Neutral Citation Number: [2022] EWHC 2960 (Ch)

Claim Number: BL-2022-000913

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Re: HARRINGTON & CHARLES TRADING COMPANY LIMITED (IN LIQUIDATION)
Re: BRAMHALL & LONSDALE LIMITED (IN LIQUIDATION)
Re: HOLDWAVE TRADING LIMITED (IN LIQUIDATION)
Re: OC305234 LLP (IN LIQUIDATION)
Re: OCEANROAD GLOBAL SERVICES LIMITED (IN LIQUIDATION)
Re: CONNECOR (UK) LIMITED (IN LIQUIDATION)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

22nd November 2022

Before :

MR JUSTICE EDWIN JOHNSON

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Between :

(1) HARRINGTON & CHARLES TRADING COMPANY LIMITED (in liquidation) **(2) BRAMHALL & LONSDALE LIMITED (in liquidation)** **(3) HOLDWAVE TRADING LIMITED (in liquidation)** **(4) OC305234 LLP (in liquidation)** **(5) OCEANROAD GLOBAL SERVICES LIMITED (in liquidation)** **(6) CONNECOR (UK) LIMITED (in liquidation)** **(7) COLIN DISS** **(As Liquidator of the First to Sixth Claimants)** **(8) NICHOLAS STEWART WOOD** **(As Liquidator of the First to Sixth Claimants)**	**Claimants**
and	
(1) JATIN RAJNIKANT MEHTA **(2) SONIA MEHTA**	**Defendants**

(3) VISHAL JATIN MEHTA
(4) SURAJ JATIN MEHTA
(5) HAYTHAM SALMAN ALI ABU OBIDAH

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Ewan McQuater KC, Ian Wilson KC, Philip Hinks, James McWilliams, and William Day (instructed by Hogan Lovells International LLP) for the Claimants
Andrew Hunter KC and Luka Krsljanin (instructed by Jones Day) for the First, Second, and Fourth Defendants
Justin Higgo KC, William Willson, and Paul Adams (instructed by Howard Kennedy LLP) for the Third Defendant

Hearing dates: 6th, 7th, and 10th October 2022
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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.00am on Tuesday 22nd November 2022 by circulation to the parties and their representatives by email and by release to The National Archives.

Mr Justice Edwin Johnson:

The structure of this judgment

1. This judgment is, necessarily, a lengthy judgment. For ease of reference, I provide the following guide to the different sections of the judgment.

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Introduction

2. This is the hearing of rival applications seeking, respectively, either to continue or to discharge a worldwide freezing order.

3. I made the worldwide freezing order in question at a hearing (**"the First Hearing"**) on 27th May 2022, together with certain ancillary orders. These orders were made on the application of the Claimants against the First to Fourth Defendants in this action. The application was made on a without notice basis and was heard in private. I will use the expression **"the WFO"** to mean the worldwide freezing order which I made at that hearing. I will use the expression **"the May 2022 Order"** to refer to the entirety of the orders which I made at that hearing. By the May 2022 Order, the WFO was expressed to continue until the return date, which was specified as 10th June 2022.

4. The grounds upon which I decided to grant the WFO and certain associated relief, as contained in the May 2022 Order, were set out in an unreserved judgment which I delivered at the conclusion of the First Hearing. A transcript of the First Hearing and a transcript, which I have approved, of my judgment delivered at the First Hearing (**"the First Judgment"**) were both available for this hearing.

5. The WFO was continued, by the consent of the parties, by an order of Tribunal Judge Nicholas Aleksander (sitting as a High Court Judge) made on 10th June 2022. By this order the WFO was continued until the restored return date. This hearing constitutes the restored return date. As it was necessary for me to reserve my judgment on this hearing, the parties sensibly agreed the terms of an order, which I approved and made, for the WFO to continue until the handing down of this judgment and the resolution of matters consequential upon the judgment.

6. The essential dispute on this hearing can shortly be summarised. The Claimants say that the WFO should now be continued until trial. The First to Fourth

Defendants say that the WFO, as it currently exists, should be discharged, on the basis that there was serious, substantial, and material non-disclosure and unfair presentation at the First Hearing. The First to Fourth Defendants further say that there should be no continuation of the WFO, whether or not it is discharged in its existing form.

7. The hearing occupied three days, which turned out (putting it neutrally) to be a challenging time estimate. I will return to this topic, but some idea of the scale of this dispute can be gathered from the representation, by counsel, of the parties. The Claimants were represented by Ewan McQuater KC, Ian Wilson KC, Philip Hinks, James McWilliams, and William Day. The First, Second, and Fourth Defendants were represented by Andrew Hunter KC and Luka Krsljanin. The Third Defendant was represented by Justin Higgo KC, William Willson, and Paul Adams. I am grateful to all counsel for their helpful written and oral submissions, and for their co-operation in formulating and keeping to a hearing timetable which allowed the oral arguments to be concluded in the time available.

The parties

8. This is a case of alleged fraud. The Claimants' case is that each of the First to Fourth Defendants were complicit in a US $1 billion fraud whereby the proceeds of bullion advanced to two companies were misappropriated, laundered and concealed through multiple layers of corporate entities, with the vast majority of the proceeds said to have ended up in entities owned and/or controlled by the First to Fourth Defendants.

9. The First to Sixth Claimants are said to have been used as vehicles in the alleged fraud, as one layer of the corporate entities through which the proceeds of the alleged fraud are said to have passed. It is convenient to refer to the First to Sixth Claimants, collectively, as **"the Claimant Companies"**, subject to the point that the Fourth Claimant is an LLP. All of the Claimant Companies are registered in this jurisdiction. The Claimant Companies were formerly within something described as the Transactional Services Unit of a group of companies known as the Amicorp Group, which provided company administration and other services (**"the Amicorp Group"**).

10. The Third and Fifth Claimants were placed into members voluntary liquidation (**"MVL"**) on 26th October 2020. Each MVL was converted into a creditors' voluntary liquidation in February 2021, with the Seventh and Eighth Claimants taking up appointment as joint liquidators. This followed the entry of default judgment against the Third and Fifth Claimants by an order of Butcher J dated 16th January 2021. The default judgment was entered in favour of the claimants in an action in the Commercial Court (Claim No. CL-2020-000503), who were described as Standard Chartered Bank and Standard Chartered Bank India, in respect of claims arising out of the alleged involvement of the Third and Fifth Claimants in the alleged fraud.

11. It is relevant to note at this point that, as a matter of the law of England and Wales, Standard Chartered Bank and Standard Chartered Bank India are the same legal personality. I understand however that Standard Chartered Bank India is registered as a foreign company under the Indian Companies Act 2013, with the consequence that Standard Chartered Bank India has or may have some kind of

separate legal personality for the purposes of Indian law. I will use the expression **"SCB"** to refer to Standard Chartered Bank, and **"SCB India"** to refer to Standard Chartered Bank India. In doing so, it should be kept in mind that, for the purposes of the law of England and Wales, SCB and SCB India are the same legal personality.

12. The four remaining Claimant Companies were all dissolved, following MVLs, in 2019 or 2020. These four Claimant Companies were all restored to the register by orders of His Honour Judge Hodge KC made on 1st June 2021. The four remaining Claimant Companies were restored to MVLs, which were subsequently converted to creditors' voluntary liquidations on 11th August 2021. The application for restoration was made by SCB and SCB India. Judge Hodge delivered a fully reasoned judgment on the application for restoration, which is reported as *SCB v Registrar of Companies* [2021] EWHC 1566 (Ch). The Seventh and Eighth Claimants are also now liquidators of these four Claimant Companies. It is therefore convenient to refer to the Seventh and Eighth Claimants as **"the Liquidators"**.

13. The Claimant Companies are said to have comprised the bulk of the second layer (**"Layer 2"**) companies through which the proceeds of the alleged fraud were passed. The only other Layer 2 company was Carte & Hurt Tools Ltd (**"Carte"**), an Irish registered company which was also dissolved but cannot now be restored to the register because time has expired for doing so under Irish law.

14. The First to Fourth Defendants are all members of the Mehta family. The First and Second Defendants are husband and wife. The Third and Fourth Defendants are their sons. The Fifth Defendant, Mr Obidah, is said to be a close business associate of the First Defendant. Each of the five Defendants is alleged to have been involved in the orchestration of the alleged fraud. It is convenient to refer to the First to Fourth Defendants, collectively, as **"the Respondents"**, in order to differentiate them from the Fifth Defendant, Mr Obidah. It is also convenient to refer to the First, Second, and Fourth Defendants, collectively, as **"the Three Defendants"**. The Fifth Defendant, Mr Obidah, has not so far been located by the Claimants, and is not therefore before the court; he has been served with proceedings, on 11th August 2022, but has not participated in the present applications.

<u>The alleged fraud</u>

15. The factual background to the claims in this action is set out in considerable detail in the voluminous evidence filed for the First Hearing and for this hearing. There are substantial conflicts of fact which have emerged between the parties. In addition to this, the investigations of the Liquidators into the alleged fraud are not yet complete. The following summary of the factual background is however sufficient to set the scene for the matters which I have to consider in this judgment.

16. In or around 2008 a company known as Winsome, initially called Su-raj Diamonds & Jewellery Ltd and later called Winsome Diamonds and Jewellery Ltd (**"Winsome"**), entered into an arrangement described as a Precious Metals Facility (or Facilities) with a bank or banks, pursuant to which the bank or banks

provided bullion, which I understand to have been gold (or principally gold), to Winsome, by way of loan/credit facility. I understand that drawdown notes were issued, as and when Winsome drew down bullion under the facility. Payments then fell to be made pursuant to the terms of these drawdown notes. A similar facility or facilities arrangement was entered into between a bank or banks and another company, in the same group as Winsome, known as Forever Precious (**"Forever Precious"**). I believe that the terms of drawdown were that payment fell due after 270 days for each drawdown. It may therefore be more accurate to refer to these facilities as commodities sales on 270 days credit.

17. I understand that there were eight banks in total which provided these Precious Metal Facilities (**"PMFs"**), as they were called. One of these banks was SCB. I will refer to the banks who provided the PMFs as **"the Bullion Banks"**.

18. In 2009 a consortium of banks, led by SCB India, entered into a joint working capital consortium agreement with Winsome, pursuant to which the members of the consortium issued standby letters of credit (**"SBLCs"**) for Winsome, as security for the advances of bullion drawn down by Winsome pursuant to the PMFs. I understand that there was an equivalent arrangement between a consortium of banks led by the Punjab National Bank and Forever Precious. I will refer to what I understand to have been the two consortia of banks as **"the Consortium Banks"**. It is important, for reasons to which I shall come, to maintain a distinction between the Bullion Banks and the Consortium Banks notwithstanding that, in the case of SCB at least, SCB was a Bullion Bank and a Consortium Bank (at least by reference to its legal personality under English law). The First Defendant acted as guarantor of the obligations of Winsome and (I assume) Forever Precious to the Consortium Banks.

19. In 2013 there was a default by Winsome on its repayment obligations pursuant to the PMFs. I understand that there was a similar default by Forever Previous. By this time over $1 billion worth of precious metals had been drawn down by Winsome and Forever Precious pursuant to the PMFs. These defaults resulted in calls on the SBLCs given by the Consortium Banks to the Bullion Banks. The Bullion Banks were then paid, by the Consortium Banks, pursuant to the SBLCs, what they were owed under the PMFs by Winsome and Forever Precious. This left the Consortium Banks out of pocket. The Consortium Banks then sought to recover their losses from Winsome, and (as I understand matters) from Forever Precious, and from the First Defendant by civil proceedings in India. The proceedings, which I understand to have been based on the working capital consortium agreements between the relevant Consortium Banks and, respectively, Winsome and Forever Precious, were pursued to judgment. The Consortium Banks also pursued enforcement proceedings, in the form of insolvency proceedings against Winsome and Forever Precious, and garnishee proceedings against companies based in the United Arab Emirates **("UAE")** in respect of debts said to be owed by the UAE companies to Winsome and Forever Previous. These various proceedings met with only limited success. Both Winsome and Forever Previous were placed into liquidation in India on 1st September 2020. The defaults were very substantial. Repayment of approximately $700 million was sought in respect of Winsome's default, and $388 million in respect of Forever Precious' default (in this judgment all

references to dollars are to US dollars). In terms of recovery in the civil proceedings in India, there is evidence that there has been some recovery from Winsome but, as I shall explain later in this judgment, the actual figure for this recovery is unclear, beyond the point that it is no more than a small fraction of the amount of the defaults. It would also appear to be the case that the Consortium Banks have now exhausted their options, in terms of the proceedings in India against Winsome and Forever Precious arising out of the defaults, and in terms of recovery of their losses from Winsome and Forever Precious.

20. At the time of these defaults (**"the Defaults"**) the First Defendant explained to the Consortium Banks that Winsome and Forever Precious had exported substantial amounts of gold and jewellery to certain distributor companies in the UAE under the control of the Fifth Defendant (Mr Obidah), upon terms requiring payment within 180 days. These UAE distributor companies (there were thirteen companies identified as part of this explanation) then sold the gold and jewellery to their customers, but then suffered substantial losses themselves in respect of FX and commodities transactions into which they had entered. This left them unable to meet their liabilities to Winsome and Forever Precious, which in turn resulted in the Defaults. The same explanation was given by the Fifth Defendant (Mr Obidah), on behalf of the UAE companies. The Three Defendants say that the First Defendant gave the explanation which he did simply because he was repeating what he had been told by the Fifth Defendant.

21. The Claimants say that these explanations were fraudulent. The Claimants say that the Defaults were engineered by the Respondents. What in fact happened, so the Claimants say, was that the bullion advanced by the Bullion Banks was sold, and the proceeds of sale were then passed (the Claimants say laundered) through a web of corporate entities comprising layers (**"Layers"**) of different companies, of which the Claimant Companies, with Carte, comprised Layer 2. Ultimately, so the Claimants say, the proceeds of the fraud ended up in corporate entities owned and/or controlled by the Respondents, for the benefit of the Respondents. Although the movement of the funds took place through the various Layers of companies pursuant to what were described as derivatives transactions, the Claimants say that these transactions were shams. There is a very useful funds flow chart which shows the movement of the relevant funds through the five corporate Layers. This chart (**"the Chart"**) is at Appendix 1 to the first affidavit of Colin Diss (the Seventh Claimant and one of the Liquidators) which was sworn on 26th May 2022 in support of the without notice application for the WFO. The UAE distributor companies are identified as the Layer 1 companies, although the Chart shows only four of these companies as passing funds to the Layer 2 companies.

22. I will use the general expression **"the Alleged Fraud"** to refer to the alleged fraud outlined above. I stress that this is a general expression, which is not intended to be specific in referring to the mechanics of the Alleged Fraud. I keep firmly in mind that a material part of the case made by the Respondents on this hearing is the argument that the Claimants are still unable to identify how they say the Alleged Fraud occurred. In this context the Respondents also point to what they say are different versions of the Alleged Fraud which have been put forward by the Claimants.

The Indian criminal investigations

23. In addition to the civil proceedings in India, referred to above, there have been criminal investigations and proceedings in India, arising out of the Defaults. The investigations were initially opened in 2014 by the Indian Central Bureau of Investigation (**"the CBI"**), and certain investigations were subsequently pursued by the Indian Enforcement Directorate (**"the IED"**).

24. A table itemising what is currently known of the complex history of the Indian criminal proceedings (and the civil proceedings) is annexed to the skeleton argument of the Three Defendants filed for this hearing. It is not necessary to go into the detail of the Indian criminal proceedings at this stage. For present purposes I note, in particular, two matters which played a substantial part in the arguments in this hearing.
    (1) The IED applied to the Indian court (City Civil Court and Additional Sessions Judge, Mumbai), pursuant to the Fugitive Economic Offenders Act 2018, for a declaration that the First Defendant was a fugitive economic offender (**"FEO"**) and for an order confiscating properties which the IED had previously attached. The date of this application is given in the Three Defendants' table as 19th July 2019. I understand that the outcome of this application is unknown. There is no evidence of any judgment or order made on the application.
    (2) In a lengthy report produced in March 2021 (**"the CBI Closure Report"**) the CBI recommended closure of the criminal investigations. The Claimants' evidence is that they did not have the CBI Closure Report at the date of the First Hearing, and were unaware of its existence. The Respondents say that the Claimants could and should have obtained a copy of the CBI Closure Report, prior to the First Hearing, and that the report could and should have been drawn to my attention at the First Hearing.

The UAE Proceedings

25. Between April and August 2014 Winsome and Forever Precious filed a total of 26 civil suits in the UAE against the thirteen UAE distributor companies which were said by the First and Fifth Defendants to have been the cause of the Defaults by failing to pay for gold and jewellery exported to them by Winsome and Forever Precious. These thirteen companies are identified by the Claimants as the Layer 1 companies. Each of Winsome and Forever Precious filed an individual suit against each of the UAE companies. The cases were considered by the Sharjah Federal Court of First Instance, which I understand to have comprised three judges. According to the evidence which I have seen, accounting experts were instructed in the proceedings to review the accounts and records of the UAE companies. Those experts reported that the UAE companies had received processed gold from Winsome and Forever Precious, had not paid for the gold, but had sold the processed gold. Decisions in favour of Winsome and Forever Precious were issued by the Sharjah court. The UAE companies appealed against these decisions, but the appeals were dismissed.

26. The Respondents place considerable reliance upon these proceedings (**"the UAE Proceedings"**), both in support of their applications to discharge the WFO, and also as evidence which contradicts the Claimants' case in relation to the Alleged

Fraud. The Claimants say that the UAE Proceedings were collusive, and were an attempt to cover up the existence of the Alleged Fraud. The Respondents say that this is not tenable, when the claims in the UAE Proceedings were subject to judicial scrutiny, at first instance and on appeal, and were also subject to expert accounting scrutiny. The point stressed to me by Mr Hunter, in oral submissions, was that there are hundreds of documents which evidence and support the validity of the sales of gold and jewellery by Winsome and Forever Precious to the UAE distributor companies, which were scrutinised and reported on by experts in the UAE Proceedings. In oral submissions Mr Hunter took me to one of these reports, prepared in the UAE Proceedings between Winsome and Al Alam Jewellery FZE, as an example of the exercises carried out by the experts.

Various reports

27. As a result of its losses consequential upon the Defaults, SCB commissioned various reports investigating the circumstances of the Defaults. The reports in question comprised an Investigative Due Diligence Report dated 5th August 2013 from Kroll Advisory Solutions (**"the Kroll 2013 Report"**), a second report from Kroll Advisory Solutions dated 10th April 2014 (**"the Kroll 2014 Report"**), and a report from EY (I assume Ernst & Young) dated 13th August 2013 (**"the EY Report"**).

28. The Kroll 2014 Report, which is described as a final report, is substantially different to the Kroll 2013 Report. More specifically, the Kroll 2014 Report is a substantially reduced version of the Kroll 2013 Report. The differences, or reductions are best appreciated by looking at a version of the Kroll 2013 Report which is exhibited to the fourth witness statement of Mr Daniel Travers, a partner in Jones Day, the solicitors acting for the Three Defendants. This version shows, by tracked changes, the substantial number of excisions made to the Kroll 2013 Report in the Kroll 2014 Report, including the excision of the bulk of the findings in the Kroll 2013 Report which can be said to have been adverse to the Respondents.

29. In this context I should also mention due diligence reports which were prepared by Dun and Bradstreet in relation to the UAE companies which, as I have explained above, were said by the First Defendant and the Fifth Defendant to have been the cause of the Defaults (**"the DB Reports"**).

The claims made by the Claimants in this action

30. At the First Hearing the claims intended to be made by the Claimants against the Respondents in the intended action were summarised in a draft claim form, and explained by the Claimants' counsel in their skeleton argument for the First Hearing. I should mention that counsel who appeared for the Claimants at the First Hearing were the same counsel as appeared for the Claimants on this hearing, subject to, on this hearing, the omission of Mr Hughes and the addition of Mr McQuater KC and Mr Day.

31. The Claimants formally commenced this action (**"the Action"**) by claim form issued on 31st May 2022. By the time of this hearing the Claimants had pleaded out their claims in lengthy Particulars of Claim. In outline, the claims made against the Defendants in this action (**"the Claims"**) are as follows:

(1) A claim for equitable compensation and/or an account of profits on the basis that the Defendants were shadow directors of the Claimant Companies and acted in breach of the fiduciary duties which they are said to have owed to the Claimant Companies by causing or permitting the Claimant Companies to become instruments of the Alleged Fraud.
(2) Proprietary claims for the recovery of the proceeds of the Alleged Fraud held by the Defendants, on the basis that the Defendants hold those proceeds on constructive trust for the benefit of the Claimant Companies.
(3) A claim for an account of profits for the knowing/unconscionable receipt by the Defendants of the proceeds of the Alleged Fraud.
(4) A claim for equitable compensation and/or an account of profits for the dishonest assistance of the Defendants in the breaches of fiduciary duty and breach of trust which occurred by reason of the movement of the proceeds of the Alleged Fraud through the Claimant Companies and the Layer 3 company, which was a company called Docklands Investments Limited (**"Docklands"**).
(5) A claim for damages for unlawful means conspiracy.
(6) Claims for relief under the Insolvency Act 1986 (**"the 1986 Act"**), namely claims under Sections 212, 213 and 423 of the 1986 Act.
(7) Claims for contribution under the Civil Liability (Contribution) Act 1978 (**"the 1978 Act"**).
(8) It is generally convenient to discuss the Claims as the claims of the Claimants. Strictly speaking the claims made under the 1986 Act are applications which fall to be made by the Liquidators, while the remaining claims are the claims of the Claimant Companies.

32. So far as quantum is concerned and so far as the Claims can be quantified, the Claims are made for the sum of $932,466,942.36, which is said to be the proceeds of the Alleged Fraud which passed through the Layers of companies shown on the Chart. I will refer to this sum, said to have been the proceeds of the Alleged Fraud, using the neutral expression **"the Funds"**.

33. An obvious question which arises in relation to the Claims, so far as they are claims for damages/compensation, is how the Claimant Companies can have suffered any actual losses when they were, on the Claimants' case, merely conduits through which the Funds passed as part of the alleged fraud. The answer to this question, on the Claimants' case, is that the transfer of the Funds through the accounts of the Claimant Companies has left the Claimant Companies with liabilities to those who lost out as a result of the Defaults; namely the Consortium Banks (or at least principally the Consortium Banks).

34. The Respondents are disputing jurisdiction in relation to the Action. The Respondents have not therefore, at this stage, filed Defences in the Action. I should however make it clear that the Respondents each deny all the Claims. The point was emphasized to me, for the Respondents, that the Respondents have yet to make their full responses to the Claims.

35. For the sake of completeness I should mention that the claims under Sections 212 and 213 of the 1986 Act have been commenced by separate 1986 Act application notices issued in the Manchester Business and Property Courts in June 2022. I

understand that those applications (**"the Insolvency Applications"**) have been transferred to this court, but that no order has yet been made for the Insolvency Applications to be case managed and heard with the Action. This would make obvious case management sense, assuming that the Action proceeds to trial, but does not matter for present purposes. The claims under the 1986 Act are pleaded in the Particulars of Claim and it is convenient, for the purposes of this judgment, to discuss the claims under the 1986 Act as claims in the Action.

The destinations of the Funds

36. The evidence, as updated for this hearing, discloses a good deal of information as to where the Funds ended up following their passage through the Layers of companies. The evidence, including the updated evidence, discloses the following information as to the destinations of the Funds, so far as such destinations have now been identified. I should mention that in this judgment, as in the evidence and submissions, many of the figures relating to the Funds have been rounded, usually to the nearest million.

37. The following companies received the bulk of the Funds:
    (1) The sum of $650 million was received by a UAE company called Al Noora FZE (**"Al Noora"**), which was subsequently dissolved. There is a substantial dispute between the parties as to whether there is any connection between Al Noora and the Respondents or any of them. The Respondents say that Al Noora was owned by the Fifth Defendant.
    (2) The sum of $163 million was received by a BVI company called Marengo Investment Group Limited (**"Marengo"**), which was subsequently dissolved in 2014. At the time of this receipt the Second and Third Defendants were directors of Marengo. In his second witness statement for this hearing the Third Defendant accepts that Marengo was *"a family owned company"*, and identifies himself and the Second Defendant as having been shareholders in Marengo. The sum of $163 million was received from Docklands which is identified by the Claimants and shown in the Chart as the Layer 3 company through which the Funds passed. There is a document described as an Agreement for Financial Derivative Transactions between Docklands and Marengo which is signed by the Third Defendant, who is described on this document as managing director of Marengo. The document is dated 1st February 2012. In his second witness statement the Third Defendant denies that he had any management functions in relation to Marengo, which he describes as having been *"simply a vehicle for forex and commodity trading"*. Italics have been added to all quotations in this judgment.
    (3) $162 million of the sum received by Marengo was then transferred to Oriental Expressions DMCC (**"Oriental Expressions"**), a company wholly owned by the Second Defendant which was subsequently dissolved in 2017. A sum of $15,335 was paid directly from Marengo into the Second Defendant's personal bank account at Emirates NBD.

38. A number of companies connected to the Respondents received smaller parts of the Funds, as follows:
    (1) The sum of $8.42 million was paid to IIA Technologies Pte Limited, a Singapore registered company which I believe was formerly called Nozomi

Technotron Pte Limited (**"IIA"**). The Second, Third and Fourth Defendants were directors of this company at the time it received this part of the Funds. The Third Defendant is a shareholder in this company, remains a director of the company, and was managing director and chief executive officer of the company from 2009 to 2020.

(2) The sum of $7.42 million was paid to Polishing Technologies Singapore Pte Limited, a Singapore registered company. The Second and Third Defendants had been directors of this company, but prior to the time when it received this part of the Funds.

(3) The sum of $7.33 million was paid to PDC Limited, a Hong Kong registered company. The Fourth Defendant was the sole director of this company at the time of this receipt.

(4) The sum of $5.58 million was paid to Su-Raj Diamond Industries Limited, an Indian registered company. The company was part of the Winsome group of companies. Its shareholders had at one time included the Second and Third Defendants, but prior to the time when it received this part of the Funds.

(5) The sum of $4.5 million was paid to JRD International Limited, a Bahamian registered company. This company (which was later re-named Spring Field Group Limited) was a shareholder of IIA (the Singapore registered company referred to above) at the time of its receipt of this part of the Funds. The Third Defendant is a shareholder in this company.

39. The majority of the Funds received by Al Noora (totalling $546,130,162) were transferred to the UAE distributor companies, which are identified as the Layer 1 companies, as follows:

(1) $139,809,766 was paid to Al Mufied Jewellery FZC.
(2) $197,306,458 was paid to Al Alam Jewellery FZE.
(3) $175,400,188 was paid to Italian Gold FZC.
(4) $23,133,849 was paid to Al Abia Jewellery FZC.
(5) $6,776,711 was paid to Al Minhaj Jewellery FZE.
(6) $3,450,585 was paid to Al Razin Jewellery FZE.
(7) $111,000 was paid to Al Subhi Jewellery FZE.
(8) $110,000 was paid to Al Jumanah Jewellery FZE.
(9) $2,031,605 was paid to Al Masa Jewellery FZE.

40. By reference to the Chart, it will be seen that some of the Funds referred to in the previous paragraph have been transferred in a circle, finding their way back to the four UAE companies (Al Mufied, Al Alam, Italian Gold and Al Abia) which are shown as Layer 1 companies on the Chart.

41. Of the Funds paid to Al Noora, a sum of $829,741 was paid directly to Su-Raj Diamonds and Jewellery DMCC, a wholly owned subsidiary of Winsome of which the First Defendant was chairman.

<u>The applications and the procedural position</u>

42. There were, in theory, six application notices before me or at least potentially before me on this hearing. They were as follows:

(1) The Claimants' application, by application notice issued on 1st June 2022, for the WFO to be continued until trial.

(2) The application of the Three Defendants, by application notice issued on 6th July 2022, for an order that the WFO and passport surrender orders (which were also contained in the May 2022 Order) be discharged on the grounds of non-disclosure and unfair presentation by the Claimants at the First Hearing.

(3) The application of the Three Defendants, by application notice issued on 6th July 2022, for an order under CPR Part 11(1) declining jurisdiction over, or staying the Claims.

(4) The application of the Three Defendants, by application notice issued on 6th July 2022, for an order under CPR 3.4(2)(b) that the Claims be struck out as an abuse of the process of the court.

(5) The application of the Third Defendant, by application notice issued on 6th July 2022, for:

  (i) An order under CPR Part 11 declaring that the English court has no jurisdiction to try the Claims or should not exercise any jurisdiction which it may have, and ordering the setting aside of the claim form, Particulars of Claim and May 2022 Order and/or staying the Action.

  (ii) An order under CPR 3.4(2)(a) or (b) striking out the claim form and the Particulars of Claim.

  (iii) An order that the WFO be set aside and discharged, or alternatively varied, with liberty to enforce the cross-undertaking in damages.

(6) The application of the Third Defendant in the Insolvency Applications, by application notice dated 6th July 2022, for an order that the Insolvency Applications be set aside, or alternatively an order that the Insolvency Applications be struck out and/or a declaration that the court will not exercise jurisdiction and/or an order that the Insolvency Applications be stayed. Strictly speaking, this application was not before me because it had been issued in the Insolvency Applications. In reality, this application was simply, and strictly speaking, the procedurally correct way of challenging the Claims, so far as they are made in the Insolvency Applications. As such, it plainly belonged with the other applications made by the Respondents.

43. The problem of dealing with these applications was alleviated, to a certain extent, by some earlier procedural directions given by Judge Hodge. The applications referred to above came before Judge Hodge at a hearing on 22nd July 2022. By an order made on that date Judge Hodge gave directions for the applications to be listed for this hearing, and for the service of evidence for this hearing. By paragraph 1 of his order, the Judge gave the following directions in terms of what was to be heard at this hearing:

> *"1. There shall be a hearing listed on 5, 6 and 7 October, with one day's pre-reading on 4 October 2022, to hear the Claimant's Continuation Application and the Defendants' Discharge Application ("the October Hearing"). Subject to the final delineation to be made by the Judge hearing the October Hearing, that Hearing shall not include the Defendants' jurisdiction challenges or related challenges to the WFO on the grounds of non-disclosure or lack of fair presentation regarding jurisdiction, which shall be deferred to a further hearing (see paragraph 3 below)."*

44. The jurisdiction challenges made by the Respondents, under CPR Part 11, are therefore for separate hearing. I understand that a separate listing has been obtained for this purpose in December 2022 (**"the December Hearing"**).

45. Even with the jurisdiction challenges hived off to the December Hearing, the volume of evidence, authorities, and arguments at this hearing would have rendered it impossible to deal with the Respondents' strike out applications in this hearing. There would simply have been too much to get through. This problem effectively resolved itself by the sensible decision of the Respondents not to pursue their strike out applications at this hearing. For the Claimants, Mr McQuater indicated to me that the Claimants were content to have at least part of the strike out applications dealt with at this hearing, and would not take any point on the strike out applications being dealt with in advance of the hearing of the jurisdiction challenges. This however was never going to be a feasible course, and the strike out applications were not pursued at this hearing by the Respondents. They will require a separate hearing. I should also mention that the Claimants did not seek a continuation of the passport surrender orders which were part of the May 2022 Order.

46. This effectively left, for decision at this hearing, the application of the Claimants for the continuation of the WFO, and the applications of the Respondents for discharge of the WFO. I will refer to the Claimants' application as **"the Continuation Application"**, and to the Respondents' applications as **"the Discharge Application"**.

47. I should stress that, although it is convenient to refer to the Claimants' application as the Continuation Application, this is not strictly accurate and should not be taken to prejudge any of the questions which I have to decide. The WFO will expire once an order has been made consequential upon the outcome of this hearing. In relation to the Continuation Application the question I am deciding is whether I should now make a freezing order to continue until trial. If I accede to the Discharge Application, the WFO will have been discharged in any event, and the discharge of the WFO will be a relevant factor in my decision on whether to make a freezing order to continue until trial. As I have said, it is convenient to refer to the Claimants' application as the Continuation Application, and to refer to the continuation of the WFO. It is important to keep in mind, and I do keep in mind that this expression is not strictly accurate, in terms of what I have to decide.

48. It will also be noted that paragraph 1 of Judge Hodge's order envisaged that *"related challenges to the WFO on the grounds of non-disclosure or lack of fair presentation regarding jurisdiction"* would be for the December Hearing. The division in issues in paragraph 1 of this order was however expressed to be subject to my *"final delineation"*. I exercised this power of final delineation to require that the parties address, as part of the Discharge Application, the complaints of non-disclosure and lack of fair presentation in relation to the jurisdiction issues. I took this course because (i) it seemed to me that all questions arising in relation to the Discharge Application should, if possible, be resolved in this hearing, and (ii) it seemed to me that I could decide questions of non-disclosure and lack of fair presentation in relation to jurisdiction without having to decide the substantive questions of jurisdiction which will be for the December Hearing.

49. The position is not, unfortunately, so straightforward in relation to the overlap between the Respondents' strike out applications and the Continuation Application. In order to decide the Continuation Application, the first question I have to address (following determination of the Discharge Application) is whether the Claimants have a good arguable case against the Respondents. This creates an unavoidable overlap with at least some of the issues likely to be raised in the strike out applications. I will come, in the next section of this judgment, to the question of how this overlap is to be managed.

50. In summary therefore, the position is as follows. On this hearing and in this judgment, I am determining the Continuation Application and the Discharge Application.

