to contract may have a limited authority to act for the claimant, for example in filling out the blanks in the document recording the contract. In so doing he may be required both to adhere to the mandate given and to exercise it in good faith. In many situations the duty may be, by virtue of the circumstances, limited; or restricted or even excluded by contract. "The precise scope of [the obligation] must be moulded according to the nature of the relationship"[14]".

136 Mr Onslow QC also placed reliance on the judgment of the Privy Council in Kelly v Cooper [1993] AC 205 which concerned the duties of an estate agent contractually engaged by competing vendors of nearby properties. In such a case the agent was not bound by a fiduciary duty to disclose confidential information about one vendor's instructions to another vendor. Rather the scope of the fiduciary duty was defined by the terms of the contract of agency.

137 Mr Onslow QC submitted that the Claimants were correct to characterise the Defendants as agents and had identified duties owed by the Defendants to the Claimants which rendered them fiduciaries. That said, it was not necessary to, and the Claimants did not wish to continue to, allege that the Defendants owed an unqualified duty of loyalty or were obliged to act in the Claimants' best interests, but they did maintain that the Defendants were required to give honest instructions to KS.

138 As to [72] of the proposed RRAPOC[15], there was ample evidence to support each of the allegations of breach of duty and that each alleged breach was a step which caused or contributed to the LIA's decision to invest in the JV and to the payment of

[14] New Zealand Netherlands Society "Oranje" Inc v Kuys [1973] 1 WLR 1126, Lord Wilberforce at p.1130
[15] Summarised at [41] above

£10.5m. On any view there was a real prospect of establishing that the alleged breaches had occurred and, as alleged at [75] of the proposed RRAPOC, that they caused or contributed to the decision to participate in the JV and the loss of all, or most, of the £12.26m invested therein.

139 Mr Adkin QC submitted, by reference to the passage cited above from Bristol and West Building Society v Mothew, that the duty of loyalty was the foundation of a fiduciary obligation. He also referred to the judgment of the Privy Council in Arklow Investments Ltd v Maclean [2000] 1 WLR 594 at p.598G :

"In the present context, the concept [the duty of loyalty] encapsulates a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal. An example of the obligation relevant to the present case is not to exploit or take advantage of the position of fiduciary at the expense of the principal. The existence and extent of the duty will be governed by the particular circumstances".

140 Mr Adkin QC submitted that there was no basis in this case for contending that any such legitimate expectation arose. Mr King and Mr Merry had simply agreed to help. They had provided KS with information, including as to what was required; at the first meeting, as KS's note recorded, Mr Merry had expressly made clear that he and his company advised Mr King and his companies and it was clear that they, not the LIA, were his and his company's clients. There was nothing to support the proposition that Mr King and Mr Merry had agreed that they would act on behalf of the LIA. The claim in the proposed RRAPOC was entirely new and it represented a 180 degree turn. The Claimants had not been able to get the existence of a duty of loyalty off the ground.

141 Mr Adkin QC submitted that four of the allegations at [72] of the proposed RRAPOC were also new : accepting instructions from Mr Layas which were known or believed to be dishonest; giving instructions to KS which were known to be false or misleading; concealing Savills' opinion from the LIA; and, deceiving the Claimants as set out in the deceit claim.

142 Mr Adkin QC further submitted that the Claimants had not demonstrated, to the level of having a real prospect of success, that fiduciary duties had arisen, that breaches of duty had occurred, or that loss had been thereby caused. Causation was merely asserted by the Claimants, it had not been particularised properly or at all and there was no previous allegation of causative effect of the content of the KS Letter. This was

not an arid or technical pleading point. There was nothing to explain how the alleged breaches at [72] of the proposed RRAPOC had caused or contributed to the Claimants' decision to enter into the JV.

143 As I understand the Claimants' breach of duty claim, the starting point is that the Defendants, in response to a request from Mr Layas, put themselves in the position of agents for the Claimants, or at least the LIA and LIA UK, at every stage of their interaction with KS. On the facts as alleged and as so far supported by documentary evidence I consider that there is a real prospect that such a finding will be made at trial and that a defence based on the contention that the Defendants merely responded to a request for help in a way which did not give rise to any obligation or duty as agents of the Claimants or the LIA will fail.

144 As to the Claimants' allegation that as agents a fiduciary duty of loyalty followed, in my view an unqualified duty of loyalty was not necessarily a consequence of the particular relationship. As counterparties negotiating or considering the JV there would obviously have been scope for conflicts of interest and duty. However, given the use for which a valuation report was required, which use was known to the Defendants, a number of duties commonly regarded as features of a fiduciary's duty of loyalty arguably arose. Of the particular duties alleged at [71.1]-[71.3] the only duty that seems to me to be open to challenge as an alleged duty of the Defendants to the LIA and LIA UK is a duty to act in their best interests. That said, the actual allegation at [71.2] was not of an unqualified duty to act in the LIA's and LIA UK's best interests but to do so by giving honest instructions to KS. Having regard to the role which the Defendants allegedly assumed and the currently available documentary evidence supporting those allegations, I regard that as realistically arguable.

145 As to [72] of the proposed RRAPOC, each of those alleged breaches of duty has a realistically arguable foundation on the available evidence. I also accept Mr Onslow QC's submission that the steps from existence of the obligation or duty, through breach, to causation of loss are sufficiently pleaded and have a real prospect of success. The story line in the proposed RRAPOC is perfectly clear and it is realistically arguable.

146 I do not accept Mr Adkin QC's argument that the allegations were new with the consequence that the Defendants have not previously had cause to investigate lines of enquiry raised by the proposed RRAPOC. The spotlight may have been angled differently, and now be turned away from KS, but the focus remains on previously

pleaded allegations of fact concerning the KS Letter from instruction of KS to promulgation of the KS Letter. The Defendants have addressed the KS Letter and their conduct in their existing Defence and their own case is that they had looked at all aspects of their involvement and had neither misled nor been dishonest. I therefore do not accept Mr Adkin QC's submissions that this claim consists of or raises entirely new and previously unconsidered facts and matters.

147 The Claimants no longer wish to assert that the core duty of loyalty, importing wide-ranging facets or duties of a fiduciary, was owed, or even to label the duties owed as fiduciary. That is for consideration later in this judgment, but for now it suffices to note that deletion of the words "fiduciary" and "loyalty" would not render the remaining alleged breach of duty case fanciful, lacking conviction, or unarguable.

Dishonest assistance

148 The previous dishonest assistance claim alleged that the Defendants dishonestly assisted KS to breach its alleged fiduciary duty to the Claimants by sending the KS Letter to them knowing or suspecting that the assumptions and calculations were unreasonable and that the KS Letter would be treated as a valuation. In addition, there was a conspiracy allegation that the Defendants conspired with Mr Layas and/or KS and/or one another to injure the Claimants by means of the KS Letter.

149 At [73] of the proposed RRAPOC the revised claim is that the Defendants dishonestly assisted Mr Layas to breach his fiduciary duties as a director of LIA UK and those of the Defendants primarily liable for breach of fiduciary duty to commit the same.

150 As a form of accessory liability the Claimants must establish that there was a breach of a fiduciary duty owed to them by Mr Layas and that the Defendants dishonestly assisted in or procured that breach. The latter element requires consideration of both the actual state of the Defendants' knowledge or belief as to the facts and whether the Defendants' conduct was dishonest by the standards of the ordinary honest person. Thus, the notional ordinary honest person is to be circumstanced as the Defendants were or, more precisely, individually as each of Mr King and Mr Merry had been. For a statement of the law Mr Onslow QC referred to FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm) at [82] and the references there to Royal Brunei Airlines v Tan [1995] 2 AC 378 and Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67.

