Neutral Citation Number: [2023] EWHC 2392 (Ch)

Case No: BL-2021-001907

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS AND PROPERTY COURTS

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

Date: 28/09/2023

Before :

MR JUSTICE FREEDMAN

- -

Between :

(1) AKKURATE LIMITED (in liquidation)

(2) LIAM ALEXANDER SHORT AND STEPHEN ILLES (as the joint liquidators of Akkurate Limited)

Claimants

- and –

(1) JOHN CHRISTOPHER RICHMOND

(2) MARK JOHNATHAN SCHOFIELD

Defendants

- -

James Pickering KC and Samuel Hodge (instructed by **Spring Law**) for the **Claimants/Respondents**
Claire Bunbury ((instructed by TLT LLP) for the **First Defendant/First Applicant**
Jamie Riley KC (instructed by **Addleshaw Goddard LLP**) for the **Second Defendant/Second Applicant**

Hearing dates: 16-19 and 22 May 2023
Post-reply written submissions: 23 May 2023
Judgment handed down in draft: 19 September 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 28 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN :

I Introduction

1. There are before the Court applications by the First Defendant Mr John Richmond ("Mr Richmond"), a former director of the First Claimant ("the Company") and by the Second Defendant Mr Mark Schofield ("Mr Schofield") for reverse summary judgment and/or strike out against the Claimants. It will be necessary to consider first who the parties are, the applicable principles and the issues to be determined.

2. There are various claims against Mr Richmond in this action which are said to be barred by Mr Richmond to be barred on the basis of a settlement agreement made in 2019 by Mr Richmond and the Claimants which is said to have settled and/or extinguished certain claims which are now pursued in this action against Mr Richmond. The claims made against Mr Richmond comprise:

    (i) a claim for breach of fiduciary duty that he acquired secretly interests in Trademarks which were sold by the Claimants. Mr Richmond denies that he had any such interest in the acquiring vehicles or that he owed any fiduciary obligations to the Company;

    (ii) a claim in respect of stock of the Claimants and the failure of Mr Richmond to protect the interests of the Company in respect of the stock. Mr Richmond denies that the stock was owned by the Claimants or that he was involved in the acquisition of the stock;

    (iii) a claim about representations on the part of Mr Richmond made in order to enter into a settlement agreement in 2019. This is denied in particular on the basis that it is denied that the representations were made or that they induced the settlement agreement made on 23 May 2019 ("the 2019 Settlement") or that the Claimants relied on the representations (if they were made).

3. There are claims of dishonest assistance made against Mr Schofield, which are denied. There are claims for unlawful means conspiracy which are denied by the Defendants.

4. Before considering the above, there will be an outline as to who are the parties. Then the principles applicable to summary judgment/strike out applications will be set out. There will be highlighted unusual aspects of the applications. It will also be pointed out that whilst abuse of process arguments/res judicata may arise for the purpose of trial, it is accepted that this does not arise for the purpose of this application.

II The parties

5. The Company went into compulsory liquidation on 18 May 2015. It was on a petition of HMRC with a claim for unpaid taxes and penalties of about £1.6 million. There were creditor claims notified to the Company in liquidation of approximately £17 million.

6. The Second Claimants are liquidators of the Company. There have been changes in the officeholders from time to time. As at the time of the commencement of this action,

Mr Short and Mr Wolloff were in office. Mr Illes later replaced Mr Wolloff as joint liquidator and became a Second Claimant in these proceeding by order on 18 January 2023. The term "the Liquidators" is used to refer to the Liquidators from time to time.

7. Mr Richmond is a fashion designer who created his eponymous brand "John Richmond" in the 1980s. Since then, he has created other related brands and labels which became the subject of various registered trademarks ("the Trademarks").

8. The Company was incorporated on 2 April 1998 and operated as the owner of the Trademarks. Pursuant to various licence agreements, it licensed the Trademarks to manufacturers in the fashion industry. The company had two 50% shareholders, namely (i) Hamptons Services Limited, a BVI registered company controlled by Saverio Moschillo ("Mr Moschillo"), and (ii) Word Cloths Holdings Limited an English company ("WCHL") jointly owned and controlled by Mr Richmond and Mr Tony Yusuf ("Mr Yusuf").

9. On 26 March 1999, Mr Richmond was appointed a director of the Company which office he retained until the Company entered liquidation. Mr Richmond held 70% of the shares of WCHL, and therefore indirectly held a 35% stake in the Company. Mr Moschillo became a director of the Company in 2001. At the time of its liquidation, Mr Richmond and Mr Moschillo were directors of the Company. There are issues regarding the status of Mr Richmond after the liquidation, to which reference will be made below.

10. Mr Schofield and Mr Richmond first met in 1988 and have had at least intermittent contact since then including in 2014, discussing an attempt to acquire on a 50/50 basis the 'Destroy' fashion label then owned by WCHL. By the time of the events in question, according to the Claimants, they were very well acquainted, communicating with each other sometimes very frequently on personal and business matters, and going on a family holiday together in 2015.

11. Mr Schofield is a beneficiary together with other members of his family of a Guernsey based discretionary trust called The Toco Trust of which the sole trustee is a Guernsey fiduciary company, namely Liberation Management Limited ("LML"). Mr Schofield has provided consultancy services to The Toco Trust as a representative of an English company called UCommunications Limited of which he has been the sole shareholder.

III Summary judgment/strike out: the legal principles

12. There are before the Court applications on behalf of both Defendants respectively for reverse summary judgment and/or strike out. The threshold and the applicable principles are so similar that it is very frequent for applications to be made in the alternative for summary judgment or strike out.

13. CPR 24.2 provides as follows:

> *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –*

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

(Rule 3.4 makes provision for the court to strike out[2] a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)"

14. CPR 3.4 provides as follows:

"(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

15. The general principles applicable to summary judgment applications were set out by Lewison J (as he then was) in *Easyair Ltd (Trading As Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch):

(i) The court must consider whether the claimant (or defendant) has a "realistic" as opposed to a "fanciful" prospect of success.

(ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

(iii) In reaching its conclusion the court must not conduct a "mini-trial".

(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in its statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application, but also the evidence that can reasonably be expected to be available at trial.

(vi) Although a trial may turn out not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus, the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: see *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

(vii) On the other hand, it is not uncommon for an application under CPR 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

16. There can be added that in *Partco v Wragg* [2002] 2 BCLC 323 at para. 27, Potter LJ referred to the following cautionary principles:

(i) The purpose of summary relief is to help resolve the litigation.

(ii) The court must have regard to the overriding objective. The court should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event and/or where summary disposal of a single issue may delay (because of appeals) the ultimate trial of the action. The court should consider whether the objective of dealing with cases justly is better served by summary disposal or by letting matters go to trial so that they can be fully investigated, and a properly informed decision reached.

17. At para. 28 in *Partco*, Potter LJ said the following:

> *"…Summary disposal will frequently be inappropriate in complex cases. If an application involves prolonged serious argument, the court should, as a rule, decline to proceed to the argument unless it harbours doubt about the soundness of the statement of case and is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of the trial itself: see the Three Rivers case per Lord Hope at 94–98 (pp.542–544), considering the Williams & Humbert case*
>
> *….It is inappropriate to deal with cases at an interim stage where there are issues of fact involved, unless the court is satisfied that all the relevant facts can be identified and clearly established: see Killick v Price Waterhouse at 20, Col.2 and 21 Col.1.*
>
> *…It is inappropriate to strike out a claim in an area of developing jurisprudence. In such areas, decisions should be based upon actual findings of fact: see Farah v British Airways The Times, January 26, 2000 (CA) per Lord Woolf MR at para.35 and per Chadwick LJ at para.42, applying Barrett v Enfield London Borough Council [2001] 2 AC 550 and X (Minors) v Bedfordshire CC [1995] 2 AC 633 at pp.694 and 741."*

18. By way of contrast, in a summary judgment application which lasted 6 days, in *King v Steifel* [2021] EWHC 1045 (Comm), Mrs Justice Cockerill said the following at [21]:

> *"The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial."*

IV Unusual features in these applications

19. There have been features in these applications which have given rise to inter-related concerns in trying this case. The first is the apparent contradiction between the concepts of summary judgment and strike out and a 5-day listing. The second is the nature and size of the evidence relied upon for the instant case comprising long witness statements and voluminous bundles which themselves seem to contradict the summary nature of the process. The third is how to deal with witness evidence which is at variance from

the apparent meaning of contemporary documents on a summary judgment/strike out application.

20. The Court (Master Kaye) in the instant case made a direction on 17 August 2022 in respect of the applications that the case was no longer to be listed for 1 day but should be listed for 5 days including a reading day. That was to include the application for a worldwide freezing order ("WFO"). Before this Court, it was in the event agreed that the application for the WFO should be dealt with by the continuation of undertakings to await determination dependent upon the ruling of the Court on the summary judgment/strike out applications.

21. In this instance, the 5-day summary judgment was to include a question is as to the continuation of the WFO. In the event, at the initiative of the Court, and with the approval of the parties, the resolution of the WFO has been postponed pending determination of the summary judgment/strike out applications. In the event, this did not prevent the case being heard over a period of 5 days on 16-19 May and about half a day on 22 May 2023.

22. There are difficulties in the application of the dictum above of Potter LJ about declining to proceed to argument. The difficulties include the following. It is often not easy to decide what is a complex case, and in particular to analyse whether outer garments of apparent complexity are concealing a much simpler case. In those cases, it might be consistent with the overriding objective to remove those outer garments. There were issues which were suitable potentially for summary disposal such as whether the action was barred by reason of the 2019 Settlement. It therefore follows that this was not a case where a summary judgment application was inappropriate. The questions, if any, were about the scope of the application. There is a difficulty of application of the dictum in cases other than complex cases (where the complexity is such that a summary judgment application might be recognised as a non-starter). When applicants, in this case, defendants, submit that the case is based on false premises and that, if successful, potentially weeks of court time will be saved by summary judgment or strike out, it is often very difficult at the outset to say whether the court time of the application is justified.

23. In this case, these difficulties have been compounded by the nature of the evidence. There have been long witness statements which have been criticised by the Claimants as being like witness statements for trial. By way of example, the second witness statement of Mr Richmond in support of his application and the first witness statement of Mr Schofield in support of his application were each about 35 pages in length. They each contained heavy references to documents. The witness statement of Mr Schofield contains 6 exhibits, each being over 100 pages (save for MJS2 which is less but exhibit MJS 3 is more than 200 pages). The second witness statement of Mr Richmond contains 487 pages of exhibit being documents referred to in the Particulars of Claim. The core bundle for the summary judgment/strike out applications was over 500 pages in length and the chronological bundle was over 1900 pages. There is an apparent contradiction between the length of the statements and the target of showing that the case can and ought to be dealt with summarily.

24. It is obvious from the above that there are many contemporary documents. Some of them are internal between the parties, especially between Mr Richmond and Mr Schofield. Others are between the Claimants and the Defendants or between the

Defendants and third parties. Much of the evidence is the commentary of the Defendants on various contemporary documents. The Court at trial tends to be cautious about such evidence, testing their veracity against the documents which are generally regarded as more reliable than their oral evidence. If this applies at trial, it applies equally or even more so in the context of summary judgment/strike out applications where the applicant provides explanations about contemporary documents which do not necessarily confirm the obvious meaning of the documents.

25. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413, Males LJ stated the following at paragraphs 48-49 under the heading

> "*The importance of contemporary documents*":
>
> *"48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:*
>
> *"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."*
>
> *49. It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to*

be taken at face value or are outweighed by other compelling considerations."

V Abuse of process/res judicata

26. In the skeleton argument on behalf of Mr Richmond, there were set out at length two further arguments which did not feature in his Defence. Together, these claims comprised many pages of the skeleton argument for Mr Richmond, and although less than 50%, a considerable percentage of the skeleton. The first was that the claims were barred by reason of abuse of process/res judicata. The claims were said to have been made in the 2018 Proceedings (defined below) or were claims which ought with reasonable diligence to have been made in the 2018 Proceedings: see *Henderson v Henderson* (1843) 3 Hare 100; *Johnson v Gore Wood* & Co (No.1) [2002] 2 AC 1; *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748.

27. The second was that the claims were barred because there had been recovered a sum of £750,000 in a solicitors' negligence claim against Harris Cartier solicitors. It was contended that this would have provided full recovery together with the 2019 Settlement of £850,000.

28. The skeleton argument led to an objection in correspondence that these were new heads of defence and/or new bases for a strike out application. It was submitted on behalf of the Claimants that it was unfair for the Defendants to be able to rely upon these new matters which had not been presaged earlier. Not only would the pleadings have required an amendment but also and more importantly for the purpose of the summary judgment/strike out applications, it would have required evidence which was not currently before the court. Very sensibly, Counsel for Mr Richmond accepted that these matters would not be advanced in the summary judgment/strike out applications. If the claim is to go forward to trial then Mr Richmond is at liberty to apply to amend his defence and, subject to being permitted to amend his defence, to be able to rely upon such matters by way of defence to the claim.

29. It follows that assuming that Mr Richmond is allowed to amend to plead abuse of process/res judicata, this can be considered at trial (if there is a trial). It is next necessary to consider the submissions that as a matter of construction at least parts of the action are barred by the 2019 Settlement. If and to the extent that these parts of the action still go on to trial, Mr Richmond would at trial (subject to amendment) be able to rely at the same time upon the *Henderson v Henderson/*res judicata arguments. If that is to occur, then the arguments about the effect of the 2019 Settlement and the *Henderson v Henderson/*res judicata arguments would be considered at trial together. I shall return to this at the end of the next stage of the argument.

VI Has the claim against Mr Richmond been discharged by a compromise of an earlier claim?

30. Have the claims made against Mr Richmond been settled or discharged as a result of a settlement agreement? On 29 June 2018 the Liquidators issued proceedings against Mr Richmond and Mr Moschillo ("the 2018 Proceedings"), seeking orders that they contribute up to £10,000,000 to the Company's insolvent estate. This was based on

their misfeasance in office and fraudulent conduct in relation to the Company between 2010 and 2015. On 25 January 2019, the Liquidators obtained judgment in default against Mr Moschillo for £10,000,000 which judgment has not been satisfied. On 23 May 2019 the claims against Mr Richmond were settled by way of the 2019 Settlement. This compromised all claims by the Liquidators against Mr Richmond in the 2018 Proceedings. The 2019 Settlement was for a payment of £850,000 of which only £450,000 has been paid to date.

31. The 2019 Settlement settled the 2018 Proceedings. Recital (C) provides: "The Liquidators commenced proceedings in the High Court against JR [Mr Richmond] on 29 June 2018 under action number CR-2015-005573 ("the Proceedings")". Recital (D) provides: "*JR [Mr Richmond] and the Liquidators [C2] have agreed to settle the Proceedings on the terms of this Deed without Mr Richmond making any admission as to liability*."

32. *Clause 5 provided:*

> *"5.1. By the making of this Deed, JR [Mr Richmond] and the Liquidators (on behalf of themselves and AL [the Company]) agree that upon registration of the Legal Charge pursuant to clause 3, alternatively full payment of the Settlement Sum pursuant to clause 8.3.3, all claims in the Proceedings will be compromised and settled SAVE for any claim by the Liquidators (on behalf of themselves and AL) against JR [Mr Richmond] which relate solely and directly to the enforcement of the provisions of this Deed.*
>
> *5.2. The Liquidators (on behalf of themselves and AL [the Company]) also release and discharge JR [Mr Richmond] from any and all claims, liabilities and causes of action which arise from or are based on JR's [Mr Richmond's] conduct as a director of or in relation to AL [the Company] prior to AL [the Company] entering into liquidation on 18 May 2015."*

33. There is a dispute as to what is comprised by *"all claims in the Proceedings"*. The case of the Claimants is that this is limited to all claims which were contained in the pleadings in the 2018 Proceedings which defined the ambit of the same. Mr Richmond submits that the claims are any claims which were mentioned in the 2018 Proceedings and are not limited to those referred to in the pleadings. They submit that they extend to any claims referred to in the second statement of Mr Short dated 29 June 2018 referred to in the application in support of the misfeasance claim, and that it is a matter of no consequence that a claim contained in that statement did not find its way into the pleadings (whether intentionally or inadvertently).

34. Further or in the alternative, the Claimants submit that the claims in the 2018 Proceedings were limited to Mr Richmond's conduct as a director of or in relation the Company prior to the Company entering into liquidation on 18 May 2015. This tracks the wording of Clause 5.2. The Claimants submit that this is the widest that it can be

because the term *"all claims in the Proceedings"* was in fact some specific claims, but none arising from conduct of Mr Richmond after the winding up order on 18 May 2015.

(a) The case of Mr Richmond

35. The case of the Defendants is that the claim extends to conduct of Mr Richmond after the commencement of the liquidation and in particular relating to the Trademarks. The argument is as follows:

(i) The 2018 Proceedings were initiated by an application notice dated 29 June 2018. The Liquidators sought an order that Mr Richmond repay, restore and/or account for money and property of the Company together with interest and/or pay compensation pursuant to section 212(3)(b) of the Insolvency Act 1986.

(ii) The 2018 application notice stated that the applicants relied on the facts and matters set out in the Second Witness Statement of Liam Alexander Short dated 29 June 2018 attached to the notice.

(iii) Reference is made to paras. 88-89 of the second affidavit of Mr Short in which it was stated that the intellectual property of the Company was sold by the Liquidators to FE Limited, formerly John Richmond Limited, in which Mr Richmond had an interest. This is said to mean that Mr Richmond had an interest in the entity that purchased the Trademarks as a result of which he was unlawfully profiting from the same. This is said in particular from paras. 207 - 209 of the same statement of Mr Short. This reads as follows:

> *"JR's acquisition of the Company's assets*
>
> *207. The evidence as a whole suggests that JR [Mr Richmond] intended the Company to go into liquidation in 2015, so that he might acquire its Trademarks and then re-licence them for his own benefit, without having any liability to the Company's creditors or shareholders. [emphasis added] Reference is made to the fact that:*
>
> > *(i) JR [Mr Richmond] was party to several communications before the Company was wound up about the possibility of transferring the Company's IP to a new company, so as to retain ownership of the Intellectual Property Rights, whilst prejudicing the interests of creditors and shareholders;*
> >
> > *(ii) JR [Mr Richmond] was involved in a similar scheme in 2012 in relation to FC and FF;*
> >
> > *(iii) JR's [Mr Richmond's] conduct in 2015, when the Company was facing a winding up order, suggests he intended the Company to be wound up. He failed to monitor HMRC warnings and respond to professional*

> *advice about preventative measures; he failed to provide insolvency advisors with a proper account of the Company's debtors and he failed to call in loans that would have enabled the Company to remain solvent; and*
>
> *(iv) JR [Mr Richmond] subsequently bought the Company's IPR which (with outside investment) has been re-licenced it to at least one of the Company's former licensees. JR [Mr Richmond] is now receiving remuneration in relation to those licences.*
>
> *208. The position, therefore, is that JR [Mr Richmond] is currently profiting from his unlawful conduct as detailed above. He should be made to account to the Company and to compensate it accordingly."*
>
> ***Summary of Claims***
> *209. Based on the above, losses suffered by the Company as a result of the conduct of SM and JR [Mr Richmond] as outline above are €54,053,051, made up as follows:*
>
> *…"*

[A table was then set out totalling the above sum of €54,053,051, but not including a claim relating to trademarks]

36. The case of Mr Richmond is that the 2018 Proceedings included a claim for compensation arising from the sale of the Trademarks and any subsequent licence agreements entered into. This was therefore a part of *"all claims in the Proceedings"* which was compromised and settled as per Clause 5.1 of the 2019 Settlement. It did not matter that the claims other than the sale of the Trademarks had been calculated. There was no possibility at that stage of calculation of the claim for the Trademarks.

