Neutral Citation Number: [2022] EWHC 690 (Comm)

Case No: CL-2016-000553

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2022

Before :

MRS JUSTICE COCKERILL

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Between :

(1) RECOVERY PARTNERS GP LIMITED **(2) REVOKER LLP**	**Claimants**
- and -	
(1) MR IRAKLI RUKHADZE **(2) MR IGOR ALEXEEV** **(3) MR BENJAMIN MARSON** **(4) HUNNEWELL PARTNERS (UK) LLP** **(5) HUNNEWELL PARTNERS (BVI) LIMITED** **(6) PARK STREET (GP) LIMITED** **(7) PARK STREET (BR) LIMITED** **(8) PARK STREET (GS) LIMITED** **(9) PARK STREET (L) LIMITED**	**Defendants**

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Shaheed Fatima QC, Tom Cleaver, Will Bordell and Marlena Valles (instructed by **Brown Rudnick LLP**) for the **Claimants**
Stephen Cogley QC, Simon Birt QC, Watson Pringle and Farhaz Khan (instructed by **Signature Litigation LLP**) for the **Defendants**

Hearing dates: 18 October – 26 November and 20-21 December 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii and The National Archives. The date and time for hand-down is deemed to be Friday 25 March 2022 at 10:00am.

Mrs Justice Cockerill:

Introduction

1. This is the Phase 2 liability/quantum trial, following an earlier trial in 2018 in which I found that the Defendants had breached fiduciary duties owed to the Claimants by appropriating a developing business opportunity which was to be regarded as an opportunity of the Claimants. The size of the claim now said to flow from that finding is US$263,000,000.

2. The business opportunity is obviously therefore substantial. It is also perhaps an unusual one. As described at greater length in the Phase 1 judgment ([2018] EWHC 2018 (Comm) [2019] Bus. L.R. 1166), it concerns services provided to "the Family", who are family members of the deceased Georgian billionaire Arkadi "Badri" Patarkatsishvili, who died unexpectedly in February 2008. Prior to Badri's death, he had owned assets in various jurisdictions, which were in many instances held by structures and individuals in ways which meant that they were not readily identifiable as property of his estate.

3. Following his death, the Family were left unsure what assets existed or how to access them. Because of the unconventional asset owning structures, assets were also under threat from various third parties, who acted quickly following Badri's death to seek to control the assets. The Family decided they needed assistance with identifying, protecting and recovering the estate's assets (the "Recovery Services").

4. The Claimants and the Individual Defendants (Messrs Rukhadze, Alexeev and Marson) were involved in the Recovery Services together in the early years but fell out. A dispute ensued as to whose was the right to pursue the Recovery Services. Was it a right which vested in the Claimants and/or a company called Salford Capital Partners Inc ("SCPI"), owned by Mr Eugene Jaffe (for whom in broad terms the Individual Defendants at one time worked)? Or was it a right which Messrs Rukhadze and Alexeev and the other Individuals who provided the Recovery Services before May 2011 were entitled to pursue when they divided themselves from SCPI/Mr Jaffe?

5. I concluded that the former was the right answer – that at the time when the Individual Defendants parted company with SCPI there was still a maturing business opportunity ("MBO") being actively pursued by SCPI and that their actions in resigning with an intent to compete and then taking over that business opportunity were breaches of fiduciary duties which they owed resulting from the positions they held within SCPI and/or or the claimants.

6. Following that decision, the Claimants have opted to pursue an account by way of remedy. This trial is intended to decide the principles of taking of the account and certain limited issues as to valuation. It was originally intended that there would be a Phase 3 trial before a Master which would finalise the amount due. In the event both parties have moved away somewhat from that original plan; consequently this trial has involved (as its six week length indicates) a significant amount of detail. At this point I am in a position to make an order which sets out an overall figure for the account in relation to the majority of inputs, albeit that (i) the valuation of one asset remains to be finally determined and (ii) issues as to the sums which each Defendant is liable to pay – in the light of the sums which they have received - will also remain to be determined.

7. In "macro" terms the debate proceeds against a background where the relevant business opportunity was pursued between before the date of the breach of fiduciary duties in early 2011, through to around spring 2018. Within that period a formal agreement between the Family and the Defendants was operative between late 2012 and spring 2018. Little was paid by the Family to the Defendants before 2017, but loans were extended to them. During that time – largely from around 2015 - the Defendants also made a number of investments which have been said to be significant in the context of the account.

8. In very broad terms the battle lines are drawn up thus:

    a. The Claimants maintain that the Defendants should pay over all proceeds which have come to them via the business opportunity they pursued. Prior to and at trial that case extended to a number of the subsequent investments.

    b. The Defendants maintain that a number of factors should mean either that the account should produce a close to zero sum or that certain proceeds should not be paid over at all or that there should be a considerable reduction in the amount to be paid pursuant to the account – a reduction in the region of 60%. In particular they say that this is a "strident and egregious" case of unconscionable behaviour on the part of the "victim" of the breach and that this should have a real impact on the amount awarded.

    c. In relation to this the Defendants adopt a somewhat "free range" approach – invoking a number of concepts derived from certain of the authorities both individually and as aggregated points. This approach leads to questions about the correct approach to accounts generally as well as a need to consider carefully the ambit of the case law on a number of distinct issues.

    d. As to quantum, there are differences of about US$7.8 million when it comes to the question of what receipts respond to the inquiry ("the Responsive Receipts") and of US$20.5 million when it comes to the correlated, Responsive Expenses. So far as investments made with the proceeds are concerned there is now (following a refocussing of the Claimants' case in closing) a single investment worth US$49.9 million in issue.

9. By way of final introduction I note that this dispute has, in many ways, a family flavour unusual in the Commercial Court. Not only does it concern work with an actual family, but also Mr Jaffe and the Individual Defendants, who are the UBOs of all the corporate claimants and defendants, had worked closely together for some time before they parted ways. The dispute is hence flavoured with the kind of personal bitterness often seen in family disputes. The case has been pursued on both sides with utter commitment, verging on venom. This is illustrated by the fact that the Defendants' estimated costs for this phase of the trial were in the region of £20 million.

10. Consistently with this, during the course of the trial a huge number of issues – factual, legal and expert – were raised. Each party served 99 page skeletons. The written closing submissions for each party were limited to 200 pages, but were accompanied by dense appendices. Plainly therefore it is impossible to deal with all of the issues at length. This judgment is therefore structured as follows: Part 1, dealing with the basic timeline and facts which any non-party reader may need in order to comprehend the judgment;

Part 2 which provides a summary of the issues and the trial, Part 3 which deals with the law, Part 4 which deals with the essential factual and expert issues which remain and the application of that law to the facts and Part 5 which contains conclusions on contingent issues.

11. In more detail:

Introduction 2
Part 1: The Facts 5
  Badri and his assets 6
  The Individual Defendants 7
  Before the breakdown: 2008-2011 8
  Between the breakdown and the IRSA: May 2011 to September 2012 11
  The IRSA 19
  The Recovery Services post the IRSA: October 2012-December 2017 21
  After the termination 28
Part 2: The Issues and the Trial 29
  The issues on the scope of the account 29
  The Responsive Receipts and Responsive Expenses 29
  Common Ground 29
  The Issues 30
  The Responsive Investments 30
  The Trial 31
Part 3: The Legal Issues 38
  Legal issues: backdrop 39
  The deterrent dimension 40
  Legal issue 1: Equitable principles v. the circumstances of the case 44
  Legal Issue 2: the nature or magnitude of the breach 47
  Legal Issue 3: "reasonable relationship" vs "equitable causation" 48
  Delay 52
  Pre-existing agreement 64
  Allowance for skill 65
  The relevance of the company to whom duties were owed: Mr Marson 68
Part 4: Fashioning the account 69
  Original scope of the breach found 69
  The "transformation of the opportunity" 72
  Insufficient connection: October 2012 "or such other date as the Court may determine" .. 75
  Insufficient connection: RBS funding 76
  Alleged profit-sharing agreement 78

Estoppel 80
Skill, time and risk 80
The Defendants' conduct of the litigation 87
Connection issues: conclusion 88
The expert issues 88
Forensic accounting 89
Responsive Receipts 90
Valuation issues 96
Rustavi Steel LLC (by valuing the interest in Tolanius Beheer BV) 97
Teleimedi LLC and other related entities (by valuing their interested in Georgian Media Production Group Limited (GPMG) 101
Studio Maestro LLC (by valuing their interest in Media Finance Group BV) 104
Benahavis/Tidjicka 104
Zurgovani LLC; 108
Responsive Investments 108
Responsive Expenses 109
Deductible Costs 112
Conclusion: fashioning the account 113
Part 5: Contingent Issues 114
The 50/50 agreement: revocable, revoked or not? 114
Mr Jaffe’s Conduct 115
Mr Jaffe's delay 117
Appendix: Mr Jaffe’s Conduct 119
Introduction 119
Conduct Part 1: conduct said to have affected recovery 119
Conduct Part 2: alleged attempts to impede recovery 129

Part 1: The Facts

12. A more detailed account of the “back story” to this case can be found in the Phase 1 judgment. Given the issues for this Phase 2 trial the account below focuses on:

    a. The relevant assets which are very much in focus for the purpose of the account;

    b. The chronology against the background of which the factual issues take place.

13. As part of the factual account I have also endeavoured to identify where factual issues which recur later in the judgment fit in to the overall sweep of the story.

Badri and his assets

14. The proceedings concern services provided to "the Family", who as previously noted are family members of the deceased Georgian billionaire Arkadi "Badri" Patarkatsishvili, who died unexpectedly in February 2008. Badri had been a high-profile businessman and politician in Georgia. He was for quite some time close to Boris Berezovsky.

15. The principal of the Claimants, Mr Jaffe and his company SCPI, were close to Badri. Indeed, SCPI was incorporated in 2001 to provide investment services to Badri (and Mr Berezovsky).

16. SCPI was closely involved before Badri's death with the first asset of which mention needs to be made: New World Value Fund Limited ("NWVF"). This was incorporated in Gibraltar in 2002, to be managed by SCPI. It was funded by investments from Badri and Mr Berezovsky. It represented one of Badri's largest investments. Its original intention was to acquire assets in the food and beverage sector in Central and Eastern Europe.

17. Linked to NWVF was Value Discovery Partners LP ("VDP"). VDP was a private equity vehicle incorporated in the BVI and was managed by SCPI, which was its General Partner. NWVF's investments were structured through VDP.

18. The original term of VDP was due to end on 1 July 2008. As to extensions:

    a. Clauses 11.2.1 and 11.2.3 of the VDP Articles permitted a one-year extension by SCPI acting alone, and a further two years by agreement with the LP, in each case "*in order to permit an orderly liquidation of the Partnership Assets.*"

    b. If SCPI issued a notice to the LPs that it was not possible to carry out orderly liquidation of the assets by the termination date, then the GP could extend by such further time as is necessary to complete the "orderly liquidation", with a backstop date of 4 years – so 1 July 2012 (Cl. 11.2.3).

    c. Further and in any event, upon the termination of the Partnership, SCPI was obliged to carry on no further business, and wind up the affairs of the partnership qua "liquidating trustee" (11.5.3).

    d. The Articles proscribed that such winding up was to be by (i) selling the assets "*on the best terms available*" or (ii) distributing them in specie (11.5.4).

19. SCPI as GP had unrestricted powers to manage the partnership's business including by borrowing, investing and selling assets (Cl 4.1.1). SCPI owed fiduciary duties to the VDP investors. There was an Investment Committee ("the IC") which was to provide non-binding advice to SCPI, and which SCPI had to consult on all major management decisions (Cl. 4.3). Mr Alexeev (from 2011) and Mr Rukhadze (from 2012) became members of the IC.

20. SCPI's executives were entitled to 30% of profits and gains made on the sale of the investments (24% for general management of the assets ("Senior Carried Interest") –

payable to KBC, and a further 6% for the management of assets comprised in individual 'strategies' ("Strategy Carried Interest") – payable to SCI).

21. Another significant investment of Badri's was Teleimedi LLC ("Imedi"). He founded it as the first independently owned television station in Georgia with nationwide coverage. His ownership of Imedi and the independent stance taken by Imedi caused significant tension with the Georgian government. Imedi's independent status is in valuation terms a key issue when the financial aspect of this case is in focus.

22. A third significant investment was Fisher Island. Fisher Island is a high-end island development located off the coast of Miami. In 2004, Badri purchased various plots of land with the intention of building a luxury real estate development. The investment was subsequently placed under Badri's Valmore Trust and the land remained largely undeveloped when Badri died in 2008.

23. A final asset was Rustavi Steel. It is a large metallurgical plant in Georgia. It was acquired by Badri in 2005. It was an asset which formed a key part of the Recovery Services and whose value is one of the valuation issues.

24. As previously noted prior to Badri's death, he had owned assets in various jurisdictions, which were in many instances held by structures and individuals which meant that they were not readily identifiable as property of his estate. This meant that assets were also under threat from various third parties, who acted quickly following Badri's death to seek to control the assets. Amongst these were Mr Berezovsky himself, another well-known Russian businessman Vasily Anisimov ("Mr Anisimov") and a relation of Badri, Mr Joseph Kay. For example, following Badri's death Mr Kay – acting with the Georgian government – annexed/expropriated Imedi and Rustavi. Mr Kay also laid claim to Fisher Island.

25. The Family decided they needed assistance with identifying, protecting and recovering the estate's assets (the "Recovery Services"). Because Mr Jaffe and his company SCPI were close to Badri, they were in a prime position to seek to provide those services.

The Individual Defendants

26. As noted in the Phase 1 judgment the First Defendant, Mr Irakli Rukhadze, was a director of SCPI from 2004 until December 2009 and was from 2004 the head of its Georgia office. As such he had come to know and work closely with Badri and was one of the individuals trusted to be the nominal holder of assets for Badri. He was involved in the management of Imedi from its inception. He had heard conversations which gave an insight into Badri's arrangements for the holding of other assets. Mr Rukhadze knew the Family also before Badri's death and had developed a good relationship with them which was distinct from Mr Jaffe's own relationship with the Family.

27. Mr Rukhadze developed his own business associations and allies. Certain of them have come to give evidence in the trial. An example dating to this early period is that Mr Rukhadze worked with Mr Frank Hunnewell, an American investment banker who was involved with Badri in a project known as Maudi. Mr Hunnewell was to become the inspiration for the name of the Defendant companies.

28. In addition Mr Rukhadze had a significant Georgian background. He is a Georgian national with knowledge of the Georgian market, and a fluent Georgian speaker. His family, and perhaps particularly his mother, were well connected in Georgia and able to facilitate access for him to influential individuals.

29. Mr Alexeev is a Russian native with a background in economics, who had previously worked for McKinsey & Co and had various financial investment roles in New York, Russia and Georgia. He worked in various locations around the world before joining the Recovery Services project from the start of 2009. He was involved in running NWVF, where he eventually became a member of the Investment Committee of VDP, and in the extraction of value from those assets.

30. Mr Marson had been a qualified solicitor since 2001 and previously worked for leading UK and US firms. He also has experience in the property industry having managed a real estate law firm in Spain for two years whilst on sabbatical from one of those firms. He was recruited as described further below in late 2009.

Before the breakdown: 2008-2011

31. On 12 October 2008, the Family signed a non-binding term sheet with SCPI governing provision of the Recovery Services ("the First Term Sheet"). Mr Jaffe was very keen to ensure that any agreement contained provision for a new private equity fund for him to manage, as he had managed VDP.

32. It is the Defendants' case that this is around the time when it was first orally agreed between Mr Jaffe and Mr Rukhadze that they would share the profits of the Recovery Services as to 60% for the Pall Mall team (including Mr Jaffe) and 40% to Mr Rukhadze. The existence of such an agreement is an issue in the claim (LOI 20).

33. The Claimant companies ("RP" and "Revoker") were established by Mr Jaffe/SCPI with a view to their forming part of a structure for the agreement with the Family. Revoker was incorporated in England and Wales in 2008 with Mr Jaffe, Mr Rukhadze, Paul Blyumkin, Peter Nagle, Jamal Khan and Kira Gabbert as members. Mr Rukhadze's membership was terminated shortly afterwards. RP was incorporated in the BVI on 3 November 2008.

34. Later, in December 2008 Mr Igor Alexeev ("Mr Alexeev") was recruited to work on the Recovery Services. His initial remuneration was based on a package of £30,000 per month plus accommodation.

35. Also in December 2008 Mr Berezovsky commenced three related Chancery Division actions against several defendants, including the Family and SCPI ("the Chancery Actions"). Mr Berezovsky claimed – amongst other things – an entitlement to 50% of Mr Patarkatsishvili's commercial assets, including NWVF. This called into issue whether it was or was not the case that he and Badri had previously concluded an "economic divorce". At the same time, Mr Berezovsky was pursuing an already live Commercial Court action issued in 2007 against Roman Abramovich and others ("the Abramovich action").

36. The Individual Defendants managed the defence of Mr Berezovsky's claims in England, and also separate proceedings commenced by the Family in Gibraltar against the trustee

and protector of the majority of the entities through which Badri's interest in NWVF were held.

37. Mr Alexeev was admitted as a member of Revoker on 17 April 2009, whilst Mr Rukhadze was re-admitted to membership. On 5 October 2009, Mr Marson signed an employment contract with Revoker to become its chief legal counsel. His remuneration was £150,000 plus a bonus of £35,000.

38. Throughout 2009 SCPI, the Claimants and the Defendants proceeded to try to recover assets for the Family (with limited success) – and also to persuade the Family to sign an agreement with them for the Recovery Services (with no success), producing a second draft term sheet. Meanwhile they were remunerated with limited management fees and loans.