The scope and circumstances of this judgment

51. Before I come to my consideration of the Continuation Application and the Discharge Application, there are some important points I must make about the scope and circumstances of this judgment.

52. The first point is the obvious point that there has been no trial of the Claims, either in the Action or in the Insolvency Applications. In general terms, I am not in a position, on this hearing, to make findings on disputed questions of fact in this judgment and, unless I indicate to the contrary, I do not do so. In particular, but without prejudice to the generality of what I have just said, I stress the following point, in case of any inaccurate reporting of this judgment. I am not in a position to decide and I do not decide, in this judgment, whether the Alleged Fraud did take place, or whether the Respondents or any of them had any involvement in the Alleged Fraud, if it did take place.

53. The second point is that nothing I say in this judgment, on the question of jurisdiction, is intended to bind the court which hears the jurisdiction challenges at the December Hearing. The substantive issues in relation to the jurisdiction challenges are for the December Hearing.

54. The third point is that I am not dealing with the strike out applications in this judgment. In this context a demarcation line between what I am deciding in this judgment and what will fall to be decided (subject to the outcome of the jurisdiction challenges) in the strike out applications is not so easily drawn. As I have already noted, the Continuation Application requires a decision from me on whether the Claimants have a good arguable case in respect of the Claims. In making this decision it seems to me unavoidable that I will be required to consider and, at least, express a view on some issues which will overlap with some of the issues raised by the strike out applications. In general terms however it is not my intention that anything I say in this judgment should be seen as precluding the pursuit by the Respondents of their respective strike out applications. I can see that what I say on good arguable case may have a bearing on the issues in the strike out applications and may be said to inform the answers to some of the issues raised by the strike out applications. Subject to that, it seems to me that the questions raised by the strike out applications are for separate hearing.

55. The fourth point brings me back to the challenging time estimate for this hearing. The materials before the court for this hearing were, to put it mildly, voluminous. The skeleton arguments (excluding annexes attached to the principal skeleton argument of the Three Defendants) ran to a combined total of just short of 350 pages. The bundles of authorities, excluding statutory materials, ran to over 130 cases and some 30 textbooks/articles. The witness statements and affidavits for this hearing ran to many hundreds of pages, and thousands of pages of exhibits. In terms of the Respondents' claims of non-disclosure and lack of fair presentation, the case of the Three Defendants was (helpfully) summarised in an Appendix A to the second witness statement of Daniel Travers who is, as I have said, a partner in Jones Day, the solicitors acting for the Three Defendants. Appendix A runs to 11 pages and 32 paragraphs. Paragraphs 6-32 set out the specific complaints of non-disclosure and lack of fair presentation, which were extensive, and remained extensive as presented in the written and oral submissions made on behalf of the Three Defendants. To these complaints were added the complaints of non-disclosure and lack of fair presentation on behalf of the Third Defendant.

56. In fairness to all parties it should be recorded that the evidence, authorities and skeleton argument before me on the First Hearing were also extensive. Essentially, what were already extensive materials duly expanded further, as between the First Hearing and this hearing.

57. Paragraphs 14.24 and 14.25 of the recently revised and updated Chancery Guide 2022 provide as follows, in relation to time estimates for applications:

> *"14.24 Parties must be realistic about the length of time required to determine applications. The court's experience is that parties under-estimate the time required for pre-reading, for the hearing, or both, far more often than they over-estimate time. Where pre-reading or hearing time is under-estimated, the hearing may be adjourned and/or there may be costs sanctions.*
>
> *14.25 If at any time either party considers that there is a material risk that the hearing of the application will exceed the time allowed, it must inform the court immediately."*

58. The original time estimate for this hearing was three days, with one day of pre-reading; see paragraph 1 of the order of Judge Hodge made on 22nd July 2022 (quoted above). By the time the parties had filed their evidence for this hearing, and the Respondents had produced their skeleton arguments, it was, or should have been apparent to all parties that this time estimate was seriously problematic. The Claimants' counsel wrote to my clerk, on 20th September 2022, drawing my attention to the fact that they considered that there was a material risk that the reading and hearing time estimates for this hearing were insufficient. The letter set out the basis on which the Claimants' counsel had come to this conclusion which was, in summary, the quantity of material, both in terms of evidence and submissions which would have to be dealt with by the court. In the light of the actual quantity of material which was before me on this hearing, it was entirely proper for the Claimants' counsel to have communicated their concerns about the time estimate to the court.

59. This letter drew a response from counsel for the Three Defendants, by letter to my clerk dated 22nd September 2022. This letter was said also to reflect the position of counsel for the Third Defendant. The letter resisted any change in the timetable. It was contended that there had been no material change of circumstances since the order of Judge Hodge which set the original time estimate for the hearing, and that the existing timetable, taking account of the hiving off of the jurisdiction challenges to the December Hearing, *"permits sufficient time for the Court to deal with the issues raised in Ds 1, 2 and 4's and D3's applications for discharge of the Worldwide Freezing Order (WFO") and other relief."* (the underlining is my own). The letter was a lengthy one, and went into the procedural history of the Action at length, with a view to justifying the existing time estimate and resisting its revision. The only concession contained in the letter was a suggestion that the hearing time be reduced to two and a half days, in order to allow a further half day of pre-reading, or that time should be found on 3rd October 2022 (a day not listed for the hearing) for further pre-reading.

60. I did not, and do not consider that the letter of 22nd September 2022 took a realistic view of the situation, regarding the time estimate, which had emerged by the latter part of September 2022. I say this regardless of the procedural history, and regardless of the rights and wrongs of the procedural history. I was however also acutely conscious of the fact that there would be prejudice to the Respondents if the hearing was adjourned and the questions of discharge and continuation of the WFO were left outstanding, with the Respondents still subject to the very considerable restraints placed upon their rights and liberties by the WFO. In the event the less than ideal solution I adopted was to convert the first day of the hearing into an additional pre-reading day, and (with the kind co-operation of the Chief Listing Officer) to add an additional day to the hearing, which both I and the parties were able to accommodate. This solution would probably not itself have been viable if I had had to hear the strike out applications but, as I have said, counsel for the Respondents made the sensible decision not to pursue those applications in this hearing.

61. The overall result was not ideal. Even with the applications reduced to the Continuation Application and the Discharge Application, the result was still a very tight squeeze. Nevertheless, with the assistance of counsel for all parties, a hearing timetable which was respected by counsel, and efficient management and presentation of the documents, for all of which I am most grateful, it proved possible to fit the arguments into the three days of the hearing. There was a great deal to get through but, ultimately, I am satisfied that all parties had a fair opportunity to put their case on the Continuation Application and the Discharge Application, and were fairly heard.

62. I have spent some time on this fourth point for three reasons. First, the problems with the time estimate for this hearing do seem to me to bring out the importance of parties taking a realistic approach to time estimates, particularly in terms of the duty of the parties to inform the court, *"at any time"*, if there is a material risk of the hearing of the relevant application exceeding the time allowed. In my judgment there was such a material risk in the present case by the latter part of September 2022, which should have been appreciated on all sides. While I

consider that what I have just said needs to be recorded, it is not material to what I now have to decide, and I have put it out of my mind for the purposes of making my decisions in this judgment. Second, one consequence of the volume of material before me was that I heard argument, specifically on the legal issues, which would have been better suited to a trial measured in weeks, rather than an interim hearing measured in days. This is a point of some relevance when I come to my decisions on the Continuation Application and the Discharge Application. Third, and by way of related reason, anyone looking in this judgment for a fully reasoned resolution of some of the very interesting and complex issues of law on which I heard argument in this hearing will be disappointed. I have not considered such resolution to be required for the purposes of determining what needs to be determined in the two Applications. Much the same applies to many of the other issues put before me in this hearing.

63. My fifth and final point is that despite the length of this judgment, which may be said to be excessive for the purposes of dealing with two interim applications, it has not been feasible to go through all the detail of the arguments and evidence put before me, independent of the question of whether this is necessary, given the nature of the two Applications. All of the arguments and evidence put before me have been considered in the making of my decisions in this judgment, whether or not the subject of specific mention or consideration.

The evidence at the First Hearing and at this hearing

64. As I have already noted, and further to the point which I have just made, the materials before me at the First Hearing were extensive, and duly expanded further for this hearing, including hundreds of pages of evidence, in the form of affidavits and witness statements, and thousands of pages of exhibits. In relation to the First Hearing the principal evidence before me was a first affidavit of Colin Diss, one of the Liquidators. This first affidavit was lengthy, running to 393 paragraphs. The exhibit thereto ("CD1") ran to 2710 pages. At the First Hearing this evidence was supplemented by a second affidavit of Colin Diss which, while shorter, ran to 42 paragraphs.

65. A good deal of further evidence, in the form of witness statements and, most recently, a third affidavit of Colin Diss has been served since the First Hearing. After introducing each witness statement or affidavit to which I make reference in this judgment, I will refer to the relevant witness statement or affidavit by name and number; that is to say **"Diss 1"** for the first affidavit of Colin Diss, and so on for other witnesses. It will be understood that I intend no discourtesy to the relevant witness by this form of reference.

66. In relation to Diss 3 there was considerable protest from the Respondents at the late arrival of this evidence, not least because the Respondents protested that they had not had a fair opportunity to answer Diss 3, save for what could be said in the skeleton arguments filed on behalf of the Respondents in response to the Claimants' skeleton argument for this hearing. I do not have to rule on these protests because both Mr Hunter and Mr Higgo accepted (realistically and sensibly), in oral submissions, that the better course to take was for the evidence in Diss 3 to be admitted, subject to taking into account the objections of the Respondents that they had not had a fair opportunity to respond to this evidence.

I have therefore taken the evidence in Diss 3 into account, while keeping firmly in mind the Respondents' case that they have not had a proper opportunity to answer this evidence.

67. I turn now to the two Applications themselves. I will take the Discharge Application first, and then the Continuation Application. I do so because the outcome of the Discharge Application is a material factor in my consideration of the Continuation Application. If I accede to the Discharge Application, and the WFO is discharged, this will be relevant to my decision on whether to make what will, in effect, be a new freezing order.

The Discharge Application – the law

68. There was no dispute over the principles to be applied on the Discharge Application. Those principles have been authoritatively stated by Carr J (as she then was) in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7]. The statement of the principles is lengthy, but I should set it out in full.

> *"The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:*
>
> *i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;*
>
> *ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;*
>
> *iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;*
>
> *iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;*
>
> *v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of*

every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) *Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;*

vii) *A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;*

viii) *In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;*

ix) *If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;*

x) *Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;*

xi) *The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;*

xii) *The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free*

to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

69. I should also mention the following particular points on the correct approach to an application to discharge a freezing order on the basis of non-disclosure/lack of fair presentation, which were emphasized in the written and oral submissions.

70. In the present case there was a good deal of argument and counter-argument as to whether the Respondents were seeking to turn this hearing into a mini-trial, and as to whether the Respondents had adopted a scatter gun approach in the Discharge Application. The Respondents were accused of doing both these things by the Claimants. In this context my attention was drawn by Mr Hunter to *DBI Innovations (UK) Ltd v The May Fair Avenue General Trading LLC* [2019] EWHC 2235 (QB). In considering whether a freezing order should be discharged Martin Spencer J said this, at [47]:

> *"47. Whilst fully aware of the dangers of turning the return date for a freezing order into a "mini trial" where matters which will be in contention in the main action are summarily considered and adjudicated upon without hearing important oral evidence and on a somewhat superficial basis, it seems to me that this cannot provide a claimant who has obtained a freezing order ex parte with a "full stop" argument where a defendant seeks to defend himself and put a wholly different complexion on a case from that as it was presented to the judge when the freezing order was obtained. In some cases, the material which the defendant can put before the court presents such a different picture and presents the case in such a different light that the judge on the return date, in order to do justice to the defendant, must take a view about the alternative pictures presented and whether, had the original judge been presented with the material now presented, he or she would have made the original order."*

71. This was said by the judge after citing what Longmore LJ had said about mini-trials in *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381 [2014] 1 C.L.C. 451, which is also relevant in the present case. At [36] Longmore LJ made reference to what Toulson J (as he then was) had said in *Crown Resources AG v Vinogradsky*, concerning the correct approach to issues of non-disclosure in cases of any magnitude or complexity:

> *"36. As long ago as 1990 Sir Nicolas Browne-Wilkinson V-C asked this court for guidance about the right approach to be taken to the inevitably lengthy hearings which were then growing in relation to non-disclosure in respect of freezing and search and seizure orders, see Tate Access Floors Inc v Boswell [1991] Ch 512, 533H–534D. I am not aware that this court has ever answered that cri de coeur and we did not receive any argument which would enable us to do so authoritatively in the present case. The judge adopted the approach of Toulson J (as he then was) in Crown Resources AG v Vinogradsky (15 June 2001) for cases of any magnitude and complexity and I am content to do the same:*

> *'… issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself (pages 4–5 of the transcript).*
> *Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion (page 6).*
> *I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees (page 7).*
> *In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion (page 22).''*

72. Mr Hunter also drew my attention, in particular, to the following points identified by Carr J in her statement of the relevant principles in *Tugushev*:
    (1) The duty of disclosure and fair presentation is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy.
    (2) The duty extends to the need to draw attention to related proceedings in another jurisdiction. This is a point of particular relevance in the present case, given the existence of other proceedings; specifically the UAE Proceedings and the Indian civil and criminal proceedings.

73. Finally, I also highlight the following points, in relation to the exercise of the court's judgment as to whether there has been non-disclosure or lack of fair presentation at the relevant without notice hearing:
    (1) The applicant should draw attention to unusual features of the evidence adduced. I accept that this may include contradictions or inconsistencies in the evidence, although this plainly depends upon the contradiction or inconsistency in question.
    (2) A fact is material if it would be relevant to the exercise of the court's discretion in the sense that it is a fact which a judge would need or want to take into account.
    (3) An important point which follows from this is that a fact is not prevented from being material simply because it would not have altered the outcome of the application. The test is not whether the fact would have made any

difference if it had been disclosed, but whether the fact was material to the relevant decision. This is an important point, as there is always a temptation for the court to judge materiality by considering whether disclosure of the fact would have made any difference to the decision. This is not however the test of materiality.

(4) The test of materiality is objective. If a fact is material, but was not disclosed, it is not a defence for the applicant to say that it did not consider the fact to be material.

(5) The duty of disclosure is linked to the duty of fair presentation. The presentation to the judge at the without notice hearing should be fair. By way of example, these duties are not discharged by including, but not making specific reference to a material document which is buried in an exhibit where the court is unlikely to find the document for itself.

The Discharge Application – the case of the Respondents

74. The case of the Three Defendants on non-disclosure/lack of fair presentation was helpfully grouped under six general heads, as follows:
    (1) Jurisdiction.
    (2) Non-participation of the Indian Banks; quantum/maximum WFO sum.
    (3) Core facts.
    (4) The law.
    (5) Indian criminal and civil proceedings.
    (6) Procedural/other.

75. The Third Defendant is now separately represented. The case of the Third Defendant on non-disclosure/lack of fair presentation was helpfully grouped under four general heads, which overlapped to a certain extent with the heads of complaint raised by the Three Defendants. The four general heads under which the case of the Third Defendant was grouped were as follows:
    (1) The Grant Thornton Scheme.
    (2) The viability or merits of the causes of action relied upon.
    (3) The weakness of the evidential case against the Third Defendant in particular.
    (4) The viability or merits of the allegations that the Claimant Companies have suffered loss and are insolvent.

76. I will first consider the case of the Three Defendants, taking each of their general heads of complaint in turn. I will then consider the case of the Third Defendant, again taking each of his general heads of complaint in turn. It is of course important to keep in mind that, in considering any particular complaint of non-disclosure/lack of fair presentation made by the Three Defendants, such complaint may apply equally to the position of the Third Defendant, even if not specifically advanced by the Third Defendant. The position is the same in relation to any particular complaint of non-disclosure/lack of fair presentation made by the Third Defendant. Before however I come to the specific complaints of the Respondents, it is necessary to set out an explanation of what the Respondents called *"the Grant Thornton Scheme"*.

The Discharge Application – the so-called Grant Thornton Scheme

77. I start with an explanation of the so-called Grant Thornton Scheme, because it pervaded the case of all four Respondents. The essential point made by the Respondents was that the Claims were all an artificial contrivance which was, in essence, a joint venture between SCB and Grant Thornton, with a view to trying to avoid all the problems which confront the making of claims against the Defendants arising out of the Alleged Fraud.

78. The Respondents say that from around 2019, or possibly earlier, SCB instructed Grant Thornton to explore claims on SCB's behalf outside India, with a view to recovering what had been lost as a result of the Defaults and the calls on the SBLCs. What is said to have happened is that SCB and Grant Thornton entered into a collaboration agreement and a litigation funding agreement, pursuant to which, by a series of pre-planned steps, the Claims could be made. The pre-planned steps are said to have involved SCB restoring the Claimant Companies to the register, so far as the same had been dissolved, appointing Grant Thornton (in the person of the Liquidators), and making claims and presenting proofs in the liquidations of the Claimant Companies. For its part Grant Thornton would procure litigation funding through an associated company, in return for a share of the recoveries from the Claims, and would pursue the Claims by litigation.

79. There did not appear to me to be much in dispute, at least in factual terms, in relation to the way in which the Claims came to be made, as summarised in my previous paragraph. The principal evidence which was said by the Respondents to disclose the existence of the Grant Thornton Scheme came from a note of what was referred to as the Dubai Presentation. What happened was that Mr Wood, the Eighth Claimant, attended at a conference called Thought Leaders 4 Fire in Dubai, at which he gave a presentation. According to Mr Wood's evidence the purpose of the conference, which was held in November 2021, was to bring the global asset recovery community together and share experiences operating in the contentious insolvency, fraud litigation and international enforcement arena. As part of his presentation Mr Wood included a case study which was anonymised but was in fact the present case. Also attending the conference was an associate solicitor working for Jones Day, the Three Defendants' solicitors, who were then acting for all four Respondents. By November 2021 the applications to restore the relevant Claimant Companies to the register had been heard, in the course of which the First Defendant had been identified. The Respondents had become aware of this, and had become aware of the potential for proceedings against them in this jurisdiction. I assume that this is what resulted in the instruction of Jones Day.

80. Mr Travers, the solicitor at Jones Day with conduct of this matter, says in Travers 2 (paragraph 16/footnote 10) that he became aware that one of the associates at Jones Day would be attending the conference, and that certain individuals from Grant Thornton were to make a presentation on the subject of a *"Case Study of a Billion Dollar Multi-Jurisdictional Fraud"*. Mr Travers put two and two together and instructed the associate to take a note of what was said in the presentation. The result can be found in an email sent by the associate to Mr. Travers, which is dated 17th November 2021 and contains a note of what was said by Mr Wood. The note provides an interesting record of how the Claims have come about.

81. Of most relevance, for present purposes, is the part of the note which is headed *"Comments on how GT got involved + implemented their new strategy"*. I set this section of the email out in full:

> *"• As with most jobs it starts with GT's director of development (Nick Clarke Note to DT: I am having coffee with Nick Clarke tomorrow but obviously do not plan on mentioning this case in any way) having a beer with a lawyer who mentioned the case. At the time GT was setting up its asset-recovery fund (GT now self-fund some of these cases) and GT thought this case would be ideal for their fund as the international bank (as opposed to the Indian ones) was very keen to progress the recovery and enforcement efforts. After that, Nick Wood (Partner at GT) had a couple of beers with the head of one of the consortium banks and they were able to secure the matter.*
>
> *• Even though the international bank is massively keen to press-ahead there was still a number of hurdles before things could get started (internal approvals/ T&Cs to be agreed etc.. which takes 3 or 4 months). Then the international banks said they wanted to add the Indian banks (approx. 14) to the claim — so GT had to carry out a number of trips to Mumbai and Delhi to meet with the Indian banks. Unfortunately — it's near impossible to meet with decision makers in Indian banks so GT felt a lot of time was wasted with indirect meetings and referrals up the chain. This took many weeks and every time GT thought they'd agreed something they would realize the agreement then needed to be vetted by countless individuals and go through a whole new approval process.*
>
> *• All the above, created a c. 12 month delay and the Claimants became concerned about limitation issues.*
>
> *• So there was a need to re-think the strategy to be able to proceed fast. The Indian banks did want to do this, they agreed with the strategy but they didn't want any active involvement or to sign a collaboration agreement. So, GT needed a new plan to lead the consortium without the Indian banks signing a collaboration agreement. GT was sure the Indian banks also didn't want to spend any money themselves — so they were pretty confident the Indian banks would not be taking any competing enforcement action.*
>
> *• GT finally understood that the route was via the UK derivative companies — these UK companies had gone through a solvent liquidation process in the UK and had been dissolved for a couple of years.*
>
> *• Accordingly, the new strategy was to restore the UK derivative companies then put GT in as liquidators of these companies. This was a better workable solution as all the Indian banks had to do was not object to the proposal to put GT in as liquidators (so no longer a need for the Indian banks to sign any type of collaboration agreement).*
>
> *• From the brief factual background presented — "any idiot could see this was an outright fraud" [direct quote]. So GT thought it would be pretty simple to establish + there was just a need to put the evidence in front of a judge and the latter would doubtlessly make the necessary orders. However, GT had not taken into account the full & frank disclosure obligation (+ recent caselaw about the granular level of disclosure that is required). This turned a relatively simple application for restoration and liquidation into a 150 page WS with $150k in legal spend."*

82. In his first witness statement, prepared in response to Travers 2, Mr Wood (one of the Liquidators) confirmed that the note contained in the email *"is a fairly accurate note of the presentation"*, given by Mr Wood. Mr Wood did seek to argue, somewhat faintly, that passages from the note referred to in Travers 2 had been taken out of context and created a misleading impression. It seems to me however that the note speaks for itself. I agree with Mr Hunter that what it shows is that there was a Plan A and a Plan B, both conceived by Grant Thornton as ideal for their asset-recovery fund, which had been set up by Grant Thornton to fund the pursuit of this kind of litigation. Plan A was to persuade the Indian Consortium Banks to join SCB, which I assume to be *"the international bank"* referred to in the note, in taking direct recovery and enforcement action. Unfortunately, and for the reasons given in the note, it proved difficult to sign up the Indian Consortium Banks to collaboration agreements. This created a delay, which in turn created concerns about limitation issues. The result was a re-thinking of the strategy and a resort to Plan B. Plan B was, to quote from the note, *"to restore the UK derivative companies then put GT in as liquidators of these companies. This was a better workable solution as all the Indian banks had to do was not object to the proposal to put GT in as liquidators (so no longer a need for the Indian banks to sign any type of collaboration agreement)."*. Put more simply, Plan B comprises the process which has resulted in the making of the Claims.

83. I also agree with Mr Hunter that the note shows how and why Plan B was conceived to replace Plan A, following the failure of Plan A.

84. In Travers 2, at paragraph 201, Mr Travers speculates that Grant Thornton have negotiated a 50% share of the recovery in respect of the Claims. This has not been contradicted or responded to by the Claimants in their evidence for this hearing. There has been no disclosure by the Claimants, as matters stand, either of any litigation funding agreement which is in existence, or of what is described as the collaboration agreement entered into between SCB and Grant Thornton in respect of the pursuit of the Claims.

85. I have taken some time to give a summary of what was characterised by the Respondents as the Grant Thornton Scheme because the Grant Thornton Scheme pervaded the submissions of the Respondents, at a number of different levels. The implementation of the Grant Thornton Scheme, in its Plan B phase, was said by the Respondents to be an abuse of process, justifying a strike out of the Claims on that basis alone. The Grant Thornton Scheme also formed a substantial part of the Respondents' complaints of non-disclosure and lack of fair presentation. The way in which Plan B of the Grant Thornton Scheme operated was also said by the Respondents to explain, in substantial part, why the Claims were not viable and gave rise to no good arguable case.

86. The Claimants objected to the Respondents' description of the origin of the Claims as the Grant Thornton Scheme, on the basis that this description carried unfair connotations. I do not agree. I do not think that the Grant Thornton Scheme is an unfair description of what is evidenced by the note of what was said by Mr Wood at the Dubai conference, and I will use the same expression. I will refer to what was said by Mr Wood at the Dubai conference, as recorded in the note, as

"the Dubai Presentation". The actual implications of the Grant Thornton Scheme, both for the Claims and for the various applications which have been made, constitute a separate set of questions.

The Discharge Application – jurisdiction

87. I can take the question of jurisdiction shortly. The essential complaint is that a series of matters which went to the question of jurisdiction were not properly drawn to my attention at the First Hearing. It is said, on behalf of the Three Defendants, that the Claims have everything to do with India (and to some extent the UAE) but little to do with England. As such, so it is argued, any fair presentation of the application for the WFO (i) would have identified to the court that a forum non conveniens challenge was likely, (ii) would have alerted the court to what was, at least arguably, an artificial attempt to create a tangible connection with this jurisdiction, and (iii) would have alerted the court to the true scope and extent of the issues as to jurisdiction.

88. It seems to me that there are several problems with this argument.

89. First, I was alerted to the possibility of the jurisdiction challenge at the First Hearing. The Claimants' skeleton argument for the First Hearing (**"the First Skeleton Argument"**), at paragraph 87, expressly contemplated the possibility of a jurisdictional challenge. The relevant part of paragraph 87 was in the following terms:

> *"87. The Respondents are all currently in the jurisdiction. Assuming they are present here when the Claim Form is served on them, the Court will (subject to any future application for a stay on grounds of forum non conveniens) assume jurisdiction over the claims."*

90. The Claimants' case was, of course, that England and Wales was the appropriate jurisdiction for the Action to be commenced, and the Claims to be heard. Whether or not they were right about that was a question which would have to be resolved in the future, if a jurisdictional challenge was made. The essential facts on which such a jurisdictional challenge might be based were in the evidence which was before me on the First Hearing. The arguments on jurisdiction which have been raised by the Three Defendants at this hearing are all arguments which derive from matters which were before me at the First Hearing.

91. Second, the question of jurisdiction was addressed in the course of the First Hearing. In particular, the transcript of the First Hearing discloses the following exchange between myself and Mr Wilson, for the Claimants at the First Hearing:

> *"MR JUSTICE EDWIN JOHNSON: Right, you were going to tell me about possible defences. Again, I don't want to cut you short but I have read what you have to say about matters such as limitation, jurisdiction. Mr Diss quite fairly discusses some of the questions that are going through my mind in relation to sort of circuity of actions and the questions that I have just asked you. But I mean, as at presently advised, I can see that these might give rise to good defences to the claims or some of them, but they are not matters that are particularly troubling me at this stage.*
> *MR WILSON: I won't ––*
> *MR JUSTICE EDWIN JOHNSON: I have read what you have to say.*

> *MR WILSON: The important thing is to record that your Lordship has −− because all of these have to be put to your Lordship as a matter of fair presentation."*

92. So far as the question of jurisdiction was concerned, I said what I am recorded as saying in this extract of the transcript because I could see the possibility of a future challenge to the Claims on the basis of jurisdiction. What I could not then see was any point by reason of which it was clear that a jurisdictional challenge would succeed. I could see arguments going both ways, which it was not necessary for me to determine at the First Hearing because I was not required to decide arguments of jurisdiction. It was for this reason that I cut Mr Wilson short on the question of jurisdiction. I continue to see arguments both ways; being the arguments which will need to be resolved at the December Hearing. I keep my views on those arguments to myself, given that this is not the December Hearing and given that such views can only be preliminary views in any event.

93. Taking his steer from what I said at the First Hearing, in the extract from the transcript set out above, Mr Wilson did not go further into questions of jurisdiction at the First Hearing. It seems to me that it would be very unfair to the Claimants to say that they should have gone further into questions of jurisdiction, given the steer I had given to Mr Wilson.

94. Third, and independent of the course which events took at the First Hearing, I cannot see that the Claimants were under an obligation, at the First Hearing, to take me through the arguments which might be advanced, if and when a jurisdiction challenge was launched. The points on jurisdiction which are raised by the Three Defendants in this context read as a dress rehearsal of their arguments for the December Hearing. In respect of each point the arguments of the Three Defendants proceed on the footing that the point is a material point in favour of the Three Defendants in relation to the issue of jurisdiction and, as such, should have been articulated to me at the First Hearing. Unsurprisingly, the arguments of the Claimants, in response to each point, contend that the relevant point is not a good one. All this is of course for the December Hearing. Indeed, the reason why I do not go through the individual points raised by the Three Defendants is because they are for the December Hearing. In these circumstances, as I have said, it seems to me to be inappropriate for me to be expressing views on these points. For present purposes, what is relevant is that these points are all points which can be seen to emerge from the evidence and arguments which were before me on the First Hearing. Beyond that, they are points for the December Hearing.

95. In summary, I do not think that there was any non-disclosure or lack of fair presentation in relation to the question of jurisdiction. At the First Hearing I was made aware of the possibility of a jurisdictional challenge and, as it seems to me, I was in possession of the material facts on which a jurisdictional challenge might be made. I do not see that the Claimants were obliged, at the First Hearing, to take me through the arguments which will now be heard at the December Hearing.

96. The Three Defendants included, in this part of their case, an argument that the Claimants failed to disclose to the court, at the First Hearing, that the bringing of

the Claim was an abuse of process, given what was said to be the true background to the Scheme, and the nature of the Grant Thornton Scheme. The argument of abuse of process was addressed in much greater detail in the submissions on behalf of the Third Defendant. As such, I will address this question when I come to consider the Third Defendant's case on non-disclosure and lack of fair presentation.

The Discharge Application - non-participation of the Indian Banks; quantum /maximum WFO sum

97. In relation to the non-participation of the Indian banks, the essential complaint is that the Claims were presented as claims made on behalf of, and for the benefit of the Consortium Banks, when in fact the true position was that the Consortium Banks had been invited to collaborate in the Claims by Grant Thornton, but had declined to do so, with the exception of SCB. In fact, only SCB had submitted proofs of debt in the liquidations of the Claimant Companies. Given this position, the Three Defendants say that Mr Diss had no basis for claiming, as he did in paragraph 278 of Diss 1, that it was *"reasonably anticipated"* that the Liquidators would receive proofs of debt from other creditors in due course.

98. This is combined with a complaint that the Claimants failed to explain a variety of difficulties, for the pursuit of the Claims, created by the pursuit by the Consortium Banks of civil proceedings in India. These difficulties, so it was contended, explained why the majority of the Consortium Banks had not wished to collaborate in the Claims.

99. What the court should have been told at the First Hearing, in this context and on the case of the Three Defendants, was as follows:
    (1) The only participant in the Grant Thornton Scheme and the only creditor to have submitted a proof of debt was SCB.
    (2) The other fourteen Consortium Banks had declined to participate in the Scheme.
    (3) The other fourteen Consortium Banks had not submitted proofs.
    (4) Mr. Diss had no reasonable basis for his assertion that he reasonably expected proofs. That was inconsistent with the correspondence there had been with the Indian Consortium Banks and statements made by Mr Wood in the Dubai Presentation, neither of which was disclosed.
    (5) The other fourteen Consortium Banks had elected to pursue other civil claims in India and there were numerous other reasons which would prevent or deter them from submitting proofs.

100. The case of the Three Defendants is that this lack of disclosure or fair presentation also meant that the likely quantum of the Claims was misrepresented. With only one Consortium Bank having submitted proofs of debt in the liquidations, the quantum of the Claims was likely to be restricted to around £50 million; being the loss suffered by SCB as a result of the call on the SBLCs. This mattered considerably because, amongst other things, it affected the value of the assets which could fairly be the subject of the WFO.

101. It seems to me that these grounds of complaint do not stand up to scrutiny, for a number of reasons.

102. The starting point is that, at the First Hearing, I was aware that the only creditor to have submitted proofs of debt was SCB. This information was in Diss 1, at paragraph 278. The claim of Mr Diss that proofs of debt were reasonably anticipated from other creditors necessarily entailed that they had not yet arrived. Equally, the view of Mr Diss that proofs of debt were reasonably anticipated was just that; namely the view of Mr Diss, which might or might not turn out to be correct.

103. In the event, and since the First Hearing, seven Consortium Banks have given written confirmation that they will be submitting proofs in the liquidations. One other Consortium Bank has indicated that it intends to submit proofs in due course, and a further Consortium Bank has said that it is actively considering doing so. By the time of this hearing additional proofs of debt had in fact been received from four of the Consortium Banks; see the letters from the Claimants' solicitors to the Respondents' solicitors dated 5th October 2022 and 7th October 2022 (the later letter enclosed copies of the actual proofs of debt). These are of course events subsequent to the First Hearing, but it does seem to me to be of some significance that these subsequent events demonstrate that some, at least, of the Consortium Banks have clearly not made any decision not to participate in the Claims. To the contrary, they have made the opposite decision. This in turn would seem to suggest that the Consortium Banks have not been deterred from participating in the Claims (collaboration may be a more accurate description of the role intended for the Consortium Banks in the Claims) by the problems which the Three Defendants allege to have been created by the pursuit in India of the various forms of civil proceedings against Winsome, Forever Precious and the First Defendant. This would also suggest that Mr Wood is right to say, in Wood 1 at paragraphs 13 and 14, that the reluctance of the Indian Consortium Banks to participate in the Claims can be attributed to legal and business factors peculiar to the Indian banking system.

104. All this however seems to me to miss the essential point in this context, which is this. It was made perfectly clear to me at the First Hearing, and it is an obvious feature of the Claims that the Claimant Companies cannot claim to have suffered loss in the conventional sense of the word. In so far as the Claimant Companies seek compensation for loss in the Claims, as opposed to the restoration of funds to which the Claimant Companies are said to be entitled, such compensation can only be claimed on the basis that the Claimant Companies have, by reason of the legal wrongs alleged to have been committed by the Defendants, been left with liabilities to the Consortium Banks, in the total amount of the loss suffered by the Consortium Banks.