37. Mr Richmond cites case law said to be in point and in particular the case of *Brazier v News Group Newspapers Ltd* [2016] EWCA Civ 79 affirming [2015] EWHC 125 (Ch). In that case, notwithstanding the fact that the phone hacking relied upon in the subsequent case was not known about at the time of the settlement in the first action, it was held as a matter of construction that the claim was discharged by the settlement. Thus, it is submitted on behalf of Mr Richmond that in the instant case, it did not matter that the Particulars of Claim did not refer to the claim relating to Mr Richmond having an indirect interest in the acquisition of the Trademarks from the Liquidators. It sufficed that the claim arose out of that acquisition was also barred because it was a claim in the 2018 Proceedings, as set out in Mr Short's statement, which itself was referred to expressly in the Claim Form. The Claim Form was not subsequently amended. The Claim Form was widely drawn, requesting that Mr Richmond not only repay, restore and account for money and property of the Company but also to order that Mr Richmond "*contribute such sum to the Company's assets by way of*

compensation as the court [thought] just together with interest, pursuant to section 212(3)(b) of the Insolvency Act 1986".

(b) The case of the Claimants

38. The case of the Claimants is that a claim for compensation from the sale of the Trademarks was not included in *"all claims in the Proceedings".* This was for the following reasons, namely:

(i) The second witness statement of Mr Short was superseded by Particulars of Claim, which was ordered to be provided. This did not include any claim arising from the conduct of Mr Richmond after the Company was wound up. Consequently, Mr Richmond was not called upon to plead to the claim for the Trademarks and no disclosure would follow in respect of the same.

(ii) The comments in paras. 207-209 of the second statement of Mr Short appeared only in vague terms *("the evidence as a whole suggests…")* and without particularisation. In the list of claims comprising the sum of €54,053,051 in para. 209, there was not included any claim arising from the sale of the Trademarks.

(iii) At para. 150 of the Particulars of Claim, there is an almost identical table to the one at para. 209 of the second statement of Mr Short comprising 16 items coming to almost the same amount. The two sums are in the same ballpark, both being €54 million and something, on the first case €54,310,146 and in the second case €54,053,051. Neither table includes a claim for the sale of trademarks, and both are about conduct prior to the winding up.

(iv) The release and discharge clause in Clause 5.2 is consistent with the intention only to be referring to pre-winding up claims, referring to conduct *"prior to [the Company] entering into liquidation on 18 May 2015."* It does not refer to conduct following the winding up order. Mr Richmond answers this point by saying that Clause 5.2 was adding something to Clause 5.1. It provided for a release of all claims prior to the liquidation even if it was not a claim in the 2018 Proceedings. It therefore did not assist in the definition of what was comprehended by the term *"all claims in the 2018 Proceedings."*

39. The Claimants say that it was deliberate to carve out claims based on events after 18 May 2015 primarily because they were to be fully investigated. The conduct giving rise to the matters set out in the statement of Mr Short were pre-the winding up order. There are losses referred to which arose in consequence of the winding up, but they are not in consequence of conduct post-the winding up order. The investigations in respect of the claim regarding Trademarks have been mostly since 2020. The Defendants suggest that the claim has been excluded from the Particulars of Claim due to error on the part of the Claimants. They say that the Claimants' error should not affect the scope of the 2019 Settlement.

(c) Discussion

(i) The law

40. In construing an agreement, the proper approach to construction is as follows. The general principles of construction of written contracts were summarised by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> *"The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."*

41. More recently and following various cases in the Supreme Court culminating in *Wood v Capita* [2017] AC 1173, Popplewell J (as he then was) in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd ("The Ocean Neptune")* [2018] 1 CLC 94; [2018] EWHC 163 (Comm) stated the principle in the following terms at para. 8:

> *"the Court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract, would have understood the parties to have meant."*

42. As Lord Hodge explained in *Wood v Capita* [2017] AC 1173 at [10] the court must ascertain the objective meaning of the language which the parties have used and in doing so "*must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning*." The Court must read the language in dispute and the relevant parts of the contract that provide its context. Then it does not matter which the Court considers first out of (a) the factual background and the implications of the rival constructions or (b) the relevant language of the contract: see *Wood v Capita* at [12]. It is an iterative process going from language to context or the other way around and to and fro, balancing the indications given by each.

43. The case of *Brazier* referred to above is an application of the above authorities relating to settlement. In that case, the Particulars of Claim were generic relating to phone hacking abuses and so did not confine the settlement to instances of which Mr Brazier had knowledge. The settlement was *"agreed terms in full and final settlement of the claimant's claim in proceedings…"*. The subsequent claim was in respect of phone hacking activities discovered after the settlement and which were alleged to have been conducted by different journalists and by a different desk. As a matter of construction,

a settlement was capable of applying to claims not known about at the time of the settlement. Further, the Particulars of Claim were in respect of all phone hacking. Mr Brazier expected to get relief in respect of whatever level of activity was found by the end of trial as a result of disclosure, witness evidence and inference. It made no difference that the activity was definable by reference to a separate set of journalists and the features desk as opposed to the news desk. It therefore barred the subsequent claim.

44. In respect of the question of whether the term *"all claims in the Proceedings"* extends to a claim which may have been made in the originating application and in the second witness statement of Mr Short, but not in the subsequent pleadings, assistance can be derived from cases about the continuing importance of pleadings even after CPR.

45. In *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 Lord Woolf MR observed:

> *"Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties."*

46. This was quoted and followed in *Loveridge & Loveridge v Healey* [2004] EWCA Civ 173. At para.23, Lord Phillips MR added the following:

> *"It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial…Where…departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."*

47. A claim which appears in a claim form, but which is omitted from the Particulars of Claim is not deemed to have been irrevocably abandoned. The effect is that in an appropriate case, a party can seek to amend the pleading to include the claim. That is to say that it has ceased to be a part of the claim, but the Court has a discretion on application to allow it to be restored. *"…There is no principle of law which says that a claim abandoned on the pleadings cannot be resurrected by amendment, or that an 'election', once made on the pleadings, cannot be revoked by a change of mind. This is a matter of procedural rather than substantive law. Whether a court permits the resurrection to take place is a pure matter of discretion. There may well be circumstances where the election or abandonment has in some way prejudiced the other party or it is otherwise too late for a change of direction. But those are matters which are weighed in the balance when the discretion is exercised."* per Morison J at para. 14, (and see paras. 11 – 17) in *British Credit Trust Holdings UK v UK Insurance Ltd* [2003] EWHC 2404 (Comm) The consequence is that the claim no longer forms part

of proceedings in those circumstances, albeit that by amendment in an appropriate case, and subject to the discretion of the Court, it might again become a part of the claim.

(ii) Applying the law to the facts

48. In this case, the Court has to rule only whether the claim has a real prospect of success or that there is some other compelling reason for the case to be tried. There is before the Court an application of strike out/reverse summary judgment, but not an application for judgment on the issue by the Claimants.

49. There are many construction issues which are decided summarily one way or the other. It is frequently the case that such issues are susceptible to be so decided. Whether this issue is or is not so susceptible, it is stressed at the outset that the decision in this case is not to be treated as binding on the trial judge but is a decision only that there is at least a real prospect of success in establishing that the claims are not barred on the ground of being settled by the 2019 Settlement. I shall not use the qualification of "there is a real prospect of success" before each statement, but this is to be read into the same.

50. The starting point is that the Court has to construe the term *"all claims in the Proceedings"* in Clause 5.1 of the 2019 Settlement in accordance with the principles set out above. Construing the language used and ascertaining what a reasonable person with all background knowledge which would reasonably have been available to the parties in the situation at the time of the contract, the starting point would be to the pleadings. Those define, using the language from *McPhilemy "the parameters of the case that is being advanced by each party"* and *"identify the issues and the extent of the dispute between the parties."* It is the pleadings which identify the claims in the Proceedings.

51. The next question is what pleadings should be referred to. Is it the current pleadings at the time of the 2019 Settlement or is it earlier documents, in this case the claim form with its reference to the second witness statement of Mr Short? In abstract, the current pleadings would define the claims in the proceedings, but it is necessary to consider the matter not in abstract, but by reference to the instant case.

52. In the instant case, if the claims were considered at the time of the commencement of the action, then one would look at the claim form and at the second statement of Mr Short dated 29 June 2018. The claim form of the same date referred to the Claimants relying on the facts and matters set out in that statement. However, it is necessary to consider the position at the time of the 2019 Settlement itself, that is as of 23 May 2019. By that stage, the position had changed due to the order to have pleadings. The pleadings occurred pursuant to the order of Chief ICCJ Briggs dated 20 August 2018. It ordered the service of particulars of claim, a defence and points of reply, if any. There was then an order for disclosure, intended by reference to the issues in the usual way. It was not the case that the existing witness statements stood as evidence, because a part of the order (para. 6) was following disclosure that witness statements should be exchanged.

53. Further, the parties have referred to skeleton arguments in advance of the order of Chief ICCJ Briggs, which informs as to why pleadings were ordered notwithstanding the prior

service of the second statement of Mr Short. The skeleton argument on behalf of Mr Richmond at that time was as follows:

(a) At para. 20: "*It is JR's* [Mr Richmond's] *position that pleadings are necessary in this case due to its legal and factual complexity as well as the seriousness of the allegations made against JR* [Mr Richmond]";

(b) At para. 24: "*…The witness statement already filed in support of the application is 40 pages long. This witness statement does not properly set out the causes of action against JR* [Mr Richmond] *in a way that he would be able to answer (it is for that reason that pleadings are necessary)…"*

54. It is necessary to note that a skeleton argument of Mr Pickering KC on behalf of the Claimants at the time (para. 13), referring to the original proposal of the Claimants that the second witness statement of Mr Short should stand without statements of case, because the statement was *"highly structured and the case against each of the defendants [including Mr Richmond] is entirely clear."* However, this was not the position which prevailed. The decision was to order pleadings as above. This was to define the claims being advanced in the 2018 Proceedings, and to follow it through in defences and replies (if any) so that the parties could know not only what claims were being made, but also what issues arose by reference to the claims. In terms of the order made, whether by order or by agreement does not matter, the Particulars of Claim defined the claims in the 2018 Proceedings going forward by reference to which a defence was pleaded, and disclosure took place. It was this which set out the facts and causes of action relied on and quantifying the claims advanced. A reasonable person having all the background knowledge available to the parties at the time of the contract would have understood the parties to have meant that the statements of case would define the claims in the Proceedings from that point onwards. The person would not have taken the issues by reference to an amalgam of the pleadings and the second witness statement of Mr Short.

55. When the matter was pleaded, the claims prior to the winding up of the Company were set out in the Particulars of Claim. This contained the same list of claims totalling a sum of just over €54 million in para. 209 of Mr Short's statement, and almost identically at para. 150 of the Particulars of Claim comprising 16 items. That table did not contain any reference to a claim by reference to the sale of the Trademarks in the course of the liquidation. There was no claim in the Particulars of Claim arising from the conduct of Mr Richmond after the Company was wound up or any claim by reference to the sale of the Trademarks, albeit that there were instances of the amount sought arising out of the winding up rather than from post-winding up conduct. Consequently, Mr Richmond was not called upon to plead to a claim in respect of the Trademarks and no disclosure would follow in respect of the same.

56. The above suffices to raise a real prospect of success that the claims in the Proceedings are to be understood as the claims as formulated in the Particulars of Claim and does not refer to any claim mentioned in the second statement of Mr Short which was not followed through into the Particulars of Claim (and therefore not in the Defence or the subject of disclosure thereafter).

57. The argument is fortified thereafter by further matters. Although a possible claim about the Trademarks was mentioned in paras. 207-208 of the second statement of Mr Short, there are two qualifications, namely:

    (i) Insofar as there was a claim, it was not in clear terms. It was a summation towards the end of the witness statement that *"the evidence as a whole suggests…".* Whilst thereafter it referred to an account for Mr Richmond's unlawful conduct, it was not put forward in the usual clear terms of a formulated claim. It was not a part of the 16 claims set out in tabular form at para. 209 comprising just over €54 million.

    (ii) Even assuming that it is to be construed as a claim, it is less extensive than the claims made in the current proceedings. It appears to be based on conduct prior to the winding up of the Company, that is to say that Mr Richmond intended the Company to go into liquidation in 2015 so that he might acquire its Trademarks and then re-license them for his own benefit. It fastened on his conduct prior to the winding up in his communications prior to the winding up and failing to take appropriate steps when the Company was faced with a winding up order, evidently so as to be able then to purchase the Trademarks. There is an argument to the effect that the pleaded case in the instant case now extends to different breaches of fiduciary duty, that is to say to breaches of fiduciary duty and conduct of Mr Richmond post-the winding up order.

58. The first qualification is whether the formulation in the second statement of Mr Short was sufficient for the matter to be referred to as a claim. Even assuming that it could, the second qualification is that this might be a claim in respect of conduct prior to the winding up giving rise to a fiduciary duty thereafter not to take advantage of unlawful conduct during the currency of the directorship. However, it might not be a claim in the nature of the alternative formulations which are by reference to conduct after the winding up order. This is in the nature of being in breach of fiduciary duty because of acting as a de facto director or abusing a position of trust arising out of his stewardship of the Trademarks and the tasks entrusted to him by the Liquidators in respect of the same.

59. It follows from the foregoing that even if the Court were to characterise the reference to the Trademarks in the second witness statement of Mr Short as a claim in the Proceedings even at the time of the 2019 Settlement, then it might not embrace the broader way in which the claim for breach of fiduciary duty is now formulated in the instant claim. Any claim in the second witness statement stems from conduct prior to the winding up order, whereas the claim that is now formulated is not so dependent and can be considered by reference solely to conduct after the winding up order alone. It would therefore follow, if this were carried through, to the conclusion that the alleged bar of the 2019 Settlement would not be an answer to those parts of the breach of fiduciary duty claims which are by reference only to conduct after the winding up order was made.

60. All of the above lends force also to the contention of the Claimants that the settlement was limited to conduct prior to the winding up order. That is consistent with Clause 5.2 which stated that the release and discharge to liabilities and causes of action which arise from or are based on Mr Richmond's conduct as a director of or in relation to the

Company prior to the Company entering into liquidation on 18 May 2015. I accept the observation that Clause 5.2 is additional to Clause 5.1. Nevertheless, if there had been an intention to include within Clause 5.1 liabilities and causes of action arising from or based on Mr Richmond's conduct after 18 May 2015, it would be odd for the release or discharge in Clause 5.2 to be limited to conduct up to 18 May 2015, but to have a settlement in Clause 5.1 of claims which accrued after the winding up. The confinement of the wording of Clause 5.2 is an indicator that Clause 5.1 may have been intended to relate to claims arising out of conduct of Mr Richmond prior to the winding up order and not thereafter.

61. The effect of the above is to provide further support for the argument that the 2019 Settlement did not bar the claims in the instant action, and specifically to alleged unlawful conduct occurring after the winding order.

62. It therefore follows that there is at least a real prospect that:

(i) the effect of the order for statements of case (and thereafter the formulation of the statements of case) was that the term *"all claims in the Proceedings"* is to be understood as being by reference only to the claims which were pleaded in the statements of case served pursuant to the order of ICCJ Briggs;

(ii) the passages by reference to the Trademarks prior to the order for pleadings may have fallen short of the making of a claim, but if it did not, it was by reference to the conduct prior to the winding up of conduct preparatory to the winding up so as to facilitate the acquisition of the Trademarks. There is an argument with a real prospect of success that the claims for breaches of fiduciary duty now claimed are to be distinguished to the extent that they are by reference to the conduct of Mr Richmond after the winding up order. This then gives rise to the possibility that a claim originating from pre-winding up breach of fiduciary duty would be barred, but not breaches of fiduciary duties which started only after the winding up order. It might be that such claims were so closely connected that there might be a bar of abuse of process/res judicata, but as noted at paras. 26-29 above, that is not a consideration for this application because it is accepted that that would be for a decision for trial.

63. Reference has been made above to *Partco v Wragg* and the caution that the Court should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event and/or where summary disposal of a single issue may delay (because of appeals) the ultimate trial of the action. This applies in the instant case. In the event that the Court were to allow the application in respect of such parts of the fiduciary claim as might be founded on breaches of fiduciary duty prior to the winding up order, that might lead to a severance of the claim which was barred from claims for breach of fiduciary duty which were based solely on conduct after the winding up order. In any event, the striking out of a part of the claim would not bar other claims to the extent that the Court does not strike out the whole of the claim e.g. the claim in respect of stock and the claim for fraudulent misrepresentation in connection with the 2019 Settlement. Those other parts of the claim would entail calling evidence overlapping with or closely connected with the parts of the case which will have been struck out. It would not avoid a complex trial.

64. There are other compelling reasons not to give summary judgment and not to strike out. If there is to be a trial in any event, then, as was a concern in *Partco*, there is the danger that interim applications relating to parts of the action will not provide a shortcut but will prolong the case as a whole. Further, it is desirable that all matters which might shed light on the issues in the case should be before the Court when deciding the closely related issues in the case. Reference is made to the matters set out in paragraph 63 above, that is to say such parts of the claim which may not be struck out such as the claim in respect of stock or the claim for fraudulent misrepresentation in connection with the 2019 Settlement. Further, subject to permission being granted to amend Mr Richmond's defence, there will be issues of issue estoppel and res judicata to which reference has been made, that is that the extent to which matters should have been pursued and disposed of in the first action. There is a real prospect that there will be evidence in that regard which might shed light on what claims might be left over into the instant second action. The consideration of these matters involves a very close overlap with any issues as regards the ambit of Clause 5 of the Settlement Deed. Such evidence and cross-examination are better deferred so that all of it takes place at once rather than in separate tranches with the possibility of inconsistent findings and/or reasoning. The overriding objective is served by having a single determination of closely related issues.

65. For these reasons, there is at lowest a real prospect of success of the Claimants in meeting the argument that the claims against Mr Richmond are barred by reason of the 2019 Settlement. It suffices to say at this stage that the Court accepts the arguments on behalf of the Claimants to the effect that they have at lowest a real prospect of success at trial of establishing that the claims in this action have been not barred by the terms of the 2019 Settlement. In any event, there are other compelling reasons why there should not be strike out or reverse summary judgment on parts of the claim when they are closely connected with other parts of the case which would go to trial in any event if and to the extent that other bases for the applications of the Defendants do not succeed.

VII Claim for breach of fiduciary duty in connection with the sale of the Trademarks and the subsequent exploitation

(a) Introduction

66. The Claimants claim that in breach of fiduciary duty, Mr Richmond acquired secretly interests in the Trademarks which were sold by the Claimants in the course of the liquidation. There are a number of matters to be considered in this regard. It is first necessary to consider the facts alleged to give rise to fiduciary obligations on the part of Mr Richmond in the period leading up to the sale of the Trademarks and thereafter. As is reflected in voluminous evidence and lengthy pleadings, there are major contentious areas as regards the facts and in particular as to whether Mr Richmond attempted to acquire and acquired an interest in the Trademarks acquired from the Company. The Defendants submit that it is apparent from a proper analysis of the factual evidence and the contemporaneous documents that the Claimants have at highest only a speculative case to support a case that Mr Richmond acquired directly or indirectly ownership of the Trademarks in whole or in part.

67. Even if Mr Richmond did acquire ownership of any kind in the Trademarks, there are issues of law as to whether he was thereby in breach of fiduciary duty. The Defendants submit that as a matter of law, any fiduciary obligations which he had as a director, ceased upon the making of the winding up order. This gives rise in part to questions of law as to whether there were any residual or new fiduciary obligations owed by Mr Richmond to the Company. The Claimants submit that there is a real prospect of success that there are fiduciary obligations, and that Mr Richmond has been in breach of the same. A part of what fiduciary obligations, if any, are owed, may turn upon the analysis of the facts of the case. The Claimants submit that none of this is susceptible to determination on a summary application. The Defendants submit that the Claimants are pursuing a case which has no real prospects of success, whether from a legal or factual perspective.

(b) The factual case

68. There is an issue between the parties as to whether Mr Richmond had a personal interest in the purchase and subsequent exploitation of the Trademarks. In the context of the allegation of a breach of fiduciary duty, conflict of interest and a breach of the self-dealing rule, Mr Richmond denies that he had any interest. Mr Schofield supports that case. The Defendants' summary of the facts is as follows (taken largely from the skeleton argument on behalf of Mr Schofield).