39. As I have noted in the Phase 1 judgment the lion's share of the active work in this period was done by Mr Rukhadze, Mr Alexeev and Mr Marson, the Family's office on Park Street in Mayfair. A further two employees (Ms Diana Miftakhova and Mr Filip Karadaghi) were added to the "Park Street team". Mr Jaffe headed up the main SCPI team, also referred to as the "Pall Mall team", SCPI's office being located in Pall Mall.

40. On 12 January 2010 Mr Rukhadze circulated Mr Jaffe's revised term sheet, which he believed that the Family would execute ("the Second Term Sheet"). The January 2010 term sheet provided in relation to the new private equity fund that the first US$400 million of recoveries would be for the Family to use as they saw fit. The Family would then be entitled to elect between (a) using the next US$400 million of recoveries to set up a private equity fund; or (b) paying a break fee to the Principals of up to US$50 million (the precise amount would depend on the level of recovery above the initial US$400 million).

41. As recorded in the Phase 1 judgment following this there were discussions with the Family and steps were taken to set up a structure on the SCPI/Revoker side. But the Family's view would not align with that of SCPI. From May 2010 relations between Mr Jaffe and the Family and Mr Jaffe and Mr Rukhadze began to sour. The Park Street team started to draw away from the Pall Mall team. There was a row over summer 2010 about the Family's attempts to reach settlements with Mr Berezovsky and Mr Anisimov at the same time – and about contact which Mr Jaffe initiated with Mr Anisimov.

42. By September Mr Jaffe and Mr Rukhadze were talking about a parting of the ways, on terms whereby SCPI would withdraw from an active role, but nonetheless receive a share of any proceeds of the Recovery Services, reflective of the fact that they were a "Salford Project".

43. In September 2010, the Family agreed a settlement with Mr Anisimov, under which Mr Anisimov agreed to pay between $300 million and $500 million to settle the Family's potential claims against him ("the $300 million Agreement").

44. Between September 2010 to May 2011, the relationship between Mr Jaffe and both the Family and Mr Rukhadze deteriorated further. During this period, there were ongoing emails and discussions as to the future of the Recovery Services. Negotiations took place between January 2011 and May 2011 between Mr Jaffe, the Defendants and the Family in respect of the future of the Recovery Services.

45. Mr Jaffe in this period sought to push the Family into an agreement, while at the same time trying to exert more control over Mr Rukhadze and Mr Alexeev, including warning them about the existence of their fiduciary duties. A letter sent on 9 April 2011 stated:

> "It follows that if you or any other members of the Revoker team were to seek to conclude personal arrangements with the Family, you or they would be in flagrant breach of your duties to Revoker. You would also be required to account to Revoker, as set out above, for any benefit you gained personally from any such arrangement and any other profits, or pay damages for any loss caused by any such breaches."

46. The Individual Defendants during this period made plans to set up Hunnewell and to continue to provide the Recovery Services "seamlessly" in the event of a split. "New Revoker" was very much in discussion amongst them and their intimates.

47. On 13 May 2011 Salford Georgia suspended Mr Rukhadze from his duties as Managing Director of Salford Georgia and prohibited him from contacting other Salford Georgia employees.

48. Following this, there was a meeting on 16 May 2011 and a written resolution involving all Revoker members except for Mr Rukhadze and Mr Alexeev regarding their actions in respect of the provision of Recovery Services. Consequently, Mr Rukhadze and Mr Alexeev were suspended from Revoker and the Recovery Services.

49. On 16 May 2011 Recovery Partners wrote to the Family attaching a resolution made by Revoker which prohibited Mr Rukhadze and Mr Alexeev from communicating with the Family in relation the Recovery Services or the performance thereof. Mr Marson accepted that from this point he knew of the possibility of a claim or at least a legal risk: "*with the correspondence we got there was clearly a risk, yes*".

50. Revoker wrote to the Family on 19 May 2011 reassuring them that the Recovery Services would continue notwithstanding Mr Rukhadze and Mr Alexeev's suspension (and the prohibition on Mr Marson from communicating with them), and whilst they could be called upon to carry out discrete tasks, the other Revoker members and employees were fully committed to continuing the Recovery Services.

51. On 25 May 2011, the Family, via Olswang LLP, wrote to RPGPL to terminate their relationship with the Claimants. It is the Defendants' case that by this date, a prevailing profit share agreement as between Mr Jaffe and Mr Rukhadze was that any future carry that may be obtained as a result of the then ongoing negotiations with the Family would be split as to 50% to the Pall Mall Team and 50% to Mr Rukhadze and Mr Alexeev. This issue underpins LOI Issue 20.

52. On the same date, Mr Marson emailed Mr Jaffe and cited his frustration about his employment contract with Revoker. Mr Jaffe replied on 27 May 2011, accepting that Mr Marson's email amounted to a repudiatory breach. Following a breakdown in relations, Mr Rukhadze and Mr Alexeev resigned from Revoker on 26 May 2011.

53. There is an issue between the parties as to whether the opportunity was effectively dead from this point so that either the breaches by the Defendants were minor and not

causative (LOI 25.2) or so that it might be said that the business opportunity was subsequently transformed and the benefits flowing from it lacked a sufficient connection to the breaches (LOI 15).

Between the breakdown and the IRSA: May 2011 to September 2012

54. Following the Termination Date, the Defendants continued to provide Recovery Services to the Family initially on an ad hoc basis. The Family's needs in this respect were pressing, and it was critical that the Recovery Services continue (a point made by the Defendants in unchallenged evidence).

55. Recovery Partners sent a letter to Mr Rukhadze dated 27 May 2011 (which Mr Jaffe confirmed had been written with the assistance of paid legal advice), by which the Claimants reserved their rights including to seeking an account of profits of the Recovery Services but did not direct the Defendants to cease providing the services.

56. In June 2011, the Defendants - via Herbert Smith Freehills ("HSF") – wrote denying the Claimants' allegations, seeking details of the basis for the allegations and making it clear that, whilst there was at that stage no agreement for the Defendants to provide any services, the Defendants would assist the Family as required.

57. The Claimants did not respond to this letter and so HSF wrote again on 14 June 2011 requesting proper particularisation of the allegations against the Defendants who "*cannot be expected to tolerate the uncertainty that you seek to create*" and further stating that, unless the allegations are withdrawn or particularised, the Defendants reserved the right to seek appropriate declaratory relief. When asked why he did not clarify his position (either by particularising the allegations, or withdrawing them), Mr Jaffe sought to characterise the HSF letter and any response as a "pure legal" matter for the lawyers, not him.

58. The Claimants responded to HSF on 16 June 2011, repeating that they reserved their right to sue the Defendants for damages or an account of profits and stated the Defendants must particularise the basis for any declaratory claim in accordance with Pre-Action Protocols. This correspondence forms part of the arguments on delay (LOI 26).

59. There is clear evidence that in this period Mr Jaffe was (unsurprisingly) enraged at both the Defendants and the Family. His prospects of a golden payoff appeared to have been snatched from him by associates, some of whom at least he had liked and trusted. What he considered his considerable loyalty to the Family had been flung back in his face. He stormed via text to Mr Blyumkin: on 5 June 2011: "*...I will do everything to make their [the Family's] life miserable until we get our money. All 100% of Revoker proceeds.*"

60. He also mulled inventive ways of bringing trouble into the Family's life as can be seen from a series of text messages he sent to Mr Ruslan Fomichev in June 2011:

    (1) "*RA buying Fund and Russians freezing proceeds (I am sure RA and you can get some back). To be honest, I plan to initiate the discussions on the second part. I will be merely cooperating with Russian authorities who approach me first*."

(2) "*Have them write a letter to Salford. / Them, who? / Those who want to freeze BB money? We will cooperate.*"

(3) "*Our best leverage is when we get close to cash – helping Russians freeze it or … We play cool as if we will do something and they will probably prefer to settle last minute. If there is a comprehensive deal between BB and Family (if it will last) it could be a comprehensive settlement with all of us, including on Revoker. We must play cool and make sure they start panicking when well over $1bn start coming in.*"

(4) "*Russians going after Inna will be very strong move. Now they will have a very good reason / excuse to do it. She is really afraid of it. I really wonder what is VA position.*"

61. At the same time Mr Jaffe pondered how best to flavour the dish of revenge -and a wait and see game was certainly part of his thinking. In a text to Mr Fomichev he said "*…Family/Irakli logic today. They know they have done something really bad against Salford and are afraid of us…At stake about $150m (payable only when recovery takes place) but damages for all are far higher…*".

62. In later messages to Mr Fomichev including one sent on 26 June 2011, Mr Jaffe anticipated bringing a claim "*for value in 3 years, without damages and interest*" worth "*about $180m*". One option he was mulling therefore appeared to be playing a long game in hope of extracting maximum value for the claim. Whether a decision was taken on this deliberately, at this point, is part of the delay issue (LOI 26) between the parties. While I deal with delay separately later in the judgment it makes sense to deal with this early part of this disputed issue here.

63. It seems clear and relatively undisputed on the evidence that by the end of summer 2011 Mr Jaffe had decided against suing the Defendants for the present. His evidence was that at this stage this was about commercial interests, not his finances. In essence it was because his own interests were aligned with those of the Family. The points in his mind were the outcome of the Berezovsky trial and the VDP exit. His evidence was that suing the Defendants at this stage would be acting like "*an elephant in a china shop*".

64. While the Defendants urged me to reject this evidence (not least because Mr Jaffe's pleaded reason was impecuniosity) it rang true. This period appears to have been a hiatus while Mr Jaffe indulged in a lot of angry communications (such as the Fomichev texts) and, as he would put it, nursed "bad thoughts"; but while he also pondered what the best way forward was for his interests. Further it is self-evident that it was not yet clear that the Defendants would themselves achieve a deal with the Family. There was therefore a commercial side to the decision to hold fire, as the Defendants positively asserted.

65. This quasi-reflective approach also feeds into his conduct in relation to Mr Berezovsky. It was not until later that Mr Jaffe aligned himself with someone whom he knew to be hostile to the Family (Mr Anisimov). In 2011 and early 2012, it would have been quite simple to align himself with Mr Berezovsky if he wanted to act in a way which was hostile to the Family; but he did not do so. As at 2011 there was no "wider reckless" conduct in relation to the VDP assets as the Defendants alleged.

66. It follows that not launching proceedings at this point is something which cannot fairly be categorised as delay for the purposes of an unconscionable delay argument. The question of delay will however have to be revisited later, because in the event these proceedings were not started until late in 2016.

67. Moving on, on 6 July 2011, a settlement was reached between the Family and the Georgian government to return certain expropriated assets, including the Rustavi metallurgical plant.

68. In July 2011, following unsuccessful negotiations for Mr Rukhadze to take over Salford Georgia from SCPI, Mr Jaffe sent Mr Nagle to the offices of Salford Georgia, together with some security officers, to shut it down. It is common ground that documents seized from the offices were given to the Georgian law firm, BLC, who were at the time acting for Mr Kay. The closure of Salford Georgia is one of the matters of conduct relied upon by the Defendants under LOI 28.8 as actions taken with the deliberate intent of impeding the Recovery Services, and hence as making some reduction from the account appropriate.

69. Between August and September 2011, the Individual Defendants began formal discussions with the Family regarding a deal for providing the Recovery Services and the creation of the Hunnewell corporate structure. Hunnewell (UK) Ltd (the Fourth Defendant) and Hunnewell (BVI) (the Fifth Defendant) were incorporated on 26 and 27 September 2011.

70. Initial proposals put forward by the Defendants were not acceptable to the Family. On 28 September 2011 Mrs Gudavadze's son in law Mr Hunyak[1] wrote an email about a proposal which Hunnewell had put forward saying that it was:

> "necessary to explain why the suggested Hunnewell variant in [sic] inacceptable…Besides, I consider that sitting at the negotiations table with the specialists who are supposedly mistaken for the third time, with regard to one and the same contract which is constantly changed not in our favor, we, obviously, make the mistakes which encourage the opposite side to make such actions. We would not like to think that we are made a fool of, but this is how it feels."

71. This email also referred to the proposal as "*one and the same contract, constantly changed not in our favour*".

72. On 5 October 2011, the Family obtained a certificate of inheritance in Georgia, allowing them to be recognised as both heirs and executors of Badri's estate.

73. Also in October 2011, an outline agreement in the form of the Hunnewell Term Sheet was agreed (on a non-binding basis) between the Defendants and the Family – it was then provided to the law firm Olswang to prepare a draft agreement. This developed over the next 11 months, through negotiations which the Defendants describe as "*painstaking and convoluted*", into the Investment Services Recovery Agreement ("IRSA"). Hunnewell faced severe liquidity issues during the negotiation period. The

[1] Referred to in Phase 1 as Guniak: [300] [415] [416]

Family too continued to suffer cash shortages and were only able to pay fees and expenses to Hunnewell as ad hoc loans.

74. In this period a three-month trial (October 2011 to January 2012) took place in the Abramovich litigation before Gloster J to determine some of Mr Berezovsky's claims against – among others – the Family and Mr Abramovich. The Family and Mr Anisimov agreed on 9 November 2011, at the request of Mr Anisimov, to terminate the $300 million Agreement due to his imminent cross-examination at the joint trial.

75. The termination of that agreement was not controversial because the Defendants and the Family by this time had acquired certain information (including via disclosure in the Chancery Actions) which suggested that the basis of that deal was not accurate and that Badri had a greater interest in Metalloinvest than Mr Anisimov had suggested. If that was right the Defendants could push for a better deal for the Family. So even as the agreement was terminated the Defendants started to work carefully through the documents with the lawyers, to try to gain a better understanding of the position before they needed to re-engage with Mr Anisimov.

76. In December 2011 Mr Jaffe was looking to obtain finance to buy some or all of VDP's assets. As set out above, SCPI was required by the VDP Articles to sell the assets prior to the end of the extended term, failing which, as liquidating trustee, it was required either to sell them "*on the best terms available*" or to distribute them in specie. Mr Jaffe did not want to do either of those things in 2011/2012 because he believed that the economic conditions were not right and that the assets (particularly the mineral water company Borjomi) were worth far more than could be achieved for them at that time. He considered it unfair that he should have to sell at such a time and therefore receive far less carry than he had banked on.

77. Whether his actions at this time were done with the intention of disrupting the recovery of value from the assets and/or damaged the value of the assets is one of the conduct issues for trial (LOI Issue 28.1).

78. Mr Jaffe proposed to Mr Fomichev that Sberbank would lend 90% of the acquisition price, and that he and Mr Fomichev would contribute 10% by way of equity. Also involved in the proposed deal was Mr Tatarchuk, the CEO of Alfa Bank, although acting in his personal capacity rather than on behalf of Alfa. The Defendants' case is that Mr Jaffe's actions at this point were in breach of fiduciary duty. The Defendants also say (in an unpleaded argument) that the whole rationale was that Mr Jaffe would buy as low as possible and that he thought that that he and his allies would "*make a killing*" from this transaction.

79. A good deal of detailed discussion followed: On 9 December 2011, Mr Jaffe was sent a term sheet in relation to this proposed deal by Olga Ryzhkova, of Troika Dialog, the investment banking arm of Sberbank, for Sberbank to finance SCPI (or a company owned by it) to the tune of $255 million. The term sheet provided that the shares that were to be acquired would be pledged to Sberbank as part of the agreement, and they were described as "*water assets in Russia and Ukraine*", so this clearly related to at least Borjomi. Mr Jaffe confirmed that it in fact related to all of the assets.

80. In March 2012, SCPI, in hope rather than expectation, sought an extension of the VDP term from the IC. It made a further such request to NWVF in May 2012. NWVF was

not obliged to grant any extension, and it did not. Mr Alexeev, who was on the IC, was opposed to any such extension. It seems that some at least of the IC (including Mr Alexeev) were alive to the fact that if the clock ran down without the assets having been sold, NWVF would be able to argue that SCPI had no right to any carried interest. Citibank ("Citi") which had been at work on the exit process for Imlek and Borjomi since about 2006 were retained to advise VDP on the sales process.

81. At the same time Mr Jaffe was corresponding with another potential purchaser, one Dima W. Again this appears to have been in pursuit of a retained interest transaction. Mr Jaffe gave Mr W details of the VDP asset valuation and an indication of a price likely to be attractive to the Family.

82. At the end of April 2012, Mr Jaffe had written to the other Salford executives, in anticipation of the request for an extension to the term, expressing concern about the privacy regime in the Chancery Actions (which involved replacing the names of NWVF, VDP and all of the assets with code names) coming to an end for the purposes of the trial in October 2012. The privacy regime had hitherto been used in the proceedings to avoid any reference being publicly made to even the fact that Mr Berezovsky was claiming an interest in the fund or its assets, because any such association (the "BB taint" as it was referred to by those involved) would seriously endanger the value of the assets.

83. Between February and May 2012, SCPI agreed a deal to sell Imlek a.d. and Mlekara Subotica, two of VDP's Balkan Assets, to Royal Friesland Campina NV. The deal would have realised around $300 million for the Family after payment of minority interests. That money was much needed and the Balkan assets were subject to severe debt issues. The deal fell apart in May 2012 following a change in negotiating position on currency taken by Mr Jaffe. It is the Defendants' case that this deal was "sabotaged" by Mr Jaffe (in support both of his own attempts to buy and his wish to disrupt the recovery process). This is another of the "conduct" allegations (LOI 28.1).

84. At a May meeting of the IC many of those involved pressed for Mr Jaffe to attempt to revive the deal. He was resistant to this and the deal never came to fruition.

85. By spring/summer 2012 Mr Jaffe and Mr Fomichev were falling out. Mr Jaffe believed Mr Fomichev had acted against him in regard to their VDP proposals. Mr Fomichev threatened to bring the details of their discussions to a wider audience.

86. Meanwhile Mr Jaffe and Mr Anisimov drew closer. Mr Jaffe met with Mr Anisimov in May 2012 and at other times in 2012. He learnt from Mr Anisimov in May 2012 that the $300 million Agreement had fallen through and would not be re-signed. He also knew, from Mr Anisimov and Mr Emme, that the Family (on the Defendants' advice) now believed that Mr Anisimov owed them more than the $300 million that had originally been agreed and that attempts to agree a revised figure had not succeeded.