151 Mr Onslow QC submitted that the alleged dishonest assistance of Mr Layas was principally, if not exclusively, given by Mr King and Mr Merry. Mr King and Mr Merry had responded to Mr Layas' request for assistance in finding an alternative surveyor to Savills at short notice who, unlike Savills, would support a valuation of the JV at £21m. It was obviously understood by all three men that this was necessary to persuade the LIA to pay £10.5m for a 50% share in the JV. As alleged at [30] of the proposed RRAPOC, the inference to be drawn was that the Defendants knew that Mr Layas's conduct was contrary to the Claimants' interests. As alleged at [50] of the proposed RRAPOC, Mr King, Mr Merry and/or others of the Defendants agreed to and did instruct KS; the instructions were, as the Defendants knew, misleading and untrue as to whether the JV had been agreed, whether the JV value had been agreed at £21m, and whether the S&P Letter remained reliable without making reference to Savills' valuation; and, in addition the LIA had not agreed that Mr King and Mr Merry should vet drafts of the KS Letter and they knew, or must have appreciated, that any such agreement by Mr Layas was a breach of his duty. Further Mr King and Mr Merry had made material changes to drafts, including the final draft, of what became the KS Letter before it was signed and sent to Mr Layas for onward transmission to the LIA. The obvious purpose had been to induce the LIA to enter the JV. In all of this Mr King and Mr Merry colluded or were in cahoots with Mr Layas; in addition to Mr Layas' dishonesty in breaching his duty to the Claimants, the Defendants' dishonesty in combining with him was also dishonest assistance.

152 Mr Onslow QC submitted that the references back to [30] and [50] of the proposed RRAPOC identified the assistance which the Defendants gave to Mr Layas and the dishonesty on their part and that of Mr Layas.

153 Mr Adkin QC submitted that the proposed RRAPOC contained no allegation at all that the Defendants had provided any assistance to Mr Layas. What the Claimants had alleged was that it was to be inferred that Mr King and Mr Merry knew that Mr Layas was acting contrary to the Claimants' interests and, further, what the Defendants had done in instructing KS. There was neither a plea nor particularisation of how Mr Layas had been assisted. It was an entirely unclear makeweight claim and it was very difficult to discern what would have to be investigated.

154 I do not share Mr Adkin QC's view of the difficulties which the Defendants would face if required to respond to a claim of dishonestly assisting Mr Layas in breach of his duties as a director of LIA UK. A fair reading of [30], [50] and [73] of the proposed RRAPOC

in the context of the alleged factual chronology, itself based on contemporaneous documents, leaves little, if any, room for doubt as to how the Defendants' allegedly assisted Mr Layas or as to the alleged dishonesty on the part of the Defendants. The Claimants acknowledged that they did not know what discussions had taken place between Mr Layas and Mr King and/or Mr Merry; however, it was common ground that Mr Layas had approached them for assistance. Further, given the evidence as to Mr King's communications with Savills on 17-18.6.10, it would be reasonable to infer that the reason for Mr Layas' approach had been or had included that Savills would not support the hotel site value, and therefore the JV value, sought by the Defendants. The disclosure from KS has provided some insight into the role which the Defendants were given or assumed and their dealings and communications with KS; and, the documents demonstrate, at least arguably, that Mr Layas accepted the KS Letter, as finalised by Mr Merry and Mr King, and passed it on to the LIA as an independent valuation.

155 The interaction between Mr Layas and the Defendants was a basis for the conspiracy claim previously alleged. That was answered in the Defendants' Defence, but not in a way that allayed the Claimants' concerns. Mr Layas is not a defendant (nor is he likely to be a witness). That may be unsatisfactory but it is plain that the Claimants regarded and regard his conduct as disloyal and it is arguable that he owed fiduciary duties to the Claimants, as a director of LIA UK and as the person representing the LIA in the UK, which he breached by placing the Defendants in control of the instructions given to KS and authorising or permitting them to involve themselves in drafting and finalising the content of what became the KS Letter. Given, as the Defendants have asserted and Mr Layas knew, that they were counterparties to ongoing negotiations with the Claimants about the JV and the value of a 50% investment, there is realistic scope for drawing the inferences or reaching the conclusions alleged at [50] and [73] of RRAPOC.

156 In my view, a claim in dishonest assistance based upon allegations that Mr Layas was in breach of his fiduciary duties as a director of LIA UK and as a representative in the UK of the LIA and that, once engaged or enlisted to assist in finding an alternative surveyor, the Defendants, in particular Mr King and Mr Merry, proceeded deliberately to intermeddle in the instruction of KS and the preparation and finalisation of the KS Letter and in so doing dishonestly assisted him in breaching his duty of loyalty to the Claimants is realistically arguable. Secondly, and as to whether the claim is entirely new, the Defendants have, for the purposes of their Defence, investigated and made

out a positive case as to their dealings with Mr Layas in relation to the KS Letter. There is a fine line between the formulation of this claim as dishonest assistance of Mr Layas and the claim in conspiracy alleged in the proceedings the subject of the 23.10.18 order. I do not regard the claim as unclear or new.

Conspiracy

157 In the previous claim the Claimants had alleged that the Defendants had conspired with Mr Layas and/or KS and/or one another to injure one or more of the Claimants by unlawful means, specifically by deceiving the Claimants by means of the KS Letter. In their Defence the Defendants had criticised the allegation for want of particularity and had asserted a positive case denying that there had been any conspiracy at all. In my judgment on 23.10.18, and based on the facts as then alleged and supported by the available documentation, I referred to the concerted efforts of Mr Layas, Mr King and Mr Merry to secure the LIA board's approval on 27.6.10 to investment of £10.5m in the JV. I understood the Claimants' allegation to be that the concerted efforts were made by Mr King, Mr Merry and Mr Layas combining, or acting in cahoots, and that seemed to me to be at the heart of the Claimants' case and to have a credible evidential basis.

158 The revised claim in conspiracy, at [74] of the proposed RRAPOC with causation alleged at [75] and loss at [76], necessarily excluded reference to KS, and alleged a conspiracy only between Mr King and Mr Merry and/or the other Defendants with one another and with Mr Layas. The central figures to the combination were Mr Layas, Mr King and Mr Merry. The subject matter of the combination was the course of events over the period 17.6.10 to 24.6.10 concerning the engagement of a surveyor to replace Savills, the concealment of Savills' opinion, and furnishing the LIA with a letter report which supported a valuation of £21m and, therefore, £10.5m as the price for a 50% interest in the JV. The alleged unlawful means were : the alleged deceit practised on the Claimants, Mr Layas' alleged breach of fiduciary duty (by his involvement in concealing Savills' opinion and lying as to the reason for disinstructing Savills, arranging with the Defendants for them to instruct KS and then forwarding the KS Letter to the LIA, and concealing from the LIA Mr King's and Mr Merry's involvement in instructing KS and in the KS Letter), and the Defendants' alleged breach of fiduciary duty. In short, the conspiracy claim was that the alleged deceit and breaches of duty were not the result of independent and unconnected or merely coincidental conduct on the part of Mr King, Mr Merry and Mr Layas but were the product of an understanding or arrangement between them by which they combined, taking different roles and undertaking different tasks, with the common intention of persuading the LIA to enter

into the JV agreement and pay £10.5m for a 50% share notwithstanding that to their knowledge the underlying asset value was or was likely to be materially less and the Claimants would, by paying an excessive or inflated price, thereby suffer loss.

159 Mr Onslow QC referred again to FM Capital Partners Ltd v Marino at [94] for a summary of the elements of the cause of action, namely (1) a combination, arrangement or understanding between two or more people, (2) an intention to injure, which may be inferred from the inevitability of loss, (3) active participation in concerted action consequent on the combination, arrangement or understanding, (4) the use of unlawful means as part of the concerted action, and (5) loss caused to the target of the conspiracy.

