Case No: CR-2017-003513

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Neutral Citation Number [2021] EWHC 1071 (Ch)

IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006 AND IN THE MATTER OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION)

Before

MRS JUSTICE JOANNA SMITH DBE

BETWEEN:

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(1) GREIG WILLIAM ALEXANDER MITCHELL
(2) KENNETH MELVIN KRYS
(JOINT LIQUIDATORS OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION))

Applicants

-v-

(1) SHEIKH MOHAMED BIN ISSA AL JABER
(2) MASHAEL MOHAMED AL JABER
(3) AMJAD SALFITI
(4) JJW HOTELS & RESORTS UK HOLDINGS LIMITED
(5) JJW LIMITED (REGISTERED IN GUERNSEY) (IN LIQUIDATION)

Respondents

JOSEPH CURL (Instructed by **Clyde & Co LLP**) appeared on behalf of the Applicants

CLARE STANLEY QC (Instructed by **Baker & McKenzie LLP)** appeared on behalf of the First, Second and Fourth Respondents

Judgment (as approved) 12 February 2021

MRS JUSTICE JOANNA SMITH:

1. This is an application to amend the Re-Amended Points of Claim in the form of a Re-Re-Amended Points of Claim ("**the Proposed Amendment**") provided by the applicants ("**the Liquidators**"), to the court and to the respondents on the morning of the fifth sitting day of the trial on 10 February 2021. As I shall address in more detail in a moment, the Proposed Amendment has been prompted by a list of corrections to the first respondent's four witness statements provided to the court on the fourth day of the trial, 9 February 2021.

2. I shall refer throughout this judgment to the first respondent as "**the Sheikh**".

3. In light of the nature of the amendments which seek substantially to change part of the case that is currently being advanced against the respondents, and at the request of Ms Stanley QC on behalf of the first, second and fourth respondents (who I shall refer to in this judgment as "**the MBI Respondents**"), I adjourned the trial at 11.15am on 10 February in order to give the parties sufficient time in which to prepare their submissions on the Proposed Amendment. I heard those submissions on 11 February and give this judgment on 12 February.

4. Ms Stanley has already indicated that if the amendments are permitted, she is likely to make an application to adjourn the trial.

5. For the sake of completeness, I should say that the third respondent has compromised the claim with the Liquidators and so does not appear at trial other than as a witness. The fifth respondent ("**JJW Guernsey**") is in liquidation and is unrepresented.

The Background to the Amendments

6. The claims in this case are brought by the Liquidators of a BVI company, MBI International & Partners Inc., (in liquidation) ("**the Company**"), which has been in liquidation since 10 October 2011. They arise out of a series of alleged transactions dating from between late 2008 and 2017 which, it is said by the Liquidators, give rise to claims of breach of statutory and fiduciary duty, breach of trust and negligence against the directors of the Company (the Sheikh and his daughter, the second respondent) together with claims for delivery up, knowing receipt and unlawful means conspiracy against various respondents.

7. The Proposed Amendment specifically concerns events that occurred in 2017, which events have been pleaded to reflect evidence provided to the Liquidators by the Sheikh.

8. The existing Re-Amended Points of Claim pleads at paragraphs 54 to 56:

"54. According to a certificate of incumbency dated 3 July 2017 from the Registrar General of the BVI, the Company continued to hold 129,112 shares in Holding BVI on that date.

55. The Sheikh has asserted that pursuant to a purported resolution of Holding BVI dated 27 July 2017 ('2017 Resolution'), 100 per cent of the shares in Holding BVI (i.e. necessarily including the entirety of the Company's Holding BVI Shares, including the 129,112 shares in Holding BVI that remained registered in the name of the Company as at 3 July 2017), was transferred or purportedly transferred to Holdings UK. The Sheikh, or some person(s) acting on the Sheikh's instructions, carried out that transfer or purported transfer.

55A. Since on or about 27 July 2017, legal title to the entirety of the issued shares in Holding BVI has been registered in the name of Holdings UK.

56. As is the position with the 2016 Void Disposition, the purported transfer away from the Company of the remaining 129,112 shares (or any assets owned by the Company) made after the commencement of the liquidation on 10 October 2011 was wholly void inter alia under the provisions of the 1986 Act and/or the 2003 Act."

9. Pausing there, I note two points. First, this case is expressly said, in paragraph 55, to be based on assertions made by the Sheikh, a point I shall return to later. Second, there are differences throughout the pleadings and witness statements in the abbreviations given to varying companies in what has loosely been described as the MBI Group. I shall try to use the same abbreviations as have been used in the Re-Amended Points of Claim. In particular, I shall refer to JJW Hotels & Resorts Holding Inc. as **Holding BVI** and the fourth respondent as **Holdings UK**.

10. In light of the facts pleaded in paragraphs 54 to 56 of the Re-Amended Points of Claim, that pleading went on to allege:

(i) (in paragraph 74) the 2017 resolution and/or any other post-liquidation purported dealing with the Company's Holding BVI shares was void and those shares remained vested in the Company and must be placed under the Liquidators' custody and control;

(ii) (in paragraph 81) breach of fiduciary and statutory duties on the part of the Company's directors in causing or purporting to cause the Company to enter into the 2017 resolution and/or any other post-liquidation purported dealing with the Company's Holding BVI shares;

(iii) (in paragraph 82) breach of trust on the part of the directors of the Company, the first and second respondents, in causing or purporting to cause the Company to enter into the 2017 resolution and/or any other post-liquidation purported dealing with the Company's Holding BVI shares.

(iv) (in paragraphs 90 to 92) Holdings UK received or purported to receive the Company's Holding BVI shares as a consequence of the 2017 resolution or otherwise as a consequence of further post-liquidation purported dealing with the Company's Holding BVI shares, that the Sheikh has, at all material times, been the controlling mind of Holdings UK and that Holdings UK is liable to account as a constructive trustee for its knowing receipt of the shares.

(v) (in paragraph 96) the first, second, fourth and fifth respondents conspired together in causing or allowing or participating in the 2017 resolution and/or further post-liquidation purported dealings with the Company's Holding BVI shares which were overt acts involving, inter alia, breaches of fiduciary duty and/or breaches of trust that had the foreseeable result of defrauding or otherwise harming the Company.

(vi) (in paragraph 97) that pursuant to the conspiracy the first, second, fourth and fifth respondents have failed to deliver the Company's BVI holding shares into the custody and control of the former liquidator.

11. Pausing there, I note that paragraphs 81 and 82 are both criticised by the MBI respondents on the grounds that the Company did not enter into the resolution, a criticism that Mr Curl identified in opening, saying that he accepted that the Company did not enter into the 2017 resolution but asserting that there was a transfer made to give effect to that resolution and pointing out that he relied on the words "*and/or any other post-liquidation purported dealing with the company's Holding BVI shares*."

12. This has, however, been overtaken by events.

13. Before turning to look at the Proposed Amendment, I should identify the case advanced by the respondents in their defence in relation to the 2017 resolution and the alleged transfer of the 129,112 shares in Holding BVI to Holdings UK.

14. Aside from the criticism I have already referred to, the MBI Respondents' Amended Defence, served on 17 December 2020, addresses the allegations about the 2017 resolution as follows.

(i) it denies (in paragraph 33) that the first and second respondents caused or purported to cause the Company to enter into the 2017 resolution, a denial that was in its original Defence.