87. It is common ground that in this period Mr Jaffe also had negotiations with a number of purchasers about retained interest transactions, i.e. deals in which Mr Jaffe himself would be given an interest and/or invited to reinvest. Again Mr Jaffe's actions in this regard form a significant part of the conduct allegations under LOI 28. Retained interest transactions were discussed with Sistema, Alfa, One Equity Partners, Standard Capital Group ("SCG") and RDIF.

88. These discussions caused a good deal of discomfort in NWVF and elsewhere. On 21 May 2012, Mr Simmonds (one of NWVF's directors) wrote to say:

> "we withdraw our consent with immediate effect to Salford Capital Partners Inc engaging in any further discussions with or disclosing any further information to Legacy Management Limited concerning NWVF, VDP or its asset."

89. In mid-2012, there were exchanges internally at Salford and with Citi, in relation to a retained interest transaction which Mr Jaffe was contemplating entering into with SCG, a consortium backed by a Mr Palikhata.

90. SCG's initial bid had been received on 3 May 2012. It was a "bulk" offer, in the sense that it was an offer to purchase all of VDP's assets, for a total of $520 million, with $310 million of that for Borjomi. The offer provided that the current management would be retained, and offered them the chance to reinvest up to $100 million.

91. On 27 May 2012, Mr Blyumkin and Mr Jaffe had a conversation about negotiations that Mr Jaffe had been having with purchasers about deals "*with ... strings attached*", which Mr Jaffe accepted in cross-examination was a reference to retained interest transactions. Mr Blyumkin's position as of 27 May was that, in order to find out the best price available, Mr Jaffe should have asked the various purchasers to provide their best bid without SCPI involved.

92. Mr Jaffe accepted that he had had "a number of discussions" with Mr Palikhata before receiving their offer. He claimed that he did not discuss its terms, however it is not obvious, and he did not explain, what else they would have been talking about.

93. On 18 June 2012, SCG sent its revised offer, of $550 million for all of the assets, including $335 million for Borjomi. That provided for the current management team to stay and reinvest, and referred to an expectation of SCPI and the existing management committing to pay $25 million within a year. Both of these offers from SCG were made directly to Mr Jaffe, and did not copy in Citi, VDP's official advisers.

94. Mr Mtibelishvily of Citi, when he did hear about it, was not happy, saying *"I am getting increasingly uncomfortable with this situation"*, and that the offer would be very difficult unless it was an all-cash deal. Mr Jaffe replied that he should not give up so easily. However Mr Mtibelishvily's view was that there was enough interest by this point for them to run a competitive auction for Borjomi, and that this would be the best way of maximising value. He felt that granting exclusivity to SCG would have closed off this route, with very uncertain benefits given the problems with its funding arrangements.

95. Moving to 25 June 2012, a loan agreement was signed pursuant to which an entity affiliated with Mr Anisimov agreed to make a loan of $2million to Mrs Olga Jaffe's company Pumula Management Limited. The $2million was paid on 28 June 2012 and the loan written off on the same day. The Defendants place considerable emphasis on this and a later payment from Mr Anisimov in the context of the conduct issues.

96. In late June 2012, Mr Jaffe travelled to Russia at short notice to meet with Mr Palikhata. The Defendants evidently believed that he was on the verge of signing a deal.

97. On 28 June 2012, Mr Jaffe sent an email to the IC in which he said "*if the primary objective is to achieve a quick and reasonably certain sale, Salford would propose to proceed with the grant of exclusivity to Standard Capital Group tomorrow*". However he went on not to recommend that, and instead to suggest that they implement a "structured process" (i.e. an auction) as had been suggested in a note from Citi, involving other parties who had expressed an interest.

98. One such party mentioned in the email chain was called Sistema, a large oligarch-backed Russian group which was acting jointly with Elbrus Capital, a London-based investment group represented by a Mr Savin, a manager of a different investment fund and an acquaintance of Mr Jaffe.

99. Mr Alexeev replied in his capacity as an IC member, objecting to giving SCG exclusivity, and saying it was not correct that NWVF wanted effectively a fire sale. Mr Simmonds also replied on behalf of the IC, to the same effect. On 29 June 2012, NWVF wrote formally to SCPI to express its concern about the conflict that had arisen in relation to the sale to SCG.

100. Mr Jaffe responded by email the same day, saying that SCPI was alive to the conflict, and had been reviewing it in conjunction with its advisors, and would decide how best to proceed in view of the conflict issues. SCG were ultimately an unsuccessful bidder via the auction process.

101. On 29 June 2012, following a summons for interrogation by Russian Prosecutors, Mr Jaffe gave evidence as part of the criminal case against Mr Berezovsky. Mr Jaffe did not make any specific disclosure of this event to NWVF or the IC. Whether this evidence was given under compulsion, or the summons was staged, and whether the evidence was causative of problems to the Recovery Services is reflected in Issue 28.3. On 18 July 2012, an Investigative Committee led by Mr Lomovtsev (who had conducted Mr Jaffe's interview) issued a ruling on conduct of a preliminary investigation.

102. In mid-July 2012, while the parties were waiting for the judgment of Gloster J in the Abramovich Action, attempts were made to see if the Chancery Actions could be settled before the judgment was published. This led to a mediation over 2 days, which was unsuccessful.

103. There were then meetings between Mr Anisimov and Mr Berezovsky, which were unsuccessful. Mr Jaffe's role in these meetings is another of the conduct issues (Issue 28.7). The Defendants' case is that Mr Jaffe suggested that there could be a settlement between Mr Berezovsky and Mr Anisimov on terms that the latter would acquire the former's interest in NWVF and that Mr Jaffe's motivation in so doing was to put pressure on the Family by preventing them from selling VDP's assets and thereby starving them of funds.

104. VDP's term expired on 1 July 2012 and SCPI began to act as a liquidating trustee under Art.11.5.3 of the VDP Articles. It was no longer permitted to carry out or conduct any business, and its mandate was now to sell the assets at the best terms available or to distribute the assets to NWVF in specie. Mr Jaffe accepted that the requirement to sell on the best terms available meant within a "*short period of time*", rather than at some

stage in the future (because otherwise SCPI would have been required to continue to trade in the meantime, which as liquidating trustee it was prohibited from doing).

105. In July 2012, an auction formally began for VDP's most valuable asset, IDS Borjomi. Meanwhile, the Sixth to Ninth Defendants were incorporated on 11 July 2012.

106. Mr Jaffe wrote further to NWVF on 9 July 2012, to say that SCPI had been giving careful consideration to the conflicts position with its advisers. Mr Jaffe confirmed that this meant Macfarlanes, Linklaters and Citi, and that this represented their advice. The Proposal was that a committee be formed with oversight of the sales process, which would be constituted of at least three members, one of whom would be Mr Jaffe himself, which would make decisions by majority vote. There was no suggestion that SCPI would cease to be the GP.

107. A note of advice from Macfarlanes dated 26 August 2012 shows that Macfarlanes had advised to somewhat different effect, namely that, (i) a subcommittee should be created to handle and make decisions in the sales process; (ii) ideally that would be an entirely independent committee; (iii) given the amount of involvement that Mr Jaffe had already had with the prospective purchasers, i.e. that he was the face of the negotiations as far as they were concerned, SCPI could seek the consent of NWVF to a sub-committee which included Mr Jaffe, but that if NWVF did not agree he would have to allow Citi, or independent members of the committee, to take over the process entirely.

108. NWVF were not happy with the proposed procedure or the constitution of the committee. At a meeting between NWVF and SCPI in Amsterdam on 10 July 2012, the minutes record that NWVF said the following:

a. Mr Blazquez asked whether, in making value judgments, SCPI would rely on the bankers. Mr Jaffe "*went on to state that to date bankers had less of a role in decision-making but when establishing value Salford would rely on their analysis and opinions; particularly in relation to any transactions where Salford or individuals associated with Salford would have a retained interest*".

b. Mr Averbuch queried which of the SCPI executives were going to be asked to re-invest. It was put to Mr Jaffe that, whatever uncertainty there might have been about the precise list of individuals, it was undoubtedly going to include him personally. He appeared to accept that ("*Did I know that Palikhata/Interfood wanted me? Yes.*")

c. Mr Young said that he thought there was a material conflict of interest on the part of Mr Jaffe as he was responsible for negotiating and decision-making on all exits and with one of the potential buyers he and others stood to gain a personal benefit. Mr Jaffe responded that whilst no one wanted a conflict, if a buyer demanded it, it may be in everyone's interests for it to proceed. He said that the issue could well arise again.

109. NWVF raised a dispute with SCPI on 9 August 2012 under the VDP Articles, arguing *inter alia* that SCPI was required to distribute all of VDP's assets to NWVF in specie (the "Dispute Letter"). That letter was leaked to various bidders on or around 24 August 2012.

110. In particular, it was leaked to Friesland Campina the night before a meeting reviving negotiations over Imlek was due to take place. The leak dealt a huge blow to SCPI's ability to sell the assets. The suggestion that that leak originated with the Defendants appears likely given the stone wall which was then put up to suggestions that the leak be investigated: NWVF did not respond to SCPI's correspondence asking it to help coordinate an investigation and to disseminate a letter of comfort to bidders to prevent further damage to the sales process. Further when NWVF eventually provided a draft letter of comfort, it was couched in inappropriate language that would not have addressed bidders' concerns.

111. In August Mr Marson held a meeting with Mr Nagle, who still owed duties to SCPI. It appears that the Defendants were interested in Mr Jaffe's financial problems. At about the same time the Russian prosecutor issued an application to freeze assets against Mr Berezovsky.

112. Meanwhile from August to October 2012, the Family and the Individual Defendants were involved in discussions regarding the auction sale of Borjomi focussing on the possibility of a sale to Alfa Bank. It appears that this was prompted at least in part by unhappiness about the Sistema bid and Mr Jaffe's part in it. Mr Fomichev, who had by this stage fallen out with Mr Jaffe, was the initial vector for the contact being made. At the same time Sistema made its first formal bid on 23 August 2012, for $390 million. It provided that Sistema intended to retain the current management of the Borjomi Group. Other bids in the picture emanated from TPG, Klever and Interfood. There is some evidence that the Defendants were involved in communications with some of these bidders (in particular Klever) in terms which would not assist SCPI's authority.

113. On 31 August 2012, Gloster J handed down judgment following the joint trial of Mr Berezovsky's claims against Mr Abramovich and the Family – Mr Berezovsky was unsuccessful and his credibility was undermined. As Mr Cotlick (who was formerly Mr Berezovsky's adviser) said, he was damaged by the judgment. The Family was correspondingly benefitted by the judgment.

114. A global settlement was reached by the Family in their dispute with Mr Berezovsky on 9 September 2012 for $150million. The settlement included the terms on which the Chancery Actions would be discontinued as between them; those claims had in large measure been dependent on Mr Berezovsky's oral evidence about the "economic divorce".

The IRSA

115. After the settlement it appears that the Defendants put their collective foot down and insisted on the negotiations for the IRSA being drawn to a conclusion.

116. The IRSA was entered into by the Defendants and the Family on 30 September 2012. A management deed was agreed between Hunnewell ("BVI") and Park Street ("GP") Ltd, pursuant to which BVI was given responsibility for performing services under the IRSA. It is essentially the date of this agreement that the Defendants contend marks the cut-off point after which profits made by them were no longer causally connected to the Defendants' breaches of fiduciary duty.

117. The IRSA is a far from straightforward document. It reflects no great credit on its drafters; unless those drafters were actually seeking to confuse readers. Mr Rukhadze described it as a "cumbersome document". In essence:

a. The Defendants were contractually bound for an indefinite period to complete certain "Mandatory Tasks" set out in the IRSA. In the event, these were not complete until 2015.

b. The IRSA contained an Overriding Objective, namely to maximise the aggregate value of Proceeds, i.e. net distributions to the Family after payment of all costs and liabilities. The purpose of this was to free the Family from the unwanted burden and risk of having to manage assets, i.e. to turn them to the extent possible into cash.

c. The IRSA contained broad management obligations in respect of assets that were not sold. There was no guarantee the Defendants would be able to secure separate remuneration for this, which required negotiation of individual Management Deeds with the Family.

d. In order to earn carried interest (of 15%) the Defendants had to achieve a threshold of $500 million in Proceeds which required distribution of cash to the Family net of liabilities ("the Carry Threshold"). This was no mean feat, not least as the Family had very significant liabilities including (but not limited to): (1) the Mr Berezovsky settlement payment ($150 million); (2) the settlement payment to David and Olga – Mr Patarkatsishvili's other wife in Russia and her son ($103.6 million); and (3) repayment of loans from third parties (e.g. loans totalling $298.5 million from Mr Abramovich).

e. The Defendants had no right to terminate the IRSA.

118. The IRSA and the Term Sheet which Mr Jaffe had advocated pre-breach were rather different. In summary: the financial package was totally different; the structure, operation and success threshold for a fund was different, as well as the management of assets that were to be recovered; the existence of a hurdle rate was substantially different – before which the Defendants could not receive any carry; and the risks placed upon the Defendants were extreme and indeterminate. The IRSA was a less beneficial deal than the Term Sheet; it gave the Defendants the right to receive sums of money, but only when the Family had received "Proceeds" exceeding the $500m (net) carried interest threshold as set out in the IRSA. In other words it incentivised substantial success.

119. The IRSA envisaged that Management Deeds would be agreed for Rustavi, Fisher Island, MagtiCom and Benahavis. The Management Deeds were the subject of lengthy negotiation between the Defendants and the Family and were not signed until July 2013, when the Family were willing to do so only for Rustavi, Fisher and Borjomi. Under the Management Deeds for Fisher and Rustavi the Defendants had to achieve an increase in agreed base valuations in order to earn any carry. In addition the Defendants agreed to accept a flat management fee in respect of Borjomi "*rather than the market standard carried interest*", thereby "*giving up potentially many tens of millions of dollars*".

120. The Family were not willing to enter Management Deeds for MagtiCom, Benahavis or VDP's Balkan assets, which the Defendants therefore had to manage under their general management obligations in the IRSA (and for no additional fee).

121. There is an issue between the parties as to the extent to which the IRSA deal was a "step down" from the SCPI Term Sheet. On one level it was not, in that the Family were never prepared to agree a binding deal before the IRSA; the IRSA was the bird in the hand, with the SCPI Term Sheets as birds in the bush. However, it did illustrate the Defendants losing out in the negotiations with the Family; as they accepted the terms agreed were, "compared to what they sought", to the Family's benefit and the Defendants' detriment; there then arises a question as to whether the less beneficial terms agreed reflected on the Defendants' skill (LOI 21-22).

The Recovery Services post the IRSA: October 2012-December 2017

122. In broad terms it is common ground that the Defendants did a huge amount of detailed work on the Recovery Services. There is an issue which will be considered below (LOI 21-22) as to whether the Defendants exercised particular skill or underwent particular risk in so doing. Nobody doubts however that they worked extremely hard.

123. Two freezing orders were made in relation to VDP's assets in Russia and Ukraine on 2 October 2012. These form part of the conduct allegations against Mr Jaffe (LOI 28).

124. On 4 October 2012 a Term Sheet between Alfa Bank and the Family was circulated regarding the acquisition of Borjomi. By this Term Sheet the Family and Alfa Bank agreed to "*cooperate [...] to effect the joint acquisition*" of Borjomi for $460 million. The Defendants encouraged Alfa Bank to pretend that it remained interested in the SCPI/Citi auction process by pursuing due diligence.

125. Early October 2012 saw the end of the bidding process for Borjomi via the auction organised by Citi on 1 October 2012. The top bid, that of Sistema, was for $515 million (ie it was US$65 million higher than the Alfa bid). That offer provided, at §1(b), that Sistema intended to offer "*senior management of the Borjomi Group the right to acquire up to 20% of the shares in the Company at the price paid by us for the Borjomi Group*".

126. On 8 October 2012, Mr Jaffe emailed the IC to say that Sistema had won the Borjomi auction. That email attached a draft term sheet and exclusivity letter for the deal with Borjomi. That led to an exchange of emails with the IC – in particular Mr Alexeev – about, *inter alia*, the retained interest provision, in which Mr Jaffe reassured them that no discussions had taken place about it – the bidders had been told that that would be discussed with them if and when their bid was successful.

127. NWVF wrote to SCPI on 9 October 2012 setting out their concerns with the Sistema bid, which were discussed at a meeting on 10 October 2012. SCPI then wrote to NWVF the same day. In that letter SCPI maintained that it was acting in NWVF's best interests.

128. Alfa Bank was offered the opportunity to increase its bid further but refused to offer more than the $460m it had already agreed with the Family.

129. The terms of the exclusivity arrangements that were negotiated with Sistema were explained on a call between the IC and Mr Mtibelishvily on 9 October 2012. The final term sheet included provision for a $25m convertible loan, associated drag-along and tag-along rights, and "*Transaction Delay Events*" which would extend the five-week exclusivity period by up to one month. That term sheet was entered into on 23 October 2012.

130. On 10 October 2012, Mr Jaffe had an exchange with Barbara Ericson-Peichl, a representative of Raiffeisen Bank, who he had evidently asked whether they would be interested in financing Sistema's bid.

131. Also on 10 October, following a without prejudice meeting in Paris, NWVF offered to pay SCPI carry in the sum of $120 million, if it would agree to a distribution in *specie*. That offer was calculated by reference to the carry to which SCPI would be entitled based on the best offers made for each asset, plus a 20% premium. Mr Jaffe rejected that offer on 11 October 2012. Not all of the SCPI executives agreed with this decision. Consequently on 12 and 16 October 2012, letters were written respectively by SCI and KBC (in essence Mr Nagle and Mr Blyumkin and the other SCPI executives), urging Mr Jaffe to accept NWVF's offer.

