Neutral Citation Number: [2022] EWHC 1052 (Comm)

Case No: **CL-2021-000009**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: **28 April 2022**

Before :

His Honour Judge Mark Pelling QC
Sitting as a Judge of the High Court

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Between :

(1) HRH Prince Khaled Bin Sultan Bin Abdulaziz Al Saud and (2) HRH Princess Deema Bint Sultan Bin Abdulaziz Al Saud	**Respondent**
- and -	
(1) Ronald William Gibbs and (2) Sunnydale Services Limited	**Claimant**

- -
- -

Matthew Parker QC (instructed by **Clyde & Co LLP**) for the **Respondent**
Simon Atrill and **Samuel Rabinowitz** (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Claimant**

Hearing dates: **28th April 2022**

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JUDGMENT

His Honour Judge Mark Pelling QC **Thursday 28th April 2022**
(**13:08**pm)

HIS HONOUR JUDGE MARK PELLING QC:

Introduction

1. This is the hearing of an application by the second claimant for summary judgment in relation to that part of her claim described in these proceedings as her "*alternative claims*". This claim is concerned with what is alleged by the second claimant to have been a failure on the part of the first defendant, a solicitor and formerly a partner in a well-known City of London law firm, to retain, and his alleged misappropriation of, a fund of just short of US$25 million that was transferred to a Credit Suisse bank account in the name of the second claimant by her late father. A power of attorney was executed in favour of the first defendant on or about 9 July 2011 in relation to the second claimant's banking relationship with Credit Suisse, and the fund was transferred to the account just over a month later on 15 August 2011.
2. The second claimant's primary claim concerns alleged breaches of duty by the first defendant in relation to the fund and the failure by the first defendant to return the fund to the second claimant. The primary claims are formulated as claims in breach of trust and allied causes of action including negligence.
3. The second claimant also advances, as an alternative claim, a claim based on a settlement agreement made on 18 April 2018 between the first defendant and Mr Al Kholaifi, who is described in the settlement agreement as "*the manager*", who, it is common ground, managed the affairs and acted as the legal representative of the second claimant at the time the settlement agreement was entered into. It is common ground, at any rate for the purposes of this application, that the settlement agreement was entered into in full and final settlement of the dispute the subject of the primary claims.
4. Mr Matthew Parker QC, who appears for the first defendant, took the point in both his skeleton and orally that the primary and alternative claims are mutually inconsistent and that the second claimant

ought to be put to her election and be required to abandon her primary claims as the price of being permitted to proceed with this application in relation to her alternative claims. Mr Atrill, who appeared on behalf of the second claimant, accepted that there may come a time when that was so, but it ought not to be any earlier than if and when I conclude that the judgment ought to be entered against the first defendant on the alternative claim.

5. Following a short argument on this point, I ruled that Mr Atrill's approach was to be preferred, although I recorded that no authority was relied upon by either party to support their respective submissions, nor was any argument advanced by reference to any supposedly analogistic situations including what happens when a party to a civil claim submits that there is no case to answer at a trial and what happens following judgment being entered for a claimant in relation to liability where the claimant has sought mutually inconsistent remedies as for example damages or an account of profits.

6. In addition to the summary judgment application, the second claimant applies for an interim payment on account of the damages, which she maintains she is entitled to recover, assuming she succeeds on her summary judgment application in relation to the liability issues.

7. It is convenient to set out the contractual framework, the principles applicable to the application and to the construction of the settlement agreement, and then to consider the two issues on which the second claimant must succeed if she is to obtain summary judgment, being (a) whether the machinery set out in the settlement agreement was triggered as she alleges and (b) assuming she is successful in relation to that issue, whether the first defendant acted in breach of the agreement. If the second claimant succeeds on those issues, it will be necessary then to consider quantum to the extent necessary to enable the second claimant's claim for either a summary assessment or interim payment on account to be determined.

8. The first defendant's case is that the machinery set out in the settlement agreement was never triggered for reasons I consider in detail in a moment, and that in consequence, he was entitled, and perhaps even obliged, to continue to manage the fund.

9. Since the first defendant accepts that a significant portion, if not all of the fund has been invested in three assets, that is to say, a yacht, a property in Montenegro and a company closely controlled by the first defendant, there is an issue as to whether if that is so, other claims might arise, but none of that is relevant to the issues that I have to determine.