105. I did not understand it to be in dispute between the parties that, as a matter of the law of damages, a claimant may claim against a defendant in respect of a liability incurred by the claimant to a third party, where such liability is caused by the defendant's legal wrong. In a case where the claimant has not had to satisfy that liability before the claim comes to trial, difficult questions of fact may arise on the question of whether the claimant will actually be required to meet the liability. Questions may in any event arise as to whether the relevant liability does exist as a genuine, in the sense of legally enforceable liability. Questions may also arise

as to the nature of the remedy which the claimant should be awarded, where the liability is unsatisfied. The appropriate remedy may be an indemnity, as opposed to an award of damages. None of this alters the fact however that the law will recognise a liability to a third party as a recoverable head of loss; see The Law of Contract Damages, Third Edition (Adam Kramer) at 20-01 and 20-02 and see *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 1710 (TCC), at [736]-[738].

106. In the present case therefore I do not see the relevance of whether the Consortium Banks have or have not submitted proofs in the liquidations to the question of whether the Claimant Companies have a good arguable case in respect of the Claims. If, as at the date of the First Hearing, the Claimants could demonstrate a good arguable case that the Defendants had, by one or more legal wrongs, caused the Claimant Companies to incur liabilities to the Consortium Banks, then I do not see that it particularly mattered, for the purposes of what I had to consider at the First Hearing, whether or not the Consortium Banks had or had not submitted proofs of debt in the liquidations and/or whether or not the Consortium Banks had declined to collaborate in the Claims. Neither of these matters affected the question of whether the Claimant Companies did have a liability to the Consortium Banks.

107. I can see that the position would have been different if there had been evidence, available to the Claimants at the date of the First Hearing, that the Consortium Banks would clearly never enforce any liability which they might be owed by the Claimant Companies. This was clearly not the case in respect of SCB and, in respect of the other Consortium Banks, the matters relied upon by the Three Defendants in this context do not constitute any evidence of this kind. I can also see that the position would have been different if it had been clear at the First Hearing that, by reason of the Indian civil proceedings, the Consortium Banks had lost their ability to make claims against the Claimant Companies arising out of the Alleged Fraud. It is however clear that this was not, and is not the position. Instead, I am simply confronted with competing arguments from the Three Defendants and the Claimants, respectively, as to the merits of the points made by the Three Defendants in relation to the impact of the Indian civil proceedings on the ability of the Consortium Banks to pursue claims against the Claimant Companies arising out of the Alleged Fraud.

108. I will need to come back to the Indian civil proceedings when I consider the complaints of non-disclosure and lack of fair presentation in relation to the Indian civil and criminal proceedings. I will also need to address non-disclosure and lack of fair presentation in respect of the Grant Thornton Scheme, when I come to the complaint which is specific to the Grant Thornton Scheme. For present purposes however the relevant point is that I cannot see that there was any lack of disclosure of material facts or lack of fair presentation in relation to the participation or non-participation of the Consortium Banks in the Claims or in relation to the quantum of the Claims. The material which was put before me at the First Hearing, both in terms of evidence and argument, made it clear that only SCB had signed up to participate in the Claims and also made it clear that, in so far as the Claims were claims to compensate loss, the demonstration of such loss depended upon demonstrating that the Claimant Companies had been left with

liabilities to the Consortium Banks, arising out of the Alleged Fraud, as a result of the legal wrongs alleged to have been committed by the Defendants. In the absence of evidence, available to the Claimants, which demonstrated that the Consortium Banks (with the exception of SCB) had made a final decision not to pursue any claims which they might have against the Claimant Companies and in the absence of any evidence or point of law which demonstrated that the Claimant Companies could have no liability to the Consortium Banks, it seems to me that the Claimants were not required to go further than they did go, in terms of disclosure in this context, at the First Hearing.

The Discharge Application – core facts

109. The first complaint, in the context of core facts, is that the Claimants presented their case at the First Hearing on the basis that the bullion drawn down pursuant to the PMFs was sold to two bullion traders in India, with the proceeds of the alleged sale being transferred by Winsome and Forever Precious, by unknown means, to the bank accounts of four of the Layer 1 (UAE based) companies in Macau. It is said that my attention should have been drawn to evidence which contradicted or undermined this factual case.

110. This complaint focusses on paragraph 66 of Diss 1, which stated as follows:

> *"The joint liquidators' investigations suggest that gold and jewellery produced by Winsome and Forever Precious using drawdowns under the Precious Metals Facilities from the Bullion Banks were sold, including to two Indian bullion firms named Raksha Bullion and Safari Bullion. The proceeds of those sales were, by means currently unknown, transferred to USD accounts at Banco Nacional Ultramarino in Macau held in the names of four of the Layer 1 Companies, namely Italian Gold, Al Alam, Al Mufied and Al Abia."*

111. It will immediately be seen that Mr Diss did not specify, in this paragraph, who actually sold what had been produced by Winsome and Forever Precious from the drawn down bullion, or how the proceeds of such sale came to be paid to the Layer 1 Companies. The relevant point which was being made by Mr Diss in paragraph 66 was that the proceeds of sale from the bullion drawn down pursuant to the PMFs ended up in the hands of the Layer 1 Companies. From the Layer 1 Companies these funds, which I am referring to as the Funds, commenced their journey through the Layers of companies shown on the Chart.

112. I accept the point made by the Claimants that they did not know, at the First Hearing, and still do not know by whom the bullion was actually sold. It remains to be established whether the bullion (processed or otherwise) was sold by Winsome and Forever Precious or exported to the UAE and sold in the UAE. This will be a factual issue for trial. Whichever hypothesis is correct, the Claimants' case is that the exercise was orchestrated by the Respondents and was the first step in the Alleged Fraud.

113. In these circumstances I do not see that the Claimants were obliged to draw specifically to my attention the various items of evidence upon which the Three Defendants rely in this context. All that these items of evidence seem to me to do is to demonstrate that there is a factual issue in this respect, which will have

to be gone into at trial. The relevant point is that the Claimants' case is that the proceeds of the sale of the bullion ended up in the hands of the Layer 1 Companies, where they commenced their journey through the various Layers of companies. Indeed, and so far as I am aware, it is not in dispute, or at least does not yet appear to be in dispute that the proceeds of the sale of the bullion (whether processed or unprocessed) did, by some means or other, end up in the hands of the Layer 1 Companies. So far as I am aware, there is no alternative explanation put forward as to how the Funds came into the hands of the Layer 1 Companies. When that is combined with the fact of the Defaults, and the explanation given by the First Defendant at the time of the Defaults, it becomes difficult to accept that there is any innocent explanation for the Funds ending up in the hands of the Layer 1 Companies. It also becomes difficult to accept that the Claimants were under an obligation, at the First Hearing, to take me through the detail of the evidence bearing on the question of precisely how the Funds ended up in the hands of the Layer 1 Companies.

114. The second complaint, in the context of core facts, is that the Claimants failed to disclose substantial material which undermined their case that the Respondents were shadow directors of the Layer 1 Companies and other companies involved in the Alleged Fraud.

115. The starting point, in this context, is that Mr Diss said this, at paragraphs 40.3 and 40.4 of Diss 1:

> *"40.3. Save for Al Alam, Mr Obidah is (or was) a director and majority shareholder of all the Layer 1 Companies.*
> *40.4. As regards Al Alam, its sole shareholder is (or was) a company registered in the Bahamas named Herald International Limited. Between 5 July 2004 and 18 December 2008, one of Herald International Limited's directors was SM."*

116. Mr Diss thus made it clear that Mr Obidah, the Fifth Defendant, was the director and shareholder of the Layer 1 Companies. If therefore the Claimants were to make out a good arguable case that the Respondents were shadow directors, the starting point was that the officially recorded director and shareholder was the Fifth Defendant.

117. The only possible exception to this was Al Alam. It is worth spending a little time on this possible exception, because it illustrates a point of general relevance to the Discharge Application.

118. The Respondents say that publicly available shareholding records demonstrate that Herald International (the company identified by Mr Diss as a company of which the Second Defendant was a director) had no interest in Al Alam. They point to a letter of ownership dated 13th May 2015 which does not show Herald International as a shareholder in Al Alam. On this basis the Three Defendants asserted, in their submissions at this hearing, that it was clear that Herald International had no interest in Al Alam.

119. The position is not however this straightforward. There is a second witness statement of James Southworth, of the Claimants' previous solicitors, which

makes reference, at paragraph 102.2, to evidence that Herald International was a shareholder in Al Alam between 2006 and 2009. If one goes to the relevant document in the exhibit to Southworth 2, it is a report from the Diligencia Group which, amongst other information about Al Alam, records an apparent transfer of the shareholding in Al Alam from Herald International to two individuals, one of whom appears to be the Fifth Defendant.

120. The Three Defendants duly set about seeking to discredit this document. In Travers 4, at paragraph 43.1, Mr Travers points out that the corporate records from Diligencia show a different corporate number for Herald International to the number shown in the corporate filings exhibited to Travers 2. At paragraph 43.2, Mr Travers points out that the Diligencia document states that it was downloaded on 27th July 2022, although it is not clear to me what point Mr Travers is seeking to make in this context. At paragraph 43.3 Mr Travers makes reference to an expert report in the UAE Proceedings which he says makes it clear that neither the Second Defendant nor Herald International ever had an interest in Al Alam.

121. Clearly there is an unresolved factual issue in this context. I have spent a little time on this possible exception because it seems to me to illustrate the difficulties in arguing that the Claimants should, at the First Hearing, have disclosed or highlighted particular items of factual evidence. If there was a piece of factual evidence which was or should have been available to the Claimants at the First Hearing which (i) clearly showed a material part of the case put forward by the Claimants to be wrong and (ii) was not drawn to my attention, then I can see the argument that there was a failure of disclosure or a lack of fair presentation. If however one is dealing with particular items of factual evidence which simply lead one further into a factual issue, incapable of resolution in advance of trial, I have much more difficulty in seeing the case on non-disclosure or lack of fair presentation.

122. Returning to the second complaint, the Three Defendants make reference to a series of items of evidence which, so it is said, were not disclosed or were not properly presented.

123. First, it is said that the reports and judgments in the UAE Proceedings were either not disclosed or were not fairly presented. In fact Mr Diss does deal with the UAE Proceedings, at paragraphs 48-51 of Diss 1. Mr Diss records the belief of the Liquidators that the UAE Proceedings were part of an attempt by the First Defendant to conceal the Alleged Fraud. Whether this is right or wrong is an issue for trial. For present purposes the relevant point is that the UAE Proceedings were included in the evidence before me at the First Hearing, including the judgments and expert reports in the UAE Proceedings. These documents do not bear on the case now advanced by the Claimants, no doubt because what is now the Claimants' case arising out of the Alleged Fraud was not being advanced in the UAE Proceedings. I do not accept that the Claimants were required to do more than include reference to the UAE Proceedings, as they did, in the evidence before me at the First Hearing.

124. Next it is said that the Claimants should have disclosed that the position of the CBI, as set out in the CBI Closure Report, contradicted the claim of shadow

directorship of the Layer 1 Companies by the Respondents. The Claimants did not have the CBI Closure Report at the date of the First Hearing. The Three Defendants contend that if the Claimants had made reasonable inquiries, they would have become aware of the CBI Closure Report prior to the First Hearing. I do not think that this contention is made out, given the scale of the investigations which the Liquidators have had to make, and are still making in this case. I do not think that it is reasonable to say that the Claimants should have been aware of the CBI Closure Report by the First Hearing. There is however this point. If the CBI Closure Report had been available to the Claimants at the First Hearing, its content would have been of some assistance to the Claimants. The CBI Closure Report states that three of the Layer 1 Companies were incorporated by the First Defendant, and were subsequently transferred to the Fifth Defendant.

125. The CBI Closure Report also contains the following paragraph, on page 158 (underlining also added):

> *"Investigation revealed that all the exports were made to related parties based in UAE. Statement of witnesses recorded in group cases reveal that the control of all the UAE buyers was in the hand of Shri Jatin R. Mehta and Smt. Sonia J. Mehta. The entire functioning of 13 defaulting companies was handled by the employees of Smt. Sonia J. Mehta who was owner of M/s Oriental Expression DMCC, Noble Jewellery LLC and Oriental Jewellery LLC. Important employees were Shri Amit Jitendra Shah, Shri Vastupal Shah, Shri Hitesh Shah, Shri Kamaludeen. These employees gave instructions to factory heads at Chennai and Cochin as to in which company's name the exports were to be made. Shri Amit Jitendra Shah, Shri Vastupal Shah, Shri Hitesh Shah who were the key employees of Shri Jatin Mehta have not been examined as they have not returned to India. Their LOC's have been opened and renewed from time to time."*

126. The CBI Closure Report is a lengthy report. Like all of the other evidence referred to in relation to the case of the Three Defendants on core facts, it contains nothing which is finally conclusive one way or the other. It does seem to me however that the CBI Closure Report can be said to contain evidence helpful to the Claimants' case on shadow directorship. The extract from the CBI Closure Report stated in my previous paragraph seems to me to be highly material. The paragraphs from the report prior to this extract also seem to me to be highly material (underlining also added):

> *"• Investigation has revealed that the manufacturing heads of the company at MEPZ Chennai Shri Natrajan and Shri Ratheesh NC at CSEZ Cochin used to inform through Skype to the employees of Shri Jatin Mehta in Dubai or to Shri Hasmukh Shah/ Shri Kinjal Shah about the consignments ready for exports. The manufacturing heads of both the units used to receive instructions through Skype as to in whose name the exports were to the made. The purchase orders also used to be received through Skype after the gold was processed into coins or pendants.*
>
> *• In the normal course, business start with obtaining a purchase order from a buyer, placing of order containing details such as design, weight, specification of the product etc.*
>
> *• However, investigation has revealed that in this case it was the other way round. After processing the gold the manufacturing heads of units at*

> *Chennai and Cochin used to inform the employees of Shri Jatin Mehta in Dubai or to Mumbai office regarding the ready consignment. Therefore, it give rise to suspicion that there was some hanky-panky going on in these two companies."*

127. If one assumes, contrary to my view, that the Claimants should have included the CBI Closure Report in their evidence for the First Hearing, and should have highlighted the CBI Closure Report in their submissions at the First Hearing, it seems to me that this is more accurately described as a failure by the Claimants to put evidence before me which was helpful to their case, as opposed to material which undermined their case.

128. Next, it is said that the Claimants failed to disclose the DB Reports, which they had at the time of the First Hearing. The problem here is that the DB Reports, in common with the reports and judgments in the UAE Proceedings, were not addressing the question of whether there were shadow directors of the Layer 1 Companies, let alone the Claimant Companies. All these documents were essentially only recording the registered directors and shareholders of the Layer 1 Companies. As such, I do not think that there was any failure of disclosure or lack of fair presentation in this respect.

129. The next point relates to the interview given by Ms Rashmi Oberoi. Ms Oberoi was employed within the Amicorp Group and was directly involved in certain transactions, which formed part of the progress of the Funds through the Layer Companies, which are referred to as the Blackstone Transactions. In this interview an email was put to Ms Oberoi which was sent on 8th January 2013. The email, sent by Kevin Wee of the Amicorp Group and copied to Ms Oberoi, identified the First Defendant as the ultimate beneficial owner of the Layer 1 Companies which received the Funds. The interview transcript contains a good deal of useful information about the transactions by which the Funds were moved through the Layer Companies, including the information that the derivatives contracts pursuant to which the transfers of the Funds were supposed to be taking place were in fact sham transactions, and that the route which the Funds took was predetermined, with the derivative contracts intended to function as the ostensible basis on which the Funds were transferred between the Layer Companies.

130. The Three Defendants complain that reference was not made to the part of Ms Oberoi's interview where she explained that the reference to the First Defendant as UBO (ultimate beneficial owner) was in fact a mistake on the part of Mr Wee. In fact however Mr Diss did make reference to this alleged error on the part of Mr Wee in paragraph 60 of Diss 1, where he deals with the email of 8th January 2013. I do not therefore think that there was any failure of disclosure or lack of fair presentation in this respect.

131. The next point relates to Al Noora. It is said that the presentation at the First Hearing was fundamentally deficient because it failed to draw attention to the lack of evidence establishing any ownership or control of this entity by any of the Three Defendants and to the considerable amount of evidence which undermined this case.

132. I can take this point shortly. Mr Diss dealt with the question of control of Al Noora in paragraph 117 of Diss 1. Mr Diss identified the former directors of Al Noora as the Fifth Defendant and Prasad Krishnan, and identified the sole registered owner of Al Noora as Prasad Krishnan. There are plenty of other documents which confirm the same directorships and ownership. All this however begs the question of whether the true owners of Al Noora, prior to its dissolution, were the Respondents. I do not see that the Claimants were obliged, at the First Hearing, to draw my attention to every piece of evidence which recorded or related the official position, in terms of the ownership and directorship of Al Noora. The relevant question at the First Hearing was whether the Claimants could establish a good arguable case that the true owners of Al Noora were the Respondents. That required a consideration of whether there was evidence to support such a case. I am doubtful that any useful purpose is served by the claim that there is plenty of evidence which confirms the official position, in terms of the ownership and directorship of Al Noora.

133. The final point relates to the Claimants' case that the Respondents were shadow directors of the Claimant Companies. It is said that this case was not fairly presented at the First Hearing. I can also take this point relatively shortly. Mr Diss dealt with the Claim based on breach of fiduciary duty (the shadow director claim) in paragraphs 256-261 of Diss 1. In this section of Diss 1 Mr Diss identified the registered directors of the Claimant Companies, and explained the Claimants' case that Daniel Skordis, an employee of Amicorp Group, and Amicorp UK were de facto and/or shadow directors of the Claimant Companies, with the exception of the Fourth Claimant, which is an LLP. At paragraph 258 Mr Diss said this:

> *"The joint liquidators infer that the above de jure, de facto and shadow directors operated the Claimant Companies pursuant to instructions that ultimately emanated from the Defendants, such that each of the Defendants were also shadow directors of the Claimant Companies."*

134. In relation to this final point, the Three Defendants make the point that when the Amicorp officers were interviewed by the Liquidators, they gave no evidence that Mr Price (the registered director of the Claimant Companies) or Mr Skordis received any instructions from the Respondents. This however seems to me to overlook the way the Claimants' case was presented at the First Hearing. In paragraphs 44 and 45 of Diss 1, Mr Diss explained, on the basis of the interview with Ms Oberoi, how the instructions for the chain of transactions by which the Funds made their way through the various Layers of companies came from the Fifth Defendant. The relevant question thus became whether the Fifth Defendant's instructions came from the Respondents. In this context, and in the section of Diss 1 where Mr Diss dealt with matters of full and frank disclosure, Mr Diss said this, at paragraph 380:

> *"It might be said by the Respondents that there is no direct evidence of their involvement, or of the involvement of certain of them, in the Alleged Winsome Fraud. In particular, I acknowledge that the instructions given to the Amicorp Group to launder the proceeds of the fraud were given by and/or on behalf of Mr Obidah, and that there is limited direct evidence of Mr Obidah's own instructions emanating from JRM, SM, VJM or SJM in*

(or, as regards the latter three, of their involvement in the Winsome Default itself)."

135. It seems to me that the Claimants fairly presented this part of their case at the First Hearing. It was made quite clear that this part of the Claimants' case depended upon demonstrating that the instructions for the flow of the Funds through the Layer Companies came ultimately from the Respondents, and that this was not a matter which the Claimants could demonstrate by direct evidence. At that point the question became whether the Claimants could demonstrate a good arguable case by indirect evidence.

136. In these circumstances it does not seem to me to be strictly necessary to deal with the remaining matters on which the Three Defendants rely in relation to their final point on the core facts. I will however deal with these remaining matters briefly.

137. The Three Defendants point out that the Claimant Companies, as part of the Amicorp Group, were bound by corporate governance principles or practices which, on the evidence, were complied with. I see the point, and I see how it can be relied on in support of the argument that everything was above board, in relation to the flow of the Funds through the Layer Companies. I am bound to say that I regard the point as one carrying little weight. According to the evidence of Ms Oberoi, in her interview, all of the transfers of the Funds were pre-ordained, and the derivative transactions pursuant to which they were supposed to be taking place were shams. On the assumption that corporate compliance was limited simply to the approving of the relevant payments of the Funds, it seems to me difficult to say that the absence of any compliance objection demonstrates that everything was above board. In any event, I cannot see that the Claimants were obliged to highlight this corporate compliance argument at the First Hearing.

138. The Three Defendants also point to the absence of any clear documentary evidence that the Respondents habitually gave directions or instructions to the Claimant Companies. Again, I see the point. Again, the point may be said to overlook that the Claimants' case is that the Respondents were giving their instructions through the Fifth Defendant. Again however I cannot see that there was any lack of fair presentation in this context. Mr Diss made the position clear in paragraph 380 of Diss 1.

139. Finally, in respect of the remaining matters, the Three Defendants make the point that no reference was made to the witness statement of Matthew Brown of SCB, dated 12th February 2021. In that witness statement Mr Brown had disclosed that SCB had acted as advising bank to the Second Claimant in June 2014. This demonstrated, so it was said, that the Second Claimant carried out ordinary legitimate commercial activities, with no sign of any direction from the Respondents in their alleged role as shadow directors. I have looked at the relevant paragraph of Mr Brown's witness statement (paragraph 31). Mr Brown made the witness statement in support of the application made by SCB for restoration of the First, Second, Fourth and Sixth Claimants. It is true that Mr Brown thought it right, in the witness statement, to draw to the attention of the court, on the basis of full and frank disclosure, that SCB had previously acted as advising bank to the Second Claimant. I am not however persuaded that it was a

matter which needed to be drawn directly to my attention at the First Hearing. I come back to the point that Mr Diss had identified very clearly in Diss 1 that the Claimants' case on shadow directorship was one based on inference, not direct evidence. I do not think that the relevant part of Mr Brown's evidence in his witness statement demonstrated that the required inference was simply one which could not be drawn on the facts of this case. Essentially, Mr Brown's evidence is one more factor in the competing arguments over whether the required inference of instruction and control of the Claimant Companies by the Respondents can be drawn.

140. In conclusion, and so far as the Discharge Application is based on failure of disclosure or failure of fair presentation of core facts, I do not think that there was any such failure. In relation to this part of the case of the Three Defendants it seems to me that the relevant facts and matters were either fairly put before me or, to the extent that they were not, were not such as to engage the Claimants' duties of disclosure and fair presentation at the First Hearing.

The Discharge Application – the explanation of the law

141. The Three Defendants' complaints in this context are, in summary, that there was not a fair presentation of the law in relation to the Claims. The specific areas of complaint are the claim in conspiracy, the proprietary claims, the claims under the 1986 Act, the claims under the 1978 Act, and the claims of breach of fiduciary duty (the alleged shadow directorships).

142. In this context I think that it is necessary to quote what is said in the skeleton argument of the Three Defendants for this hearing, at paragraphs 123 and 124:

> *"123.For the purposes of assessing this part of the case, the Court does not need to make a determination as to whether or not Ds 1, 2 and 4 are correct to say that the legal flaws below are such that either (i) there is no good arguable case on the claims, or (ii) that Ds would succeed at a trial in defeating the claims. The primary question, rather, is whether or not Cs ought to have disclosed the legal issues. Ds 1, 2 and 4's position is that each of the issues identified below are individually material; and cumulatively they are highly material. Had they been fairly presented, the Court would have appreciated that, as a result of the Grant Thornton Scheme, the claims advanced are legally misconceived and represent an attempt to force a square peg into a round hole.*
>
> *124. Although that is the primary question, it is submitted that the Court is also entitled to go further. The issues identified below are, as well as being difficulties which should have been identified to the Court, of such a fundamental and unanswerable nature that they undermine Cs' purported good arguable case altogether."*

143. I have quoted these paragraphs because it seemed to me that the cases of all four Respondents in relation to the issues of law became seriously entangled, as between the Discharge Application and the Continuation Application.

144. In the Continuation Application I have to decide whether the Claimants have a good arguable case on the Claims, or any of them. That exercise necessarily

requires some examination of the legal issues raised by the Claims, subject to the overriding consideration that difficult issues of law may be better left to trial, when they can be subject to final determination, in the light of the facts of the case as found at trial. In the present case, in relation to the Continuation Application, there is also the additional overriding consideration that the Respondents have made strike out applications which have yet to be heard. As I have explained in an earlier section of this judgment, my intention is to seek to avoid, so far as I can, deciding matters which are for the strike out application.

145. In the Discharge Application the inquiry is much more limited. The question is only whether the legal issues were fairly presented at the First Hearing.

146. In the skeleton arguments and, to an even greater extent in the oral submissions at this hearing, the limited nature of the inquiry in relation to the Discharge Application rapidly disappeared beneath a mass of complex and competing submissions on the law. In addition to this the Respondents tended to frame their submissions on the basis that the Claims suffered from legal difficulties which were of a *"fundamental and unanswerable nature"* (to quote from the Three Defendants' skeleton argument). In the result, I was confronted with a series of legal points from the Respondents which did not admit of the possibility that there might be scope for argument. This in turn was then used to bolster the argument that each such legal point had required full articulation from the Claimants at the First Hearing. I did not find this approach particularly helpful in deciding whether there had been fair presentation of the relevant legal issues at the First Hearing.

147. With the above preliminary points made and mindful of the fact that, in this part of this judgment, I am dealing with the Discharge Application and not the Continuation Application, I turn to the legal issues which are the subject of this part of the Three Defendants' case.

148. Starting with the claim in conspiracy, the position is as follows:
    (1) The Three Defendants say that the Claimants failed to draw attention to the point that it was a necessary corollary of the Claimants' case that the alleged intentions and acts of the Respondents, as alleged controlling minds of the Claimant Companies, must be attributed to the Claimant Companies. As such, the Claimant Companies must necessarily have been part of a conspiracy to cause loss to the Consortium Banks which involved the passing of the Funds through the Claimant Companies. This argument was however raised by Mr Diss, at paragraphs 349.5 and 379 of Diss 1. The same argument was addressed in paragraph 135 of the Claimants' First Skeleton Argument. The Claimants' argument was, and is that the knowledge of the directors of the Claimant Companies, including shadow directors, should not be attributed to the Claimant Companies for the purposes of the conspiracy claim. Whether this is a good argument or not is a separate question. The issue was fairly identified at the First Hearing.
    (2) The Three Defendants say that the Claimants failed to draw attention to the point that, by reason of the nature of an unlawful means conspiracy, a conspirator cannot be the victim of their own conspiracy. This seems to me to bound up with the issue I have just considered. Again, I do not think that there was any lack of fair presentation.

(3) The Three Defendants say that it should have been obvious that there would be an illegality defence to the conspiracy claim. I do not understand this point. Mr Diss devoted a lengthy section of Diss 1 (section J) to questions of full and frank disclosure and fair presentation. At paragraph 378 Mr Diss raised the question of illegality, albeit in the context of pointing out potential inconsistencies with the position taken by SCB on the applications to restore the relevant Claimant Companies to the register. In any event, the question of illegality seems to me to be bound up with the question of what knowledge should be attributed to the Claimant Companies for the purposes of the conspiracy claim, which was clearly raised at the First Hearing. I do not think that there was any lack of fair presentation.

(4) The Three Defendants say that the alleged conspiracy was one aimed at monies, namely the Funds, which were, on the Claimants' case, trust monies. As such, so the argument goes, any cause of action in conspiracy would be a trust asset, in respect of which the Claimants could only sue as trustees. The Claimants' pleaded case is however that they have a beneficial interest in the Funds, and sue in that capacity. This particular point seems to me to relate to the question which arises principally in relation to the proprietary claims; namely whether the Claimant Companies have any ability to pursue claims on the basis of a beneficial interest in the Funds. I will therefore deal with this point when I consider, next, the proprietary claims.

149. Turning to the proprietary claims the Three Defendants say that there are fundamental problems with the proprietary claims which were not drawn to my attention at the First Hearing. The essential point, which occupied much of the argument at this hearing, is that the Claimants make the proprietary claims on the basis of an equitable interest in the Funds which, so the Respondents contend for a variety of reasons, is unsustainable. At best, so it is said, the Claimant Companies can only claim to have been trustees of the Funds, when the Funds were in the hands of the Claimant Companies. On the Claimants' case, the beneficial interest in the Funds could only remain with the Consortium Banks. In this respect the Three Defendants point to the claim form issued by SCB in its action against the Third and Fifth Claimants, which resulted in the default judgment granted by Butcher J. In that claim form part of the pleaded case of SCB was that the Funds (referred to as the Misappropriated Money) were held on constructive trust for SCB by the two Claimant Companies.

150. The problem for all the Respondents in this context is that I was fully alive to this particular problem, or group of problems at the First Hearing. The proprietary claims were fully explained to me at the First Hearing, as were the mechanics of the Alleged Fraud in relation to the transfer of the Funds through the Layer companies. An obvious point which arose, and continues to arise in the context of the proprietary claims is how the Claimant Companies can make these claims when they were only conduits for the passing of the Funds through the various Layers of companies to their ultimate alleged destination in the hands of the Defendants.

151. This is illustrated by an exchange between myself and Mr Wilson at the First Hearing. The exchange commenced in the following terms:

"MR WILSON: Thank you very much.
So I am not proposing to go through each of the causes of action and explain their legal basis and so on again, because that is dealt with very fully in the skeleton. What I was going to focus on is some of the potential defences that might arise and how they may be overcome, and also any questions that your Lordship has about individual causes of action.
MR JUSTICE EDWIN JOHNSON: The principal question I have was this: as I understand it, it is said that the respondents, that is the −− treating the respondents as the four members of the Mehta family who, as I understand it −− Mr Obidah, as I understand it, is not a respondent to this application −−
MR WILSON: Yes, correct.
MR JUSTICE EDWIN JOHNSON: −− although he is an intended defendant.
MR WILSON: Correct.
MR JUSTICE EDWIN JOHNSON: It is said that the respondents were shadow directors −−
MR WILSON: Yes.
MR JUSTICE EDWIN JOHNSON: −− of these companies, using company" to include the LLP. So I follow how causes of action could be said to arise on the basis of the alleged conduct of the respondents as shadow directors. What I didn't really follow was why −− how proprietary claims would arise, because as I understand your case the claimant companies, that is the first six intended claimants, were effectively used as the Layer 2 conduits –
MR WILSON: Correct."

152. I then put my question to Mr Wilson, in the following terms (underlining also added):

"MR JUSTICE EDWIN JOHNSON: −− for money. So one wouldn't expect, would one, those claimant companies to have proprietary claims?
MR WILSON: Well, that certainly might be said against us. But the way −−
MR JUSTICE EDWIN JOHNSON: I am not sure −− I am sorry to cut across you, that doesn't knock out all your causes of action. I appreciate that. But when I read the judgment of His Honour Judge Hodge and His Honour Judge Pearce I found what I expected to see there, which was consideration of the claims of Standard Chartered Bank −−
MR WILSON: Yes, of course.
MR JUSTICE EDWIN JOHNSON: −− which is the entity which has effectively lost the money here.
MR WILSON: Yes.
MR JUSTICE EDWIN JOHNSON: <u>But if the claimant companies have just acted as conduits I was struggling to see how they would have proprietary claims or claims in knowing receipt, or anything like that.</u>"

153. The response to my question was as follows (underlining also added):

"MR WILSON: Yes, we have thought about that. It may be a somewhat technical point. The short answer is there is no conceptual difficulty with having different layers of trusts. <u>In other words, A could be a trustee for B, who is a trustee for C, and in short, that is how we would say this works.</u>

> *We would absolutely accept that anything we recover on a proprietary claim would have to be passed further up the chain on a proprietary basis to the true owners, legal owners.*
> *MR JUSTICE EDWIN JOHNSON: Yes.*
> *MR WILSON: But that doesn't mean that someone in the chain can make that claim. It is not a defence to say to the recipient, for example, of stolen monies to say, well, you, layer B, can't claim against me because you yourself would owe the money by way of a proprietary obligation to persons above you. So from the perspective as between ourselves and the recipients down the chain, we would seek to say that they have no beneficial entitlement to the monies that they held, but in respect of those above us we would accept that we don't have a beneficial entitlement over −− that we would merely be obtaining as essentially nominees, as bare trustees, and to pay those above, to those who really owned the money above us. And that is the intention."*

154. I claim no credit for raising the point that the Claimant Companies had, on the Claimants' case, only acted as conduits. It is an obvious potential problem with the proprietary claims, which emerges from the materials which were before me at the First Hearing. I raised the point and the Claimants' counsel (Mr Wilson) gave me essentially the same answer that the Claimants have maintained at this hearing. In particular, the underlined section of Mr Wilson's answer encapsulates the particular issue which has been the subject of much of the argument at this hearing. It is true that this issue and all the associated arguments in relation to the proprietary claims have been explored in far more detail in this hearing, but I cannot see that it was reasonable to expect the Claimants to go into matters in the same level of detail at the First Hearing. Whether the answer I was given by Mr Wilson was a good answer is a separate question. For present purposes, it seems to me that the legal issues in relation to the proprietary claims were fairly addressed at the First Hearing.

155. Turning to the claims under the 1986 Act, I can take them together, and very shortly. Looking at Diss 1 and the First Skeleton Argument, the issues which the Three Defendants say were not fairly presented to me were in fact all raised in Diss 1 or the First Skeleton Argument, or both. For a fuller explanation of the position, I simply make reference to the arguments of the Claimants on this topic, which I accept.