132. On 12 October 2012 Mr Jaffe gave NWVF three days' notice of his intention to sign the Sistema term sheet. On 14 October 2012 NWVF wrote to say that in light of the death of Mr Jaffe's father, they were willing to delay filing an arbitration if SCPI would also delay entering into the term sheet. It was agreed that there would be a three-day armistice.

133. On 19 October 2012, NWVF made its final offer, of $130 million, adding a further $10 million to the $120 million offer. The Defendants say that there was no rational basis on which the offer could be refused, given that it exceeded the best possible return that Mr Jaffe could have hoped to achieve by virtue of the sales for which he was at that point campaigning.

134. This event was key in Mr Jaffe's relationship with other remaining members of the SCPI Board. It is fair to say that some of them had been unhappy with the way that he had approached the pursuit of retained interest transactions with potential buyers, bearing in mind SCPI's fiduciary duties. And all of them were concerned to ensure that their carry, whatever it would be, was not prejudiced by failing to sell within the period. They were less sure of the benefits to be obtained by delaying a sale than was Mr Jaffe and they feared that Mr Jaffe was acting in his own interests and not in SCPI's. By this stage therefore certain of the Salford executives were in discussions with NWVF, a course of action which may well have put them in breach of their fiduciary duties to SCPI; at the same time they were concerned that Mr Jaffe was himself in breach of his duties to SCPI and that he had caused SCPI to breach its duties to KBC and SCI.

135. Consequently, the SCPI board unhesitatingly voted to accept the offer. However, Mr Jaffe still did not want to accept it, so he dismissed three of the dissenting board members and rejected the offer.

136. Mr Petrovic was among those board members who voted to accept the deal, indeed after Mr Jaffe rejected it, he resigned from the board in order to try to pressurise Mr Jaffe into accepting it. He also suggested that the reason why Mr Jaffe did not want to accept

the offer was not the financial amount, but rather that he did not want the Salford executives who had defected to NWVF to get any of it (despite it being their contractual entitlement).

137. Mr Nagle resigned from the IC on 20 October 2012, writing a long letter in which he detailed what he saw as Mr Jaffe's misconduct in relation to the VDP sales process – referencing in particular to concerns over the SCG and Sistema bids, and the Imlek/RFC situation. He also resigned from Salford.

138. Following this, NWVF offered to pay the Salford executives their commensurate share of the carry from that offer, if they would assist them in protecting and selling the assets. That is what happened, and deals were done accordingly. As part of those deals the executives were required to agree to co-operate with the Family and NWVF in claims involving SCPI, to the extent possible under their contractual terms with SCPI. Thus in late October 2012, Mr Nagle entered into an agreement with the Family regarding his carried interest entitlement in VDP.

139. The Family made a deal with the Georgian government on 18 October 2012 to return Imedi to their ownership. This deal was made possible by the change of government in Georgia, but also involved considerable work on the part of the Defendants, in particular Mr Rukhadze.

140. Mr Jaffe says in his evidence that he first contacted potential liquidators for VDP on 17 October 2012.

141. On 18 October 2012 NWVF filed its request for an arbitration in relation to its request for a distribution in *specie*.

142. Mr Jaffe appointed liquidators on 23 October 2012. They were appointed not under VDP's Articles – which made no provision for such an appointment and exclusively attributed responsibility for liquidating the assets to the "liquidating trustee", i.e. SCPI – but rather under a provision of the BVI Limited Partnership Act. This action is another of the conduct allegations which are live under LOI 28.

143. Mr Jaffe gave no advance indication to NWVF or the investors that he was going to do this. The Defendants adduced evidence from Mr Blazquez and Mr Baumann, both directors of NWVF, which the Claimants did not seek to challenge, that their view was that the appointment of liquidators would lead potential buyers to view the assets as distressed and therefore negatively impact the value of the assets, and that they believed that by this move Mr Jaffe was seeking to further his own ulterior motives rather than act in the interests of the Family. Mr Jaffe's evidence was that he took this step to facilitate the sale which he considered in NWVF's best interests.

144. Also on the same day as, and immediately prior to, the appointment of liquidators, Mr Jaffe caused Rissa, Borjomi's holding company, to sign the term sheet, exclusivity letter and side letter with Sistema for the sale of Borjomi. However the deal was rescinded by Rissa's corporate director after it found out about the liquidation.

145. On 14 November 2012, writs of attachment were issued by the Russian Court in Moscow in respect of certain VDP assets in Georgia.

146. The defendants thereafter sought to find a buyer for Borjomi, agreeing a deal based on the US$460 million figure with Alfa, together with 40% shareholding for the Family and a "Texas Shoot-out" mechanism which meant that Alfa gave up the control premium. The negotiations on this sale were led by Mr Rukhadze supported by Mr Alexeev and Mr Marson. The Family, Mr Rukhadze and Mr Alexeev thereafter sat on the Borjomi Board.

147. In December 2012, NWVF signed a Distribution Agreement with VDP's liquidators whilst VDP's majority shareholding in Borjomi was distributed to NWVF – a majority of that shareholding was sold to Alfa Bank.

2013

148. On 23 January 2013, the Family issued proceedings against Mr Anisimov in the Commercial Court after relations with him worsened ("the VA Claim"). The Family claimed that $600 million received following the sale of an interest in RusAl (the "RusAl Proceeds") had belonged to Badri alone, and that Mr Anisimov had invested a significant amount of them into Metalloinvest on behalf of Badri. Mr Anisimov's defence was that Badri had agreed to gift Mr Anisimov 50% of the RusAl Proceeds (i.e. $300 million) as a result of a moral obligation arising out of Badri's involvement in the sale of Mr Anisimov's aluminium assets at an undervalue years earlier. Based on this, Mr Anisimov argued that he had invested his own 50% of the RusAl Proceeds in Metalloinvest. This action therefore effectively reflected the previous US$300 million Agreement, which had been terminated in 2011 and which the Family no longer saw as reflecting the reality of the situation.

149. 22 February 2013 saw VDP's liquidators commence proceedings regarding SCPI's claim to an entitlement to carried interest in VDP in the BVI (the "BVI Carried Interest Proceedings").

150. 11 July 2013 saw a freezing order made in respect of VDP's assets in Serbia.

151. At this point also the Family and the Defendants entered into management deeds for Rustavi and Fisher Island (for which annual management fees of $1m each were agreed) and Borjomi (an annual management fee worth $2m was agreed). There were also further delegation agreements entered into between Hunnewell (BVI) and Park Street (GP) Ltd in respect of managing Rustavi, Fisher Island and Borjomi. 18 July 2013 saw Dioskuria LLC and Traktat Syndicate LLC and the Sixth to Ninth Defendants enter into a limited partnership agreement to form Park Street Partnership LP. The agreement was later amended to include – with retrospective effect – Pars Barking LLC.

152. One aspect of the work on Rustavi involved further claims from Mr Kay, which were ongoing until 2016. Mr Birkaia's evidence (echoed by Mr Blake) was that Mr Rukhadze was central in dealing with this threat, working closely with Mr Marson.

153. A freezing order on VDP's assets in Serbia was lifted on 14 August 2013 and the case was remitted for retrial.

154. On 1 November 2013, a company with which Mr Jaffe was associated entered into a loan agreement with a Russian businessman introduced to him by Mr Anisimov's adviser (Mr Emme) in respect of a loan of $6m to Mr Jaffe. The loan was increased to

$10m on 19 December 2012. Mr Jaffe received the $10m in instalments between 20 November 2013 and 6 January 2014. During this period, between 1 November 2013 and 5 February 2014, Mr Jaffe served three witness statements in the VA claim. The Defendants' case is that this was done by Mr Jaffe with the deliberate intent of impeding the Recovery Services, and forms conduct Issue 28.6.

2014

155. On 3 March 2014, both Russian and Ukrainian freezing orders were lifted over VDP's assets.

156. 11 March 2014 saw a settlement agreed between the Family and Mr Anisimov regarding the VA claim, a result of which was that Mr Anisimov agreed to pay $750 million to the Family. This was the culmination of the Defendants' work on re-evaluating the Family's position vis a vis Mr Anisimov, and some hard negotiations, during the course of which Mr Shvidler, who was able to represent Mr Abramovich's perspective and information, provided the Defendants with some assistance. The level of skill on the part of the Defendants involved in this deal was one of the issues under LOI 21 (skill) and their involvement in this improved deal is part of LOI 22 (enhancing asset values).

157. On 16 April 2014, the benefit of the $10m loan to Mr Jaffe was assigned to a company associated with Mr Anisimov.

158. From mid-2014 onwards, the Defendants pursued various investment opportunities, including the acquisition of JSC Liberty Bank ("Liberty Bank"), and a joint venture in the Georgian cement industry.

2015

159. An SPA was signed for the sale of VDP's Balkan Assets on 2 February 2015.

160. On 24 July 2015, following an approach from Mr Graham Huntley of Signature Litigation to the Individual Defendants, Hunnewell (BVI) entered into the "RBS Funding Agreement", agreeing to provide funding in connection to the RBS Rights Issue Litigation up to a total of £15.5m. The RBS Funding Agreement was amended in November 2015 to provide additional funding.

161. On 19 November 2015, the Privy Council dismissed SCPI's appeal in the BVI Carried Interest Proceedings. SCPI was therefore deemed to not be entitled to carried interest in VDP.

2016

162. SCPI assigned its claims in this action to RPGPL on 1 June 2016.

163. On 12 September 2016, the Claimants brought the current proceedings against the First to Fourth Defendants. The remaining Defendants were added in late 2017. One argument for the Defendants was that Mr Jaffe (and hence the Claimants) was in a position to commence the litigation earlier and that it would be unconscionable to permit the claim for an account of profits after that date as a result (Issue 26).

164. According to the Defendants it was in October 2016 that the Defendants reached the threshold under the IRSA necessary to generate a carried interest entitlement. It is fair to say however that the evidence suggested that the Defendants had little oversight during the currency of the IRSA as to how the money recovered for the Family was being accounted for, or as to the robustness of the figures being used for the Family's expenses.

    a. For most of the period in question the figure was calculated by recording the amounts that had actually ended up being distributed to the Family (in payment of Family personal liabilities, cash or assets) after Recovery Services related expenses had been paid. These were then shown in "split table" spreadsheets that were passed periodically between the Family and the Defendants.

    b. It was not until February 2018 Mr Alexeev suggested to Ms. Miftakhova that they attempt to cross-check this figure by producing an analysis of total recoveries less total recovery expenses less total Family expenses.

    c. However, it appears that this was never done. Mr Alexeev satisfied himself, on the basis of a phone discussion involving a rough calculation that the number reached was in the correct ballpark. He also concluded that the actual process which the IRSA appeared to contemplate would be impossible due to the difficulty in tracking retrospectively all of the expenses paid, and so the idea of a full analysis was abandoned.

2017

165. On 21 July 2017, the Defendants completed the acquisition of a 31% interest in MagtiCom LLC ("MagtiCom") via a 67.39% interest in Sector Telecom Georgia LLC ("STG") and a 46% interest in International Telcell Cellular LLC ("ITC"). The total consideration was worth $92m.

166. On 30 July 2017, the Management Deed entered in respect of Borjomi expired on its terms.

167. In August 2017, Hunnewell (BVI) received a payout in relation to the RBS Rights Issue litigation. That payment was £48.2m, equating to a return of 65% of its funding plus the relevant uplift under the RBS Funding Agreement. The Defendants received further returns in April 2018, March 2020 and May 2020.

168. On 15 August 2017, Cement Invest BV ("Cement Invest") acquired a 45% interest in Caucasus Cement Holding BV ("CCH") for around $24m in a 50/50 joint venture between the Defendants and the Georgian Co-Investment Fund ("GCF").

169. During the course of 2017 Lincoln International were engaged to investigate the possibilities for a sale of Rustavi. Lincoln screened a number of potential buyers, approaching 64 industry participants across a broad spectrum of geographies. The process generated two bids. One was from GCF of $16 million (due diligence having been carried out), and a second offer from a Russian bidder of $25 million (without due diligence). Both of those were figures for the equity. A figure of US$30 million was estimated by Rustavi executives as the best offer that might be hoped for in February 2018.

170. From July to October 2017, pursuant to an SPA signed in July 2017, the Defendants – through European Financial Group BV ("EFG"), acquired 74.64% of the shares in Liberty Bank for around $42m. On 22 March 2018, EFG increased its interest in Liberty Bank to 75%. In 2019 EFG, now renamed Georgian Finance Group BV ("GFG"), increased its interest in Liberty Bank to 91.18% by acquiring further minority interests for $7.4m.

171. In 2017 Mr Rukhadze started negotiating with Vano Chkhartishvili, which led to a global agreement to settle all disputes between Vano and the Family in 2018.

Exiting the relationship with the Family: late 2017 onwards

172. By the end of 2017 considerable points of friction had emerged between the Defendants and the Family. The Family (primarily through Mr Hunyak and Mr Ershikov) had sought to pressure the Defendants by (1) reducing the annual Recovery Services fees; and (2) terminating the Borjomi Management Deed and resisting an extension of the Fisher and Rustavi Management Deeds, despite the ongoing sales process in relation to Fisher; and (3) trying to widen the scope of the work under the IRSA.

173. The Defendants therefore faced the prospect of losing the majority of their annual fees, whilst facing protracted disputes with the Family (who were now well-resourced). They were concerned that such carried interest as was due to them would have been extinguished by the Defendants' liabilities to the Family. Further sums would only become payable following valuations, waiting for assets to be sold, and potentially lengthy litigation.

174. Ultimately, the idea of a "clean break" emerged. This would entail termination of all agreements in exchange for payment of fixed amounts by the Family. This was attractive to the Defendants as it would avoid lengthy and expensive disputes about amounts due under the IRSA and extensive, expensive, valuation processes, and alleviate the cash flow pressure caused by the reduction in annual fees. It would also allow the Defendants to devote time and funds to their other investments.

175. The Family was broadly amendable to a split but wanted to pay the Defendants with assets rather than cash, as they had no appetite to own and manage assets.

176. The negotiations that ultimately led to the Deed of Termination ("DoT") commenced in late 2017.

177. By early February 2018, the Defendants were exasperated by Mr Ershikov and Mr Hunyak and concerned that they were not acting in good faith. On 5 February 2018, the Defendants wrote formally to Mr Ershikov saying that they were giving notice that they considered that the Family had terminated the IRSA. There was much debate about whether this letter was a mistake – particularly in the light of the arguments on skill.

178. The Family's formal response to this on 19 March 2018 said, *inter alia*, that they (the Family) had not terminated the IRSA, and that they were treating the Defendants letter as itself amounting to a termination. A termination by the Defendants would, under the terms of the IRSA, have had severe negative financial consequences in terms of the Defendants carry entitlement.

179. Notwithstanding this, the Family did come to the table and the DoT was negotiated.

180. On 20 April 2018, the Family and the Defendants entered into the DoT and its associated side letter. There had been some suggestion prior to the trial that the DoT was a sham (a case probably reflecting a belief by Mr Jaffe that the Defendants had made far more from the Recovery Services than was appearing to be the case). That case was not however pursued at trial.

181. Under the DoT, the Family agreed to transfer ownership of certain of their assets to the Defendants, as well as an amount of cash, by way of final settlement of the dispute. The parties could not agree upon a value to be attributed to Fisher Island, and so it was agreed that a separate valuation process would take place for that asset. It was ultimately valued by Deloitte in a long and controversial process starting in April 2018.

182. An Annex entitled "*Calculations for IRSA Final Payment*" ("the DoT Annex") was inserted into a draft of the DoT by the Family's lawyers. This set out the values that had been attributed to the DoT Assets during the negotiations and, therefore, how the amount of the cash portion of the deal had been calculated. The DoT Annex was included in the execution version of the DoT by mistake and the parties subsequently agreed to remove it.

183. There is a dispute between the parties as to the significance of the figures in the DoT Annex and whether they are reliable evidence of what the market values of the assets were, or what the parties believed the market values to be, at that time.

After the termination

184. Between 25 June and 19 July 2018, the Phase 1 trial took place before me. Judgment was handed down on 1 November 2018.

185. On 19 October 2018, pursuant to the DoT, 100% of the issued and allotted share in Marbella RE Group Ltd, ("Marbella RE") at the time the 100% beneficial owner of Tidjicka (SL) ("Tidjicka"), was transferred to Park Street Capital.

186. On 3 December 2019, contrary to the express terms of the Deed of Termination, 100% of the issued and allotted share capital of Tolanius Beheer BV, a 100% subsidiary of 2B Nice Finance AG and the 100% legal and 83.3% beneficial owner of Rustavi, was transferred to Park Street Lux Sarl.

187. On 20 December 2019, Marbella RE merged with PS Capital Lux Sarl, such that the Defendants' interest in Tidjicka was held through RTK Amsterdam BV.

188. On 18 November 2020, pursuant to the Deed of Termination, 100% of the issued and allotted share capital in Media Finance Group BV ("MFG"), at the time the 25% beneficial owner of Studio Maestro LLC ("Maestro"), was transferred to Stitchting Media Finance, the entity through which the Individual Defendants hold their ultimate beneficial interest in MFG.

189. On 3 August 2021, pursuant to the Deed of Termination, 100% of the issued and allotted share capital in Georgian Media Production Group Ltd ("GMPG"), at the time the 100%

beneficial owner of various Georgian media companies including Imedi, was transferred to MFG.

Part 2: The Issues and the Trial

The issues on the scope of the account

190. As outlined above, there are a number of issues as to whether certain factors can or should lead to a limitation on the account. In particular there are issues as to:

   a. The degree of connection between the breaches found and the sums gained by the Defendants, both by reference to the scope or seriousness of the breach and by reference to what is said to have been a later transformation of the opportunity;

   b. The impact of the profit-sharing agreement or arrangement which SCPI had had with the Defendants before the breach;

   c. The impact of the Defendants skill, time and risk in pursuing the Recovery Services after the breaches;

   d. The relevance of the delay by Mr Jaffe in commencing proceedings;

   e. The relevance of Mr Jaffe's conduct in a myriad of respects; and

   f. The relevance of Mr Marson's contractual position.