160 Mr Onslow QC submitted that all the elements were present in this case and had been pleaded in the proposed RRAPOC. The Defendants were intent upon securing the gain of raising £10.5m by persuading the LIA to enter into the JV agreement fully aware of the loss that the LIA would thereby inevitably sustain. The combination was alleged at [29], [30] and [50] of the proposed RRAPOC and fully supported by the available contemporaneous documentation.

161 Mr Adkin QC referred to Clerk & Lindsell on Torts 22nd edition at 24-95 where the nature of a conspiracy is explained as the combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means. Without an agreement or combination there could be no conspiracy. The combination alleged was based on a reference to [29] and [30] of the proposed RRAPOC in which no allegation of an agreement or combination between Mr Layas, Mr King and Mr Merry was made. There were two references to Mr Layas seeking help or assistance from Mr Merry or other Defendants and a further reference to the Claimants not knowing what was said between Mr Layas, Mr Merry and Mr King on and after 17.6.10. There was no actual allegation of a conspiracy at all. Mr Adkin QC submitted that this claim was fatally flawed because it lacked any allegation of conspiracy at all.

162 I read the proposed RRAPOC very differently from Mr Adkin QC. Conspiracy is expressly alleged at [74]. The introductory words (1) assert that Mr King, Mr Merry and/or other Defendants conspired with one another and Mr Layas and (2) identify the conspiracy as an unlawful means conspiracy where the target was the LIA and MHICL. The reference at [74.1] to the combination being pleaded at [29] and [30] is a reference to the circumstances of the arrangement by which, on the Claimants' case, Mr King and Mr Merry came to be involved in instructing KS and came to have a hand in what

became the KS Letter. The plea at [74.2] that the alleged deceit was part of the conspiracy is, as I read the proposed RRAPOC, central to the Claimants' case and constitutes a realistically arguable claim that, through their combination together, Mr King, Mr Merry and Mr Layas with other Defendants caused the LIA to pay £10.5m for a 50% share in the JV which they knew was, or was likely to be, a materially inflated price. It is to be remembered that there is apparently credible documentary evidence that during the crucial one week period of 17.6.10 to 24.6.10 (1) Mr King made efforts to persuade Savills to increase its valuation from the much lower figure of £5.7m, (2) Mr Layas turned to Mr King and Mr Merry for an alternative surveyor, the instruction of that surveyor, and the provision of a letter form report which met the Defendants' requirements, (3) each of Mr King, Mr Merry and Mr Layas took a role in keeping the Savills valuation figure from the LIA and persuading the LIA that £21m was an appropriate JV enterprise value of which £18m was properly attributable to the value of the hotel site, and (4) Mr King, Mr Merry and Mr Layas were in contact with one another before, during, and after the course of the crucial week 17-24.6.10. The documentary evidence supports as realistically arguable the proposition that all of this happened as a result of some combination, agreement or understanding between Mr Layas, Mr King and Mr Merry; it does not support a conclusion at this stage that Mr Layas, Mr King, Mr Merry and/or the other Defendants all acted independently with the likely result that the LIA came to enter into the JV through happenstance or some other unconnected reason.

163 In my judgment the proposed RRAPOC contains a sufficiently pleaded and realistically arguable claim in conspiracy.

Are the Claimants required to apply for relief from sanctions before the 28.5.19 application may be considered? If so, what is the consequence of the Claimants' failure to apply for such relief? Is the 28.5.19 application permitted by the 23.10.18 order?

164 By the 28.5.19 application the Claimants applied for permission to amend the 13.11.18 application to make what Mr Onslow QC characterised as minor amendments to the proposed Re-Amended Claim Form and to the proposed RRAPOC. Mr Adkin QC submitted that the court should not be misled into thinking that the Claimants' 28.5.19 application was a minor tidying up exercise but should recognise it for what it really was – a lack of belief in the claim. As already noted[16], the Defendants' primary challenge to the proposed revisions was that their consideration was subject to the

[16] See [17] and [28] above

Claimants seeking and obtaining relief from sanctions imposed by paragraph 3 of the 23.10.18 order[17]. Although the Defendants' initial position in response to the 28.5.19 application was that the court should not entertain it until they had had a reasonable opportunity to consider it, by the final day of the hearing, on 19.7.19, sufficient time had passed for them to be in a position to address the application.

165 As a preliminary point I note that the Defendants did not oppose two proposed amendments to the 13.11.18 application proposed RRAPOC. First, at [29] where the Claimants addressed the response of Mr Layas, Mr King and Mr Merry to Savills' communication on 17.6.10 that they considered S&P's 2009 valuation to be materially overstated and the Claimants applied to change the allegation that "Mr Layas asked Mr Merry and/or BPIL for assistance in finding alternative valuation advice at short notice" to an allegation that "Mr Layas, Mr Merry and/or Mr King sought alternative valuation advice at short notice". Secondly, at [60.2] where incorrect cross-references to "sub-paragraphs 59.1 and 59.2" were corrected to "sub-paragraphs 59.2 and 59.3". On that basis, these revisions may be made to the 13.11.18 proposed RRAPOC.

166 The Claimants' evidence filed as part of the 28.5.19 application was very brief. The explanation for the proposed revisions was contained in a single sentence which referred to "a number of changes to the RRAPOC" having been raised and discussed. As I understood it from Mr Onslow QC, the genesis of the proposed revision to the deceit claim was a passage in the skeleton argument of Mr Adkin QC and Ms Tandy[18]. Correspondence then passed between the parties' solicitors, Hogan Lovells International LLP for the Claimants and Croft Solicitors for the Defendants. The rationale relied on by the Claimants was set out in a note by Mr Onslow QC and Ms Holderness dated 31.5.19. Mr Croft, the Defendants' solicitor, made a witness statement in which he set out the procedural chronology of the litigation, pointed to a series of alleged failures on the part of the Claimants, identified seven versions of the Claimants' Particulars of Claim up to and including that the subject of the 28.5.19 application, and summarised the Defendants' argument that relief from sanctions was required before the court could consider the 28.5.19 application. Mr Ditchburn, the Claimants' solicitor, made a witness statement dated 17.7.19 in which he set out the Claimants' response to Mr Croft's criticisms and briefly explained the Claimants' reasoning that the 23.10.18 order had been complied with and why relief from sanctions was not required.

[17] Set out at [10] above
[18] Paragraph [36.1]

167 The parties were at odds as to whether the 28.5.19 application for permission to amend the 13.11.18 application fell foul of the 23.10.18 order and, if so, whether it was open to consideration at all. This required consideration of the terms of the order, in particular paragraph 3, in the context of the law as to the imposition of and relief from sanctions following a court order.

168 The court's case management powers include, by CPR r.3.8, rules providing for sanctions to have effect unless a defaulting party obtains relief. In so far as relevant CPR r.3.8 provides :

"(1) Where a party has failed to comply with a … court order, any sanction for failure to comply imposed by the … court order has effect unless the party in default applies for and obtains relief from the sanction.

(Rule 3.9 sets out the circumstances which the court will consider on an application to grant relief from sanctions).

(2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.

(3) Where a … court order –

(a) requires a party to do something within a specified time, and

(b) specifies the consequence of failure to comply,

the time for doing the act in question may not be extended by agreement between the parties except as provided in paragraph (4).

(4) In the circumstances referred to in paragraph (3) and unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date".

169 In general, the defaulting party is required to make a formal application for relief supported by evidence to enable the court to assess whether relief should be granted but, as noted in the notes to CPR r.3.8 at 3.8.2, the court may consider relief from sanctions without an application and of its own motion.