69. Soon after their appointment in August 2015, the Liquidators looked to sell the Trademarks. Since Mr Richmond was the namesake of the brand and Trademarks he created, he wanted to ensure they continued. He entered into discussions with Mr Moschillo to acquire them, but those discussions broke down. Mr Richmond explained that he was unwilling to agree to the condition that Mr Moschillo sought to impose whereby Mr Richmond would be jointly liable with Mr Moschillo for the Company's indebtedness to the bank (around £3 million) for which he had provided a guarantee: see Mr Richmond's second statement at paras. 25-32.

70. Following the breakdown of negotiations between Mr Richmond and Mr Moschillo and following discussions with Mr Richmond, in October 2015 Mr Schofield decided that the Trademarks represented a good investment opportunity for The Toco Trust which he recommended to LML. This was with a view to re-establishing the brand and selling it on: see Mr Schofield's witness statement at paras. 13-14.

71. The Liquidators invited sealed bids for the Trademarks. The Toco Trust submitted a bid of £510,000 which was successful: see Mr Schofield's witness statement at para. 15.

72. A Luxembourg company, Fashioneast Sarl ("FE Sarl") was established as the vehicle to acquire the Trademarks. A Luxembourg company was selected in light of the then favourable tax treatment of intellectual property revenue in that jurisdiction. The law firm, Jones Day, was instructed to act on behalf of The Toco Trust in relation to the acquisition. In light of the time taken in establishing FE Sarl in Luxembourg, and in order to meet the deadline imposed by the Liquidators to enter into a sale agreement, a Guernsey company, namely Fashioneast Limited ("FE Ltd") was established initially to purchase the Trademarks and then assign them to FE Sarl.

73. Ultimately, by a written sale and purchase agreement dated 20 November 2015 between the Company, the Liquidators and FE Ltd, the latter, as nominee for The Toco Trust, agreed to purchase the intellectual property relating to the John Richmond brand (including the Trademarks). It was agreed that the Company would effect an assignment of the intellectual property to transfer title. Therefore, a deed of assignment was duly executed to assign title to FE Ltd from the effective date of 20 November 2015: see Mr Schofield's witness statement at paras. 17-19.

74. Subsequently, on 1 December 2015, pursuant to a further Deed of Assignment, FE Ltd sold and assigned all its rights, title and interest in the Trademarks to FE Sarl as nominee of The Toco Trust.

75. Following its acquisition of the Trademarks, FE Sarl and Mr Richmond agreed an Exclusive Consultancy Agreement (the "ECA") by which FE Sarl engaged Mr Richmond as an independent consultant to provide design services using the Trademarks.

76. Further, FE Sarl sought to enter into new licences with the Company's licensees. Following negotiations, on 28 June 2016, it agreed a new licence with an Italian company called Italian Luxury, connected with one of the Company's former licensees, Calzaturificio Rodolfo Zengarini Slr ("CRZ").

77. Also on 16 June 2016, FE Sarl entered into an agreement with the liquidator of another Italian company which had been a licensee of the Company, and which had been connected with SM, namely Falber Confezioni Srl ("FC"). This agreement provided for the sale and purchase of what was estimated to be around 240,000 items of stock manufactured by FC bearing the Trademarks or with other intellectual property under licence ("the FC Stock" and "the FC Stock Sale"). FE Sarl agreed to pay €600,000 for the FC Stock (€2.50 per item) although this was reduced to €497,682.50 because it transpired that on inspection, the FC Stock instead comprised a total number of 199,073 items. FE Sarl on-sold the FC Stock to a Danish company called TET ApS for which it made at best a net profit of around €80,000 after expenses including a fee to a Mr Ballerini who had brokered the deal: see Mr Schofield's witness statement paras. 29-32.

78. In May 2017, following extensive negotiations, FE Sarl entered into agreements with two Italian companies for the sale of the majority of the rights in the Trademarks and a licence of the residual rights. Specifically, on 18 May 2017, pursuant to a Purchase and Transfer Agreement ("the PTA") FE Sarl agreed to sell 83% of its right, title and interest in the Trademarks to AMVI Srl ("AMVI"); pursuant to the PTA FE Sarl was entitled to a payment of €750,000 plus earn out consideration over 5 years. In addition, pursuant to a License and Related Services Agreement ("the Arav Licence"), it licensed the remaining 17% of its interests to Arav Fashion Spa ("Arav"), an Italian company which is connected with AMVI. Under the terms of the Arav Licence, FE Sarl was entitled to annual royalties from 2017/2018. As part of the overall Arav transaction, Mr Richmond entered into a design consultancy agreement with Arav and the ECA was terminated.

79. It is understood that in or around December 2017, Arav acquired stock held by the liquidator of another former licensee of the Company, namely Falber Fashions Srl ("FF"). FF was connected with FC and Mr Moschillo. However, neither FE Sarl nor Mr Schofield was involved or interested in that transaction.

(c) Was Mr Richmond a purchaser of the Trademarks?

80. There is a whole series of communications which have led to contrary cases of the Claimants and Mr Richmond as to their meaning and effect. Without setting out each and every communication, the following is highlighted.

81. First, the impression being provided by Mr Richmond to the Liquidators was that he was having conversations with interested investors, which is by implication not himself. On 14 September 2015, Mr Richmond emailed the Liquidators saying, "*In respect of purchasing the trademarks I have had conversations with various investors who are interested".*

82. On the same day, Mr Richmond emailed Mr Schofield regarding a potential purchase by Mr Moschillo and Mr Richmond, saying "Had a meeting with Moschillo last week where he tried to sell me the idea of buying back the label and the new co paying back the bank 3.2 mil and he would give me 30%. I didn't say anything just told him to put it on paper. But won't be going down that route in a hurry". Mr Richmond then said to Mr Schofield: "Forgot to add he [Mr Moschillo] said I would get paid £150 k per year but would have to work exclusively for the label. You have to admire his cheek." Mr Schofield replied: "You have to laugh".

83. The Claimants made at least two points about these communications. First, Mr Richmond rejected the offer in strong terms on 22 September 2015, suggesting, consistently with his communication with Mr Schofield, that he would get better terms than those offered to him by Mr Moschillo. Second, the treatment as laughable of the offer of £150,000 per annum is in contrast to the position now adopted by Mr Richmond, namely that he agreed to provide design services to FE Sarl for no agreed remuneration and no form of equity interest at all (on what Mr Richmond called at para. 36 of his second witness statement, an "*informal, non-remunerated basis*").

84. On 7 October 2015, Mr Richmond wrote to Mr Schofield about the deal which Moschillo had offered which he intended to refuse and saying, "*If we could buy it there would be an immediate income stream for the shoe license, approx £450k per year".* Mr Schofield asked Mr Richmond: "*What funding do you think would be required on top of the cost to buy the trademark?"*and Mr Richmond responded to this.

85. On 22 October 2015, Mr Richmond informed the Liquidators saying, "*Further to your email I would like to confirm I am not connected to any of the parties you may have received offers from".* This followed from communications the day before, when Mr Richmond asked the Liquidators *"to keep my involvement with Toco Trust confidential".* The Liquidators responded saying "*As a general point I must inform you that we are bound by a very strict codes of conduct when dealing with connected party transactions. This means that if a sale of assets takes place to a connected party the liquidator must report this to creditors and disclose amongst other things, the nature of the connection and the amount paid for the assets."* Mr Richmond passed this on to Mr Schofield without response. Mr Schofield replied saying "*I would avoid putting anything in writing to the liquidator unless you want it formalised".* Mr Richmond said that his communication about keeping his involvement with Toco Trust confidential was because he wished to keep his involvement in assisting a party bidding for trademarks a secret from Mr Moschillo. Mr Schofield stated (in his first witness

statement at para. 82) that his advice was because he did not wish the Liquidators to misconstrue the position.

86. The Claimants say that these explanations do not make sense. They submit that Mr Richmond was by this stage seeking to acquire the Trademarks either for himself or with Mr Schofield, and that the communications culminated in his lying about his not being connected. He wished to avoid detection as a connected party. It is difficult to know and understand what the communications meant, but there is a real prospect that the Claimants' interpretation is correct and further that cross-examination at a trial would help support this case.

87. Over the period of 26 and 27 October 2015, there were a number of communications which appear to show that Mr Richmond was seeking to acquire an interest in the Trademarks. These were as follows:

(i) On 26 October 2015, Mr Schofield wrote to Mr Richmond saying, "*Also are you able to agree that if we cannot secure the shoe licence or something else onerous comes up between our bid being successful and having to pay the balance if we pull out that we share the costs of the deposit?"*

(ii) On 27 October 2015, Mr Richmond emailed Mr Tom Binns (a friend of his) telling him: "*I'm bidding to buy back the trademarks from the liquidators and start all over again".*

(iii) On the same date, Mr Schofield emailed Mr Richmond saying "*Call me we got the bid. Don't discuss with liquidator".*

88. Both Defendants have given evidence to explain these communications. At least at this stage, the contemporaneous documents bear prima facie their natural meaning, namely that they are evidence of the Defendants working together and sharing an interest in the bid, and especially that Mr Richmond was intending to have an interest in the purchase of the Trademarks.

89. By way of example of explanations in witness statements, in Mr Schofield's first witness statement at para. 60, he said that the reason for his communication of 26 October 2015 was because he wanted Mr Richmond to be committed to the provision of accurate information, and therefore his having to meet one half of the deposit would provide a sense of commitment. This is a difficult explanation to accept in that it appears to be more consistent with Mr Richmond having a share, legal or beneficial, in the Trademarks. Oral evidence with cross-examination in which the respective explanations would be tested is likely to be revealing.

90. As regards Mr Richmond's second witness statement that he was bidding to buy back the Trademarks in his email of 27 October 2015, he says at para. 46 that he was seeking to find a role with whichever entity ultimately acquired ownership of the Trademarks and so this was his way (by implication false way) of impressing on Mr Binns his continued involvement in the brand. This is a difficult position for Mr Richmond: either he was not being truthful to Mr Binns, or he is not now being truthful with the Court. It is not necessary or possible to make findings at this stage: only to say that this IS

illustrative of the difficulties on such an application where the evidence is not straightforward and possibly at variance with the apparent meaning of contemporaneous documents.

91. As regards Mr Schofield's response of 27 October 2015, he says at para.57 of his first witness statement that "we" was not a reference to him and the addressee (Mr Richmond), that is to their joint benefit. Mr Schofield says that it was a reference to lawyers Jones Day and the Trust. The reference to not discussing with the liquidator was, according to Mr Schofield, not to keep the interest of Mr Richmond secret, but not to cause confusion about his role. The explanation of Mr Schofield can only be assessed properly by cross examination, testing oral recollection against the contemporary documents.

92. There is evidence of various communications involving lawyers. On 4 November 2015, Mr Schofield wrote by email to Mr Richmond as follows "*Just got off a long conference call with the lawyers. Will catch my breath and call you a bit later. We have got to push Radolfo along to get a more clear commitment i.e. a letter of intent or similar subject to proving ownership. We could show him our offer letter, the letter of acceptance of our offer from the liquidator and a letter from Jones Day stating they are acting for us to complete the Purchase Agreement for the acquisition of the John Richmond TM's from Akkurate…."*. Mr Richmond responded: "*Yes I'm sure Rodolfo would welcome proof that we are acquiring the TM's, I will get his lawyers details in the morning and ask Jones Day to prepare a letter of intention"*. These communications appear to show the Defendants working together in connection with an offer made for them jointly.

93. On 5 November 2015, Mr Daniel Tozer of Harbottle and Lewis emailed Mr Richmond saying "John – Glen has passed your email to me concerning a recommendation for a Luxembourg lawyer to support your proposed setting up of a Luxembourg company to hold trademark assets" and gave a recommendation. This was forwarded to Mr Schofield. This appears to be a part of joint collaboration of the Defendants.

94. On 10 November 2015, Mr Richmond emailed Mr Schofield regarding some trademarks and saying "Need to take advice on these and explain to a TM lawyer what are [sic] objective and reasoning to assign these to the newco is." On 16 November 2015, Mr Schofield told Mr Richmond the name of the "Luxco" (FE Sarl), saying "The domain registration can go to a St Vincent and Grenadines company, Maracas Limited, and we can do the share allocation etc." In these discussions, Mr Richmond wrote by email to Mr Schofield on 17 November 2015 saying, "I have sent Bilal [Ahmed of UCom] some info so he can start doing a cash flow and I'm working on the company structure perhaps we should go over all that later…". Mr Richmond's explanation was that this was not referring to a corporate structure but how the design team would be made up and where would be a suitable location for an office: see his second statement at para. 51. As the Claimants submit, this explanation, which is at variance with the words "working on the company structure" will be the subject of challenge in cross-examination.

95. When the sale was completed on 20 November 2015, Mr Schofield emailed Mr Richmond saying: "*DONE !!!!"* Mr Richmond replied: "*YES !!!!!!!!!!!!!!!!!! GREAT WELL DONE AND THANKS MARK"*.

96. On 25 November 2015, Mr Richmond emailed Mr Giovanni Sgariboldi of Euro Italia saying: "As promised here is confirmation that the trademarks have been purchased by the company Fashioneast. I can assure you that Moschillo has no interest in this new company. I own 50 % of the shares along with a private investor." Mr Richmond says at paras. 64-65 of his second witness statement that this sentence was "incorrect". He said that this was because he wanted to assure Mr Sgariboldi that Mr Moschillo was not involved. If that is what he wished to say, then he would have been expected to say that. This does not explain why he told what (on his case) was a lie about his business interests. The Claimants say that this was in fact evidence of Mr Richmond's interest, and at lowest it is material for cross-examination. There was reference in a trade magazine article of 27 November 2015 to Mr Richmond's interest in the label. The article said: "*The purchase of the John Richmond, Richmond X, Richmond Denim, Richmond jr and Richmond brands by Fashioneast was finalised last week and now the designer owns 50% of his own label, he specified to Fashion Mag, explaining that the operation took place following the liquidation of Akkurate"*.

97. There was reference to the Exclusive Consultancy Agreement ("ECA") dated 1 December 2016 on the front sheet (apparently a dating error which should have been 1 December 2015). Under the ECA, Mr Richmond agreed to provide exclusive design services to FE Sarl. Clause 3 provides that his fees would be "*As agreed in the Shareholders Agreement for Fashioneast S.a.r.l"*. Mr Richmond initially denied that he had entered into any agreements/consultancy agreements with FE Sarl. Mr Schofield later told the Liquidators about it during a voluntary interview.

98. The Defendants have both said that the ECA never came into effect. In an affidavit, Mr Schofield said "Mr Richmond, to my knowledge, only assisted FE SARL in the provision of some design work in 2017 for which he was paid £10,000 in June 2017 by FE SARL".

99. These explanations are at odds with a document dated 17 May 2017 signed by Mr Richmond and Mr Schofield terminating the ECA. Further, drafts of the ECA were circulated on 11 January 2016, which suggests that it was signed then but backdated to December 2015. Mr Schofield says now (para. 25 of his first witness statement) that the ECA was in fact signed on 1 December 2016 and backdated a year to 1 December "*to reflect the fact that D1 had been providing design services to FE Sarl since that date. Specifically, since 1 December 2015…"*. That conflicts with previous assertions that the ECA never came into effect and with the statement of Mr Schofield as to Mr Richmond's involvement with FE Sarl being only in 2017.

100. Leaving aside these inconsistencies, the ECA refers to the remuneration of Mr Richmond being "*As agreed in the Shareholders Agreement for FE Sarl*". This suggests that there was a shareholders' agreement specifically for FE Sarl to which Mr Richmond was a party (and thus a shareholder), and his remuneration was agreed by him thereunder. There are documents in January 2016 containing an initial draft of the ECA and questions of Jones Day including under "Fees" the question "does this need to be included?" It also had a January 2016 date. The inference is that Jones Day was instructed to include reference to a shareholders' agreement for FE Sarl. This appears to indicate that there was a shareholders' agreement.

101. In an email of 18 January 2016, Mr Schofield sent an email to Ms Naselli and Mr Zengarini attaching a "*company flow chart showing the ownership of Fashioneast*

S.a.r.l as you requested." It is unclear who created this chart. The chart showed two shareholders of Fashioneast S.a.r.l., namely as to 50% beneficial owner Mr Schofield through Toco Trust and as to 50% Mr Richmond. Mr Schofield has contended that the flow chart was not accurate and said that it was because Mr Zengarini had "*expressed concern about the possibility that D1 was no longer committed to or involved in the Brand*". He said: "*I wished to reassure [Mr Zengaini] that [Mr Richmond] was [committed to or involved in the Brand]. I accept that the diagram was not accurate, it was sent during the negotiation period to demonstrate Mr Richmond's involvement with the Brand, but an email attaching a structure chart obviously does not mean [Mr Richmond] in fact owned 50% of FE Sarl"*. If the need to reassure Mr Zengarini was correct, it is difficult to see why it was necessary to lie (on the Defendants' case) to Mr Zengarini, a very important licensee, about Mr Richmond having an interest. This structure chart was sent again to Mr Zengarini, copying Mr Richmond, on 13 June 2016. The Claimants rely on this as the true evidence of Mr Richmond interest in FE Sarl.

102. On 29 January 2016, Mr Richmond assigned all of his rights, title and interest in (1) five trademarks which he owned in his personal capacity, and (2) two trademarks in the name of WCHL, to FE Sarl for £1. Mr Richmond says (para. 71 of his second witness statement) that he did this "*in order to formalise and regularise the position in relation to all the trademarks relating to the Brand. […] I considered that it would be desirable, in order to preserve the stability of the Brand, to have all of the relevant intellectual property rights to the Brand would be held by the same entity, namely FE Sarl"*. This gives rise to the question as to why he would transfer such a valuable interest to FE Sarl for £1, particularly when he had no income and was said to be living off savings. The Claimants say that an obvious explanation for this is that Mr Richmond was interested in FE Sarl.

103. In February 2016, FE Sarl and Mr Richmond brought legal proceedings against Mr Moschillo in Italy concerning alleged trademark infringements. The pleadings stated that "*John Richmond has created a new company (Fashioneast), owner of the Richmond rights, and through it continues its stylistic and creative activity"*. Mr Schofield says (at paras. 69-70 of his first witness statement that the pleading was "*misleading"* and that he "*informed the lawyers responsible for the filing of this shortly after I learned of it"*). There is correspondence of 7 February 2019 from Mr Schofield to his Italian lawyer Mr Baghetti, but it is apparent from the email that Mr Baghetti said that the statement had been approved by Mr Richmond and Mr Schofield.

104. On 26 May 2016, Mr Schofield emailed Mr Richmond saying "Just got off a call with Alota and Lorenzo. Just so you know: E1.5m cash, they invest E3.5m in the company now and a further E1m in the shop to have it open 6 months. We retain 30%. I think what this says is that we can portably get more out of this deal if we wanted to pursue it, he has deep pockets. However, the key strategy is to preserve equity. It is useful to keep all conversation going, we can use this to now push Franco and Sandro and we do not have anything back from them yet. I will push Marcello." Mr Richmond seeks to explain the reference to "we retain 30%" as being not because of his having a share of the 30%, but because he was working with FE Sarl as a creative director: see para. 78 of his second witness statement.

105. On 8 August 2016, BSIG wrote to LML regarding the proposed transaction between them. The Term Sheet at point 5 stated that: "*LM will be entitled to (a) appoint one representative in the Board of Directors of Arav through the existing governance*

agreement between Blue Skye and Vertis and (b) negotiate by December 31, 2018, a stock option plan for up to 5% or Arav share capital to reward the top management, including JR to whom 2.5% Arav share capital shall be granted, based on a five year-business plan". Updated terms were circulated among the Defendants on 10 September 2016.