191. Once those issues are clarified it becomes necessary to apply the principles to the figures (Responsive Receipts, Responsive Expenses and Responsive Investments) at which level there are also issues.

The Responsive Receipts and Responsive Expenses

Common Ground

192. The question of what were the Responsive Receipts and Responsive Expenses is one which was dealt with by the forensic accountants.

193. As regards Responsive Receipts, they achieved a good measure of agreement. In essence they agreed that:

   a. The Responsive Receipts could be broken down into Recovery and Management Fees, Rissa Termination Fee, Loans, Deed of Termination ("DoT") Related Receipts and Other.

   b. For each there was a central agreed core as follows:

      (1)Recovery and Management Fees: US$29,235,000

      (2)Rissa Termination Fee: US$5,000,000

      (3)Loans:US$37,199,000

(4)DOT Related Receipts: US$34,427,000

(5)Other: US$3,379.

194. As regards Responsive Expenses, the difference was larger. The experts agreed that at least US$11,486,000 of Responsive Expenses were incurred. However Mr Davies, for the Defendants, put forward a figure of US$38,458,000 – a gap of US$26,792,000. The difference between them was spread over a number of subheadings, but hinged on their differing approach to the evidence.

The Issues

195. The issues relating to the Responsive Receipts related to:

a. Fees in relation to Fisher Island, Rustavi, Rissa/Borjomi and Vano. This relates to the applicable period for fees;

b. Two detail points on specific loans;

c. DoT Related Receipts: items relating to Vano, Fisher Island and Zurgovani LLC, a Georgian entity beneficially owned by the Family;

d. Other: the differences relate to loans to Mr Marson, loan repayments to Mr Rukhadze;

e. Pre-IRSA expenses, Family Expense Payments, Mr Alexeev's salary paid by Tidjicka (SL), a Spanish company controlled by Marbella RE Group Limited – a BVI company at that time beneficially owned by the Family, amounts settled directly, so-called “Annex 1 Receipts” (receipts which the Defendants say fall outside the scope of the account) and so-called “Family Schedule” receipts.

196. As for the Responsive Expenses there are a miscellany of issues. The major issue however turns on whether there were qualifying agreements with certain Georgian partners and Ms Miftakhova.

The Responsive Investments

197. The evidence raised a number of issues concerning various investments made by the Defendants. The key investments originally in scope, and their dates were:

a. Liberty Bank: October 2017;

b. Magticom: July 2017;

c. Cement Invest: October 2017;

d. RBS Funding Agreement: July 2015 / November 2015; and

e. Other litigation funding: Responsive Receipts totalling $3,125,955 were paid by Hunnewell BVI to Signature Litigation LLP between 1 March 2015 and July 2016 in order to fund a confidential arbitration proceeding involving a client of

that firm. The Defendants have also (starting in March 2019) funded a further case in litigation which remains ongoing.

198. Within these investments were issues about sums received by individual Defendants thus:

a. Mr Rukhadze: Dioskuria LLC

b. Mr Alexeev: Traktat Syndicate LLC

199. Ultimately however the Claimants realistically – and possibly also strategically – did not pursue the majority of this case - as regards Liberty Bank, Cement Invest, Magticom and the non-RBS litigation projects. This was on the basis that *"the connection between those investments and the Defendants' breaches is less direct, and the valuation of those investments raises more difficult questions about where it is fair to draw the line"*. The Claimants nonetheless in closing set out their submissions as to the value of those assets in case I were to consider that they should be brought into the account or that their value is relevant to the calculation of the Defendants' net position.

200. However I do not at all disagree with the Claimants' approach; had the case on these investments been pursued I would have found that the Claimants' case in respect of these items did not succeed. It is therefore not necessary for me to consider these items.

201. The result is that the only live issue on the Responsive Investments relates to the RBS Litigation Funding investment. The value of the investment is agreed: US$54.398 million. The question is whether it falls within the account or not.

The Trial

202. There was a considerable echo of the Phase 1 trial in the evidence. Mr Jaffe and the Defendants gave evidence, as they had done at the first trial. Though I evaluated their evidence afresh, my impression of them was not materially different to the impression which I formed at the first trial – and the resemblance between their evidence in the two Phases was a point highlighted by both sides in closing – albeit always focussing on the other side's witnesses.

203. In summary the main witnesses were (again) not impressive witnesses. I was not persuaded that any of them was entirely candid and I was entirely sure that the memories of all of them had been corrupted by the prolonged processes of litigation, including the preparation for this trial and the trial of Phase 1 as well as the discussions amongst themselves both with and without reference to the documents. As a result their evidence has consequently to be treated with a considerable degree of caution. It was fortunate that as matters have transpired I regard very little of the factual evidence as critical to the issues which actually matter in this case.

The main witnesses

204. The Claimants' main witness was Mr Jaffe. As in the previous trial he was prone to give somewhat extensive answers though it was apparent that he was making some attempt to curb this tendency and his answers were on the whole not quite as discursive as they had been in the Phase 1 trial. He also plainly had thought carefully about the impression

that some of the documents might create and had developed a "*party line*" on them: "*I had bad thoughts (but I didn't act on them*)". While this cut through what might otherwise have been lengthy evidence, I was not persuaded that this was a full and honest answer. I will consider the details of his evidence below mainly in the context of the conduct allegations. As will appear there, while I conclude that some of Mr Jaffe's evidence offers the best explanation for the facts, there are other respects in which I conclude that his evidence was inaccurate – and in some respects it would seem deliberately so.

205. One submission made about his evidence was that Mr Jaffe appeared to treat the Court process as a tool at his disposal. While I would tend to accept that submission, and there are a number of respects (particularly in relation to the interlocutory stages of this trial) where Mr Jaffe's approach has been somewhat dubious, it is an attitude which is probably not uncommon among sophisticated commercial litigants. And the reality is that (i) absent Court proceedings Mr Jaffe would not be able to enforce his claim – as I have held he is entitled to do and (ii) on the pleaded case Mr Jaffe's evidence was largely of marginal relevance at this stage of proceedings and his manifest reluctance to provide all the information sought by the Defendants was therefore understandable.

206. The Defendants' legal team submitted that each of them was to some extent "scarred" by the experience of Phase 1 and the terms of my conclusions as regards their evidence. I received no impression of any such mental scarring - at least from Mr Rukhadze and Mr Alexeev, although it was quite plain that all three individual Defendants struggled with the doublethink involved in appearing to accept a judgment whose terms they will probably never subjectively accept.

207. As for Mr Rukhadze, it is fair to say that he was calm and polite and that his evidence was in some respects and at some points markedly better than it was during Phase 1. However, it remains the case that over time he tended to fall back into the habits demonstrated then.

208. During the course of cross examination Ms. Fatima QC cited Gloster J's impression of the evidence of Mr Berezovsky in the *Berezovsky v Abramovich* trial. That passage runs thus:

> "At times, the evidence which he gave was deliberately dishonest; sometimes he was clearly making his evidence up as he went along in response to the perceived difficulty in answering the questions in a manner consistent with his case; at other times, I gained the impression that he was not necessarily being deliberately dishonest, but had deluded himself into believing his own version of events."

209. It is a passage which she submitted could be said to apply to Mr Rukhadze also. My own impression of Mr Rukhadze on the second outing was that while a parallel could certainly be drawn with this *bon mot* it would, as regards him at least, verge on the unfair.

210. One part of it provided a striking parallel. In the first trial I remarked on the fact that Mr Rukhadze provided a number of answers purporting to provide new evidence, nowhere given in his (very extensive) witness evidence and nowhere reflected in the

documents. The impression given was that he was making up answers on the hoof to meet difficulties as they confronted him. There was this facet to his evidence in this trial also, though to a less marked degree. An example (of which a number could be given) is in relation to his impact on the Abramovich settlement, where the documents appeared to suggest that his role was peripheral and that most points he raised were in play already with the legal teams, but he nonetheless asserted that the lawyers only had the points because he had previously spelled it out to them.

211. I was less persuaded that he was telling deliberate untruths. He was dogmatic in his evidence, and on a number of occasions his evidence demonstrably diverged from the written record; but my impression on most such occasions was that the divergence related to a combination of wish fulfilment and a less exhaustive review of the documentary record than he had performed before giving evidence the first time. However this did not render his evidence satisfactory – since I was left with the impression that what he considered to be his recollection and the facts were frequently some way apart. Further, somewhat like Mr Jaffe, he had decided on certain themes he wished to convey – the lengthy and substantially unnecessary evidence concerning his mother's position and his profound respect for her appeared contrived, possibly with a view to gaining sympathy.

212. Mr Alexeev's demeanour in this phase of the litigation was less confident and assertive than in the Phase 1 trial, and he seemed to be making an effort to avoid the problems of the past. He was very cautious in giving his evidence, on some occasions appearing to anticipate traps which were not there. However, his efforts to be more constructive did not carry over into the contents of his evidence. The litigation process appeared to have to some extent divorced him from the facts – an example being the passage in his evidence where he asserted that Mr Jaffe must have known that no carry was due to him, when this was manifestly a highly arguable point which required the minds of the Privy Council to resolve.

213. Because of this process, when these points emerged, he tended to push back against the truth. A striking example was when he asserted that the term "parties" was defined in the IRSA as including the Family, such that that definition read across to the Delegation Agreements. His response to being shown the IRSA was not to accept the error but to push back:

> "what I'm saying is that we went into this agreement with a very clear understanding of what it was meant to reflect and we believe that it did. Now that you're pointing to me that there are some missing paragraphs … Probably technically it does not say, but the intent and our understanding and the way we acted on it was of course the one as I've described…"

214. I was left with the impression that Mr Alexeev's focus is on his own interests and he is perfectly ready to persuade himself of the truth of that which is necessary to sustain his position.

215. Mr Marson was again a less than satisfactory witness. He was perhaps unfortunate in being scheduled first in the Defendants' line up facing cross-examination by a different QC. I did receive a strong impression that he was nervous and if not distressed, certainly diffident in the light of my previous findings. It may be that he was genuinely trying to

assist, but the result was not entirely happy; it resulted in a frequently defensive approach to answering questions and an unwillingness to agree with propositions even where the answer was obvious. He was also unfortunate as having been portrayed by the rest of his team as the legal "go to" person, when his legal skills certainly did not display to advantage in the litigation sphere and this aspect of his skills had already come under fire in Phase 1 in relation to his misapprehension in relation to statements of truth.

216. However this depiction of him left him exposed in a case where the question of unique skill was a critical issue in the Defendants' eyes. For example his failure to exhibit key material or provide evidence of propositions would strike any litigator as an obvious failing. So too was the absence of notes of key meetings – a key discipline for a lawyer, as well as, as Ms. Fatima noted, one which might be expected on basic prudential principles. Echoing the Russian proverb contributed by Ms. Gudavadze in Phase 1[2], she cited the Arabic proverb أعقلهاوتوكل ("*trust in God, but tie up your camel*"). In addition, his witness statements seemed to have been produced with little understanding of what their real role was, with extensive attempts to re-interpret my judgment and other irrelevant and inadmissible material.

217. There were also a number of aspects in which his involvement in this litigation process appeared to have resulted in his rewriting his memory. Examples included occasions where his confident assertion as to what the Phase 1 judgment said on a particular matter which turned out to be demonstrably inaccurate, or the demonstrably incorrect assertion that all Hunnewell Georgia's work was Recovery Services.

218. Even more striking was his claim to have conducted a meaningful assessment of the RBS litigation funding prospect without any apparent awareness that it concerned statutory interpretation. Asked about the passage in his statement where he said "*Within hours I carried out urgent research, principally online. I ... began to form some views as to the potential merits of the claims against RBS in the Rights Issue Litigation ...*" this was the outcome:

> "Q. Yes, so what did you do? Did you look at the statute?
>
> A. The statute?
>
> Q. Yes, it was all about a statute.
>
> A. Sorry, I don't understand what you mean by "statute"….
>
> Q. Did you look at the statutory provision?
>
> A. I did not, no. … My initial thought was just to find out the background, where it had gotten to, what had been happening in the trial so far, what the claim was about. A lot of that was available online."

219. However there was ultimately some force in the submission made by the Defendants that it was artificial to focus on Mr Marson's abilities as a lawyer. As I noted in the Phase 1 judgment, Mr Marson was never a litigator; he was a transactional lawyer and

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[2] [32]

he appears to have moved the centre of gravity of his operations into the business world at a relatively early stage in his career.

220. I would accept that what he brought to the table was not so much his own technical legal ability but rather his ability to act as a facilitator in terms of bridging the divide between lawyers and business people and his ability to act as a day to day manager. This was particularly in relation to the numerous teams of external lawyers and other professionals in multiple cases (and the consequent deluge of information involved) but also appears to have extended to a willingness to engage in keeping track of and following up on various matters concerning assets across multiple jurisdictions. He was also able to act as a liaison between the various teams and the Family, as well as filling in the gaps when Mr Alexeev and Mr Rukhadze were not able to do so. He acted in a sense as a junior officer.

The other witnesses

221. Mr Mtibelishvily of Citigroup ("Citi") gave evidence on behalf of Mr Jaffe in relation to the VDP sales process, in relation to which Citi had close involvement in 2012. The Defendants submitted that he was argumentative, aggressive, and disrespectful while the Claimants saw him as clear and concise, only responding emotionally to attacks on his professionalism and motives. My impression of him was that he was indeed somewhat argumentative, particularly when treated with what he considered to be a lack of respect due to himself. He at points spent as much time critiquing the questions as he did answering them. He was however firm and clear in his answers. He certainly gave the impression of being a person unlikely to be ridden over roughshod by Mr Jaffe.

222. Mr Petrovic's evidence was not critical on anyone's analysis, which was perhaps regrettable since he was a polite clear witness who appeared to be doing his best to assist the Court, and upon whose evidence both parties relied for certain points. The Defendants suggested that his recollection of certain meetings was incorrect – as to the detail of meetings that he and others had with them shortly before his departure from SCPI. I have broadly accepted his evidence.

223. Mr Baumann, who gave evidence by video-link was a clear and straightforward witness who was plainly doing his best to assist the Court.

224. Mr Blazquez likewise gave evidence by video-link. He was in many ways an impressive witness with a telling turn of phrase ("*even when I make a bid, I leave myself so many holes to get out that, you know, it's more akin to a Swiss cheese than an offer*"). I was generally satisfied that he was trying to assist the Court, although he was plainly close to Mr Rukhadze and not enamoured of Mr Jaffe, and on occasion (e.g. in relation to the effects of the freezing orders) his evidence was pitched a little higher than the rest of the evidence suggested was justified. He also tended to be somewhat instinctively defensive of his written evidence.

225. Mr Kabanovsky gave evidence by video-link. His focus was very much on Alfa Bank's involvement and as such he seemed to be more or less neutral.

226. Mr Cotlick gave evidence live. He was a quiet and careful witness and was scrupulous to make clear what he could and could not remember. His evidence was however largely peripheral.

227. Mr Skelton gave evidence live. A good deal of his evidence was not challenged. In his oral evidence he was clear and helpful. He was also candid about the extent to which his recollection had eroded over time.

228. Mr Vepkhvadze's video-link evidence was not entirely satisfactory. The Claimants suggested that he was highly partisan and that the problems with his evidence were down to this. My own impression was that he was somewhat partisan and unwilling, but that the difficult experience of giving evidence was (as the Defendants submitted) affected by both technical and linguistic issues and that at points he was not clear on what he was being asked. Owing to this combination of factors I did not receive much assistance from his evidence.

229. Lord Edward Spencer Churchill gave evidence live. He was a clear and careful witness. It was plain that he was close to and thought highly of Mr Rukhadze personally; this essentially reflected his position as a joint venturer with the Defendants in STG and as someone whose position is "very much aligned" with those of Mr Rukhadze. It was also apparent that he thought less well of Mr Jaffe. He appeared to be doing his best to assist the Court, but in the event the areas where his evidence was principally directed ceased to be in issue. I therefore gained little from his evidence for the purposes of the live issues.

230. Mr Bachiashvili was examined remotely. He was a straightforward witness, described by the Claimants as "even-handed". Like Lord Edward Spencer-Churchill his evidence related largely to one of the Responsive Investments which ceased to be in issue. Accordingly his evidence is of no great moment in practical terms, save in that it contributed to the picture of Mr Rukhadze as a successful businessman, who is held in considerable regard by his business associates.

231. Mr Nagle gave evidence live. There was an interesting backdrop to his evidence. He was previously a senior associate of Mr Jaffe, but has since fallen out with him badly, with litigation between them resulting. He was contractually prohibited by an agreement with Mr Jaffe from giving evidence in the Defendants' favour without a release. His evidence was not very satisfactory. The impression which emerged was that he had an axe to grind. His emphatic claim to have perfect recall of conversations a number of years ago was frankly incredible, particularly given the fact that contemporaneous documents contradicted him on more than one occasion. I was not persuaded that he was telling the truth when he gave such evidence. My conclusion that his evidence was not to be relied upon was only reinforced when Mr Rukhadze said of him: "*much of this is not true, and I'd much rather trust my partners on this issue than Mr Nagle*". I concluded that where his evidence was not supported by contemporaneous documents it should not be accepted.