(ii) it admits that on 27 July 2017 the directors of Holding BVI resolved to proceed with the fourth respondent's offer to acquire 100 per cent of Holding BVI but denies that a resolution of the Holding BVI board could have effected the transfer of that entity's own shares to Holding UK as a matter of corporate procedure. See paragraphs 35(1), 36, 91, 109 and 124(1), all of which are new amendments added on 17 December 2020.

(iii) it states that it has "never been disputed" by the MBI Respondents that the 129,112 shares in Holding BVI belong to the Company "as was explained in the email from Alexander Petsche of Baker & McKenzie to Tristan Cox of Clyde & Co on 12 December 2017 ("**the Petsche email**")".

(iv) it makes no admissions as to any other post-liquidation purported dealing with the 129,112 shares but asserts that such plea is unparticularised. See paragraphs 109, 118(3), and 129(3).

(v) it states that the fourth respondent does not assert a claim to the 129,112 shares in Holding BVI (see paragraph 35.2) and denies that the fourth respondent is liable to account as a constructive trustee for knowing receipt (see paragraph 124(2)) both paragraphs as originally drafted.

(vi) it pleads in paragraph 35(3) the following:

"If (which is not admitted) JJW UK [i.e. Holdings UK] received the Shares and/or the

129,112 shares in JJW Inc BVI [i.e. Holding BVI] in circumstances where the Company was a beneficial owner thereof, JJW UK [Holdings UK] held them as a bare trustee, and not a constructive trustee and has no liability to account for the same."

(vii) it pleads at paragraph 129(1) that the respondents do not aver that they, or any of them, acquired any beneficial interest in 129,112 shares, a new amendment as at 17 December 2020, and

(viii) it pleads at paragraph 130(3) that the respondents, and in particular Holdings UK, do not assert any title to the 129,112 shares in Holding BVI as evidenced by the Petsche e-mail. This was an original paragraph.

15. It will be readily apparent from these paragraphs that they assert that the 129,112 shares belong to the Company (albeit by reference to an explanation in the Petsche email, to which I shall return later) and that the MBI Respondents' pleaded case appears to have developed over time. Even from the date of their original Defence on 24 September 2019 the MBI Respondents have pleaded that Holdings UK does not assert a claim to the 129,112 shares. However, the plea at paragraph 35(3), to which I've already referred, does not provide any real comfort over the case that the MBI Respondents were running in respect of the 129,112 shares.

16. The Amended Reply dealt with the assertion in the Amended Defence that the Company had never disputed that it owned the 129,112 shares in paragraph 24(b) where it denied that Alexander Petsche “explained” in the email dated 12 December 2017 that “it has never been disputed” by these Respondents and/or JJW Guernsey that the Company owns 129,112 shares in Holding BVI. In paragraph 28(cA), it pleaded that “if (which is denied) Holdings UK has not at any time asserted a claim to the 129,112 shares in Holding BVI”, then the Respondents were put to proof of the registered ownership of the 129,112 shares

at all times since the commencement of the Company's liquidation, including their current registered ownership. At paragraph 71, the Amended Reply pleaded that "according to the Petsche email (which was sent on the Sheikh's instructions and on his behalf by Dr Petsche of Baker & McKenzie in Dr Petsche's capacity as the Sheikh's lawyer), by a resolution of 27 July 2017 'it was resolved that 100% of [Holding BVI] will be acquired by [Holdings UK]'". Paragraph 71 went on to refer to paragraph 4 of a witness statement dated 4 May 2018 in which the Sheik said that Holdings UK had "acquired all the shares of [Holding BVI]". Paragraph 71(c) pleaded that "If these Respondents do not accept that Holdings UK is the current registered owner of 100 per cent of the shares in Holding BVI", then the Respondents and JJW Guernsey "are put to proof of the registered ownership of the 129,112 shares at all times since the commencement of the Company's liquidation, including their current registered ownership".

17. The plea that Holdings UK asserts no claim to the 129,112 shares and that the Company is the owner of the shares is not consistent with the content of the Sheikh's witness statements for this trial, which appear to support the factual position identified and reflected in paragraph 55 of the Re-Amended Points of Claim. Thus, in paragraph 4 of his first statement dated 4 May 2018 and provided pursuant to a court order of Registrar Barber dated 26 April 2018, the Sheikh said this:

"*JJW Hotels & Resorts Holding UK Holdings Inc*. (which he subsequently corrected to 'Limited' in paragraph 20 of his third statement, i.e. Holdings UK) *acquired all the shares of JJW Hotels & Resorts Holdings, Inc* [i.e. Holding BVI]."

18. In paragraph 6 of that statement he said:

"*I set out in the paragraphs that follow the events that occurred concerning [the Company] in liquidation ... which was a minority shareholder and its historical shareholding in JJW*

Hotels & Resorts Holding, Inc. [i.e. Holding BVI] ... *and how the shares in JJW Inc.* [i.e. Holding BVI] *now come to be held by JJW Holdings* [i.e. Holdings UK]."

19. In paragraph 16 of his first statement he said:

"*On 27 July 2017 a Written Resolution of the board of JJW Inc. was passed. This resolution recorded that MBI had assigned its debt to JJW Holdings. The board of JJW Inc. resolved that the shares of JJW Inc.* [i.e. Holding BVI] *will be acquired by JJW Holdings* [i.e. Holdings UK]."

20. In paragraph 17 of his first statement he went on to say:

"*I wish to inform the Court that the documents referred to in this witness statement and exhibited to it were sent to Clyde & Co LLP in an e-mail dated 12 December 2017 from my lawyer Alexander Petsche of Baker & McKenzie LLP. This e-mail also contained an explanation of how the shares of JJW Inc.* [Holding BVI] *came to be held by JJW Holdings* [Holdings UK]."

21. In paragraphs 42 to 49 of his fourth statement, dated 19 June 2020, the Sheikh addressed what he referred to as "The 2017 transfer of the Transferred Shares to UK Holdings". UK Holdings being defined in this statement as the fourth respondent, i.e. Holdings UK.

22. Paragraph 49 reads as follows:

"*It was determined at the Second Meeting, which was also attended at my request by Mr Ragheb, that it was in the best interests of BVI Holding, it's shareholders, employees and creditors, for BVI Holding's shares to be transferred to UK Holdings. As a result, the transfer of BVI Holding's* [Holding BVI] *shares to UK Holdings* [Holding UK] *was effected in July 2017*."

23. These passages in the Sheikh's statements were also mirrored in sworn evidence he gave to the court at a section 236 examination before ICC Judge Barber on 26 April 2018. During

this first examination, the Sheikh appeared to confirm that, since July 2017, 100 per cent of the Holding BVI shares had been owned by Holdings UK. However, Mr Curl, acting for the former liquidator, wanted absolute clarity on this point, saying at the hearing, as I have seen from the transcript, that the key thing for the former liquidator was to know "*where the shares in the BVI entity have ended up*".

24. Accordingly, following the first examination, the Sheikh undertook to the court to provide a witness statement "*supported by a statement of truth which sets out the name of the UK entity that now holds shares in Holding BVI*". That undertaking was embodied in an order backed by a penal notice and was made against the background of the Sheikh having failed to comply with an order for examination within 11 weeks made on 29 August 2017. The Sheikh's first statement of 4 May 2018 was made in purported compliance with that order, and as I have already said, subject to a small error in paragraph 4 which was later corrected, said in terms that Holdings UK acquired all the shares of Holding BVI.

25. The Sheikh attended a second examination before deputy ICC Judge Schaffer on 1 November 2018 and made similar assertions at that examination.

26. The Liquidators' case is that they were entitled to rely upon the information provided to them by the Sheikh during his two section 236 examinations and that they were entitled to plead a case in their Points of Claim which reflected that information.