The Contract and Relevant Background

10. Insofar as is material, the settlement agreement starts with five recitals in the following terms:

> "A. The Manager manages the private affairs and legally represents for the purposes of this Agreement HRH Princess Deema bint Sultan bin Abdulaziz Al Saud (hereinafter referred as 'HRH Princess Deema').
>
> B. RWG [I interpolate, that is the first defendant] has for a number of years been managing cash funds totalling USD 25,000,000 (hereinafter referred to as the 'Funds') which were transferred to him on behalf of HRH Princess Deema in connection with the possible purchase of a property, which as at the date of this Agreement have not been used for that purpose.
>
> C. RWG has been managing the Funds on behalf of HRH Princess Deema on a discretionary basis and the Funds are currently represented by an investment portfolio of assets as more particularly described in the Schedule to this Agreement ...
>
> D. RWG has agreed to consult with the Manager regarding the management of the Investment Portfolio with a view to liquidating as soon as reasonably possible certain securities investments and in due course, liquidating the entire Investment Portfolio. Net liquidation proceeds will be transferred to an account

of HRH Princess Deema managed by the Manager. Liquidations will be made on terms which maximise the returns on current investments and avoid any early termination penalties or 'fire sale' losses. Following the liquidation of the Investment Portfolio, it is agreed that the fund created by the liquidation proceeds will be managed by the Manager on behalf of HRH Princess Deema.

E. The parties have entered into this Agreement to record the terms and conditions upon which they have agreed a full and final settlement in relation to the above matters."

11. The settlement agreement then proceeded to set out the operative terms of the agreement, and insofar as material, did so in these terms:

"1. HRH PRINCESS DEEMA

1.1 On or prior to the execution of this Agreement RWG has procured the delivery to the Manager of a summary of the current Investments Portfolio and the value in each investment position which is attributable to HRH Princess Deema (hereinafter referred to as the 'Valuations').

1.2 RWG will continue to manage the portfolio and will report regularly to the Manager. Following receipt of the letter referred to in Clause 1.3, RWG will commence a program to liquidate the Investment Portfolio with a mandate, but no liability, to realise liquidation proceeds of not less than US$25m. The program of management and liquidation will be to maximise current investments and achieve liquidations without penalties and to avoid any 'fire sale' situations.

1.3 The Manager agrees to procure and supply to RWG a letter signed by HRH Princess Deema as soon as possible following the date of this Agreement. The letter will instruct RWG to commence liquidation of the Investment Portfolio and to consult with the Manager with respect thereto and will specify a bank account

> into which net liquidation proceeds are to be paid. Following receipt of the letter, RWG will instruct the liquidation of all positions of HRH Princess Deema in any shares and securities on terms that no penalties are to be incurred and all net liquidation proceeds will be paid into the designated account ...
>
> 2. COMPLETION AND SETTLEMENT
>
> 2.1 This Agreement shall constitute the full and final settlement between RWG and HRH Princess Deema of all and any claims any party may have against any other party in connection with the subject matters of this Agreement whether now or in the future ...
>
> 2.3 This Agreement supersedes all and any prior agreements between any persons whether verbal or in writing, in respect of its subject matter.
>
> 3. LAW AND JURISDICTION
>
> 3.1 This Agreement shall be governed by the laws of England and Wales and the parties hereby agree to submit to the non-exclusive jurisdiction of the English Courts..."

The agreement annexed a summary, entitled "Summary of investor position", which is the schedule which is referred to earlier in the agreement. The schedule to the settlement agreement breaks down into a number of separate categories of investment consisting of (a) cash, which is valued in the summary at $826,117; (b) Credit Suisse managed securities valued in the schedule at US$2,323,000; (c) UK residential real estate valued in the schedule at US$6,412,331; (d) other residential real estate valued at US$1,912,312; (e) UK commercial real estate valued at US$7,075,119; (f) company shares which were valued at US$2,536,000; and (g) contracts for future trading which were valued at US$3,476,812. The total value under management by reference to the values contained in the schedule was said to be US$24,561,691. The schedule ended with some notes that

included notes to the effect that valuations were current book values, and actual market values may be higher or lower, and that the cost of liquidating investments had been estimated at current market rates.

12. On 25 April 2018, Mr Al Kholaifi sent by email to the first defendant a letter in purported compliance with clause 1.3 of the settlement agreement. The letter was in these terms:

> "Dear Mr Ronald W Gibbs,
>
> Greetings.
>
> Reference to the settlement agreement that has been reached between yourself and Mr Salih Al Kholaifi in Dubai on the 18 April 2018, I, HRH Princess Deema Bint Sultan Bin Abdulaziz Al Saud, hereby delegate Mr Salih Al Kholaifi ... to manage my complete foreign investment portfolio which is being handled by your office, and hereby authorise him to receive all the returns that are due to me and you are kindly requested to commence transferring the full amount of my investment along with all relevant returns to the below mentioned account ..."

There then followed the details of a bank account, with the account holder name being given as HRH Prince Khaled Sultan Abdulaziz Al Saud, the first claimant in these proceedings. The letter was apparently signed by the second claimant at the bottom of it.