170 CPR r.3.9(1) sets out the court's approach when considering relief from sanctions :

"… the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need-

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders".

CPR r.3.9(2) requires that an application for relief is supported by evidence. Following guidance given by the Court of Appeal in Denton v TH White Ltd [2014] EWCA Civ 906, any application for relief is considered in three stages. First, the court considers the seriousness and significance of the failure to comply; if the breach is neither serious nor significant the court is unlikely to dwell upon the following stages. Otherwise, secondly, the court considers whether there is a good reason or explanation for the default. Thirdly, the court evaluates all the circumstances to enable it to reach a just decision, including taking into account (a) and (b) referred to above.

171 The Claimants have not made an application for relief from sanctions. Their primary submission was that there has been no breach of the 23.10.18 order and the requirement to apply for relief had not arisen.

172 The Defendants' primary submission was that the 23.10.18 order permitted the Claimants a single further opportunity to formulate a Re-Amended Claim Form supported by particulars of claim which identified and pleaded a cause of action having a real prospect of success and further that, properly understood, the order did not permit "a second bite at the cherry". In addition, the Defendants submitted that the proposed amendments (1) had no real prospect of success; (2) were out of time; and (3) should be refused as a matter of discretion. These points were also threshold objections to the claim and the RRAPOC the subject of the 13.11.18 application and, depending on the outcome of the primary objection, fall to be considered by me (if at all) in that context.

173 The hearing bundle includes a transcript of the 23.10.18 hearing. After some argument about the form of the order to reflect the judgment then handed down, I gave a short ruling[19]. I left the Amended Claim Form "hanging by a thread" and ruled that :

" … unless within three weeks an application is issued and served seeking permission to advance particulars of claim in some new form against some or all of the second to seventh defendants, then the claim form too is to be treated as having been struck out without further order being required against those defendants … and in relation to the second to seventh defendants the particulars of claim are struck out in their entirety".

At the hearing on 23.10.18 the Claimants sought only a short period of time for any reformulation of pleadings; three weeks was a period acceptable to the Claimants.

[19] Transcript 23.10.18 pp. 28-29

174 In addition, during argument as to costs, Mr Adkin QC sought an order that a sum of money by way of security for the costs for any amendment application of £150K be paid into court as a condition of the making of any amendment application. I agreed with Mr Adkin QC's point in principle but considered £80K a more realistic figure for security for the Defendants' costs of any amendment application and the Claimants did not oppose security in that sum. On that basis the payment of security for costs within three weeks became a further precondition to avoiding the automatic striking out of the Amended Claim Form and dismissal of the action against the Defendants.

175 The parties' representatives then co-operated to agree a form of draft order to reflect my judgment, ruling and decisions as to costs. Paragraph 3 of the 23.10.18 order[20] gave effect to the above ruling on costs.

176 At paragraph 3.1, the Re-Amended Particulars of Claim were struck out and the claims advanced therein were dismissed.

177 At paragraph 3.2, two conditions were imposed which had to be satisfied by 13.11.18 in order to avoid the automatic striking out of the Amended Claim Form and dismissal of the action against the Defendants.

178 Paragraph 3.3 only came into play if both conditions at paragraph 3.2 were met. By paragraph 3.3, if the Claimants "issue[d] and serve[d] an application for permission to amend and provide[d] security in accordance with paragraph 3.2", (1) the striking out of the Amended Claim Form and dismissal of the action would be "stayed pending the determination of such amendment application" and (2) "if the amendment application is refused, the stay shall be lifted upon such refusal and the Claim Form shall stand struck out and the action dismissed as against the [Defendants] without further order".

179 In addition, I made further costs orders, that the Claimants should pay the Defendants' costs of the action to date on the indemnity basis and should make a payment on account of £475K and, pending agreement of costs or a detailed assessment, for the retention of a further £30K already held in court for these costs. As £505K was already held in court as security for costs it was not necessary to consider setting a further precondition to any amendment application. This costs order effectively drew a line under the litigation as at 23.10.18. Whether or not the line reflected final closure of the

[20] Set out at [10] above

Claimants' claims concerning the JV against the Defendants depended on whether or not the Claimants sought to and did comply with paragraph 3 of the 23.10.18 order.

180 For the Claimants, Mr Onslow QC submitted that the Claimants had not breached any order, rule or practice direction and no sanctions had taken effect. The condition at paragraph 3.2(i) of the 23.10.18 order had been met by the issue and service of an application which sought permission to "amend the Claim Form and advance further amended Particulars of Claim" and by annexing a proposed Re-Amended Claim Form and RRAPOC to the evidence in support of the 13.11.18 application. The condition at paragraph 3.2(ii) had been met by the remittance of £80K to the Court Funds Office on 8.11.18. The unless order potentially giving rise to the striking out of the Amended Claim Form and dismissal of the action against the Defendants had not required a specific pleading or particularisation, or prescribed that any pleading was to be taken as in its final form for consideration on a permission to re-re-amend application.

181 Mr Onslow QC submitted that it was well established that an order dealing with the possible dismissal of an action at an interim stage had to be precise and unambiguous in its terms so that the affected party was in no doubt as to the steps to be taken in order to avoid the sanction of dismissal of the action without a trial. Mr Onslow QC supported this submission with reference to Abalian v Innous (1936) 2 AER 834, in particular the judgment of Greene LJ at p.838 and Scott LJ at p.840, and Reiss v Woolf [1952] 2 QB 557 in which the Court of Appeal endorsed the decision in Abalian and applied it to an attack on the insufficiency of particulars ordered to be given of paragraphs in a defence within a set time limit so that the failure to provide particulars did not result in the automatic striking out of the particular paragraphs of the defence.

182 Mr Onslow QC further submitted that it was improbable that in any case a court would ever make an order which forbade any future revision at all of a pleading. Yet further, the 23.10.18 order could not have been, and was not, intended to bar sensible amendments or revisions of the sort proposed by the 28.5.19 application, which were themselves minor.

183 Mr Onslow QC submitted that there was rarely a pleading which could not be improved when subjected to examination under a microscope. In the present case, the Defendants had made clear their intention to oppose the 13.11.18 application and the Claimants had, some three months before the hearing date, asked to be told the grounds of objection; the Defendants had responded promptly that the grounds would

be stated in evidence then in the course of finalisation but the Claimants had had to press three times, including through a threatened court application, before the Defendants served their evidence barely two weeks before the commencement of the hearing and, even then, the basis of the opposition had not been set out. The Defendants' actual challenge to the draft statements of case only emerged on exchange of skeleton arguments three days before the hearing.

184 Mr Onslow QC also submitted that the proposed revisions did not seek to alter the pleaded facts, the essence of which was that the Defendants deliberately caused the LIA to be provided with valuations critical to their investment decision which were (as the Defendants knew) inaccurate or unreliable. Rather the proposed revisions went to the conclusions to be drawn from the pleaded facts and the legal elements which founded the particular causes of action.

185 As to paragraph 3.3 of the 23.10.18 order, the words "such amendment" had not affected or qualified the two conditions at paragraph 3.2 so as to prohibit any variation to or change in the content of the application. That was an unrealistic and impractical construction of the 23.10.18 order. Paragraph 3.2 had set two conditions, it had not excluded the possibility of necessary, sensible, justifiable or minor revisions and paragraph 3.3 had not had the effect of superimposing a further precondition.

