Neutral Citation Number: [2021] EWHC 200 (Ch)

Case No: BL-2018-002028

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2020

Before :

Tom Leech QC (sitting as a Judge of the Chancery Division)

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Between :

BARROWFEN PROPERTIES LIMITED **Claimant**

-- and –

(1) GIRISH DAHYABHAI PATEL
(2) STEVENS & BOLTON LLP
(3) BARROWFEN PROPERTIES II LIMITED **Defendants**

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Ms Lexa Hilliard QC and **Mr Tim Matthewson** (instructed by **Withers LLP**) for the **Claimant**
The First Defendant in person
Mr Roger Stewart QC and **Ms Angharad Start** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second Defendant**

Hearing dates: 1 and 2 February 2021

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APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 am on 5th February 2021.

Tom Leech QC :

Introduction

1. By Application Notice dated 13 January 2021 the Claimant, Barrowfen Properties Ltd ("**Barrowfen**"), applied to strike out certain paragraphs in the Amended Defence of the Second Defendant, Stevens & Bolton LLP ("**S&B**"), which were added by amendment on 24 November 2020.

2. The trial of this action is listed to commence on 22 February 2021. The strike out application came on for hearing at the PTR which was listed on 20 and 21 January 2021. I adjourned the application to give S&B time to file evidence in answer to the application and Barrowfen evidence in reply and I heard the application on 1 and 2 February 2021. Ms Lexa Hilliard QC and Mr Tim Matthewson appeared for Barrowfen and Mr Roger Stewart QC and Ms Angharad Start appeared for S&B. Mr Girish Patel ("**Girish**") appeared in person.

3. On 19 October 2019 Deputy Master Linwood heard the first CMC in this action. In his Order (the "**CMC Order**") he ordered that the parties should give disclosure in accordance with Model D of Practice Direction 51U in respect of the issues contained in Section 1A of the Disclosure Review Document ("**DRD**"). He disallowed a number of issues to which Barrowfen had objected on the grounds of relevance. For example, the Deputy Master refused to order disclosure on issues relating to misconduct relating to the Patel family businesses apart from Barrowfen and, in particular, the Aumkar plantations in Malaysia.

4. On 6 April 2020 Birss J heard both S&B's application to strike out parts of the Particulars of Claim and Barrowfen's application to amend the Particulars of Claim, and on 14 May 2020 Birss J gave judgment on those applications: see [2020] EWHC 1145 (Ch). He set out in detail the background to the claim. He also set out the allegations made against S&B, Girish and the Third Defendant, Barrowfen Properties II Limited ("**Barrowfen II"**). Rather than set out the background myself I refer the reader to that judgment.

5. It is a feature of that factual background that S&B acted for both Barrowfen and Girish personally when he had been a director and had acted as its sole or de facto managing director. At the time of S&B's strike out application Girish had not waived privilege in relation to communications with S&B over which he was entitled to claim legal advice privilege or litigation privilege and in its Defence, S&B pleaded that there had not been a sufficient waiver of privilege to enable it to defend itself fully. In his Order dated 6 July 2020 Birss J gave the following direction:

> "4. The Defendants shall file and serve Amended Defences, if so advised by: (a) 4 pm on 17 August 2020, or (b) within 14 days after the determination of any application that the Claimant makes to challenge the claim to privilege made by Girish Patel (the '**Privilege Application**') or 14 days after written confirmation from the Claimant that it no longer intends to make the Privilege Application, whichever is the later."

6. On 15 and 16 September 2020 I heard the Privilege Application and ordered Girish to give disclosure of privileged communications. On 16 September 2020 I made the Order but set out my reasons in a judgment dated 24 September 2020: see [2020] EWHC 2536. Again, I set out some further background to the claim which may also assist the reader: see, in particular, [11] to [18]. In the Order I extended time for service of statements of case:

> "5. The Claimant shall file and serve a re-Amended Particulars of Claim, if so advised, by 4 pm on 3 November 2020. 6. The Defendants shall file and serve Amended Defences by 4 pm on 24 November 2020. 7. The Claimants shall file and serve Amended Replies, if so advised, by 4 pm on 8 December 2020."

7. On 24 November 2020 S&B served its Amended Defence. It contained a number of allegations about the conduct of Girish and two of his brothers, Mr Suresh Patel ("**Suresh**") and Mr Rajnikant Patel ("**Rajnikant**") and the conduct of Rajnikant's son, Mr Prashant Patel ("**Prashant**"). Suresh and Prashant are now the directors of Barrowfen and have given evidence in support of the claim. Prashant has also initiated a private prosecution against Girish (the "**Private Prosecution**") and I summarised the counts in my earlier judgment: see [26]. I also add that Girish's son is Kiraj Patel ("**Kiraj**") and a number of the issues

which I have to consider on this application arise out of communications between Prashant and Kiraj.

8. The principal allegations which Barrowfen applied to strike are set out in paragraphs 5A to 5J of the Amended Defence under the heading "**The Deliberately Concealed Matters**". I set them out in full (and where I give a number with the prefix 5A I intend to refer to these paragraphs unless I state otherwise):

> "5A Documents written by Prashant, disclosed recently by Girish together with limited documents from the Private Prosecution, establish that:
>
> 5A.1 the Patels' multi-jurisdictional business and family affairs concerned repeated conspiracies to defraud, to money launder and to pervert the course of justice through to the highest level in the Malaysian Courts together with the Courts of the United Kingdom;
>
> 5A.2 Prashant considered there was an "undocumented arrangement" between Prashant, Barrowfen and Girish concerning these proceedings following Prashant's advice to Kiraj that he could "*get this pinned on Stevens and Bolton but I need to see what Richard King was saying to you. Don't forget that whatever I get back from S&B 1/3 belongs to you. Let me know our thoughts*";
>
> 5A.3 there was a conspiracy to pervert the course of justice in the will proceedings referred to in paragraph 79.5 of the Amended Particulars of Claim (the Will Proceedings);
>
> 5A.4 Prashant has sought to pervert the course of justice in the Private Prosecution;
>
> 5A.5 these proceedings themselves are the product of a conspiracy to pervert the course of justice and/or there has been more than one conspiracy to pervert the course of justice in these proceedings between Prashant, Barrowfen and/or Suresh and/or the same constitute abuses of process, namely:
>
> 5A.5.1 as part of the "undocumented arrangement" referred to by Prashant in 5A.2, to invite Girish through Kiraj to admit false allegations in these proceedings and/or to blame Stevens & Bolton so as to secure compensation to which Barrowfen is not entitled for the benefit of the three brothers' families; and
>
> 5A.5.2 [ ].[1]

[1] S&B withdrew the allegation in paragraph 5A.5.2 on service of Barrowfen's evidence in support of the strike out application.

5B. Stevens & Bolton will contend that Barrowfen and/or Prashant and/or Suresh and/or Rajnikant have agreed as part of the Settlement Agreement dated 6 March 2019 to settle all family disputes excepting "the Barrowfen Claim" as therein defined so as to preserve their ability to pursue this litigation against Stevens & Bolton distributing any profits of the same.

5C. The context of the concealed international criminal enterprises in which at least Prashant, Suresh, Rajnikant were involved, and the shareholder disputes which ensued as a result, are key to these proceedings.

5D. Disputes arose from 2009 and Stevens & Bolton will refer to Paragraph 19 and 26 of Girish's Defence.

5E. Both Girish and Stevens & Bolton in these proceedings:

5E.1 have denied that Girish was acting at odds with but asserted he acted in favour of Barrowfen's interests and

5E.2 asserted that it was Prashant and Suresh who acted contrary to the interests of Barrowfen driven by a determination to levy pressure on Girish so as to exact the result they required from other litigation.

5F. From the very limited disclosure received thus far from Girish, Stevens & Bolton now has an improved understanding of the collateral interest it alleged in its Defence and Barrowfen denied in its Reply, namely conduct designed to levy pressure on Girish in relation to the resolution of the separation of what Prashant contends were global criminal business interests.

5G. In fact, Prashant's recently disclosed email dated 13 May 2018 to Kiraj Patel, Girish's son, asserts that the Patel Family Partnership (namely Prashant, Rajnikant, Suresh and Girish) historically acquired full ownership of the Aumkar Plantations by way of a sophisticated criminal enterprise. Prashant admits knowledge of and complicity in the criminal enterprise together with complicity in dealing with (and hiding ownership of) the proceeds of the crime.