106. On 11 September 2016, Mr Schofield sent Mr Richmond a document called "JR Business Plan V3" and wrote: "I am sending you the projections we did a while back for your ref. as I used these to negotiate the guaranteed minimums and the 20% of 2017 licence fees. I also calculated our projected net profit vs the guaranteed return from the Arav deal based on these projection (less a realistic o/h to achieve them) which is important to compare. We need to get an indication of sales from Zengarini and CDP to give an indication of where our projections are heading". The projection contained a net profit projected figure of €53.7m across 8 years, and provided for Mr Richmond and "MD" (i.e. managing director, Mr Schofield) to get identical salaries over 7 years, totalling €1.08m each. Mr Richmond, at para. 83 of this second witness statement, says that these were not his documents, and he was not the author of the email. Mr Schofield contends at para. 80 of his witness statement that this projection was based on Mr Richmond providing design services to FE Sarl and any future purchaser of the Trademarks but was not evidence of Mr Richmond ever acting as a director or exercising management functions. This contention is highly questionable and there is good reason for the Claimants to wish to test its veracity by cross-examination.

107. Following the sale of the stock, in December 2016, a statement of account was prepared indicating that the profit from the re-sale of some stock was €146,791. Mr Bilal Ahmed informed Mr Giorgio Ballerini (who had helped with the transaction) "*In John's [Mr Richmond's] and Mark's [Mr Schofield's] opinion amount Euro 146,791 should be split 3 ways (Euro 48,30.33 Each), minus the ISA s.p.a claim amount Euro 6,137.68. Amount due to you is Euro 42,792.65."* Mr Schofield says (para. 90 of his statement) that there was no evidence of a split in favour of Mr Richmond, and that two thirds were for Sarl. Mr Richmond says that he did not receive a share: see para. 87 of his second statement. The Claimants say that if the money was paid to FE Sarl as to two thirds, this was consistent with the interest of both Defendants being held via their interests in FE Sarl.

108. On 18 May 2017, FE Sarl, Arav, and AMVI, entered into an arrangement under which AMVI acquired 83% of FE Sarl's rights, title and interest in the Trademarks, while the 17% interest retained by FE Sarl became the subject of a licence agreement with Arav. The result, it seems, is that Arav and AMVI together had the rights to use 100% of the Trademarks from May 2017. Communications between those parties at this point in time (which would be expected on disclosure) may shed light on Mr Richmond's position. Mr Richmond entered into a consultancy agreement with Arav and TLTL (owned by Mr Schofield) under which Mr Richmond would provide design services to Arav for an initial fee of €150,000 per annum, payable in monthly instalments to TLTL. It is not clear why TLTL, Mr Schofield's company, should have received all payments due to Mr Richmond (rather than being paid to Mr Richmond directly). There is presumably some agreement between Mr Richmond and TLTL/Mr Schofield about this. Even then, payments apparently went first through Mr Richmond's wife's company, EBC, as is stated at paras.20-21, Mr Richmond's affidavit of 23 November 2018 and para. 10 of Mr Richmond's affidavit of 2 January 2019 (again, something

about which there are presumably agreements recording or evidencing the same) before going to Mr Richmond. Disclosure about this is likely to shed light on matters and the true nature of the parties' interests.

109. Indeed, the terms of the "*Arav Settlement Agreements*" from 2021, and surrounding communications, should also shed light on the position between Mr Richmond, Mr Schofield and FE Sarl, in relation to the position with Arav, and would be relevant to matters in dispute.

110. There are many more examples of such communications. The Claimants submit that at lowest, they indicate that at this stage their case that Mr Richmond was interested in the Trademarks post-sale to FE Sarl (either directly, or through a direct or indirect shareholding in the purchaser) which he concealed from the Liquidators before and after the sale, and as to Mr Schofield's dishonest assistance of him in that regard (including concealing that fact from the Liquidators) has real prospect of success. They say that it is a *"quintessential trial issue"* and that the Defendants *"have a very great deal of explaining to do and their credibility is certainly in issue."*

(d) Did Mr Richmond owe fiduciary obligations as regards the Trademarks to the Company?

111. The Claimants submit that Mr Richmond acted as a fiduciary vis-à-vis the Company and owed it fiduciary obligations after the winding up order of 18 May 2015. The different ways in which the Claimants seek to present their case about the continuation of fiduciary duties are as follows:

(i) There is at least a question of law as to whether fiduciary obligations come to an end at the point of winding up notwithstanding authority to the effect that a director ceases by operation of law to be a company director on a company going into compulsory liquidation: see *Measures Brothers Ltd v Measures* [1910] 2 Ch. 248.

(ii) A claim that at least as regards the Trademarks and/or the intended sale, Mr Richmond acted as a de facto director and is therefore subject to continuing common law or statutory fiduciary duties.

(iii) The conduct on the part of Mr Richmond post-dating the making of the winding up order which gave rise to a fiduciary relationship and fiduciary duties on the part of Mr Richmond to the Company. Any fiduciary duty was fact specific arising out of the activities of Mr Richmond in his stewardship of the Trademarks and his involvement in connection with the sale of the same.

(iv) The possibility that the opportunities which led to the sale were commenced prior to the liquidation e.g. the cooperation between Mr Schofield and Mr Richmond starting before the winding up. The first communications so far found between them was the day after the liquidation, despite assertions made to the effect that they had not been in contact about this subject until much later. The relevance of that is that the duty to avoid conflicts of interest (section 175

of the Companies Act 2006) applies as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director: see section 170(2)(a). Likewise, the duty not to accept benefits from third parties (section 176 of the Companies Act 2006) applies as regards things done or omitted by him before he ceased to be a director: see section 170(2)(b).

(e) The conduct of Mr Richmond relied upon as giving rise to a fiduciary duty

112. The Claimants rely upon the following conduct on the part of Mr Richmond as set out in the draft Amended Particulars of Claim as follows:

> *"13. Notwithstanding the above, however, the First Defendant [Mr Richmond] continued after the winding up order to act as a director of the First Claimant and to conduct the First Claimant's business without the knowledge or consent of the Liquidators. In particular:*
>
> *(1) The First Defendant [Mr Richmond] purported to exercise the First Claimant's rights and perform the First Claimant's obligations under agreements with its licensees, including with Falber Fashion Srl ("**FF**") and Calzaturificio Rodolfo Zengarini S.r.l ("**CRZ**"), by assisting them with the design and manufacturing of licensed products for seasons S/S[1] 2015, F/W[2] 2015-2016 and S/S 2016. In relation to FF, the First Defendant [Mr Richmond] continued to attend its factory premises in Italy on a regular basis, and assisted FF with the design and production of licensed goods.*
>
> *(2) The First Defendant [Mr Richmond] conducted marketing activities in relation to the Trademarks, including by putting on a 'Menswear' show on 21 June 2015 and the Milan Fashion Show for 23-28 September 2015.*
>
> *14. It is to be inferred that the First Defendant [Mr Richmond] carried out the above steps in anticipation of his acquiring the Trademarks from the First Claimant in due course and wanted the First Claimant's business of [licensing] the Trademarks for profit ("Trademark Business") to continue seamlessly, for his subsequent benefit."*

113. In his Defence (especially para. 23.3), some contact of Mr Richmond with licensees FF and CRZ was admitted. It was said that this was done on an *"informal basis"* and not holding himself out as a director of the Company. It was denied that he was exercising the Company's rights or performing their obligations. He was said to be *"very worried after the First Claimant entered liquidation that there was a significant risk that the brand would fail and all be damaged and he wished to ensure that the brand which he regarded on an emotional level as an extension of his own identity was not damaged or*

demeaned by for example the production of substandard designs." It was said that he was worried about the brand because his own standing in the industry was intrinsically linked to the brand. He was also concerned about Mr Moschilllo continuing to use the Trademarks and Mr Richmond did not wish Mr Moschillo to harm the reputation of the Brand.

114. In his Defence (para. 23.4), Mr Richmond admitted the marketing activities referred to at para. 13(2) of the Particulars of Claim, contending that this was in a personal capacity to protect the Brand's value and stability. He *"chose the models, and together the outfits, and organised the music for the Shows."*

115. In their Reply to the Defence of Mr Richmond (at paras. 12 and 13), the Claimants said that (a) there was no explanation of what work on an "informal basis" meant or how it was different from work prior to the winding up, and (b) there was no supporting evidence in relation to the same.

116. At para. 24 of the Particulars of Claim, it was stated that in the first week of October 2015, with the consent of the Liquidators, Mr Richmond used his own resources to renew some of the Trademarks which were due to expire shortly, even though they remained the property of the Company. This is evidenced by an email dated 1 October 2015 from Mr Richmond to Lindsey Nicholson, a manager for the Liquidators. This was admitted in the Defence of Mr Richmond at para. 36. This is said to have occurred because the Trademarks registered in the USA were about to expire. It was contended on his behalf that Mr Richmond paid to renew the USA Trademarks because he did not wish them to lapse since they were linked with his identity. He was concerned that at some time in the future he would be involved with the Brand, and he was aware of the importance of the USA Trademarks to any potential investor. He therefore wished to ensure the stability and value of the Brand was preserved pending any sale to a successful bidder.

117. Attention was drawn to an email from Mr Richmond to Mr Moschillo dated 22 September 2015, responding to an offer from Mr Moschillo to him. This indicates a detailed knowledge as to the trading between the Company and its licensees, Euroitalia, Falber Fashion and Zegarini. It may have been a spoiling or distracting tactic to discourage Mr Moschillo by indicating that there were serious problems with each of the licensees. The important point is that this showed a detailed knowledge of the current business of the Company derived from his continuing role in respect of the Trademarks in the course of the liquidation, and consistently with the pleaded case.

(f) The Defendants' case

118. The Defendants submit that this conduct does not prove a case for the Claimants. First, it simply reflects isolated instances of Mr Richmond seeking to keep the Trademarks going pending a sale. There is no pattern from the instances to demonstrate that Mr Richmond was working for the Company as he had done prior to the winding up.

119. Second, there is nothing to indicate that there was a role as director, de facto or otherwise, or that akin to a senior management employee that was capable of giving rise to fiduciary duties. A de facto director is a matter of corporate governance: see

Smithton v Naggar [2015] 1 WLR 189 at para. 33 per Arden LJ: *"The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director."* At para. 35, Arden LJ said *"The question is whether he has assumed responsibility to act as a director*", and at para. 38, that *"The court is required to look at what the director actually did and not any job title actually given to him."* It cannot be inferred from the provision of design services or marketing that Mr Richmond was assuming being a director. It is not suggested that he was sitting down with the Liquidators and making decisions as if he had assumed to be a director of the Company. The Defendants submit that this is all a construct to force a fiduciary duty which is illusory and self-serving. As a matter of corporate governance, one would not expect a former director to remain as such de facto given the nature of the statutory and other responsibilities and duties of Liquidators.

120. Third, if and to the extent that Mr Richmond assumed the obligations of the Company vis-à-vis two of the licensees, that does not mean that he thereby assumed responsibility to act as director of the Company: see the Defence of Mr Richmond at paras. 22-23. If it be the case that Mr Richmond was taking steps to preserve the value of the brand, it does not follow that he was in a fiduciary relationship as regards the Trademarks, let alone as regards the sale of the Trademarks. It is said that there is no allegation that his relationship with the Company was based on trust and confidence such as would be the case of an agent which does not describe the limited role of Mr Richmond. Likewise, it is said that there was nothing in the relationship that indicated that Mr Richmond was to subordinate his own personal interests to those of the Company. On the contrary, it is said on behalf of Mr Richmond that he was acting out of self-interest in that he was assisting the sale of the Trademarks to look after his future.

121. Fourth, on the contrary, the Liquidators were in control, and it would be a very odd set of events for the Liquidators to be in office, yet for a former director to have some joint control. This was not the case that Mr Richmond had any role in connection with participating in the sale, let alone having any control over the sale to transfer the Trademarks to another person. He did not decide to whom to sell the Trademarks. He did not conduct the sealed bids. He did take some steps to preserve the value of the Trademarks such as by liaising with Licensees and ensuring that the Trademarks did not expire. Even if Mr Richmond had an interest in a purchaser, he was not on both sides of the sale because he was not at the material time a director of the Company nor were the Trademarks in his custody or control. It follows that Mr Richmond had no conflict of interest in the sale since he was not on the Company's side of the line.

122. Fifth, it was submitted that at an earlier stage, as evidenced by an email sent by Lindsey Nicholson to a valuer dated 21 September 2015, the former directors were interested in purchasing the trademarks from the Company. It was said that Mr Richmond had said that *"the trademarks (are) worth more if we sell to him as he will continue to support and promote the brand"*. It therefore followed that when Mr Richmond was assisting, it was in the context of his intended purchase. Thus, the thesis that his activities occurred in the context of a secret purchase was not the case. It was therefore demonstrably not the case that there was any stewardship of the Trademarks contrary to the Claimants' contentions, nor was there conduct which could be elevated to the level of a de facto directorship.

123. Sixth, there is no allegation of a sale at an undervalue or that Mr Richmond received payments from third parties in the period between the winding up and the sale. It is not said that Mr Richmond had custody of the Trademarks pending the sale. There is no evidence from the Liquidators to support this. There is no reason to believe that further evidence to this effect will become available at trial. It is mere "Micawberism" to think that such evidence will emerge at some point, now so many years after the event. This is particularly the case given that there was a lengthy application by the Claimants against the former directors pursuant to section 236 of the Insolvency Act 1986. If there was something of value to the Claimants' case, it would have emerged in those proceedings and by now, and, it was submitted, there is no reason to believe that it will emerge now more than 8 years after the winding up order. It is at this point, it was submitted, that the concept of stewardship of the Trademarks falls down. It follows that the Court is left with a nebulous alleged fiduciary duty based on some concept of stewardship which, even if true, is not sufficiently specific to give rise to a fiduciary duty as regards the sale of the Trademarks.

124. Seventh, points are taken to the effect that Mr Richmond is not registered as a shareholder in the entities recorded as having purchased the Trademarks. Mr Richmond is said not to be interested in the purchasers of the companies which have acquired the Trademarks, and various confirmations have been provided to this effect. If and to the extent that the Claimants say that he or his family had beneficial interests, this has not been pleaded, nor is there the basis of an inference for taking issue with the denials provided. It follows, according to the Defendants, that Mr Richmond was not on the other side of the line as purchaser and for this reason also there was no conflict of interest.

(g) The Claimants' case

125. The Claimants submit the following. First, on the basis that Mr Richmond acquired secretly an interest in the purchaser of the Trademarks, this activity of Mr Richmond was not because of some emotional tie, but it was to secure for his benefit as purchaser the continuing value of the Trademarks. The pleaded case is well made out that Mr Richmond maintained in the course of the winding up close contact with the licensees e.g. see the above-mentioned email of 22 September 2015 from Mr Richmond to Mr Moschillo.

126. Second, on the Claimants' case, there has emerged on a drip/drip basis a discovery that Mr Richmond acquired an interest in the Trademarks. In short, there was no transparency from Mr Richmond. The Claimants therefore submit that there is no reason to trust Mr Richmond that he is being transparent about the extent to which Mr Richmond was working for the Company between the winding up and the sale of the Trademarks. The inference (or at lowest, the suspicion based on reasonable grounds) is that the instances uncovered are part of a much bigger picture which will emerge of Mr Richmond managing the relationship between the Company and the Licensees between the time of the winding up and the sale of the Trademarks. It is not an answer that the interest was concealed through elaborate devices whether in the nature of companies or trusts or otherwise.

127. Third, the inference that Mr Richmond has not been presenting an honest and frank account of the extent of his involvement in the business during the course of the winding

up is in part from the contested contention that Mr Richmond hid from the Liquidators his interest in the buyer of the Trademarks. On 22 October 2015, Mr Richmond informed the Liquidators that he was not connected to any of the parties who made offers. If the Claimants' case turns out to be correct about the connections between Mr Richmond and Toco Trust/Mr Schofield, this was a lie. There is a real prospect that Mr Richmond was lying to the Liquidators and that in fact he was at least intending to become a part owner of the Trademarks through various vehicles. It suited Mr Richmond to conceal his involvement because the creditors might object to his being a purchaser and/or the Company might recognise a special value to Mr Richmond as the owner of the Trademarks and change the terms altogether. The Claimants say that there have been shortcomings in the disclosure of Mr Richmond in the section 236 proceedings, and it is this rather than the absence of documents which explain how the disclosure in the section 236 proceedings may not have been particularly revealing.

128. Fourth, the email relied upon by Mr Richmond of 21 September 2015 does not provide a killer punch to Mr Richmond. If that were the case that there was proper disclosure about the directors were interested in purchasing, then the question arises as to how and why Mr Richmond was able unequivocally to assert on 22 October 2015 that he was not connected to any of the parties from whom the Claimants had received offers. The position was never corrected thereafter whether before or after the sale. Further, the very communication relied upon of Lindsey Nicholson of 21 September 2015 contains the assertion that the Trademarks would be worth more if they were sold to him. This therefore provides a clear motive for not disclosing that the sale would be to an entity connected with Mr Richmond, to avoid having to pay a price which might recognise the greater worth to a former director.

129. Fifth, it is said that there is evidence here that at the earlier stage there may have been disclosure that the former directors, including Mr Richmond, being interested in purchasing, and so the work being undertaken by Mr Richmond was wholly or in part for himself. It is not clear at this stage that there had been such disclosure provided by Mr Richmond that he would be a purchaser, and if there had been disclosure, at what stage it was by reference to the conduct of Mr Richmond vis-à-vis the licensees over the period of months before this. The position is very confused because of the statement on 22 October 2015, evidently accepted by the Liquidators that Mr Richmond was not connected with anyone who made an offer. The factual position is far from clear based on these snapshot exchanges. There is a real possibility that Mr Richmond acted in a fiduciary capacity, in which case he was subject to the obligation to disclose his interest in any purchaser. In the event, he did not disclose his interest: on the contrary, he made the representation that he was not connected with those who had made offers. It therefore follows that there is a real prospect that there will be found fiduciary obligations and breaches of duty, but that the true analysis can only satisfactorily be worked out through the greater information which will emerge through evidence including cross-examination and by further disclosure.

130. Sixth, if Mr Richmond was untruthful to the Liquidators about his role in connection with the purchase of the Trademarks, then it makes the more likely that he has not provided the full picture as regards the extent of his actions on behalf of the Company amounting to what has been termed by the Claimants as the stewardship of the licences. The motive for the concealment of his involvement in the purchase was so that he could conduct his stewardship purportedly on behalf of the Company without opposition from

the Liquidators and so that the Company would permit a sale to a purchaser in which he had an interest. There was a concern that either creditors or the Company would object to his involvement or that there would be a special price to be extracted from him due to the particular benefits of acquiring Trademarks with which he was so intimately connected.

131. Seventh, if a person owes a fiduciary obligation to disclose their interest or not to self-deal, it is no answer to say that there is no evidence that the transaction was below a market value. The duty is so rigorous or harsh that this would not amount to an answer. *"The rule is thus a severe one which applies however honest the circumstances, even though the price is fair and irrespective of whether any profit is made by the trustee"*: see *Lewin on Trusts* 20th Ed." para. 46-008. In fact, the email of 22 October 2015 from the Liquidators before the sale and the profits alleged to have been made by Mr Richmond after the sale (all challenged by the Defendants) are such as to support a case with a real prospect of success that in the event that there had been disclosure, the sale may have been only allowed to proceed on different terms, bearing in mind the advantages that Mr Richmond could derive in view of his unique connection with the Trademarks.