186 As to the first of the contentious proposed revisions, that to the deceit claim at [64.3] of the proposed RRAPOC, Mr Onslow QC acknowledged that the Claimants had been alerted to this point by the Defendants' skeleton argument. He submitted that the Claimants had then recognised the fact that, at the time, so far as the Claimants were concerned the Defendants had had nothing to do with the KS Letter and the Defendants' beliefs and wishes had not been understood to be the subject of or to have influenced the KS Letter; what had been, or had been supposed to be, the subject of the KS Letter was an independent professional opinion based on experienced professional expertise and, without it needing to be said expressly because it was obvious, unfettered by interested party influence. The Claimants had been entitled, as reasonable recipients of the KS Letter, to take it as implicit that there was no reason to believe that the valuations referred to in the KS Letter were or might be inaccurate or unreliable. Put another way, the reasonable representee would naturally have assumed that the true state of affairs (that in fact there were good reasons to doubt the valuations) did not exist and that, if they did exist, they would have been drawn to the representee's attention. That revised plea was no more than

the negative counterpart of the positive plea at [64.3] that the valuations in the KS Letter and the S&P Letter "were, and were honestly believed to be, accurate and reliable". It certainly was not the case that the Claimants sought to escalate that implied representation to some form of guarantee.

187 Mr Onslow QC submitted that the revision was linguistically and substantively minor and it corrected an obvious error. The fact that the Defendants, in particular Mr King and Mr Merry, had, in collusion with Mr Layas, in fact applied their minds to and had been involved in drafting the wording of the content of and in finalising the KS Letter had not been known to the LIA or MHICL at the time and no one had suggested to the contrary. However, Mr King and Mr Merry had in fact been co-authors of important passages in the KS Letter and they had caused KS to make what, to their knowledge, were false and misleading representations as to the value of the hotel site and the JV as an enterprise.

188 As to the second of the contentious proposed revisions, those to the allegations of breach of fiduciary and dishonest assistance at [71], [72] and [73], the conspiracy claim at [74], and the causation plea at [75] of RRAPOC, the Claimants had changed their focus from KS to those behind and orchestrating the deceit practised on them through KS unwittingly. Mr Onslow QC submitted that the Defendants, in particular Mr King and Mr Merry, had been the Claimants' or the LIA's agents when engaging, instructing and dealing with KS. This had been expressly pleaded in the 13.11.18 application proposed RRAPOC at [50.3] and [71]. What the proposed revision addressed was the scope of the agent's duties in the context of what they did, i.e. the performance of their duties as agents, not the existence of the agent/principal relationship.

189 Mr Onslow QC submitted that the Claimants did not resile from the contention that the Defendants, in relation to their involvement in the KS Letter, owed the full fiduciary duty of loyalty to the LIA, including the duty to act in the best interests of the LIA when instructing KS. However, upon further consideration the Claimants' had concluded that they did not need to go that far and that all that they needed to establish was a breach of the agent's duty of honesty. This revision took into account that the Defendants were counterparties when negotiating with the Claimants the agreement to form a JV, and the Defendants' challenge to the proposition that they, or Mr King and Mr Merry, owed a duty to act in the best interests of the Claimants as principals. It was not necessary to contest that point in order to make good the Claimants' claim.

190 Mr Onslow QC submitted that the Claimants' proposed revision effectively reduced the scope of the agency claim to its necessary ingredients and further that the element of honesty was an aspect or element embraced within the fiduciary duty of loyalty. Further, the Claimants continued to rely on the same breaches of duty as pleaded at [72] of the 13.11.18 application proposed RRAPOC as particulars of the breach of the duty as agents, albeit re-characterised as one of honesty rather than the full duty of loyalty or the full range of duties of a fiduciary. The Claimants' proposed revisions to the claim pleaded at [73] of dishonest assistance of Mr Layas in breach of his fiduciary duties and of such of the Defendants as were primarily liable for breach of an agent's duty of honesty, at [74] of conspiracy being a breach of the duty as agents rather than a breach of fiduciary duty, and at [75] of causation being the result of breach of duties as agents rather than breach of fiduciary duties, were all consequential. The Claimants contended that this revised claim was part and parcel of, or inherent in, the breach of fiduciary claim the subject of the 13.11.18 application and that that claim had gone further than was necessary and had been scaled back to reflect the position of the Defendants more accurately.

191 Mr Onslow QC submitted that there was a substantial body of authority and comment which supported the proposition that agents owed a duty of honesty to their principal. He referred to Nocton v Lord Ashburton [1914] AC 932 and the speech of Viscount Haldane LC at pp.954-955 :

"Derry v Peek simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever the character of that intervention".

Mr Onslow QC drew attention to Bowstead & Reynolds at 6-037, cited above[21], and the discussion on whether all agents were always fiduciaries, including the observation that the extent of an agent's duties varied from situation to situation.

192 Mr Onslow QC also referred to a passage in MacDonald Eggers at 3.22 which commented on the importance of context when assessing whether a lie will sound in liability for deceit.

[21] [135] above

193 As to the logically prior question of whether the Defendants, Mr King and/or Mr Merry were the Claimants', or the LIA's, agents, Mr Onslow QC submitted that the characterisation of the Defendants, or at least Mr King and Mr Merry, as agents for the LIA was not newly introduced by the 28.5.19 application; it had been the platform for the claim as set out in the Re-Amended Claim Form and the 13.11.18 application proposed RRAPOC. Mr Onslow QC drew attention to the absence of any attack on the allegation of agency in the Defendants' skeleton argument for the hearing on 21.5.19 and 22.5.19.

194 As a matter of principle, a counterparty to a negotiation might also be or become the agent of the principal, at least for some purposes. Mr Onslow QC referred to Bowstead & Reynolds at [6-037][22] for an example and where the existence of a duty of honesty was also emphasised.

195 Mr Onslow QC submitted that the position and conduct of Mr Layas when enlisting Mr King and Mr Merry to find a replacement valuer at short notice gave rise to intricate issues of fact and law in the complex areas of conferral and/or chain of authority cases. At this stage, it sufficed that it was realistically arguable that Mr King and Mr Merry had acted as agents with the chain of authority of the Claimants running via Mr Layas; that arguably sufficed to fix Mr King and Mr Merry with the duties of agents, certainly honesty, and likely also the full range of fiduciary duties, when instructing KS for, or as if for, the LIA.

196 Put another way, by assuming to act for the LIA in the LIA's affairs the Defendants, in particular Mr King and Mr Merry, had imposed upon them or had brought upon themselves the duties of agents, the most basic of which was honesty.

197 Mr Onslow QC submitted that the criteria for the relationship of agency identified in the opening sentence of Bowstead & Reynolds was, or at least arguably was, met :

"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation".

[22] [135] above

Mr Onslow QC submitted that any dishonesty was not a feature of the authority to appoint and act as agent, rather it was a feature of abusive performance of the duties of an agent.

198 In relation to the appointment by Mr Layas of Mr King and Mr Merry in connection with the instruction of a valuer, Mr Onslow QC submitted that there was a critical distinction to be made between Mr Layas' authority to appoint an agent and then acting dishonestly in the performance of agency duties. It was not a question of whether Mr Layas could shed and readopt the mantle of acting for the Claimants or the LIA, there was a fundamental distinction between the creation and existence of authority on the one hand and its abuse by dishonest performance on the other.

199 Mr Onslow QC submitted that the case set out by the Claimants under both versions of the proposed RRAPOC was entirely consistent with the circumstances in which equity recognised and imposed consequences on special relationships. Mr Onslow QC referred to the speech of Lord Browne-Wilkinson in White v Jones [1995] 2 AC 207 at pp.271E-272A :

" … The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, pro tanto, for B's affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, including normally a duty of care. … By so assuming to act in B's affairs, A comes under fiduciary duties to B. Although the extent of those fiduciary duties (including a duty of care) will vary from case to case some duties (including a duty of care) arise in each case. … Although such factors [mutual dealing between A and B or a relationship akin to contract] may be present, equity imposes the obligation because A has assumed to act in B's affairs. …

Moreover, this lack of mutuality in the typical fiduciary relationship indicates that it is not a necessary feature of all such special relationships that B must in fact rely on A's actions. If B is unaware of the fact that A has assumed to act in B's affairs (e.g. in the case of B being an unascertained beneficiary) B cannot possibly have relied upon A. What is important is not that A knows that B is consciously relying on A, but A knows that B's economic well being is dependent on A's careful conduct of B's affairs".