13. Following receipt of the letter, on 8 May 2018, the first defendant emailed General Ayed, one of the second claimant's representatives, with whom the first defendant had been in regular contact up to and after the making of the settlement agreement. The email concerned various matters, but at paragraph 4 of his email the first defendant said this:

> "I need an address for the principal to transfer funds to his account with NCB. I have written to Salih twice and do not have an answer. Can you please confirm the address registered with NCB for the account."

This was a reference to the account contained in the letter of 25 April referred to a moment ago. The "Salih" referred to is Mr Al Kholaifi, who, as I have said, was referred to as the "manager" in the settlement agreement. The principal can only be the first claimant, being the person in whose name the account referred to in the letter of 25 April was apparently the customer. Thereafter the relevant information was provided to the first defendant.

14. Notwithstanding these exchanges, no funds were transferred by the first defendant into the bank account referred in the letter of 25 April, notwithstanding his acceptance that at least some of the assets referred to in the schedule to the settlement agreement had been liquidated after the agreement had been made.

Applicable Legal Principles.

15. The principles applicable to the summary judgment application are not in dispute, and are those identified by Mr Justice Lewison, as he then was, in EasyAir Limited v Opal Telecom Limited [2009] EWHC 339 (Ch), as summarised and approved by the Court of Appeal in TFL Management Services Limited v Lloyds TSB Bank plc [2013] EWCA Civ 1415 in these terms:

> The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success ...
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial' ...
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...

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

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case ...

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

> argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction ...
>
> 27. Neither side sought to challenge these principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action ... Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications ... Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy..."

16. In relation to the principles applicable to the construction of contract, subject to English law, again there was no real dispute between the parties. In summary:

    a. The court construes the relevant words of a contract in its documentary, factual and commercial context assessed in the light of (i) the natural and ordinary meaning of the provision being construed; (ii) any other relevant provisions of the contract being construed; (iii) the overall purpose of the provision being construed and the contract in which it is contained; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any parties' intentions - see Arnold v Britton [2015] UKSC 36; [2015] AC 1619, per Lord Neuberger PSC at paragraph 15, and the earlier cases that he refers to in that paragraph.

b. The court can only consider facts or circumstances known or reasonably available to both parties that existed at the time when the contract was made - see Arnold v Britton ibid, per Lord Neuberger PSC at paragraph 21.

c. In arriving at the true meaning and effect of the contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they used in the contract and (b) the parties must have been specifically focusing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision - see Arnold v Britton ibid, per Lord Neuberger PSC at paragraph 17.

d. Where the parties have used unambiguous language, the court must apply it - ee Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900, per Lord Kerr JSC at paragraph 23.

e. Where language used by the parties is unclear, the court may properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual presumed knowledge would conclude the parties have meant by the language they used, but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used - see Arnold v Britton ibid, per Lord Neuberger PSC at paragraph 18.

f. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other - see Rainy Sky ibid, per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties at the date that the contract was made - see Arnold v Britton ibid, per Lord Neuberger PSC at paragraph 19.

g. In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of the drafting of the clause and the agreement in which it appears -see Wood v Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent - see Wood v Capita Insurance Services Limited ibid, per Lord Hodge, at paragraph 13.

h. A court should not reject the natural meaning of a provision as incorrect, simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton ibid, per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited ibid, per Lord Hodge JSC at paragraph 11.

The Trigger Issue.

17. The second claimant submits that the machinery set out in the settlement agreement was triggered by the letter of 25 April, and that if and to the extent it was not, then the first defendant is estopped from denying such is the case and the contrary is not realistically arguable applying the principles set out above.

18. The defendant maintains that it has at least a realistic prospect of establishing that the letter was not an effective trigger because (a) it was not signed by the second claimant and/or (b) because the account identified in the letter of 25 April did not comply with the requirements of clause 1.3 of the settlement agreement when properly construed.

19. I turn first to the suggestion that the signature on the 25 April letter is a forgery. In my judgment that is a fanciful suggestion that does not give rise to a realistically arguable ground for defending this claim. My reasons for reaching that conclusion are as follows.

20. First, it is common ground that the letter referred to in clause 1.3 had to be a "... *letter signed by HRH Princess Deema* ..." I reject the suggestion made on behalf of the claimant that that should be construed as including a document signed on behalf of the Princess by an agent. As I explain below the requirement for the letter to be signed by the second claimant was her protection against misuse of the settlement agreement machinery and for that matter the means by which the first defendant could ensure he obtained a good receipt by making payments in accordance with that machinery. This point is relevant only to a secondary issue advanced by the second claimant that if and to the extent there was an arguable basis for contending her signature on the letter had been forged, it was corrected by a subsequent letter from her solicitors dated 10 May 2021.