5H. The victim of the first criminal enterprise, NM Amin a family member, pursued litigation in Malaysia with a view to unravelling the fraud perpetrated on him, namely a forced sale of his minority shareholding triggered by a fictional sale of the company. Prashant explained that this litigation necessitated the shareholdings in the Aumkar Plantations being swiftly moved to offshore vehicles so as to fraudulently hide the true ownership of the company. Rajnikant's disinclination to permit Bedford to be registered as a shareholder of Barrowfen is likely to be linked to these matters and/or Bedford may be some such vehicle and/or linked to proceeds of crime. In consequence, Prashant notes the members of the Patel Family Partnership cannot publicly assert ownership of the business, as such assertions would be

> inconsistent with the fictional sale of the business they deposed to in the Malaysian Courts.
>
> 5I. In the email Prashant asserts that his desire to pay off the victim (so as to retain ownership of the criminal assets) has been frustrated by Girish's conduct. He gives this as a reason that he, Prashant, has taken a "*strong stand*" against Girish.
>
> 5J. Moreover, it appears from Prashant's email to his family dated 10 December 2015 that terms needed to be agreed about Barrowfen "*and the other companies*". Resolution of the various disputes was linked as is evidenced by the Settlement Agreement dated 6 March 2019. That the so-called "Barrowfen Claim" was excepted from that agreement followed Prashant's view that he had calculated a route to "pin the blame" on Stevens and Bolton without detriment to Girish."

9. Barrowfen also objected to a number of other statements in the Amended Defence (including a sentence in paragraph 148) which are parasitic on those paragraphs and certain paragraphs in S&B's witness statements for trial. It was not suggested that any of that material would survive a strike out of the Deliberately Concealed Matters and I, therefore, focus on them. On 24 December 2020 S&B also served "Voluntary Further Particulars of Paragraphs 5A to 5I and 148 of the Amended Defence" (the "**Voluntary Particulars**"). In Barrowfen's Skeleton Argument the paragraphs in the Amended Defence, the witness statements and the Voluntary Particulars were described collectively as the "**Challenged Paragraphs**" and I adopt that description.

10. On 9 December 2020 Barrowfen served its Amended Reply. In paragraph 4 it pleaded that the allegations contained in the section headed Deliberately Concealed Matters were "vexatious and without merit". Barrowfen also relied upon the CMC Order and pleaded that S&B had sought to introduce issues which had been expressly excluded by the Court. However, there was no specific objection that S&B had no permission to make the amendments and Barrowfen did not reserve the right to apply to strike them out on that basis.

11. As I have stated, S&B had originally pleaded that Girish had not made a sufficient waiver of privilege to "permit Stevens & Bolton to defend itself as it would choose" and the Defence represented its permissible response in that context. Despite the Order which I made on the Privilege Application, S&B

continued to maintain that contention in the Amended Defence. In paragraph 3.1E of the Amended Reply Barrowfen replied to it as follows:

> "If, which is not admitted, prior to the September Order, Stevens & Bolton's defence of Barrowfen's claim was constrained in any way by Girish's assertion of privilege as pleaded in paragraph 2.3A, as a consequence of the September Order Stevens & Bolton is no longer constrained and, contrary to paragraph 2.4, is permitted and entitled to defend Barrowfen's claim as Stevens & Bolton would choose."

12. In 5A.1 (above) S&B allege a series of conspiracies in a number of different jurisdictions. Both in his written and his oral submissions Mr Stewart focussed on the allegations relating to the Aumkar Plantations in Malaysia: see 5A.1 and 5G to 5I. I will refer to the allegations in those paragraphs as the "**Aumkar fraud**" allegations. Mr Stewart realistically accepted that if I was not persuaded that S&B had a real prospect of success in relation to those paragraphs, I would not be persuaded in relation to the other proceedings in England and the Seychelles and the Private Prosecution. I deal with them, therefore, only briefly and in the context of the Aumkar fraud allegations.

13. Mr Stewart also focussed on the allegation that Prashant conspired with Girish to pervert the course of these proceedings: see 5A.2, 5A.5 and 5B. I will refer to this allegation as the "**undocumented arrangement"** allegation. It gives rise to a number of separate issues and for that reason it is more convenient to deal with the Aumkar fraud allegations and the allegations relating to other proceedings first.

The Aumkar fraud allegations

14. The Aumkar fraud allegations arise out of a series of proceedings in Malaysia. I take the basic facts from the judgment of Judge Ravinthran Paramguru in the High Court of Sabah and Sarawak dated 20 December 2017 in the claim *Shanta Holdings v Aumkar Plantations* (the "**Shanta Judgment**"):

    i) Shanta Holdings Sdn Bhd ("**Shanta**") was owned by Mr Nitin Manubhai Amin ("**Mr N Amin**") and Mr Prabhakar Manubhai Amin ("**Mr P Amin**"). In 2005 it owned 9.99% of the shares Aumkar Plantations Sdn

Bhd ("**Aumkar**"). The remaining 90.01% of the shares were owned by 10 companies (none of which included Barrowfen). They were owned or controlled by Girish, Suresh and Rajnikant and Mr Vanialingam A/L Tharumalingam and they included Bedford Development Ltd ("**Bedford**").

ii) At an EGM on 21 February 2005 Girish, Suresh, Rajnikant and Mr Tharumalingam voted on behalf of the majority shareholders to accept an offer for their shares from a company called Golden Uni-Consortium Sdn Bhd ("**GUC**") at RM 2.05 per share. Shanta voted not to accept the offer.

iii) GUC made an application to Court under section 180(3) of the Companies Act 1965 to acquire the remaining 9.99% at the same price. Shanta resisted the application but on 28 September 2005 the High Court found in GUC's favour. It appears that no allegation of bad faith was made by Shanta at that stage. The court refused a stay and on 28 November 2006 the High Court ordered Shanta to transfer its shares in Aumkar to GUC for RM 2,245,294.25.

iv) On 20 June 2007[2] GUC transferred its shares to five entities in different jurisdictions: Rajpat Sdn Bhd ("**Rajpat**"), Fine Sun Investments Ltd, Aryan Investment Ltd, Barrington Development Ltd ("**Barrington**") and Agrocorp Ltd. I will refer to the five transferees as the "**New Shareholders**".

v) On 23 August 2007 the Court of Appeal dismissed an appeal on the ground that the vendors had failed to give adequate notice of the application and held that the price of RM 2.05 was not unjust or manifestly lower than the value asked for by Shanta.

vi) On 24 January 2008 the Federal Court allowed an appeal on the ground that GUC's application to court was premature and a nullity because it had been made before a statutory time limit of three months had expired.

[2] The Shanta Judgment records this as the date. S&B challenges the authenticity of the relevant documents: see further below.

It set aside the order of the High Court but made no finding as to the value of the shares. By this time GUC had sold on all of the shares in Aumkar.

vii) Shanta then issued oppression proceedings. It argued that the sale by the majority shareholders to GUC and the subsequent sale by GUC to the New Shareholders were a sham and that the takeover was "a fraudulent and fictitious scheme or schemes designed to remove the Petitioner (Shanta) from membership in the Company (Aumkar)".

viii) On 27 October 2009 the High Court dismissed the petition on the basis that Shanta had delayed bringing the petition. The Court also dismissed the petition on the basis that the sale by the majority shareholders to GUC was not oppressive in itself and that the Federal Court had set aside the original High Court decision. The decision was affirmed by the Court of Appeal and permission to appeal was refused by the Federal Court.

ix) In 2012 or 2013 Shanta commenced new proceedings in the High Court claiming damages for conspiracy and the tort of abuse of process. It alleged that Girish, Suresh, Rajnikant and Mr Tharumalingam had conspired with a number of individuals including Mr Heinz Fochem to defraud Shanta by acquiring its shares at an undervalue. Shanta alleged again that the sale to GUC was a sham.

x) On 20 December 2017 Judge Paramaguru dismissed the action with costs. He held that the claim for abuse of process was misconceived and he dismissed the conspiracy claim. In his judgment he made the following findings:

> "[43] Shanta had pleaded that GUC and the Patel brothers had wanted to remove Shanta as a minority shareholder of Aumkar and that they wanted to acquire its shares at below market value. As correctly, pointed out by counsel for the defendants, even if the object of the 2005 action was to remove Shanta as a minority shareholder, it is something that is allowed by section 180(3) of the Companies Act 1965.
>
> [44] As for the fair market value of the minority shares, the High Court and the Court of Appeal addressed the issue and

> did not find that it was unfair. The Federal Court set aside the decision only on the issue related to the notice period given to the minority shareholder. In any event, I find it difficult to conclude that the mere act of attempting to purchase something at below market value without anything more can amount to an unlawful act that attracts liability under the tort of conspiracy to defraud or injure. Therefore, Shanta has not proved that the act of pursuing the action by GUC was unlawful in any way.
>
> [45] Shanta had also pleaded that the entire exercise of acquisition of the majority shares was a sham perpetrated by the Patel brothers and that the 8th Defendant [Mr Fochem] was a fictitious person and that it was a conspiracy to compel Shanta to give up its Aumkar shares. I find no evidence to support this allegation for the following reasons.
>
> [46] Shanta's witnesses as I said earlier had merely echoed the pleaded case of Shanta without any proof to support this allegation. In fact, during cross-examination, PW1 [Mr N Amin] admitted that the 8th defendant [Mr Fochem] was an international vegetable trader whom he had met in person. As for PW2 [Mr P Amin], he refrained during cross-examination from stating that the 8th defendant was a fictitious person. To sum up, Shanta failed to produce any evidence of conspiracy between the Patel brothers and the 7th defendant in respect of the alleged sham sale."