Mr Onslow QC submitted that, as with a duty of care, so too a duty of honesty was a basic duty which arose from the intervention by one person in the affairs of another and White v Jones provided more than sufficient support for rationale of the claim.

200 In written submissions Mr Onslow QC and Ms Holderness briefly addressed CPR r.3.9 and Denton v White. They referred to an observation of Moore-Bick LJ in Ahmed v Ahmed [2016] EWCA Civ 686 at [16], an appeal against permission given at trial to amend particulars of claim in a case concerning the validity of a will to allege forgery consistently with the underlying evidence to which no objection had been taken :

"There was simply an application for permission to amend the particulars of claim, a course which the court has power to take at any stage in the proceedings in accordance with well-established principles. I strongly deprecate attempts to force every application to the court for an indulgence of one kind or another into the straitjacket of relief from sanctions. To do so merely leads to excessive formality and satellite litigation of a kind which interferes with the proper conduct of proceedings and causes parties to incur unnecessary costs".

201 As to the Denton v White three stage test, the Claimants' brief submissions were that (1) any default was neither serious nor significant because in substance the application and the pleadings had all been issued and served in time, the facts alleged and relied upon were unchanged, all that had changed was minor revisions to the possible legal conclusions arising from the pleaded facts; (2) the reason for the proposed changes was straightforward and reasonable; and, (3) consideration of all the circumstances did not lead to a conclusion that relief would be inappropriate, there being no disruption of the future conduct of the litigation or imperilment of hearing dates, no possible prejudice to the Defendants, no adverse impact on the efficiency of the litigation given the minor nature of the amendments, no disproportionate effect on the costs of the litigation, no culpable delay, and no conduct by the Claimants which warranted the sanction of terminating a claim with a real prospect of success.

202 Finally, Mr Onslow QC submitted that if permission to make the revisions was refused, the Claimants would not rely on or oppose the deletion of the reference to the implied representation as to the Defendants' belief at [64.3] RRAPOC, and would maintain the breach of fiduciary duty pleading at [71] to [73] RRAPOC except they would not oppose the striking through at [71.2] of the reference to the requirement to "act in the best interests of the Claimants" but would maintain the pleaded requirement to "give honest instructions to KS".

203 The Defendants' first submission in opposition to the 28.5.19 application was that the application was out of time under the terms of the 23.10.18 order and, there being no application for relief from sanctions, it should be refused without further consideration. Mr Adkin QC submitted that, under paragraph 3.2 of the 23.10.18 order the gate

closed at 4.00pm on 13.11.18 and the stay operating against the striking out of the Amended Claim Form and dismissal of the action against the Defendants was operative only pending determination of "such application", which phrase necessarily and only referred back to the application issued and served by 4.00pm on 13.11.18. There was only one sensible construction that could be given to the explicit language of paragraphs 3.2 and 3.3(i) of the 23.10.18 order. What the Claimants now sought to do was rely on a different RRAPOC, but for that the Claimants needed relief from the sanctions imposed by paragraph 3 of the 23.10.18 order.

204 Mr Adkin QC drew attention to the discussion after judgment had been handed down on 23.10.18, which preceded my ruling, about the terms of the order then to be made and to my observation that :

" … the claimant could have a short period of time to see whether there is some form of reformulation that manages somehow to weave a path through these thickets that might be so wedged together that no path can reasonably be carved … what I am doing is saying that that opportunity should be there".

Mr Adkin QC submitted that what I was doing was affording the Claimants a single opportunity to provide a complete explanation of the case they wish to pursue.

205 Mr Adkin QC submitted that that construction of the 23.10.18 order needed no further explanation but, nevertheless, it was supported by a number of further matters. Points made by Mr Adkin QC and Ms Tandy in their written submissions included : (1) the permission was to be interpreted strictly because it afforded the Claimants a last chance to avoid entirely striking out a claim set out in the statement of case then under consideration which had been found to be hopeless; (2) even at that point in time the Claimants had had several years to formulate a claim, which had been issued just before expiration of the six year limitation period, and after issue there had been ample opportunity and several attempts to decide the final shape of the Claimants' pleaded case; (3) the three week period for pleading was all that the Claimants required; (4) the judge (me) plainly had in mind only one further opportunity to amend, see the judge's observation that "it is pretty terminal but before the last gasp is breathed … they should have an opportunity"[23]; (5) the 23.10.18 order imposed a stay only pending "the determination of such amendment application", "such" was a reference back only to the 13.11.18 application; and, (6) as a matter of common sense it had been neither suggested nor

[23] Emphasis added by Mr Adkin QC and Ms Tandy.

anticipated that the Claimants should have unlimited opportunities to reformulate their case.

206 Mr Adkin QC submitted that any argument that the 23.10.18 order provided no sanction and accordingly no relief from sanctions was required to be sought was misconceived. Mr Adkin QC referred to R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633 and the judgment of Moore-Bick LJ at [36]. The Court of Appeal held that the practice, for some 12 years, of treating applications for extensions of time to appeal as applications for relief from sanctions had become too well established to be overturned. Mr Adkin QC submitted that that case was authority for, or was an example of, the proposition that it had become widely accepted that there was no need for a sanction to be expressly stated in a court order or CPR rule before the principles underpinning CPR r.3.9 took effect.

207 Mr Adkin QC and Ms Tandy addressed CPR r.3.9 and Denton v White in their written submission but, as the Claimants had not applied for relief from sanctions, Mr Adkin QC did not develop these parts of the written submission at the hearing on 19.7.19. The Defendants' position was that there had been ample opportunity to apply for relief from sanctions and, having chosen not to seek such relief, the Claimants had to live with that choice.

208 If I consider that relief from sanctions is required, it remains open to me, of my own motion, to consider whether or not to grant relief. The Defendants' written submissions would then be taken into account. In relation to the first stage, the Defendants submitted that an application issued and served almost six months out of time and in the course of a hearing to decide whether the Claimants may continue a claim against the Defendants was both serious and significant. This was all the more so given the warnings on 23.10.18 that the most that the Claimants were to get was a last chance to be actioned in short order. In relation to the second stage, the Defendants submitted that the reason given – almost any pleading is capable of improvement when submitted to close scrutiny under a microscope – was no reason at all, not least because the scrutiny should be by the Claimants themselves and they had been afforded a period which they, knowing their case and the change in direction their case would have to take, regarded as sufficient. As to the third stage, all the circumstances weighed only in the Defendants' favour : (1) to date there had been no, never mind a prompt, application for relief; (2) the progress of the litigation had been yet further delayed and disrupted by the Claimants; (3) this was not the first occasion of breach

by the Claimants; (4) the Claimants had conducted this litigation inefficiently and disproportionately at every stage, including the CMC in March 2018, which had impacted on the court's resources and those of the Defendants; (5) the continuation of this litigation beyond its "last gasp", which would follow if the litigation was not terminated now, would add to the severe prejudice already suffered by the Defendants, particularly Mr King and Mr Merry whose reputations in their field of business were at stake. By contrast, the prejudice to the Claimants of terminating the litigation would be very slight; and, (6) it was now time to impress upon the Claimants the importance of court orders by enforcing compliance.