232. As with Phase 1, there was one "stand out" witness, whose evidence I was persuaded was entirely straightforward and not driven or subliminally coloured by any affection, disaffection, interest or agenda. In Phase 1, it was the late Mr Hauf. In this trial it was Mr Eugene Shvidler. Mr Shvidler is a man of (to put it mildly) considerable wealth; operating, as the Defendants put it, "*at a different hierarchical level to the players in this case*". He is a close associate of Mr Roman Abramovich. He has no interest in the outcome of these proceedings. He was called primarily in relation to the Berezovsky litigation and the Defendants' role in compromising it. He gave evidence live. He was a lively, considered and clear witness, with a telling turn of phrase. I gained the

impression that he was happy to be completely plain with the Court in giving his evidence. I accepted his evidence without reservation.

233. The Claimants also asked me to note what they said were striking absences from the witness box, in the form of representatives of the Family, and also Mr Voisin, whose evidence was withdrawn on Day 15 and Ms Miftakhova who was the person with most day to day involvement with the calculations of the Defendants' IRSA entitlements as well as with the process of dealing with expenses and distributions under the IRSA. However it was not suggested that I should draw any specific adverse inferences from these absences and I do not do so.

The experts

234. All of the experts were plainly sensible professional people doing their best to assist the court. Naturally I have to prefer the evidence of some of them over the evidence of others, for the reasons which I will give in relation to the issues where there was a conflict. However I must note my gratitude to the experts generally for the way in which they had co-operated to produce clear and helpful joint expert statements which have been essential to me in navigating the evidence and understanding the differences between the parties.

235. The Claimants called the following experts:

a. Mr Travis Taylor was the Claimants' expert on valuation. Mr Taylor was a sensible, composed and resilient witness who stood up to the demands of a lengthy and focussed cross-examination well. He was scrupulous to express himself with clarity in an area which is not necessarily instinctive to the judicial mind. He took challenges firmly but in very good part conceding ground where he thought it appropriate to do so. In large measure he was an impressive witness. There was a challenge to his evidence in one important respect. That related to his adoption of the evidence of Mr Whittingham of Duff and Phelps ("D&P") in relation to the valuation of Benahavis (a development on the Costa del Sol). This raised an interesting question as to the increasing practice of expert witnesses adopting the work of others as part of their expert reports.

b. Mr Daniel Barton was the Claimants' expert on forensic accountancy. Mr Barton has twenty-five years of experience, and while it was his first appearance as an expert witness in the English Courts, he has previously given factual evidence in this country and both factual and expert evidence in other jurisdictions. Mr Barton was a genuine down to earth witness, and on the whole impressive; though Mr Cogley QC's skilled (and at times combative) cross-examination revealed he had tended to overstate his expertise. Perhaps in part because of the combative nature of the questioning he defended his position with considerable vigour – bordering on intransigence - and gave the impression he was not willing to give ground. Mr Cogley made a fairly determined attempt to portray him as partisan and with a background in fraud investigation as excessively minded to look for any possible hole in the evidence. Although much play was made of Mr Barton's previous foray into the courts in the case

known as "the Three Amigos"[3], it did not provide any real basis for impugning Mr Barton's expertise or impartiality.

236. The Defendants called:

a. Ms Victoria Seal of Savills on the valuation of the Benahavis development. Ms. Seal was a decisive and conversational witness.

b. Mr David Mitchell the Head of the UK Valuations Team at BDO, on the value of the majority of the other assets. Mr Mitchell was (unsurprisingly) a very knowledgeable witness who gave his evidence in a refreshingly down to earth and straightforward way acknowledging agreement clearly where he considered it appropriate to do so.

c. Mr Chris West of Grant Thornton is a partner in their UK Forensic and Investigation Services department, leading contentious valuation activities. He covered valuations of Magticom, Imedi and Maestro. Mr West gave his evidence clearly and was, despite some resistance, often prepared to make reasonable concessions. During the course of evidence my attention was drawn to the judgment of Asplin J in *Destiny Investments v TH Holdings* in which the judge made some criticisms of Mr West. Unlike her I did not find him prone to deliver speeches and argument. I am persuaded that he was trying to assist the court, although ultimately I do conclude that he did not have sufficient material to form a reliable expert view/or that that material he had was right on the borderline of feasibility and it would have been helpful had he made more clear the rather marginal nature of the materials which he had.

d. Mr Will Davies, a partner at Grant Thornton LLP, gave evidence on forensic accountancy issues. He was a careful and quietly spoken witness who gave me the impression that he was doing his best to assist the court within the constraints upon him in terms of the instructions he was given and the materials available – a point to which I shall revert below. Mr Davies was responsible for preparing a very helpful document "the BTA" which recorded and reconciled about 30,000 transactions over a 10 year period, which was a key document for the purposes of the experts' engagement with the issues. Ultimately however there was a limit to the assistance which I could get from Mr Davies' evidence given that he was proceeding on the basis of the assumptions which he was given, and without fully acknowledging the nuances which were inherent in that evidence. Mr Davies was also responsible for one of the bons mots of the trial, noting that when it comes to documentation forensic accountants are like wedding photographers – they can never have enough.

Part 3: The Legal Issues

237. Despite the five weeks of evidence in this case, the centre of gravity for the dispute is in my view very firmly within the legal issues. In particular, much of the factual evidence and a very large proportion of the Defendants' written closing related to matters which are of great importance if I form the view that in the event that Mr Jaffe delayed in bringing his claim, or interfered in the Recovery Services, it would be open

[3] *Airbus Operations Limited v Witney & Ors* [2014] EWHC 1126 (QB) (HHJ Havelock-Allan QC).

to me or appropriate to disallow or limit the recoveries. However, the answer to those prior questions are legal ones.

238. In relation to the legal issues the Defendants also urged a fairly broad approach to weighing the various factors which were identified. Their reasons for doing so are entirely comprehensible – this is a case where the situation is complicated and for the reasons set out in this section I come to the conclusion that once the question of ascertaining the appropriate degree of connection between the default and the loss is concluded, it is in broad terms not appropriate to limit the recovery. That is subject to two further riders which then need to be followed through in the facts in Section 3. Those riders are:

a. The date for the taking of the account.

b. The question of the impact of any prior agreement as to the proceeds.

Legal issues: backdrop

239. There is a considerable amount of common ground between the parties on the law which forms the backdrop to the points at which they part company. There is consensus that:

a. An account of profits and equitable compensation are alternative, inconsistent remedies, and a claimant must elect between them; *Willis Ltd v Jardine Lloyd Thompson Group* [2016] EWHC 723 (QB), at [19], per Soole J;

b. The ordering of an account is an equitable remedy. It is granted or withheld on the basis of equitable principles: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638(Ch) [1579];

c. There is a fundamental rule that a fiduciary must not be allowed to make an unauthorised profit: out of his fiduciary position *Ultraframe* [1588(i)];

d. The remedy of an account of profits is not penal; equitable principles do not compel a fiduciary to disgorge more than he has received/earned by reason of his breach: *Vyse v Foster* (1872) LR 8 Ch App 309, at 333;

e. The profits for which an account is ordered must bear a reasonable relationship to the breach of duty proved;

f. The fashioning of an account should not be allowed to operate as the unjust enrichment of the claimant: *Ultraframe* [1588(ii)];

g. Identification of what has been acquired is key: *Ultraframe* [1588(iv)] *CMS Dolphin v Simonet* [2002] BCC 600 [97];

h. So too may be identification of the breach of duty: *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, at [513] (Australian Federal Court);

i. The burden of establishing that part of the profit does not fall within the account is on the fiduciary: *Warman International v Dwyer* (1995) 182 CLR 544 at 561.

240. The authorities also indicate the types of limits which may be imposed by the Court in fashioning the account. They include:

a. A temporal limit;

b. A limit by reference to particular assets or particular customers;

c. A capital payment instead of or in addition to an account of profits; and

d. An allowance for the fiduciary's skill, labour and assumption of business risk.

The deterrent dimension

241. An area which was broadly common ground, but upon which the parties placed very different degrees of emphasis, was what might broadly be called the deterrent dimension *vis a vis* the accounting party.

242. Here it is clear that because of the nature of the fiduciary relationship the courts have historically regarded it as important that the remedy ensures disgorgement effectively, lest a failure to do so encourages other fiduciaries to breach their duties. This can be seen in a number of places. The classical example is found in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 46:

> "[t]he rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, **cannot escape the risk of being called upon to account**." [my emphasis]

243. The other striking example of the principle at work is the case of *Boardman v Phipps* [1967] 2 A.C. 46. In that case the solicitors of a family trust, acting entirely in good faith, had bought a majority shareholding in a company in which the trust had a minority shareholding, and had taken steps in relation to that company which were to the net benefit of both themselves and the trust. It was "*not in dispute, that the conduct of the appellants and each of them has never been anything except utterly honest and above board in every way*" (Lord Upjohn p 123).

244. Despite that, a majority of the House of Lords held that, because the solicitors had profited from a fiduciary position, they were liable to account for that profit. Lord Guest said at p.115: "*the law has a strict regard for principle in ensuring that a person in a fiduciary capacity is not allowed to benefit from any transactions into which he has entered with trust property*".

245. Lord Hodson said that the principle was

> "that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person" (p.105).

246. Dealing specifically with the deterrent aspect, he continued, "[*i]t is obviously of importance to maintain the proposition in all cases and to do nothing to whittle away its scope or the absolute responsibility which it imposes*" (p.105).

247. The deterrent effect is perhaps seen at its high-water mark in the case of *Guinness Plc v Saunders* [1990] 2 AC 663. In that case a committee of three directors had agreed that a fee would be payable to one of them (Mr Ward) in relation to services provided in connection with a takeover bid, and the services were duly provided, but the fee was not properly approved in accordance with the requirements of the company's articles.

248. The House of Lords held that the fee had to be disgorged and that no equitable allowance should be made for the work done by the director. The deterrent aspect is fairly clear at a number of points, but is most trenchantly expressed thus by Lord Goff, saying that the principle relating to an equitable allowance:

> "is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees…
>
> The decision has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided in the trust deed […] it can only be reconciled with it to the extent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule […] such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees".

249. That approach was then reflected in the case of *Murad v Al Saraj* [2005] EWCA Civ 959, a case where Mr Cogley attempted to persuade the Court of Appeal to show a degree of mercy to a defendant whose good faith was perhaps somewhat less clear.

250. In that case two sisters, Ms. Aysha and Ms. Layla Murad, agreed with Mr Al Saraj to buy the Parkside Hotel in Clapham together. The plan – initiated by Mr Al Saraj - was that they would each contribute £500,000 and raise the rest by way of bank loan; and they would then share the profits equally. Mr Al Saraj however, instead of contributing £500,000, secretly agreed with the seller of the hotel that various nominal amounts totalling £500,000 (including a £369,000 commission for introducing the Murads to the seller) should be offset against the sale price.

251. When the truth came to light the Murads sued for, *inter alia*, an account of profits earned from his investment in the hotel. Mr Al Saraj contended that he should not be required to account for the entirety of his profits because, if full disclosure had been made, the joint venture would still have gone ahead, albeit with his share of the profits set at a lower percentage. Jonathan Parker LJ at [101] laid stress on the importance of:

> "laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court".

252. The Court therefore rejected the argument in favour of an allowance in terms of the profits; though it did sanction an allowance for his services and disbursements (remuneration for acting as manager of the hotel).

253. That same approach has been seen again - and very recently - in the Court of Appeal in *Gray v Global Energy Horizons Corporation* [2021] 1 WLR 2264. That is a case of particular interest here because, like this case, it concerned a maturing business opportunity. The facts were somewhat complex, but in essence Mr Gray had been a fiduciary of the defendant company but breached his fiduciary duty by doing business in conflict with the defendant's interests – business in which his breach of duty put him in a position to participate.

254. On appeal Mr Gray (like the defendants in this case) relied heavily on the judgment of Lewison J in *Ultraframe,* in particular as regards the point which refers to avoiding unjust enrichment of the principal ([1588(ii)]). On this point the Court of Appeal was unyielding:

> "[125] …we would sound a note of caution in relation to Lewison J's second principle (unjust enrichment)…
>
> [126] The point we wish to emphasise is that the basic equitable rule is indeed a stringent one which requires an errant fiduciary to account to his principal for all unauthorised profits falling within the scope of his fiduciary duty. The rule is intended to have a deterrent effect, and to ensure that no defaulting fiduciary can make a profit from his breach of duty. It does not matter if the result is to confer a benefit on the principal which the principal would otherwise have been unable to reap …
>
> [127] It follows, in our view, that the doctrine of unjust enrichment has, at best, only a subsidiary role to play in limiting the liability of a fiduciary to account."

255. I note and accept that this adamantine attitude has not lacked critics in the academic sphere. In particular Ho, "*Deemed Performance in Account of Profits*" in "*The Impact of Equity and Restitution in Commerce*", eds. *Devonshire and Havelock* (2019), pp.183-202 advocates a more generous approach to the non-dishonest fiduciary.

256. One can also see an argument that the strictness of the approach to deterrence may take the court beyond what seems truly fair in situations (such as the present) where the fiduciary relationship is not one between parties where there is an imbalance of power. As David Richards LJ noted in *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471, [2021] 3 WLR 395 at [36], in the modern world "'*Fiduciary duty' is a protean term, capable of covering a wide range of different rights and obligations*."

257. Building on this, one might say that the original paradigm driving deterrence was the professional man safeguarding the assets of the widow and the orphan and that there is a lesser need for deterrence in (for example) joint venture situations where a fiduciary relationship arises between parties equally well resourced, well advised and robust.

258. A similar potential faultline was highlighted in *Murad* where Arden LJ said this (and Clarke LJ went rather further in limited dissent[4]):

> "[82] … It may be that the time has come when the court should revisit the operation of the inflexible rule of equity in harsh circumstances, as where the trustee has acted in perfect good faith and without any deception or concealment, and in the belief that he was acting in the best interests of the beneficiary. I need only say this: it would not be in the least impossible for a court in a future case, to determine as a question of fact whether the beneficiary would not have wanted to exploit the profit himself, or would have wanted the trustee to have acted other than in the way that the trustee in fact did act. Moreover, it would not be impossible for a modern court to conclude as a matter of policy that, without losing the deterrent effect of the rule, the harshness of it should be tempered in some circumstances….
>
> [83] In short, it may be appropriate for a higher court one day to revisit the rule on secret profits and to make it less inflexible in appropriate circumstances, where the unqualified operation of the rule operates particularly harshly and where the result is not compatible with the desire of modern courts to ensure that remedies are proportionate to the justice of the case where this does not conflict with some other overriding policy objective of the rule in question..".

259. However, it seems to me clear that the balance of authority as matters stand is against such an approach, in particular in the light of *Gray*. So, interestingly, appears to be the balance of academic commentary. I note in particular:

    a. Conaglen, "*The nature and function of fiduciary loyalty*" (2005) LQR 121(Jul), at pp.452-480 emphasises the deterrent function of the account of profits. In particular at p 463: "*Removing the fruits of temptation is designed to neutralise the temptation itself by rendering it pointless*". He emphasises the derivation of the "no profit" rule as being born out of the "no conflict" rule, focusing on situations that carry increased risks of the fiduciary abandoning their non-

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[4] Clarke LJ agreed [158] that it may be that the time has come for the court to revisit the inflexible rule of equity in harsh circumstances; though he considered the tools were already in place to enable this to be done.

fiduciary duties in favour of their personal interests. At pp. 469-70 he argues that in order to achieve its prophylactic function, the rule must be applied strictly;

b. Conaglen, "*Strict fiduciary loyalty and accounts of profits*" (2006) CLJ 65(2), pp.278-281 considers the obiter suggestion in *Murad* that a higher court might wish to consider relaxing the stringent account of profits rules where a fiduciary has acted in the principal's best interests. Conaglen prefers orthodoxy because: (i) fiduciary doctrine is prophylactic; (ii) in cost-benefit terms, strict fiduciary rules provide a clear benefit in terms of protection against a fiduciary's temptation; (iii) courts would dilute that benefit if they considered such matters;

c. McInnes, "*Account of profits for breach of fiduciary duty*" (2006) LQR 122 (Jan), pp.11-15 concurs that draconian rules are justified by the vulnerability and temptation at the heart of the fiduciary relationship;

d. Samet, "*Guarding the fiduciary's conscience – A justification of a stringent profit-stripping rule*" (2008) OJLS 28(4), pp.763-781 argues against the proposition that the law should distinguish between honest fiduciaries whose actions benefit their principals and dishonest fiduciaries whose actions harm their principals noting that the only way to lower the risk of self-deception to a minimum is to leave no room for the fiduciary to consider whether their actions are legitimate. She contends that the rule must be sufficiently inflexible to lower the risk of self-deception by a tempted fiduciary;

e. Conaglen, "*The extent of fiduciary accounting and the importance of authorisation mechanisms*" (2011) CLJ 70(3), pp.548-578 argues that letting fiduciaries believe that they may be able to retain their profits "*provided they acted in a way that the court somehow considers less egregious than other cases would distort the incentive structures*" of the fiduciary doctrine. He suggests that judicial preparedness to entertain arguments that the fiduciary acted in good faith and/or in the principal's best interests would increase temptation for a fiduciary, and may even incentivise some to try to contrive situations where their actions appear to fit that mould.

260. What this run of authority says clearly, and what I therefore hold in my mind as part of the backdrop to the exercise which is to be performed, is that the court should attempt – if possible - to hold the balance between disgorgement of profits wrongly earned and not unjustly enriching the claimant. However, the very considerable significance attached to the deterrent effect means that if there is a doubt of which side of the line to stray, that doubt should be resolved in favour of the principal. In essence the need for consistency, principle and deterrence is seen as more important. That may – as in the cases of *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 and *Boardman v Phipps* [1967] 2 AC 46 - lead to harsh results. But those harsh results are the accepted price of the deterrent motivation which underpins the remedy.

Legal issue 1: Equitable principles v. the circumstances of the case

261. The first piece of acknowledged "parting company" on the law occurs in relation to the fashioning of the account and the interplay of the ordering of the account on equitable principles and the passages which say that an account is fashioned to fit the nature of

the case. This latter approach is the hallmark of the Defendants' argument in this dispute. They see it as enabling them to ask me to draw the boundaries of the account by reference to a wide range of "fairness" arguments.