156. So far as the claims under the 1978 Act are concerned, they are not directly relevant at this stage because, as was conceded by the Claimants at the First Hearing, no right of contribution has yet arisen. In this context however the Three Defendants say that there was lack of fair presentation in two respects. First, it is said that the point should have been drawn to my attention that SCB London (which I am referring to in this judgment as SCB) could have no claim for any loss because it was one of the Bullion Banks, and was paid in full for what it had advanced pursuant to the PMFs. Second, it is said that the point should have been drawn to my attention that the Consortium Banks had, by their pursuit of the civil proceedings in India, made an election which precluded the pursuit of the proprietary claims against the Claimant Companies.

157. The first of the above points seems to me to be misconceived. In terms of understanding how the Claims are said to work, it is vital to maintain a separation between the Bullion Banks, who advanced bullion on credit pursuant to the PMFs, and the Consortium Banks, who effectively guaranteed the liabilities of Winsome and Forever Precious under the PMFs, by the SLBCs. It is true, as I understand the position, that the Bullion Banks were paid in full. The parties who suffered the losses were the Consortium Banks, who were obliged to pay out pursuant to the SBLCs and, as I understand the position, have not managed to recover more than a small proportion of those losses through the Indian civil proceedings.

158. At this point I should pause briefly to mention the question of what recovery the Consortium Banks have in fact achieved in the Indian civil proceedings. In Travers 2, at paragraph 183, Mr Travers quotes from the CBI Closure Report, which makes reference to *"hypothecated goods i.e. diamonds"* of which *"the lender banks"* were said to have obtained custody. The value of these goods is unclear from the relevant part of the CBI Closure Report. Various valuations are given, which are substantially different from each other. The highest of the valuations is said to amount to the equivalent of £15,655,487.56, but it is wholly unclear whether this valuation ever had any validity, given the much lower valuations which are also quoted in this part of the CBI Closure Report. The CBI Closure Report suggests that the differing valuations are the result of Winsome manipulating its books of accounts. In the Three Defendants' skeleton argument for this hearing it is baldly stated that the Consortium Banks have, to date, obtained recoveries from Winsome of *"approximately £15,443,152.98"*. The source of this figure is given as paragraphs 182-183 of Travers 2. As I have just noted, these paragraphs of Travers 2 contain no such unequivocal evidence. The true position, in terms of the recovery so far achieved by the Consortium Banks in the Indian civil proceedings, seems to be considerably more opaque.

159. Returning to the specific point that the Bullion Banks were paid in full, my understanding of the position is that SCB was one of the Bullion Banks, and SCB India (which does not have separate legal personality as a matter of the law of England and Wales) was one of the Consortium Banks. Given this position, I cannot see the relevance of the point that SCB, in its capacity as a Bullion Bank, was paid in full. There is still the loss suffered by SCB India, in its capacity as a Consortium Bank. As such, I cannot see that the Claimants were required, at the First Hearing, to draw my attention to the fact that SCB, in its capacity as a Bullion Bank, had been paid in full.

160. There is a separate point in this context, which occurred to me and which I mention for the sake of completeness. The separate point is the question of how the Consortium Banks, which did not advance the bullion which is said to have been the original subject matter of the misappropriation of the Funds, could themselves make proprietary claims in respect of the Funds, either against the Claimant Companies or against the Defendants. This question seems to me to be glossed over in the Particulars of Claim produced by the Claimants, and was barely raised in the argument at this hearing. Brief reference was made by Mr Higgo, in his oral submissions, to the Consortium Banks being subrogated to the rights of the Bullion Banks. In this context Mr Higgo drew my attention to the claim form, by which SCB and SCB India commenced the action in which they

obtained default judgment against the Third and Fifth Claimants. The claim form identified the rights of SCB India against the Third and Fifth Claimants as arising by virtue of subrogation to the rights of SCB against the Third and Fifth Claimants. Subrogation appears therefore to be the answer to this point. I raise the point because it does seem to me to be relevant to an analysis of the Claims. There was much argument at the hearing over whether either the Bullion Banks or the Consortium Banks were able to claim any beneficial interest in the Funds, in the context of the proprietary claims. In the context of both the Discharge Application and the Continuation Application however, the arguments did not focus on how the Consortium Banks might be able to stand in the shoes of the Bullion Banks. I do not find any lack of disclosure or fair presentation in this respect.

161. The point raised on the election argument is more difficult to deal with. The Claimants have argued, in this hearing, that they have good answers to the election argument, and that the claims which, so it is said, the Consortium Banks can make against the Claimant Companies are not barred by election. Whether this is right or not, it does not appear to be the case that the election argument was specifically drawn to my attention at the First Hearing, as a possible answer to the basis on which it was said that the Claimant Companies had themselves suffered a loss; namely that the Claimant Companies were themselves liable to the Consortium Banks. I can see some force in the point that the election argument was something which should have been drawn to my attention, as a likely issue in relation to the proprietary claims. I have however come to the conclusion, applying the authorities on the duty of disclosure to which I have made reference above, that the election argument was not sufficiently central to the viability of the Claims to require specific reference at the First Hearing. As I understand the election argument, it affects the question of whether the Consortium Banks could maintain proprietary claims in respect of the Funds against the Claimant Companies. If however such proprietary claims could not be made against the Claimant Companies, it does not necessarily follow that the Consortium Banks could have no other claims against the Claimant Companies. On this hypothesis the question which also arises is whether that would actually, as the Claimants argue, strengthen the proprietary claims of the Claimant Companies. Looking at the matter in the round, I do not think that the election argument qualifies as an issue relating to the Claims which required to be drawn specifically to my attention at the First Hearing.

162. In the remainder of this judgment, I will adopt Mr Higgo's expression, **"the Inbound Claims"**, to refer to the claims which the Consortium Banks are said (by the Claimants) to have against the Claimant Companies arising out of the Alleged Fraud.

163. Finally, in the context of the law, the Three Defendants say that the Claimants failed to give a fair presentation of the legal issues relating to the claim for breach of fiduciary duty (the shadow directorship claim). I can take this point very shortly. Looking at Diss 1 and the First Skeleton Argument, it seems to me that the law and the legal issues in this context were fairly explained to me. There was not the detail which is now before me, but I do not think that it was reasonable to expect to the Claimants to go into the level of detail which is now before the

court. This part of the Three Defendants' case seems to me to exemplify the confusion which I have already mentioned between what I have to decide on the Discharge Application and what I have to decide on the Continuation Application. In the context of the Discharge Application my attention was drawn, at the First Hearing, to the definition of a shadow director in Section 251 of the Companies Act 2006 and to the question of whether the Respondents, if they were shadow directors at the relevant time, would have owed fiduciary duties. The Claimants also explained their case on the facts, which necessarily was, and remains largely one of inference from the available evidence. I do not think that the Three Defendants demonstrate any lack of fair presentation by now arguing that, for various reasons, this part of the Claimants' case is fatally flawed.

164. In conclusion, and so far as the Discharge Application is based on non-disclosure and/or a lack of fair presentation of the law/legal issues, I do not think that there was any such non-disclosure or lack of fair presentation. In my judgment the relevant legal issues were fairly identified to me at the First Hearing. Those issues are now the subject of far more detailed argument at this hearing, with a corresponding expansion of the legal materials referred to me. It does not however follow that the legal issues were not adequately disclosed and fairly presented to me at the First Hearing.

The Discharge Application – the Indian civil and criminal proceedings

165. In relation to the Indian civil proceedings the central complaint of the Three Defendants is that there was no disclosure of these proceedings at all, or the recovery made in these proceedings.

166. It is not the case that there was no disclosure of the Indian civil proceedings. The Indian civil proceedings were referenced in paragraph 35 of Diss 1.

167. This reference was only a brief reference. It told me nothing of the detail of the Indian civil proceedings, so far as such detail was, or should have been known to the Claimants. I am however not persuaded that it was necessary for the Claimants to go further into the Indian civil proceedings. Taking in turn the specific points made by the Three Defendants, the position seems to me to be as follows:
    (1) It is said that the Indian civil proceedings were relevant to the jurisdictional challenges made by the Respondents. I have dealt with this point already. I was made aware at the First Hearing of the potential for a jurisdictional challenge. Beyond this, the detailed arguments on jurisdiction are for the December Hearing.
    (2) It is said that disclosure of the Indian civil proceedings would have caused the court to consider whether or not the Claims could properly be brought. I do not follow this point. I cannot see how it can be the case that pursuit of the civil proceedings in India precludes the bringing of the Claims. It may be that this is a reference to the memorandum of advice produced by Rajdeep Panda, a partner in the firm of Dua Associates, which is dated 8th September 2022. This memorandum explains, amongst other matters, that there is relevant Indian statutory law which provides that, on the commencement of certain civil proceedings in India (which are said to have been implemented) parties in the position of the Consortium Banks are

prohibited from pursuing other proceedings. I can see that this is a point which, if it is a good one, could affect the ability of the Consortium Banks to make claims against the Claimant Companies, but I do not think that the point was one which required to be drawn to my attention at the First Hearing.

(3) It is said that disclosure of the Indian civil proceedings would have caused the court to consider whether the Claims are undermined by a defence that the Consortium Banks have made an election, by their pursuit of civil proceedings in India, which precludes pursuit of any proprietary claims in respect of the Funds. This is the election argument which I have already considered in the previous section of this judgment. I confess that this particular point has given me pause for thought, but I repeat my conclusion from the previous section of this judgment; namely that I do not think that the election argument required specific reference at the First Hearing.

(4) It is said that disclosure of the Indian civil proceedings would have caused the court to consider the risk of double recovery, which in turn would have raised the further question of what amount of assets should have been restrained by the WFO, if the WFO was to be granted. I see this point, but it does not strike as a material matter which required specific reference at the First Hearing. I also note, in this context, that Mr Diss did make reference, at paragraph 6 of Diss 1, to some *"limited success"* which the Consortium Banks had had in relation to recovery in respect of the Defaults. The forum in which this limited success had been enjoyed was not identified, but it did raise the possibility of double recovery, albeit to a limited extent.

168. My conclusion is that there was no failure of disclosure or lack of fair presentation in relation to the Indian civil proceedings. This leaves the Indian criminal investigations and proceedings. I will take the complaints made in this context in turn. Before I do so, there is an important preliminary point which I need to make.

169. It appears to me, from the quantity of submissions and evidence devoted by the Three Defendants to this particular topic, that the Three Defendants are concerned that the Indian criminal proceedings have been used by the Claimants effectively to characterise them as fugitives from Indian criminal justice. To my mind, and if my impression is correct, this greatly overstates the importance of the Indian criminal proceedings, both at the First Hearing and at this hearing. The short point is that, despite what appear to have been extensive criminal investigations in India, none of the Respondents have been convicted of any criminal offence in India or, so far as I am aware, in any other jurisdiction. In these circumstances I did not and do not regard it as appropriate to make decisions on whether there is a good arguable case that the Respondents have been implicated in a substantial international fraud, or for that matter on the question of risk of dissipation on the basis of substantial reliance upon unresolved or (given that I have now been shown the CBI Closure Report) closed criminal proceedings in India. I believe that this is borne out by the terms of the First Judgment; see in particular paragraphs 22-23, 47, 50-51, and 71. As those paragraphs demonstrate, I only considered the criminal proceedings relevant as a factor to take into account in my decision on risk of dissipation and in my decision on the application for passport surrender orders. In my decision on good arguable case, the Indian

criminal proceedings did not feature at all. While I do consider aspects of the Indian criminal proceedings to have some relevance, in relation to the Continuation Application, I am currently concerned with the Discharge Application and with what happened at the First Hearing. I do not think that I would have approached matters in any materially different manner, at the First Hearing, if I had been provided, at the First Hearing, with all the additional information about the Indian criminal proceedings which is now before me.

170. I appreciate that the test for non-disclosure and/or lack of fair presentation in this case is based on what was material, as materiality is identified and explained in the authorities which I have cited above. The test is not based on what I did and did not consider to be important to my decisions at the First Hearing. That said, in terms of considering what was required of the Claimants at the First Hearing, so far as disclosure and fair presentation were concerned, and looking at the matter objectively, I am doubtful that criminal proceedings in India which resulted in no convictions against any of the Respondents were that important, or required the level of disclosure now contended for by the Three Defendants.

171. Returning to the complaints, the Three Defendants say that the Claimants gave the clear impression, at the First Hearing, that they had disclosed all criminal proceedings documents in their possession. The reference given is paragraph 155 of Diss 1, where Mr Diss said this:

> *"In May 2021, the IED disclosed to SCB/SCB India certain documents pertaining to the criminal proceedings in India, which are exhibited at [CD1/1327-1679] (the IED File). My statements in this section Cl derive from my review of the IED File."*

172. This paragraph seems to me to come nowhere near stating or implying that the Claimants had disclosed all the documents from the criminal proceedings which were in their possession. The criminal proceedings were dealt with relatively briefly in this section (section C1) of Diss 1, in paragraphs 155-160. Mr Diss identified his evidence as deriving from his review of the IED file. Whether Mr Diss should have gone further in what he did say is a separate question. I cannot see that any misleading impression was given. It is said that this alleged non-disclosure has been admitted in correspondence, but I do not read the relevant letter (a letter dated 23rd June 2022 from the Claimants' previous solicitors) as making any admission of a failure to disclose documents which should have been disclosed at the First Hearing.

173. The Three Defendants say that the non-disclosure which they say was admitted was material because it contained a witness statement of a Mr Abhishek Kumar which was said to be relevant to limitation, and also revealed the existence of the Indian civil proceedings. I have already dealt with the Indian civil proceedings. So far as the statement of Mr Kumar is concerned, limitation in relation to the claims of the Consortium Banks against the Claimant Companies was an issue which was clearly placed before me at the First Hearing. The matter was dealt with by Mr Diss, in paragraphs 373-374 of Diss 1, in the section of Diss 1 (section J3) where Mr Diss considered the argument that the claims of the Consortium Banks against the Claimant Companies should be rejected by the Liquidators. Mr Kumar's witness statement is another example of an item of evidence on a

particular issue which is not decisive either way. It is simply another factor to be considered in the argument over whether the claims of the Consortium Banks against the Claimant Companies are statute barred.

174. I should also add, in this context, that limitation, along with jurisdiction, was one of the matters on which I cut Mr Wilson short in the course of the First Hearing. For ease of reference I repeat the relevant part of the transcript:

> *"MR JUSTICE EDWIN JOHNSON: Right, you were going to tell me about possible defences. Again, I don't want to cut you short but I have read what you have to say about matters such as limitation, jurisdiction. Mr Diss quite fairly discusses some of the questions that are going through my mind in relation to sort of circuity of actions and the questions that I have just asked you. But I mean, as at presently advised, I can see that these might give rise to good defences to the claims or some of them, but they are not matters that are particularly troubling me at this stage.*
> *MR WILSON: I won't ––*
> *MR JUSTICE EDWIN JOHNSON: I have read what you have to say.*
> *MR WILSON: The important thing is to record that your Lordship has –– because all of these have to be put to your Lordship as a matter of fair presentation."*

175. As with the question of jurisdiction, I could see scope for all sorts of arguments concerning limitation, both in respect of the Claims and the Inbound Claims. What I could not see, at the First Hearing, was any point by reason of which it was clear that either the Claims or the Inbound Claims were statute barred. It was for this reason that I cut Mr Wilson short, at the First Hearing, on the question of limitation. As with jurisdiction, it seems to me that it would be unfair to the Claimants to criticise them for not going further into the question of limitation than they did go, both in the context of the Claims and the Inbound Claims. It will also be noted that Mr Wilson, whilst courteously accepting my steer on jurisdiction, limitation, and other questions which I had raised, pointed out that it was the duty of the Claimants to put these matters before me as a matter of fair presentation.

176. The Three Defendants say that there was a failure to present the CBI criminal proceedings fairly. It is said that the Claimants' presentation gave the impression that there was a single CBI investigation or set of investigations against the Respondents which was being pursued but not defended. It is said that the Claimants failed to disclose that of sixteen criminal complaints registered with CBI, only one resulted in any charges being issued against the Three Defendants. It is said that there was no disclosure of the CBI Closure Report, which seriously undermined the Claimants' case.

177. I have already dealt with the CBI Closure Report. For the reasons which I have already given, I do not think that there was any failure of disclosure in this respect. So far as the CBI investigations were concerned, I do not read the relevant section of Diss 1, at paragraphs 155-160, as giving the impression of a single CBI investigation or investigations against the Respondents, or of an investigation or investigations which were being pursued but not defended. So far as the point about sixteen criminal complaints is concerned, with only one complaint resulting

in charges, I do not see the relevance of this. So far as the Indian criminal proceedings were concerned, and so far as this mattered, the relevant point was that criminal charges were brought against the Three Defendants. The fact that these derived from one out of sixteen complaints, in circumstances where the Claimants were not relying upon the fact of multiple complaints, seems to me to be neither here nor there.

178. The Three Defendants say that there was a failure to present the IED criminal proceedings fairly. It is said that the Claimants wrongly suggested that the First Defendant had fled India to evade the criminal proceedings, and failed to draw my attention to the First Defendant's engagement with the proceedings, in which he explained his reasons for leaving India. It is also said that an unfair presentation of the FEO proceedings was given, by which it was falsely presented that the First Defendant had been declared an FEO. It is also said that there was a failure to disclose that SCB and the Winsome liquidator participated in and opposed the application of the IED for a confiscation order in the course of the FEO proceedings. It is also said that the Claimants failed to make reasonable inquiries in relation to the Indian criminal proceedings, which resulted in a failure to obtain a full set of the criminal files for the First Hearing.

179. So far as the declaration that the First Defendant was an FEO is concerned, I can see nothing in this complaint. It was made perfectly clear in Diss 1 that the IED had applied for a declaration that the First Defendant was an FEO; see paragraph 160. It was not stated that any judicial decision or order to this effect had been made. Mr Diss made it clear, at several points in Diss 1, that he was referring to the position of the IED, not a judgment or order of a court; see paragraphs 287 and 332.3. In the First Skeleton Argument it was made equally clear that it was the IED's position that the First Defendant was an FEO. There was no suggestion that the First Defendant had been declared an FEO by a court. It is also clear that I was under no illusion in this respect. At paragraphs 51 and 71 of the First Judgment I note that I made specific reference to it being *"the position of the IED"* that the First Defendant had absconded from India to avoid criminal prosecution. To state the obvious, the position of the IED is not the same as a judgment or order of a court. I do not see how any court could have been misled in this respect. I am bound to say that I find it surprising that the Three Defendants have chosen to make so much of this point. It is obviously misconceived.

180. So far as the First Defendant's leaving India was concerned, paragraph 158 of Diss 1 states that the First Defendant failed to appear in response to summonses from the Indian authorities. At the First Hearing the Claimants' case was that the IED considered that the First Defendant had fled India to evade criminal proceedings. It was obvious that this was the IED's view of the position, because the IED applied to the court for a declaration to that effect. I see nothing wrong with the Claimants putting this information before me at the First Hearing. In terms of the reasons given by the First Defendant for leaving India, I assume, from the evidence given in Travers 2 at paragraphs 157-166, that the Three Defendants are intending to refer to a letter which was written by the First Defendant to Mr Kumar of the IED, in response to an email from Mr Kumar informing the First Defendant that a summons had been sent to his residence in

India. The email was sent on 20th August 2015, and the letter in response from the First Defendant is dated 8th September 2015. The letter was exhibited to Diss 1, but I accept that this would not have been sufficient to satisfy the Claimants' duties of disclosure and fair presentation, if specific reference to the letter was required at the First Hearing. In terms of the First Defendant's explanation for leaving India, the letter says this:

> *"For personal and family reasons, I had, after the resignation/s, taken steps for acquiring citizenship of St. Kitts & Nevis and surrendered my Indian citizenship as required in law."*

181. The First Defendant did not identify the personal and family reasons referred to in this part of what was a relatively lengthy letter. I cannot see that the Claimants were required to make specific reference to this letter at the First Hearing. It did not contradict the information given about the Indian criminal proceedings in Diss 1, for what that information was worth.

182. Turning to the remaining complaints in this particular category I cannot see that the information concerning the participation of SCB and Winsome's liquidator in the IED proceedings needed to be disclosed at the First Hearing. Equally I cannot see that the Claimants were obliged to obtain a full set of the files for the Indian criminal proceedings, if and in so far as they had the means to do so. All of this material seems to me to be peripheral to the questions which I had to answer at the First Hearing. I also repeat the preliminary point which I have made in this section of this judgment. It does seem to me that points such as these points are the consequence of an overstatement of the importance of the Indian criminal proceedings to the applications which were before me at the First Hearing. It also seems to me that this part of the case of the Three Defendants operates on the false foundation that the Claimants put their case at the First Hearing on the basis that the First Defendant had been declared an FEO in the criminal proceedings. As I have already explained, the Claimants made no such claim at the First Hearing.

183. The Three Defendants also say that the Claimants omitted to make any reference, at the First Hearing, to the positive explanations given by the First Defendant as to his reasons for leaving India. I have already effectively dealt with this complaint, where I have considered the relevant paragraphs of Travers 2 and the letter of 8th September 2015. For the reasons I have already stated, I do not think that specific reference was required to this material.

184. In conclusion, and so far as the Discharge Application is based on non-disclosure and/or lack of fair presentation in relation to the Indian civil and/or criminal proceedings, I do not think that there was any such non-disclosure or lack of fair presentation. In my judgment the information which I was given at the First Hearing was sufficient to satisfy the Claimants' duties of disclosure and fair presentation in this context.

<u>The Discharge Application – procedural/other</u>

185. The Three Defendants say that the application for the WFO was presented as being of the utmost urgency when there was in fact substantial and publicly available information which showed that the Three Defendants had been resident

in London for some time. The relevant information is identified as news articles, going back to 2019, identifying the First Defendant as living in London, the First Defendant's profile on LinkedIn, which had identified the First Defendant as being based in London, and company records which identified the Third Defendant as being based in London, for the purposes of his role as a company director, since 2020.

186. The circumstances in which the Claimants came to discover the whereabouts of the Respondents are explained in section E of Diss 1. I do not think that it is reasonable to say that the Claimants should have discovered where the Respondents were located any earlier than they did make this discovery. Since the Defaults, all four of the Respondents have relinquished their Indian citizenship and taken up citizenship in St Kitts and Nevis. It is important to note that the Claimants were only put on to the trail of inquiry which resulted in the Third Defendant's address being found by an unsolicited email sent by a journalist, which provided the names of a number of UK registered companies said to be connected to the Mehta family; see Diss 1 at paragraph 225.

187. I am also bound to say that I found this part of the Three Defendants' case somewhat unattractive. It is clear, from the obtaining of evidence of the Dubai Presentation by Jones Day, who were then acting as solicitors for all four Respondents, that the Respondents were monitoring what was going on, in relation to the pursuit of claims arising out of the Alleged Fraud by the Liquidators/SCB. The Respondents were not of course under any obligation to make contact either with the Liquidators or with SCB, still less to volunteer their whereabouts. Nevertheless if, as appears to be the case, the Respondents had decided to monitor events from a distance, I do not find it an attractive submission that the Claimants should have been more efficient in their sleuthing than the investigations described by Mr Diss in Diss 1.

188. Accordingly, I do not think that there was any lack of fair presentation in this respect at the First Hearing.

189. The Three Defendants next rely on the failure of the Claimants to draw my attention to the Kroll 2014 Report at the First Hearing. The Kroll 2014 Report was included in the exhibit to Diss 1 at the First Hearing, but was not mentioned in Diss 1 or referred to in the written or oral submissions for the First Hearing. The Kroll 2013 Report and EY Report were identified in paragraph 38 of Diss 1, but not the Kroll 2014 Report. Mr Diss then went on, in paragraph 40 of Diss 1, to identify various items of information which came out of the Kroll 2013 Report. In oral submissions considerable reference was also made to the Kroll 2013 Report, but not to the Kroll 2014 Report. The Three Defendants also say that there were limitations to, and problems with the content of the Kroll 2013 Report, even if the Kroll 2013 Report is considered in isolation, which should have been drawn to my attention.

190. I do not think that there was a lack of fair presentation of the Kroll 2013 Report. The limitations of that report are apparent on its face. So far as the content of the Kroll 2013 Report was concerned, I do not think that the matters relied upon by

the Three Defendants were matters which required to be drawn specifically to my attention.

191. In relation to the failure to make reference to the Kroll 2014 Report, I think that the position is rather different. As I have already noted, the Kroll 2014 Report is materially different to the Kroll 2013 Report. In particular, the bulk of the relevant content in the Kroll 2013 Report had been excised from the Kroll 2014 Report. Given the Claimants' reliance upon the Kroll 2013 Report, the obvious questions which arose were (i) what the relationship was between the Kroll 2013 Report and the Kroll 2014 Report, (ii) why the Kroll 2014 Report was so different, and (iii) what implications this had for the Kroll 2013 Report. In their submissions at this hearing the Claimants approached this part of the case on the basis that there had been no necessity to address the Kroll 2014 Report, because there was nothing in that report which undermined the Kroll 2013 Report. This seems to me however very much to beg the question of what relationship existed between the two reports. The questions which I have just set out seem to me to have been material questions, which should have been addressed at the First Hearing. In my judgment, it was not open to the Claimants to rely on the Kroll 2013 Report, at the First Hearing, in support of their case for the WFO, without drawing my attention to the fact that there was a later report from the same company which appeared to be a substantially reduced and excised version of the Kroll 2013 Report. Had my attention been drawn to this point, I would have been able to investigate with the Claimants the question of the relationship between the two reports.

192. I therefore conclude that the Claimants did fail in their duties of disclosure and fair presentation at the First Hearing, by their failure specifically to draw my attention to the Kroll 2014 Report. I will consider the implications of this failure at the conclusion of my consideration of the grounds upon which the Discharge Application is advanced.

193. Finally, in relation to this category of complaints, the Three Defendants say that there was a failure to present to the court at the First Hearing the true nature of the joint venture pursuant to which the Claims are being pursued, and the associated conflicts of interest which this creates, in terms of the position of the Liquidators. Essentially, the complaint is that there was a failure to identify that the Claims were being made pursuant to the Grant Thornton Scheme.

194. I do not accept this argument. At the First Hearing I was made aware, from the evidence and the submissions, that the Claims were unusual, in the sense that they were brought not by the Consortium Banks, but by the Claimant Companies which, together with Carte, comprised the Layer 2 Companies. As such, the Claimant Companies can be described, and were described by me at the First Hearing, as having been no more than *"conduits"* for the Funds. It is this basic feature of the Claims which gives rise to many of the arguments which arise over the viability of the Claims. I was however well aware of this basic feature of the Claims at the First Hearing.

195. Turning to the position of the Liquidators, Mr Diss identified the potential for a conflict of interest in Diss 1, at paragraph 376, where Mr Diss disclosed the

financial interest of Grant Thornton in the outcome of the Claims. The potential for a conflict of interest in the position of the Liquidators, in circumstances where the Claimants could only show a loss on the basis of a liability to the Consortium Banks, was obvious at the First Hearing.

196. Beyond this, I do not see that it was necessary for the Claimants to spell out, at the First Hearing, all the mechanics of the Grant Thornton Scheme. The Grant Thornton Scheme is relevant because it explains how the Claims have come to be made. It was quite obvious, at the First Hearing, that the Claims had come about as a result of a series of pre-planned steps. The arguments of the Respondents which are said to be based upon the Grant Thornton Scheme seem to me to be based upon the fact that the Claims have come about because the Liquidators, using funding provided by a Grant Thornton associated commercial litigation funder, have taken control of the Claimant Companies and are pursuing the claims arising out of the Alleged Fraud which the Claimant Companies are said to have against the Defendants. Whether this course of action constitutes an abuse of process is a separate question. For the purposes of the Discharge Application, it seems to me that the Claimants fairly disclosed the essential facts which are relied upon in support of the Respondents' arguments that all this is an abuse of process and/or gives rise to a conflict of interest in the position of the Liquidators.

197. In this context I note that, in paragraph 7 of the First Judgment, I described the applications which were before me in the following terms:

> *"Quoting more or less directly from the skeleton argument filed in support of the Application, the Application and the underlying proceedings which are to be issued are said to be part of a global asset tracing and recovery exercise, arising out of what is described as a very substantial and sophisticated suspected international fraud perpetrated by the Mehta family. The alleged fraud is said to have involved the misappropriation of approximately US$1 billion obtained by way of precious metal/bullion loan facilities, which are said to have been laundered through layers of entities or companies in various jurisdictions, including the Claimant Companies, for the ultimate benefit of the Mehta family and their businesses."*

198. This seems to me to bring out the point that I was under no illusions as to how the Claims had come about. In this context, I also note that Judge Hodge, in paragraph 22 of his judgment on the applications to restore the relevant Claimant Companies to the register, set out in some detail the proposed steps which would put the Liquidators into a position to pursue the Claims in the name of the Claimant Companies. The pre-planned nature of those steps does not appear to have been a matter of concern to Judge Hodge, and I do not think that it was something which was required to be spelt out or highlighted at the First Hearing.

199. In summary, I do not think that there was any non-disclosure or lack of fair presentation either in relation to the Grant Thornton Scheme or in relation to the potential for a conflict of interest in the position of the Liquidators.

<u>The Discharge Application – non-disclosure of the Grant Thornton Scheme</u>

200. I now turn to the case of the Third Defendant in relation to the Discharge Application. I can take the case relatively shortly, because the matters raised have

already substantially been dealt with in my discussion of the case of the Three Defendants in support of the Discharge Application. In taking this course it will be understood that I intend no disrespect to the Third Defendant's extensive and careful submissions or, in particular, to the well-organised and forceful oral submissions of Mr Higgo. All of the arguments of the Third Defendant have been taken into account.

201. In relation to the Grant Thornton Scheme the Third Defendant makes two broad complaints. The first is that there were numerous outright failures of disclosure in relation to the Grant Thornton Scheme. The second is that there were major and overarching failures of fair presentation. The essential point which is made here is that the Claims are an artificial contrivance of Grant Thornton, and should have been explained to the court as such at the First Hearing.

202. I do not accept any of these arguments, essentially for the reasons which I have already set out in my discussion of this part of the Three Defendants' case. As I have already explained, the Grant Thornton Scheme and, in particular, the Dubai Presentation explain how the Claims have come to be made. I do not see that the history of the Grant Thornton Scheme was something which needed to be laid out before me at the First Hearing. It was clear to me, as it was clear to Judge Hodge at the hearing of the application to restore the relevant Claimant Companies to the register, that the Claims had come about as a result of a series of pre-planned steps. The potential for a conflict of interest in the position of the Liquidators was also identified. I was also fully alive to what I myself described as an *"oddity"* in respect of the Claims; namely that they were brought by companies which could be said to have been no more than conduits of the Funds. I do not accept that I was misled as to the reality of the situation.

203. In this context I should also mention a point which seems to me to affect much of this part of the Third Defendant's case. The point I have in mind is a tendency to present issues of law on the footing that what the Third Defendant says is correct, and beyond argument. By way of example, it is asserted that the Claimants failed to draw proper attention to (i) *"the fact"* that the Consortium Banks had affirmed their contracts (I assume this is a reference to their contractual relationship with Winsome and Forever Precious) and thus would not realistically be able to assert proprietary claims, (ii) *"the fact"* that claims by the Consortium Banks against the Defendants would be governed by Indian law, while the Claimant Companies were purporting to make the Claims under English law, and (iii) *"the fact"* that claims by the Consortium Banks against the Defendants would be time barred, while the liquidations of the Claimant Companies were relied upon as entailing that the Inbound Claims were not time barred. These *"facts"* were however the subject of dispute by the Claimants in their arguments at this hearing. As with the case of the Three Defendants I did not find it particularly helpful to be confronted with arguments that there had been non-disclosure or lack of fair presentation on the footing that the Claimants had failed to draw my attention to matters of law which were presented by the Third Defendant as being beyond argument, in circumstances where it was apparent that there was, at the least, reasonable scope for argument.

204. In summary, I reject the argument that the Claimants failed in their duties of disclosure and fair presentation in relation to the Grant Thornton Scheme.

205. In saying this I should make it clear that I am making no decision on the argument of the Third Defendant that the Claims are an abuse of the English insolvency process. It seems to me, consistent with the position Mr Higgo took in his oral submissions, that this particular argument will be for the hearing of the Third Defendant's strike out applications and/or, if the argument is said to go to jurisdiction, for the December Hearing.

The Discharge Application - the viability or merits of the causes of action relied upon

206. The Third Defendant's first complaint in this context relates to the proprietary claims. The Third Defendant says that these proprietary claims are untenable because, on the Claimants' own case, the Claimant Companies never had any beneficial title to the Funds, with the consequence that the Claimant Companies could not have equitable proprietary claims of their own. Nor was the case of the Claimant Companies put on the basis that they were bringing the proprietary claims as trustees for anyone else nor, on the facts of the case, could the proprietary claims have been put on that basis. In this context the Third Defendant also points to what he says was the affirmation by the Consortium Banks of their contracts with Winsome and Forever Precious, which is said to have ruled out any proprietary claims by the Consortium Banks in respect of the Funds. The Third Defendant also points out that, because title to the bullion did pass from the Bullion Banks to Winsome and Forever Precious, a fraud involving the proceeds of sale of that bullion could not have created a situation where the beneficial interest in the proceeds of the fraud (assumed to be the Funds for the purposes of considering the proprietary claims) ever vested in the Consortium Banks.