15. Whilst they were defending the Shanta proceedings, there were separate proceedings in other jurisdictions between the individual brothers. In England, Girish sought to prove his mother's will and Yashwant challenged the grant of probate on the grounds that Girish had forged the subsequent will and that he was the sole executor and beneficiary under an earlier will (the "**Probate Proceedings**"). On 10 February 2017 Andrew Simmonds QC gave judgment in favour of Yashwant. One of the issues which arose in those proceedings was whether Girish was the beneficial owner of Barrington (which had acquired shares in Aumkar). The judge stated this (at [13]):

> "I should mention at this stage that shares in Barrington, Agromin and Makita were registered in the names of the Deceased and also that, in 1997, Girish set up a Guernsey Trust (the PD Patel Discretionary Trust) for the benefit of his two children and of which the original trustees were Yashwant and Suresh. The beneficial ownership of some of the companies referred to is in issue in other proceedings and I make no findings in that regard."

16. The other proceedings to which the judge was referring involved a claim by Barrington and Girish in the Supreme Court of the Seychelles against Ocra (Seychelles) Ltd ("**Ocra**"), Barrington's registered agent (the "**Seychelles Proceedings**"). In a judgment dated 20 October 2017 Govinden J recorded that the claims made by Girish and Barrington were to have the share register of Barrington rectified to show that Girish was the sole and absolute owner and an injunction restraining Yashwant from making any claim to the shares: see [49]. The Court dismissed the claim on the basis that there was no evidence that the shares belonged to Girish beneficially but, in any event, that the Court did not recognise a beneficial owner for the purposes of the registration of shares: see [52] and [58].

17. On 6 March 2019 Girish, Kiraj, Yashwant, Rajnikant, Suresh and Prashant (together with other members of the Patel family) entered into a settlement agreement in very wide terms. The definition of "Released Claims" extended to all of the ongoing litigation apart from the following (see clause 1(f)):

> "For the avoidance of any doubt the parties on their own behalf (and on behalf of their Related Parties) expressly acknowledge and/or agree that nothing in this agreement shall operate to settle or waive any right to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the other party or its Related Parties any matters arising out of (i) the Barrowfen Claim, (ii) the Criminal Proceedings, or (iii) the Partnership Accounts Dispute."

18. The Barrowfen Claim was a reference to the present action and the Criminal Proceedings was a reference to the Private Prosecution. In clause 2.1 of the Settlement Agreement the parties agreed that the Seychelles Proceedings would be withdrawn and also affirmed that Yashwant was the sole legal and beneficial owner of Barrington.

19. On 10 September 2020 (as Mr Stewart confirmed) Girish made disclosure of an email chain dated 13 May 2018 from Prashant to Kiraj (the "**13 May 2018 email chain**") including an email dated 4 October 2013 (the "**4 October 2013 email**"). Barrowfen asserts that the 13 May 2018 email chain was privileged from production because it was sent on a without prejudice basis (and I will return to

this issue below). It was common ground, however, that the 4 October 2013 email was admissible and, indeed, ought to have been disclosed by Barrowfen.

20. In the 4 October 2013 email Prashant wrote to his uncles, Yashwant and Suresh setting out the draft of an email which he proposed to send to Kiraj with a view to settling the outstanding disputes but which, in the event, he never sent. He provided a narrative in relation to all of the family business. In the first paragraph he stated that his career had been affected by the family dispute and that he had little choice but to take a "strong stand" against Girish. In relation to the dispute over the shares in Aumkar he began by describing Mr N Amin's refusal to accept offers to acquire his shares. He then continued as follows:

> "In order to remove him forcefully, a scheme was designed to pretend to sell the entire company to a European consortium. NM Amin's shares were 9.99% of the entire company. Section 180 of the Malaysian Corporations Act states that if there's a buyer for 100% of the company and over 90% accept the offer, then any remainder are forced to accept the offer. The scheme was put into place under a company called Golden Uni Corporation with Sureshkaka's friend Hienz [sic] Fochem from Germany used as the Consortium leader. As you require local Directors for any Malaysian company, we asked Auntie Teh (our longstanding staff member from Penang) to lend her daughter's name as a Director The final Director was an admin clerk from our company secretary's office in Tawau. All 3 people were mere nominees for us and perfectly innocent parties that had no clue as to the scheme being put in place. As NM Amin continued to refuse transfer of his shares at $2.05, Golden Uni litigated him to force the transfer under Section 180. The high court of Tawau allowed our case. The Court of Appeal upheld our case and finally NM Amin had no choice but to sell. He was duly paid at $2.05. He then appealed to the Federal Court (highest in Malaysia) and in a surprise decision, the Federal Court overturned the verdicts of both the High Court and Court of Appeal. They overturned the case on a technicality that a notice form was not given.
>
> This placed the entire company in limbo as you had a shareholder that was forced to sell his shares, but subsequently a Court decision that overturned his requirement to sell the shares in the first place. The extent of this litigation took nearly 4 years from 2005 to 2008. However now, we faced a difficult situation as we had 'sold' our shares (the 90.01%) to a fictitious European Consortium. As the Directors of Golden Uni, (the 3 innocent people) could now potentially face legal action, we rapidly transferred the shares (prior to Federal Court decision) to a new

> set of 5 companies in tax haven companies like the BVI and Seychelles, and 1 Malaysian company that my father has operated for years. After the transfer, Golden Uni was placed into liquidation during Chinese New Year when everything would be low key. This was about the time when I started contributing significantly to our Malaysian business taking on management of our palm oil mill.
>
> We now had a company that we wholly owned but could not disclose in public that we were the real owners behind the tax haven sheltered holding companies. NM Amin then started a new set of litigation to force the wind up of Aumkar and outlined to the Judge that it was a scheme to remove him and the original owners are still the current owners. To reassure the Judge, my father, Girishkaka, and Sureshkaka all had to falsely swear on oath that they were not the owners of Aumkar. As our documentation was concise and on the anomaly that it was curious why a 'restored' shareholder would want to wind up his own company, the Judge dismissed the case. NM Amin appealed to the Court of Appeal and subsequently to the Federal Court. Both courts luckily dismissed his appeals. This took another 4 years from 2008 to 2012.
>
> Now, NM Amin has started a new action demanding a public trial of the events to show that it was a scheme to remove him and that he is owed damages. He named Aumkar, my father, Girishkaka, Sureshkaka, Hienz [sic], the clerk in the Tawau office and Teh's daughter in the suit. It is so shameful that we have caused innocent people to be placed on trial who know absolutely nothing about what went on."

21. He continued by describing the difficulties which the litigation posed for the Patel family both in collecting evidence and commercially. He also described the effect on his own "reputation or credibility for myself in the market attempting to operate a company in which I'm not a real owner". He also described earlier settlement negotiations in Kuala Lumpur in 2011:

> "At our KL meeting in 2011, everyone agreed that we would put Aumkar for sale due to the ongoing litigation and problems obtaining financing. I also informed Girishkaka that I wanted to exit our share investment in the London properties as I had no involvement managing it and we wanted our money for other purposes in Australia."

22. Under the heading "Makita Corporation and Barrowfen Properties" Prashant described historic settlement negotiations in relation to the present action. He then continued:

> "If there is so much mistrust and no agreement can be made to buy each other's shares, then the only thing to do is to place all the companies into liquidation and let an independent liquidator sell the assets and distribute the funds. This bottomless pit of bickering is something I can no longer take and I now have every intention to force the liquidation of all companies via the Courts if no agreement can be reached."

23. S&B places particular reliance on the last two extracts which I have quoted because it is Barrowfen's case that if Girish had not committed the relevant breaches of fiduciary duty (or S&B had not assisted him to do so) Prashant and Suresh would have taken control of Barrowfen in early 2014 and would have progressed the original development in its principal asset, the commercial premises at 180 to 216 Upper Tooting Road London SW17 7EW (the "**Tooting Property**").