(h) The law relating to fiduciary duties

132. A useful starting point is a summary in Snell's Equity 34th Ed. at para. 7-05, a part of which reads as follows:

> *"The categories of fiduciary relationship are not closed. Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept. Numerous academic commentators have offered suggestions, but none has garnered universal support. Thus, it has been said that the "fiduciary relationship is a concept in search of a principle".*
>
> *There is, however, growing judicial support for the view that:*
>
> *"a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."*
>
> *The undertaking can be implied in the circumstances, particularly where someone has taken on a role in respect of which fiduciary duties are appropriate. Hence, it has been said that:*
>
> > *"fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility*

> *assumed by one person in respect of the conduct or the affairs of another."*
>
> *"The concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."*
>
> *...*
>
> *Where the fiduciary expectation is appropriate in respect of part only of the arrangement between the parties, it is possible for fiduciary duties to be owed in respect of that part of the arrangement even though it is not fiduciary in general: "a person ... may be in a fiduciary position quoad a part of his activities and not quoad other parts".*

133. Much has been written about fiduciary duties in Australian courts and by jurists in Australia, which are frequently cited in the courts of England and Wales. In *Vivendi SA v Richards* [2013] EWHC 3006 (Ch), Newey J (as he then was) cited the following:

> *"Mason J said in a much-quoted passage in Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 (at paragraph 68):*
>
> > *"The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."*
>
> *Professor Edelman (now a judge of the Supreme Court of Western Australia) argued in a 2010 article (126 LQR 302, at 317) that the essential question is:*
>
> > *"did the party, by his words or conduct, give rise to an understanding or expectation in a reasonable person that he would behave in a particular way (for example, not put himself in a position of conflict, not make an unauthorised profit, and act in good faith and in the best interests of the beneficiary)."*
>
> *That article was cited in F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch), [2012] Ch 613, where Sales J said (at paragraph 225):*
>
> > *"Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility*

> *assumed by one person in respect of the conduct or the affairs of another."*
>
> ...
>
> *As, however, was noted by the Full Court of the Federal Court of Australia in Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6 (at paragraph 177), there remains "no generally agreed and unexceptionable definition" of a fiduciary. The Court (which included Finn J) went on to say:*
>
> > *"the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest."*

134. At para. 138, Newey J quoted from Finn J who earlier in his career had said the following in "The Fiduciary Principle" (in Youdan (ed.), Equity, Fiduciaries and Trusts (Toronto, Carswell, 1989):

> *"'A fiduciary is a person who undertakes to act in the interests of another person.' But this is in the end unhelpful. A fiduciary responsibility, ultimately, is an imposed not an accepted one. If one needs an analogy here, one is closer to tort law than to contract; one is concerned with an imposed standard of behaviour. The factors which lead to that imposition doubtless involve recognition of what the alleged fiduciary has agreed to do. But equally public policy considerations can ordain what he must do, whether this be agreed to or not. This emerges most clearly in those cases where the fiduciary principle is used to protect property and near property interests, and in the* de facto *fiduciary relationship cases."*

135. At para. 139, Newey J considered the extent to which assumption of responsibility test can be imported into fiduciary duties. He said the following:

> *"If an undertaking/assumption of responsibility test is to be reconciled with the case law, that must be by dint of two features: first, the question whether there was such an undertaking/assumption must be determined on an objective basis rather than by reference to what the alleged fiduciary subjectively intended; secondly, the taking on of a role or position must be capable of implying an*

> *undertaking/assumption of responsibility. A trustee will not escape fiduciary duties because, subjectively, he did not want to assume them. Nor can it be an answer, as it seems to me, for him to say that no one could reasonably have expected him to act in the beneficiaries' interests because, say, he was known to be a very dishonest and unreliable person. Fiduciary duties will have arisen with his acceptance of the position of trustee, regardless of his personal wishes or reputation."*

(i) The extent to which duties of directors of a company were capable of continuing following a compulsory liquidation

136. The Defendants start by saying that upon the winding up order on 18 May 2015, Mr Richmond ceased to be a director of the Company, and with that, his main fiduciary obligations to the Company fell away. Reliance is placed on *Measures Brothers Ltd v Measures* above. The assumption in that case is that the effect of a winding up order is to bring the office of the director to an end. The case then goes on to discuss the consequences of that to the director's employment contract and post-contractual restrictions. The effect of a winding up order on a director's appointment was acknowledged obiter and slightly tentatively by Joanna Smith J in *Mitchell v Al Jaber [*2023] EWHC 364 (Ch) ("Mitchell") at [349], where she said:

> ***"****It is relevant to note that this is not the case in English law, where a director's appointment would appear to be terminated automatically by a compulsory liquidation (see McPherson & Keay: The Law of Company Liquidation, 5th Edition at 7-049). As I shall come to in a moment, under English law, directors do however remain in post on an administration or creditors' voluntary liquidation."*

137. It is worth setting out paragraph 7-049 in full from McPherson & Keay which explains the slightly tentative nature of the above dictum in *Mitchell*:

> *"While the position in relation to the powers of directors is clear, far more doubt has surrounded the question whether the appointment of the liquidator brings to an end the office as distinct from the powers of directors.*
>
> *In relation to voluntary winding up there is no statutory provision dealing with the issue. However, it is submitted that the office of director does not come to an end because the Act permits directors to exercise certain powers in some circumstances after the commencement of winding up, and if their office had terminated why not just state that the positions of officers terminate and that would automatically mean that powers of directors would cease? Also, there is case law to the effect that the office of directors does not end. However, in*

> *relation to executive directors, their position as employees is terminated on winding up.*
>
> *What about compulsory winding up? In* Madrid Bank Ltd v Bayley, *Blackburne J decided that directors could be made to answer interrogatories in their capacity as officers of the company even after the liquidator had been appointed after saying that nothing in the legislation made the persons concerned cease to be directors. Later Australian cases have held that the making of a winding-up order does not remove the directors. On the other hand, the South African case of* Attorney-General v Blumenthal *is authority for the view that on winding up they cease to be directors "officially, functionally and nominally" and cannot be criminally prosecuted in respect of acts done after winding up under a statutory provision referring to "directors" of the company. This view accords with several Canadian decisions to the effect that the appointment of a liquidator frees the directors from their fiduciary duties to the company and enables them to purchase company property from the liquidator. The same view was taken, in effect, in* Measures Bros Ltd v Measures *where the English Court of Appeal held that on a court winding up occurring the appointment of the directors terminated automatically. Given the position taken in this last case we must conclude that the appointment of a director does come to an end on winding up. The fact that the position of director ends in one mode of liquidation and not in another seems to be anomalous as there appears to be no justification for the difference save for the fact that in voluntary winding up the exercise of directors' powers may be sanctioned, and if the office of director had ceased these powers could not be exercised."*

138. The following points are to be noted:

(i) There is an argument that *Measures Brothers* was about whether the appointment of a liquidator brought to an end the office as distinct from the fiduciary duties of a director. It was then concerned with the impact on the contract of employment of a director following the winding up order. There is at least an argument that the question of whether any fiduciary duties continued thereafter notwithstanding the winding up order was not determined in *Measures*.

(ii) There is an apparently anomalous difference between a compulsory liquidation where the directorship ends and a voluntary winding up where it does not.

(iii) As is evident from the above citation from *McPherson and Keay*, there are differences in courts in various Commonwealth countries which may inform about the issue of the continuation, if at all, of fiduciary duties after a liquidation.

(iv) In any event, the assumption underlying the continuing existence of fiduciary obligations on the part of directors in a compulsory liquidation was expressed by Joanna Smith J in *Mitchell* at [367-368] as follows:

> *"367. ….where I have accepted the view of the experts that a director in the BVI is effectively divested of his powers and duties following a liquidation, it is very hard to see how, ordinarily, his fiduciary duties could persist. The framework of duties which gave rise to the relationship of trust and confidence prior to the liquidation has been stripped away as a consequence of the operation of the relevant BVI statutory provisions.*
>
> *368. A director in such circumstances is excluded from the decision making process and excluded from participation in the company's affairs – he has no "position" as a director in any meaningful sense. The Liquidators are appointed in his place. With the removal of a director's powers comes also removal of his functions and duties."*

139. There were arguments in *Mitchell* about the continuation of fiduciary duties after the termination of the appointment as director by a compulsory liquidation as follows at [350]:

> *"ii) Second, further or alternatively, the Liquidators say that the Sheikh and Ms Al Jaber each owed a fiduciary duty to the Company ("the Fiduciary Duty Argument"), alternatively each was a constructive trustee (" the Constructive Trust Argument ") liable to account to the Company, as if they owed such a fiduciary duty, after the commencement of the Liquidation:*
>
> *a) in respect of any property of the Company that remained in either of their hands or under their control, or in the hands or under the control of a corporate entity over which either of them was able to exercise control, or in respect of which they had otherwise taken stewardship either directly or indirectly; and/or*
>
> *b) in respect of any property of the Company in respect of which either of them set up or purported to set up a beneficial title of their own or a beneficial title adverse to the rights of the Company.*
>
> *iii) Third, the Liquidators contend that at all times following the Liquidation the Sheikh owed duties as a director of the Company to account to the Company acting by its Liquidators for (i) his stewardship of the Company and its assets prior to the commencement of the Liquidation; and (ii) his stewardship of any assets that remained in his hands or otherwise under his custody or control (" the Duty to Account Argument "). These are*

> *duties that the Liquidators contend were fiduciary in nature, being "an incident of the Sheikh's fiduciary duties" arising by reason of his general duties as a director and, as such, could only be discharged by the provision of "honest, full, accurate and candid information given with reasonable care and skill".*

140. In the paragraphs which followed from para. 360, there was consideration about directors who "had obtained custody and control of company assets, which custody and control continues following liquidation (at least in the sense that the director is able improperly to take control of, or "deal" with, the assets). It is in this very specific circumstance (adverse dealing with company assets) that I am invited to find that a duty as a fiduciary or a liability as a constructive trustee (as if a fiduciary duty was owed) continues to exist." It is not necessary then to follow through the analysis in Mitchell which is fact specific and contains an amalgam of English and BVI law.

141. Although *Mitchell* is a case primarily about BVI law, to the extent that there is an overlap, it appears that the Court of Appeal is about to consider the issue of whether a director owes fiduciary duties in respect of company's assets post-liquidation, and if so, what the scope of these duties is. According to a website of Counsel for an appellant dated 5 April 2023, the Court of Appeal has given permission to appeal in *Mitchell*. One of the issues on the appeal is whether, as a matter of BVI law (and English law, to the extent they overlap), a director owes fiduciary duties in respect of company's assets post-liquidation, and if so, what the scope of these duties is. According to the case appeal tracker service, the appeal is due to be heard by the Court of Appeal in March 2024.

142. It is also apparent that the law as regards the nature and extent of duties of directors to a company following a compulsory liquidation is part of a developing area of law. The starting point is the duties under ss.170-177 of the Companies Act 2006. Pursuant to s.170(3) the general duties are based on and replace the established common law rules and equitable duties. However, by s.170(4) the duties codified in the Companies Act 2006 are to be interpreted and applied in the same way as the common law rules and equitable duties. Accordingly, the court should give effect to the duties in the statutory code, but they must be interpreted in accordance with pre-existing caselaw governing the previously established principles from which they derive.

143. The two established strands of a director's duty in respect of conflicts of interests operate via the "no conflict rule" and the "no profit rule". These are now catered for in ss.175 and 177 of the Companies Act 2006:

(i) Pursuant to s.175, a director must avoid a situation in which they have or may have interests which conflict with those of the company. In particular, this applies to the exploitation of any property, information or opportunity (irrespective of whether the company could take advantage of the same) i.e. the "no profit rule". However, s.175 does not apply to conflicts arising in relation to a transaction with the company (s.175(3)). That scenario is covered by s.177.

(ii) Pursuant to s.177, where a director is interested in a proposed transactions with the company, they must declare the nature and extent of that interest. This preserves the prohibition against self-dealing.

(iii) Both ss.175 and 177 limit the scope of the duty and provide that the duty is not infringed in circumstances where objectively it cannot reasonably be regarded as likely to give rise to a conflict of interest (s175(4) and s.177(6)).

144. As for the duration of a director's duties to a company, the established principle is that in general, fiduciaries cease to be subject to their fiduciary duties upon the fiduciary relationship coming to an end: see *Attorney General v Blake* [1998] Ch 439, 453-454 where it was said:

> *"Equity does not demand a duty of undivided loyalty from a former employee to his former employer, and it does not impose a duty to maintain the confidentiality of information which has ceased to be confidential…*
>
> *But these duties last only as long as the relationship which gives rise to them lasts. A former employee owes no duty of loyalty to his former employer."* per the court of Lord Woolf MR, Millett and Mummery LJJ. The case went to the House of Lords on other points.

145. This applies to company directors: see *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200; [2007] Bus LR 1565 at [8] and [69]. In that case, Rix LJ affirming the decision of Mr Livesey QC at first instance, affirmed how limited a maturing business opportunity was, and in particular that the conduct would have had to start during the currency of the employment, or the resignation would have to take place in order to exploit the maturing business opportunity. There was approval of the following from the judgment of Lawrence Collins J (as he then was) in *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 who said:

> *"95. In English law a director's power to resign from office is not a fiduciary power. A director is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the company. So also in English law, at least in general, a fiduciary obligation does not continue after the determination of the relationship which gives rise to it: A-G v Blake [1998] Ch 439 , at p. 453, varied on other grounds [2001] 1 AC 268 (HL) . For the reasons given in Island Export Finance Ltd v Umunna a director may resign (subject, of course, to compliance with his contract of employment) and he is not thereafter precluded from using his general fund of skill and knowledge, or his personal connections, to compete.*
>
> *96. In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business*

> *opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property. In the case of the director he becomes a constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest, and exploited it by resigning from the company."*

146. There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation. The most important of these is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The relationship between employer and employee is of this character. The core obligation of a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee. The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer. These duties generally last only as long as the relationship which gives rise to them lasts.

147. The provisions of the Companies Act 2006 s.170 are consistent with these established principles regarding the duration of directors' duties in that according to s.170(1), the duties in ss.171 to 177 are owed by a director. Therefore, they are not owed by persons who are no longer directors. According to s.170(2), there is an exception to this. A person who ceases to be a director continues to be subject to the duty in s.175 to avoid conflicts as regards the exploitation of property, information or opportunity of which they became aware while being a director.

148. There are conflicting decisions in the authorities as to whether the s.175 duty as extended by s.170(2) is a continuing duty or not: if it is a continuing duty, then conduct of a director after they left office can amount to a breach. In *Thermascan Ltd v Norman* [2011] BCC 535 (David Donaldson QC sitting as a deputy Judge of the High Court), it was held that there has been no change as a result of these parts of the Companies Act 2006 to the established principles at common law and in equity. For the company to succeed it had to establish conduct putting the director in a position of conflict while in office or to show that the opportunity exploited by the director after they resigned was a maturing business opportunity.

149. By contrast, in *Burnell v Trans-Tag Ltd* [2021] EWHC 1457 (Ch) (Mr Ashley Greenbank sitting as a Deputy Judge of the High Court) at [409-413], it was held that to date the courts had held that a director would not ordinarily be in breach of duty by resigning to set up a competing business, provided that, before resigning, the director was not exploiting business opportunity that should be treated as the company's property. Should a director resign and subsequently exploit a maturing business opportunity, a company may still have a claim for breach of duty, but it would be based

on the director's pre-resignation actions, rather than anything they did after resigning. In this sense, the duty to avoid a conflict of interest would not continue after a director resigned.

150. In *Burnell*, the Deputy Judge held that section 170(2) had changed that. The meaning of the words of that provision was that, so far as it relates to the exploitation of property, information or opportunity of which a director becomes aware before resigning**,** the duty to avoid a conflict of interest does continue after someone ceases to be a director**.** It follows that as regards any property information or opportunity known to the director before he or she ceased to be in office, conduct after termination of office could be relied upon as comprising the breach of duty.

151. It follows that given that s.170 refers to former directors, it is at least reasonably capable of argument that the former directors of a company in compulsory liquidation would still be subject to ss.175 (duty to avoid conflicts of interest) and 176 (duty not to accept benefits from third parties) of the Companies Act 2006: see *McPherson and Keay* at para. 7-55.

(j) Discussion

152. It follows from the above analysis that there are reasons of fact and law for finding that Mr Richmond was under fiduciary duties of no conflict and of disclosure in connection with the acquisition of an interest in the Trademarks. The legal bases of the foregoing include the following:

(i) If and insofar there is an understanding that fiduciary obligations come to an end upon the making of a winding up order, that is on the premise of a cessation of involvement or participation in management of a director on or following the winding up of a company.

(ii) If a director continues thereafter, then the fiduciary obligations may continue in a number of different senses, namely:

(a) the analysis in *Measures Brothers* may be restricted to directors who cease to have a role in the company, and, if they do continue to have a role, it may be possible to find that at least some fiduciary obligations continue depending on the nature of the role;

(b) a director may continue to act as such by reason of their participation in the affairs of the winding up, and be involved to such an extent that he or she is a de facto director of a company, albeit that it would be an unusual case that a director would still be assuming the status and function of a director despite the liquidation;

(c) perhaps more appositely in respect of a specific asset, in this case, it may have been that the Trademarks can be regarded in the hands of Mr Richmond or under his custody or control whether prior to the commencement of the liquidation, or during the liquidation. Alternatively, Mr Richmond's involvement may have been to a lesser extent, but enough to create obligations arising out of his activities in

respect of the Trademarks. The Claimants submit that there was a continuing stewardship in respect of the Trademarks and that the involvement above gave rise to duties to fiduciary obligations in respect of the Trademarks.

153. The Claimants answer the submissions of the Defendants that (a) Mr Richmond was excluded from participation as a director from the time of the winding up, (b) he was not entrusted with or given custody or control of the Trademarks, and (c) he not able to dispose of the Trademarks and, on the contrary, the sale was conducted by the Liquidators by a process of sealed bids. In response, the Claimants submit that the legal analysis is fact specific, and that at this stage of the analysis, the facts are still to be established. On the Claimants' case, it is submitted that:

(i) Mr Richmond's evidence for his activities, namely, to preserve the brand for a purchaser was not the value of the brand in abstract, but the value associated with the Trademarks and to preserve and/or generate value for his work.

(ii) This was done at a time when he accepted that the Trademarks were for the benefit of the Company and therefore its creditors.

(iii) He did not do this as an outsider assisting the Liquidators, but as a person who was eponymous with the Trademarks and who had been a director of the Company for many years.

(iv) His activities in respect of the Trademarks went, even on the currently known information, far beyond some assistance afforded by a former director to Liquidators. Contrary to what is said by the Defendants, there is no reason to accept the assertion that these were isolated instances and not part of more extensive activities as part of his secret design. Likewise, given how extensive his involvement was, notwithstanding the appointment of Liquidators, there is no reason to exclude at this stage that he was not acting as regards the Trademarks, even after the winding up order, as if he was still a director or akin to a director.

(v) The submission of the Defendants that Mr Richmond was not in a position of trust and confidence as regards the Trademarks only goes so far. It is correct that the Liquidators conducted the bidding process, but before then they allowed Mr Richmond to take important steps in connection with the Trademarks. The precise extent of his activities are matters for legitimate inquiry. There is a real prospect at trial that what he was allowed to do or what he ended up doing might be properly characterised as giving rise to fiduciary obligations as regards the Trademarks.

(vi) Mr Richmond had the combination of being permitted to represent the Company vis-à-vis the Trademarks whilst being by name and in the mind of Licensees eponymous with them. There are real questions as to the extent to

which he was, by reason of his position, able to spoil or to contribute to the spoiling of other possible rival bidders and in particular Mr Moschillo.

(vii) On the Claimants' case, there is at lowest a real prospect of success in showing at trial that Mr Richmond was at the same time concealing his interest as a purchaser and informing the Liquidators that he had no interest in a purchaser. This case to answer is apparent from the numerous documents which Mr Richmond has sought to explain away documents indicating common interests of the Defendants in the acquisition of the Trademarks. There are numerous emails which indicate the sharing of ownership in the purchased Trademarks of Mr Richmond with Mr Schofield. If the emails bear the meanings contended for by the Claimants, and there is a real prospect that they do, it may be found at trial that Mr Richmond has been concealing the position from the Liquidators and the Court about his true intention. There have been analysed above numerous alleged lies of Mr Richmond who together with Mr Schofield may have been concealing the position from the Liquidators and setting up an arrangement whereby Mr Richmond would participate as owner with Mr Schofield in the acquisition of the Trademarks. There is a possible inference that not only was he concealing this, but also, he was doing more than he says in preparing the position to enable him and Mr Schofield together to make the acquisition of the Trademarks.