207. Mr Higgo devoted much of his oral submissions to the question of whether the proprietary claims were viable claims, but in terms of non-disclosure and lack of fair presentation, the position is as I have discussed it in relation to the case of the Three Defendants in this respect. The question of whether the Claimant Companies could assert a beneficial interest in the Funds was raised at the First Hearing, and Mr Wilson stated the case of the Claimants. As I have already observed, the case stated by Mr Wilson may have been a good case or a bad case, but the relevant issue was squarely before me at the First Hearing. I do not see merit in the argument that the Claimants should have provided further explanation of this issue, and I see even less merit in the argument that there was a lack of fair presentation on the basis that it should have been explained to me at the First Hearing that the proprietary claims were hopeless. At its highest, the duty of the Claimants was to identify the issue, not to make concessions on the issue.

208. The affirmation/election and title arguments are not quite so easy to deal with, because they were not matters which, so far as I can see, were drawn specifically to my attention as potential arguments against the proprietary claims. I have however already discussed the election point in relation to the case of the Three Defendants. My conclusion remains that, looking at the matter in the round, I do not think that the election argument and the title argument qualify as issues

relating to the Claims which were required specifically to be drawn to my attention at the First Hearing.

209. In the context of the proprietary claims the Third Defendant also says that there was a limitation issue which was not explained to me at the First Hearing. If the Funds had been held by the Claimant Companies on trust for the Consortium Banks, and if the causes of action arising out of their onward payment were also held on trust for the Consortium Banks, the knowledge of the Consortium Banks would have fallen to be attributed to the Claimant Companies, affecting the limitation position. As I have already noted however, the question of limitation was raised before me at the First Hearing, and I cut short Mr Wilson's submissions on both jurisdiction and limitation, for the reasons which I have explained earlier in this judgment. Looking at all the circumstances, I do not think that the Claimants can be criticised for not going into all the potential arguments which might arise in relation to limitation. It seems to me that there was sufficient identification of limitation as a potential issue at the First Hearing.

210. The Third Defendant then makes a series of complaints alleging non-disclosure and lack of fair presentation in relation to the non-proprietary claims. I deal briefly with each of these complaints:
    (1) It is said that the Claimants failed to disclose that the Liquidators had caused the Claimant Companies to charge their causes of action to the Grant Thornton associated litigation funder and that, insofar as the causes of action were held on trust, this was in breach of trust. It is not clear to me where this argument goes, in terms of the viability of the Claims, if it is assumed that the argument is a sound one. I do not think however that the Claimants were required to draw this argument to my attention at the First Hearing. It seems to lie well beyond the issues which the Claimants could reasonably have been expected to raise at the First Hearing.
    (2) It is said that the Claimants failed to disclose that SCB and SCB India had abandoned any proprietary claims which they might have had against or through the Third and Fifth Claimants by their entry of default judgment against these Claimants. As is a common feature of the Third Defendant's arguments, in relation to non-disclosure and lack of fair presentation in respect of the viability of the Claims, it is asserted as a fact that the relevant proprietary claims have been abandoned by SCB and SCB India. Inevitably, this is disputed by the Claimants. I do not think that the Claimants were required to draw this particular argument specifically to my attention at the First Hearing.
    (3) It is said that the Claimants failed to disclose that the submission of proofs of debt by SCB/SCB India in respect of the Claimant Companies, combined with their participation in the liquidation of the Claimant Companies as unsecured creditors, means that they have abandoned any proprietary claims they might have against or through the Claimant Companies. The argument is disputed by the Claimants. Again, I do not think that the Claimants were required to draw this argument specifically to my attention at the First Hearing.
    (4) It is said that the Claimants failed to disclose that where the Claimant Companies were mere conduits for the Funds, the Claimants would not be able to satisfy the intention requirement for the claim in unlawful means

conspiracy. The First Skeleton Argument identified intention on the part of the defendant to injure the claimant as one of the required elements of an unlawful means conspiracy. It is not clear to me why the Claimant Companies acting as mere conduits for the Funds would necessarily preclude the required intention being established. To repeat a point which I have already made, but which bears repeating, it is difficult to deal with a point of this kind, when the point proceeds on the basis that if the Claimant Companies were mere conduits, the Claimants *"would not be able to satisfy the intention requirement for the unlawful means conspiracy claim"* (underlining also added). If, as is plainly the case in this instance, the point is one which is subject to argument both ways, it is difficult to assess the position, in terms of disclosure and fair presentation, when the respondent's case proceeds on the basis that the relevant point is beyond argument. The Claimants say that this particular issue was addressed in the Claimants' explanation, at the First Hearing, of the issues in relation to the claim under Section 423 of the 1986 Act. I am not sure that I have understood this argument of the Third Defendant in this context any better than I have understood the Claimants' argument in response. In any event, I was given, at the First Hearing, a clear explanation of what was required to prove an unlawful means conspiracy. I do not think that the Claimants were required to draw my attention to this particular argument of Third Defendant, if and in so far as it was not drawn to my attention in the context of the claim under Section 423.

(5) It is said that the Claimants failed to disclose material case law in relation to the claims under the 1986 Act. I do not accept this. The claims under the 1986 Act were fairly explained at me at the First Hearing. Detailed argument on the case law was not for the First Hearing, and the Claimants were not obliged, at the First Hearing, to anticipate all the contents of the Respondents' skeleton arguments at this hearing.

(6) It is said that the Claimants failed to disclose that the claim made under the 1978 Act could not support the WFO because there was only a claim for a declaration, which was pointless, and the court was not provided with any proper analysis of whether the requirements under the 1978 Act were satisfied. I do not think that there was any non-disclosure in this respect. It was made perfectly clear at the First Hearing that the claim under the 1978 Act was for a declaration only at that stage, which rendered the claim under the 1978 Act of peripheral importance. The requirements for a contribution claim under the 1978 Act were adequately explained in Diss 1 and in the submissions for the First Hearing.

211. Finally, the Third Defendant contends that there was a failure of fair presentation of the significance of the issue as to whether the Claims were governed by English law. I do not accept this. The law applicable to the Claims was discussed at some length in the First Skeleton Argument, at paragraphs 88-91. I cannot see that the Claimants were required to address *"the significance of the issue to the court"*. It was not the duty of the Claimants to predict how much significance this issue might or might not turn out to have in the future. The Claimants identified this particular issue to me, and set out their case on this issue. I do not see that any more was required.

212. In conclusion, I reject the argument that the Claimants failed in their duties of disclosure and fair presentation in relation to the viability and merits of the Claims.

The Discharge Application - the alleged weakness of the evidential case against the Third Defendant in particular

213. The heading of this part of the Third Defendant's case assumes that the evidential case against the Third Defendant is weak. Whether that is correct is a matter I will consider when I come to consider the Continuation Application, and the question of whether there is a good arguable case against the Third Defendant, in the light of all the arguments and evidence which are now before the court.

214. Beyond the above point, this part of the Third Defendant's case seems to me to amount to an extended complaint that the Claimants failed to put the Third Defendant's case on the evidence, as it is now constituted, to the court at the First Hearing. As such, this part of the Third Defendant's case seems to me to be misconceived. It seems to me that the Claimants' case on the evidence was perfectly fairly presented to me at the First Hearing.

215. In particular, in Diss 1 at section D, Mr Diss dealt with *"the evidence that is currently available to the joint liquidators showing the involvement of each of the Respondents in the Alleged Winsome Fraud."*. Each of the Respondents was then dealt with separately. The Third Defendant was dealt with in D3. In that section Mr Diss summarised, perfectly fairly as it seems to me, what evidence there was which was said to demonstrate the Third Defendant's involvement in the Alleged Fraud. In relation to each of the Claims the Claimants' counsel explained to me what was required to establish the relevant Claim. It then became a matter for me to decide whether there was a good arguable case, in relation to all or any of the Claims.

216. It is telling that, in relation to this part of his case and subject to one exception to which I shall come, the Third Defendant's case depends upon arguments that the Claimants should have highlighted or emphasized particular points on the evidence. This seems to me to go beyond what is required by the duties of disclosure and fair presentation. The duty is to ensure that evidence and issues material to the relevant application are brought fairly to the attention of the court. The duty does not require the applicant to second guess how, or with what stresses and emphases the relevant respondent will put their case on the return date.

217. The exception to what I have said in my previous paragraph is the one allegation of non-disclosure in this part of the Third Defendant's case. It is said that the Claimants should have disclosed and explained to the court the transcript of the interviews with Daniel Skordis and Michael Price, former employees of the Amicorp Group. This is said to be important because Mr Skordis made no mention of the Third Defendant in his interview, and Mr Price, when asked about the Third Defendant, responded that he had never heard of him.

218. I have already dealt with the equivalent point made by the Three Defendants in their case in support of the Discharge Application. For ease of reference I repeat what I have previously said. It seems to me that this allegation of non-disclosure

overlooks the way in which the Claimants' case was presented at the First Hearing. In paragraphs 44 and 45 of Diss 1, Mr Diss explains, on the basis of the interview with Ms Oberoi, how the instructions for the chain of transactions by which the Funds made their way through the various Layers of companies came from the Fifth Defendant. The relevant question thus became whether the Fifth Defendant's instructions came from the Respondents. In this context, and in the section of Diss 1 where Mr Diss dealt with matters of full and frank disclosure, Mr Diss said this, at paragraph 380:

> *"It might be said by the Respondents that there is no direct evidence of their involvement, or of the involvement of certain of them, in the Alleged Winsome Fraud. In particular, I acknowledge that the instructions given to the Amicorp Group to launder the proceeds of the fraud were given by and/or on behalf of Mr Obidah, and that there is limited direct evidence of Mr Obidah's own instructions emanating from JRM, SM, VJM or SJM in (or, as regards the latter three, of their involvement in the Winsome Default itself)."*

219. The Claimants' case, whether or not it is a good case, is that the Respondents controlled the Claimant Companies through the Fifth Defendant, not by direct instruction to employees of Amicorp Group. In these circumstances it seems to me that the absence of mention of, or knowledge of the Third Defendant by Mr Skordis and Mr Price in their interviews is of limited evidential value. I do not think that it was a matter which required specific mention at the First Hearing.

220. In conclusion, I reject the argument that the Claimants failed in their duties of disclosure and fair presentation in relation to the alleged weakness of the evidential case against the Third Defendant.

<u>The Discharge Application - the viability or merits of the allegations that the Claimant Companies have suffered loss and are insolvent</u>

221. This category of complaints is concerned with the Inbound Claims. The Third Defendant makes two initial points. The first point is that the Claims which seek to recover actual loss suffered by the Claimant Companies depend upon the validity of the Inbound Claims. If, for some reason, the Inbound Claims are invalid, the Claimant Companies have not suffered any loss. The second point is that if the Inbound Claims are invalid for any reason, the Claimant Companies were not and are not insolvent, in the absence of a liability to the Consortium Banks, which in turn means that they should not have been restored to the register and should not be in liquidation.

222. On the basis of these initial points the Third Defendant contends that the Claimants failed fairly to present the following matters at the First Hearing:
    (1) The position of the Liquidators was conflicted. Accordingly it was not for the Liquidators to assess the merits of the Inbound Claims. This was a task for the court, for the purposes of which the court needed to be provided with the necessary factual and legal analysis of the Inbound Claims. Save in respect of limitation and governing law, the Claimants made no attempt to provide that analysis, or to draw the attention of the court to the problems with the Inbound Claims. Even in respect of limitation and governing law, the analysis was flawed and inadequate.

(2) The Claimants failed to explain the true position to the court in terms of the actual making of the Inbound Claims. Proofs of debt had only been received from SCB and, in spite of letters to the other Consortium Banks inviting proofs of debt, no other proofs had been received or could reasonably be expected. As such, and in terms of the quantum of assets subject to any freezing order which was granted, that quantum should have been limited to the loss alleged by SCB; being around $70 million, not some $932 million.

223. So far as the second group of matters referred to in my previous paragraph are concerned, I have dealt with these arguments in my consideration of the Three Defendants' case in this respect. I refer to the relevant previous section of this judgment in which I have considered the complaints of the Three Defendants under their heading of *"non-participation of the Indian Banks; quantum /maximum WFO sum"*. For the reasons which I have set out previously in this judgment I do not think that there was any lack of fair presentation in relation to the second group of matters relied upon by the Third Defendant.

224. So far as the first group of matters was concerned, the merits of the Inbound Claims were considered by Mr Diss, in section J3 of Diss 1 (paragraphs 370-376). In my view this was sufficient to put me on notice of the need to consider the merits of the Inbound Claims. These merits had been considered by Judge Hodge (in the application to restore the relevant Claimant Companies to the register) and by Judge Pearce (in the application to restore Docklands, the Layer 3 company, to the register). Both judges delivered reasoned judgments on the applications, after receiving written and oral submissions. In section J3 of Diss 1, the only specific objections to the Inbound Claims which were dealt with by Mr Diss were limitation and governing law. Given however that the merits of the Inbound Claims had been explored and adjudicated upon in the restoration hearings, I do not think that it was unreasonable or misleading for Mr Diss to incorporate by reference the conclusions of Judge Hodge and Judge Pearce in the restoration hearings, by way of further commentary on the merits of the Inbound Claims. I do not think that the Claimants were required, at the First Hearing, to identify and highlight all the points now taken by the Third Defendant. Still less were the Claimants required to join the Third Defendant in characterising these points as rendering the Inbound Claims as hopeless as the Third Defendant claims them to be.

225. In conclusion, I reject the argument that the Claimants failed in their duties of disclosure and fair presentation in relation to the Claimants' position on loss or in relation to the merits of the Inbound Claims.

<u>The Discharge Application - conclusions</u>

226. I have concluded that there was one failure of disclosure or fair presentation on the part of the Claimants at the First Hearing; namely the failure to draw my attention to the Kroll 2014 Report. I do not think that it much matters whether this is characterised as a failure of disclosure or a failure of fair presentation.

227. The question which now arises is whether this one failure justifies the discharge of the WFO.

228. Useful guidance on this question can be found in the judgment of Christopher Clarke J (as he then was) in *OJSC Ank Yugraneft v Sibir Energy plc* [2008] EWHC 2614 (Ch) [2010] BCC 475. At [102]-[103] the judge approved the following principles as guiding the exercise of court's discretion in relation to cases of non-disclosure in without notice applications:

> *"102. Mr Boyle drew my attention, with appropriate diffidence, to a decision of his own, sitting as a deputy judge of the Chancery Division, as to the approach to be taken by the court in the event that there is culpable non-disclosure. In The Arena Corp Ltd v Schroeder [2003] EWHC 1089 (Ch) at [213], he summarised the main principles which should guide the court in the exercise of its discretion as follows:*
>
> > *"(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.*
> >
> > *(2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.*
> >
> > *(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.*
> >
> > *(4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.*
> >
> > *(5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.*
> >
> > *(6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.*
> >
> > *(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.*
> >
> > *(8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.*
> >
> > *(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."*
>
> *103. I regard that as a helpful review of the applicable principles, subject to the overriding principle, reflected in proposition (9), that the question of whether, in the absence of full and fair disclosure, an order should be set aside and, if so, whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the court's discretion, to which (as Mr Boyle observes at [180]) the facts (if they be such) that the non-disclosure was innocent and that an injunction or other order could*

properly have been granted if the relevant facts had been disclosed, are relevant. In exercising that discretion the court, like Janus, looks both backwards and forwards."

229. The judge then went on to provide the following further guidance, at [104]-[106]:

"104. The court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose in consequence. The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders.

105. As to the future, the court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.

106. As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

230. Applying this guidance in the present case, I cannot see that the general rule, as it was characterised by Christopher Clarke J at [102(1)], should apply in the present case. It seems to me that the sole failure of non-disclosure/lack of fair presentation which occurred does not justify the discharge of the WFO, or any other part of the May 2022 Order. I say this for the following reasons.

231. First, the failure of disclosure or fair presentation which I have found was an isolated one. This is not a case where there was a whole series of failures of disclosure or fair presentation, let alone anything matching the scale of the myriad of allegations of non-disclosure and lack of fair presentation put forward by the Respondents. A mass of arrows have been fired by the Respondents, but only one has hit the target.

232. Second, I do not think that the failure was a deliberate or reckless one. The Claimants went to considerable trouble, in Diss 1 and in their written and oral

submissions at the First Hearing, to address their duties of disclosure and fair presentation. There was no pattern of misconduct on the part of the Claimants, at the First Hearing, in relation to non-disclosure and lack of fair presentation. The failure was isolated. The Claimants' skeleton argument for this hearing refers to the Claimants having made a *"decision"* not to make reference to the Kroll 2014 Report at the First Hearing; see paragraph 391 of the skeleton argument. I accept that this was a decision made in good faith, and was not deliberate in the sense of seeking to conceal from me the existence of the Kroll 2014 Report. Putting these factors together I do not think that I can or should infer that the failure was deliberate (in the sense in which I have just identified deliberate) or reckless. My finding is that the failure was the result of what was, in my judgment, the wrong judgment call on whether reference to the Kroll 2014 Report was required at the First Hearing. In that sense I regard the failure as inadvertent and innocent.

233. Third, if the Kroll 2014 Report had been drawn to my attention at the First Hearing, I do not think that it would have caused me to refuse the WFO or any of the other relief granted by the May 2022 Order. In saying this I do not know what answer I would have received if, at the First Hearing, I had asked counsel to explain the differences between the Kroll 2013 Report and the Kroll 2014 Report. In these circumstances it seems to me that I should approach the question of what I would have done, armed with knowledge of the Kroll 2014 Report at the First Hearing, on a worst case scenario. By this I mean that I approach this question on the basis that I would have been told that the Kroll 2014 Report overrode the 2013 Report, and effectively withdrew everything in the Kroll 2013 Report which did not appear in the Kroll 2014 Report. I should say, in this context, that in the course of oral submissions Mr McQuater contended that the Kroll 2014 Report did not have this effect, but rather stood independently to the Kroll 2013 Report and, even on its own terms, contained conclusions which were supportive of the Claims. It seems to me however that I should assume the worst case scenario I have just outlined. On this hypothesis I do not think that I would have changed any of the decisions which I made in the First Judgment. In my judgment there was plenty of other evidence available at the First Hearing to support the conclusions which I reached in the First Judgment. In terms of reports, there was also the EY Report, the conclusions of which were supportive of the Claimants' case. In addition to this, and as may be apparent from the First Judgment, the Kroll 2013 Report was not central to my reasoning in the First Judgment.

234. Fourth, I do not think that excusing this particular failure will undermine the principles that this particular jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure. I do think that discharging the WFO on the basis of the sole failure I have found would work an injustice to the Claimants and would carry the principles which support the duties of full disclosure and fair presentation too far.

235. For the above reasons I do not think that the failure to draw the 2014 Kroll Report to my attention at the First Hearing justifies the discharge of the WFO.

236. Accordingly, my overall conclusion is that the Discharge Application falls to be dismissed. Specifically, what fall to be dismissed are the relevant application of the Three Defendants for discharge of the WFO and that part of the application of the Third Defendant which seeks discharge of the WFO.

237. As was explained in *OJSC*, the exercise which I have just conducted is a backward facing exercise, considering what should happen in relation to the WFO. The outcome of the Discharge Application is also however capable of affecting the Continuation Application, which seeks renewal of the WFO to trial. In this context it seems to me that the Discharge Application does not affect the Continuation Application. The Discharge Application has failed. This is not necessarily the end of the matter, because I have found that there was a failure of disclosure or fair presentation in relation to the Kroll 2014 Report. It seems to me however that it would be wrong for this failure to affect the Continuation Application. For the reasons which I have set out, I have been willing to excuse this failure in the context of the Discharge Application. It seems to me, as a matter of logic, that those reasons also justify excusing this failure in the context of the Continuation Application. I therefore approach the Continuation Application on the basis that it is unaffected by the Discharge Application and is unaffected by the failure of disclosure or fair presentation which I have found.

238. On this basis, I turn to the Continuation Application.

The Continuation Application – the issues

239. I did not understand the test for the grant of a worldwide freezing order to be in dispute between the parties. The applicant, in this case the Claimants, must establish (i) a good arguable case on the merits, (ii) a real risk of dissipation of assets, (iii) that there is reason to believe that the respondent, in this case the Respondents, have assets either within or without the jurisdiction, and (iv) that it is, in all the circumstances, just and convenient to grant the order.

240. The question of whether there are assets held by the Respondents is not in dispute. Each of the Respondents has made an affidavit in response to that part of the May 2022 Order in which the Respondents were required to make disclosure of their assets. The assets disclosed, as between the Respondents, are said to amount to a combined value of around $146 million.

241. There was little argument on the question of risk of dissipation. There was some limited argument from the Third Defendant on this question, but I did not understand any of the Respondents seriously to dispute this part of the test, if a good arguable case was established. Nor was there much, if any argument addressed directly to the just and convenient part of the test.

242. The real argument between the parties, in relation to the Continuation Application, concentrated on the first part of the test. Is there a good arguable case on the merits? In oral submissions Mr Wilson suggested to me that it was only the Third Defendant who was contesting the question of good arguable case, as opposed to non-disclosure. For the avoidance of any doubt I did not understand this to be the position of the Three Defendants. While the skeleton argument of the Three Defendants concentrated heavily on the question of non-disclosure and

lack of fair presentation, it was quite clear that the Three Defendants were, by their submissions, contesting both the issue of non-disclosure/lack of fair presentation and the issue of good arguable case. It is also of course the case that a substantial part of the submissions on the issue of good arguable case made by the Third Defendant applied equally to the Three Defendants. I therefore approach the issue of good arguable case on the basis that it was fully joined between the Claimants, on the one side, and each of the Respondents, on the other side. In terms of the issue of good arguable case, the rival position of the parties are easily summarised. The Claimants say that there is a good arguable case. The Respondents say that there is not. Given that this was the real issue between the parties, in relation to the Continuation Application, it is this question of whether the Claimants have a good arguable case in respect of the Claims, or any of them, on which I must concentrate.

The Continuation Application – is there a good arguable case?

(i) Good arguable case? – the test

243. The basic test of what constitutes a good arguable case can be found in *The Niedersachsen* [1983] 2 Lloyd's Rep 600, at 605, where Mustill J (as he then was) said this:

> *"In these circumstances, I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent. chance of success."*

244. A further explanation of what constitutes a good arguable case was given by Longmore LJ in *Kazakhstan Kagazy*, at [25]:

> *"25. The second comment relates to the judge's decision that KK had 'a much better argument' than Mr Arip. I would, with respect, say that this sets the hurdle a little too high. It was established in Pertamina [1978] QB 644 that the appropriate test to be met by a claimant seeking a freezing injunction was that of 'good arguable case'. We were not referred to any authority which has changed that test. 'Much the better of the argument' has recently emerged as a test on applications for service out of the jurisdiction. But I see no reason why that test should apply to freezing injunctions where ex hypothesi (or subject to any jurisdictional challenge) the defendant is properly before the court. But the fact that the judge may have applied a slightly higher hurdle than he need have done does not in any way affect his conclusions."*

245. I was also referred to *Metropolitan Housing Trust Limited v Taylor* [2015] EWHC 2897 (Ch), which contains further useful guidance on the nature of the good arguable case test. In particular, two points emerge from Warren J's discussion, in that case, of the test of good arguable case. The first point is that the test of good arguable case is more demanding than the test of a serious question to be tried, which is the usual first stage test on an application for an interim injunction. In the case of a freezing order a stronger case must be shown than would justify relief of a less stringent kind. The second point is that, in contrast to a summary judgment application, where the court is at liberty to consider not only the evidence before it, but also evidence which may reasonably be expected to be

available at trial, the court is confined, on an application for a freezing order, to considering the evidence before it when the application is heard.

246. In terms of the extent to which a court should try to decide whether either side has the better of the argument, it is useful to consider what Nugee J (as he then was) said in *Holyoake v Candy* [2016] EWHC 970 (Ch) [2016] 3 WLR 357. In that case the application was for what was described as a notification order, rather than a freezing order, but the judge decided that the same test of good arguable case should be applied. In considering the content of the test of good arguable case, the argument of the defendants was that the claimants were required to demonstrate that they had much the better of the argument on the material available. The judge's response to this argument was a carefully nuanced one, at [13].

> *"13 That leads Mr McQuater to submit that the same applies in an application for a freezing injunction. He has the support of Roth J in The Complete Retreats Liquidating Trust v Logue [2010] EWHC 1864 (Ch) at [72] ("there seems no basis not to apply that observation in the context of a freezing order"), followed by Mr Andrew Sutcliffe QC in OJSC TNK-BP Holding v Beppler & Jacobson Ltd [2012] EWHC 3286 (Ch) at [83]. He also referred to what Toulson J said in Petroleum Investment Co Ltd v Kantupan Holdings Co Ltd [2002] 1 All ER (Comm) 124, but in fact that judgment is more nuanced than Mr McQuater's reliance on it might suggest. It is true that, at para 37, Toulson J said that the same concept as applied by Waller LJ in the Canada Trust Co case is "equally helpful when considering whether to make a freezing order", but, at para 38, he continued as follows:*
>
> > *"The limitations inherent in the interlocutory process may vary from case to case according to the subject matter. Where the subject matter involves questions of fact on which the evidence is incomplete and contradictory, it may be very difficult for a court to form even a preliminary view as to the parties' rival strengths. Reading Waller LJ's judgment as a whole, I do not understand him to be suggesting that in such a case the court has to be satisfied that the evidence on the claimant's side is stronger than the evidence on the defendant's side in order for the claimant to make out a good arguable case, for that would be in effect to apply the civil standard of proof, which he emphasised is not applicable at the interlocutory stage. However, where the claim depends on the construction of a contractual document on which there is detailed argument at the inter partes stage, a court may well reach a conclusion that one side has a much better argument than the other, although it must remember that the ultimate decision would belong to the court of trial or arbitral tribunal."*
>
> *That I must confess chimes with my own instinctive inclination. When the question is one of construction or one of law, and there is argument on the point, the court may well be able to take a view as to who appears, albeit at the interlocutory stage, to have the better, or indeed much the better, of the argument. Where however the merits of the case turn on questions of fact it would impose a severe limitation on the court's ability to grant effective relief if it had to be satisfied that the claimant had much the better*

of the factual case. That is very often impossible to say at the interlocutory stage where the issues are pure factual issues, particularly if the question turns on the credibility of witnesses."

247. The judge was referred to the reservations expressed in the *Kazakhstan* case as to whether the test was one which required the applicant to demonstrate that it had much the better of the argument. The judge's conclusion on this point, at [15], was in the following terms:

"15 In these circumstances I hold that I am free to follow Toulson J in the Petroleum Investment Co Ltd case [2002] 1 All ER (Comm) 124 and the indications in the Court of Appeal in the Kazakhstan Kagazy plc case [2014] 1 CLC 451 and that I am not obliged to follow Roth J and Mr Sutcliffe in applying the "much the better of the argument" test to the question whether a good arguable case has been shown on the merits. In the case of purely factual questions, I consider that it is sufficient for the claimant to meet the traditional test laid down by Mustill J in the Ninemia Maritime Corpn case that the claimant needs to show a good arguable case in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success. Indeed I would regard it as wholly invidious in a case of this type, which is likely to turn largely on the credibility of the principals on each side and their recollections of oral conversations, for a judge faced with nothing other than the pleaded cases and assertions that each side's pleaded case represents the truth, to have to form a view as to where the better of the argument on such issues might lie, let alone where much the better of the argument might lie. I find myself completely incapable, and indeed I would regard it as wholly inappropriate, to judge such matters on the basis of what are at this stage hotly disputed allegations on each side."

248. Mr Higgo, for the Third Defendant, contended that the law, in respect of the test of good arguable case, had recently moved on. He referred me to the decision of the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 [2019] 1 W.L.R. 3514, which was a case concerned with a jurisdictional challenge. At [57]-[80] Green LJ (with whose judgment Davis and Asplin LJJ agreed) set out his analysis of the position, by reference in particular to the two decisions of the Supreme Court in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 [2018] 1 WLR 192 and *Goldman Sachs International v Novo Banco SA (Banco de Portugal intervening)* [2018] UKSC 34 [2018] 1 WLR 3683. Green LJ commenced his analysis, at [57]-[59], with the following observations, both in respect of the way in which the judge at first instance had gone wrong in applying the test of good arguable case, and in respect of how a test which had been intended to be straightforward had become befuddled with glosses:

"57 The judge applied a two-part test. First, he asked whether the claimant had demonstrated a good arguable case. In this he seemed to equate the test with that for summary judgment. Second, he went on to ask whether the claimant had "the better and more plausible" argument. In the light of case law as it has evolved it was common ground between the parties before us

that this two-part approach was incorrect and that in this respect the judge erred.

58 Over many years the courts have expressed the view that the determination of disputes about jurisdiction should be determined with despatch. They are a (frequently costly and time consuming) distraction from the main event, which is the determination of the substance of the dispute and not where its adjudication takes place. The courts have however struggled to find a formulation which encapsulates in readily workable language what the test is and how it should be applied.

59 A test intended to be straightforward has become befuddled by "glosses", glosses upon glosses, "explications" and "reformulations". In relation to the standard of proof, that which the claimant must establish to found jurisdiction, the courts have referred to a test of "good arguable case", who has the "better argument" or "much" the better argument, the need for "reliable" evidence, the need for "clear and precise" evidence, "credible" evidence, evidence of real "substance", "plausible" evidence, and "sufficient" evidence. Disputes abound over whether the test is a single test or comprised of two parts and, in any event, as to whether the test is absolutist and/or relative."

249. At [62] Green LJ then summarised what had been said by Lord Sumption in *Brownlie*, as follows:

"62 I turn now to Brownlie [2018] 1 WLR 192. There Lord Sumption JSC (with whom Lord Hughes JSC agreed) explained that the starting point was the judgment of Waller LJ in Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547 ("Canada Trust") who had construed the "good arguable case" test as including within it the relative concept of who had "much" the "better argument". Lord Sumption JSC stated, at para 7:

> *"An attempt to clarify the practical implications of these principles was made by the Court of Appeal in Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547. Waller LJ, delivering the leading judgment observed at p 555: " "Good arguable case" reflects... that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i e of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction." When the case reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke of Thorndon and Lord Hope of Craighead agreed, but without full argument: [2002] 1 AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: [Bols Distilleries BV (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd [2007] 1 WLR 12, para 28, and Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804, para 71]. In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in Vitkovice Horni A Hotni Tezirstvo v Korner [1951] AC 869. What is meant is (i) that the*

claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

250. After referring to certain problems which had been said to exist in relation to the test reformulated by Lord Sumption, Green LJ then made reference to *Goldman Sachs*, in the following terms, at [70]-[71]:

> *"70 An opportunity to clarify the test arose in Goldman Sachs [2018] 1 WLR 3683. Lord Sumption JSC (giving a judgment with which Lord Hodge, Lady Black, Lord Lloyd-Jones JJSC and Lord Mance agreed), essentially repeated his formulation in the Brownlie case. To the extent that there was disagreement in Brownlie about the reformulation of the Canada Trust test the Supreme Court has now spoken with a single voice and the route forward lies with that reformulation. In para 9 Lord Sumption JSC stated:*
>
> > *"This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192, para 7, this court reformulated the effect of that test as follows: "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it." It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."*
>
> *71 Any dispute about whether the three-limbed test is obiter has accordingly now vanished. The test has been endorsed by a unanimous Supreme Court. But the court has not gone further than in Brownlie and has not expressly explained how the test works in practice nor as to what is meant by "plausible" nor how it relates to "good arguable case" nor how the various limbs interact with the relative test in Canada Trust."*

251. Green LJ then set out, at [72]-[80], how the reformulated three-limbed test in *Goldman Sachs* should be applied. It is not necessary to set out this part of the

judgment, but it contains invaluable guidance on the application of the three-limbed test.

252. *Kaefer* was concerned with a jurisdictional challenge. The decisions of the Supreme Court in *Brownlie* and *Goldman Sachs* were also concerned with jurisdiction. In *Lakatamia Shipping Co Ltd v Morimoto* [2019] EWCA Civ 2203 Haddon-Cave LJ, in the context of a dispute over whether a risk of dissipation had been shown in an application for a freezing order, addressed the good arguable case test and the analysis in *Kaefer* in the following terms, at [37]-[38]:

> *"37. There has been much discussion of the meaning of the 'good arguable case' test since Mustill J's well-known observation in Ninemia Maritime Corp v Trave Schiffahrts GmbH (The Niedersachsen) [1983] 2 Ll Rep 600 at 605, namely that a good arguable case is a case 'which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'.*
>
> *38. The 'good arguable case' test was the subject of a comprehensive review by the Court of Appeal recently in Kaefer v AMS [2019] EWCA Civ 10; [2019] 1 CLC 143 in the context of jurisdictional gateways. Green LJ (who gave the leading judgment, Davis and Asplin LJJ concurring) conducted a magisterial analysis of the recent authorities, including Brownlie v Four Seasons Holdings [2017] UKSC 80; [2018] 2 CLC 121 and Goldman Sachs International v Novo Banco SA [2018] UKSC 34; [2018] 2 CLC 174. He observed at [59] that a test intended to be straightforward 'had become befuddled by "glosses", glosses upon glosses, "explications" and reformulations".' The central concept at the heart of the test was 'a plausible evidential basis' (see paras [73]–[80])."*

253. This extract from Haddon-Cave LJ's judgment in *Lakatamia* was cited by the Chancellor (Sir Julian Flaux C) in *PJSC Bank Finance and Credit v Zhevago* [2021] EWHC 2522 (Ch), which was another case in which the issue arose as to whether a good arguable case had been shown that there was a real risk of dissipation of assets. At [171] the Chancellor made it clear that, in considering the arguability of the claimants' case, he had applied the test as referred to by Haddon-Cave LJ in *Lakatamia*.