209 Turning to the substance of the 28.5.19 application, Mr Adkin QC submitted that the failings of the pleadings annexed to the 13.11.18 application were not solved or assisted by the proposed revised pleadings. There were two relevant proposed revisions. The first was that at RRAPOC [64.3] to alter the third alleged misrepresentation from one that "the Defendants had no reason to believe that those valuations were inaccurate or unreliable" to one that "there was no reason to believe that [they] were or might be inaccurate or unreliable". The second was at RRAPOC [71] to redefine or revise the duty allegedly owed by the Defendants acting as the Claimants' agents from "a fiduciary duty of loyalty" to "a duty of honesty".

210 As to the first proposed revision, that at RRAPOC [64.3], Mr Adkin QC submitted that the candidates for representors would be the Defendants or KS and, in relation to the S&P Letter, S&P. The Defendants had made no representation to the Claimants, other than to Mr Layas who, on their case, knew the full picture. KS had made representations to the Claimants, by the KS Letter, but they were unaware of Savills' view as to valuation and had no reason to believe that the valuations within their letter were or might be inaccurate or unreliable and, in any event, the KS Letter was heavily caveated. S&P had made no representations and were out of the picture months before the material period. Moreover, Savills had informed Mr Layas of their view as to the value of the hotel site. Thus, there was no relevant representor. Viewed objectively, the proposed revision to [64.3] would be tantamount to a guarantee and that was inconsistent with and contradicted by the terms of the KS Letter.

211 As to the second proposed revision, that at RRAPOC [71], Mr Adkin QC submitted that the important context was that the Claimants and the Defendants were counterparties to ongoing negotiations whose subject matter was the very issue they were dealing with. Attaching a label of agency to the arrangement between the parties did not make

them any the less counterparties or give rise to any fiduciary obligations. The real question was identification of the Defendants' obligations, if any, to the Claimants. Neither Mr King nor Mr Merry, nor any of the other Defendants, had done anything more than tell KS what they thought the LIA's position was.

212 In the circumstances, no duty in equity as a fiduciary arose. The Claimants had not alleged a contractual relationship by which the Defendants or Mr King and/or Mr Merry were engaged to deal with KS on the Claimants' behalf. Further, there was no tort of fraud, see the judgment of Buxton LJ in Barnard v Restormel BC [1998] 3 PLR 97 at p.107G. Mr Adkin QC submitted that there was, therefore, no basis, whether founded in equity, contract or tort, upon which to found a plea of a breach of a generalised duty of honesty except, possibly, to the extent that fraudulent misrepresentation was alleged. That was the subject of the 13.11.18 application and completed the circle without reference to an alleged agency duty of honesty.

213 As to the allegation that the Defendants or any of them were agents for the Claimants or any of them, Mr Adkin QC submitted that any agency relationship must have arisen out of some conferral of authority by Mr Layas. That gave rise to a fatal inconsistency. Either Mr Layas' actions were those of the Claimants, in which case Savills' view as to the value of the hotel site was not concealed and there was no case to answer, or they were not, in which case there was no agency at all and therefore no scope for a fiduciary or other duty, including one of honesty. As, in fact, the crux of the Claimants' case was that Mr Layas' instructions to the Defendants were fraudulent, it followed from this that Mr Layas had neither actual nor ostensible authority to act in such a manner.

214 In my judgment the Claimants were not required to apply for relief from sanctions. The conditions to be satisfied to avoid the striking out of the Amended Claim Form and the dismissal of the Claimants' action against the Defendants were those set out at paragraph 3.2 of the 23.10.18 order. The Claimants met both conditions within the set time limit. Paragraph 3.3 addressed the consequences of the unless conditions being met, it did not add a further condition or qualify those conditions. This is consistent with the ruling that the particulars of claim to be advanced by the Claimants as in the proposed RRAPOC had only to be "in some new form against some or all of the Defendants".

215 The discussion in court on 23.10.18 did not, and a fair reading of the transcript does not, justify a conclusion that the judge (me) expressly confined the Claimants to pursuing only the form of particulars of claim settled upon by 13.11.18. References to "last gasp" and the like were figurative. Objectively and reasonably understood, one or more references to "an opportunity" had not ruled out the possibility of further amendment. On the other hand such references had ruled out the possibility of withdrawal of one pleading and replacement by a completely or substantially different one. Moreover, the critical words are those of the ruling not those of any discussion before the ruling.

216 The reference to "such amendment application" at paragraph 3.3(i) may be taken to refer back to an amendment application complying with paragraph 3.2(i), but that reference is not prescriptive as to the precise form of the application to be determined. That would be too narrow and too restrictive a construction and it would impose a condition not expressed or plainly inherent in the constraints imposed on the Claimants by the 23.10.18 order whether by reference to paragraph 3 or read as a whole.

217 There are circumstances in which that would or might work injustice. Taking a narrow or restrictive view as contended for by Mr Adkin QC would or might preclude consideration of a proposed RRAPOC containing the two revisions which the Defendants had not opposed. Indeed, Mr Adkin QC did not contend that the word "such" had precluded the possibility of the court permitting any and all variations. So there must have been some margin for permitted revision, even on the Defendants' case. That said, it was not open to the Claimants to place an entirely different proposed Re-Amended Claim Form or RRAPOC before the court at or before the hearing of the amendment application. Departure from the amendment application made in compliance with paragraph 3.2 required explanation or justification and the extent to which deviation would be permitted depended upon the explanation or justification given. At one extreme, the discovery of a suppressed document or suppressed evidence might justify a material revision. That is not this case.

218 As noted above, Mr Adkin QC referred to six points supporting a conclusion that the only RRAPOC for which permission might be granted was that annexed to the 13.11.18 application. I agree that a strict approach is required, but, as Mr Onslow QC submitted with supporting authority, this would not entitle the court to take a course which is not clearly expressed in the order. I also recognise that the Claimants have had years to formulate their claim; in part the situation in Libya may have accounted

for delay, at least up to the point at which receivers were appointed; in addition, the claim got off on a wrong footing; the passage of time is relevant for a number of reasons but it does not impact upon the meaning of the 23.10.18 order. Three weeks was all the time that the Claimants had required to formulate a claim focussed on the Defendants; such a claim was formulated but there is nothing in the Claimants' representations and submissions on 23.10.18 which constituted a foregoing or waiving of any opportunity to seek to revise or further amend. As to what the judge had in mind on 23.10.18, and doing my best to put aside the subjective influence of what I now think I then had in mind, a fair reading of the ruling and the entire transcript of 23.10.18 would not lead to the conclusion that the court confined the Claimants' further pursuit of this litigation to only whatever particulars of claim, if any, were issued and served by 13.11.18. I do agree, and have made clear above, that it was neither suggested nor anticipated that the Claimants would or might have unlimited opportunity to reformulate their case. In my judgment, the extent of the opportunity afforded to the Claimants lies somewhere between a single opportunity and unlimited opportunities and is much closer to the former than the latter. However, it is neither realistic nor sensible to be prescriptive and fix a precise limit irrespective of the circumstances.

219 As a final point, unlike Mr Adkin QC, I did not understand the Claimants' case to be that the 23.10.18 order did not provide sanctions. Paragraph 3.2 did just that, as Mr Onslow QC recognised. I understand the Claimants' submission to have been that they have complied with paragraph 3.2 and, therefore, no relief from sanctions was required. In my view, that is correct. As to R(Hysaj) v SSHD, I agree with Mr Onslow QC that that the circumstances in that case and the point under consideration by the Court of Appeal were quite different from this case. It follows that consideration of the factors in Denton v White is unnecessary.