27. They say that other information they had available to them in the form of the Petsche e-mail of 12 December 2017 and the July 2017 resolution itself was patently unclear, hence their reliance on the Sheikh's evidence.

28. In his skeleton argument for trial, Mr Curl identified at paragraph 135 that "*it appears that the Sheikh now contends, opportunistically and without any explanation for his change of position, that the 129,112 shares were not transferred to Holdings UK*".

29. He made this submission in circumstances where,

(i) on 1 February 2021, the first day of the trial window, the MBI Respondents disclosed a registered agent certificate for Holding BVI dated 26 March 2020, which indicated that none of the shares in Holding BVI was owned by Holdings UK and

(ii) on 2 February, the judicial reading day, a copy of the register of members of Holding BVI, as at 14 January 2020, was disclosed followed later by another registered agent certificate for Holding BVI dated 30 September 2019.

(iii) however, the Sheikh's witness statements referred to above had not changed at this point.

30. In the MBI Respondents' skeleton argument for trial, Ms Stanley criticised the claim in respect of the 2017 resolution and asserted that the 129,112 shares "*belonged to the Company*", a submission that is consistent with the MBI Respondents' pleaded case, but not, at that time, the Sheikh's evidence.

31. During his oral opening, Mr Curl said this in the context of dealing with a point on the pleading as to the 2017 transaction:

"*The reason that was included was to provide for the possibility that the Sheikh was not telling us the truth about transferring the shares to the fourth respondent in 2017 and that in fact he had done something else with them and it may appear from my initial look at the further documents disclosed on Monday evening that that may indeed be the position he's going to adopt, although we will see*."

32. From this it is clear that the Liquidators' position at this point, i.e. on the first day of trial, was that they anticipated that there would be a change in the Sheikh's evidence in light of the new disclosure but, absent any such change, they chose to bide their time to see what would transpire in relation to his evidence in due course.

33. On the morning of the third day of the trial, Mr Curl addressed the question of potential amendment in the following way:

" *... I'm not seeking permission to amend now, and again, just to put down another marker, a second marker, the way the points of claim are currently pleaded in relation to the 2017 disposition is based on the Sheikh's sworn evidence, both oral and repeated in writing on a number of occasions in this jurisdiction* ..."

34. He went on to say:

"*The current position is that the material disclosed by the Sheikh last week raises a number of currently unanswered questions about the Sheikh's current position on what happened in 2017 and that tension is one of the reasons why we now want to cross-examine Mr Deen, for example. So without knowing what the Sheikh is saying [about] what happened in 2017, given this obvious tension in the material, I'm not yet in a position to take the point of amendment any further. I realise that's most unusual, but that is the position we're in.*"

35. Ms Stanley indicated that she would strenuously oppose any such amendment on the basis that it was very late and that "*my client is entitled to know the case against him before he gets into the box.*"

36. Mr Curl points out now that the MBI Respondents did not engage with the consequences of the new material disclosed just before the trial, saying that it was obvious, however, that there would be consequences.

37. Shortly before 10.30 on the morning of the fourth day of the trial, a list of corrections and additions which it was intended would be made to the Sheikh's witness statements when he entered the witness box was provided to the court and to the Liquidators for the first time. That afternoon, Ms Stanley apologised for the fact that the corrections had been provided

very late but indicated that they had been provided to the court and the Liquidators as soon as she herself had received them. She provided no explanation as to why what have turned out to be significant factual corrections had not been made earlier, for example when the late disclosure was provided. She has since candidly acknowledged that the Sheikh will have questions to answer on this issue in cross-examination.

38. Given the volte face displayed by the corrections and the obvious impact on the Liquidators' case, in particular against Holding BVI, I would have expected a witness statement to have been served explaining at the very least:

(i) when it had come to the Sheikh's attention that his existing witness statements were incorrect and required amendment;

(ii) what had alerted him to that fact;

(iii) when and how he had come by the documents that had been disclosed shortly before the trial; and

(iv) if there had been a delay in drawing the change in his evidence to the attention of the court and the Liquidators, what the reason for that delay was.

No such witness statement has been provided and I remain in the dark as to the circumstances in which the Sheikh came to give (what now appears to have been) inaccurate information to the court at his section 236 examinations and in his witness statements verified with statements of truth, and when and how the Sheikh realised that the evidence he has previously given, which has been relied upon by the Liquidators in their pleading, was inaccurate. Furthermore, I have no explanation as to why the Sheikh's evidence remained for so long apparently inconsistent with the MBI Respondents' pleaded case.

39. Insofar as material, the proposed corrections,

(i) seek to amend paragraphs 4, 16 and 17 of the Sheikh's first witness statement to say that the 2017 resolution was for a transfer of the assets and liabilities of Holding BVI to Holdings UK and not a transfer of shares, and that when he had said in paragraph 17 of that statement that the Petsche e-mail of 12 December 2017 explained how the shares in Holding BVI "*came to be held by* [the fourth respondent]", he had intended to say that the e-mail explained how the shares in Holding BVI "*were, at that time, planned to be transferred to JJW Holdings* [i.e. the fourth respondent]*"*, but that *"this did not in fact take place, but* [Holding BVI] *assets and liabilities were in fact what was transferred to JJW Holdings* [Holdings UK]".

(ii) seek to amend paragraphs 42 to 49 of his fourth witness statement to say that although he has previously described the transfer of Holding BVI to UK Holdings in July 2017 as a share transfer, "*it has been pointed out to me that the resolution was to effect a transfer of BVI Holding's assets and liabilities*".

40. The Proposed Amendment is said to arise in consequence of these corrections and the amendments are extensive in that they change the Liquidators' case in respect of the events in 2017.

41. In summary, they identify the circumstances in which the Sheikh first produced the 2017 resolution to the former liquidator, together with his subsequent representations to the court on at least four occasions that the entirety of the shares in Holding BVI, including the 129,112 shares, had been transferred to UK Holdings on or about 27 July 2017.

42. The Proposed Amendment then goes on to allege that these representations were untrue, that the Sheikh knew them to be untrue and that he did not correct his misrepresentations until 9 February 2021, after the trial had commenced (in the extracts below, all pre-existing amendments have been adopted and only the Proposed Amendments have been

underlined):

"54. According to a certificate of incumbency dated 3 July 2017 issued by Maples Corporate Service (BVI) Limited ('Maples') (the BVI registered agent of Holding BVI), the Company continued to hold 129,112 shares in Holding BVI on 23 June 2017.

55. The Sheikh has asserted that pursuant to a purported resolution of Holding BVI dated 27 July 2017 ('2017 Resolution'), 100 per cent of the shares in Holding BVI (i.e. necessarily including the entirety of the Company's Holding BVI Shares, including the 129,112 shares in Holding BVI that remained registered in the name of the Company as at 23 June 2017, was transferred or purportedly transferred to Holdings UK.

55A. The Sheikh first produced the 2017 Resolution to the Former Liquidator by an e-mail sent on behalf of Dr Alexander Petsche (an Austrian lawyer and a partner in Baker McKenzie) to the Former Liquidator's solicitors dated 12 December 2017.