262. The juridical basis for this argument is slim. It has been in issue since early in the case. Since that time the Defendants have pointed to two places as support for that argument. The first is the Australian case of *Warman International v Dwyer* (1995) 182 CLR 544. This is a case which figured also in *Murad* and to which repeated reference will have to be made. Warman International Ltd was an Australian company that had served as the Australian distributor for gearboxes manufactured in Italy by a company called Bonfiglioli. The claim arose from the departure of one of its senior employees (Mr Brian Dwyer) to participate in a joint venture with Bonfiglioli pursuant to which the gearboxes would be manufactured and sold in Australia by a different entity.

263. It was held that Mr Dwyer had breached his fiduciary duties. However, the Court noted that the Italian manufacturer, which was a 50/50 partner in the joint venture, was already itself the owner of substantial goodwill in respect of the sale of its gearboxes in Australia, over which Warman could have no claim, and that goodwill was a significant contributor to the success of the new business. This is clear from the following passages:

> "The local goodwill associated with the Bonfiglioli products distributed by Warman - the local product goodwill - was the property of Bonfiglioli just as the local product goodwill in Australia in Hospital Products (51) was that of the United States principal. That, of course, is not to deny the existence in Warman of a goodwill associated with its distribution of Bonfiglioli products. It does not appear that any distinction was drawn at trial between the goodwill of Bonfiglioli and that of Warman or that any attempt was made to identify and value each of them…
>
> …the local goodwill associated with the Bonfiglioli products had always remained the property of Bonfiglioli. Warman was entitled to exploit that local goodwill only during the period of its distributorship. Warman's agency had not extended at all to the local assembly of the Bonfiglioli products. Realistically, . the main basis of B.T.A.'s business was what Bonfiglioli had always retained and been entitled to exploit, namely, the local goodwill of the Bonfiglioli products after the termination of Warman's agency and the right to assemble those products locally."

264. For present purposes, the key point is that in that case at p. 559 the Court stated: "*It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.*" In that case, applying that approach, the Court ordered an account of profits, but limited to a period of two years.

265. The second place is the following passage from *Spry, Equitable Remedies* (19th Ed.), at 1:

> "Equitable principles have above all a distinctive ethical quality, reflecting as they do the prevention of unconscionable conduct. They are of great width and elasticity, and are capable of direct application, as opposed to application merely by analogy, in new circumstances as they arise from time to time. Thus at law a court is required to operate largely by analogy when presented with new situations. But in equity the establishment of fiduciary duties or the application of an equitable doctrine may arise in any circumstances at all, whether or not similar circumstances have come about previously, provided that the case falls within the general principles that originated in the Court of Chancery."

266. To the extent that the Defendants did pursue this argument I reject it. It is right that the fashioning of the account is done on the facts of the case, but it is to be done always subject to established equitable principles. It is not a free for all.

267. The reliance on *Warman* in this regard was in my view misplaced. In my judgment the Defendants have elevated this *dictum* to a status quite undeserved by it, and which is in danger of undercutting what was actually being said. When one looks at the judgment, the statement in question appears in the context of a discussion of the circumstances in which an equitable remedy will be "*withheld according to settled principles*", for instance because it is "*defeated by equitable defences such as estoppel, laches, acquiescence and delay*". The passage in question comes essentially as an interlude between an entirely conventional rehearsal of the law via a reference to *Coomber v Coomber* [1911] 1 Ch 723, to the conclusion: "*But the basic principle remains that a principal who so elects is entitled to an account of profits, subject to considerations of the kind already mentioned [i.e. established defences and limits]*". Further as will be seen below the result in *Warman* is capable of being explained on entirely conventional principles.

268. Having said that however, this conclusion is not as great a set-back for the Defendants as it might at first appear. This is because the equitable principles are not many and are not such as to entirely constrain the court's approach. The interrelationship is perhaps best seen in *Boardman v Phipps* at p. 123 where Lord Upjohn said: "*Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case*".

269. To similar effect is the dictum of David Richards LJ in *Wood v Commercial First Business Ltd* already cited and that of Fletcher Moulton LJ in *Coomber v Coomber* where he indicates that it would be wrong to conclude that "*every kind of fiduciary relation justifies every kind of interference*".

270. However bearing in mind the backdrop noted above, these points simply mean that the fact that two parties have a relationship that can be described as "fiduciary" does not determine the outcome of a given dispute: regard must be had to the facts of the case, such as the nature of the relationship, the facts of the alleged breach, and the potential applicability of any equitable defences.

271. I conclude that there is no general, wide-ranging discretion, or justification for the introduction of limits on the account that are not supported by established principles.

The fashioning of the remedy is done to fit the nature of the case; but it is done by reference to established equitable principles and to any equitable defences that may be pleaded and proven in a particular case.

Legal Issue 2: the nature or magnitude of the breach

272. One issue of significance is the question of the nature or magnitude of the breach. It is a point which was expressly flagged by the Defendants in opening, saying in writing that "*the account should be fashioned to fit the facts of the case (including, in this case, reflecting the minor nature of the breach)*" and orally that the nature and magnitude of the breach is relevant to the fashioning of the account.

273. This argument did not feature to any great extent in closing. To the extent that it was still live I accept the Claimants' submissions that there is no scope outside equitable defences for a reflection of a lack of moral culpability. That point is made clear by the authorities dealing with deterrence to which I have already referred. It is clearly demonstrated by (inter alia) *Boardman* where fiduciaries were obliged to account even though they had "*never been anything except utterly honest and above board in every way*".

274. Similarly there is no scope for reflecting the lack of loss to the principal. That is made plain in, for example:

a. *IDC Ltd v Cooley* [1972] 1 WLR 443 at 453F: "*When one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant.*";

b. *Murad* at [59-60]: "*the liability of a fiduciary to account does not depend on whether the person to whom the fiduciary duty was owed could himself have made the profit.*"

275. The Defendants relied on the decision in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43 as an example of a case in which the magnitude of the breach was relevant. To the extent that it did so, that authority could not affect well-established principles of English Law. But I am not persuaded that the case does in any event provide such an example. The *Foresters* case is one of considerable interest in this case because of some not inconsiderable factual similarities, and it is one to which reference will need to be made at more than one point.

276. In *Foresters*, the defendant friendly society owned a company, Funeral Plan Management ("FPM"), which provided funeral products – specifically funeral savings plans. Two senior managers of the company, a Mr Woff and a Mr Corby approached Foresters (also a friendly society) with a plan to develop Foresters' own funeral products offering in a way which would essentially annex most of FPM's existing business. They would set up their own company doing roughly what FPM did and Foresters would employ them.

277. It was, therefore a deliberate and bad faith breach of fiduciary duty on the part of Messrs Woff and Corby. The Australian Court described it as a plan for the "*despoliation of*

the business of Lifeplan and FPM". At first instance, they were ordered to account for the profits derived from contracts entered into within the first five years of the new business. On appeal, the High Court of Australia held that this was too narrow: since the breach involved the diversion of the entire funeral bond business away from the claimant, the appropriate relief was an order to account for the entire net present value of the new entities' business. Thus, while the court plainly took a very dim view of the moral standards of Mr Woff and Mr Corby, the basis for the decision was not the level of immorality, but the extent of the diversion and consequent benefit to the defaulting fiduciaries.

278. *Foresters* therefore has no help to give the Defendants as regards this aspect of the case and the submission ultimately went no further than saying that the defaulting fiduciary had to account for "*the net benefits [...] of its breaches*".

279. The Defendants also placed some reliance on *Grimaldi v Chameleon Mining NL (No. 2)* [2012] FCAFC 6. Similar points apply here. If the case were authority for any such proposition, that could not assist in the face of the English cases. In any event it is clear from the passage relied on that the case does not go to the question of magnitude of breach but rather to the focus for the question of connection. In that case the court said:

> "In determining what is the appropriate relief and its extent … require two questions to be answered: (i) what is the breach of fiduciary duty the misappropriation of 'trust' property; the improper diversion of an opportunity; an undisclosed personal interest in a sale or purchase, etc?; and (ii) what is the profit or benefit which the fiduciary has made in consequence of that breach?.."

280. It does not follow, as Mr Cogley suggested, that "*once you're into the territory of asking what is the breach, you cannot ignore the magnitude*." Magnitude is relevant to the profit, not to the breach.

Legal Issue 3: "reasonable relationship" vs "equitable causation"

281. In opening, the Defendants suggested that causation was a relevant concept, at least in the sense of so called "equitable causation". In closing that case had also moved somewhat.

282. However again lest the point be said to be live I will make clear that I reject any submission that there is a relevant concept of equitable causation in this area. The test is one of reasonable relationship. That may equate to what Professor Conaglen calls "attribution" (Conaglen, "*Identifying the profits for which a fiduciary must account*" (2020) CLJ, 79(1), pp.38-63); however it is probably safer to stay within the parameters of the way that the concept has been expressed in the authorities. That is clear as a matter of authority, because the question of the role of causation has been previously raised, argued and rejected.

283. In *Murad* Arden LJ said at [72] that this proposition was established by many authorities. In *Gray* the CA held at [128] that:

> "There needs to be some link or nexus between the breach of duty proved and the profits for which an account is ordered, such that there is a 'reasonable relationship' between them (as Lewison J said in the *Ultraframe* case). But a link or nexus does not need to be of a causal character. It will normally be sufficient if the profit arose within the scope of the defaulting fiduciary's conduct in breach of duty."

284. To like effect is *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, [96]: "*a fiduciary's duty to account for a secret profit does not depend on any notion of causation. It is sufficient that the profit falls within the scope of his duty of loyalty to the beneficiary*".

285. That leaves the question of: what is a reasonable relationship or connection? This is obviously a fact sensitive inquiry. However, in the present context it is (however tempting) not sufficient to leave the point there. This is because the question of the sufficiency of the connection is acutely relevant in this case at two important points. The first is in relation to the question of the relevance of the exact breach found and the overall ambit of the account. This is a cousin to the argument as to the relevance of the magnitude of the breach, but approached by a different legal analysis. The second relates to scope for the account in a different way – in particular that of at what point is a profit too distantly related; the point at which, in the words of Asplin J at [137] in *Gray* "*the connection fails or is insufficient*". This is key for the single Responsive Investment issue, the RBS litigation funding.

286. There is no absolute answer to either of these points in the authorities. The best that can be done is to assemble the guidance which there is. On the first issue, the following points are of note.

a. The question of the nature of the breach is by no means a usual question to be asking, or needing to answer. In many cases of breach of fiduciary duty the breach is simple and manifest. Such cases are discussed by Conaglen in his 2020 article in section A, giving the example of *De Bussche v Alt* where the agent charged with selling a ship bought it himself before selling at a profit to a buyer he had already identified.

b. The question of a perimeter issue derived from the ambit of the breach appears to be one which has principally resonated in the context of misuse of certain assets but not others. This is the approach seen in *My Kinda Town Ltd v Soll* [1982] FSR 147 (also known as The Chicago Pizza Pie Factory/LS Grunts Chicago Pizza dispute) where the account had to be referable to what profits would have been without the use of the words "Chicago Pizza" in the restaurant's name.

c. One approach to the case of *Warman* is to regard it in this light, in that the profits were generated from both the breach of duty, but also the Italian manufacturer's goodwill. The account therefore had to reflect only the breach, and not the goodwill aspects.

d. The principal authority upon which reliance was placed was the Australian case of *Grimaldi v Chameleon Mining* [2012] FAFC 6. But as I have already noted

that authority does not advance matters beyond the identification of the nature of the breach and the connected profit.

e. As to the wording in *Gray*, which seems to be used as the jumping off point for this particular iteration of the argument, I do not accept that what the Court of Appeal was there saying is that there needs to be some nexus to specific facets of the conduct which goes to make up the breach of duty. That would be out of step with the other authorities on nexus/connection, and one would expect the Court to explain any such move away from orthodoxy if that had been intended. Nor was it a live point in that case; there is no sign of such a point being live or of such an approach being taken in *Gray* itself.

287. There is therefore no authority for the approach of carefully taking the constituent elements of the breach of fiduciary duty and seeking to fashion an account referable only to them. As I will explain in Part 4 below, I do not consider that my findings were ones which were akin to a finding of a breach only in relation to particular assets. I found a breach of fiduciary duty which related to the MBO. The authorities establish that the account should be taken by reference to that breach. This effectively will dispose of the remains of the "*magnitude of the breach*" argument.

288. As to the quasi-remoteness aspect, I note the following points:

a. It is clear that derivative claims are not necessarily excluded. In *Murad* at [85] Arden LJ said: "*The profit obtained in breach of trust ... may indeed be derivative, as where a trustee misappropriates trust property and then sells it and make a profit out of something else. But equity does not take the view that simply because a profit was made as part of the same transaction the fiduciary must account for it.*"

b. One example is *Foresters*, where the High Court of Australia rejected the submission that there should be a five-year cut-off for the account of profits – because "*[t]he advantages of the business connections appropriated from Lifeplan and FPM were to be enjoyed by Foresters for as long as those connections could be retained in its business*" – and instead ordered an account of the entire net present value of the fiduciaries' new business entities.

c. On the other hand, while it is true that in *CMS Dolphin v Simonet* Lawrence Collins J held [97]: "*other contracts might not have been won, or profits made on them, without (e.g.) the opportunity or cash-flow benefit which flowed from contracts unlawfully obtained*", the facts of the case indicate a less far reaching approach. Simonet was the managing director of an advertising company, CMSD. In breach of fiduciary duty, he set up a competing business, taking with him the staff from CMSD and CMSD's three principal clients, Argos, DFB and Reebok. Lawrence Collins J held Simonet liable to account for the benefit of the contracts that CMSD had with Argos and DFB, which Simonet had diverted to his new business, and for the benefit of the business opportunities CMSD had with all three clients, which Simonet had also diverted to his new business. However the claim appears not to have been allowed in respect of any of the profits generated by Simonet's new business from other clients – though it may in reality have been that those clients were attracted by a ripple effect.

d. There can be real difficulties in particular in identifying the source of the profits. This is considered at length in Conaglen 2020, in particular by reference to partnership cases, fiduciary relationships and carve outs (whether business carved out of the plaintiff's business). He concludes (contrasting *Warman* and *Foresters*) that:

> "Where the whole of the new business has been carved out of the plaintiff's business, then the fiduciary is more likely to be held liable to account for all of the profit from that business, subject to allowances, because the whole business represents a profit or benefit that has been obtained in breach of fiduciary duty. However, … even where the defendant's business has been carved out of the plaintiff's business, there can be other, legitimate, contributions to the generation of that profit …".

289. Another point to note, which I raised in submissions, was the approach which is taken to tracing, and the extent to which this can be said to be relevant. Conaglen in his 2020 article has this to say:

> "In these latter decisions, the liability to account effectively treats the profits as an "accretion to the property which has yielded them", which provides an effective means of stripping the profit that the fiduciary otherwise claims for himself. In *Tang v Tang*, Lord Millett N.P.J. rebuked counsel and the courts below for seeking to apply profit-stripping principles to the case at hand, rather than tracing principles, arguing that the two involve conceptually distinct principles. However, that distinction is not as clear as he suggested. In *Scott v Scott*, for example, which Lord Millett relied on in *Tang v Tang*, the High Court of Australia held that a trustee who purchased property using a mixture of trust funds and his own could be required to account for the profit generated when that property increased in value, and that the obligation to account for that profit would be secured by a lien against the property. The High Court mentioned, but expressly did not decide, the question whether this could potentially be given effect through a co-ownership constructive trust, of the kind that the House of Lords (including Lord Millett) later recognised, following a tracing exercise, in *Foskett v McKeown*. The point here is not to argue that tracing and accounts of profits necessarily operate on identical principles and will always produce the same results. The point being made, and to which it will be necessary to return, is that the principles overlap, in the sense that both provide mechanisms for stripping profits from an errant fiduciary, and that the principles have influenced one another in their development."

290. Conaglen does not offer a simple solution here, however he notes later in the article that the tracing approach seems to be discernible primarily at the input stage and he suggests "*is not sufficient on its own to answer the question*".

Delay

291. On delay the question is essentially one of whether this argument is available at this stage, the Defendants asserting it as a relevant concept and the Claimants contending that the ship has sailed in that the argument is only available as a defence to the ordering of an account.

292. I prefer the Claimants arguments.

293. The Defendants relied upon two well recognised concepts, laches and acquiescence. In summary the principles upon which they relied are:

    a. Laches, which requires there to have been unreasonable delay, and that the delay renders the relief (or scope of relief) now sought unconscionable. This can have the same effect where it is "practically unjust" to grant the relief sought (or the equitable principle "*which might fairly be regarded as equivalent to waiver*"), *Lindsay Petroleum Co v Hurd* (1873-4) L.R. 5 P.C. 221, at 239-240, per Sir Barnes Peacock.

    b. Acquiescence likewise has two elements: there must be a putting by of the Claimant's right or remedy; and it must be unconscionable to allow the Claimant to now seek the particular remedy; *Spry, Equitable Remedies* (9th Ed.), at 456 and 458.

294. Pausing here, it is apparent that these concepts do not go to the ordering of an account at all – they are either equitable defences to the claim, or they are not. It follows that the time for relying on them was the point at which the question of the availability of a remedy was live. At Phase 1 it was argued for the Defendants that the Claimants had to elect. There was no suggestion that an account of profits was not available.

295. Perhaps because of this, considerable reliance was instead placed by the Defendants on a so-called general principle of unconscionable delay, with it being contended that "*in some cases, unconscionable delay (without particular reference to laches or acquiescence) has been held to be the decisive principle in refusing an account of profits*". Reliance was placed in particular on *Edmonds v Donovan* [2005] VSCA 27, at [76] – [77], per Phillips JA.