21. Returning to the forgery issue, Mr Parker relies in paragraph 45 of his skeleton argument on the non admission contained in paragraph 45 3 of the amended Defence that the 25 April letter was signed by the second claimant. In my judgment the first defendant has failed to establish a more than fanciful case that the 25 April was or might not be signed by the second claimant. My reasons for reaching that conclusions

22. First, there is no evidence filed on behalf of the first defendant that supports a positive case that the signature on the letter was forged. Secondly, the first defendant's own evidence on this issue is conjecture and surmise. In his third witness statement, he asserts that the first claimant, the second claimant's brother, had been seeking to obtain the US$25 million invested for the second claimant and provided for the second claimant by the claimants' late father. This leads the first defendant to say at paragraphs 19 to 20 of his relevant statement:

> "19 ... The receipt of the 25 April 2018 Letter confirmed my view that the First Claimant was seeking to intercept monies which had been earmarked for C2, as does the fact of the First Claimant's participation in these court proceedings. It appeared to me at the time, and it remains my view now, that the 25 April 2018 Letter was sent on behalf of the First Claimant alone, without reference to C2 – hence I do not believe

> that the 25 April 2018 Letter was in fact signed by C2 (as expressly required by clause 1.3 of the 2018 Settlement Agreement).
>
> 20. I cannot conceive of any reason why C2 would have wanted the sum of $25 million which had been earmarked by her father for her benefit, to be transferred to the First Claimant. Neither of the Claimants has put forward any explanation, let alone a credible explanation, for why this was allegedly the case (nor indeed has either of the Claimants ever provided any witness evidence themselves in these proceedings, notwithstanding that there have been numerous issues considered by the Court – such as the Claimants' application for a worldwide freezing order – on which evidence from the Claimants would have been relevant)..."

Thirdly, if that was the first defendant's view, it is not a view he articulated either at the time when the letter was received by him or at any time until his amended defence. Mr Parker submitted that there was no need for the first defendant to so state because the first time the second claimant was alleged to have signed the letter was by amendment to the particulars of claim. This misses the point in my judgment. If the first defendant thought that the letter had not been signed by the second claimant, as he alleges, then he could and would have said so at the time, not least because if he thought the letter was not signed by the second claimant he could not safely make any payments in accordance with the machinery contained in the settlement agreement. Not only did he not say so, but to the contrary, he sought details of the account ostensibly so as he could arrange for the liquidated proceeds of assets constituting the fund to be credited to it – see his email to General Ayad referred to above. .

23. Fourthly, the second claimant has provided evidence on this issue in her first witness statement of 28 February 2022. Insofar as is material to the issue I am now considering, her evidence is to the following effect:

"8. I understand from Mr Gibbs' witness statement that he suggests that my brother is conducting these proceedings without my consent and has undertaken a number of actions without my consent. Mr Gibbs has even suggested that my brother is seeking to improperly obtain the money for himself rather than for me.

9. This is completely wrong and I do not understand how Mr Gibbs could suggest it, having dealt with my family for a long time and with my brother specifically in relation to my US$25 million for a number of years. As I have said -- and as Mr Gibbs is well aware -- my brother has always assisted me and acted on my behalf in relation to these matters. It Is not unusual in Saudi culture for an older brother to adopt such a role in looking after the financial affairs of his younger sister(s), as HRH Prince Khaled did.

10. My brother and I are both represented and advised by [Quinn Emanuel] in these proceedings, because our interests are wholly aligned. I am well aware of the proceedings and am up to date with what is going on in them. To be clear, they are not being conducted without my consent ..."

In relation specifically to the signature of the letter, the second claimant states under the sub-heading "*Letter of 25 April 2018*" as follows:

"15. Mr Gibbs has suggested that this letter was not valid under the settlement agreement and he has gone so far as to suggest that it was in fact sent on behalf of my brother, without reference to me and that I did not actually sign it.

16. Taking the latter points first, I do not understand how Mr Gibbs can say that. My signature appears at the bottom of the letter of 25 April 2018. I do not know if Mr Gibbs is suggesting that my signature was forged, but to be absolutely clear: it was not. I signed the letter of 25 April 2018, by hand, and the document that was then sent to Mr Gibbs by Mr Al Kholaifi was a scanned version of that signed document.

> 17. I was fully aware of what I was signing and I signed the document on my own behalf, not on behalf of my brother. I understand from Mr Gibbs' witness statement that he suggests this cannot be so, because the letter provided that he should transfer the liquidated sums into an account in my brother's name. But as Mr Gibbs would have been well aware, there was nothing surprising or unusual about that given my brother's close involvement in the arrangements concerning this money, including in its transfer to Mr Gibbs in the first place, instructions to Mr Gibbs since then, and the long-running efforts to have the money or my investments returned.
>
> 18. As for the arguments about whether or not the letter is valid under the settlement agreement, I will again leave that to my lawyers. But it was always my understanding that the letter was valid and I never had any cause to even contemplate that it was not: despite what he now says, as far as I am aware Mr Gibbs never suggested that it was invalid. Everyone -- me, my brother and our representatives -- proceeded on the assumption that nothing more had to be done in order to instruct Mr Gibbs to do what he had agreed to do under the settlement agreement. Obviously, if any of us had thought that there was any chance that that was wrong, we would have addressed and remedied the issue..."