55B. The Sheikh represented to the court and to the Former Liquidator and subsequently to the Joint Liquidators that the entirety of the shares in Holding BVI (i.e. necessarily including the 129,112 shares in Holding BVI that remained registered in the name of the Company as at 23 June 2017) had been transferred on or about 27 July 2017 to Holdings UK on at least the following occasions:

a. while sworn in the witness box before ICC Judge Barber on 26 April 2018;

b. by his first witness statement dated 4 May 2018, which was made in purported performance of an undertaking given by the Sheikh to the court embodied in an order backed by a penal notice made by ICC Judge Barber on 26 April 2018;

c. while sworn in the witness box before Deputy ICC Judge Schaffer on 1 November 2018; and

d. by his fourth witness statement dated 19 June 2020.

55C. The Sheikh's representations particularised at Paragraph 55B were untrue and the representation at Paragraph 55B(b) was made in breach of the Sheikh's undertaking to the court given on 26 April 2018 in that:

a. the Sheikh's real position was that he had caused 891,761 of the Company's Holding BVI Shares to be transferred to MBI International Holdings Inc (a company registered in BVI of which the Sheikh was the controlling mind at all material times) on or about 23 June 2017 and had not caused any of the Company's Holding BVI Shares to be transferred to Holdings UK at any time; and

b. 129,112 of the Company's Holding BVI Shares remained registered in the name of the Company and had not been transferred to Holdings UK.

55D. The Sheikh knew at all times from 23 June 2017 that the Company's Holding BVI Shares continued to be registered in the name of MBI International Holdings Inc, despite his representations to the contrary particularised at Paragraph 55B above, in that the Sheikh knew that neither he nor anyone else had caused any of the Company's Holding BVI Shares to be transferred to Holdings UK.

55E. Further or alternatively, the Sheikh knew from on or about 30 September 2019 that the Company's Holding BVI Shares continued to be registered in the name of MBI International Holdings Inc, despite his representations to the contrary particularised at Paragraph 55B above, in that Maples issued a registered agent's certificate on that date and a further certificate to like effect on 26 March 2020 to the Sheikh's in-house solicitor, Zahy Deen, setting out that information, and the Sheikh was aware of those certificates and what they said from on or about the date they were issued.

55F. Despite the Sheikh's knowledge of the inaccuracy of the representations he had made particularised at Paragraph 55B above, and in particular the ongoing breach of the

undertaking referred to at Paragraph 55B(b) above, the Sheikh did not correct his misrepresentations with either the court or the Joint Liquidators until 9 February 2020, which was after the trial of this action had commenced.

55G. Contrary to the untrue representations particularised at Paragraph 55B above, the Sheikh's real position was that he had caused the assets and liabilities of Holding BVI (as distinct from the shares in Holding BVI) to be transferred to Holdings UK on or about 27 July 2017. At all material times the principal asset of Holding BVI was its 100 per cent shareholding in JJW Guernsey.

55H. The disposal of the assets and liabilities of Holding BVI on or about 27 July 2017 had the effect of extinguishing the value of the Company's Holding BVI Shares at a time when the Sheikh knew that the Former Liquidator had applied for and obtained recognition of the Company's liquidation under the CBIR on 9 June 2017 with a view to taking steps to investigate and/or recover the value of the Company's Holding BVI Shares. The Sheikh knew that recognition under the CBIR had been obtained by the Former Liquidator by (at the latest) his receipt of the Former Liquidator's solicitors' letter to him dated 13 June 2017".

43. These Proposed Amendments flow through into the causes of action as follows.

(i) The allegation of causing or purporting to cause the Company to enter into the 2017 resolution is deleted from paragraphs 81 and 82.

(ii) A new claim of breach of duty or breach of trust is raised in paragraph 82A by reason of the making of the untrue representations as follows:

"82A. Further or alternatively, in making and maintaining the untrue representations particularised at Paragraph 55B in the premises particularised at Paragraphs 55C to 55H above until 9 February 2021, which was a date after (a) the value of the Company's

Holding BVI Shares had been extinguished; and/or (b) JJW Guernsey had entered insolvent liquidation, the Sheikh breached his duties to the Company particularised at Paragraphs 61 to 63 above and/or committed a breach of trust in that:

a. the untrue representations had as their object the prevention and/or frustration of the Former Liquidator's and the Joint Liquidators' ability to take steps to realise the Company's assets in accordance with the BVI liquidation regime, which was an object that held no commercial benefit for the Company and was positively adverse to the interests of the liquidation of the Company;

b. the untrue representations were made for a collateral purpose, and the Sheikh did not act for a proper purpose, in that the principal beneficiary of the untrue account was the Sheikh and/or other entities within the MBI Group and was positively adverse to the interests of the liquidation of the Company;

c. the untrue representations had the effect of causing the Former Liquidator and the Joint Liquidators to pursue Holdings UK when the Sheikh's real position was that Holdings UK did not own any of the Company's Holding BVI Shares, which had the effect of increasing the deficiency in the Company's estate in circumstances where the Sheikh knew that Holdings UK had not received the Company's Holding BVI Shares; and/or

d the untrue representations were made without reasonable care and skill, in that the Sheikh did not take any or any sufficient steps to ensure that the representations, particularly the representation made in purported discharge of an undertaking backed by a penal notice referred to at Paragraph 55B(b) above, were true and accurate in every respect."

(iii) The allegation in paragraphs 90 to 92 that Holdings UK received the shares as a consequence of the 2017 resolution and is liable to account as a constructive trustee is

deleted.

(iv) The unlawful means conspiracy allegation is amended to delete the reference to the 2017 resolution and to instead pray in aid the untrue representations set out in paragraph 96:

"96. Pursuant to the Conspiracy, the Sheikh and/or Ms Al Jaber and/or JJW Guernsey and/or Holdings UK or any one or more of them caused or allowed or participated in the untrue representations particularised at Paragraph 55B and the matters particularised at Paragraphs 55C to 55H above, which were overt acts involving *inter alia* breaches of fiduciary duty and/or breaches of trust that had the foreseeable result of defrauding or otherwise harming the Company."

44. The Liquidators say that this is a responsive re-pleading which responds to the Sheikh's change of position as evidenced by his list of corrections. Insofar as this new case involves deletions, it is obviously something of a blow for the Liquidators because it brings to an end any chance of a claim against Holdings UK, an onshore and apparently solvent entity for knowing receipt, leaving only what Mr Curl described, as a vestigial claim in conspiracy against it.

The approach to late amendments

45. In the first instance the court must determine whether the proposed amendments have a real prospect of success. The test to be applied is the same as that for a summary judgment under CPR Part 24. Thereafter, the question of whether to grant a late amendment is within the discretion of the court and is to be determined having regard to the overriding objective. An over-arching consideration is the need for the court to strike a balance between the injustice to the applicant, if the amendment is refused, and injustice

to the opposing party and other litigants in general, if the amendment is permitted.

46. Mr Curl took me to *Swain Mason v Mills & Reeve LLP*, [2011] 1 WLR 2735 in which Lord Justice Lloyd said at paragraph 72:

" *... it is always a question of striking a balance. I would not accept that the court in [Worldwide Corporation Limited v GPT Limited] sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court*."

47. Mr Curl pointed out that in this passage Lord Justice Lloyd appeared to have identified what Mr Curl described as a carve-out for late disclosure or new evidence, such that the approach in such a case would not be as stringent as might otherwise be the case for late amendments and should be more balanced in favour of the party seeking the amendment.

48. I do not read this paragraph in quite the same way as Mr Curl. In my judgment, Lord Justice Lloyd was not intending to identify a separate category of case to which entirely different considerations would apply. On the contrary, his remarks in the final sentence of this passage were plainly intended to have a general application to very late amendment applications, albeit that I do not doubt that a litigant who advances a very late amendment in circumstances where he has been prompted to do so by late disclosure or late evidence may well, depending on the facts, be more able to discharge the heavy onus to which Lord

Justice Lloyd refers than might otherwise be the case.