24. It is also Barrowfen's case that at a meeting on 9 December 2015 Mr Richard King, a partner in S&B, made a fraudulent misrepresentation to Prashant and Suresh and that if he had not made it, they would have taken immediate steps to repay the loan made by Barrowfen II. It was required to give further information of this allegation and pleaded that the relevant funds could have been advanced by Bedford. Response 33 (which was adopted in response 41) which stated as follows:

> "The funds could have been raised with two clear business days' notice, by the provision of a loan to Barrowfen, Bedford, Aumkar Plantations (the Patel family's Malaysian business) or from Suresh personally. Further or alternatively, the funds could have been raised from an accelerated rights issue, which would have taken about two weeks to complete."

25. In his fourth witness statement dated 6 January 2021 (for trial) ("**Prashant 4**") Prashant gave evidence that the explanation which he had given in the email dated 4 October 2013 was not correct:

> "The contents of my draft email relating to Aumkar Plantations were not correct. My comments relating to a fictitious sale and Rajnikant, Girish and Suresh falsely swearing on oath in the Malaysian courts about the ownership of Aumkar Plantations were based on the legal documents submitted by NM Amin in his conspiracy to defraud claim against Suresh, Rajnikant, Girish

> and Aumkar Plantations in Malaysia that he commenced in 2013. After I sent the draft email to Suresh (the email address aumcom@singnet.com.sq is Suresh's email address), he immediately called me at my office from his office to explain that I had completely misunderstood the situation and that there was no fictitious sale and that they had not lied on oath. I therefore did not send the draft email, until I forwarded it to Kiraj in 2018 to help explain the background to why the other Patel family members felt the need to part ways with Girish. I did not re-read the email carefully before I forwarded it to Kiraj, which is why I did not delete the references to a fictitious sale and to Rajnikant, Girish and Suresh falsely swearing on oath."

26. In his fifth witness statement dated 12 January 2021 ("**Prashant 5**") Prashant provided a very similar explanation. In both statements he relied upon the Shanta Judgment. I return to Prashant 5 below in the context of the undocumented arrangement allegation.

27. S&B now alleges in these proceedings that the findings made by the Malaysian Court "the Patels' multi-jurisdictional business and family affairs concerned repeated conspiracies to defraud, to money launder and to pervert the course of justice through to the highest level in the Malaysian Courts together with the Courts of the United Kingdom": see 5A.1. In the Voluntary Particulars S&B also asserts the following:

> 1. Stevens & Bolton contend that the matters identified at paragraphs 5A to 5I and 148 of the Amended Defence are directly relevant to issues in the proceedings as:
>
> 1.1. they concern the conduct of the proceedings themselves and whether the same involves an abuse and/or attempt and/or conspiracy to pervert the course of justice; and/or
>
> 1.2. they concern the pleaded issue at paragraphs 182 to 187 of the Amended Defence which is denied at paragraph 58 of the Amended Reply, namely that Suresh and Prashant's conduct in relation to Barrowfen was driven by a collateral interest in levying pressure on Girish and not by Barrowfen's best interests; and/or
>
> 1.3. they concern the question of whether Barrowfen's affairs and development of the Tooting Property were funded using criminal property within the meaning of the Proceeds of Crime Act 2002, a matter relevant to the recoverability of the alleged loss and the terms upon which Stevens & Bolton acted. For the avoidance of any doubt, Stevens & Bolton will contend that insofar as either was so funded:

> 1.3.1. any Barrowfen retainer of Stevens & Bolton contained an implied term and/or was preceded by Barrowfen's fraudulent representation by its then director(s) (upon which Barrowfen reasonably relied in agreeing to and providing its services) that the funding of Barrowfen's affairs and the development of the Tooting Property was and would be at all material times lawful and free from dishonesty;
>
> 1.3.2. in the premises, Stevens & Bolton's reliance upon the aforesaid fraudulent representation and Barrowfen's breach of the implied term extinguishes the claim brought by the Claimants and gives rise to a defence of circuity of action in that Stevens & Bolton will be entitled to damages in the same sum as any damages it is ordered to pay to the Claimants; and/or
>
> 1.3.3. any alleged loss is irrecoverable on the grounds of illegality; and/or
>
> 1.4. they evidence Rajnikant and/or Prashant seeking to conceal ownership of their assets, and their reasons for the same, when there is an issue in these proceedings (at paragraph 62 of the Amended Defence denied at paragraph 25 of the Amended Reply) as to whether Bedford gave directions that it should not be registered as a shareholder; and/or
>
> 1.5. they evidence conduct whereby material witnesses in these proceedings were prepared to and/or conspired to mislead courts of justice; and/or
>
> 1.6. they evidence conduct on the part of Suresh and/or Rajnikant and/or Prashant which supports the allegation that for Suresh and/or Prashant to take control of Barrowfen was not in its best interests, an issue in these proceedings."

28. In the Voluntary Particulars S&B also relies on the 13 May 2018 email chain as particulars of 5A.1 and has set out in detail the reliance which it placed on the contents of the 4 October 2013 email. Under the heading "Bedford" S&B also contend as follows:

> "Bedford, then controlled and owned by Rajnikant and later controlled and owned by Rajnikant and/or Prashant, participated in the fraud referred to in the 13 May 2018 email receiving, it is reasonable to infer, full value for the shares sold alternatively the sum of approximately £2 million."

29. On 26 January 2021 and in support of the case which it was advancing in the Amended Defence and the Voluntary Particulars, Mr Nicholas Bird, the partner in RPC LLP ("**RPC**") with conduct of the Defence, made his third witness statement ("**Bird 3**"). In paragraphs 4 and 12 he stated that the trigger for the

Aumkar fraud allegation was the production by Girish of the 13 May 2018 email and the 4 October 2013 email.

30. Mr King and Ms Kathleen Philipson, also of S&B, have both made witness statements for trial and they have both stated that they were shocked by the content of the 4 October 2013 email. Ms Philipson also stated that between 2015 and 2017 she was involved in proceedings in the Seychelles and Malaysia in relation to Barrington and its shareholding in Aumkar. She also stated that in the course of that retainer she carried out a detailed review of documents which included the 851 pages which she exhibited as KLP2. In paragraph 70 she explained the nature of that review:

> "My work involved a detailed review of, amongst other things, the documentation exhibited at KLP2, p.1 to 851. This material covers the subject matter of the transaction in the email from Prashant to Kiraj Patel dated 13 May 2018 and in particular the changes in the ownership of Aumkar Plantations. It does not though disclose the details of the dishonest scheme that Prashant sets out in his email and I was not aware of them from anything communicated to me by Girish or anyone else."

31. Bird 3, paragraphs 12 to 108 are devoted to what Mr Bird describes as "an account of the facts and matters revealed by the documents that have been disclosed by Girish Patel in this claim and/or previously provided to Stevens & Bolton by him". It is clear that S&B with the assistance of RPC has undertaken a careful analysis of the original documents. Mr Stewart took me to a number of them to support S&B's case that, contrary to the evidence in his most recent witness statements, the account which Prashant gave in the 4 October 2013 email represented the truth.

32. In particular, Mr Bird dealt in detail with the sale and purchase agreements dated 17 May 2005 under which the shares were transferred to GUC by the original shareholders (other than Shanta). He stated that those agreements were conditional upon GUC acquiring Shanta's shares and that the consideration comprised ordinary and preference shares in GUC. He also set out a table which showed that Bedford was to sell its 6,447,817 shares to GUC in return for 644,782 ordinary shares and 12,895,634 preference shares in GUC.

33. Mr Bird also produced documents to support S&B's case that the documents relating to the onward sale by GUC to the New Shareholders must have been backdated in order to defeat any possible application to the Court of Appeal to restrain the sale (or to give the appearance that it had taken place before any application had been made). He also set out a table showing that the price payable for the shares transferred to the New Shareholders was not to be paid to GUC itself but to a number of other companies including Bedford (which was to receive RM 13,218,025).

34. Mr Bird then referred to a memorandum dated 19 November 2007 from Suresh to Rajnikant and Girish enclosing a reconciliation of the sums owed by the three brothers to each other. It showed that Girish and Suresh owed Rajnikant RM 255,677.85 in total and that Girish owed Rajnikant RM 139,114.95. Mr Bird also referred to an email dated 27 August 2008 from Girish to Rajnikant in which he stated that £571,140 was being transferred to Bedford's account at the Bank of Baroda in Singapore on 8 September 2008. He stated that this sum was "to address the following amount due to yourself":

    i) A sum of £323,880 representing 50% of shares identified in a letter dated 8 April 2008;

    ii) £22,260 representing the RM 139,114.95 which was due in accordance with the memorandum and reconciliation dated 19 November 2007; and

    iii) A sum of £225,000 from Makita Corporation Ltd in accordance with a letter dated 18 July 2008.

35. I was not taken to any letter dated 8 April 2008 or 18 July 2008. Mr Bird asserted that Bedford received not only the £22,260 referred to in Girish's email dated 27 August 2008 but also the funds due under the original 2005 sale and purchase agreement. But when I raised this point in argument I was not taken to any other documents which showed that it received any cash as the proceeds of the original sale of its shares.