The second claimant's solicitor is Mr Khatoun, a solicitor and partner in Quinn Emanuel Urquhart & Sullivan. In his sixth witness statement, he confirmed at paragraph 5 that the second claimant's statement was prepared without any input from the first claimant, as was the letter signed by her on 9 February 2022. This is evidence that I must accept. It was not challenged. It is consistent with the first defendant's conduct immediately after he received the 25 April letter - see Mr Khatoun's sixth witness statement at paragraph 19.

24. Sixthly, although Mr Parker submitted that he wanted to cross-examine the second claimant at trial on this issue, that is unreal. There is no evidence put forward to suggest a realistically arguable basis

for supposing that the second claimant's signature had been forged. That being so, to assert a wish to cross examine on an issue such as that I am considering is precisely the sort of "*something may turn up*" approach which is not acceptable on an application of this sort, and is contrary to the principles referred to by Mr Justice Lewison in paragraphs 2 and 4 of the Easyair summary set out earlier, in circumstances where there is no more than fanciful reasons for thinking that any material additional evidence on this issue can reasonably be expected to become available by the time of a trial.

25. The other point on which the defendant relies turns upon the true construction of the settlement agreement and depends upon the fact that the 25 April letter does not refer to an account in the name of the second claimant but is an account in the name of the first claimant.

26. The first defendant's case on this is that clause 1.3 has to be construed having regard to recital D, and so construed, the bank account referred to in clause 1.3 can only be an account in the name of the second claimant. In further support of that proposition, the first defendant submits that unless construed in that way, effect cannot be given to what he maintains is a contractual obligation that the fund created by the liquidation of the investment portfolio will be managed on behalf of the second claimant by Mr Al Kholaifi.

27. The claimant's primary case is that on a proper construction of clause 1.3, the 25 April letter is a fully compliant letter, so that the obligation to commence liquidation imposed on the first defendant by clause 1.2 was triggered on the receipt by the first defendant of the 25 Until that occurred, the first defendant's obligation was to "... *continue to manage the portfolio and report to* ..." Mr Al Kholaifi. The second claimant's secondary case is that if her primary case is wrong, then the letter was in any event an instruction to commence liquidation and as such should have been complied with. I reject that secondary construction for the following reasons. The trigger event is described in clause 1.2 as being "... *receipt of the letter referred to in Clause 1.3* ..." Clause 1.3 requires that the letter (a) be signed by the second claimant, (b) instruct the first defendant to commence liquidation of the investment portfolio as defined in the settlement agreement, and (c) instructs the

first defendant to consult with Mr Al Kholaifi with respect to the liquidation; and (d) specified a bank account into which "net liquidation proceeds" was to be credited. These requirements are plainly conjunctive, not disjunctive, because they are all linked to each other by the word "*and*". Thus unless the letter complies with each of these four requirements, then it is not "*the letter referred to in Clause 1.3*", as referred to in clause 1.2, which is the only trigger for the liquidation obligation contained in that clause.

28. Returning then to the full requirements for a compliant letter, I have addressed already the signature requirement and need say no more about it. It is not in dispute that the letter sufficiently complies with the requirements referred to in (b) and (c) above, so I need say no more about them either. That leaves only the requirement summarised in subparagraph (d) above. As to that, it is common ground that the account identified in the letter is one in the name of the first claimant. If clause 1.3 is viewed in isolation, it requires that the letter specify only "... *a bank account into which net liquidation proceeds are to be paid* ..." The 25 April letter complies with that requirement. The first defendant maintains, however, that clause 1.3 cannot properly be read in isolation. He says that the contexts within which the construction exercise is to take place is established by the recitals, and that recital D is plain in identifying that

    a. The liquidation proceeds: "... *will be transferred to an account of HRH Princess Deema managed by the Manager* ..."; and

    b. The fund created by the liquidation proceeds was to be be managed on behalf of the second claimant by Mr Al Kholaifi.

29. I regard the last of these two points as entirely immaterial to the issue that arises. The ability of Mr Al Kholaifi to manage the fund is not dependent on the name of the account holder of the designated account to which the liquidation proceeds were to be credited. The ability of Mr Al Kholaifi to manage the funds depends upon him having a mandate in respect of the relevant account. In any event, I do not consider that the reference to it being agreed that the liquidation fund would be

managed by Mr Al Kholaifi, to mean anything other than that at the time the agreement was entered into, management of the portfolio would pass on liquidation from the first defendant to Mr Al Kholaifi. How that intention was carried into effect was exclusively a matter for the second claimant - see clause 2.2 of the settlement agreement.