(viii) If there have been such lies, the obvious question arises as to what was the point of such an elaborate design to enable Mr Richmond secretly to acquire the Trademarks. There is an inference with at least a real prospect of success that the purpose was to enable Mr Richmond (and Mr Schofield) to acquire something which without such subterfuge would have been either unattainable or not attainable on those terms. The Defendants object to an inferential case, but cases by inference with bases for the inferences are often at the heart of cases involving commercial subterfuge or equitable or other fraud. The case has still to be proven, and there are questions of fact and law which will have to be dealt with at trial, but it suffices at this this stage to find that it is not one which is speculative or fanciful.

154. Whilst the analysis of the limited fiduciary duties which apply after a winding up of a company in a usual case provides real difficulties in the analysis of the Claimants, there is a real prospect on the unusual facts of this case of the Claimants establishing continuing fiduciary obligations relating to the Trademarks and their sale. Mr Richmond was in a unique position to preserve the value of the Trademarks, and thereby to preserve or enhance the value of the primary assets of the Company, that is to say its intellectual property. Even on the premise that Mr Richmond ceased to be a director upon the winding up order, he was able in the period between the winding up order and the sale to utilise all of his detailed knowledge of the business and the Trademarks from his years as a director. All of this might put into a different light the attempt on the part of Mr Richmond to minimise his activities prior to the sale and to deny the fiduciary duty.

155. In the light of the foregoing, I am satisfied that there is a real prospect of success in the emergence at trial of a greater involvement of Mr Richmond in connection with the stewardship of the Trademarks and of his being active in connection with the path towards the sale of the Trademarks. Given the immediate contact between Mr Richmond and Mr Schofield the day after the winding up order, there is scope for inquiry as to when this opportunity to acquire the Trademarks first arose and as to all the steps taken to drive through this opportunity.

156. The different ways in which the Claimants seek to show that Mr Richmond owed fiduciary obligations in connection with the Trademarks are matters which are properly raised inferentially on the basis of everything which is known at the moment. Even the information currently known is about an involvement that is unusual for a former director of a company in connection with the sale by the Liquidators. It is far removed from the usual director of a company which goes into compulsory liquidation where the director ceases to have any role, formal or informal.

157. In this regard, it is important to note the fact-specific nature of fiduciary obligations, both when they arise and as to their scope in any particular case. In *Plus Group v Pyke* [2002] EWCA Civ 370, the Court of Appeal emphasised how every decision of this kind in respect of the scope of fiduciary duties and whether they have been breached in each case is fact specific. Reference was made to the speech of Lord Upjohn in *Phipps v Boardman [1967] 2 AC 46* , at p.107 who said that the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made. At p.123C, Lord Upjohn observed that:

> *'… [r]ules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.'*

158. In F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) above, Sales J at paras. 222-223 said:

> *"222.…Where a person agrees to be appointed as a company director in ordinary circumstances, for example, the fiduciary obligations which are attached to that role are known, at least in general terms. However, there has always been scope for fiduciary duties to be found to arise in a range of other contexts which have important similarities to the paradigm cases, but also significant differences. In those contexts, it is necessary to examine with some care what is the precise content of the particular fiduciary obligations arising in the specific circumstances of the individual case.*
>
> *223....Fiduciary obligations may arise in a wide range of business relationships, where a substantial degree of control over the property or affairs of one person is given to another person…"*

159. I am satisfied that there is an argument with a real prospect of success at trial that he owed continuing fiduciary obligations to the Company in connection with the stewardship and the impending sale of the Trademarks. The nature and extent of a fiduciary duty depend on a fuller investigation of the facts which will become available through trial and the process to trial with the opportunity for cross-examination and a full understanding of what happened. There are reasonable grounds to believe that a fuller investigation would add to or alter the evidence available to a trial judge and so affect the outcome of the case. The fact-sensitive nature of the fiduciary duties makes it inappropriate to consider whether there is or is not a fiduciary relationship in a particular case or the scope of any fiduciary duty at a summary stage. This is such a case.

160. There is a real prospect that Mr Richmond had fiduciary obligations as regards the Trademarks to avoid conflicts of interest (including to avoid self-dealing) and to declare any interest that he did have. The source of these obligations may have been through the duties continuing beyond the liquidation having regard to the continuing role of Mr Richmond in the management of the Trademarks during the liquidation. It may be that this gives rise to a duty which survived the liquidation despite the case of *Measures*: alternatively an analysis by reference to section 170(2) and a continuing duty to avoid a conflict of interest and to declare any such conflict: see ss. 175 and 177; alternatively an analysis of de facto directorship: alternatively still, a duty arising from the precise nature and extent of the stewardship of Mr Richmond in respect of the Trademarks before and after the sale.

161. The arguable breaches of fiduciary duty then enabled Mr Richmond to purchase the Trademarks together with Mr Schofield. It is apparent from the communication of the Liquidators of 22 October 2015 that in the event that it had been disclosed that Mr Richmond, a connected party, was to be an acquiring party of the Trademarks, this would at best have prolonged or complicated the transaction. It might have led to close scrutiny of Mr Richmond's financial position, and it would have led to distancing him from anybody else in the bidding process. On this basis, there is an argument with a real prospect of success that the Defendants should have to disgorge the benefit of the profits earned from the acquisition of an interest in the Trademarks on the part of Mr Richmond.

162. The Defendants place reliance on the case of *Framlington Group plc v Anderson* [1995] 1 BCLC 475. This was a case after a trial of an action with witnesses being called and cross-examined. It was a case about an employment contract where the issue was about the package which the employees were entitled to negotiate with their new employer which was purchasing the business of their employer. There was disclosure that the employees were moving to that new employer, and as a result the claimants ensured that the employees were not to be involved in the sale process. The negotiation of the package which the employees negotiated was not without more, whether disclosed or not disclosed, a breach of a duty of good faith to the claimant. There is a real prospect that it will be shown at trial that Mr Richmond was involved in the sale having a share in the purchase and that his involvement was actively concealed from, and the subject of express misrepresentation by him, to the Liquidators. The purpose of doing this was to ensure that the Liquidators subjected the bid to less scrutiny than would otherwise happen, thereby affecting whether the bid would proceed and on what terms. These

fundamental differences between the instant case and *Framlington* underscores the importance of a fact-specific analysis in every case.

163. There is also an argument with real prospects of success that alleged breaches continued thereafter. They are not limited to the point up to sale. Thereafter, the Claimants raise a case about separate and distinct breaches arising out of the secret exploitation for Mr Richmond's own benefit of the trademarks or stock once they had gone into the hands of FE Sarl. These comprise breaches of duty separate from the sale in making and receiving profits or other benefits from the exploitation of the Trademarks. These arise from the breaches of fiduciary duty and not informing the Liquidators of the same. Whether or not these are separate breaches of fiduciary duty is not clear, but in *Hotel Portfolio II UK Limited v Ruhan & Stevens* [2022] EWHC 383 (Comm) at paras. 284-285, Foxton J considered that such conduct did amount to separate breaches of fiduciary duty on the facts of that case, as well as to separate instances of dishonest assistance to breach of fiduciary duty. There is sufficient here to raise a real prospect of success of an argument to like effect in this case.

164. It follows from the above that there are various different ways in which the fiduciary duties might have arisen. It is not necessary to analyse separately the arguments for and against each one of them. Some are more difficult to establish than others. They are all closely related. Whether or not any of them can be established is fact intensive. There are numerous factual issues and there is a reasonable prospect that a fuller investigation will lead to wider perspectives both as to the facts and to the legal issues and especially any fiduciary obligations of Mr Richmond to the Company and breaches for which he is accountable. All of this leads to the conclusion that the breach of fiduciary duty case in respect of the Trademarks raises issues with real prospects of success and that therefore the Defendants' application for summary judgment and/or strike out in this regard must fail.

165. The Defendants also submit that the pleaded case does not embrace each of the ways in which the matter has been argued in this application. They also submit that there was correspondence between the parties in which the Claimants were asked six precise questions about the pleadings: see a letter of 17 June 2022 from Addleshaw Goddard to Spring Law. They comprise largely questions about particularisation or criticisms about matters being raised in the Reply which should have been in the Amended Particulars of Claim. The Defendants say that they have never received any or any satisfactory response to their requests. The only response has been a draft Amended Particulars of Claim which has not engaged with all the requests.

166. I have not found any alleged shortcomings in the pleaded case to be such that they should render the case liable to be struck out or adjudicated summarily in whole or in part. The various ways in which the case has been argued as regards the fiduciary duties or the alleged breaches appear to me sufficiently to emerge from the statements of case for the purpose of deciding the applications before the Court. The pleaded fiduciary duty is not to self-deal or not to allow or permit the Company to sell property or assets to himself or entities or to derive a profit from his activities as a director or former director in which he was beneficially interested without first (a) declaring his interest in the acquiring entities to the Company, and (b) obtaining the Company's informed consent to the arrangement: see Amended Particulars of Claim especially at paras. 83(5), 84, 84A(1), 84A(2) and (3) and 85(1) and 85(2). Although the pleading could be clearer and might require particularisation, it is broad enough to encompass conduct

after the winding up. Without making a final ruling on this, it appears to embrace at least the alleged breaches of fiduciary duty post-winding up whilst acting as a de facto director or by reference to the subject matter of the action, the continuing stewardship (post-the winding up order) in respect of the Trademarks.

167. This is not a case where the Defendants have been taken by surprise by some new way of putting the case that has not been foreshadowed in the extensive application, rounds of evidence and written and oral submissions in a lengthy hearing where each of the parties were able to develop fully their respective cases. If the case had been for some specific further particularisation or to strike out an averment for being in the wrong document, then the Court would have had to engage with that specific point. As it is, the application is about a more general attack on the claim as a whole or parts of it. If and to the extent that there are shortcomings in the pleaded case, they are not such as ought to be reflected in reverse summary judgment or a striking out of all or parts of the claim.

168. For all these reasons, the claim for summary judgment/strike out in respect of the claim in respect of the sale of the Trademarks and other related breaches of fiduciary duty must fail.

VIII Claim in respect of the stock

169. In the Particulars of Claim at paras. 91 and following, there is a claim in relation to stock. The claim is that in the period from the winding up to the time of sale there were hundreds of thousands of fashion items which had been manufactured by FC and FF under licence from the Company but not paid for. It was alleged that this comprised high-valued goods which could readily be sold on the secondary market having a value of millions of pounds. It included stock held by the liquidators of FC and FF. The stock remained owned by the Company, and the Company had the right to take possession and resell the same following non-payment of its sale price and unlawful use of the Trademarks. The allegation is that Mr Richmond knew of the existence of the stock which was designed by him and manufactured under his personal supervision.

170. At para. 94, the allegations against Mr Richmond are that:

(i) Mr Richmond failed to disclose the same to the Liquidators. Nor did he disclose the indebtedness of FC and FF to the Company comprising respectively €7 million and €11 million.

(ii) Within one working day of the Sale completing, Mr Richmond took steps to acquire the stock in the possession of the liquidator of FC which stock was re-sold for a profit of €146,791 of which a sum of €48,930.22 was paid to Mr Ballerini who assisted with the transaction (comprising a balance of €97,860): see Particulars of Claim at para. 94(2) and 73.

(iii) Stock in the possession of the liquidators of FF which was valued in 2017 in a sum of €1,810,908 was acquired by Mr Richmond and/or Arav during December 2017: see Particulars of Claim para. 94(3).

171. It is also alleged that the failures of disclosure of Mr Richmond led to the Company not recovering the stock and/or protecting its value. Instead, due to the failure of Mr Richmond in 2015 to inform the Liquidators of the existence of the Licensee stock or the indebtedness of FC and FF to the Company, or of the continuing use of the Company's Trademarks, the Liquidators sold the Trademarks to FE Ltd without protecting the Company's position in relation to the stock or ascribing any value to such stock under the sale agreements: see Particulars of Claim para. 95.

(a) The case of the Defendants

172. These allegations were denied at paras. 112 to 116 of the defence of Mr Richmond. In connection with these applications, it is now positively asserted that the Company did not have any entitlement to the stock as at the date of liquidation or sale or at any subsequent point. The Defendants rely in that regard upon a legal opinion from an Italian lawyer dated 8 July 2022 adduced by Mr Schofield. The allegation is that any previous entitlement of the company to purchase the FC stock had long since expired, that right existing only for a 30-day window following the eight-month period after termination of the FC licence. That licence terminated on 27 September 2012, and the Company did not exercise its right to purchase the stock. It appears that thereafter the Company granted licences to FF in place of FC to continue using the Trademarks. The Defendants say that the Claimants have not explained how they claim that the Company was able to deal with the licence in this way or what the effect of its actions vis-à-vis FC was in respect of the stock by the time of the winding up of the Company.

173. It is also denied that Mr Richmond personally benefited from the purchase and onward sale by FE Sarl of the stock and that there was no evidence of any payment having been made to him or for his benefit. There are also issues regarding the valuation of the stock.

(b) The case of the Claimants

174. The Claimants do not accept that the rights of the Company to obtain the stock would be so limited. If it is the case that these rights had long since expired as the Defendants contend, then this begs the question as to how or why Mr Richmond took steps to acquire the Licensee Stock. They rely upon Mr Richmond taking steps to acquire the Licensee Stock in November 2015. The liquidator of FC told the Liquidators (of the Company) that the sale of FC stock was negotiated by both Defendants and that Mr Richmond attended at least one meeting with the liquidator of FC in April 2016: see Reply to Defence of Mr Richmond para. 41. In connection with the failure to give disclosure, attention has been drawn to the Liquidators' annual progress report to creditors and members dated 7 October 2015 reporting about the first year since the appointment of the Liquidators dated 11 August 2015. This referred to the book debts without identifying the above-mentioned debts of €7 million and €11 million respectively. This is despite the fact that the licensees FC and FF were mentioned at para. 5.13, there was no reference to this indebtedness or to any possible claim to stock. This is said to evidence the failure to give the disclosure about the indebtedness or the possible claim to the stock.

175. The Claimants also point to the design agreement between the Company and FC which provided among other things that the right to use the Trademarks came to an end with the termination of the agreement. They say that the agreement came to an end upon the bankruptcy of FC in 2012: see Article 20.1(c). There was an obligation at that point in time to inform the Company about the stock which they still held: see Article 25. There were then various alternatives which could occur in Article 25. It is not necessary to set out those options, but they involved a decision by the Company to purchase or a destruction of the stock within a limited period by FC or an authorisation by the Company to FC to continue to sell the stock. The Claimants say that none of these events occurred, but the stock remained branded in the warehouse and that FC was not able to use it. The submission of the Claimants is that in this event the Company was able to take delivery the stock.

176. Reference was also made to an email on 1 December 2015 from solicitors acting for Euroitalia in which the Claimants were invited to purchase certain stock, and the Liquidators responded saying that they were not interested in so doing. This might lead to an answer of the Defendants that the FC stock claim would not go anywhere because the Liquidators would never have taken action even if informed at an earlier stage. The Claimants submit that this would not be an answer because Mr Richmond was in breach of fiduciary duty in not providing information before about the stock and in helping to secure the Company's position in that regard, and that instead he has diverted this property or this corporate opportunity to himself. It is no answer to a breach of fiduciary duty that the Liquidators, not knowing the true position and without disclosure or consent being sought by Mr Richmond, did nothing at the time or even would have done nothing if disclosure or consent had been sought.

177. The Claimants submit that there are serious questions of fact which need to be resolved in relation to the stock claim. This includes the extent of the knowledge of the Defendants of the stock and the Company's ability to go after it. It includes also how and why the Defendants took or attempted to take the stock after the Company went into liquidation. These issues of fact need greater clarity before questions are framed for expert consideration. In any event, the Claimants submit that the issue requires expert evidence on Italian law and the opinion provided of Avv. Guarino Francesco is not compliant with CPR part 35. This is in part because he was apparently the Italian lawyer of Mr Schofield, he fails to set out his duties to the Court, his short opinion is light on the facts and there is not set out any detail about his instructions. The Defendants submit that the Courts have a discretion at an interim stage to admit expert evidence, even if it does not comply with all the formalities usually required, and that a flexible approach is adopted: see *Ross v Attanta* [2021] EWHC 503 (Comm). In the instant case, they submit that the Claimants have known about this evidence for months, the application having been issued in July 2022. There is no evidence from the Claimants despite the Liquidators having been in office for 8 years. Nevertheless, the Claimants submit that the expert has not opined on what is to happen in the events set out above, namely that the available courses of action under Clause 25 did not take place.

(c) Discussion

178. As regards the stock claim, there are considerable factual controversies. The Defendants do not make any admissions. In further information, they have claimed no

knowledge about the availability of stock. Mr Richmond says that he knew nothing about it until 2016 following conversations between Mr Schofield and the liquidator of FC who confirmed stock held by FC. This is at odds with emails of November 2015 immediately following the sale. It is evident from correspondence on 22/23 November 2015 that Mr Richmond was in touch with Mr Schofield about this, having information about the FC liquidation and knowing how much it owed to the Company. On 24 November 2015, following this, Mr Schofield for FE Limited wrote to the liquidator of FC saying that they were aware of a large amount of stock falling under the IP of the John Richmond which they had in stock. It is evident that the Defendants were following this up with the liquidator of FC with a view to extracting money on the back of the Trademark ownership.

179. This was the background to the sale and purchase agreement of 16 June 2016 between the liquidator of FC and FE Sarl in which FE Sarl asserted its rights to the Trademarks and there was agreement as set out above. This agreement is referred to above.

180. The Claimants derive from the above the following:

(i) It appears that the purchase of the Trademarks was being done with knowledge of the opportunity to use that in order to extract value relating to the stock. Any licensee with the stock could be stopped from using the same unless authorised by the Trademark owner so to do.

(ii) The Trademarks were the key to being able to use the stock was known to the Defendants, as is evident from the attempts within two days of the acquisition of the Trademarks to obtaining the details of FC.

(iii) This suggests that the Defendants obtained from the Company this information about the money owed by FC to the Company and about the opportunity to use this information in order to enter into the sale and purchase agreement of 16 June 2016.

(iv) There is also a contradiction between the further information provided and the real date of the acquisition of the knowledge. The Claimants infer that in fact this information must have been known about prior to the acquisition and they argue that this was part of the exploitation of information and/or opportunities of the Company.

181. This has then led to an argument between the Claimants and the Defendants in that:

(i) The Claimants say that this information and/or these opportunities were acquired by Mr Richmond in a fiduciary capacity and that this enabled the acquisition of the Trademarks and the exploitation of the stock. It is possible that this information was obtained prior to the winding up order and that it was used by him at a later stage. Alternatively, it is possible that it was acquired by him in connection with the work done for the Company during the winding up, which for reasons above noted may have been subject to fiduciary obligations. The Claimants also say that it is possible that even if there was no right to the stock because of the points relied upon by the Defendants through their Italian

law expert evidence, it was possible to extract value from the stock through the assertion of the Trademark rights.

(ii) The Defendants deny that this information was acquired unlawfully. It was part of the know-how of Mr Richmond, and it was neither knowledge or an opportunity belonging to the Company.

182. In my judgment, it is inappropriate to give reverse summary judgment in respect of or to strike out the stock claim for the following reasons, namely:

(i) the factual disputes are not ones which can realistically be resolved on a summary application;

(ii) there ought first to be a full investigation of the facts with any evidence as to Italian law being based on the established facts. It is apparent from the matters set out above that the facts are heavily contested. They cannot be resolved summarily;

(iii) this is particularly in the context, as seen from the analysis of the facts relating to the Trademark claim, where on the case of the Claimants, Mr Richmond is shown to be an unreliable witness. On one tenable view, the claim in respect of the stock and the claim in respect of the Trademarks are closely intertwined, such that it is dangerous to form a view about one without the other. It follows that the resolution of the application against summary judgment in respect of the Trademarks is an important indication that there should be a refusal of summary judgment in respect of the stock claim, and the reverse is also the case;

(iv) the Italian lawyer's legal opinion has the shortcomings referred to above;

(v) in due course, there ought to be an opportunity at the appropriate time for the Claimants to seek and adduce evidence of Italian law;

(vi) in the above circumstances, the Claimants are not to be criticised for not themselves having adduced evidence as to Italian law in respect of this application for strike out/reverse summary judgment;

(vii) it would therefore be unjust to decide this case with reference to the Italian law evidence at this stage and a flexible approach in some cases to the requirements of CPR part 35 is not appropriate in the circumstances of this case to the application to strike out or for summary judgment in respect of the stock claim in the instant case;

(viii) it would be inappropriate to strike out or give reverse summary judgment as regards this part of the claim in circumstances where the matters are closely connected with the Trademarks claim as to which there will be a trial in any event.