36. S&B also alleged that Prashant, Suresh and Yashwant conspired to pervert the course of justice by misleading the English Court in the Probate Proceedings:

see 5A.3 and the Voluntary Particulars, paragraph 20. S&B relied on the 4 October 2013 email as evidence that Girish was the beneficial owner of Barrington because it showed that he had retained a one third interest in Aumkar. S&B made a similar allegation about the Seychelles Proceedings: see S&B's Skeleton Argument, paragraph 81.

37. Finally, in the prosecution response dated 2 December 2020 in answer to Girish's application to stay the Private Prosecution, leading and junior counsel dealt with the 4 October 2013 email by stating: "PP did not participate nor have first-hand knowledge of the transaction since it occurred before he joined the Patel family business." Mr Stewart drew my attention to a number of documents which, so he said, demonstrated that this statement was false. He placed particular reliance on the fact that Prashant's wife had signed documents in 2005 on behalf of Rajpat.

38. S&B alleges that Prashant had deliberately misled the criminal court by giving these instructions: see 5A.3 and S&B's Skeleton Argument, paragraph 78. In his oral submissions Mr Stewart submitted that once they had conspired to pervert the course of justice in the Malaysian proceedings, Prashant, Suresh and Rajnikant had to continue to give false evidence in the Probate Proceedings, the Seychelles Proceedings and the Private Prosecution to cover up their earlier misconduct or, in the case of Prashant, to distance himself from the Aumkar fraud.

The undocumented arrangement allegation

39. Under cover of a letter dated 2 June 2020 Girish disclosed an email dated 31 May 2018, a Whatsapp exchange dated 10 December 2018 and an email dated 19 September 2018 all passing between Prashant and Kiraj. Girish disclosed these documents in support of his attempt to persuade Master Clark to reconsider his application to enforce an alleged agreement under which Prashant had agreed to pay his fees. Master Clark declined to do so and I dismissed an attempt by Girish to renew the same application at the PTR.

40. On 22 October 2020 Girish served his fifth witness statement ("**Girish 5**") in support of an application to extend time for the payment of an interim costs

order and an unusual request for the Court to initiate an investigation into a number of matters, including the Aumkar fraud allegations. He exhibited a large number of documents to Girish 5 (on a data stick) including a colour-coded schedule of Whatsapp messages from 6 December 2015 to 24 June 2019.

41. S&B now alleges that there was an "undocumented arrangement" between Prashant and Girish that Prashant would get liability "pinned on" the firm: see 5A.2. The words "undocumented arrangement" are taken from a Whatsapp message sent by Prashant to Kiraj on 17 January 2019 and the other quotation in 5A.2 is taken from the email dated 31 May 2018 (above). In the Voluntary Particulars the case was put a number of ways but in S&B's Skeleton Argument Mr Stewart and Ms Start submitted as follows (original emphasis):

> "The offence is in the conspiracy to contrive (without succeeding) Girish's admission of a claim which was false; namely, that Stevens & Bolton had **conspired** with Girish for him or his nominee **to secure the Tooting Property at an undervalue**. The evidence defeats this allegation against Stevens & Bolton."

42. In the original Particulars of Claim Barrowfen had claimed that Girish put Barrowfen into administration in order to acquire the Tooting Property at an undervalue. However, on 10 July 2020 it served Amended Particulars of Claim in which it withdrew that allegation: see paragraph 94. Mr Stewart invited the Court to draw the inference that Barrowfen was compelled to amend when Girish refused to make the necessary admissions and waive privilege over S&B's files.

43. Barrowfen asserts that the email dated 30 May 2018 and the Whatsapp message dated 17 January 2019 formed part of without prejudice negotiations and Prashant has given evidence that they took place in the course of negotiations with Kiraj in an attempt to settle the claims against Girish. He also states that he has not waived privilege and has not consented to them being put before the court: see Prashant 5, paragraph 11. In the light of the claim for privilege I will not discuss or quote from any of the other Whatsapp messages or emails for which privilege is claimed.

The Test

44. CPR Part 3.4(2) provides that 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."

45. CPR Part 17.1(2) provides that if it has been served, a party may only amend his statement of case with the written consent of all other parties or with the permission of the court. CPR Part 18 also provides as follows:

> "18.1(1) The court may at any time order a party to— (a) clarify any matter which is in dispute in the proceedings; or (b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case. (2) Paragraph (1) is subject to any rule of law to the contrary. (3) Where the court makes an order under paragraph (1), the party against whom it is made must— (a) file his response; and (b) serve it on the other parties, within the time specified by the court.
>
> 18.2 The court may direct that information provided by a party to another party (whether given voluntarily or following an order made under rule 18.1) must not be used for any purpose except for that of the proceedings in which it is given."

46. In *Jsc Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) Flaux J (as he then was) gave guidance about applications to strike out fraud and conspiracy. He set out the general test applicable to an application to strike out at [12]:

> "CPR 3.4(2) gives the court power to strike out a statement of case which discloses no reasonable grounds for bringing or defending a claim or a statement of case which is an abuse of process. Where, on the material before the court, there are disputed issues of fact, the court should not strike out a claim unless certain it is bound to fail: see per Peter Gibson LJ at [22] in Colin Richards & Co v Hughes [2004] EWCA Civ 226 . The test is similar but not identical to that for summary judgment where the court will not grant summary judgment, here in favour of a defendant, unless the claim has no real prospect of success. It is well established that where it is clear that there are disputed

> issues of fact between the parties, the court should not engage in a mini-trial of the merits at an interlocutory stage: see Civil Procedure [3.4.2]. Where a party seeks to amend a statement of case, the court will not permit an amendment unless it has a real prospect of success, so that the test is the same as for summary judgment: see Civil Procedure [17.3.6]."

47. Then, after considering *Three Rivers DC v Bank of England* [2001] 2 AC 1 and the submissions of counsel, he identified the following test at [20] to be applied to allegations of fraud:

> "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge. This is made absolutely clear in the passage from Lord Hope's speech at [55]-[56] which I quoted above.

The Issues

48. I prefer to defer consideration of the procedural question whether S&B had permission to amend the Defence to add the Challenged Paragraphs until after I have considered the substantive issues on which both parties made detailed submissions. I therefore consider the issues in the following order:

(1) Does S&B have no real prospect of proving the Aumkar fraud allegations at trial?

(2) Does S&B have no real prospect of succeeding in a defence of illegality in relation to the Aumkar fraud allegation?

(3) Are the documents upon which S&B relied in support of the undocumented arrangement allegation admissible in this action?

(4) Does S&B have no real prospect of succeeding in its defence of illegality in relation to the undocumented arrangement?

(5) If it is arguable that the relevant documents are admissible, should the Court permit the undocumented arrangement allegation to go to trial?

(6) Did S&B have permission to amend the Defence to plead the Challenged Paragraphs?

49. Both parties made a number of criticisms of the opposing party's conduct in relation to disclosure, the timing of the amendments and the timing of the strike out application. I do not consider it necessary to address those criticisms in this judgment although they may become relevant to other issues which the Court may yet have to determine.

(1) Does S&B have no real prospect of proving the Aumkar fraud allegations?

50. S&B alleges in 5A.1 that the Patels (whom I take to be Rajnikant, Suresh, Girish and Prashant) conspired to defraud and to pervert the course of justice in the Malaysian proceedings. S&B also pleads a detailed case based on the 4 October 2013 email which formed part of the 13 May 2018 email chain: see 5G to 5I. It is impossible for me to conclude that the allegations which S&B has made in those paragraphs have no real prospect of success. In order to do so, I would have to be satisfied that Prashant's evidence in relation to that email should be accepted and I could not do so without conducting a mini-trial on the merits which is not permitted: see *Kekhman* (above) at [12].

51. Furthermore, even if I had been prepared to consider striking out the allegations on the basis of the 4 October 2013 email alone, the documents which Ms Philipson and Mr Bird have exhibited provide solid evidentiary support for those allegations and, in my judgment, take S&B above the threshold required for striking out an allegation. In my judgment, the test for fraud or dishonesty set out in *Kekhman* at [20] is satisfied. The 4 October 2013 email and the supporting documents are capable of supporting a finding in the terms of 5A.1.

(2) Does S&B have no real prospect of succeeding in a defence of illegality in relation to the Aumkar fraud allegations?

52. As Ms Hilliard pointed out, the specific elements S&B's defence of illegality are not pleaded in the Amended Defence but in paragraph 1.3 of the Voluntary Particulars. She submitted that the Voluntary Particulars had no status and that I should not treat them as part of S&B's case. I agree with that submission. It is not possible for a party to avoid the deficiencies in a statement of case or the need for an application to amend by serving voluntary further information and CPR Part 18.2 does not permit a party to do so.