30. The only point that is material concerns the recital that the liquidated proceeds be transferred to "... *an account of HRH Princess Deema managed by the Manager* ..." Turning first to the textual meaning of this. In my judgment there is no textual requirement that the account holder be the second claimant but merely that the account be one to which her funds could be transferred and managed by Mr Al Kholaifi. Viewed in that way, the informal summary of the arrangements set out in recital D is entirely consistent with the literal meaning of the operative words used in clause 1.3.

31. The first defendant then submits that the construction for which he contends, namely that the account had to be one in the name of the second claimant, arises as a matter of obvious commercial common sense. In my judgment this is mistaken. It is first said that the first defendant was under a contractual obligation to pay the net proceeds to the second claimant. However, that is not an accurate summary of the obligation imposed by the settlement agreement. The obligation was, upon receipt of the clause 1.3 letter, to commence liquidation and then to credit the proceeds of the liquidation to the designated bank account identified in the letter. It is submitted by the first defendant that it was essential that there should be clarity as to the particular account to which the proceeds were to be paid. I agree. The parties achieved that result by requiring that the clause 1.3 letter specify the account to which the proceeds were to be credited.

32. Next, it is said that the construction for which the second defendant contends is necessary to protect the second claimant against the risk that a third party, , claiming to act with her authority, would instruct the first defendant to pay the proceeds into an account not in her name. In context that could only be presumably Mr Al Kholaifi. As to this, I agree that the first defendant had a legitimate interest in obtaining a good receipt, and that on the face of the agreement at least, he was obliged to

accept that Mr Al Kholaifi was authorised to act on behalf of the second claimant. That said, at no stage prior to the making of the agreement did the first defendant dispute Mr Al Kholaifi's authority to act on behalf of the second claimant, nor did he seek any additional comfort on that point. Mr Al Kholaifi's authority does not appear to have been in dispute therefore. However, the real point is that the protection of the second claimant against the fund being dealt with other than in accordance with her wishes was the requirement that the clause 1.3 letter be signed by her. As long as the first defendant dealt with the proceeds of the liquidation process by causing them to be credited to the account specified in the letter signed by the second claimant, then the second claimant was protected because the fund was being dealt with in accordance with her wishes, and the first defendant was protected as well and would obtain a good receipt, because the proceeds would have been paid into the account that the second claimant herself had directed should be used.

33. Next, it is submitted by the first defendant that he "...*cannot conceive of any reason why* ..." the second claimant would want the proceeds to be transferred to an account in the name of the first claimant. With respect, that is not the business of the first defendant and it is wholly immaterial to the true construction of clause 1.3, not least because the relevant account was identified for the first time only after the settlement agreement had been entered into. It is not suggested that the second claimant is not competent to manage her own affairs. No answer is offered to the point she makes in paragraphs 9 and 17 of her witness statement referred to above, to the extent the issue is relevant to the matters I am now considering.

34. Finally, it is said that Mr Al Kholaifi could only manage the liquidation proceeds if they were transferred into an account in the name of the second claimant. I do not agree that that is so. As I have said, Mr Al Kholaifi's ability to manage the funds depends upon the instructions that he receives from the second claimant and on whether he has a mandate in relation to the account to which the proceeds are credited. There is no evidence that is not so in relation to the nominated account. In any event, there is nothing in the agreement that could prevent the second claimant

dealing with her money as she chooses. The first defendant's only concern is to get a good receipt, and that he would get by paying the proceeds into the account identified in the clause 1.3 letter, provided that letter was signed by the second claimant.

35. Returning to the agreement itself, clause 1.3 is expressed in clear and unambiguous terms. Where the parties have used clear and unambiguous language, the court must apply it - see paragraph c of the summary of the principles of contractual construction that I set out earlier in this judgment.

36. There is no reason for departing from the language used in clause 1.3 on commercial absurdity grounds for the reasons that I have explained and in particular no justification of any sort for construing the agreement in a way that restricted the second claimant's ability to deal with her own funds, in the way that she herself chose. The construction for which the second claimant contends delivers the common sense solution that the second claimant was entitled to require that her fund be paid as she chose and directed.

37. If and to the extent there is an inconsistency between recital D and clause 1.3 (which I do not accept for the reasons explained already) , then clause 1.3 prevails - see Qatar National Bank QPSC v The Owner of the Yacht Force India [2020] EWHC 103 (Admiralty) per Teare J at paragraphs 38-42.