183. There arises from all of the above, factual and legal issues as regards the dispute in relation to the stock including but not limited to the following facts and matters, namely a real issue to be tried regarding whether Mr Richmond was in breach of his duties as regards the following, namely:

(i) the failure to provide information to the Liquidators as regards the existence of the Licensee stock and the ability of the Liquidators, with such knowledge, to take steps to enforce the Company's rights as regards the same;

(ii) the ability of the Liquidators to carve out any continuing rights of the Company out of the sale of the Trademarks;

(iii) to use his knowledge about the Licensee Stock acquired on behalf of the Company whether before or after the winding up for his advantage and at the expense of the Company, so that the Licensee Stock would be acquired other than for the benefit of the Company.

184. It therefore follows that the Defendants' application for summary judgment and/or strike out in respect of the claim in respect of stock must fail.

IX Claim about representations in respect of the 2019 Settlement

(a) The nature of the claim

185. There is a whole series of allegations that Mr Richmond made false representations intentionally or recklessly about his resources which induced the Claimants to enter into the 2019 Settlement. The sum for which settlement was made was a sum of £850,000 of which only £450,000 has been paid to date. This was notwithstanding the fact that the claim was that Mr Richmond and Mr Moschillo should contribute up to £10 million to the estate of the Company. Proceedings were issued against Mr Richmond and Mr Moschillo on 29 June 2018. On 25 January 2019, default judgment was obtained against Mr Moschillo for a sum of £10 million, none of which has been satisfied.

186. The representations included statements regarding shares and ownership of the Trademarks including the following:

(i) In a letter from his solicitors of 22 October 2018, that Mr Richmond (a) *"did not receive any payment, shares or other interest"* as a result of the acquisition of the Trademarks by FE limited or FE Sarl; that (b) Mr Richmond *"does not know"* who the shareholders of FE limited or FE Sarl are; and (c) that Mr Richmond "*did not receive any payment, shares or other interest"* as a result of the acquisition of the trademarks by AMVI in 2017;

(ii) in a letter from his solicitors dated 7 December 2018 and like statements that Mr Richmond *"did not receive any payment shares or other interest as a result*

of the eventual acquisition of the [Trademarks]" and he *"was not in any way involved in setting up [FE Limited] or [FE Sarl]"*;

(iii) in a letter from his solicitors dated 16 January 2018 and like statements that he did not get paid from either company as part of the deal with AMVI and Arav in 2017 and was only able to negotiate a consultancy agreement of €150,000 per annum;

(iv) in an affidavit dated 23 November 2018 that he had no shareholding or interest in Toco Trust or its beneficiaries or FE Ltd, FE Sarl, Liberation Management Ltd, Arav Fashion or Arav Group: see Particulars of Claim paras. 114-118.

187. The representations included statements by the affidavit dated 23 November 2018 that when he married his wife in 2013, she agreed to move to London when they got married on condition that she would have a 50% interest in his property at 56 Overstrand Mansions, Prince of Wales Drive, London SW1 4EY ("the Property"): see the Particulars of Claim at paras. 107-113. In fact, Mr Richmond resided in San Marino until 2015 and did not move with his wife into the Property until November 2015. He said that he had attempted to transfer title in 2014 and in 2015 to him and his wife jointly pursuant to the agreement of 2013. He also referred to his half share being worth £860,000 (on the premise that the other half share was owned by his wife). In fact, the Claimants infer that there was no such agreement in 2013 and the first time that attempts were made to transfer the interest were in the context of the liquidation of the Company from 18 May 2015. In other words, there was no pre-existing genuine agreement whereby there was a transfer of 50% of the value of the Property in consideration of marriage, but a belated attempt to divest 50% of the Property in order to defraud his creditors.

188. The representations included statements about very limited sources of income when in fact there were substantial sources of income not disclosed including various agreements referred to at paras.119-121 of the Particulars of Claim.

189. The 2019 Agreement at Clause 7.5 states that "*the Liquidators rely fully and specifically on the representations made by JR regarding his worldwide assets in his sworn affidavits [23 November 2018 and 7 January 2019] and JR further represents that he has not acquired any assets (as defined for the purposes of those affidavits) worth £5,000 or more since making those affidavits*".

190. There is no issue that a person seeking relief on a misrepresentation claim must demonstrate that they are a representee and were induced (i.e. materially influenced): which involves them showing that the representation was actively present in their mind when they decided to contract. It is for the representee to prove that the misrepresentation had materially influenced their decision to make the contract, in the sense that it had been actively present to their mind. A representee is not required to show he would not have entered the contract "but for" the misrepresentation, and the fact there may have been other reasons besides the misrepresentation for the representee to have entered the contract did not mean they had not been induced by it.

191. It was common ground that in a claim for fraudulent misrepresentation, in respect of reliance, the law was as follows:

(i) once there was established a fraudulent misrepresentation made in order to induce a party to enter into a contract, reliance was presumed;

(ii) the burden is on the representor to prove that there was no reliance;

(iii) it is not necessary for the representee to demonstrate that they believed that the statement made was true;

(iv) the evidential presumption of fact is *"particularly strong"* and is *"very difficult to rebut"* that a representee would have been induced by a fraudulent misrepresentation that was intended to cause them to enter into the contract: see *BV Nederlandse Industrie v Rembrandt Enterprises Inc* [2020] QB 551, and *Zurich Insurance Co plc v Hayward* [2017] AC 142;.

(v) no reliance means in this context that the representation did not have any substantial effect on the decision of the representee to enter into the contract;

(vi) it would not suffice to rebut reliance if the representee had a suspicion that the representation was false if in fact the representation was false, which might influence the representee and if in fact it influenced the representee to enter into the contract: see *Zurich Insurance Co plc v Hayward.*

(b) The Claimants' case

192. The Claimants say that if they had known the true position, they would have settled the claim for a substantially higher sum of no less than £2 million which given the strength of the claim, Mr Richmond would have been prepared to accept or there was real prospect that he would have settled for a higher sum of no less than £2 million. Alternatively, the Claimants would have proceeded to trial and obtained a judgment for a higher sum.

193. The Claimants say that they have learned more about Mr Richmond's resources since the time of the 2019 Settlement. In particular, it has emerged how hundreds of thousands of pounds have been spent in resisting continuing proceedings against him including an application under section 236 of the Insolvency Act 1986. On the basis of the information provided as regards his resources, he did not have this money to spend, and the inference drawn by the Claimants is that he had far more resources than those to which he has admitted. In the draft Amended Particulars of Claim, it has been claimed that since 2015, the expenditure of Mr Richmond has exceeded his alleged income by more than £500,000, and since 2021 by more than £200,000. The inference is that the source of his resources and his ability to fund his legal fees may have been derived from his interest in the Trademarks: see paras. 82A and 82B. Further, and in any event, the information as described above, part of which has emerged because of research since the 2019 Settlement, has led to a clearer picture of Mr Richmond having a part of the ownership of the Trademarks as a result of the sale by the Company.

(c) The Defendants' case

194. Mr Richmond denies having made any misrepresentation or that there was any reliance on the part of the Claimants or that the Claimants suffered any loss. In support of the defence, Mr Richmond makes the following central points, namely:

(i) he did not conceal a retained interest in the Trademarks (this overlaps with the matters set out above in the analysis of the claim relating to the Trademarks);

(ii) he did not have any retained and undisclosed wealth as was apparent from the fact that he has been unable to repay the balance of £400,000 under the 2019 Settlement;

(iii) given the nature of the claim about fraudulent trading and misfeasance, it is not credible that the Claimants relied on any of the representations.

195. It was submitted that the representations were not pleaded with sufficient clarity which was fatal to the claim. There was particularly detailed reference to the representations relating to Mr Richmond's claim that his wife had acquired a 50% interest in the Property. It was shown by reference to correspondence that the first document in which there had been references to the attempts to transfer the Property into the name of the wife was not on 18 May 2015. An email of January 2015 was identified to the Court. There were reasons why his wife had not moved to the UK until 2015, but that did not show that it was not true that the original arrangement to move and the agreement to transfer 50% of the Property had not been in 2013 at the time of the marriage.

196. In any event, Mr Richmond submitted that there was nothing to show that the Claimants had ever relied on the representations and had found out since the 2019 Settlement that they were untrue. The premise of the Claimants' case was that the representations relating to the transfer were belied by the absence of documentary evidence to support them and the fact that Mr Richmond's wife had not in fact moved to the UK until 2015. In light of the fact that the Claimants were settling a misfeasance claim involving allegations of dishonesty, the probing of Mr Richmond's assertions over many months, the requirement of affidavits and the like, it was incredible that the Claimants had believed any uncorroborated evidence of Mr Richmond. It followed that they had chosen to enter into the 2019 Settlement as a matter of commercial expediency, and that the case of reliance on the statements of Mr Richmond was fanciful.

197. For the purpose of the summary judgment/strike out application, Ms Bunbury on behalf of Mr Richmond presented the case on the basis that even if there were representations, there was no prospect that the Court would find that there was any reliance on the representations. Mr Richmond's case is that at this summary stage, it is obvious that the statements did not act as an inducement to the Claimants nor did the Claimants rely on the alleged representations. In this regard, the following points are made on behalf of Mr Richmond:

(i) having regard to the nature of the allegations made against Mr Richmond of fraudulent trading and misfeasance, the Claimants would not rely on Mr Richmond's uncorroborated statements;

(ii) as was apparent from a note of 21 January 2019 of a call by the solicitors for Mr Richmond and an email of the same date from the Claimants' solicitors to the solicitors for Mr Richmond confirming the call, there were numerous points made indicating that Mr Richmond had acquired the Trademarks. (This document was expressed to be without prejudice, being part of the negotiations to settle the 2018 Proceedings, but it was agreed between the parties that the Court could refer to the without prejudice correspondence). It was stated that a compromise would involve giving up a valuable opportunity to get to the bottom of these matters in a bankruptcy scenario. In light of this, the Defendants submit that the Claimants did not believe any statement to the contrary from Mr Richmond;

(iii) reference was made to an email of 5 February 2019 on behalf of the Liquidators, making a counteroffer, but one in which there was a requirement for evidence about the interest of Mr Richmond's wife in the Property and about the interest of Mr Richmond in the IP Rights;

(iv) there is not more information known about by the Claimants since the 2019 Settlement which has changed their knowledge about the subject matter of the representations;

(v) the Court is not barred from evaluating the evidence and saying that despite the need to avoid a mini trial (see *King v Steifel* above), the Court is entitled to draw a line and to say that it would be contrary principle for the case to proceed to trial.

198. If and insofar as there is a case of continuing breaches of fiduciary duty against Mr Richmond, Mr Richmond would answer that by saying that he was never in breach of fiduciary duty for all the reasons set out above. I shall also assume that he would challenge the same because he would reserve his position as regards the law relating to whether there was a duty to self-report, and he would point to the fact that it does not appear in the Particulars of Claim.

(d) Discussion

199. In my judgment, the application of Mr Richmond for summary judgment or strike out in respect of the fraudulent misrepresentations must fail. To the extent that there are issues as to a lack of clarity about the representations, there is a difference between a lack of clarity giving rise to a requirement of further particularisation on the one part and striking out or summary judgment on the other hand. The representations are adequately pleaded even if there might be scope for further particularisation, as to which there is no ruling. If and to the extent that there is any deficiency in this respect, it is not a basis for striking out or summary judgment.

200. There are issues with at lowest a real prospect of success regarding whether the representations made by Mr Richmond in advance of the 2019 Settlement (as set out in the Particulars of Claim) were made, that they were false, and if so, whether they were made knowing of or reckless as to their falsity. There will need to be disclosure, and Mr Richmond will need to be cross-examined at trial on the statements he made (and indeed his evidence).

201. In respect of the representations regarding the 50% interest of Mr Richmond's wife in the Property, the arguments are set out in great detail in the lengthy pleadings about the representations. Mr Richmond raises a full factual answer, but the Claimants are able to say at this stage that the answer is uncorroborated. If the agreement was made with Mr Richmond's wife in 2013 as he contends, it seems unlikely that it would not be in some way documented at the time. It also seems odd that the arrangement should have been made in 2013 without then being acted upon by the move to England, which only occurred more than two years later. The Claimants' case is not to be looked at in abstract, but in the context of the alleged falsities underlying the case relating to the sale of the Trademarks and the stock. In my judgment, there is at least an issue with real prospect of success as regards whether there were fraudulent misrepresentations.

202. Mr Richmond relied heavily upon the email dated 18 January 2019 referred to above to the effect that the Claimants did not accept that Mr Richmond owned or had a share in the Trademarks. The email covers some of the points referred to above in the factual analysis relating to ownership of the Trademarks. The Claimants answer this by saying that this occurred about four months prior to the 2019 Settlement, and there were many relevant communications over that period. The Claimants may have continued to entertain suspicion at that stage about the account of Mr Richmond as regards the email (and indeed continued to entertain suspicion at the time of the 2019 Agreement), but suspicion is not sufficient to give rise to a defence if in fact the representee did rely on the representation.

203. The Claimants submit that the evidence relied upon by Mr Richmond concentrates on earlier parts of the settlement discussions whilst ignoring the reality of what actually occurred over the full negotiation period, and in particular the position later on in the close run up to settlement. There is force at this stage for the purpose of an assessment on a summary judgment/strike out applications in the submission of the Claimants that the evidence of Mr Richmond does not take adequately into account the fact that settlement negotiations took place over 5 months. As explained by Mr Short at paras. 187-188 of his second witness statement dated 14 November 2022 in this action, it was a process through which Mr Richmond sought to convince the Claimants or at least make them comfortable enough to settle the action, that Mr Richmond had no assets of value other than the Property or income of any significant level. Mr Richmond provided sworn statements as to his means and made a variety of other representations. Mr Short said at para. 187: "*Going to trial for a judgment which D1 claimed he was unable to satisfy seemed the wrong thing to do, so I believed it was in the interests of C1 and its creditors to reach a settlement on the basis of what D1 was telling us at the time….I am sure that, if we had the evidence in 2019 that we have now, we would not have settled on the basis we did. A further enquiry would have been required, and, absent D1's satisfactory explanations, we would have proceeded to trial and sought a judgment for the full £10 million claimed."*

204. The Claimants also rely on an email from Mr Dykins, the Claimants' solicitor, said to show the state of minds of the Claimants shortly before settlement, and particularly in respect of the suggestion that they had a clear and settled view that Mr Richmond had an interest in FE Sarl. In the email dated 15 May 2019 (just over a week before the 2019 Settlement), Mr Dykins said: "*Our clients intend to settle the claims in the Proceedings only, not claims unknown or suspected, which concepts are very nebulous anyway. Also, I don't favour a one-year limit on investigations, given what we've been through with your client over the last three years… We have discussed post-liquidation issues with your client and he assures us there are no issues. If he is concerned about anything then he should explain now and our clients will consider."* The Claimants say that there was a host of various representations made by Mr Richmond and in particular as to his financial position that had a substantial effect on the Claimants in taking the decision to settle and that the settlement was entered into on that basis.

205. Whether or not Mr Short is right can be probed by cross-examination at trial. Whether or not the Claimants entertained something more than suspicion amounting to sufficient knowledge to negative reliance can likewise be explored at trial. It is not a matter which can be tested by snapshots of emails in this summary process without oral evidence, even though the written evidence does indicate that the Claimants were at best highly sceptical of anything said by Mr Richmond. In the context of the caution of the appellate court interfering with decisions of courts of first instance, Lewison LJ in *Fage (UK) Ltd v Chobani UK L*td [2014] EWCA Civ 5 at [114] referred to the danger of island hopping rather than looking at the whole sea of evidence which is or might be examined at trial. The analogy is apposite to the dangers in a summary judgment or strike out application in picking out random emails in a long negotiation to demonstrate the state of mind of a representee at the time of the eventual agreement.

206. Whilst the presumptions are not irrebutable in respect of inducement and reliance following a finding of a dishonest representation, the presumptions are not easy to rebut. Given the law set out above in this regard, it is ambitious to say the least that it is so clear that Mr Richmond will be able to rebut the presumptions that the case against him should be the subject of summary judgment or struck out. This involves overcoming the difficulties imposed by the sympathy of the law to the position of the representee of a fraudulent misrepresentation. That is not only the difficulty of rebutting presumptions about reliance. It is also having to meet the fact that the bar for the representee of the fraudulent misrepresentation is low in that the tort of deceit can be established even in respect of a representee who entertains suspicion about a representation if they act on it to the very limited extent required (a substantial effect on their decision to enter into a contract). Bearing in mind the combined difficulties of meeting these legal tests and the fact that the Court at this stage is only concerned with the question of a real prospect of success at trial, I am satisfied that the Claimants have at lowest a real prospect of success in establishing the claim to fraudulent misrepresentation.

(e) Further matters raised in argument

207. It was submitted on behalf of Mr Richmond that even if there was an element of misrepresentation, looked at overall, the representations were substantially correct: see *Avon Insurance plc and others v Swire Fraser Ltd [2000] EWHC 230 (Comm).* It was said that the Court should consider whether the difference between what was represented by Mr Richmond and what was actually correct is likely to have induced a reasonable

person in the position of the Liquidators to enter into the 2019 Settlement. On the information currently before me, this point does not assist Mr Richmond on a summary judgment/strike out application. There is raised a case with a real prospect of success that the misrepresentations were substantial. A contrary conclusion is not available at a summary stage bearing in mind how substantial the alleged misrepresentations were and the evidence of Mr Short as to the impact of the misrepresentations. It will be available at trial for the Defendants to pursue cross-examination and a detailed evaluative exercise of the kind that would be inappropriate for the instant application. In the meantime, this submission does not assist the Defendants on this application and does not make the Court any more reluctant to find that there is a real prospect of success in the misrepresentation claim.

208. There was some consideration in respect of various clauses of the 2019 Settlement by way of defence to the fraudulent misrepresentation claim, and especially clauses 7.5 and 10.1. Clause 7.5 has been noted which is an acknowledgment of reliance relating to clauses which appear in the affidavits of Mr Richmond of 23 November 2018 and 7 January 2019. If it is said that this prevents other representations not mentioned in the affidavits, this does not follow, absent a clear term to that effect. Clause 10.1 provides "*This Deed contains all the terms agreed between the parties and replaces all previous agreements written or oral on the subject matter of this Deed and may not be varied except in writing signed by all of the parties. Each of the parties confirms that no person acting or purporting to act on her or his behalf has made any promises or representations upon which he or she have relied when entering into this Deed other than the warranties and representations made hereunder"* This does not prevent reliance on representations made by Mr Richmond himself. If it did, the parties could not as a matter of public policy seek to exclude liability for fraudulent misrepresentation: see *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351 and *HIH Casualty and General Insurance Limited v Chase Manhattan Bank* [2003] UKHL 6; [2003] 1 CLC 358 and *FoodCo UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), per Lewison J at [166].

209. It should be added that the pleadings did not contain a contractual estoppel plea, the effect of which might have been to prevent Mr Richmond from setting up a defence of no reliance in the face of the acknowledgment of reliance in Clause 7.5. It will be noted that this only applies to such matters as were contained in the affidavits and not to representations in letters and otherwise. *"This form of "estoppel" is said to arise when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such "contractual estoppel" is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract."*: see Chitty on Contracts 34th Ed. para. 6-126.