254. The Claimants contended that it was wrong to conflate the test for good arguable case in the freezing injunction context with the test for good arguable case in the jurisdictional context. So far as good arguable case is concerned however, both Haddon-Cave LJ in *Lakatamia* and the Chancellor in *PJSC* do not appear to draw this distinction, at least in the context of showing a good arguable case in relation to the question of risk of dissipation. It may be that any such distinction derives from the fact that the test of good arguable case in the context of jurisdiction had come to engage the concept of having much the better of the argument; whereas now the use of the word *"much"* in this formulation of the test of good arguable case has been discredited in the jurisdictional context.

255. Where does all this leave the test of good arguable case? I accept the submission of Mr Higgo that the law has moved on from a simple 50% test of good arguable case. It seems to me that, in applying the test of good arguable case, I should take

account of the analysis of Green LJ in *Kaefer*, and the three limbed test as reformulated by Lord Sumption in *Goldman Sachs*.

256. It is not entirely clear to me, in my reading of the above test, how it applies to issues of law or construction, which may or may not depend upon the resolution of factual issues. It seems to me that the question of what view can be taken on issues of law or construction at this interim stage depends upon the nature of the issue. The overriding point is that it is for the Claimants to show that they have a good arguable case, both in respect of issues of fact and issues of law which arise in relation to the Claims. I add that, in relation to issues of law, it seems to me that it is not open to me simply to dismiss an issue of law as too difficult to deal with at this stage. I must, at the least, take a view on whether the Claimants have demonstrated a good arguable case on the issue.

257. It also seems clear that it is perfectly proper for a court, in applying the test of good arguable case, to adopt the yardstick of considering whether one party or the other has the better of the argument, both on a particular issue and on the relevant case as a whole. Returning to *Kaefer*, this is explained by Davis LJ, in his short judgment agreeing with the judgment of Green LJ, in the following terms at [119] (underlining added):

> *"119 I am in something of a fog as to the difference between an "explication" and a "gloss". But whatever the niceties of language involved, it is sufficiently clear that the ultimate test is one of good arguable case. For that purpose, however, a court may perfectly properly apply the yardstick of "having the better of the argument" (the additional word "much" can now safely be taken as consigned to the outer darkness). That, overall, confers, in my opinion, a desirable degree of flexibility in the evaluation of the court: desirable, just because the standard is, for the purposes of the evidential analysis in each case, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either)."*

258. Finally, I should mention two cases which are relevant to the question of whether a good arguable case has been made where fraud is alleged.

259. The first case is *Finurba Corporate Finance Ltd v Sipp SA* [2011] EWCA Civ 465. At [31] Lord Neuberger MR (as he then was) said this:

> *"31. I respectfully agree with, and endorse, what was stated in the interlocutory written observations (cited in para 5 above) of Rix LJ, who has unrivalled experience in this field. In the light of the increasing sophistication of fraudsters, and their extensive use of companies and other entities to mask their activities and assets, the courts should adopt a robust and realistic approach to technical points of substantive law or evidence raised against the grant of a freezing order, in cases where there is good reason to believe that fraud has occurred. Having said that, a freezing order can have very serious adverse effect often over a long period, sometimes even financial ruin, for the individual or company against whom it is made. The court should be satisfied not only that there is a properly arguable case against the defendant and a risk of dissipation or hiding of assets, but also as to the proportionality of the order, and it should be*

especially concerned about making the order when there seems to be little real value in the cross-undertaking."

260. It will be noted that the Master of the Rolls referred to the observations of Rix LJ. It is worth quoting the account, at [5], of what Rix LJ had said on the application for permission to appeal:

"5. On considering Finurba's application for permission to appeal on the papers, Rix LJ ordered that the application be heard by a full court, with the appeal to follow immediately if permission was given. He was concerned that the Judge may have taken too strict or technical a view of the legal position "where a fraudster has used companies which he controls to hide or moneylaunder the proceeds of fraud", particularly given that "the various companies are all parties to the action"."

261. The second case is *Cunningham v Ellis* [2018] EWHC 3188 (Comm), which contains the following timely warning, in cases where it is said that fraudulent activity can be inferred from primary facts which do not directly establish fraud or dishonesty. The case was concerned with an application made by the defendants to strike out the claimant's claims or alternatively for summary judgment. The claims made in the relevant action included claims in unlawful conspiracy and fraudulent misrepresentation. In considering whether the pleading of these claims was adequate Teare J set out, at [42], the following summary of what the law requires, in terms of pleading fraud and dishonesty:

"42. Before considering the adequacy of the pleading it is necessary to note what the law requires in this regard. In Portland Stone Firms Limited and others v Barclays Bank and others [2018] EWHC 2341 (QB) Stuart-Smith J. referred, at paragraph 26, to "many other decisions of high authority which establish that pleadings of fraud should be subjected to close scrutiny and that it is not possible to infer dishonesty from facts that are equally consistent with honesty". Also, at paragraph 29, he said that where an allegation of fraud or deceit rests upon the drawing of inferences about a defendant's state of mind from other facts "those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends." Stuart-Smith J. endorsed and adopted the following passage from the judgment of Flaux J. in JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at paragraph 20:

> *"The Claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence."*

262. With all of the above guidance in mind, I turn to the question of whether, at this hearing, the Claimants have discharged the burden of establishing a good arguable case in respect of the Claims.

263. In this context it is convenient to spell out this additional point. The question of whether the Claimants have established a good arguable case in relation to each of the Claims is a question which I have already considered, in the First Judgment. It seems to me however that I should not give any weight to my previous conclusions in the First Judgment. I have now had the benefit of argument and

evidence from all the parties, and it seems to me that I should approach this question afresh, as if I was coming to it for the first time. I also note in passing, lest it be lost sight of, that in the First Judgment, at paragraph 47, I expressed the view that the Claimants had (underlining added);

> *"demonstrated a good arguable case that the Respondents, and Mr Obidah for that matter, were involved in a very substantial fraud which, it is well arguable, gives rise to <u>some at least, if not all of the claims</u> which are intended to be pursued by the two sets of proceedings which I have mentioned."*

264. I did not find it necessary to deal with the Claims individually at the First Hearing, but the above extract from the First Judgment does demonstrate that it would be a mistake to assume that, at the First Hearing, I regarded the test of good arguable case as having been met in relation to all of the Claims.

(ii) <u>Good arguable case? - the Alleged Fraud</u>

265. I am satisfied that there is a good arguable case that the Alleged Fraud, by which I mean a major international fraud, took place. Indeed on the evidence, and while it is not necessary to go this far, I think that there is more than a good arguable case that the Alleged Fraud took place. The evidence that a major international fraud took place seems to be strong.

266. The conclusions set out in my previous paragraph have been formed on the basis of all the evidence which has been put before me on this hearing, which is voluminous. I highlight however the following matters.

267. In the present case the evidence is that Winsome and Forever Precious drew down, pursuant to the PMFs, around a billion dollars worth of bullion from the Bullion Banks. In relation to these drawdowns there appears to have been a near total default in terms of payment. The explanation for this, given by the Fifth Defendant and by the First Defendant was that the UAE distributor companies had taken delivery of gold and jewellery from Winsome and Forever Precious, sold the gold and jewellery to their customers, and then lost what they owed to Winsome and Forever Precious in FX and commodities transactions. This explanation takes some swallowing. If the dealings between Winsome and Forever Precious and the UAE distributor companies, whatever they were, were legitimate business dealings, it seems extraordinary that a loss on this scale could occur in this way.

268. Next, and by reference to the Chart, one finds four of the UAE distributor companies transferring the Funds, in the total amount of just over one billion dollars, to the Layer 2 Companies. From there, and by reference to the Chart one finds the Funds passing through the different Layers of Companies before reaching the ultimate or penultimate destinations, as they are currently known, which I have summarised earlier in this judgment. Around half of the Funds, that is to say around half a billion dollars turn out to have travelled in a circle, making their way back to the four Layer 1 UAE distributor companies.

269. The obvious questions are where the Funds came from and why they were passing in this way. In relation to the first question it is difficult to find any answer other

than that the Funds, by whatever means and by whatever route, represented the proceeds or product of the bullion drawn down from the Bullion Banks. I agree with the Claimants that it does not matter, for present purposes, quite how this came about. In relation to the second question, the explanation is said to be that the transfers of the Funds were all made in connection with FX and commodities derivatives contracts.

270. The Liquidators have interviewed a number of individuals in connection with the liquidation of the Claimant Companies. One of those interviewed was Ms Rashmi Oberoi, who was a sales officer employed by Amicorp Singapore Pte Limited and was one of the individuals within the Amicorp Group who was directly involved in the movement of the Funds through the Layer companies. The transcript of the interview is exhibited to Diss 1, and a summary of the interview can be found in paragraph 44 of Diss 1. The evidence of Ms Oberoi is that the transfers were all pre-structured, pursuant to an explanation from the Fifth Defendant that he wanted to re-structure his balance sheet, so that certain assets were taken off the books. Ms Oberoi accepted that the derivatives contracts were shams, and that no derivatives transactions actually took place.

271. If the evidence of Ms Oberoi is to be believed, the movement of the Funds through the Layers of companies did not take place pursuant to legitimate transactions. If one puts this together with the passage of the Funds starting with the Layer 1 companies, which are said to have defaulted on their obligations pay for the gold and jewellery they are said to have been sold by Winsome and Forever Precious, the inference that this constituted a substantial international fraud is a strong one.

272. The position might well be different if there was evidence from the Respondents, or any of them, which explained how all of this was legitimate. There is however (as yet) no evidence from the Respondents which, in my judgment, provides a satisfactory explanation for the movement of the Funds. It is a notable feature of this hearing that direct evidence from the Respondents is very limited. There is ample evidence from their solicitors, but very little from the Respondents themselves. Each of the Respondents has made two affidavits in response, respectively, to the May 2022 Order and the order of Judge Hodge of 11th July 2022. The May 2022 Order required the Respondents to make disclosure of their assets. The later order of Judge Hodge required the Respondents, in brief summary, to set out their knowledge of the whereabouts and holders of the Funds paid to Al Noora, Marengo, and certain other companies which I have referred to, as recipients of parts of the Funds, earlier in this judgment. Beyond that, none of the Three Defendants has made a witness statement. The Third Defendant has made two witness statements, but the evidence in those witness statements is directed to demonstrating the Third Defendant's case that he had no involvement in the subject matter of the Alleged Fraud. The Third Defendant deals specifically with Marengo in paragraphs 62-73 of his witness statement. As I understand the Third Defendant's evidence, Marengo was set up to be used for forex and commodities trading activities with BSI Bank in Singapore. The trades were all arranged by Apurva Kothari, a private banker with BSI Bank, with the Third Defendant's role said to have been confined to providing his signature after the trades had been executed.

273. The net result of all this is that I have no direct evidence from any of the Respondents which provides a plausible explanation of how the movement of the Funds was legitimate. I find this unsatisfactory. I have set out, in an earlier section of this judgment, how the parts of the Funds were received by companies in respect of which various of the Respondents were directors or shareholders or both. While I appreciate that the relevant events took place some ten years ago, I find it surprising that none of the Respondents can offer any direct evidence to support the legitimacy of the movement of the Funds through the Layers of companies. Equally, I find it surprising that the First Defendant, in particular, has not taken the opportunity to set out his own account of how the Defaults came about. I assume that the First Defendant would confirm the explanation which he previously gave or, if his explanation derived from what he had been told by the Fifth Defendant, explain whether he still stood by that explanation or had some other explanation to offer. In this context I do not think that it is satisfactory to say, as the Respondents' legal representatives have said, that the Respondents will be making their full responses to the Claims in due course, after the jurisdictional challenges have been dealt with. The Claimants have alleged and continue to allege that the Respondents were all implicated in a major international fraud. In terms of the legitimacy or otherwise of the transactions by which that fraud is alleged to have been achieved, I cannot see any obstacle to the Respondents addressing this question directly, in the evidence for this hearing.

274. One matter which has given me considerable pause for thought, in considering the question of whether there is a good arguable case that the Alleged Fraud occurred, is the existence of the UAE Proceedings. I very much take the points made by Mr Hunter in oral submissions (i) that there are hundreds of documents which evidence what appear to have been legitimate sales between Winsome and Forever Precious and the UAE distributor companies, and (ii) that these dealings were the subject of expert and judicial scrutiny in the UAE Proceedings. I am however, at this stage, only considering the question of good arguable case. In this context it seems to me that there are two points to be made on the importance of the UAE Proceedings to what I have to consider. The first point is that I have accepted the Claimants' argument that, for present purposes, it is not necessary to pin down precisely how the Alleged Fraud originated. The relevant point in this context is that the Funds made their way through the Layer companies, in circumstances for which, at least as matters stand, there does not appear to be a legitimate explanation. The second point is that, as I understand the position, the UAE Proceedings were not concerned with allegations of fraud. Indeed, this point is borne out by the expert report in the UAE Proceedings to which I was referred by Mr Hunter. The expert report does not appear to be concerned with the question of whether a fraud occurred. This must necessarily affect the weight to be given to the UAE Proceedings as evidence that the Alleged Fraud did not occur.

275. I accept that the matter is one of inference, as opposed to direct evidence, but I regard the primary facts, as they are currently known, as establishing a strong case, and certainly a good arguable case that the Alleged Fraud took place.

(iii) <u>Good arguable case? - the position of each of the Respondents</u>

276. I turn now to the question of whether there is a good arguable case that the Respondents were, each, implicated or involved in the Alleged Fraud. For this purpose, and as at the First Hearing, it is both necessary and important to take the Respondents individually. Again, my conclusions have been formed on the basis of all the evidence which has been put before me on this hearing, which is voluminous. In this discussion I highlight only some of that evidence.

277. Starting with the First Defendant he was managing director of Winsome until 19th April 2011, and thereafter remained a registered director and non-executive chairman of Winsome until 9th November 2012. The First Defendant was also registered director of Forever Precious until 13th August 2012. Mr Travers, in Travers 2 and Travers 4, says that the First Defendant stepped away from the day-to-day management of Winsome in April 2011. This does not sit easily with the financial statements filed by Winsome in the aftermath of the Defaults. Winsome's annual report for 2012-2013 contains the following statements:

> *"The Promoter & Guarantor (and former Chairman and Managing Director), Mr Jatin Mehta, has contended, in e-mails to one of the whole-time directors of the company as also in communications to Punjab National Bank that he was not involved in day-to-day management of the company since April 2011. The Board respectfully disagrees with his contentions. Though Mr Jatin Mehta is not formally on the Board of the Company, he had been and is involved in its affairs and all key decisions are subject to his informal concurrence."*
>
> *"We have been given to understand by the banks that the Promoter & Guarantor, Mr Jatin Mehta, has claimed that he was not involved in day-to-day management of the Company since April 2011, the said contention, however, is untrue. Though Mr Jatin Mehta is not formally on the Board of the Company, he had been and is at the helm of the affairs."*

278. In Travers 4, at paragraph 21.1, Mr Travers says that he has been instructed that this report *"contains demonstrably incorrect information"*. Mr Travers does not say where this instruction came from, but he proceeds to explain, at length, what he says was the correct factual position. In fairness to Mr Travers, the opening part of paragraph 21 makes it clear that Mr Travers' purpose is to illustrate the dispute which exists over the assertion that the First Defendant was in control of Winsome and Forever Previous at the time of the Defaults. Nevertheless, the further one travels into the evidence, the more apparent it becomes that the First Defendant has a substantial case to answer, in terms of when he ceased to be *"at the helm of the affairs"* in relation to Winsome and Forever Precious. As with other assertions made in the evidence of the Respondents' solicitors for this hearing, what is asserted to be clear turns out, on examination, to be somewhat less than clear.

279. Turning to the Layer 1 companies the CBI Closure Report states that Italian Gold, Al Alam, and Al Mufied were all incorporated by the First Defendant. The report also states that control of all *"the UAE buyers"* was in the hands of the First and Second Defendants. I have already quoted the relevant extract from the CBI Closure Report, but it bears repeating (retaining my underlining):

> *"Investigation revealed that all the exports were made to related parties based in UAE. Statement of witnesses recorded in group cases reveal that the control of all the UAE buyers was in the hand of Shri Jatin R. Mehta and Smt. Sonia J. Mehta. The entire functioning of 13 defaulting companies was handled by the employees of Smt. Sonia J. Mehta who was owner of M/s Oriental Expression DMCC, Noble Jewellery LLC and Oriental Jewellery LLC. Important employees were Shri Amit Jitendra Shah, Shri Vastupal Shah, Shri Hitesh Shah, ShriKamaludeen. These employees gave instructions to factory heads at Chennai and Cochin as to in which company's name the exports were to be made. Shri Amit Jitendra Shah, Shri Vastupal Shah, Shri Hitesh Shah who were the key employees of Shri Jatin Mehta have not been examined as they have not returned to India. Their LOC's have been opened and renewed from time to time."*

280. I have also quoted, earlier in this judgment, the accompanying extract from the CBI Closure Report, which refers to the odd nature of the orders placed by the UAE buyers with Winsome and Forever Precious, where the vendors rather than the purchasers appeared to be specifying the purchases. As the CBI Closure Report comments, the suspicion was that there had been *"hanky panky"* going on.

281. In a statement dated 16th August 2018 given to the IED, a Mr Chaturvedi, a former accountant to the Layer 1 companies, stated that the Fifth Defendant was the owner on paper of the Layer 1 companies, but that the First Defendant was the actual owner of those companies. The Respondents contended that Mr Chaturvedi's evidence was unreliable, because of a comment to this effect in the CBI Closure Report, but, as is true of so much of the evidence in this case, once one considers the relevant part of the CBI Closure Report, the position is nowhere as clear cut as it is presented to be. The CBI Closure stated that Mr Chaturvedi's statement was unreliable because of mistakes he had made in his evidence concerning an accountancy firm named Falcon International. Whether those mistakes affect the reliability of his evidence on the ownership of the Layer 1 companies is, putting matters at their lowest, a very open question.

282. There is a great deal more evidence I could discuss, in terms of the First Defendant's role and involvement with Winsome and Forever Previous, and in terms of the First Defendant's position in relation to the Layer 1 companies. In fairness, I should make it clear that this reference includes all the evidence which is said to support the First Defendant's case, as explained by Mr Travers in his evidence. In summary however, if the Alleged Fraud did take place, and I have already decided that there is a strong case that it did, it seems to me, on the evidence, that there is a good arguable case that the First Defendant was involved in the Alleged Fraud. If the First Defendant was involved with Winsome and Forever Precious to the extent and at the times alleged by the Claimants, and if the First Defendant was involved with the Layer 1 companies to the extent alleged by the Claimants, this gives rise to a strong inference that the First Defendant must have been involved in the Alleged Fraud, if it took place. In my judgment there is the evidence available to give rise to a good arguable case that this inference can be drawn.

283. Turning to the Second Defendant there is, again, evidence which, in my judgment, gives rise to a good arguable case that the inference of involvement in the Alleged Fraud can be drawn. In particular, there is the receipt of $163 million by Marengo, which was, according to the Third Defendant, a family owned company, in addition to the Second Defendant's directorship of that company. From Marengo the sum of $162 million, from the sum received by Marengo, was then transferred to Oriental Expressions, a company wholly owned by the Second Defendant. In addition to this a sum of $15,335 was paid directly from Marengo into the Second Defendant's personal bank account at Emirates NBD. The Second Defendant deals with her knowledge of what happened in this respect in her second affidavit, made pursuant to Judge Hodge's order of 11th July 2022. This evidence is however very limited, and does not seem to me to provide a satisfactory explanation of how $163 million made its way into the hands of Marengo and then, save for $1 million, into the hands of Oriental Expressions. The same applies to the various companies, in which the Second Defendant was also interested, which received smaller parts of the Funds.

284. In relation to Al Noora the Second Defendant is very clear in her second affidavit. At paragraph 5 she says this:

> *"5. Al Noora FZE is not and has never been legally or beneficially owned by me and I have not otherwise had any control over or been involved in the management of that entity at any time. I confirm that I do not know the current whereabouts (or current holders) of the USD 650.85m allegedly received by Al Noora FZE between October 2012 and May 2013, referred to in paragraph 5(a) of the Disclosure Order."*

285. In Travers 2, at paragraph 215, Mr Travers says this:

> *"215. As for the monies paid to the UAE Companies, the great majority went to Al Noora which is nothing to do with the JD Respondents. To the extent that any monies derived from the UAE Companies was later paid to entities in which the JD Defendants had an interest, such monies were paid pursuant to legitimate transactions, and principally derivatives trading conducted by Mr Amit Shah who at the time operated a proprietary derivatives and hedging business for some members of the Mehta family."*

286. Mr Travers does not identify the source of the information in this paragraph. It does not appear to be information which could be within the personal knowledge of Mr Travers. In paragraph 2 of Travers 2, Mr Travers says that matters set out in the witness statement are matters within his own personal knowledge, *"Save where otherwise stated"*. He goes on to say that where matters are not within his personal knowledge, the source is identified. In the case of paragraph 215 of Travers 2 this appears not to have happened. This appears to have been a breach of the requirements of CPR PD18.2, which requires a witness statement to indicate (i) which of the statements in the witness statement are made from the witness's own knowledge and which are matters of information or belief, and (ii) the source for any matters of information and belief.

287. The above evidence of both the Second Defendant and Mr Travers is contradicted by evidence in Diss 3. In Diss 3 Mr Diss sets out information which has been obtained recently by the Liquidators by applications for third party disclosure in

other jurisdictions, including an application for third party disclosure from Emirates NBD in relation to accounts held by Al Noora and Marengo. The documents disclosed by Emirates NBD reveal that the user name on Al Noora's online banking account was, until April 2007, the Second Defendant. The information comes from a letter dated 15th April 2007 from Al Noora to the bank. Thereafter, and pursuant to a request to the bank made by Al Noora, the user name was changed to Vastupal Shah. Mr Vastupal Shah's name also appears in the documents provided by Emirates NBD in relation to Marengo, which was a Mehta family owned company.

288. In this context I have to keep in mind the Respondents' case that they have not had a fair opportunity to respond to Diss 3. In oral submissions Mr Hunter said that it was disputed that the Second Defendant had ever been the signatory of the relevant bank account. In their reply skeleton argument for this hearing, the Three Defendants asserted that the authenticity of the letter of 15th April 2007 was not accepted. I am bound to say that I did not find any of this particularly convincing. No basis was suggested for treating the letter of 15th April 2007 as some kind of forgery and, as with other aspects of the Respondents' case, there was no witness statement from the Second Defendant contradicting this information. Diss 3 is dated 26th September 2022. If the Second Defendant had wished to make a direct denial of the information in the letter, it seems to me that the required witness statement could have been prepared and filed for the hearing. Given the late arrival of Diss 3, the Claimants would not have been in a strong position to have such a witness statement excluded.

289. I find it concerning that the Second Defendant felt able to make such an unequivocal statement in her second affidavit, as to her alleged lack of involvement with Al Noora. The statement appears plainly to be wrong, at the least in relation to Al Noora's bank account and in relation to the Second Defendant's denial that she had ever been involved in the management of Al Noora. Beyond that, there is the link between Marengo and Al Noora represented by Mr Vastupal Shah. Beyond that, there is the obvious fact that Al Noora, together with Marengo, received the lion's share of the Funds, prior to their onwards transmission, as detailed earlier in this judgment. I also find it concerning that Mr Travers should be so unequivocal, in paragraph 215 of Travers. I have no reason to think that Mr Travers did not believe what he said in paragraph 215, not least because the relevant statement is so emphatic. It therefore seems reasonable to assume that the information that Al Noora has *"nothing to do with the JD Respondents"* came from one or more of Mr Travers' clients; namely the Three Defendants. On this basis Mr Travers appears to have been given the wrong instructions by one or more of the Three Defendants. It is true that Mr Travers uses the present tense in paragraph 215, when saying that Al Noora *"is nothing to do with the JD Respondents"*. To my mind however a statement of this kind is properly read as denying past as well as present involvement.

290. I also find it concerning that this and other evidence has come to light as a result of the Liquidators' investigations. But for the Liquidators' applications for third party disclosure from the relevant banks in Dubai (Emirates NBD) and Singapore (BSI Bank), I would not have been aware of this and other material evidence. All

this raises a concern in my mind as to whether the Respondents are in possession of relevant information which they have not disclosed.

291. Turning to other evidence which I highlight in relation to the Second Defendant, there is also a statement by a former employee of Al Noora, a Mr Shaikh, given to the IED. The statement is dated 13th August 2018. In the statement Mr Shaikh said that he took his instructions in respect of Al Noora from the First Defendant, and understood that the Second Defendant owned Al Noora.

292. The recently obtained documents which are exhibited to Diss 3 also include a KYC (know your client) report of BSI Bank on the Fifth Defendant, in relation to the opening of an account in the name of Blackstone Group Management Limited, a BVI company which was involved in the transfer of the Funds from the Layer 1 companies. In Diss 1, at paragraph 43, Mr Diss explains that the transactions by which the Funds were transferred through the various Layers of companies were known as Blackstone Transactions or TAF 422 and TAF 454. TAF stands for transaction activation form, and the numbers were the internal file numbers allocated to this client matter by the Amicorp Group. Returning to the KYC report, which was dated 29th April 2013, the report identifies that the Fifth Defendant had been referred to BSI by *"our existing client"*, Marengo Group. The Second Defendant, who was identified in the report as the *"BO"* (business owner), was stated as having known the Fifth Defendant for over 20 years, and the report further stated that the Fifth Defendant was *"the principal distributor for Sona Mehta's jewellery business in UAE"*.

293. The recently obtained documents exhibited to Diss 3 also contain a KYC report of BSI Bank in relation to Marengo, which is also dated 29th April 2013. This report makes considerable reference to the Second Defendant, as a director and owner of Marengo, and includes the information that the *"family wealth is very conservatively estimated at USD 425mm"*. The Respondents have made affidavits, pursuant to the May 2022 Order, in which they give their account of their assets. The disclosed assets have a combined value which has been calculated at around $146 million, although precise calculation is not possible in the light of the nature of some of the assets. Even allowing for the lapse of time since the KYC report, and for the fact that the figure in the KYC report is an estimate, and for the necessarily imprecise calculation of the value of the assets disclosed in the Respondents' affidavits, there is still a substantial, and so far unexplained gap between BSI's valuation of the Mehta family assets in the KYC report, and the assets disclosed in the Respondents' recent affidavits.

294. As with the First Defendant, there is a great deal more evidence which I could discuss, again on both sides, in terms of the Second Defendant's involvement in the companies which are said to have been involved in the Alleged Fraud. Ultimately however my conclusion is the same as that I have reached in relation to the First Defendant. If the Alleged Fraud did take place, and I have already decided that there is a strong case that it did, it seems to me, on the evidence, that there is a good arguable case that the Second Defendant was involved in the Alleged Fraud. The matter is one of inference, but in my judgment there is the evidence available to give rise to a good arguable case that the inference of involvement by the Second Defendant in the Alleged Fraud can be drawn.

295. I reach the equivalent conclusion in relation to the Third Defendant, whose evidence I have already discussed in the previous section of this judgment. The Third Defendant was at various times and/or is now a shareholder and/or a director of five companies which received a substantial proportion of the Funds, although it is important also to state that the Third Defendant was a director and/or shareholder of only two of these five companies (Marengo and IIA), at the time of receipt of the relevant Funds by these companies. I have decided that there is a strong case for saying that the Funds were the subject matter of a substantial international fraud. In these circumstances, and while I am not making findings of fact in this judgment, I do not find it easy to accept the Third Defendant's evidence that the movement of the relevant parts of the Funds represented no more than normal business transactions. In particular, the signature of the Third Defendant is to be found on a derivatives contract which, if Ms Oberoi's evidence is to be believed, was a sham.

296. I also have this concern in relation to the case of the Respondents and, in particular, the case of the Third Defendant. As I understand the relevant section of the Third Defendant's second witness statement, his evidence is that he was only a director in name of Marengo, with the strings being pulled by Amit Shah, who is described as a senior employee in charge of the treasury division in Dubai, and Apurva Kothari, from BSI Bank. In their submissions for this hearing the Respondents' counsel have hammered the point that there is no official record of any of the Respondents having any role in relation to the Claimant Companies. In relation to Marengo however the Third Defendant's case is that he was not actually involved in the management of Marengo, despite his status as a registered director. In terms of plausibility I have difficulty in accepting that the Respondents in general, and the Third Defendant in particular can have it both ways, in respect of control over the companies said to have been involved in the Alleged Fraud.

297. Again, the matter is one of inference, but in my judgment there is the evidence available to give rise to a good arguable case that the inference of involvement by the Third Defendant in the Alleged Fraud can be drawn.

298. This leaves the Fourth Defendant. Ironically, it is the Fourth Defendant, not the Third Defendant, who might be said to have the best case for saying, on the evidence as it stands, that he was not involved in the Alleged Fraud. In terms of those companies identified in an earlier section of this judgment as having received parts of the Funds, a direct connection between the Fourth Defendant and those companies can only be demonstrated in relation to two of those companies; being IIA, of which the Fourth Defendant was a director, and PDC Limited, of which the Fourth Defendant was also a director. In Diss 1, at paragraphs 219.2 and 219.3, Mr Diss makes reference to a company called Joint Ford Limited, which received $34 million of the Funds. The Fourth Defendant was not a shareholder or director of this company, but it had the same registered office in Hong Kong as PDC Limited.

299. Although this is only limited evidence of connections, the fact remains that the Fourth Defendant was the director of two companies which received parts of the

Funds. The problem for the Fourth Defendant, as it is a problem for all four of the Respondents, is that I do not consider that I have a satisfactory answer to the question of why all the companies to which the Respondents were connected were receiving parts of the Funds. The overall picture simply does not add up. So far as the Respondents have given evidence, they appear to be saying that these payments were all part of the normal business of the relevant companies. At the same time there is the explanation given by the Fifth Defendant and the First Defendant for the Defaults; namely that the UAE distributor companies failed to pay for the gold and jewellery delivered to them by Winsome and Forever Precious because, after selling on the gold and jewellery, they suffered catastrophic losses in forex and commodity trading. At the same time the Chart shows the Funds passing from four of the UAE distributor companies through the Layers of companies, with no evidence, or at least no evidence to which my attention has been drawn of catastrophic losses in forex and commodity trading. Indeed substantial parts of the Funds are shown as finding their way back to the UAE companies, who were supposed to have suffered the losses which prevented their meeting their alleged debts to Winsome and Forever Precious.

300. I suppose it might be said that the Funds had no relationship with the ultimate proceeds of the sale of the bullion drawn down from the Bullion Banks by Winsome and Forever Precious, and that the UAE distributor companies managed to suffer their catastrophic losses while still having separate funds available which were passed through the Layers of companies, before partially finding their way back to the UAE companies. In reality, this is a theory which I find difficult to accept, on the basis of the evidence which I have seen. It strikes me as implausible. Once one assumes, and it seems to me that there is a strong case for so assuming, that the Funds represented the ultimate proceeds of the sale (by someone and by whatever means and in whatever state) of the bullion drawn down from the Bullion Banks, it becomes difficult to accept that any of the movements of the Funds constituted normal business transactions. One therefore comes back to the question of what the relevant companies were doing in receiving the Funds, and the absence of a satisfactory answer to that question.

301. As with the other Respondents, the matter is, again, one of inference. In my judgment there is the evidence available to give rise to a good arguable case that the inference of involvement by the Fourth Defendant in the Alleged Fraud can be drawn.

302. I therefore conclude that there is a good arguable case that each of the Respondents was implicated or involved in the Alleged Fraud. Although I have taken the Respondents individually, they each face the same basic problem, in contending that there is no good arguable case in terms of their alleged involvement in the Alleged Fraud. If the Alleged Fraud did take place, and there is a strong case that it did, the evidence of the links between each of the Respondents and the companies which were part of the Alleged Fraud is such as to create a plausible evidential basis for the case that the Respondents were each involved in the Alleged Fraud. Put more simply, the evidence of these links creates a good arguable case that each of the Respondents was involved in the Alleged Fraud.

303. I now turn to consider directly the Claims themselves. In doing so I will take the following course. I will consider the Claims separately but, in each case, I will defer consideration of the question of whether the Claimants have a good arguable case in terms of issues relating to loss, quantum and the Inbound Claims. I will then take separately the issues of loss, quantum and the Inbound Claims. I take this course because there is a substantial overlap, as between the Claims, in relation to these issues, and because my conclusions on these issues, in terms of good arguable case, largely follow from previous areas of discussion in this judgment.

(iv) Good arguable case? – the proprietary claims

304. In dealing with the proprietary claims I am dealing with the claims in constructive trust and knowing receipt. Both claims proceed on the footing that the traceable proceeds of the fraud, that is to say the Funds or so much of the Funds as are held by the Defendants, are held on constructive trust for the Claimant Companies, so that the Funds belong in equity to the Claimant Companies. The Defendants are therefore liable to account to the Claimant Companies for the relevant Funds, as constructive trustees and/or on the basis of knowing/unconscionable receipt. The Claimants accept (paragraph 138 of the Particulars of Claim) that the equitable title of the Claimant Companies to the Funds is subject to any proprietary claims established by SCB, the Consortium Banks and/or the Bullion Banks, to which the Claimant Companies will be liable to account for any recoveries made. The Claimants' case is however that this position, namely a third party having a better title to the Funds, offers no defence to the proprietary claims of the Claimants.