53. Nevertheless, I would not be prepared to strike out the Aumkar fraud allegations on that basis. It seems to me that the question whether the alleged conduct gave rise to a defence of illegality is a matter of law and it is trite that a party need only plead the material facts and not the law upon which he or she relies. Further, in 5H S&B alleges that Bedford was likely to be a vehicle or linked to the proceeds of crime and in 5I S&B alleges that Prashant wished to pay off Girish so as to retain ownership of criminal assets.

54. Finally, I am conscious of the Court of Appeal's guidance in *Magdeev v Tsvetkov* [2019] EWCA Civ 1802 that the Court should not address unpleaded allegations made by a party without a formal application to amend: see the White Book (2020 ed) Vol 1 at 17.1.4. But I would have been prepared to give S&B limited permission to amend to add paragraphs 1.3 and 20 of the Voluntary Particulars given that they were no more than an expansion of the case pleaded in 5H and 5I and that the issue was fully argued.

55. I therefore turn to the substantive issue. Mr Stewart argued that the proceeds of sale of the shares in Aumkar were criminal property within the meaning of section 340 of POCA and that Bedford had committed money laundering offences under sections 327 to 330. He pointed out that section 340 was in very wide terms:

> (1) This section applies for the purposes of this Part. (2) Criminal conduct is conduct which— (a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part of the United Kingdom if it occurred there. (3) Property is criminal property if— (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that

> it constitutes or represents such a benefit. (4) It is immaterial— (a) who carried out the conduct; (b) who benefited from it; (c) whether the conduct occurred before or after the passing of this Act. (5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct. (6) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage."

56. I am not satisfied that Bedford received any benefit from criminal conduct or that S&B has a real prospect of proving otherwise if I were to permit the Aumkar fraud allegations to go to trial. I say this for the following reasons:

i) In paragraph 20 of the Voluntary Particulars S&B alleges that Bedford received full value for the sale of its share of the proceeds or, alternatively, £2 million. Moreover, Mr Bird asserted that Bedford had received the sums due under 2005 sale and purchase agreement.

ii) However, he provided no support for these assertions. If anything, the documents to which he referred tended to suggest the reverse. His earlier evidence was that Bedford received ordinary and preference shares in GUC in return for its shares in Aumkar rather than cash and his later evidence was that it received £22,260 after the sale on to the New Shareholders and the reconciliation in November 2007 had taken place.

iii) Moreover, this seems consistent with the case which S&B advanced. If the sale by the majority shareholders to GUC and from GUC to the New Shareholders was fraudulent and nothing more than a fictitious device to expropriate Shanta's shares, it seems quite likely that no money changed hands or, if it did, that the funds just went round in a circle.

iv) But even if Mr Bird is right and Bedford received the full value of the shares, I am not satisfied that S&B has any real prospect of satisfying the Court that the transfer of those funds by GUC to Bedford involved the commission of a criminal offence in Malaysia. Mr Stewart relied on section 180 of the Companies Act 1965. But in the Shanta Judgment the judge rejected the arguments that the attempt by Girish, Suresh and

Rajnikant to acquire the shares amounted to a breach of section 180 or to the tort of conspiracy: see [43] to [46] (above).

v) Ms Hilliard also submitted that even if the majority shareholders had committed a breach of section 180 there was no evidence that this amounted to a criminal offence. I accept that submission. There is nothing in section 180 which suggests that a breach gives rise to criminal sanction and Ms Hilliard drew my attention to section 975 of the Companies Act 2006 which shows that the equivalent provision does not give rise to a criminal offence under English law.

vi) I accept that the Shanta Judgment is not binding on S&B. I also accept that it is arguable that Girish, Suresh and Rajnikant deliberately misled the Court on the oppression petition and also in the conspiracy proceedings. I am also prepared to accept that it is arguable that this amounted to a criminal offence in Malaysia although there was no evidence before me to that effect. However, that conduct took place long after the transfer of the shares by GUC to the New Shareholders and the transfer of any funds to Bedford.

vii) I cannot accept, therefore, that S&B has any real prospect of persuading the Court that Bedford received the proceeds of sale of the shares as a result of or in connection with the conspiracy alleged by S&B in 5A.1 and 5G to 5I. The wording of section 340 is very wide but even so I am satisfied that the allegation in 5H that Bedford was the vehicle for the proceeds of crime is bound to fail (even if amplified by the Voluntary Particulars). Moreover, Mr Stewart cited no authority which would have suggested otherwise.

57. Nevertheless, if this conclusion is wrong and Bedford received RM 13,218,025 from the proceeds of the sale of shares in Aumkar and this sum represented criminal property, I go on to consider whether S&B has a real prospect of succeeding on its defence of illegality. In *Grondona v Stoffel & Co* [2020] 3 WLR 1156 Lord Lloyd-Jones gave guidance about the approach which the Court should adopt to applying the "trio of considerations" in *Patel v Mirza*

[2017] AC 467. The decision is also important because it involved a claim against a firm of solicitors. Mr Stewart took me through the decision in detail and relied upon the following passage at [26]:

> "It is important to bear in mind when applying the "trio of necessary considerations" described by Lord Toulson JSC in Patel (at para 101) that they are relevant not because it may be considered desirable that a given policy should be promoted but because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions. Equally such an evaluation of policy considerations, while necessarily structured, must not be permitted to become another mechanistic process. In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court. In particular, I would not normally expect a court to admit or to address evidence on matters such as the effectiveness of the criminal law in particular situations or the likely social consequences of permitting a claim in specified circumstances. The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play or to carry out a policy-based evaluation of the relevant laws. It is simply seeking to identify the policies to which the law gives effect which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. In considering proportionality at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand. Finally, in this regard, since the overriding consideration is the damage that might be done to the integrity of the legal system by its adopting contradictory positions, it may not be necessary in every case to complete an exhaustive examination of all stages of the trio of considerations. If, on an examination of the relevant policy considerations, the clear conclusion emerges that the defence should not be allowed, there will be no need to go on to consider proportionality, because there is no risk of disproportionate harm to the claimant by refusing relief to which he or she would otherwise be entitled. If, on the other hand, a balancing of the policy considerations suggests a denial of the claim, it will be necessary to go on to consider proportionality."

58. I note, however, that despite the *Patel v Mirza* approach Lord Lloyd-Jones accepted that it remained relevant to a defence of illegality whether a party must rely on illegal conduct to establish a cause of action. He stated this at [43]:

> "As a result of the change in the law brought about by Patel v Mirza , the question whether a claimant must rely upon illegal conduct to establish a cause of action is no longer determinative of an illegality defence. Nevertheless, the question of reliance may have a bearing on the issue of centrality. In the present case it is significant that, as the decision at first instance on the basis of Tinsley v Milligan demonstrates, the essential facts founding the claim can be established without reference to the illegality."

59. Ms Hilliard also submitted that the defence of illegality was only available where the illegal conduct was inextricably linked to the claim. She pointed out that most of the claims in which a defence of illegality has been raised involve the enforcement of contracts (although *Grondona* itself involved a claim for professional negligence). She also relied on the following passages in the judgments of Lord Toulson and Lord Kerr in *Patel v Mirza* at [107] and [131] respectively:

> "In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

> "Lord Sumption did refer to *Hounga*[3], however, in the later case of Bilta (UK) Ltd v Nazir (No 2) [2016] AC 1. He sought to explain the decision in *Hounga* on the basis that Ms Hounga did not rely, and did not need to rely, on the circumstances in which she had entered the United Kingdom (she had entered illegally). This is correct but she did need to rely on the fact of her employment in advancing a claim for unlawful discrimination in her dismissal from that employment. Since the employment was not legally sanctioned, she was therefore confronted with the illegality defence and, indeed, the Court of Appeal had held that the illegality of the contract of employment formed a material part of Ms Hounga's complaint and that to uphold it would be to condone the illegality. It was held in Hounga that the appellant's

[3] See *Hounga v Allen* [2014] 1 WLR 2889.

> claim was not inextricably linked to her illegal conduct. On that account her action could not be defeated on the basis that her contract of employment was illegal. But Lord Wilson's discussion of the manner in which competing public policy considerations should be viewed, in calculating whether a defence of illegality should be permitted to defeat an otherwise viable claim, unquestionably forms part of the ratio of the decision."