210. In the Claimants' skeleton argument, it is also submitted that the breaches referred to above in connection with the Trademarks and the stock claim were continuing breaches of fiduciary duty in failing to disclose the same. This is said to be based on such authorities as say that in some circumstances, there is a separate fiduciary duty to report one's own wrongdoing: see *Tesco Stores Limited v Pook* [2003] EWHC 823 (Ch) at [65]; *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [181]; *Bank of Ireland v Jaffery* [2012] EWHC 1377 (Ch) at [301].

211. It is not clear how this is pleaded in the Particulars of Claim, but the argument goes in any event that the above mentioned representations in connection with the settlement of the 2018 Proceedings about his income/financial position and his interest in the Trademarks following the sale are also breaches of Mr Richmond's fiduciary duties not to place himself in a position of a conflict and/or (as part of that) to disclose the true position. Even if it were pleaded, it is difficult to see how this duty continues long after a time when Mr Richmond ceased to be a director, including in the context of the settlement of an action brought against him for breach of his duties as a director. Since the representations as pleaded do not appear to be based on this alleged duty, this does not affect the overall analysis of whether any part of the pleaded case should be the subject of reverse summary judgment or striking out.

212. For the above reasons, the part of the application which seeks summary judgment or strike out in respect of the claim for fraudulent misrepresentation relating to the 2019 Settlement must fail. It makes no difference to the claim whether there is a claim for continuing breach of fiduciary duty by the failure to self-report wrongdoing. In view of the conclusions concerning the part of the claim, which is undoubtedly pleaded, it is not necessary to say anything regarding any continuing breach claim. Whether it is pleaded or not, this aspect in any event does not seem to be determinative on a summary judgment/strike out application, and it does not affect the conclusions which I have reached.

X Dishonest assistance

213. On the premise that there is a real prospect of success in the case that Mr Richmond was in breach of fiduciary duty to the Claimants, there now stands to be considered the causes of action relied upon by the Claimants against Mr Schofield. It is necessary first to consider the law relating to dishonest assistance.

(a) The law

214. A claim for liability for dishonest assistance requires the following elements to be established:

(i) there must be a trust or fiduciary relationship;

(ii) the trust or fiduciary relationship must have been breached;

(iii) in breaching the trust or fiduciary duty the trustee or fiduciary need not have acted dishonestly;

(iv) the breach must have been procured, induced or assisted in by the defendant;

(v) the defendant must have been dishonest in so acting.

See Civil Fraud, Grant & Mumford 1st ed. at para. 13-003 citing *Royal Brunei Airlines Sdn Bhd v Tan* [1995] AC 378.

215. What is required, or at least sufficient, for the ingredient of assistance is simply conduct (or an omission) which in fact assists the fiduciary to commit the act. It is not necessary that the assistance should play any part in the mental state of the trustee or fiduciary, still less that it should assist the mental state in a way which is necessary to render the act a breach of trust or fiduciary duty. A dishonest participant in a transaction takes the risk that it turns out to be a breach of trust or fiduciary duty. It is not necessary for the assistant to know, or even suspect, that the transaction is a breach of trust, or the facts which make it a breach of trust, or even what a trust means; it is sufficient if he knows or suspects that the transaction is such as to render his participation dishonest: *Agip (Africa) Ltd v Jackson* [1990] Ch 265, per Millett J at 294: see *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm) at [350].

216. As stated in Lewin on Trusts at 43-032: "For the requirement of assistance what is required is conduct which in fact assists the commission of the act which is a breach of trust by the trustee, and this requirement does not have any mental element in addition to the separate requirement of dishonesty. The assistance must be more than minimal importance and must enable the breach by the trustee to be committed…". It is necessary to show that the relevant assistance played more than a minimal role in the breach being carried out, but there is no requirement to show that the assistance provided would inevitably have resulted in the beneficiary suffering a loss: see Baden v Société General pour Favorses le Development du Commerce at de l'Industrie en France SA [1993] 1 WLR 509 at [246].

217. If the breach of duty has been completed prior to the alleged assistance being provided, there is no actionable assistance with the breach; *Brown v Bennett* [1999] BCC 525 at 533 per Morritt LJ. Nevertheless, assistance may precede the breach by laying the groundwork for it, or be a procurement of it (and thus precede it), but the assistance need not precede or be contemporaneous with it and may be given after the original breach (and may, for instance, be assistance in onward misapplication of money, or covering up or concealing a breach): see *Twinsectra v Yardley* [2002] 2 AC 164 at 194.

218. Assistance may also be provided in a continuing way, as in an ongoing scheme where, by its nature, assistance is required in concealing the true position, or indeed where the assistance by its nature enables a scheme to remain concealed. In *Hotel Portfolio II UK Limited v Ruhan & Stevens* [2022] EWHC 383 (Comm), a director (Mr Ruhan) had secretly self-dealt company property to himself, using nominees to assist him in concealing his interest in the purchasing entity, and thereafter went on to exploit that property and make a profit out of it which he kept for himself (through using corporate entities Mr Ruhan was interested in). Foxton J held at [262] (in relation to one of the individual nominees sued for dishonest assistance, Mr Stevens): "*(ii) By agreeing to "front" for Mr Ruhan and hide his interest in Cambulo Madeira* [the purchasing company], *Mr Stevens provided more than minimal assistance in that breach. His role was essential to ensuring Mr Ruhan's interest did not come to the attention of HPII and its stakeholders, with all of the attendant issues to which that could have given rise (see [195]). (iii) I am satisfied that the assistance was provided dishonestly, in that Mr Stevens knew that the purpose of the nominee arrangement was to enable Mr Ruhan to conceal the true position from and present a false picture to HPII and its stakeholders, and it involved Mr Stevens himself providing HPII and its stakeholders with a false account of his role. The arrangement which Mr Stevens entered into with Mr Ruhan was clearly dishonest, undertaken to deceive HPII and thereby facilitate Mr Ruhan's*

attempt to profit from the Hyde Park Hotels without facing any obstacles from HPII or having to share any profit." At [293], he held "*(i) As the individual in whose name and under whose nominal control the profit was held, and who applied that profit for Mr Ruhan's purposes and on Mr Ruhan's instructions, I am satisfied that Mr Stevens played a sufficient role in relation to the acquisition, retention and disposal of those profits to meet the causal requirements of the equitable wrong of dishonest assistance at that stage."*

(b) Application of the law to the facts

219. The case of the Claimants is that the Defendants engaged together in a scheme from the outset with a view to acquiring the Trademarks together. This would provide a benefit to both parties. Mr Richmond would be able to acquire the same without disclosure to the Liquidators or the creditors of the Company, who may have required different terms from him in order to sanction a sale to a connected party. This was as indicated by the Liquidators to Mr Richmond on 22 October 2015, and it also accords with the steps taken by Mr Richmond and Mr Schofield (if it was the case) to conceal their joint acquisition of the Trademarks.

220. The conduct referred to above in connection with the acquisition of the Trademarks is brought to bear. The case of the Claimants is that the Defendants worked together in the acquisition misrepresenting the position and deceiving the Liquidators so as to conceal the interest of Mr Richmond in the acquisition. It required both of them to lie and deceive the Liquidators about the existence and nature of Mr Richmond's interests and entitlements to benefit from the Trademarks and the FC stock up to the point of sale and continuing thereafter. It is alleged that Mr Schofield assisted in the scheme which enabled Mr Richmond 's breaches of fiduciary duty prior to and after the sale.

221. Reference is made to the discussion above about the factual basis of the breaches of fiduciary duty. The analysis of the history by reference to contemporaneous documents involves documents repeatedly telling a story about Mr Richmond and Mr Schofield pursuing the scheme together and purporting to give explanations which do not sit easily with the documents. All of this requires exploration at a trial to find out whether the explanations are accurate or whether the documents tell a different story. By way of example only:

(i) advice given by Mr Schofield to Mr Richmond not to put anything in writing to the liquidator. This advice was on about 22 October 2022 at which time Mr Richmond was (if it was the case that he was intending to acquire the Trademarks together with Mr Schofield) dishonestly informing the Liquidators that he was not connected to any of the parties from whom offers had been received. There appears to have been sharing of information passed on by Mr Richmond to the Liquidators;

(ii) advice given by Mr Schofield to Mr Richmond on 27 October 2015 when they got the bid that he should not discuss it with the liquidator apparently to keep the interest of Mr Richmond secret. Mr Schofield's innocent explanations about these communications will need to be tested;

(iii) the repeated references to "we" in connection with the bid and to the steps required to drive it on suggest a very different picture from the explanations now given by the Defendants to claim that Mr Richmond was not involved in the acquisition;

(iv) the documents in connection with the acquisition of a Luxembourg company, share allocation and the reference in the ECA to a Shareholders Agreement to form the basis of payment to Mr Richmond all have to be explained away to support a narrative of the Defendants which is at variance by what appears to be derived from the documents themselves;

(v) the same applies to the structure chart which appears to show clearly the combination of the Defendants as to which there are attempts to explain what was going on in a way which seems at variance with the plain meaning of the structure chart;

(vi) the use of language in proceedings between Mr Richmond/FE Sarl and Mr Moschillo that belies the contention that Mr Richmond had created a new company which was an owner of the Trademarks and difficult explanations such as Mr Schofield blaming his lawyer for having given a wrong account;

(vii) documents regarding sharing of profits which appear to be consistent with joint ownership, which are the subject of more explanations that everything is not as appears from the documents: see paras. 104-108 above. By way of example, there was JR Business Plan V3 sent by Mr Schofield to Mr Richmond referring to the guaranteed minimums and the 20% of 2017 licence fees showing identical salaries of Mr Richmond and Mr Schofield of over one million Euros each over a period of 7 years;

(viii) the inclusion by Mr Schofield in the acquisition documents of provisions enabling the owner of the Trademarks to bring action for the recovery of licence fees and stock, requiring this, it is said, to secure the stock that would otherwise have been capable of being obtained by the Company: see draft Amended Particulars of Claim para.99, referring to clauses 2.1.2 and 2.1.4 of the Deed of Assignment.

222. There are many other instances where the documents appear to confirm the account of the Claimants that the Defendants were cooperating in a scheme to conceal the involvement of Mr Richmond in the acquisition of the Trademarks. The Claimants' case is that this is not the time to resolve the issues raised by the documents or the attempted explanations for them. The Claimants submit that the matters set out above raise at least a case with a real prospect of success to the effect that Mr Richmond was interested in the Trademarks post sale to FE Ltd and FE Sarl either directly or through a direct or indirect shareholding in the purchaser. Further they submit that a case with a real prospect of success is made out about Mr Schofield's assistance of him in that regard (including concealing that fact from the Liquidators). That includes that Mr Richmond hid behind Mr Schofield and Mr Schofield provided the cover for Mr Richmond. But for Mr Schofield being a front man, there was no ability of Mr Richmond to hide his involvement from Mr Schofield. The Claimants submit that this

is a quintessential trial issue and that the Defendants will have a great deal of explaining to do and their credibility will be in issue in the course of a trial.

223. I am satisfied in the light of the foregoing that there is a real prospect of success that the Claimants will be able to establish dishonest assistance on the part of Mr Schofield of the breaches of fiduciary duty of Mr Richmond in enabling him to acquire a share of the Trademarks and the FC stock. There is also a real prospect of success that this continued thereafter following the sale and/or that the original assistance enabled Mr Richmond to receive the profits thereafter obtained from the acquisition and from the FC stock.

(c) The liability of Mr Schofield for the 2019 Settlement

224. For the reasons set out above, there is a real prospect of success in the Claimants' case against Mr Richmond for fraudulent misrepresentation arising out of untruthful information provided to the Claimants which led to the 2019 Settlement. Another analysis is that a consequence of the breaches of fiduciary duty was that the Claimants did not know about the interest of Mr Richmond in the Trademarks. Whilst the duty to disclose would on the Claimants' case have arisen at or prior to the sale in November 2015, there is an argument with a real prospect of success that the consequences of such non-disclosure is that following the sale Mr Richmond obtained benefits which he otherwise would not have received. That applies to the capital and income received after the sale through corporate vehicles. There is an argument with a real prospect of success that it applies also to the benefit of the 2019 Settlement to the extent that if the Claimants had known of the true position they would not have entered into an agreement on those terms.

225. On the basis of the analysis above, there is a case with a real prospect of success that Mr Schofield assisted Mr Richmond in his acquiring an interest in the Trademarks without disclosure to the Claimants. This in turn assisted Mr Richmond in connection with the 2019 Settlement. This provided more than a minimal amount of assistance in connection with the 2019 Settlement. It does not affect liability if and to the extent that Mr Schofield did not know about the respect in which this would assist Mr Richmond. There is therefore an argument with a real prospect of success that Mr Schofield did provide dishonest assistance to the 2019 Settlement.

226. The submission was made that the 2019 Settlement was one to which Mr Schofield is not a party. Further, it was some time after the winding up, the sale and the primary events thereafter relied upon. This was said to show a disconnect between the dishonest assistance and the 2019 Settlement. Nevertheless, I am satisfied that the Court should not give reverse summary judgment or order strike out for the following reasons:

(i) There is sufficient to connect the dishonest assistance regarding concealing the information about the ownership of the Trademarks with the 2019 Settlement, bearing in mind the authorities referred to above and how for the reasons set out above there is a real issue to be tried that the assistance may have laid the groundwork for the failure to disclose the interest in the Trademarks not only at the time of the sale, but much later culminating in the 2019 Settlement.

(ii) In any event, the Court ought to be cautious about giving summary judgment or ordering a strike out in respect of a part of the claim, particularly where it is so closely connected with matters are going to trial. This provides some other compelling reason for refusing the application.

XI Conspiracy to injure.

227. There is an alternative analysis of a conspiracy to injure. The ingredients of a claim in unlawful means conspiracy are as follows:

(i) a combination or agreement between a defendant and one or more others;

(ii) an intention to injure the claimant;

(iii) unlawful acts carried out pursuant to the combination or agreements as a means of injuring the claimant; and

(iv) causing loss suffered by the claimant.

See Civil Fraud, Grant & Mumford 1st ed. at para. 2-007 citing *Constantin Medien AG v Ecclestone* [2014] EWHC 387 (Ch) at [321].

228. Conspiracy has been pleaded in respect of the FC stock and in respect of 2019 Settlement. It is pleaded therefore that there was a combination as regards the FC stock and as regards the 2019 Settlement. As set out above, there is a large amount of evidence from which a combination with a common purpose of the Defendants can be inferred. It has been evident in documents from the day after the winding up onwards to the setting up vehicles for the acquisition of the Trademarks and for the interests of Mr Richmond in particular. It has been evident from the communications with the Liquidators and those of the Defendants at the same time, not to disclose the true position, and actively to mislead the Liquidators. It has been evident also from arranging for the FC stock to be acquired immediately following the sale of the Trademarks.

229. At para. 159 above, there was set out how there was a case with a real prospect of success of numerous alleged lies and acts of concealment as part of an elaborate design to enable Mr Richmond secretly to acquire the Trademarks. There is an inference with at least a real prospect of success that the purpose was to enable Mr Richmond (and Mr Schofield) to acquire something which without such subterfuge would have been either unattainable or not attainable on those terms.

230. At paras 224-228, there is set out the case of the Claimants that the Defendants engaged together in a scheme from the outset with a view to acquiring the Trademarks together. A part of this scheme became to acquire the FC stock with the benefit of the Trademarks. It is unnecessary to repeat this. Put this way, the claim of conspiracy as regards the FC stock is a different legal analysis based on the same facts and matters as the FC stock claim and the claim of dishonest assistance**.** Hence, the draft Amended Particulars of Claim refer back at para. 101 in the conspiracy section in respect of the

FC stock to paras. 97-99. In those paragraphs, there are set out the Particulars of Assistance and the Particulars of Dishonesty in respect of the claim against Mr Schofield of dishonest assistance to breach of fiduciary duty in respect of the FC stock.

231. The Defendants object to an inferential case. To the extent that it is inferential, the inferences are not fanciful or speculative, but there is a real prospect that they are inferences which can be legitimately drawn and that they have a firm foundation. Just as in the claims set out above, there are questions of fact and law which will have to be dealt with at trial, so also in conspiracy. This applies to the claim in respect of how Mr Richmond acquired an interest in the FC stock which was a part of the design with Mr Schofield.

232. What of the claim to conspiracy in respect of the 2019 Settlement? The starting point is the claim for dishonest assistance in respect of the 2019 Settlement. This arose out of the common design to acquire the Trademarks and the FC stock: the common design involved concealing the intentions from the Liquidators and misleading them. A consequence was that the same structure would be used to enable Mr Richmond to mislead the Claimants as regards the interest of Mr Richmond in the Trademarks and the stock and the income which this produced.

233. The concept of this giving rise to a conspiracy in respect of the 2019 Settlement is criticised by the Defendants because the 2019 Settlement was in respect of the 2018 Proceedings to which Mr Schofield was not a party. Nor was Mr Schofield a party to the 2019 Settlement. Even if the fiduciary obligations continued after the winding up order, the 2019 Settlement was four years after the winding up order. It is said that there is no evidence that Mr Schofield communicated with the Claimants in respect of the 2019 Settlement, nor with Mr Richmond so as to facilitate his alleged misrepresentations.

234. The conspiracy as pleaded refers back to the allegations of dishonest assistance of the 2019 Settlement. Hence, the draft Amended Particulars of Claim refer back at para. 131 in the conspiracy section in respect of the claim for misrepresentations to paras. 127 - 129. In those paragraphs, there are set out the Particulars of Assistance and the Particulars of Dishonesty in respect of the claim against Mr Schofield of dishonest assistance to breach of fiduciary duty in respect of concealing the interest of Mr Richmond in respect of the Trademarks and actively misrepresenting the position.

235. The Claimants claim that this shows that there was a common design throughout to mislead and that it continued up to and including the 2019 Settlement for the mutual benefit of the Defendants. This is not easy to prove, but there is enough in my judgment, despite the forceful points made by the Defendants to contradict the same, to show that it has a real prospect of success.

236. In any event, I am satisfied that there are other compelling reasons not to accede to the applications for summary judgment and striking out in this regard. The result of the analysis above is that as regards the remainder of the application, it must fail. The effect is that there is to be a trial of very closely related subject matter, involving the same witnesses and consideration of the same documents. If judgment is given in respect of one part, there is the danger of reaching inconsistent decisions by striking out one part and then finding that the investigations on the other claims shed a light on any claims struck out. This is a case where there is reason to believe that a fuller

investigation may add to or alter the evidence available to a trial judge and so affect the outcome of the case. It is necessary in those circumstances to be cautious, given that the scope of the investigation may cast a new light on this aspect of the case.

XII Conclusion

237. It follows that no part of the claim should be struck out and there should be no reverse summary judgment.

238. In coming to this overall conclusion in this case, I have also taken into account some of the introductory remarks about the extent to which this application was at lowest ambitious. The size of the witness statements and the pleadings make the application ambitious. The target was to show that on proper analysis, there was nothing in the claim. The application is based on an assumption that the lengthy story is flawed in the beginning, the middle and the end. I have concluded that this analysis does not work at a summary stage, and that this is not a case where the shortcut of a trial can be avoided.

239. I have considered the extent to which the application is doomed because of an overload of evidence. I have also considered the extent to which the Court is permitted to assess the evidence and take a view about the evidence as a whole. In the end, I have reached the conclusion that there are too many issues of fact and of law which make this case unsuitable for summary judgment or strike out. This is not the kind of case where unwrapping the many layers of the case reveals nothing in the inside worthy of a trial. On the contrary, this is a case which does not have a short cut, and where the parties' efforts and resources are better concentrated on a trial.

240. In the consideration of consequential matters, Counsel will no doubt consider directions as to how it is proposed that the Court should deal with the application for a worldwide freezing order (undertakings having been continued in the meantime) which was to be considered further after the provision of judgment.

241. It remains to thank all Counsel for their detailed attention to this case and for the assistance which they have provided to the Court both in their written and oral submissions.