49. Equally, such a litigant may well be in a position to submit, as the Liquidators do in this case, that lateness is a relative concept and that in truth the amendment is not late at all, owing to the fact that it could not have been made previously. If such a case is made out, then the heavy onus may not apply.

50. This is not, however, a carve-out but merely, as I understand it, an appreciation that there is a spectrum along the road to trial with different factors likely to carry different weight at different points along that road.

51. It was common ground that the general principles to be applied on an application for late amendment are to be found in the speech of Mrs Justice Carr (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 at paragraph 38:

"*Drawing these authorities together, the relevant principles can be stated simply as follows:*

(a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

(b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to

a trial date may mean that the lateness of the application to amend will, of itself, cause the balance to be loaded heavily against the grant of permission;

(c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

(d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

(e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

(f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

(g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

52. Both the cases of *Swain Mason* and *Quah Su-Ling* were approved, albeit *obiter*, in *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018]

EWCA Civ 268 at paragraph 41 by Sir Geoffrey Vos, Chancellor of the High Court:

"*The principles relating to the grant of permission to amend are set out in Swain-Mason and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in Quah Su-Ling v. Goldman Sachs International [2015] EWHC 759 (Comm) at paragraphs 36–38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal."*

53. Ms Stanley also referred me to *Rose v Creativity etc* [2019] EWHC 1043, a decision of his Honour Judge Eyre QC, in which he examined the principles to be applied to late amendments in painstaking detail at paragraphs 33 to 50.

54. Finally, Mr Curl referred me to the case of *Brown v Innovatorone* [2011] EWHC 3221 (Comm), a case before Mr Justice Hamblen, at paragraph 14:

"*As the authorities make clear, it is a question of striking a fair balance. The factors relevant to doing so cannot be exhaustively listed since much will depend on the facts of each case. However, they are likely to include:*

(1) the history as regards the amendment and the explanation as to why it is being made late;

(2) the prejudice which will be caused to the applicant if the amendment is refused;

(3) the prejudice which will be caused to the resisting party if the amendment is allowed;

(4) whether the text of the amendment is satisfactory in terms of clarity and particularity."

55. I have regard to all of the principles set forth in these cases in determining this application.

Application of the Principles in this case

General Considerations

56. This application arises midway through the trial. The Liquidators have already called their evidence and Ms Stanley has cross-examined their witnesses by reference to the pleadings as they currently stand. At first blush it therefore appears to be a very late application.

57. However, the Liquidators say that, through no fault of their own, they now find themselves in a position where they are forced to amend to reflect the new evidence as intimated in the Sheikh's list of corrections. They submit that, at all material times, the Sheikh has been under an obligation to give a true account of the affairs of the Company and that he has failed to do so on a number of occasions. They say that lateness is relative and that this application is not late because they could not previously have pleaded out the case they now seek to put, owing to the fact that until the list of corrections was served, they had been operating under the impression that the true state of affairs in relation to the events of 2017 was as set out in the Sheikh's sworn evidence before the court and in his witness statements.

They point out that the late disclosure should have been provided earlier and they say it would be unjust to preclude them now from having the opportunity to advance a claim based on the new evidence and late disclosure. They invite me to give them permission to do so.

58. The MBI Respondents strongly oppose this application and make it clear that the grant of permission will likely necessitate an adjournment of the trial. If this is correct then this is itself a factor which must go into the balancing exercise identified in *Quah Su-Ling v Goldman Sachs*.

Reasons for lateness and delay

59. I accept that the Liquidators have been put in an invidious position. They have proceeded on the basis of evidence given by the Sheikh, both during his section 236 examinations and in subsequent witness statements (making it clear in their Points of Claim that they were doing so) only to find that evidence being changed at the last minute.

60. In order to obtain information about the affairs of the company, recognition of the company's liquidation was obtained in this jurisdiction on 9 June 2017. On 29 August 2017, the Sheikh agreed to be interviewed within 11 weeks but he failed to comply with that order. On 13 December 2017, the Sheikh submitted to an order that he produce all books, papers and records in his possession and/or control in relation to the assets of the company, but I understand that he did not produce any such documents.

61. I pause here to note that if the documents which have recently been disclosed were in the Sheikh's possession and control, they should have been produced pursuant to

this order. I have no evidence as to this one way or the other from the Sheikh.

62. During his s. 236 examination, the Sheikh consented to the Liquidators approaching Maples & Calder and Citco BVI Limited (offshore service providers) for documents relating to the affairs, business and assets of the Company, but I have been told that these offshore service providers have not been cooperative. In his oral evidence Mr Krys said that in the exercise of their discretion, the Liquidators had taken the view that the best source of information was, however, the Sheikh himself, as director and controlling mind of the Company, together with other key members of his team. This is why the Liquidators sought the section 236 examinations.

63. The information provided by the Sheikh as to the transfer of the Holding BVI shares to Holdings UK was clear and was repeated on at least four separate occasions, months apart. I do not accept that, prior to the very late disclosure of last week, the Liquidators had access to any contemporaneous documents which ought to have indicated to them that the Sheikh's evidence was obviously inaccurate.

64. The 2017 resolution was unclear, referring as it did to an acquisition of 100 per cent of the Company, as was the Petsche e-mail of 12 December 2017, which said that "*…by Resolution of 27 July 2017 it was resolved that a 100% of [Holdings BVI] will be acquired by [Holdings UK]*". The documents attached to that e-mail included a certificate of incumbency which showed that the Company held 129,112 shares in Holding BVI on 23 June 2017, but no documents were produced to show the position after that date.

65. Further, the fact that the MBI Respondents' Defence asserted that it had never been

disputed by the Respondents that the 129,112 shares belong to the Company, with express and sole reference to the Petsche email (which does not appear to make that plain), did not provide a clear picture to the Liquidators. No changes were made to the Sheikh's witness statements, which continued to be apparently unequivocal in their content until the list of corrections was provided.

66. Whilst I expressly make no final decision as to whether, in litigating this case, the Liquidators have made proper investigations, that being an issue to be determined at the conclusion of the trial, I accept in general terms that insolvency office holders have a generous margin of latitude in the exercise of commercial judgment, as was indeed confirmed on the morning of 12 February 2021 by Mr Lowe QC, expert for the MBI Respondents.

67. On the submissions that I have heard for the purposes of the amendment application, and by reference to the documents that I understand to have been available to the Liquidators, it appears to me to have been reasonable for them to take the view that they were entitled to continue to pursue their pleaded case as to the transfer of the 129,112 shares from Holding BVI to Holdings UK in circumstances where the Sheikh’s witness statements remained supportive of that position.

68. Further, it strikes me as a singularly unattractive position for any director to take, including the Sheikh) to say that a liquidator knew or should have known that the information he provided when compelled to do so was inaccurate and thus that the liquidator should not have sought to rely upon it.

69. Once the late disclosure was provided and the liquidators realised that there was likely to be a change of position, they put down a marker about the possibility of an

amendment, but whilst the Sheikh's witness statements remained unchanged, a state of affairs for which, as I've said, there's been no explanation, in my judgment they were entitled to decide to wait and see what would transpire when the Sheikh came to give his evidence. The MBI Respondents could not have been oblivious to the import of the markers put down by Mr Curl.

70. It follows that having regard to the fact that this application could not have been made much earlier than it has been, I do not regard it as very late and nor do I consider that the onus on the Liquidators is as heavy as it might have been in different circumstances, although I, of course, appreciate that I must have regard to the principles set forth in the cases that I have already referred to and must carry out the requisite balancing exercise.