220 Had it been the case that I had concluded that relief from sanctions was required, I would have gone on to consider whether relief should be granted of my own motion, in part because both sides had addressed relief in their submissions, at least in writing. As to the first stage, I would have agreed with Mr Adkin QC that the time interval between the deadline set by the 23.10.18 order and the date when revisions were proposed, 28.5.19, was significant. However, I would not have viewed the breach as serious if I regarded the amendments as minor (as to which see below). As to good reason, I would have accepted that the proposed revisions were the product of close further examination of the RRAPOC and noted that the Claimants' position was that refusal of the 28.5.19 application would not be fatal to their case. As to all the

circumstances, including efficient conduct of litigation at proportionate cost and enforcing compliance with orders, I would not have considered that the conduct of this litigation had been inefficient and disproportionate at every stage. The long history of the litigation has been explained in part by the political situation in Libya and also to an extent by the wrong direction initially taken; it has also been partly explained by the fact that the Claimants have had to build up a chronology based on or following document retrieval and disclosure rather than first hand witness accounts from their own officers or employees. A factor carrying weight in the Defendants' favour would have been that the litigation casts, or may cast, a shadow over business reputations and Mr King is not a young man. However, the Defendants' own conduct, evidenced by the available contemporaneous material, would have been a counter point calling for an explanation, as to which the Claimants had made the point that Mr King had yet to say anything. Importantly, the revisions now proposed are, in the context of the 13.11.18 application proposed RRAPOC and my decision on the arguability of the claim as there formulated, properly characterised as minor. Finally, it would not have been irrelevant that the Claimants are to pay the entirety of the Defendants' costs up to 23.10.18 on the indemnity basis; such costs necessarily included the costs of investigating and preparing a defence which - to the extent that it features in or underpins any defence to the proposed RRAPOC for which permission is given - may yet turn out to be flawed. This paragraph is, of course, obiter to my decision.

221 The allegation at RRAPOC [64.3] of the 13.11.18 application proposed RRAPOC that the Defendants represented, or more accurately caused to be represented, in the KS Letter that " … the Defendants had no reason to believe that those valuations were inaccurate or unreliable" was plainly at odds with the underlying premises of the claim which included that, at the time in 2010, the Claimants had no idea that the Defendants had any involvement at all in instructing KS or in the content of the KS Letter. The Claimants were clearly correct to seek to abandon that plea at [64.3] irrespective of whether or not their proposed revision is permitted.

222 The clause which the Claimants wish to insert in substitution is a step in the Claimants' case that, having become involved in the instruction of KS, the preparation of the KS Letter and its content, and by withholding and concealing Savills' view as to the value of the hotel site from KS, the Defendants caused KS, albeit unwittingly on KS's part, to endorse or put forward a value of the JV enterprise which was materially overstated and thereby misleading. Further, in relation to the S&P Letter, it is presently unclear, there having been no disclosure, whether the Defendants were involved in the

provision of the S&P Letter to the Claimants after 17.6.10 but in time for the 27.6.10 board meeting; on the material presently available that appeared unlikely, but this is not the time to make final findings of fact. If the Defendants were so involved, and they concealed Savills' view as to valuation, they may be said to have been behind and to have caused a false representation to be made that "there was no reason to believe that [the] valuations [in the KS Letter and the S&P Letter] were or might be inaccurate", and be liable for any loss thereby caused.

223 It is not in dispute now that KS and S&P were innocent or that, so far as they were concerned, what they said in their respective Letters was said honestly and, subject to caveats expressed, believed to be accurate and reliable. The proposed revision to [64.3] is the opposite side of the coin. It emphasises that, although causing representations to be made as to value by KS and possibly by the provision again of the S&P Letter, the Defendants had not passed on their knowledge of Savills' view as to the then present value of the hotel site and business which became the JV. This is not a straightforward case of representation by A to B. In this case, A (the Defendants or Mr King and Mr Merry) made no direct representation, was a contractual counterparty, and was not known or suspected by B (the LIA) to have any role in the formulation of the representations made to B by an independent third party with relevant expertise, C (KS with Mr Layas passing on the KS Letter to the LIA), about the subject matter of the contract which A and B were negotiating as counterparties. From the alleged facts the Claimants have developed inferences and conclusions which they contended in the proposed RRAPOC were steps along a route leading to the conclusion that the Defendants deceived or caused the deception of the Claimants and conspired against the interests of the Claimants. The proposed amendment to [64.3] does not carry with it an allegation that some form of guarantee was given to the Claimants.

224 I accept the Claimants' submissions that this proposed amendment is minor and should be allowed.

225 The revised allegation at RRAPOC [71] that " … the Defendants acted as [the Claimants'] agents and owed a duty of honesty towards the Claimants", and the development of that allegation over the following paragraphs, has, on the authorities referred to by Mr Onslow QC, at least an arguable foundation as a matter of principle and is supported by the pleaded facts. Acting honestly as agents for the Claimants was a feature of the RRAPOC the subject of the 13.11.18 application; at [50.3] Mr King, Mr Merry and/or

the other Defendants were described as "act[ing] as agents for the Claimants" when instructing KS; and, at [71.2] the duties owed to the Claimants were alleged to include "giving honest instructions to KS". I agree with Mr Onslow QC that this proposed revision is, correctly analysed, a narrowing of the case as to the duties allegedly owed by the Defendants, or Mr King and Mr Merry, to the Claimants, or the LIA, from the full range of fiduciary duties of loyalty to only one duty, honesty.

226 In my judgment, the Claimants have a real prospect of establishing both that the Defendants assumed responsibility for the Claimants' affairs and that they thereby came to owe duties to the Claimants which, at least, included a duty of honesty in such dealing. Having regard to the authorities and commentary cited by Mr Onslow QC, it is at least realistically arguable that the Defendants cannot rely on the fact that they were counterparties to excuse or extricate themselves from any and all consequences of their intermeddling in the Claimants' affairs. The precise extent to which the Defendants assumed responsibility for the Claimants' affairs and any consequences which flowed are matters for trial. The point for the present is that there is a substantial body of contemporaneous documentation which supports that proposition.

227 As to the conferral of authority, Mr Onslow QC's submission that a distinction may be drawn between authority to appoint an agent and the performance of the agency after appointment has a foundation in law and is a realistic possible conclusion to be drawn from the available material in the context of the circumstances of this case as presently apparent. The Defendants have not yet given disclosure and that may change the assessment to be made, but that is for later.

228 I agree with Mr Adkin QC that labelling the Defendants, whether as agents or fiduciaries or contracting parties or otherwise, is not the point; what matters is whether the Defendants were under any obligation to the Claimants and, if so, what obligation(s) arose. That depended on the circumstances including, in particular, the actual relationship between the Claimants and the Defendants or some of each of them. It may be that, if the Defendants had had no involvement with Mr Layas about a valuer for the Claimants and/or not played a hand in the instruction of KS and the formulation of the KS Letter, the fact that they had, or might have, somehow become aware of a valuation of the hotel site which cast material doubt on the S&P Letter and the KS Letter would have been a matter for themselves in their negotiation with the LIA; but that is not what happened. It also does not appear to be the case, and on this I do not agree with Mr Adkin QC's submissions, that the Defendants did nothing more

than tell KS what they thought the LIA's position was; at this stage, the contemporaneous documentation is open to a very different interpretation.

229 Obligations depend upon circumstances, including relationships between parties, and it is realistically arguable that in the circumstances of this case a relationship of principal and agent existed between the Claimants and the Defendants, and, further, that as part of that relationship the Defendants owed the Claimants a duty or obligation of honesty. As I understand it, Mr Adkin QC's challenge was made to the proposed revision at proposed RRAPOC [71.2] on the basis that the other proposed revisions to the agency plea stand or fall with that objection. On that basis, the other proposed revisions are permitted.

Outcome

230 For the reasons given in this judgment, the Claimants have permission to Re-Amend the Amended Claim Form and to serve Re-Re-Amended Particulars of Claim in the form attached to the 28.5.19 application.