305. It is convenient to discuss the proprietary claims by reference to all of the Funds, but it should be kept in mind, assuming valid proprietary claims, that the amount of the Funds which would be subject to these claims has yet to be established. I should also mention, for the avoidance of any doubt, that my references to equitable and beneficial interests and titles mean the same thing, and are interchangeable.

306. In a sensible division of labour at the hearing, as between Mr Hunter and Mr Higgo, Mr Higgo concentrated a substantial part of his oral submissions on the proprietary claims. These submissions were of course, as with the bulk of the written and oral submissions made by Mr Hunter and Mr Higgo, equally applicable to all of the Respondents. In a forceful set of submissions Mr Higgo argued that the proprietary claims were untenable. The arguments were detailed, but I understood the principal points made by Mr Higgo to be as follows:

(1) The Claimant Companies could not have any equitable interest in the Funds, because the Funds did no more than pass through their hands, pursuant to what is claimed by the Claimants to have been a pre-ordained set of transfers. On the Claimants' case the beneficial interest in the Funds was vested in the Consortium Banks or the Bullion Banks. Assuming this to be correct the beneficial interest could not also be vested in the Claimant Companies. This was legally impossible. In the absence of any equitable title to the Funds, the proprietary claims therefore fall away.

(2) In theory the Claimant Companies might have brought the proprietary claims as trustees, but the claims had not been brought on this basis (see the Particulars of Claim) and in any event it was not open to a trustee simply to

take proceedings to recover trust assets without the authority of the beneficial owner of the assets.

(3) The contention that a constructive trust arose at all was flawed because title to the bullion passed to Winsome and Forever Precious pursuant to the PMFs. If there was a fraud involving the proceeds of the sale of the bullion, the beneficial interest in the misappropriated proceeds of sale could not lie with the Bullion Banks or the Consortium Banks. On the Claimants' factual case, it had to be the case that the beneficial interest in the Funds was vested in Winsome and Forever Precious

(4) Equally, no constructive trust could arise because the Consortium Banks by the actions they had taken against Winsome and Forever Precious, had affirmed their contracts with these companies. Equally, if Winsome and Forever Previous were the victims of the Alleged Fraud, they had affirmed their contracts with the Layer 1 companies by their actions against the Layer 1 companies in the UAE Proceedings. As such, no constructive trust could have arisen for the benefit of Winsome and Forever Precious.

307. In terms of the position of the Claimant Companies, and assuming that the Funds passed through their hands at a time when they were impressed with a trust, the Claimants' case was that it was perfectly possible to have acquired a beneficial interest of their own in the Funds. In particular, my attention was drawn to the following extract from Lewin on Trusts (Twentieth Edition), at 44.052.

> *"In a case where money is misappropriated from company A and paid into a bank account of company B in credit, and the same amount of money is then misappropriated from company B's bank account and paid to C, who applies it in the purchase of a house together with other money belonging to C, C holds a proportionate share of the house in trust for company B, subject to company A's claim against company B; but (at any rate where company A has agreed to company B taking proceedings in priority to company A) it is no defence to an action by company B against C that the money was beneficially owned by company A so that company B had no beneficial interest in it as against C."*

308. The footnoted authority which is cited in this extract from Lewin is *Bracken Partners Ltd v Gutteridge* [2003] EWHC 1064 (Ch). As much of the argument at the hearing, in relation to the proprietary claims, related to this authority, I must spend a little time on the case.

309. In terms of the relevant facts of the case, it is convenient to adopt the following summary, given by Mummery LJ in the Court of Appeal, at [1], [2] and [7]:

> *"1. This is an appeal by Ms Sariah Smalley, the wife of Mr Graham Gutteridge. Both of them were defendants in a derivative action brought by the claimant, Bracken Partners Ltd (Bracken), suing on its own behalf and on behalf of all the other shareholders in a company called Eye Group Ltd (EGL), except Mr Gutteridge, to ascertain the beneficial ownership of a house acquired in the name of Ms Smalley, but with the use of money not belonging to her.*
>
> *2. EGL is only one of three relevant companies of which Mr Gutteridge is a director. All three companies were indirectly implicated in the acquisition of the house in the name of Ms Smalley. EGL, an insolvent private company*

under the control of Mr Gutteridge, was compulsorily wound up on 27 November 2002. It was joined as a defendant in the action brought on its behalf. The second company, which was owned and controlled by Mr Gutteridge, was GMG Management Ltd (GMG). It was also joined as a defendant. The third company was Non-League Media plc (NLM), a public listed company, of which Mr Gutteridge was Chairman. It has been in administration since 25 June 2002. It is not a party to the proceedings. Although it was aware of them, it has never sought to be joined as a party. Its position, as explained by the administrators in correspondence, was that it would be bound by the judgment of the court in the proceedings, but reserved its rights against EGL in respect of any claim which NLM might have to the sums recovered from the defendants by Bracken EGL. More recently the solicitors for the administrators of NLM have made it clear that the net proceeds of sale of the house, which have been paid into court (£212,000), are the property of NLM and that they intend to recover that sum as against Ms Smalley, who has admitted NLM's claim."

"7. The Property was transferred into the name of Ms Smalley. The sources of the purchase price of £499,500 were as follows:
(1) On 25 August 2000 the sum of £272,000 was transferred from the bank account of NLM (a) to the bank account of EGL, then (b) to the bank account of GMG and then (c) to the solicitors acting for Ms Smalley. The transfers were arranged by Mr Gutteridge, who controlled EGL and GMG. Ms Smalley accepts and asserts that the sum was misappropriated by Mr Gutteridge from the bank account of NLM and was used to purchase the Property. The proper claimant was, she contends, NLM: only it, and not EGL, was entitled to an equitable interest in the Property. EGL only ever had a bare title to the money for an instant, holding it on a resulting or constructive trust for NLM. GMG held it on a constructive trust for NLM, as did Ms Smalley. EGL had no beneficial interest in the money. NLM remained the beneficial owner throughout. EGL was not therefore entitled to any beneficial interest in the Property. The deputy judge ought to have dismissed the action and this court should allow the appeal.
(2) The sum of £220,000 was provided by way of a loan by Woolwich plc secured by a mortgage on the Property.
(3) The balance of £7,500 was provided by Ms Smalley from her own funds."

310. As can be seen, the essential relevant facts of the case, for present purposes, were that the sum of £272,000 passed from NLM, to EGL, and then to GMG, and then to the solicitors acting for Ms Smalley, where the money was used to fund part of the purchase price of the Property, as it was referred to, with the remainder of the purchase price being funded by a mortgage loan from Woolwich plc, and a balance of £7,5000 provided by Ms Smalley.

311. Returning to the first instance decision, the case came before Peter Leaver KC, sitting as a Deputy Judge of the High Court, on an application for summary judgment or interim payment. The action had originally been brought by Bracken Partners Limited on behalf of the shareholders in EGL. At the hearing permission was given for EGL itself to be joined as a claimant in the action. The defendants

to the action were Mr Gutteridge, who responsible for removing the funds from NLM which ended up being invested in the Property, Ms Smalley, GMG, and EGL. As originally constituted, the action was brought by Bracken as a derivative action, for the purposes of recovering EGL's assets and monies, which were said to have been lost as a result of breaches by Mr Gutteridge of fiduciary and other duties owed to EGL. These assets included the sum of £272,000 which found its way, through GMG, into the Property.

312. In relation to the sum of £272,000 what was sought, on the summary judgment application, was a declaration that Ms Smalley held the Property on trust for herself (by virtue of her contribution of £7,500) and EGL, together with consequential orders. It will therefore immediately be seen that EGL's case depended upon it being able to demonstrate that it had an equitable title to the sum of £272,000 which had ended up invested in the Property.

313. So far as this claim in relation to the Property was concerned, the case of Ms Smalley was summarised by the judge at [28], in the following terms:

> *"28. Ms Smalley's primary case can be stated very simply. She accepts that the money was misappropriated from NLM, and that if NLM were to make a claim against her she would have no defence to that claim. She accepts that, as a matter of law, she was a volunteer when she received the money. She accepts that the money was in EGL's bank account, although she says that it remained there for only a very brief time (a "scintilla temporis" in Mr Kremen's phrase). She accepts that the money was misappropriated from EGL's account, and, thereafter, from GMG's account, before it arrived in the Solicitors' account for the purpose of the purchase of the property. She contends that the money remained NLM's money throughout the various transactions: NLM was the only entity beneficially entitled to it, and EGL was never beneficially entitled to it. Thus, she submits, this claim, whether Bracken's derivative claim or EGL's direct claim, and this application, must fail."*

314. The judge did not accept this argument. His essential reasoning can be found in [29], [30] and [32], in the following terms:

> *"29. It is fundamental to that submission that EGL never acquired any interest in the money, whether as against NLM or against GMG or Ms Smalley. I reject that submission. When the money was misappropriated from NLM's account a trust arose in favour of NLM in respect of that money. When the money arrived in EGL's account it became mixed with the monies in that account. We are not here considering a specific asset, such as a bag of coins, but a transfer of funds from one account into another account. Once mixed in EGL's account, the money, as it is described, became an asset of EGL, no matter how short a time it spent in that account. EGL was under an obligation to account to NLM in respect of that money, as it had no right to it. EGL held the money on trust for NLM.*
>
> *30. The same reasoning will apply to the subsequent transfers of the money until it was paid over to the vendor of the property. The vendor took without notice of the misappropriation, and so is under no obligation to account or as trustee. However, as between NLM, EGL, GMG and Ms Smalley, each prior recipient has a better title or claim to the money, and to an account*

for it, than the subsequent recipient, and each subsequent recipient is required to account to the prior recipient for it."

"32. There can be no doubt that NLM's equity takes priority over that of BGL. However, if Ms Smalley has any interest in the property it is a later interest than that of EGL. Consequently, EGL's interest takes priority over any interest that Ms Smalley may have. As between NLM and EGL, NLM has consented to EGL taking these proceedings in priority to it."

315. In the result, the judge concluded that EGL was entitled to a declaration that Ms Smalley held the Property on trust for herself and EGL. The actual declaration made at first instance, in its relevant terms, was as follows:

"[EGL] *...is beneficially entitled to 39/40th of the equity of redemption in the house and property known as 52 Chatsworth Gardens London W3 9LW [the Property], held in the name of the Second Respondent [Ms Smalley] and that the Second Respondent is beneficially entitled to 1/40th of the equity of redemption in the Property."*

316. The case then made its way to the Court of Appeal. The appeal was made by Ms Smalley. Her contention in the Court of Appeal was that she held the Property on trust not for EGL, but for NLM. As such, so she argued, the judge should not have made the declaration that she held the Property on trust for EGL. NLM had not been a party to the action but, by the time of the appeal, and as recorded by Mummery LJ at [2], the solicitors for the administrators of NLM had stated an intention to recover the net proceeds of the sale of the Property from Ms Smalley, who had admitted NLM's claim. It appears to have been accepted between the parties that the declaration made by the judge should be amended to that effect. One might have thought that all this rendered the appeal pointless, given that neither EGL nor Ms Smalley disputed that NLM was ultimately entitled to the net proceeds of sale of the Property, which had been paid into court. The explanation for the appeal, as Mummery LJ identified at [6], was costs. Counsel for Ms Smalley argued, in the Court of Appeal, that EGL had had no title to bring the action against Ms Smalley. It is important to identify how this argument was put to the Court of Appeal. Mummery LJ summarised this argument in the following terms at [10] and [11]:

"10. Mr Tager contended that the action had been brought to establish a proprietary interest in the Property; that only NLM could assert such a claim against Ms Smalley, as the sum of £272,000 had been misappropriated from the bank account of NLM; that EGL received that sum as a knowing recipient and assistant to its misappropriation, giving rise to a trust (resulting or constructive) in favour of NLM, with EGL having only a bare legal title; that the money was never an asset of EGL; that when the money was transferred to GMG with full knowledge of the relevant facts, that gave rise to a constructive trust also in favour of NLM; that a similar situation arose when Ms Smalley received the money from GMG; and that nothing occurred at any stage which could have given rise to a claim by EGL to a beneficial interest under a resulting or constructive trust. NLM remained throughout the only beneficiary under a trust of the money and alone had the right in equity to enforce against Ms Smalley a proprietary interest in the Property.

> *11. Mr Tager cited a number of recent authorities in support of his analysis: Westdeutsche Landesbank v. Islington BC [1996] AC 669; Twinsectra Ltd v. Yardley [2002] 2 AC 164; Foskett v. Mc Keown [2001] AC 102; and J Harrison (Properties) Ltd v. Harrison (2000) BCC 729. He submitted that the judge had wrongly applied to the field of equitable proprietary interests the doctrine of relative title, which properly belonged to the law of title to land and chattels, and not to the field of equitable interests in property. EGL simply had no right to bring the action against Ms Smalley for a proprietary right and should be liable to pay all the costs."*

317. Mummery LJ did not find it necessary to decide whether EGL had or had not had a beneficial interest in the money. In his view, what mattered was that EGL had had sufficient standing to bring the action against Ms Smalley. As he explained at [14] to [16]:

> *"14. It is also clear that everyone in the chain of payments, except the vendor of the Property, who was a bona fide purchaser for value without notice, was a volunteer with knowledge (via Mr Gutteridge) that the money received was paid out of NLM's bank account other than for the purposes of the company and in breach of Mr Gutteridge's fiduciary duties. So EGL, GMG and Ms Smalley had no right to retain that sum as against NLM. The payments of that sum out of the bank accounts of EGL and then GMG were misappropriations of the sums in their respective bank accounts made on the direction of Mr Gutteridge for purposes other than those of each company (i.e. for the personal benefit of Ms Smalley and himself) and therefore in breach of fiduciary duty.*
>
> *15. In those circumstances, EGL had a sufficient interest to support proceedings against Ms Smalley to establish that she was not, as she originally claimed to be, the sole beneficial owner of the Property and for a declaration as to the beneficial interests in it. In my judgment, issues as to relative title and the law governing the availability of proprietary and personal claims, tracing and priority are unnecessary complications of a plain case. They do not arise for decision, it being agreed that Ms Smalley held the Property on trust and that NLM was ultimately entitled to a 39/40 th beneficial interest in it.*
>
> *16. The case turns simply on issue of EGL's standing to bring the proceedings against Ms Smalley. That issue is now only relevant to the question of the costs of the action. The deputy judge was correct in treating this as a case suitable for summary treatment. EGL had sufficient standing to bring the proceedings because the circumstances in which it received the sum of £272,000 from NLM and then paid it to GMG made it personally liable to NLM for the equitable wrongs of dishonest participation in breaches of fiduciary duty by Mr Gutteridge's misapplication of NLM's funds and accordingly accountable to it in equity. In these circumstances EGL had a real and legitimate interest (a) in securing a declaration from the court that Ms Smalley held the property on trust and (b) in enabling the beneficial interest in it to be restored to its rightful owner."*

318. Pill LJ agreed with Mummery LJ in dismissing the appeal, for the reasons given by Mummery LJ. Mantell LJ also agreed that the appeal should be dismissed, but his reasoning was critically different. After citing Lord Millett's explanation of

the process of tracing in *Foskett v McKeown* [2001] AC 102, at [128], Mantell LJ said this, at [30]:

> *"30. It is beyond argument that the equitable proprietary interest in the money was at all times vested in NLM. It never passed to Eye Group* [EGL], *or to the intermediary or to Mrs Smalley. All that did pass was the legal title to be held at each stage on trust for NLM. Since from the passage in Lord Millett's speech cited above a claimant "will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset" the most that Eye Group could justify would be a claim to legal title. Eye Group never had any beneficial interest in the money either in its original or substituted form and had no standing to claim a beneficial interest in its own behalf. Any standing it might have would be as trustee of the money and as such liable to account to NLM. Hence the most that Eye Group could hope to achieve by its claim would be a declaration and order as is now agreed to be appropriate."*

319. There was considerable argument before me as to what had actually been decided in *Bracken*, and on what terms. It seems to me however that the position in this respect is fairly straightforward. At first instance Peter Leaver KC decided that EGL did have a beneficial interest in the money, subject to the prior beneficial interest of NLM; see [29], [30] and [32] of the judgment at first instance. It should be noted that the position at first instance, as the judge recorded at [32], was that NLM had consented to EGL taking proceedings in respect of the sum of £272,000 *"in priority to"* NLM. This did not however affect the judge's decision that EGL had an equity of its own in relation to the sum of £272,000 invested in the Property. In the Court of Appeal what was decided was that EGL had had sufficient standing to claim declaratory relief against Ms Smalley in respect of the ownership of the money invested in the Property. Mummery and Pill LJJ did not find it necessary to decide whether EGL had an equitable title to the money, subject to the prior equitable title of NLM. Mantell LJ did go into this question, and decided that EGL had never had more than a bare legal title to the money which, while sufficient to support an action against Ms Smalley, was not an equitable title to the money.

320. Translating all this to the present case, the editors of Lewin (at least in their treatment of *Bracken*) and the judge at first instance in *Bracken* support the case of the Claimants; namely that the Claimant Companies can claim an equitable title to the Funds, notwithstanding that others may also have an equitable title to the Funds which enjoys priority over the equitable title of the Claimant Companies and to whom the Claimant Companies may be liable to account, if and in so far as the Claimant Companies are able to trace the Funds into the hands of the Defendants. Mantell LJ supports the case of the Respondents; namely that the Claimants can claim only a bare legal title to the Funds, which is insufficient to support the proprietary claims and is not, in any event, the pleaded basis of the proprietary claims. Mummery and Pill LJJ can, I think, fairly be described as maintaining a neutral position on these questions.

321. A considerable quantity of further authority was placed before me, by the Claimants and the Respondents, on what I have identified as the division of opinion which emerges from *Bracken*. In particular, Mr Higgo drew my attention

to the following statement of the law by Anthony Boswood QC, sitting as a deputy judge of the High Court, in *Montrose Investments Ltd v Orion Nominees Ltd* [2003] EWHC 2100 (Ch). At [78] the judge said this, which clearly aligns with the view expressed by Mantell LJ in *Bracken*.

> *"78. If an agent or other kind of fiduciary (A) holds property on trust for B and C, and in breach of trust, either deliberately or because he has forgotten about C's beneficial interest, gives that property to D, a volunteer, to hold as replacement trustee for the account of B alone, it cannot be the ease that D holds the beneficial interest in the property on constructive trust for A, since A never had any beneficial interest in it. That is not to say that no constructive trust arises: on the contrary, so soon as D has notice of C's beneficial interest he holds the property on constructive trust for C to the extent of that interest: see Westdeutsche Landesbank supra at p 705. And, as an incident of D's liability to account as a constructive trustee rather than as a remedy in its own right, C can trace his property into any other assets which have been acquired in substitution for it: see eg Boscawen v Bajwa [1996] 1 WLR 328 at pp 334–336 per Millett LJ; Foskett v McKeown [2001] 1 AC 102 per Lord Millett at p 126 et seq."*

322. In this part of his judgment the judge was dealing with the Part 20 proceedings in the action. The judge's decision in the Part 20 proceedings was overturned by the Court of Appeal ([2004] EWCA Civ 1032), but not in terms which affected what the judge had said at [78]. As Waller LJ explained, at [23], it had not been necessary to analyse the case in terms of constructive trusteeship, as the judge had done at [78].

323. For their part the Claimants contended that there is ample authority to support the case that the law recognises relativity of equitable title, and that, on the facts of the present case as asserted by the Claimants, the Claimant Companies can claim their own equitable title to the Funds.

324. Tempting as it is to go further into these very interesting issues, I remind myself that I am only considering whether the Claimants have a good arguable case in relation to their proprietary claims. In relation to the question of good arguable case, and in relation to the question of whether it is possible for the Claimant Companies to assert an equitable (or beneficial) title to the Funds, the position seems clear to me:
    (1) This question is one which belongs for resolution at trial. It is not suitable for determination at a hearing of this kind. It is also the kind of question which, as it seems to me, should be determined by a court after all the relevant facts have been determined.
    (2) It does not necessarily follow from this that the Claimants have a good arguable case. As I have already noted, I do not consider myself entitled to conclude that the Claimants have a good arguable case on a particular issue simply because the issue is one better determined at trial. It does seem to me however, reviewing the arguments and authorities put before me at this hearing, that the Claimants have done enough to establish a good arguable case that the Claimant Companies can claim an equitable title to the Funds.
    (3) I consider that this is so whether one considers this issue in the abstract, by reference to the authorities, or whether one takes into account the argument

of the Respondents that no such equitable title could arise by virtue of the pre-ordained nature, as alleged by the Claimants, of the transfers of the Funds.

325. Turning to the other arguments of the Respondents which I have summarised above, the question of whether a constructive trust could or could not have arisen in the present case, and for whose ultimate benefit are plainly questions which are fact sensitive. They depend upon findings of fact as to how the Alleged Fraud originally came about. If the Claimants are right, the Alleged Fraud did not start with the Layer 1 companies, but can be traced back to Winsome and Forever Precious, who were used to procure the bullion, the proceeds of sale of which were then subjected to their fraudulent path through the Layers of companies. If the Claimants are right, it is the Consortium Banks who were the victims of the Alleged Fraud, which in turn means that there are interesting questions to investigate as to the basis on which the Consortium Banks can claim equitable title to the Funds. I do not regard it as appropriate, in this judgment, to enter into a detailed discussion either of the legal issues concerning questions of affirmation, or of the circumstances in which constructive trusts can arise, or of the interesting (but little argued at this hearing) issue of whether there is a basis on which the Consortium Banks can claim equitable title to the Funds, given that their loss arose out of the calls made on the SBLCs.

326. In particular, I do not regard it as appropriate to go into the interesting arguments which I heard as to whether the Claimants could rely on what was said by Lord Browne-Wilkinson in *Westdeutsche Bank v Islington* [1996] AC 669. His Lordship explained in his speech, at 716C-D, that when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient, with the consequence that the property is recoverable and traceable in equity. Mr Higgo contended that no such constructive trust could have arisen in the present case because the Bullion Banks were paid for the bullion which they had provided, while the Consortium Banks had elected to affirm the contracts with Winsome and Forever Precious. In this context Mr Higgo cited, in particular, what was said by Potter LJ in *Twinsectra v Yardley* [1999] Lloyds Rep Bank 438, at page 461, and by Rimer J in *Shalson v Russo* [2003] EWHC 1637 (Ch) [2005] Ch 281, at [106]-[108]. As Rimer J explained, at [108]:

> *"A typical case of a voidable contract induced by deceit is one in which C overpays for a house as the result of a fraudulent mis*[re]*presentation by D as to its physical condition. In such a case, when C pays over the purchase price he intends D to become the legal and beneficial owner of it, as D does; and D has a like intention in relation to the house when he assures it to C on completion. The contract remains voidable despite completion; but until it is avoided those respective beneficial entitlements to price and house remain the same. Mr Smith's submission involves a reversal of that ordinary principle. On his argument, as from the moment of completion D becomes a trustee of the purchase money for C, and presumably C becomes a trustee of the house for D, since C cannot at the same time be beneficially entitled to both house and price. Mr Smith's submission to the effect that D becomes a trustee of the money for C at the moment it is paid over, and that in the present case Westland or WIB became a trustee of the money for Mr Mimran immediately the money was advanced, is, in my judgment,*

incorrect. What the position is when and if, on discovery of the fraud, C elects to rescind the contract of course raises a different question."

327. It is also interesting to note, in passing, that Rimer J went on, at [110] and [111], to voice some respectful doubts in relation to what Lord Browne-Wilkinson had said in *Westdeutsche*, in the passage from his speech (at 716) which is relied upon by the Claimants in support of their case that a constructive trust arose in the present case.

328. All this, interesting as it is, seemed to me however to beg the question of what actually happened, in terms of the mechanics of the Alleged Fraud, and in terms of when and by what means the relevant property (either the bullion or the proceeds of bullion) was obtained by fraud, assuming that the Alleged Fraud occurred. It seems to me difficult to say that no constructive trust could have arisen in the present case, either on the basis of the affirmation argument or otherwise. To the contrary, it seems to me that there is a good arguable case that the Funds were impressed with a constructive trust, as a result of the Alleged Fraud, by the time they reached the hands of the Claimant Companies.

329. It seems to me, reviewing the competing arguments in relation to the proprietary claims, that the Claimants have done sufficient to demonstrate that they have a good arguable case in relation to the above and all other issues which are said to render the proprietary claims unviable.

330. My conclusion is therefore that the Claimants have a good arguable case in relation to the proprietary claims.

331. This conclusion also extends to the argument of the Respondents that the Claimant Companies are not entitled to bring any of their claims in equity or at common law, because the relevant causes of action are held on trust for a third party. It seems to me that if the Claimants have a good arguable case to an equitable title in the Funds, they are not correctly categorised as having to bring the Claims as causes of action held on trust for the benefit of a third party, albeit the Claimants may be liable to account to a third party for any recovery made in respect of the Funds.

(v) Good arguable case? – the claim for breach of fiduciary duty

332. In summary, the case of the Claimants is that the Respondents were each shadow directors of the Claimant Companies and, in that capacity, owed fiduciary duties to the Claimant Companies which they breached by directing, or causing or permitting the Claimant Companies to make the transfers of the Funds to Docklands and, as shadow directors of Docklands, by causing Docklands to transfer the Funds on to the Layer 4 companies. The case is pleaded in paragraphs 124-131 of the Particulars of Claim. The Fourth Claimant is an LLP, with the consequence that one is not strictly concerned with a company director in the case of the Fourth Claimant. This was not however a point taken in the argument and, for present purposes, I put the point to one side.

333. A shadow director is defined in the following terms, in Section 251(1) of the Companies Act 2006:

> *"(1) In the Companies Acts "shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act."*

334. The Claimants rely on the duties set out in Sections 171(b), 172(1) and 173(1) of the Companies Act 2006, which are summarised in paragraph 129 of the Particulars of Claim, and are in the following terms:

> [Section 171]
> *"A director of a company must–*
> *(a) act in accordance with the company's constitution, and*
> *(b) only exercise powers for the purposes for which they are conferred."*
>
> [Section 172]
> *"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to–*
> *(a) the likely consequences of any decision in the long term,*
> *(b) the interests of the company's employees,*
> *(c) the need to foster the company's business relationships with suppliers, customers and others,*
> *(d) the impact of the company's operations on the community and the environment,*
> *(e) the desirability of the company maintaining a reputation for high standards of business conduct, and*
> *(f) the need to act fairly as between members of the company."*
>
> [Section 173]
> *"(1) A director of a company must exercise independent judgment."*

335. In terms of the Respondents' case, and bearing in mind that I am considering the question of whether there is a good arguable case, there are two broad arguments put by the Respondents.

336. The first argument or set of arguments is that looking at the authorities on what is required to constitute a person a shadow director of a company, and looking at what is known of the administration of the Claimant Companies and such connection as there may have been between the Respondents and the Claimant Companies, it is quite clear that none of the Respondents or the Fifth Defendant could have been a shadow director of the Claimant Companies, even if the Respondents or some of them were the ultimate source of the instructions to the Fifth Defendant, who was himself no more than a customer of the Amicorp Group, which was responsible for the corporate governance of the Claimant Companies.

337. The second argument is that if the Respondents were shadow directors of the Claimant Companies, they could not have owed fiduciary duties to the Claimant Companies. This second argument relies on the fact that Section 170(5) of the Companies Act 2006, when the relevant events took place in 2012 and 2013, provided as follows:

> *"(5) The general duties* [the general duties specified in Sections 171-177 of the Companies Act 2006] *apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply."*

338. As such, it is said that the Claimant Companies cannot rely on Section 170(5), as set out above, as the basis for fiduciary duties owed by shadow directors. This leaves the common law or equitable principles. The Respondents say that the relevant case law renders it doubtful that shadow directors usually owe fiduciary duties at common law and, as I understand the position, the Claimants do not seek to rely on equitable principles.

339. Dealing first with the second argument the Claimants have pointed to the fact that Section 170(5) was amended, as from 27th May 2016, by the Small Business, Enterprise and Employment Act 2015, to the following:

> *"(5) The general duties apply to a shadow director of a company where and to the extent that they are capable of so applying."*

340. The amended form of Section 170(5) would provide a good answer to the Respondents' second argument, if the new version of Section 170(5) is retrospective in its effect. The Claimants say that there is a good arguable case that its operation is retrospective. This strikes me as doubtful and, albeit without making a final decision on this question, I would not be prepared to find that the Claimants have a good arguable case on this particular point. This leaves the question of whether the Claimants can rely on common law principles for their argument that the Respondents, as shadow directors, owed the fiduciary duties on which they rely.

341. In this context, the Claimants rely upon what Newey J (as he then was) said in *Vivendi SA v Richards* [2013] EWHC 3006 (Ch) [2013] BCC 771, at [142]-[143], while commenting on the earlier decision of Lewison J (as he then was) in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [2006] F.S.R. 17:

> *"142. In all the circumstances, there seem to me to be a number of reasons for thinking that shadow directors commonly owe fiduciary duties to at least some degree:*
>
> *(i) A shadow director will have assumed to act in relation to the company's affairs (to adapt Lord Browne-Wilkinson's words in White v Jones (above) and to ask the de jure directors to exercise powers that exist exclusively for the benefit of the company.*
>
> *(ii) A person who gives directions or instructions to a company's de jure directors in the belief that they will be acted on can fairly be described as assuming responsibility for the company's affairs, at least as regards the directions or instructions he gives.*
>
> *(iii) Although Parliament has not designated shadow directors as directors for all purposes in the Companies Acts [the British position seems to differ in this respect from that in Australia: see s.60 of Australia's Corporations Act 1989, section 9 of the Corporations Act 2001 and Australian Securities Commission v AS Nominees Ltd (1995) 18 A.C.S.R. 459, it has provided for important consequences to flow from the status]. For example, a shadow director is treated as a director in the context of Ch.4 of Pt 10 of the*

> *Companies Act 2006 (transactions with directors requiring approval of members) and can be the subject of proceedings under the Company Directors Disqualification Act 1986 (see ss.6(3C) and 8(1)) and held liable for wrongful trading (see s.214(7) of the Insolvency Act 1986). Such provisions presumably reflect a perception that a shadow director can bear responsibility for a company's affairs.*
> *(iv) There is a compelling analogy with the position of promoters. Promoters owe fiduciary duties as a result of their acceptance and use of powers "which so greatly affect the interests of the corporation". A shadow director, too, can be said to choose to make use of powers which "greatly affect the interests of the corporation".*
> *(v) A shadow director's role in a company's affairs may be every bit as important as that of a de facto director, and de facto directors are considered to owe fiduciary duties.*
> *(vi) That a shadow director may not subjectively wish to assume fiduciary duties cannot matter as such.*
> *(vii) Public policy, so far as it may matter, points towards fiduciary duties being imposed on shadow directors.*
> *143. In the end, my own view is that Ultraframe understates the extent to which shadow directors owe fiduciary duties. It seems to me that a shadow director will typically owe such duties in relation at least to the directions or instructions that he gives to the de jure directors. More particularly, I consider that a shadow director will normally owe the duty of good faith (or loyalty) discussed below [for the avoidance of doubt, I regard the duty of good faith as a fiduciary duty] when giving such directions or instructions. A shadow director can, I think, reasonably be expected to act in the company's interests rather than his own separate interests when giving such directions and instructions."*

342. Reviewing the case law cited to me in this context, it seems clear to me that the Claimants have, at least, a good arguable case that the Respondents, if they were shadow directors of the Claimant Companies, were capable of owing the fiduciary duties upon which the Claimants rely.

343. Turning to the first set of arguments, my attention was drawn to the discussions of the nature of shadow directorship in *HMRC v Holland: In re Paycheck Services 3 Ltd* [2010] UKSC 51 [2010] 1 WLR 2793 and in *Smithton Ltd v Naggar* [2014] EWCA Civ 939. In terms of a statement of the test for whether a shadow directorship exists however, I refer to what Morritt LJ said in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 (CA). It is necessary to start with [34], where Morritt LJ recorded the following common ground between counsel in the case:

> *"34 Either or both counsel for Mr Deverell and Mr Hopkins accepted that the instructions or directions did not have to cover the whole of the company's activities but must cover at least those matters essential to the corporate governance of a company including control of its financial affairs. They also accepted that the label attached to the communications from the shadow to the board were immaterial provided that the communication was understood or expected by both giver and receiver to be followed by the latter."*

344. Morritt LJ then expressed the following conclusions, at [35]:

> *"35 I propose to express my conclusions on these and other issues in a number of propositions, (i) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, as the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts, it should not be strictly construed because it also has quasi-penal consequences in the context of the Company Directors Disqualification Act 1986. I agree with the statement to that effect of Sir Nicolas Browne-Wilkinson V-C in In re Lo-Line Electric Motors Ltd 11988] Ch 477, 489. (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities. I agree with the statements to that effect of Finn J in Australian Securities Commission v AS Nominees Ltd, 133 ALR 1, 52.-53 and Robert Walker LJ in In re Kaytech International pic [1999] BCC 390, 402. (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction. (4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of "direction" and "instruction" do not exclude the concept of "advice" for all three share the common feature of "guidance". (5) It will, no doubt, be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are "accustomed to act" "in accordance with" such directions or instructions. It appears to me that Judge Cooke, in looking for the additional ingredient of a subservient role or the surrender of discretion by the board, imposed a qualification beyond that justified by the statutory language."*

345. The Claimants' case, in very broad summary, is that the instructions given to the Claimant Companies' registered and de facto directors came ultimately from the Respondents. The Respondents say, for a number of reasons, that neither the pleaded case of the Claimants nor the available evidence can support the allegations of shadow directorship.