Strength of the case

71. I turn next to consider the strength of the Proposed Amendment, which I shall do in conjunction with considering whether the text of the amendments is satisfactory in terms of clarity and particularity. I preface this section by saying that Mr Curl has produced what are complex amendments in a very short space of time. During the course of his submissions, he frankly acknowledged that there were some areas in which the proposed amendments were wanting, as a consequence of the time pressure that he had inevitably been under during the course of the trial.

72. Mr Curl took me through the Proposed Amendments paragraph by paragraph. Their purpose appears to be to advance new breaches of fiduciary duty and/or new breaches of trust together with a claim of negligent mis-statement based on the Sheikh's inaccurate statements and to amend an existing unlawful means conspiracy

claim set out in paragraph 96. They do not give rise to any claim for additional relief over and above the claim for an account, alternatively equitable compensation, that is already being sought by the Liquidators.

73. I am bound to say that having reviewed the Proposed Amendments in detail, I am not comfortable that the new amendments are pleaded with sufficient clarity and particularity, although having regard to the submissions that have been made to me, I believe that, with some exceptions which I identify below, they appear to satisfy the comparatively low hurdle of showing a real prospect of success. I now set out my reasoning in relation to each of the substantive amended paragraphs.

Paragraph 55A

74. This paragraph makes a new factual plea as to the date of the production of the 2017 resolution to Mrs Caulfield, the former liquidator. Ms Stanley asserts that this paragraph is factually wrong because the 2017 resolution was not produced to Mrs Caulfield at the time of the Petsche e-mail of 12 December 2017. Mr Curl was not able to address this point, saying that he needed to double-check it and follow it up. However, he confirmed that if Ms Stanley is correct on the factual position, then this paragraph is inaccurate as it stands and requires amendment.

Paragraph 55B

75. This paragraph asserts a representation to the court, the former liquidators and the Liquidators made on four occasions. The information set out in this paragraph has been available to the Liquidators for some time, but it is pleaded now because of the assertion in paragraph 55C that the representations made by the Sheikh were

untrue, and in one case, in breach of an undertaking. There seem to me, however, to be two significant problems with this pleading:

(i) I agree with Ms Stanley that, absent further particulars, it is difficult to see how a representation to the court is relevant to a claim brought by the Liquidators on behalf of the Company, and there is certainly no explanation as to why it is relevant. There is no allegation that the Sheikh committed perjury or a contempt of court.

(ii) there is a regrettable absence of particulars of the representations on which reliance is placed. Where an amendment is made to a pleading mid-trial, even in circumstances where it is the consequence of the late production of evidence or a late change to the other side's case, it behoves the pleader, fully and properly, to particularise the claim; in relation to the representations this would require, at the very least, identification of the words used in the witness statements and at the hearings on which reliance is placed.

76. Mr Curl appeared to acknowledge this during his submissions, praying in aid, as I have said, the extreme time pressure under which the draft was prepared. Nevertheless, the Sheikh is entitled to know precisely what it is he said, that is alleged to amount to an actionable representation and this pleading does not satisfy that requirement.

77. Having said that, it does not seem to me to be a difficult exercise to particularise the representations on which reliance is being placed.

Paragraph 55C

78. As I have already said, this paragraph asserts that the representations were untrue

and that one was in breach of undertaking. Although the use of the word "untrue" is perhaps unusual and one might more usually expect a plea that a representation was "false", I anticipate that the word "untrue" has been used in circumstances where the Liquidators are not seeking to make any claim in deceit or dishonesty. However, the paragraph contains other problems:

(i) it is not clear what the Liquidators intend to allege in relation to the breach of undertaking. As I have already said, there is no plea of contempt of court and no attempt to plead the constituent elements that would be required for such a plea.

(ii) there are no particulars that the representation was made in breach of the Sheikh's undertaking, i.e. the precise terms of the undertaking, what it required of the Sheikh, what he did or did not do and why the things he did or did not do amounted to a breach. Again, however, this could reasonably easily be remedied.

79. Ms Stanley asserts that the undertaking was also impossible to perform because it required that the witness statement should set out the name of the UK entity that now holds the shares in Holding BVI. Mr Curl responded that it was clear when seen in context that this undertaking required information about the entity now holding the shares in Holding BVI and that it was artificial to interpret the undertaking in the very strict manner adopted by Ms Stanley. It seems to me that this point is arguable and that I cannot say in the present circumstances and absent detailed argument on the law that a properly pleaded case based on the undertaking has no real prospect of success.

Paragraphs 55C(a) and (b)

80. These paragraphs appear to be intended to provide particulars of the assertion that

the representations were untrue. However, the plea that the Sheikh's "*real position*" was as pleaded appears to me to be problematic in that it is capable of creating confusion. During argument, I asked Mr Curl what he meant by this phrase and whether he meant the real position at the time of the representations, which would itself be dependent upon the Sheikh's mental state. Mr Curl's response was that the Liquidators' position is that the Sheikh "*must have known those representations had to be false*". However, no plea to that effect is included in paragraph 55C(a) or (b), and further, there is no plea that this knowledge is to be inferred, as Mr Curl also said in submissions.

81. Mr Curl attempted to explain the use of the words "*real position*" by saying that the amendments were expressed in that way so as to "*avoid accepting that these recently produced documents or what the Sheikh is now saying is necessarily the gospel truth in circumstances where he has changed his position so many times*". This appeared to me to be an acknowledgement that the Liquidators were seeking to hedge their bets against the possibility that a new case might subsequently emerge. Whilst this might be understandable in the circumstances of this case, it is not satisfactory and does not seem consistent with the clear assertion that the representations were untrue.

Paragraphs 55D and 55E

82. Paragraph 55D must be read, says Mr Curl, with paragraph 55C. In other words, it pleads sufficiently the Sheikh's knowledge that the representations were untrue at all material times. However, once again there are no particulars on which the plea of knowledge can be founded and no plea, as I have already said, that the

knowledge is to be inferred from pleaded facts if this is the Liquidator's case, as it seems to be.

83. Paragraph 55E suffers from similar problems. In this paragraph there is again a plea of knowledge, albeit again without any attempt to plead the underlying basis for that plea.

84. As to the plea in paragraph 55E that the Sheikh was aware of the content of certificates that it is said were sent to his in-house solicitor, again there is no attempt to explain how or why the Sheikh must have been so aware. It may well be the case that it is to be inferred from the way in which, for example, the Sheikh ran his business organisation, that documents sent to his in-house solicitor would also have been seen by him, but no attempt has been made to make out any such case by reference to inference.

Paragraph 55F

85. Paragraph 55F alleges that despite the Sheikh's knowledge of the inaccuracy of the representations he had made, together with his breach of undertaking, he did not correct these with the court or the Liquidators until 9 February 2020. This appears simply to build on the earlier paragraphs by making a factual statement as to the date on which the Sheikh sought to correct his earlier statements.

Paragraph 55G

86. Paragraph 55G again contains the imprecise and unclear statement as to the Sheikh's "*real position*", in respect of which I have already expressed misgivings. However, this paragraph also includes the assertion that the Sheikh had caused the

assets and liabilities of Holding BVI, as distinct from the shares in Holding BVI, to be transferred to Holdings UK.