38. Before reaching a final conclusion on this issue, I need to consider the first defendant’s submission that the relevant factual matrix material shows that he has at least a realistically arguable case that his construction is correct. This material in summary is that prior to the making of the settlement agreement, there was a discussion about the opening of an account in the name of the second claimant at UBS's Dubai branch. I do not accept that gives rise to a realistically arguable construction that justifies departing from the unambiguous language used in clause 1.3. To my mind, that involves an impermissible reference to the negotiations leading to the settlement agreement. Such material may be looked at for the purpose of exploring the commercial purpose of the agreement, but that is not material to the construction issues that arise. The commercial aim of the contract in this case was to move control of the second claimant's assets from the first defendant,

not to circumvent what she was entitled to do with her own assets. As Lord Justice Leggatt as he then was said in Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526 at paragraph 54:

> "What is not permissible ... is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean ..."

and that this principle operated so as to exclude:

> "... communications which are capable of showing that the parties reached a consensus on a particular point or used in words in an agreed sense ..."

In any event, the pre-contractual communications show that at various points, different solutions were being considered. Even if this material is admissible, the whole of the material would have to be considered, and on that basis, it does not show that the parties had agreed that an account in the name of the second claimant was to be nominated. However, whether that is right or not does not matter. The language used in clause 1.3 is clear and unambiguous. It is not permissible to resort to recitals to reverse or defeat the effect of the clear language used by the parties in the operative parts of the agreement, and it is not permissible to refer to pre-contractual negotiations or previous draft agreements for the purpose of showing what a contract or an express provision within such a contract means, particularly where the agreement or relevant provision has been expressed, as I have said, in unambiguous terms.

39. In those circumstances, I am satisfied to the standard required for a summary judgment application that the obligation to commence a programme of liquidation had been triggered on receipt of the 25 April letter and that as and from that date, the first defendant was required to credit the proceeds of that process to the designated account, being that referred to in the letter of 25 April. In the light of this conclusion, it is not necessary that I consider the claimant's alternative arguments based on waiver and estoppel.

Breach

40. As I understood Mr Parker's submissions, if I concluded that that the 25 April letter was one that complied with the requirements of clause 1.3, then it was not disputed that the first defendant had acted in breach of the agreement by not liquidating the portfolio or at any rate by failing to credit to the designated accounts the proceeds of those assets which had been liquidated.

41. If and to the extent that remains in issue, I am satisfied to the summary judgment standard that the first defendant has breached the agreement. The obligation was both to liquidate and to pay the net proceeds of such liquidation into the designated account. The evidence is replete with requests directed to the first defendant asking that he make the necessary transfers. I do not intend to further lengthen this judgment by referring to each of the relevant emails. They are in evidence.

42. On this basis I am satisfied that the cash referred to in the schedule annexed to the settlement agreement should have been transferred to the designated account on or shortly after the 25 April letter was received. It was suggested that some part of the fund needed to be retained in order to enable the first defendant to manage the portfolio pending its liquidation. The difficulty about that is that it was not an issue raised by the first defendant with Mr Al Kholaifi, as he could and should have done, applying clauses 1.2 or 1.3 of the agreement, and in any event retaining any part of the portfolio once it was liquid, that is reduced to cash or its equivalent, was contrary to the instructions contained in 25 April letter, which was to "... *commence transferring the full amount of my investment along with all material returns* ..." Similar considerations apply to the proceeds of sale, or the second claimant's share of the proceeds of sale of the residential property at Park Road in Richmond.

43. In addition, the schedule to the settlement agreement refers to a portfolio of company shares then valued at US$2.536 million. The shares were said by the defendant's solicitors to have been sold on or after 30 June 2019. It was said on behalf of the first defendant that the proceeds: "... *had been invested in Silver Arrows Marine and general corporate costs and expenses of the Silver Arrows*

Marine group of companies ..." That is an admitted breach of the settlement agreement, which required the proceeds to be paid into the designated account. The Silver Arrows Marine group of companies is a group of companies closely controlled by the first defendant, and on no view did the settlement agreement permit the liquidated proceeds of any part of the investment portfolio to be invested either in that group or much less by meeting the general corporate costs and expenses of that group.

44. Turning now to the futures trading contracts, they were valued in the schedule to the agreement at US$3.476 million. This was a portfolio of futures contracts held, as I understand it, with UBS. The only explanation for what has become of those is that offered by the first defendant's solicitors in correspondence – that is that: "*these investments matured and the net proceeds were invested in Silver Arrows Marine group of companies ..."* It is not suggested this occurred other than after the settlement agreement had been entered into and the 25 April letter received by the first defendant. There is no information available as to the sums generated at maturity. Clearly however, some funds were generated by the process if they were "… *invested in Silver Arrows Marine group of companies* ..." as the first defendant's solicitors have stated. In those circumstances, this again is a manifest and admitted breach since the net proceeds should have been credited to the designated account.