60. She also relied upon the following passage in which Lord Neuberger discussed the effect of POCA on the civil rights and liabilities of the parties (at [184] and [185]):

> "Secondly, I should briefly address the fact that the criminal law and the Proceeds of Crime Act 2002 ("POCA") may inevitably have some impact on the rights and duties of parties who have entered into contracts with an illegal connection. The involvement of the criminal law played a very important part in the judgment of McLachlin J in *Hall v Hebert [1993] 2 SCR 159*. It seems to me to have two main components. First, it is for the criminal law, not the civil law, to penalise a party or parties for entering into and/or performing a contract with an illegal component. Secondly, in so far as the civil law is fashioned by judges in a particular case, they must ensure that it is not inconsistent with the criminal law.
>
> So far as POCA is concerned, it enables the courts, through statutory powers, to do that which a common law judge cannot do, and which many might think was the best outcome in many of the more serious cases involving illegality, namely to ensure that the proceeds of crime are retained by neither party, but are paid over to the Government. This is not the occasion to discuss the effect of POCA, save to say that I would take some persuading that the common law should be influenced by the fact that POCA is or is not being invoked in any particular case, although the civil courts should not make any order, or at least permit the enforcement of any order, if its effect would run counter to the provisions of POCA or to any step which was being contemplated under POCA by the relevant authorities."

61. Finally, Ms Hilliard relied on the recent decision in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] 3 WLR 1124 in which the Supreme Court considered *Grondona* (in a very different context). Lord Hamblen rejected the proposition that considerations (a) and (b) (above) should require a mini-trial. He stated this (at [115]):

> "It is neither necessary nor desirable that consideration of the relevant policy considerations should give rise to a mini trial. They should usually be capable of being addressed as a matter of argument and at a level of generality that does not make evidence necessary, as is well illustrated by this court's decision in *Hounga v Allen* [2014] 1 WLR 2889."

62. Both counsel made helpful submissions about the relevant policy considerations and how I should weigh them up (as I had invited them to do). However, on reflection I do not consider that it would be useful or necessary for me to consider them here. I say this partly because my earlier conclusion makes it unnecessary to do so but partly because I am not satisfied that it is necessary for the Court to undertake that exercise.

63. Mr Stewart submitted that Barrowfen's claim is tainted by illegality because it would have been necessary for it to borrow the money from Bedford to repay the loan made by Barrowfen II and if Barrowfen is unable to establish this, its case on causation will fail. I reject that submission for the following reasons:

i) It is right that Barrowfen has pleaded that Bedford might have provided the funds to discharge the loan from Barrowfen II in December 2015. However, response 33 identified Bedford as only one possible source of funding including Aumkar itself and Suresh or a rights issue.

ii) But in any event there was no evidence that Bedford would have used the proceeds of the sale of Aumkar shares to do so. Indeed, this seems highly unlikely since completion of the original sale to GUC took place in 2005 and completion of the sale by GUC to the New Shareholders must have taken place in 2007.

iii) I am satisfied, therefore, that there is no real link between the claim in the present action and the receipt of criminal property by Bedford some 8 to 10 years before far less that the link is an inextricable one or that the Aumkar fraud is central to the claim. Indeed, Deputy Master Linwood was not prepared to order disclosure in relation to it in the CMC Order.

iv) Put another way, I am satisfied that however strong the competing policy considerations might be, it will not damage the integrity of the legal

> system to permit Barrowfen to recover damages in the present case and it would be disproportionate to dismiss the present claim for that reason.

64. My conclusions in relation to the proceeds of the Aumkar shares are also sufficient to dispose of the second way in which S&B relied on the Aumkar fraud allegations. S&B alleged that Barrowfen funded its fees out of criminal property. S&B produced no evidence to establish even an arguable case that Barrowfen paid S&B's fees using the proceeds of sale of the shares in Aumkar and I am satisfied that it has no real prospect of proving this allegation at trial or to make out a defence of illegality.

(3) Are the documents upon which S&B relied in support of the undocumented arrangement allegation admissible?

(a) Were they "without prejudice" communications?

65. Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence: see Hollander *Documentary Evidence* 13th ed (2018) ("**Hollander**") at 20—01. It is also well-established that it is unnecessary for parties to use the words "without prejudice" although it may be harder to determine objectively whether the discussions in question were genuinely aimed at settlement where litigants in person are involved: see 20—07. Hollander also distinguishes between two party and three party situations. However, the editors identify no clear principle and raise a number of questions at 20—18:

> "So when is without prejudice correspondence admissible in the three party situation? Does this mean that *Muller*[4] remains good law in relation to settlements in mitigation of loss? What about the point made in *Avonwick*[5] that even when there is no sufficient dispute yet existing between the parties, there may be an implied contract between them evidenced by the use of the words "without prejudice" that the correspondence be not referred to in open court: where that was analysis between the original parties to the without prejudice correspondence, would the documents be then admissible as against a third party? It is not unusual for

[4] *Muller v Linsley & Mortimer* [1996] PNLR 74
[5] *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436

> disclosure to be sought of third party without prejudice negotiations. The position [is] still entirely uncertain."

66. Ms Hilliard submitted that the 31 May 2018 email and the Whatsapp message dated 17 January 2019 (upon which S&B relies in 5A.2) formed part of a genuine attempt to compromise a number of disputes between the parties and she took me through the schedule of Whatsapp messages which Girish had disclosed to make good her point.

67. Mr Stewart submitted that the email and message are not protected by "without prejudice" privilege but were evidence of a separate agreement to pervert the course of this action. He relied heavily on the use of the words "undocumented arrangement" and he also relied upon the following additional factors:

    i) On 22 October 2020 Girish openly disclosed the schedule of Whatsapp messages to S&B and there was nothing underhand or questionable about the way in which they came into S&B's hands.

    ii) The words "without prejudice" were not used by either Prashant or Kiraj and Barrowfen made no objection to their disclosure at any time before the service of the Defence.

    iii) Barrowfen's claim for fraudulent misrepresentation arises out of a statement made by Mr King at a without prejudice meeting on 9 December 2015 and Barrowfen has itself chosen to disclose a number of documents which would otherwise be protected by without prejudice privilege.

68. Ms Hilliard's answer to these points is that: (i) the schedule of Whatsapp messages was contained on a data stick and Barrowfen and its advisers were not aware of its contents until Mr Bird exhibited it to his witness statement dated 24 December 2020; (ii) it was not necessary to use the words "without prejudice" and Barrowfen has now objected to the use of the documents; and (iii) Barrowfen's fraud claim arose out of the disclosure by Mr King of his notes of the relevant meeting and Barrowfen has limited its own disclosure to the period between November 2015 and February 2016.

69. I have considerable sympathy with Mr Stewart's position. I am not satisfied that there was a proper basis for Barrowfen to deploy without prejudice communications itself whilst objecting at the same time to the use of similar material by S&B. However, I cannot be satisfied that the 31 May 2018 email and the Whatsapp message dated 17 January 2019 do not attract without prejudice privilege or that Barrowfen has consented to Girish producing those documents by relying on other without prejudice material itself. Furthermore, even if Barrowfen has impliedly consented to the disclosure of the documents, the law on third party situations is uncertain and neither party took me to the authorities cited in Hollander and addressed me fully on that issue.

70. Finally, I add that it would not be possible for me to decide on this application whether the negotiations between Prashant and Kiraj involved a bona fide attempt to settle the claims or an agreement to pervert the course of these proceedings without hearing evidence precisely because the alleged agreement between Prashant and Kiraj was an "undocumented arrangement" and it would have been necessary to explore it in evidence. I return to this point again below.

(b) Unambiguous Impropriety

71. There are a number of exceptions to the rule that a party may not refer to without prejudice communications in evidence. In particular, a party to litigation may be allowed to give evidence of what the opposing party said in without prejudice negotiations if the exclusion of that evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety: see Hollander (above) at 20—28. In the very recent decision *Motorola Solutions Inc v Hytera Communications Corp Ltd* [2021] EWCA Civ 11 the Court of Appeal had to consider what test to apply on an interim application.

72. In that case Jacobs J applied the test of a "good arguable case" to the question whether the relevant communications demonstrated unambiguous impropriety. The Court of Appeal overruled his decision on the basis that the exception should only be applied where there is no scope for dispute about what was said by the parties. Males LJ stated this at [57]:

> "From this review of the cases I would conclude that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional, and (leaving aside *Dora v Simper*) there has been no scope for dispute about what was said, either because the statement was recorded (the admission of a dishonest claim in *Hawick Jersey Ltd v Caplan*) or because it was in writing (the email threats in *Ferster v Ferster*). I would not wish to exclude the possibility that the evidence about what was said at an unrecorded meeting may be so clear that the court is able to reach a firm conclusion about it (nor would I wish to encourage the clandestine recording of settlement meetings), but such cases are likely to be rare. *Dora v Simper* itself is clearly an outlier which has been criticised in later cases and, until the decision of the judge in this case, has never been followed. In my judgment its approach of asking whether one party's disputed evidence, if true, demonstrates an unambiguous impropriety is contrary to the weight of authority, wrong in principle and should not be followed."