346. As with the proprietary claims, I do not think that it is appropriate to go into the detail of the argument between the parties in this context. I accept that, in this context, the Claimants have a good deal to demonstrate, in terms of whether each of the Respondents did engage in activities, in relation to the governance of the Claimant Companies, which would be sufficient to render that Respondent a shadow director of the Claimant Companies, owing the fiduciary duties relied upon by the Claimants. In particular, it will be for the Claimants to demonstrate, at trial, that the directors of the Claimant Companies were *"accustomed to act"* in accordance with the directions or instructions of each of the Respondents. This is a substantial evidential burden to discharge. Ultimately however I come back to my earlier conclusions that there is a strong case that the Alleged Fraud occurred, and a good arguable case that the Respondents were each involved in the Alleged Fraud. If the Respondents were each involved in the Alleged Fraud, I find it hard to accept that any of them were either passive actors in relation to the transfer of the Funds through the Claimant Companies or had no role in the direction of the Claimant Companies. If they were not passive actors, and had a role in the direction of the Claimant Companies, the issue then becomes one for factual investigation and legal argument as to whether their role qualified them as shadow directors. As matters stand I consider that the Claimants have done sufficient to establish a good arguable case that the Respondents were shadow directors of the Claimant Companies, and did owe to the Claimant Companies the fiduciary duties relied upon by the Claimants, and did breach those fiduciary duties.

(vi) Good arguable case? – the claims under the 1986 Act

347. I start with the claim under Section 212 which, in the relevant subsections, provides as follows:

> *"(1) This section applies if in the course of the winding up of a company it appears that a person who—*
>
> *(a) is or has been an officer of the company,*
>
> *(b) has acted as liquidator or administrative receiver of the company, or*
>
> *(c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company,*
>
> *has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.*
>
> *(2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator of the company.*
>
> *(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—*
>
> *(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or*

> *(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just."*

348. The Claimants' case is that the Respondents can be brought within the terms of subsection (1)(a), as shadow directors of the Claimant Companies, or within the terms of subsection (1)(c), given the connections which the Claimants say existed between the Claimant Companies and each of the Respondents. The Respondents' primary answer to this is that Section 212 does not apply to shadow directors; see Lord Hope in *Paycheck Services* [2010] UKSC 51 [2010] 1 WLR 2793, at [22].

349. There is however plainly scope for argument here. I say this essentially for two reasons. First, the editors of Palmer's Company Law state as follows, at 15.599.13:

> *"The range of persons against whom the s.212 of the Insolvency Act 1986 procedure can be used is wide. In addition to both executive and non-executive directors, and others whose position places them within the scope of the expression "officer of the company", various other degrees of involvement in the conduct of the company's affairs will be capable of bringing a person within the broad terms of subs.(1)(c), which apply to any person who "is or has been concerned, or has taken part in, the promotion, formation or management of the company".*
>
> *The provisions of s.212 apply to de facto directors, but it appears that the omission from the section of any express reference to its application to shadow directors means that the latter type of director is not within the ambit of the section. This conclusion may require reconsideration in the light of the amendment of s.170(5) of the Companies Act 2006, described at PCL para.15.594.1; PCI para.1.594.1. Note also the emerging judicial tendency in favour of the proposition that shadow directors owe at least some degree of fiduciary duty towards the company in relation to which they act. In some cases the liability of a director under s.212 may be concurrent with liability under some other provision, such as s.213 (fraudulent trading), 214 (wrongful trading), or 239 (giving of a preference), according to what has taken place."*

350. Both *Paycheck Services* and the views expressed by Newey J in *Vivendi* (which I have quoted in the previous section of this judgment) are footnoted in this discussion. The Respondents referred me to other legal commentaries which, so they asserted, supported the conclusion of the Supreme Court. As however with so much of the legal debate at this hearing, the citation of rival authority simply reinforced my conclusion that the views expressed in Palmer are, at the least, eminently arguable.

351. Second, what I have just said assumes that the conclusion of the Supreme Court in *Paycheck Services* was that Section 212 has no application to shadow directors. It is not clear to me, having looked at what was said by Lord Hope at [22], that his Lordship was saying that a person who qualifies as a shadow director of a company cannot fall within the terms of paragraph (c) of subsection (1), as opposed to the narrower statement that a shadow director cannot qualify as an

officer of the company within the terms of paragraph (a). The narrower statement would seem more logical, given that paragraph (c) applies where a person is not an officer of the relevant company, and applies in circumstances which might also have been sufficient to render the relevant person a shadow director of the relevant company; see the factual test in the final part of subsection (1). As such, it is not clear to me that *Paycheck Services* is authority for the proposition that a shadow director of a company cannot come within any of the paragraphs in Section 212(1). The proposition that a shadow director can fall within the terms of paragraph (c) seems to me to be well arguable, assuming that the factual test in paragraph (c) can be satisfied; namely being concerned, or taking part in the promotion, formation or management of the relevant company. In this context I note the discussion of this point in Bailey & Groves, Corporate Insolvency – Law & Practice, at 17.38, at footnote 4:

> *"See 17.40 below. 'Director' clearly includes a 'de facto' director (see 17.4 above) but there has been some debate as to whether the provision can apply to a shadow director. In Holland v HMRC [2011] BCC 1, 13, para 22 Lord Hope observed that s 212 did not apply to shadow directors 'because, unlike s 214, the statute does not provide for this'. However, it may be argued that a shadow director may be pursued under s 212 because it appears from recent authority that normally a shadow director will owe fiduciary duties at least to some degree: Vivendi SA v Richards [2013] EWHC 3006 (Ch), [2013] Bus LR D63, [2013] BCC 771. Previously there were only limited situations in which a shadow director was held to owe directors' duties to the company: Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), at [1279]–[1290]. Further, a shadow director would probably be caught under s 212(1)(c) as a person 'concerned, or [who] has taken part in the... management' of the relevant company."*

352. So far as the application of the factual test in paragraph (c) to the present case is concerned, it seems to me to follow from my discussion of good arguable case above that there is a good arguable case for saying that the factual test is satisfied in the present case, in relation to each of the Respondents. The same analysis seems to me to apply to the question of whether, in the present case, each of the Respondents did act in such a way as to satisfy the factual test in the final part of Section 212(1).

353. I therefore conclude that the Claimants (specifically the Liquidators) have a good arguable case that they are entitled to claim repayment, or restoration, or an accounting or contribution from each of the Respondents pursuant to Section 212 of the 1986 Act. I add, in this context, that I agree with a point made by the Claimants; namely that this is something of an arid debate. The jurisdiction in Section 212 is only available where the relevant person, whether officer of the company, liquidator or administrative receiver of the company, or other person falling within paragraph (c), has committed a wrong of the kind referred to in subsection (1). Section 212 does not create any new cause of action. As such, it seems to me that the availability of Section 212 in the present case does, in reality, depend upon the merits of the claims in common law and equity made by the Claimants.

354. Turning to Section 213, it provides as follows:

> *"(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.*
>
> *(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."*

355. The issue raised in this context by the Respondents is whether there can be said to have been any fraudulent trading. The Claims arise out of the transfer of the Funds through the Claimant Companies. As I commented in the First Hearing, the Companies were effectively conduits for the Funds. This could not qualify, so it was asserted by the Respondents, as the business of the Claimant Companies being carried on with an intent to defraud creditors or for any other fraudulent purposes. There was no business being carried out at all.

356. The Claimants' answer to this point was that the role of the Claimant Companies in the Alleged Fraud was their business, for the purposes of Section 213, and was carried on with the intention of defrauding their creditors. At the least, so the Claimants contended, the Claimant Companies purported to engage in forex and commodities trading, as the cover for money laundering. Activity of that kind was perfectly capable of engaging Section 213.

357. Several authorities were cited to me on this issue, but the most helpful seemed to me to be *Morphitis v Bernasconi* [2003] EWCA Civ 289, in which Chadwick LJ analysed the operation of Section 213. One issue which fell to be considered in that case was whether Section 213 was capable of applying in a situation where there was only the defrauding of a single creditor by a single transaction. The essential answer given to this question by Chadwick LJ, at [46], was in the following terms:

> *"46. For my part, I would accept that a business may be found to have been carried on with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, and by a single transaction. The Cooper Chemicals case is an example of such a case. But, if (which I doubt) Templeman J intended to suggest that, whenever a fraud on a creditor is perpetrated in the course of carrying on business, it must necessarily follow that the business is being carried on with intent to defraud creditors, I think he went too far. It is important to keep in mind that the pre-condition for the exercise of the court's powers under s.332(1) of the 1948 Act – as under s.213 of the 1986 Act – is that it should appear to the court 'that any business of the company has been carried on with intent to defraud creditors of the company'. Parliament did not provide that the powers under those sections might be exercisable whenever it appeared to the court 'that any creditor of the company has been defrauded in the course of carrying on the business of the company'. And, to my mind, there are good reasons why it did not enact the sections in those terms."*

358. What I take from this extract is that Section 213 can be engaged in a situation where a creditor or creditors are shown to have been defrauded by a single transaction. This however has to occur in a situation where the business of the relevant company is being carried on with an intention to defraud creditors. It is not sufficient for a fraud to occur in the course of the business of a company. The pre-condition to the exercise of the power under Section 213 is that the business of the company has been carried on with intent to defraud creditors of the company.

359. All this however begs the question of what was the business of the Claimant Companies in the present case. Were the Claimant Companies engaged in legitimate business activities, in the course of which they happened to be used as vehicles for the Alleged Fraud? Can it be said that the business of the Claimant Companies was to engage in the Alleged Fraud? These are related questions which are also fact sensitive questions, for trial. As matters stand it seems quite clear to me that the Claimants (specifically the Liquidators) have a good arguable case that they are entitled to claim contributions from each of the Respondents pursuant to Section 213 of the 1986 Act.

360. Coming finally to Section 423 it provides, in the relevant subsections, as follows:

> *"(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—*
>
> *(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration.*
>
> *(b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or*
>
> *(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.*
>
> *(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—*
>
> *(a) restoring the position to what it would have been if the transaction had not been entered into, and*
>
> *(b) protecting the interests of persons who are victims of the transaction.*
>
> *(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—*
>
> *(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
>
> *(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."*

361. In summary, the Respondents contended that the claim under Section 423 is not viable for the following reasons:

(1) On the Claimants' case the derivatives transactions pursuant to which the Funds were represented as passing through the hands of the Claimant

Companies were shams, and the Funds were held on trust for others when they passed out of the hands of the Claimant Companies. As such, the Claimant Companies were not parties to the material transactions.

(2) Given the position of the Claimant Companies as mere conduits, there was insufficient dealing to render the transmission of the Funds a transaction for the purposes of Section 423.

(3) There is no evidence that the Claimant Companies entered into the transactions, if the relevant dealings did qualify as transactions for the purposes of Section 423, with the required statutory purpose of putting assets beyond the reach of creditors or otherwise prejudicing the interests of creditors. One cannot infer such purpose from simply looking at the consequences of the relevant transaction. Nor is the alleged purpose of the Respondents to be attributed to the Claimant Companies for this purpose. The Respondents contended that this was ruled out by the Claimants' pleaded case at paragraph 24 of the Particulars of Claim. Nor were the Consortium Banks creditors of the Claimants Companies, within the meaning of Section 423.

(4) The relief sought seeks to restore the position to what it was before the transfer of the Funds from the Layer 2 companies to the Layer 3 company (Docklands). On this footing the proper respondent to a claim under Section 423 is Docklands.

(5) The Third Defendant added the argument that there was, in any event, no evidence of any of the Funds having come into the hands of the Third Defendant. I assume that this also reflects the position of the Three Defendants

362. I cannot see that any of these arguments, whatever their merits at trial, demonstrate that the claim under Section 423 is not viable. Taking the argument in turn, albeit briefly, the position seems to me to be as follows.

363. In the context of the first argument the authorities cited by the Respondents are all arguably distinguishable on their facts. In particular, it is not the Claimants' case that the transfer of the Funds by the Claimant Companies was directed by those who, on the Claimants' case, were the ultimate beneficial owners of the Funds. Apart from this, it is the Claimants' case that the Claimant Companies had a beneficial interest of their own in the Funds. Whether that is correct is an interesting question which I have considered in the context of the proprietary claims, and in respect of which I have already concluded that the Claimants have a good arguable case.

364. As to whether the transfer of the Funds qualified as a transaction or transactions for the purposes of Section 423, it seems to me that the Claimants' case is well arguable. There was a sustained period of dealing between the Claimant Companies and Docklands and derivatives agreements were entered into between these parties, which are said to have been shams. Whether all this qualifies as a transaction or transactions for the purposes of Section 423 seems to me to be a fact sensitive question which will require resolution at trial. As matters stand it seems to me that the Claimants have a good arguable case in this respect.

365. Turning to the question of purpose it seems to me that there is a good arguable case that the purposes of the Respondents can be attributed to the Claimant Companies in this context. The Claimants' case proceeds on the basis that the knowledge and intentions of the Respondents can be attributed to the Claimant Companies for the purposes of the claim under Section 423. The Claimants' case does not rely on the knowledge and intention of its registered director. This raises a legal issue as to whether such attribution is possible, in respect of which the Claimants seem to me to have a good arguable case.

366. I do not think that the Claimants' case on attribution is ruled out by paragraph 24 of the Particulars of Claim. Paragraph 24 reads as follows:

> *"24. It is the Claimants' case that, while the knowledge and intentions of the Alleged Principal Conspirators and the Amicorp Participants (or some of them) are to be attributed to the Claimant Companies for the purposes of claims held by SCB and other creditors of Winsome and Forever Precious against the Claimant Companies, the knowledge and intentions of the Alleged Principal Conspirators and the Amicorp Participants are not to be attributed to the Claimant Companies for the purposes of the claims which the Claimants have against the Alleged Principal Conspirators and the Amicorp Participants."*

367. In the case of Section 423 the required purpose is the purpose of the person entering into the relevant transaction. In the present case the relevant persons are said to be the Claimant Companies. The purpose is required to be directed to putting assets beyond the reach of a person who is making or may at some time make a claim against the person entering into the transaction. In the present case this second person is said to comprise the Consortium Banks. This purpose is a required element of the Claimants' claim under Section 423, but it is a purpose which is said to have existed as between the Respondents and the Consortium Banks. As such, I do not think that the latter part of paragraph 24 of the Particulars of Claim extends to the question of whether this purpose existed. The latter part of paragraph 24, as I read it, is directed to meeting an argument from the Respondents that, by reason of the attribution of their knowledge and intentions to the Claimant Companies, the Claims or some of them can be defeated on grounds such as limitation or illegality. As I have said, I do not read the latter part of paragraph 24 as being directed to a question such as whether the purpose required by Section 423(3) existed in the present case.

368. If the Claimants are right on this question of attribution, the focus shifts to the Respondents. I have already discussed the position of the Respondents, both in relation to the issue of whether they were involved in the Alleged Fraud, and in relation to the issue of whether they directed the actions of the Claimant Companies. If the Alleged Fraud did take place then it must, at the least, be well arguable that the object of the transfer of the Funds from the Claimant Companies to Docklands was to put those Funds beyond the reach of those ultimately entitled to the Funds. Equally, it seems to me to be well arguable that the Consortium Banks can qualify as creditors of the Claimant Companies within the meaning of Section 423(3); being, at the least, persons who might at some time make a claim against the Claimant Companies. In this context I note the authorities relied upon by the Respondents, which make it clear that the existence of the required purpose

is not to be inferred simply because a transaction had the consequence of putting assets beyond the reach of creditors. The short point in the present case is that the Claimants' case on the required purpose is not confined to pointing to the consequences of the transfer of the Funds by the Claimant Companies. Whether this case is a good one remains to be seen. In my judgment there is sufficient to satisfy the test of good arguable case.

369. So far as receipt of the Funds by the Respondents is concerned, I refer back to my discussion of the Alleged Fraud and the question of whether the Respondents were involved in the Alleged Fraud. On the basis of that discussion, and the various links demonstrated to have existed between the Respondents and companies which were in receipt of the Funds, I think that there is a good arguable case that each of the Respondents was in receipt of at least part of the Funds.

370. Turning to the question of whether Docklands is the proper respondent to the claim under Section 423, it is true that paragraph 157 of the Particulars of Claim seeks relief *"restoring the position to what it would have been if the relevant transfers (i.e. the transfers from Layer 2 to Layer 3) had not been made"*. It seems to me however that there is, at least, a good arguable case that the court's powers under Section 423(2) extend to making an order for restoration of the position against those said to have been in ultimate receipt of the relevant assets.

371. In summary, I conclude that the Claimants (specifically the Liquidators) have a good arguable case that they are entitled to seek an order for restoration against each of the Respondents, pursuant to Section 423 of the 1986 Act.

(vii) Good arguable case? – the claim in conspiracy

372. I deal with the claim in conspiracy after the claims dealt with above, because the issues raised by the Respondents overlap with issues which I have already considered.

373. The constituent elements of an unlawful means conspiracy were explained to me at the First Hearing. They are as follows:
    (1) A combination between the defendant and one or more others.
    (2) An intention on the part of the defendant to injure the claimant.
    (3) Unlawful acts carried out pursuant to that combination.
    (4) Damage to the claimant caused by the unlawful acts.

374. The Respondents say that the claim in conspiracy is not viable, for a number of reasons, which I summarise as follows:
    (1) Any conspiracy claim would be a trust asset, and the claim in conspiracy is not advanced as a claim made by the Claimants in their capacity as trustees for another party or parties.
    (2) The unlawful means relied upon include the various other claims made by the Claimants, which the Respondents say are incapable of standing either as independent claims or as the unlawful means in the conspiracy claim.
    (3) The Claimants cannot demonstrate that the Claimant Companies were the target of the alleged conspiracy. The Claimants participated in the Alleged Fraud for profit. They were not targeted with any loss and they were not the intended victims of the alleged conspiracy. On the Claimants' case the

target and the intended victims of the conspiracy had to be the Consortium Banks.

(4) The Claimant Companies were actually part of the conspiracy, given that they were used as vehicles for the Alleged Fraud. As such, the Claimant Companies could not have been victims of a conspiracy in which they were also conspirators.

(5) The claim in conspiracy relies upon the unlawful conduct of the Claimant Companies. The court will not assist a party to recover compensation for the consequences of his own illegal conduct.

375. So far as the first and second arguments or sets of arguments identified in my previous paragraph are concerned, they raise issues which I have already dealt with in this judgment. For the reasons which I have previously set out, it seems to me that these arguments do not render the conspiracy claim unviable. The Claimants have a good arguable case that they have a beneficial interest in the Funds. As such, the Claimants have a good arguable case that they are not confined to the capacity of trustees in pursuing the Claims. Turning to unlawful means, and while it is not necessary to go through all of the unlawful means alleged by the Claimants in the Particulars of Claim, I have decided that the Claimants have a good arguable case in respect of the claims which I have considered above, all of which are included in the unlawful means alleged by the Claimants in the context of the conspiracy claim. So, again, it follows that the Claimants have a good arguable case that there are unlawful means upon which they can rely in the conspiracy claim.

376. So far as the targeting of the conspiracy claim is concerned, the Defendants' argument proceeds on the footing that the Claimant Companies had no more than a bare legal title to the Funds, when the Funds were in their hands. If this is wrong, and I have decided that there is a good arguable case that this is wrong, the landscape changes. If the Claimant Companies have a beneficial interest in the Funds, it seems to me that they also have a good arguable case that they were targeted with loss, as opposed to participating for profit. This, in itself, disregards the Claimants' case, which also seems to me to be a good arguable case, that the Claimant Companies have, as a result of the Alleged Fraud, been left with liabilities in respect of the Inbound Claims. This leaves the argument that the Claimants cannot establish the intention requirement in the present case because there was no intention on the part of the alleged conspirators to cause loss to the Claimant Companies, which were participants in the Alleged Fraud. If however the Claimants are able to demonstrate that the Alleged Fraud was capable of causing loss to the Claimant Companies, it seems to me that this alters the position, in terms of proof of the required intention on the part of the Respondents. On that hypothesis it seems to me that there is a plausible evidential basis for the argument that the Claimant Companies were the target of the alleged conspiracy, in the sense referred to by the Respondents and in the sense referred to by Lord Hoffmann in *OBG v Allan* [2007] UKHL 21 [2008] 1 AC 1, at [42] and [62].

377. Turning to the argument that the Claimant Companies could not be victims and conspirators, this argument seems to me to engage the issue of whether the alleged knowledge and intentions of the Respondents fall to be attributed to the Claimant Companies in this respect. I have already discussed this issue in the context of

the claim under Section 423. As with the claim under Section 423 it seems to me that the Claimant Companies have a good arguable case that, for the purposes of the claim in conspiracy, the Claimant Companies are not to be attributed with the knowledge and intentions of those, namely the Respondents, who are alleged to have conspired against the Claimant Companies. If this case is made good, it seems to me to provide an answer to the argument that the Claimant Companies could not be victims and conspirators at the same time. The same reasoning seems to me to apply in the case of the illegality argument. If the Claimants are right on the question of attribution, it seems to me that this provides the Claimants with a good arguable case that their claim in conspiracy should not be classified as a claim which relies upon any unlawful conduct of the Claimant Companies.

378. In summary, I conclude that the Claimants have a good arguable case in respect of their claim in unlawful means conspiracy.

(viii) Good arguable case? – loss, quantum and the Inbound Claims

379. So far as questions of recovery and loss are concerned, it is necessary to distinguish between the claims for restitutionary relief, seeking restoration of the Funds or their equivalent value to the Claimant Companies, and the claims for the recovery of loss alleged to have been caused to the Claimant Companies by the Respondents. In both cases however, it seems to me that the Claimants have a good arguable case that they are, in principle, entitled to the relief which they claim, assuming that liability in respect of the relevant claims can be established.

380. So far as restitution is sought, the essential question is whether the Claimant Companies have any interest in the Funds which entitles the Claimants to seek the recovery of the Funds or their equivalent value. The Respondents' case is that they do not, because the Claimant Companies have, at best, only a bare legal title to the Funds, which is insufficient to support the Claims and is, in any event, not the capacity in which the Claimants plead the Claims. The real issue here however is whether the Claimant Companies can show an equitable title to the Funds. If they can, then it seems to me that the Respondents' arguments in this respect fall away. I have decided that the Claimants have a good arguable case that the Claimant Companies can show an equitable title to the Funds. As such, it seems to me that the Claimants have a good arguable case that they are entitled, by their restitutionary claims, to seek recovery of the Funds or their equivalent value.

381. Turning to the claims to recover losses alleged to have been caused to the Claimant Companies by the Respondents, the Claimants' case is that the Claimant Companies have liabilities to the Consortium Banks in respect of the Inbound Claims. It is clear that a loss in the form of liability to a third party can constitute a loss which the law will recognise and compensate by an award of damages; see my earlier discussion of this issue in this judgment. As such, I cannot see an objection, in principle, to the Claimant Companies claiming to have suffered loss on this basis. In principle, it seems to me that the Claimants have a good arguable case that they are entitled to recover compensation and/or damages, pursuant to the relevant claims, assessed by reference to the liability of the Claimant Companies to the Consortium Banks in respect of the Inbound Claims.

382. The position would be different if it was clear that there can be no liability in respect of the Inbound Claims or if it was clear that the Inbound Claims will never be pursued. Neither of these matters is however clear.

383. In terms of liability, the Respondents submitted, amongst other matters, that it was clear that the Inbound Claims would be governed by Indian law, and that they would now be time barred, by virtue of the three year limitation period which, so I was told, falls to be applied by Indian law. As however with so much of what was argued in this hearing, the further one went into these issues, the more the position seemed to me to be arguable, rather than clear. In any event, my overall conclusion in this context is that the Claimants have a good arguable case (i) that the Claimant Companies do have a liability to the Consortium Banks in respect of the Inbound Claims, and (ii) that the enforcement of this liability is not barred by limitation.

384. Turning to the question of whether the Inbound Claims will be pursued, it would be surprising if I was in a position, at this stage of the Action, to make a finding that the Inbound Claims will never be pursued. In any event, it is clear that this is not the position. SCB India has now been joined by four more of the Consortium Banks in filing proofs of debt in the liquidations. I was told by Mr McQuater that these additional proofs amounted to around $400 million, in terms of the value of the debts claimed.

385. In this context, and in his oral submissions in reply Mr Hunter took me to the additional proofs of debt, which had only very recently arrived. The proofs were attached to a letter from the Claimants' solicitors to the Respondents' solicitors which is dated 7th October 2022. Mr Hunter's point was that examination of the debt claimed in these proofs demonstrates that the relevant Consortium Banks are seeking recovery of the debts owed to them by Winsome and Forever Precious, which were pursued in the Indian civil proceedings. Putting the matter the other way round, the proofs of debt, so it was said, did not even relate to the Inbound Claims.

386. In the context of a dispute over good arguable case Mr Hunter's submissions in this respect, if I may respectfully say so, seemed to me to miss the point. The proofs of debt which have recently arrived are all identified as proofs of debt against the six Claimant Companies and, in one case, also against Docklands as an additional party. As such, it would seem clear that the four Consortium Banks are not saying, in these proofs of debt, that the Claimant Companies are liable to them on the same basis as Winsome and Forever Precious. A more sensible reading of the proofs is that the relevant Consortium Banks are contending that the Claimant Companies are liable to them in the amount of the indebtedness of Winsome and Forever Precious which has not been recovered by the relevant Consortium Banks in the Indian civil proceedings. Whether this reading is correct, and whether the proofs of debt are defective in some way seem to me to be arguments for another day. What matters at this stage is that four of the Consortium Banks have joined SCB India in filing proofs of debt in the liquidations of the Claimant Companies. To state the obvious, this is not evidence which supports an argument that the Inbound Claims will never be pursued. It is

clear that the Claimants have a good arguable case that the Inbound Claims either are being pursued or are likely to be pursued, and have not been abandoned.

387. In summary, it seems to me that the Claimants have a good arguable case that, if the Respondents are liable in respect of the Claims or some of them, the Claimants are, depending upon the nature of the claim, either (i) entitled to recover the Funds or their equivalent value by way of restitutionary remedy or (ii) entitled to recover the amount of the Funds by way of compensation and/or damages.

388. It will be noted that I have referred to the Funds in their entirety in my previous paragraph. I do so because I do not think that it is right to restrict the good arguable case which I have identified, in terms of the quantum of recovery in respect of the Claims, to some part of the Funds. If one assumes that liability is established against the Respondents in respect of the Claims or some of them, it may turn out that recovery in the full amount of the Funds is not feasible, for legal and/or practical reasons. In theory however, and by reference to the Claims, what the Claimants are entitled to recover and what the Claimants have lost extends to the entirety of the Funds. I can see no logical basis for treating the recovery as being limited to the value of the Inbound Claim of SCB India or, for that matter, as being limited to the value of the Inbound Claim, whether or not made, of any other Consortium Bank. Applying such a limit would require findings which the court is not in a position to make at this stage and which may not fall to be made at trial.

(ix) Good arguable case? – dishonest assistance/the claim under the 1978 Act

389. I do not find it necessary to consider separately the claim in dishonest assistance. I have already considered the claims of breach of trust and breach of fiduciary duty in respect of which the Respondents are alleged to have provided dishonest assistance. I have also already considered the question of the Respondents' involvement in the Alleged Fraud. If I am right in deciding that the Claimants have a good arguable case in relation to these matters, it seems to me to follow that the Claimants have a good arguable case in relation to the claim in dishonest assistance.

390. I also do not find it necessary to consider whether there is a good arguable case in relation to the claim under the 1978 Act. The pleaded claim in this respect is only for a declaration as to the entitlement of the Claimant Companies to contribution. It is accepted by the Claimants that no actual right to contribution has yet arisen. Given the nature of the relief sought by the Continuation Application, which is a very substantial freezing order which will impose serious constraints upon the Respondents for what may be a lengthy period of time, I would not have thought it right to continue the WFO, if the Claimants' only claim had been the claim under the 1978 Act. I therefore express no views on whether the Claimants have a good arguable case in relation to their claim under the 1978 Act.

(x) Good arguable case? - conclusion

391. For the reasons which I have set out, I conclude that the Claimants have a good arguable case in respect of the Claims, to the extent to which I have decided the question of good arguable case above.

The Continuation Application - real risk of dissipation of assets?

392. As I have said this was an issue which was not the subject of much argument. The point was made, on behalf of the Third Defendant, that he has already made a successful application for the return of his passport, for the purposes of a holiday in the US, and then duly returned to the jurisdiction and re-surrendered his passport.

393. I have however decided that the Claimants have a good arguable case that (i) this case involved a major international fraud, (ii) each of the Respondents was implicated in that fraud, and (iii) the Claimants have claims against each of the Respondents arising out of that fraud. Although the Third Defendant is now separately represented, and has sought to emphasize that he is a successful businessman, against whom the evidence of involvement in the fraud is slender, I have not been persuaded that the Third Defendant belongs in a separate category, for the purposes of the Continuation Application. In all the circumstances of this case, and looking at matters as they stand now, I am satisfied that the Claimants have established that there is a real risk of dissipation of assets, to the required standard of proof, in the case of each of the four Respondents.

The Continuation Application – assets inside or outside the jurisdiction?

394. I have dealt with this question already. The Respondents have made affidavits in which they give their account of their assets. As I have noted previously in this judgment, the disclosed assets have a combined value which has been calculated at around $146 million, although precise calculation is not possible in the light of the nature of some of the assets. It follows that there are assets which will be secured by the WFO, if continued.

The Continuation Application – just and convenient?

395. Although this part of the test was not the subject of much argument, I have given considerable thought to the question of whether it is right that each of the Respondents should be subject to the substantial restrictions which will be imposed upon their liberties by a continuation of the WFO to a trial which is likely, subject to any questions of expedition which may arise, to lie some way in the future. Ultimately however, I come back to my decision that the Claimants have a good arguable case that (i) this case involved a major international fraud, (ii) each of the Respondents was implicated in that fraud, and (iii) the Claimants have claims against each of the Respondents arising out of that fraud. In the final analysis, and given that the Claimants have satisfied the elements of the test for the grant of a freezing order, I can see no good reason to justify a non-continuation of the freezing order.

396. If, in the future, a good case can be made for particular exceptions to the scope of the freezing order, the court can consider whether such exceptions should be made. There may also be a change of circumstances in the future, in the case of all or some of the Respondents, which justifies the discharge of the WFO. In principle however, it seems to me that the WFO should be continued to trial.

The Continuation Application – what sum should be the subject of the WFO?

397. The WFO, as it currently stands, secures assets to the value of £743,176,152.77 (the sterling equivalent of the value of the Claims, namely $932,466,942.36, as at the date of the May 2022 Order). The Respondents have argued that if the WFO is to be continued, it should only be continued in an amount which matches the value of SCB India's Inbound Claim. As I understand the position, this would reduce the value of the assets secured by the WFO, as continued, to around £50 million.

398. I do not accept that there should be this reduction in the value of the assets secured by the WFO, as continued, essentially for the reasons which I have already set out in the relevant part of my discussion of good arguable case. The case for the reduction seems to me to proceed on the basis, which I regard as misconceived, that the Claims can only be worth the amount of SCB India's Inbound Claim because only SCB India has submitted proofs of debt in the liquidations of the Claimant Companies. As it happens, the factual position now is that four other Consortium Banks have submitted their own proofs of debt, but this seems to me to be beside the point. As I have already explained, it does not seem to me that the quantum of the Claims is dependent upon whether proofs of debt have or have not been submitted by Consortium Banks. If the Claims are established, their value is not restricted to the value of any particular Inbound Claim. Their maximum value seems to me to be the total of the Funds which passed through the bank accounts of the Claimant Companies as part of the Alleged Fraud. I therefore conclude that the value of the assets secured by the WFO, as continued, should be the same as the value of the assets secured by the WFO in its existing form.

The Continuation Application – conclusion

399. For the reasons set out in my discussion of the Continuation Application, my overall conclusion on the Continuation Application is that the WFO should be continued to trial.

400. This conclusion is subject to my approval of the specific terms of the order by which the WFO should be continued. If there are particular issues which arise as to the terms on which the WFO should be continued, I will need to hear the parties on those issues. I stress however that this is not a licence to any party to seek to undermine my decision that the WFO should, in principle, continue to trial.

401. I should also make it clear that my reference to the WFO continuing until trial is not intended to pre-judge the outcome of the December Hearing, or the strike out applications, if the latter applications are pursued. If the strike out applications are pursued, it seems to me that it will be a matter for argument, at the hearing of those applications, as to whether and, if so, to what extent my decisions in this judgment impact upon the issues raised by the strike out applications.

Overall outcome of this hearing

402. The overall outcome of this hearing is as follows:
    (1) The application of the Three Defendants for discharge of the WFO and the passport surrender orders is dismissed.
    (2) That part of the application of the Third Defendant which seeks the discharge or variation of the WFO is dismissed.

(3) The application of the Claimants for continuation of the WFO to trial is allowed. I will make an order for the continuation of the WFO to trial.

403. I will hear the parties, as necessary, as to the precise terms of the order by which the WFO is to be continued, and on any other consequential matters which arise. In the usual way the parties are encouraged to agree as much as they can in these respects, subject to my approval of such agreed terms.