45. The next major asset identified in the schedule is the Credit Suisse managed securities valued in the schedule at US$2.323 million. The position is unclear, but it is apparent from the first defendant's email of 28 February 2019 that those assets had been liquidated, albeit the first defendant asserts at a loss of over US$1 million. Assuming that to be so, that would have meant cash being released by the liquidation process or maturing process of at least $1 million that should have been but had not been credited to the designated account. That again was a breach of contract to which there is no answer offered. According to the schedule provided by the first defendant concerning the state of the portfolio as at 30 June 2019, the value of the Credit Suisse securities had dropped to US$65,000

by that time. As is submitted by the second claimant, this suggests that some liquidation must have taken place, although different explanations have been offered by the first defendant at various stages. The obfuscation that surrounds this issue is of the defendant's own making. On the material that is available, I am satisfied that a breach has been made out. Quantifying how much was released by the liquidation process is not possible on the materials available.

46. In those circumstances, I conclude that the second claimant is entitled to judgment for damages to be assessed for breach of the settlement agreement.

47. That leaves the issue of the primary claims. Provisionally, pending further submissions by counsel for the parties, I consider that if I am to enter judgment on the alternative claims in favour of the second claimant, then that must be on the basis that the primary claims are stayed. However, as I have said, I will hear further submissions on that issue at the conclusion of this judgment.

Interim Payment

48. I now turn to the application for an interim payment, or, on the alternative, for summary assessment of the damages due in respect of the breach of contract I have found established to the summary judgment standard.

49. Plainly, in relation to the application for an interim payment, jurisdiction to make such an order has been established by my conclusions on the liability issues. I am satisfied by reference to what I have said already in relation to breach that the second claimant is entitled to an interim payment to be quantified by reference those elements of the portfolio that have been liquidated at least where there is some information as to the sums realised on liquidation.

50. I remind myself that any sum ordered in relation to an interim payment application must not exceed a reasonable proportion of the likely amount of any final judgment. In a case such as this, that will mean that the proportions may differ in relation to and depending on which element of the portfolio is being considered, although in the end, there will be one interim payment order.

51. In arriving at a conclusion as to what is reasonable, I bear in mind that the valuations in the schedule are net of a nominal deduction for realisation costs, which it is submitted on behalf of the claimant may be in excess of what in fact could reasonably be expected to be incurred by such activity. Furthermore I bear in mind that it is not suggested that any overpayment that is made as a result of an interim payment order cannot be repaid by the second claimant if a court concluded on the damages assessment hearing that such a repayment was required.

52. As I have said already, I accept that there is a distinction to be drawn between those assets which have been realised and those that have not. I accept that it is not appropriate to direct any interim payment in respect of unrealised assets. What if anything ought to be recovered in respect of those will involve a factual enquiry only possible at trial, as to when (if at all) the relevant assets ought to have been sold and at what price.

53. Before turning to the quantification of the interim payment, I must address the first defendant's case set out in paragraph 35 of his third witness statement, that the second claimant did not have any legal or beneficial interest in the assets referred to in the schedule but rather: "... *the value of [the second claimant's] fund was benchmarked against the book values of the assets* ..." The first defendant does not further explain what that means, nor did it feature in Mr Parker's submissions. In my judgment this argument is plainly contrary both to recital C, and more particularly clause 1.1 of the agreement. It is also contrary to the scheme of the settlement agreement generally, which called for the liquidation of the portfolio as identified in the schedule and the crediting of the proceeds of such liquidation to the designated account. As formulated it is entirely incoherent.

54. Turning then to the various liquidated elements. I come to the conclusion that there should be an interim payment calculated as follows. In relation to the cash element of the portfolio, I am satisfied that a sum equivalent to the whole of the sum held at the date of the agreement should form part of the interim payment, and therefore, that the whole of the $826,117 should be included within the interim payment. Similar considerations apply in relation to the Park Road property, where the

interim payment should be calculated by reference to the whole of the sum of £328,750 that is said to be due to the second claimant in respect of the sale of that property.

55. As to the balance of the realised assets, some caution is required because of the absence of proper information as to what was realised, when and at what price, although as I have said, the relevant information is or should be available to the first defendant. Adopting that cautious approach, the interim payment should include a payment of $250,000 in respect of the future contracts for the reasons identified in paragraph 50.3 of Mr Atrill's skeleton argument. It should include $1 million in respect of the Credit Suisse managed securities, which I arrive at taking account of the loss to which the first defendant refers in the correspondence I mentioned earlier in this judgment, and an allowance for possible adverse market movements in the period that it could reasonably have taken to liquidate that asset class, and an interim payment of £1,500 in respect of the publicly quoted shares, on the basis that the first defendant maintains that there were at least seven different shares held with a value each of £250 or thereabouts, and on the basis that those could and should have been realised almost immediately following the conclusion of the settlement agreement and the receipt of the 25 April letter.

56. On the evidence as it is currently, I do not consider it is appropriate to direct an interim payment other than one calculated in the way that I have described.

57. In conclusion, therefore, two issues remain as I see it. First, the appropriate order to make in relation to the primary claims and secondly, what directions need to be given for the assessment of damages, and in respect of that, I invite submissions from counsel.