73. I am not satisfied that the email dated 31 May 2018 or the Whatsapp message dated 17 January 2019 provide clear evidence of an agreement to pervert the course of these proceedings. In S&B's Skeleton Argument Mr Stewart and Ms Start accepted that agreement by Barrowfen to settle with Girish in order to "get this pinned on Stevens and Bolton" was not unlawful by itself. They submitted that it was a criminal offence for Prashant to conspire with Girish to admit a false claim, namely, that S&B had conspired with him to secure the Tooting Property at an undervalue.

74. Neither the email nor the message set out the admissions which Prashant was asking Girish to make in order to settle the claim. Nor can I draw the inference that Prashant asked Girish to admit that S&B had conspired with him to secure the Tooting Property at an undervalue simply from the fact that Barrowfen amended the Particulars of Claim to withdraw that allegation. I cannot be satisfied, therefore, that there is no scope for dispute about what Prashant and Kiraj said to each other or the terms of their "undocumented arrangement". I therefore find that the email dated 31 May 2018 and the Whatsapp message dated 17 January 2019 are not admissible.

(4) Does S&B have no real prospect of succeeding in its defence of illegality in relation to the undocumented arrangement?

75. It would, of course, remain open to S&B to prove its case by other admissible documents. However, the only other document upon which S&B relied in support of the undocumented arrangement allegation was a Whatsapp message dated 5 February 2019: see the Voluntary Particulars, paragraph 15. Ms Hilliard took me to that message in the schedule and I am satisfied that this message is inadmissible for the same reasons. Mr Stewart did not submit that S&B could prove the existence of the undocumented arrangement without relying upon the without prejudice material or cross-examining Prashant about his discussions with Kiraj. I am satisfied, therefore, that S&B has no real prospect of succeeding in its defence of illegality in relation to the undocumented arrangement allegation.

(5) If it is arguable that those documents are admissible on the grounds that they are not privileged, should the Court permit the undocumented arrangement allegation to go to trial?

76. If it had been necessary to do so, I would have been prepared to find that S&B had a good arguable case that the email and the message were not covered by without prejudice privilege. In *Motorola* the Court of Appeal held that this was insufficient to justify the admission of documents under the unambiguous impropriety exception. Does the same test apply where the question is whether the relevant communications were without prejudice at all? In my judgment, it does. Males LJ said this at [63] and [64]:

> "There are sound reasons for this choice in addition to those already discussed. In particular, a party who is unable to adduce evidence of statements made without prejudice is no worse off so far as the evidence is concerned than if those statements had never been made or the settlement negotiations had not occurred. But a party who is drawn into satellite litigation about the admissibility of statements made without prejudice would have been much better off if he had refused to negotiate at all. Further, if what was said (or the interpretation of what was said) at a without prejudice meeting is credibly disputed on an interim application to which a test of good arguable case is applied, there will be no occasion when that dispute will be resolved. Thus in the present case, having concluded that there was a good arguable case, the judge admitted the evidence and used it as the

> foundation for a freezing order even though, as he acknowledged at [72], he was not in a position to decide which of the competing versions was correct, and even though the consequence of that decision is that this issue will never be determined. I cannot regard that situation as satisfactory or just, not least in view of the harm to a defendant's business which a wrongly granted freezing order may cause.
>
> As for the judge's second concern, I do not regard the fact that the test of good arguable case is used in other interim contexts as a sufficient reason to apply it to the issue of unambiguous impropriety when that issue arises at an interim stage of litigation. Rather, the position should be that the test remains one of unambiguous impropriety. Nothing less will do. That is a test which, deliberately, is difficult to satisfy but the fact that it arises on an interim application is no reason to dilute it. In view of the necessary limits to the conclusions which a court can reach at an interim stage, the existence of a credible dispute about what was said (or what was meant by what was said) may mean that a court cannot be satisfied that there has been an unambiguous impropriety and therefore does not admit the evidence, but that is simply the result of applying the test which has consistently and for good reason been held to apply. Plainly it would not be appropriate on an interim application to direct a trial of an issue to resolve such a dispute."

77. The present case illustrates similar difficulties. If I permit the undocumented arrangement allegation to go to trial on the basis that it is arguable that the email and message were admissible and it is later found that they were not, this will provide grounds for an appeal and, if necessary, a retrial. The parties will also have been much better off if Prashant and Kiraj had not attempted to settle the claim at all.

(6) Did S&B have permission for the Challenged Paragraphs?

78. Finally, I consider the scope of the permitted amendments. If there had been an application for permission to amend the Defence before the Court it would have been necessary for S&B to satisfy the strict requirements for late amendments: see, e.g., *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38] (Carr J). However, S&B did not make a protective application for permission to amend and Mr Stewart made no attempt to persuade me that the test for late amendments was satisfied.

79. However, he took a preliminary point that it was not open to Barrowfen to apply to strike out the Challenged Paragraphs under CPR Part 3.4(2)(c) on the basis that S&B had failed to comply with CPR Part 17.1(2) and had made amendments without permission. I reject that submission for the following reasons:

    i) In the Application Notice dated 13 January 2021 Barrowfen applied to strike out the Challenged Paragraphs under CPR Part 3.4 and did not limit its application to any particular limb of CPR Part 3.4(2) (above).

    ii) Moreover, Ms Hilliard and Mr Matthewson took the point in paragraph 16 of their Skeleton Argument dated 18 January 2021. They did not put the point as strongly as they did in their Skeleton Argument dated 29 January 2021 but they clearly took it.

    iii) Finally, although Barrowfen answered the Challenged Paragraphs in the Reply without expressly reserving the right to argue that they were not permitted it objected to them in strong terms and described them as "vexatious". In my judgment Barrowfen could not be said to have waived the right to argue that they should be struck out on any particular ground.

80. I am satisfied, therefore, that it was open to Barrowfen to apply to strike out on this ground and I must, therefore, consider whether S&B had permission for the Challenged Paragraphs. Ms Hilliard submitted that the scope of Birss J's Order dated 6 July 2020 and my subsequent Order was limited to consequential amendments. She also submitted (as pleaded in the Amended Reply) that S&B were not permitted to amend to raise allegations which Deputy Master Linwood had excluded from disclosure in the CMC Order.

81. I am not satisfied that either Order was limited in this way. I do not recall Ms Hilliard making any submission at the hearing in September about the scope of the Orders (although it is clear that I was being asked to do no more than extend Birss J's Order). Moreover, if Birss J had intended to limit the Order to consequential amendments only, one would have expected it to say so when both parties contemplated that a waiver of privilege application would be made

and S&B had flagged up the point in its Defence. Finally, it is clear that Barrowfen considered the effect of the Order which I made to go wider than consequential amendments: see the Amended Reply, paragraph 3.1E.

82. This does not mean, however, that the Orders gave unlimited permission to S&B to raise any matters which it chose (as Mr Stewart initially argued). In my judgment, Birss J granted permission to S&B to amend to plead any matters arising out of the determination of the Privilege Application. Paragraph 4 of his Order made a clear connection between the determination of that application and those amendments. Moreover, this is clearly how Barrowfen's legal team understood it: see paragraph 3.1E (above).

83. That is not the end of the matter, however. The Order which I made on the Privilege Application was that the Defendants should disclose documents created for the purpose of giving or receiving legal advice or containing legal advice given by S&B to Girish in relation to the five matters which are the subject matter of the claim.

84. Mr Bird did not suggest in evidence that the Challenged Paragraphs arose out of the review and disclosure of those documents. Indeed, his evidence was that the trigger for the Aumkar fraud allegations was the disclosure by Girish of the 13 May 2018 email chain including the 4 October 2013 email and the subsequent review of the documents contained in KLP2. Moreover, Mr Bird did not distinguish between the documents in KLP which were privileged and those which were not. But in any event he did not suggest that S&B's files relating to the Aumkar fraud allegations fell within any of the five categories in paragraph 1 of my Order.

85. It is also clear that the undocumented arrangement allegation did not arise out of the review and disclosure of the documents in paragraph 1 either. Girish had already disclosed the 31 May 2018 email by the time that I made that Order and the allegation that there was an undocumented arrangement arose out of the Whatsapp messages which he disclosed on 22 October 2020. Moreover, those documents were not created for the purpose of giving or receiving legal advice and did not contain advice from S&B.

Disposal

86. In my judgment, therefore, S&B did not have permission to amend the Defence to plead the Challenged Paragraphs and I will strike them out under CPR Part 3.4(2)(c). I would have been reluctant to strike them out on that basis alone. But for the reasons which I have given earlier in this judgment I will also strike them out under CPR Part 3.4(2)(a). I add that nothing which I have said in this judgment would prevent Mr Stewart putting to Barrowfen's witnesses either the 4 October 2013 email or any other relevant and admissible documents. The extent to which he is permitted to explore the Aumkar fraud allegations for credit alone will have to be a matter for trial.