87. There are no particulars of the steps that the Sheikh is said to have taken in order to achieve this end and, further, Ms Stanley points out that the resolution recording the decision to proceed with the transfer of assets and liabilities states that it is a resolution of the board of directors of "JJW BVI Inc". There is no allegation that the Sheikh was a director of JJW BVI Inc. and made the resolution in that capacity, such that he was causing it to be made.

Paragraph 55H

88. This paragraph asserts that the disposal of the assets and liabilities of Holding BVI had the effect of extinguishing the value of the Company's Holding BVI shares at a time when the Sheikh knew that the Liquidators were taking steps to investigate and/or recover their value. This paragraph led to considerable argument during the hearing as to whether it was signposting a claim for reflective loss. If so, said Ms Stanley, the rule against reflective loss in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204 would be an absolute bar to such a claim.

89. Mr Curl explained that this was a plea of circumstances rather than loss and that the essence of the new claim was that the Sheikh had failed to discharge his duty to the Company to act in its best interests and for its proper purposes. He explained that the plea in 55H is intended to be circumstantial in the sense that it is describing the effect and consequence of the breach of duty, namely that assets of the Company in liquidation were put out of reach of the Liquidators by reason of the conduct of the Sheikh. Thus, he says, the loss caused by the breach of duty is to the Company

itself, which can no longer access its shares.

90. Mr Curl pointed to paragraph 82A in support of this proposition, which sets out the alleged breaches of duty or breaches of trust, making the point that these paragraphs do not allege that the Sheikh caused the value of the shares in Holding BVI to be depleted, but rather that they are concerned with the fact that the Liquidators can no longer get to the Company's shares because they have been put out of reach.

91. I am bound to say that having looked carefully at the Proposed Amendment, and although it suffers in the various respects I have already identified, I am not satisfied that it is seeking to plead a claim to loss that would be barred by the reflective loss principle, i.e. a claim that is based on the diminution of the Company's shareholding in Holding BVI. There is certainly no plea to recover such loss in the prayer, which has remained substantially the same as it was previously.

92. Whilst I can see that the way in which the pleading has been put together may have given rise to some confusion and was the cause of Ms Stanley's submissions and that it might be more clearly pleaded so as to ensure that there is no misunderstanding in this regard, I do not consider that it seeks to advance a claim that would have no real prospect of success by reason of the reflective loss principle.

Paragraph 82A

93. Ms Stanley criticises this paragraph on the grounds that it does not tie the alleged breaches of duty into the specific duties pleaded in paragraphs 61 to 63. This is

true but, as Mr Curl made clear in his submissions, these breaches can, for the most part, be tied directly back to paragraphs 61 to 63.

94. Paragraph 82A(d), however, appears to allege negligent mis-statement but is presently inadequately pleaded. The pleaded representations were not made to the Company but to the court and the Liquidators, and the pleaded duty of care alleged in paragraph 61(c) is not a duty to take care when making statements. A negligent mis-statement claim would ordinarily require a plea that when making his statement to the court, the Sheikh somehow assumed responsibility to the Company to protect it from relying on what he said in evidence and thereby suffering loss. There is no such plea.

95. Mr Curl relied on the fact that section 236 of the Insolvency Act compels the assistance of, in this case, the Sheikh, and that he is under continuing duties to the Company.

96. He went on to say that if a liquidator could not rely on representations made by company directors when compelled to provide information under section 236, that provision would have no effect. Absent sight of any authorities produced by either side, I am certainly not in a position to say that this argument has no real prospect of success although it should, in my judgment, be properly pleaded and particularised.

Paragraph 96

97. This paragraph replaces the previous claim for conspiracy with a claim that "pursuant to" the conspiracy already pleaded in respect of earlier events, the Sheikh and/or Ms Al Jaber and/or JJW Guernsey and/or Holdings UK caused or allowed or

participated in the untrue representations.

98. During argument, I asked Mr Curl how the conspiracy in this regard could possibly be said to involve Ms Al Jaber and he acknowledged that it could not. However, he said that JJW Guernsey and Holdings UK were implicated by reason of the Sheikh being their controlling mind.

99. On the face of it, this plea, in the absence of further particulars, looks difficult given the elements required to establish the tort of unlawful means conspiracy, namely two or more persons combining and taking action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage - see Clerk & Lindsell on Torts, 23rd Edition at paragraphs 23-15. How is it said that the corporate entities were involved in the making of the untrue representations? Having said that, I also note that paragraph 96 begins with the words "pursuant to the conspiracy", which appears to be intended to indicate that the making of the untrue representations was done as a part of the over-arching conspiracy pleaded in paragraphs 93 to 95.

100. Overall, in my judgment, the pleading is plainly insufficiently particularised and I accept that, as it stands, it does not indicate with sufficient clarity the case that the MBI Respondents must meet. As Mr Curl fairly said in his submissions in support of an application to adjourn the trial (made on 11 February after sight of Ms Stanley's submissions in opposition to the Proposed Amendment and without any indication as to how long he might require for such adjournment, and which I rejected before hearing full argument on the amendments) he would have preferred to have more time in which to consider the amendments, i.e. the list of corrections and then his amendments consequent upon those corrections.

101. However, as Ms Stanley herself accepts in her submissions, it is possible to ascertain that the amendments make broad allegations relating to the Sheikh's knowledge and understanding of the status of Holding BVI shares during a period since June 2017. Accordingly, it appears possible to see how a claim of breach of duty based along these lines, if properly pleaded and particularised, might have a real prospect of success.

102. I do not consider that I need to be satisfied that the claim is stronger than that in the circumstances of this case, where I do not consider the amendment to be truly late or very late, notwithstanding that the application is made in the middle of the trial.

103. I shall return in due course to the implications of my findings as to the inadequacies in the pleading of the Proposed Amendment.

Prejudice to the Liquidators.

104. The consequence of a refusal to amend will be that the Liquidators will be forced to argue their case on the basis of a factual position that the MBI Respondents have recently produced evidence to suggest is incorrect. No explanation has been provided by the Sheikh for this situation.

105. Mr Curl submitted that the Sheikh has a track record for, as he put it "*general delinquency in the conduct of litigation*", by reference to previous cases before the English courts. In this regard, however, I note that I have not yet heard the Sheikh give evidence and am not in a position to determine his credibility (which is a central issue in these proceedings) at this stage. Nothing I have said in this Judgment should be interpreted to the contrary.

106. However, as Mr Curl points out, if the amendment application is refused, then the

Sheikh would appear to have derived a tactical advantage from saying one thing in his statements, disclosing documents very late in the day which suggest a different factual position, and then changing his story so as to be consistent with those documents once the trial is under way. This would be neither fair nor just to the Liquidators.

107. Ms Stanley spent a good deal of time in her written note for the hearing submitting that the late disclosure was, in fact, helpful to the MBI Respondents, not least because it showed that the knowing receipt claim against Holdings UK was unsustainable, and that it was therefore much more likely that the failure to disclose the documents sooner, together with the Sheikh's inaccurate evidence as to the transfer of shares to Holdings UK, was the result of incompetence rather than anything more nefarious.

108. Whilst I, of course, accept that the Sheikh's current legal team have acted properly in disclosing information upon it becoming available to them, I again note that I simply have no evidence from the Sheikh from which I can draw any conclusions as to his conduct. In particular, I cannot conclude, as Ms Stanley invites me to do, that if the liquidators had sought an order for standard disclosure (rather than Model B disclosure), it is "*impossible to think*" that the March 2020 registered agent certificate and the January 2020 share register would have remained undisclosed.

109. In this regard, I note Mr Deen's witness statement for the trial dated 19 June 2020 to the effect that various investigations into documents have been undertaken by the MBI Respondents, but that difficulties have been encountered and that investigations remain ongoing. I am unsurprised that Mr Curl is now keen to cross-examine Mr Deen on that statement in this trial.

Prejudice to the MBI Respondents

110. It is difficult to see what prejudice either Holdings UK or Ms Al Jaber could possibly suffer by reason of the Proposed Amendment. In the case of Holdings UK, the amendments seek to delete the claim of knowing assistance, leaving only a plea of conspiracy, which is perhaps rather more tenuous against Holdings UK than had previously been the case. In the case of Ms Al Jaber, Mr Curl has accepted that the conspiracy plea in paragraph 96 cannot possibly include her.

111. However, Ms Stanley maintains that if I allow the amendments at this stage, "*extreme prejudice*" will be caused to the MBI Respondents, which will make it impossible for the trial to continue without an adjournment. This prejudice is said to be:

(i) first, that the allegations now set out in the Proposed Amendment have never been made before and the MBI Respondents will need to amend their pleading to respond to them.

112. As to this, the allegations have not been made before because the Sheikh has only just changed his witness evidence. Ms Stanley says that the Sheikh's legal team cannot be expected to deal with amendments such as this in the middle of a trial when fully engaged with other matters and without making wide-ranging enquiries.

113. I disagree. In circumstances which remain opaque, late disclosure has recently been provided and the Sheikh has sought to amend his witness evidence to set out a clear but revised case. Any amendments to the Defence will presumably simply reflect that evidence. The Liquidators put down a marker about this at the outset of the trial but the list of corrections was not received until the morning on which it

was anticipated that the Sheikh would give evidence.

114. I accept, however, that prejudice will be caused to the MBI Respondents if the Proposed Amendment is allowed in its current state, but this is a point I return to shortly.

(ii) Second, that further factual evidence from the Sheikh will be necessary.

115. Again, I do not understand why this is so. It would seem from Ms Stanley's written note for the hearing that investigations made shortly before the trial resulted in the disclosure of the late evidence and presumably, therefore, the change in the Sheikh's statement. Having now pinned his colours to the mast in his list of corrections, I fail to see what further factual evidence is required from the Sheikh. I would have expected him to want to provide an explanation as to why his evidence has changed so late in the day and precisely what he knew and when he knew it, but he has, to date, for whatever reason, chosen not to do that in a further witness statement (deliberately so, according to Ms Stanley, hence the provision of a list of corrections alone). Ms Stanley is also aware and has acknowledged that the Sheikh will inevitably be cross-examined about his change of case. I am not clear what further investigations could possibly be required.

(iii) Third, that an extensive further disclosure exercise will be required to identify documents within the MBI Respondents' control which go to the issues in the Proposed Amendment.

116. I do not understand this. Absent evidence from the Sheikh as to how he came to change his position, I can only infer that investigations have already taken place to obtain the documents provided by way of late disclosure, which the Sheikh obviously regards as being sufficiently clear that he has changed his evidence on

the back of them. What more documents is it anticipated need to be collected? Having changed his case, cross-examination was inevitable in respect of what he knew and when but it was not suggested at the time of the list of corrections being provided that further disclosure was now required.

(iv) Fourth, that it may be necessary to make enquiries of other potential witnesses and serve further factual evidence adduced from other people involved in the 2017 transaction.

117. Again it was not suggested that this would be necessary when the Sheikh served his list of corrections, which prompted the chain of events leading to the proposed amended pleading. An allegation as to the 2017 resolution has been on the Points of Claim since the outset in one form or another and if the Sheikh wished to obtain evidence about its "*background and rationale*", as Ms Stanley suggested in her written note, it is to be expected that he would have done so in the ordinary course of the run-up to trial.

(v) Fifth, that it may be necessary to consider whether to waive privilege in respect of the drafting of the witness statement dated 4 May 2018 and the advice given by Mr Salfiti in the lead-up to the first section 236 examination.

118. In circumstances where it was already anticipated that, in light of the list of corrections, the Sheikh would be subject to cross-examination as to how he came to give evidence in, amongst others, the statement of 4 May 2018, this is surely an issue that the MBI Respondents should already have considered. Accordingly, I also reject the yet further suggestion that Mr Salfiti's cross-examination and Mr Krys' cross-examination might have been different if the new case had been known. Without evidence about when and how the Sheikh came to change his

position, and given the marker put down by the Liquidators at the very outset of the trial, I do not see how I can give any real weight to this suggestion.

(vi) Sixth, that new paragraph 55H will have far-reaching consequences because of its plea of reflective loss, namely the need for expert valuation evidence.

119. In light of what I have said about paragraph 55H already, I do not consider this to be an issue.

120. As an over-arching point, it is important, in my judgment, in considering the submissions on prejudice, that the MBI Respondents have brought this situation on their own heads and that the Liquidators should not be in any way disadvantaged by their conduct. I repeat that the MBI Respondents have not seen fit to provide any explanation for what has happened.

The Balancing Exercise and Overriding Objective

121. In my judgment, the balancing exercise plainly weighs in favour of permitting the amendments, assuming that they have a real prospect of success and are properly particularised and pleaded. The Liquidators have a good reason for the timing of the application and the prejudice that they will suffer if I refuse this application far outweighs any prejudice that the MBI Respondents will suffer. It would be consistent with the requirements of the overriding objective to permit the application.

122. I do not consider that there is any real likelihood that the trial will have to be adjourned if I permit the amendments in a proper form, and although I will of course hear submissions from Ms Stanley in due course if she wishes to make them, my present view is that it would be neither fair nor just to the Liquidators to grant

an adjournment. The parties, the court and the court users have a legitimate expectation that trial fixtures will be kept and the MBI Respondents have only themselves to blame for the position in which they find themselves.

123. I need to return, however, to the issue of the Proposed Amendment. As it stands, it is insufficiently particularised and exhibits the lack of clarity and potential difficulties (including as to real prospect of success) that I have identified above. I have given very careful consideration to whether that means I should simply refuse the Proposed Amendment and require the trial to continue. However, on balance, that would not be the right approach given my application of the relevant principles to the circumstances of this case. In particular, this is not a truly late amendment owing to the fact that it could not have been made before now and this Proposed Amendment has been produced under substantial time pressure by the Liquidators in the middle of trial.

124. Whilst I would not be prepared to adjourn the trial for an indefinite period, as I made clear when an application to that effect was made to me on 11th February 2021, I am prepared to give the Liquidators more time in which to cure the defects in the Proposed Amendment, if they can, particularly given that it is now clear that the trial will not be completed within its existing time estimate and that more court time will need to be allocated to it in any event.

125. I am prepared to give the Liquidators until 1 pm on Monday afternoon, thus allowing the Liquidators the weekend and Monday morning to consider further a revised draft of the amendments.

126. If I am not satisfied that any revised draft I receive by then cures the defects I have identified above, then the amendments will be refused and the trial will proceed on

the existing case. I will allow the parties half an hour on Monday afternoon at 2 pm to address me briefly on anything that arises in respect of any revised draft amendments before I make a final decision. Those submissions should only be directed at the pleading of the amendments and, if necessary, the existence of a real prospect of success.

127. I will expect a reasonable and proportionate approach to this issue to be adopted by both parties. I shall then expect to proceed immediately with the evidence of the Sheikh, subject to any application that Ms Stanley wishes to make as to adjournment of the trial.

128. As they have been doing, to date, the parties will need to continue to cooperate in determining how the trial is to be completed as expeditiously as possible, given the slippage occasioned by this application.