296. That was a case which concerned breaches of fiduciary duty in connection with a business opportunity to purchase a golf course and develop it for resale. Six individuals agreed to pursue the opportunity and to share the profits equally, but "*the joint venture fell apart*" and two of them pursued the opportunity in their own right. The claimants sought an order that the defaulting fiduciaries' interests were held on constructive trust, and pursued various other relief in the alternative, including an account of profits and equitable compensation. The judge at first instance rejected the constructive trust claim and also refused to order an account of profits, instead ordering equitable compensation.

297. That decision was upheld on appeal. Phillips JA considered that the claimants' "*delay smacks of their 'waiting to see' and then, when the venture proved profitable, acting opportunistically to grasp the benefit*" and so an account should be refused. He continued, at [77]: "*[t]here was no warrant for allowing the respondents to stand by for nearly two years and then to obtain a remedy which, in effect, exposed them to none*

of the risks but gave them all of the rewards of the business having been run in the meantime."

298. The problem for the Defendants in this case is that the case is one which appears to concern acquiescence. The Victorian Court of Appeal went on to hold that the delay was so unconscionable that no account of profits would be ordered, and compensation would be ordered instead. There are no other authorities supporting such an approach.

299. There appears to be no legal basis for the Defendants' "third way". This is echoed in Spry on Equitable Remedies p 449 "*it is not sufficient that the defendant should be able to show merely that the plaintiff has been guilty of unreasonable delay*".

300. I conclude that delay principally goes to the ordering of an account at all. It does not impact on the fashioning of the account per se. The Defendants' submissions that it did were purely assertion.

301. Had it been live I note here in passing that it logically led to a very peculiar argument which would have the court deciding when Mr Jaffe should have "*commenced proceedings or taken protective steps*". I reproduce part of the argument in this respect (taken from the Defendants' opening):

> "200…. (2) the account should be limited to the period between the breach and the time at which Mr Jaffe should, in the Court's assessment, have commenced the claim or taken protective measures in relation to it (such as seeking an injunction) …
>
> 201. As to identifying the point in time by which Mr Jaffe and the Claimants (and SCPI) ought to have commenced proceedings or taken protective steps, without prejudice to the detailed evidence available to the Court on this issue at trial, what follows is a non-exhaustive summary of events in the relevant period, identifying (amongst other things):
>
> (1) Occasions when Mr Jaffe and the Claimants intimated legal action against the Defendants, but inexplicably failed to act, consistent with an inference that he had deployed a 'wait and see' policy;
>
> (2) Mr Jaffe's (and therefore the Claimants') funding position in the relevant period, which paints a picture contrary to the Claimants' case that they had 'no source of funding';
>
> (3) Mr Jaffe's alleged reluctance to disrupt his business relationship with the Family (and the Defendants);
>
> (4) The other litigation going on at the time, which Mr Jaffe relies upon in his evidence to in part explain his inaction in relation to the claim against the Defendants".

302. The extraordinarily open textured decision which the Court would thus be invited to perform is evident, and unattractive.

303. I should add that in any event it does not follow from this conclusion that the Defendants have at an earlier stage missed taking a good point, in that they failed to argue for acquiescence or laches as precluding the ordering of an account.

304. This is because as a matter of law delay does not necessarily impact on the ordering of an account even as an equitable defence (it is not an "*if delay = no claim*" sum). The authorities make clear that whether delay produces an equitable defence depends upon whether it would be inequitable to do so. That itself seems to trace back to the questions of whether (i) the profits have been made by a risky process or investment, and (ii) a clear knowledge of the conduct of the business can be shown, such that it can be said that the claimant has chosen not to accept the risks, but has rather sat on his hands until it became apparent whether there would be profits. One can appreciate that inequity.

305. This is apparent in the authorities where delay has "bitten". So in *Clegg v Edmondson* (1857) 8 De G M&G 787 the defendant managing partners of a mine dissolved a partnership to obtain a new lease for their exclusive benefit. The claimants were aware of this but allowed the defendants to work the mine without interruption for 9 years before making a claim. It was held that the claimants were entitled to an account of profits and interest for the period between last settled account of the mine under the former lease and date of notice of intention to apply for a new lease but relief thereafter was barred by laches and acquiescence because the claimants knew the defendants intended to apply for a new lease and could have done so in the same way themselves. Relevant to the decision were the particular risks of the business – and in particular the need for outlay which might be fruitless if the venture did not succeed. At 602 considerable stress was placed on the fact that "*mining property,… is subject to extraordinary contingencies, and which can be rendered productive only by a large and uncertain outlay*" and that there might well have been "ruinous expenditure". Knight-Bruce LJ said this:

> "A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointments and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing. … There was here, in my opinion, no sufficient apology, no excuse for the delay from 1846 to 1855."

306. Similar issues came to the fore in *Ernest v Vivian* [1861-73] All ER Rep Ext 1531 where a defendant obtained a lease over a mine from a landlord who later died. The new tenant gave notice to the defendant to give up the lease but took no further action. The land was then sold to the claimant who eventually sought to have the lease declared void or set aside. It was held that the claimant was disentitled from relief due to laches. The court considered it relevant that there was no dishonesty or wrongdoing by the

defendant who had worked the mines at his own risk for a considerable time. Again there is mention of the fact that mines are especially risky ventures, requiring a long course of successful working with requirements of preliminary outlay and capital investment, as well as a continuing and increasing risk.

307. Similarly in *Archbold v Scully* (1861) 9 HLC 360 it was held that for acquiescence to bar a remedy, a party must do nothing and knowingly permit another to incur an expense under belief that it would not be objected to; however laches and acquiescence did not apply in that case because "*the fact, of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be any equitable bar*".

308. In *Re Jarvis* [1958] 1 WLR 815 a testator appointed his 2 daughters as executors, but gave no power to carry on his newsagent business. After he died, one daughter (D) carried on the business, paid off debts and obtained a new lease. The other daughter (C) worked for D but later claimed a constructive trust and account of profits. This was held to be barred by the doctrine of laches. The element of acceptance of the use of the business while risk is being taken to produce results is again clear.

309. The more significant argument was whether delay can result in the account being temporally limited. The Defendants relied upon four main cases in this regard.

310. The first was the case of *Warman*. In that case of course the account was limited to two years. However, it certainly cannot be said that that decision was reached on the basis of delay. As I have alluded to above, the key fact that justified the imposition of a temporal limitation in that case was that the "main basis" of the new business established following the breach of fiduciary duty was not anything brought to the table by the fiduciary, but the goodwill of the third party business that became his 50/50 joint venture partner. The principal had no claim over the profits attributable to that goodwill and this had to be reflected somehow. Secondly there was an element of depreciation of Warman's misused assets. There was also an element of delay. What appears to be the case is that the Court, seeking to reflect primarily the first point, settled on a temporal limitation as a clean, if approximate, way of reflecting a number of factors. Delay may be said to be one of those factors; but certainly the reasoning does not rest on delay. There is no real analogy with the present case. Here if the point runs, it has to do so on the basis of delay alone. The opportunity was that of SCPI and was not parasitic upon anything brought to the table by a third party before the breach.

311. The second case, that of *Clegg*, I have already dealt with above – it is not a case of temporal allowance, but of laches barring the remedy.

312. The third case was *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; 59 CLR 641, at 679 – 681. Under a contract (a "tribute agreement") to mine gold ore within a particular area, the claimant provided facilities, processed and sold the ore, and gave the defendant miners a share of the profits. The claimant found out that in mining the defendants had gone beyond the area agreed to be mined. However he continued to take the ore and pay the defendants for over a year. The claimant then cancelled the agreement and sued for breach of contract. The Australian High Court held that the mining company was not estopped from insisting on the true boundaries of the tribute region, but was not entitled to recover amounts paid over after discovering that the tributers were mining outside the agreed area or to an account of the proceeds.

313. The Defendants see this as an example of the flexible approach to delay manifesting in a temporal limitation. The Claimants contend that the case concerned an estoppel arising from the fact that the claimant had taken payment from the defendants in the knowledge that the payments did not reflect the underlying contract.

314. While the Defendants disputed that the case was one of estoppel it is fair to say that the estoppel explicitly rejected was one that went to the entire claim. The basis of the decision is not entirely clear. Latham CJ at pp 18-19 seems to analyse the position as regards the period after the owner gained knowledge of the trespass as one grounded in estoppel. Dixon J appears, in approaching it via *Lindsay Parkinson* and *Clegg* to be more minded to treat it as a defence of laches, though he never explicitly says so. It may be that the case can properly be analysed as containing a series of breaches, some of which were barred by laches, and others of which were not. Certainly the breach was being increased and was not static and one can see a valid reason for regarding the periods disjunctively. Essentially one might say that there was no remedy for the breaches covering first period, but there was a remedy for the later breaches during the second period. Equally the analysis might be said to be grounded in estoppel.

315. I am not persuaded that it makes a huge difference, since *Grundt* is not binding on me and involves no statement of principle which cuts across anything I am saying. The essence of *Grundt* was that the landowners had knowledge of a right to claim that their land was being wrongly exploited on a number of occasions but accepted money for that very exploitation. It therefore went to the existence of a remedy for that period. In this case however there is no series of breaches, no acceptance, and no sensible way of saying that an action should have been brought at point A.

316. The next case on which heavy reliance was placed was *Ford v Foster* (1872) L.R. 7 Ch. 611. This is a delightful case concerning a quasi-trademark dispute relating to an item called the "Eureka" shirt ("A Perfect fit Guaranteed"[5]), where James LJ, at 627 (with whom, at 633-634, Mellish LJ agreed), considered that the account of profits would be temporally limited: "*having regard to all these circumstances, we are of opinion that the account should not be earlier than the filing of the bill*" (as opposed to from the date of the Defendant's wrongful use of the Claimant's "fancy name").

317. While the Defendants submitted that this case suggested that even tangential misconduct could be relevant, I do not consider that it can really be taken as authority for that proposition. The case is rather antique – dating to before the Judicature Act. What is more the result is somewhat enmeshed in (see pp 627 and 633-4) (i) the inability to prove that his loss matched the defendants' gain because their business was originally larger (ii) the fact that the court considered that the plaintiff was not entitled to any account which would enable him to recover sums in equity which he could not have recovered at law (iii) the complications ensuing on the plaintiff's own improper conduct (describing himself wrongly as the "patentee" of the shirt when he only had a trade mark) and lack of vigilance and (iv) the fact that there was the capacity to limit the account temporally by requiring the defendant to source shirts from the plaintiff in the future. These factors were given somewhat different weights by the judges and the impression is that the outcome is a happy coincidence rather than the result of matching

[5] Any reader wishing to ascertain more about the shirt will find that the item was co-incidentally advertised in the sixth part of the first issue of Charles Dickens' Bleak House: https://scholarexchange.furman.edu/cgi/viewcontent.cgi?article=1005&context=bleak-house

analysis. Further Mr Cogley sensibly accepted during the course of argument that the case was very different to the present case.

318. Finally in connection with this area I should mention the case of *Murdoch v Mudgee* [2022] NSWCA 12, which was drawn to my attention by the Defendants during the course of judgment writing. I am very grateful to them for ensuring that I had the latest authority available for consideration. Having said that, I do not consider that it really advances the legal argument. It was assumed that there is a discretionary defence of "standing by" separate to laches and acquiescence. It does not consider delay as a discretionary factor subsequent to defences to the account. Indeed it specifically refers to delay as a defence. Further the full range of argument which I have heard here (for example as to what *Edmonds* actually decides) was not deployed on this point.

319. I would also regard it as being a case which is so distinct from the present one as to lend little aid. *Murdoch* was a case where there was a dispute involving two brothers and their two sons who were directors and shareholders of several different companies, businesses broadly within the mining area, being connected with quarrying and crushing limestone and dolomite. The issue related to business opportunities discovered by the protagonists while working for the family company but which two of them had taken on through their separate companies. The issues included (i) whether such opportunities were within the scope of the defendants' fiduciary duties; and (ii) the significance of the claimant 'standing by' with knowledge that his brother was carrying on such opportunities with a view to profit.

320. So far as concerns the delay aspect, it therefore partakes of the "mining" sensitivities to which I have alluded. Further the conclusion reached in that case is plainly extremely fact sensitive.

321. However it does interestingly make plain that any such discretionary limit carries with it a burden on the defaulting fiduciary of identifying when inequitability arose from delay. It also provides a clear example of the kind of analysis which must be possible before the balance tips away from the victim of the breach – the passage from [204] illustrates the clear evidence needed and how it is put together on the facts of that case.

322. I should then touch on the cases which link delay and impecuniosity, because of the contingent argument by Mr Jaffe that if excuse for delay is needed it is found in his lack of funds. The first authority relied on here was *Davies v Ford* [2020] EWHC 686 (Ch) where a modern statement of the doctrines is given thus: "*a strong case for denying a remedy would arise in a commercial context if it were clear that the claimant had cynically waited to see whether there was value in pursuing his claim, and had in the meantime allowed the defendant to expend time, energy and money, and undertake commercial risks*".

323. In that case the judge gave weight to an impecuniosity argument even where the claimant had failed to produce any banking records in circumstances where the judge was satisfied that "*Mr Davies' only obvious source of income before 2011 seems to have been the Business, which he says was taken from him by Mr Monks*."

324. That case is however also interesting for the fact that weight is given to the fact that Mr Davies had made his position clear in correspondence at an early stage. While the

Defendants submit via *Excalibur* and *Clegg* that it is not possible simply to write letters, this is a case where the writing of a letter was effective.

325. As for *Fisher v Brooker* [2009] UKHL 41 [2009] 1 WLR 1764 – this was a case outside the 60-odd cases within the authorities bundle, which Mr Cogley, having arrived at it via a reference in *Davies* to *Patel v Shah*, in aid of the proposition that *Davies* was distinguishable, originally suggested that reference to it might be excessively discursive. However, he later specifically asked me to read the entire case but "*particularly the difference between acquiescence, laches and estoppel*" by reference to Lord Neuberger's judgment.

326. Having duly done so, I am not persuaded that it advances matters materially. That was a case where Mr Fisher, a former member of the rock group Procol Harum (best known for the 1967 hit "A Whiter Shade of Pale", upon which Mr Fisher played the famous Hammond organ track) successfully established that there had been no implied assignment of his 40 per cent share of the musical copyright in that song to a recording company when the song was first recorded. The House of Lords held that implied assignment could only have occurred if such assignment had been obvious to both parties at the time, or if the commercial relationship between them could not sensibly have functioned without it. One issue was whether Mr Fisher had lost his interest in the copyright as a result of estoppel, laches or acquiescence.

327. At [62-4] Lord Neuberger summarised the position thus:

> "… laches and estoppel are well established equitable doctrines. However, at least in a case such as this, I am not convinced that acquiescence adds anything to estoppel and laches. The classic example of proprietary estoppel, standing by whilst one's neighbour builds on one's land believing it to be his property, can be characterised as acquiescence: …. Similarly, laches, failing to raise or enforce an equitable right for a long period, can be characterised as acquiescence…
>
> Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion…"

328. Both parties relied on the passage at [79]:

> "The argument based on laches faces two problems. The first is that, as pointed out by David Richards J, laches only can bar equitable relief, and a declaration as to the existence of a long-term property right, recognised as such by statute, is not equitable relief. It is arguable that a declaration should be refused on the ground of laches if it was sought solely for the purpose of seeking an injunction or other purely equitable relief. However, as already mentioned, that argument does not apply in this case. Secondly, in order to defeat Mr Fisher's claims on the ground of laches, the respondents must demonstrate some "acts" during the course of the delay period which result in "a balance of justice" justifying the refusal of the relief to which Mr Fisher would

> otherwise be entitled. For reasons already discussed, the respondents are unable to do that. They cannot show any prejudice resulting from the delay, and, even if they could have done so, they have no answer to the judge's finding at para 81, that the benefit they obtained from the delay would outweigh any such prejudice."

329. So far as the Defendants are concerned at best this case seems to achieve that for which it was originally cited in passing – namely to flag that a degree of caution may be appropriate in dealing with *Davies* by reference to the earlier authorities and that one should be alert to the fact that the conclusion on letter writing there may well have been peculiar to the circumstances of the case – perhaps because of the different circumstances as to investment and risk.

330. However having had the opportunity to read it fully it appears to me (i) to deal squarely with the doctrine of laches, which is not applicable here and (ii) actually to reinforce the Claimants' point that something more than delay is needed before laches (or some not established generalised principle of delay derived from laches) will bite. It therefore broadly supports the Claimants' case.

Conduct

331. At the very heart of the Defendants' case is the issue of conduct. They plainly have a very strong belief that it would be unfair for them to be made to account for the profits of the Recovery Services if Mr Jaffe behaved in a reprehensible fashion. Many trees have been consumed in pursuit of this argument.

332. It is however an argument with a basis which is slim to the point of invisibility. It has been the subject of considerable contempt from the Claimants throughout the lifetime of this phase of the case; but no strike out application was made. The principles therefore come to be considered here with an ample background of possible misdeeds to colour the consideration of the issues.

333. In opening, as in the interlocutory skirmishes, the basis was in *Snell's Equity* (33rd Ed. at 7-055) which says:

> "Like all equitable remedies, the account of profits is discretionary. Thus, in cases which are more complicated than a simple case of the sort described above, the account is fashioned to meet the circumstances of the case. This is done in accordance with settled equitable principles. The governing principles are that the fiduciary must account for all of the profit which he made in breach of fiduciary duty, but this accounting must not be allowed to operate so as to unjustly enrich the claimant. Thus, e.g. it may be inequitable to award an account of profits where the claimant stood for a lengthy period before seeking the remedy despite knowing about the breach, such that it was exposed to none of the risks involved but now seeks all of the rewards".

334. This links to *Warman v Dwyer* (1995) 182 CLR 541 where the Australian High Court explained (at [28]) that the liability to account may not arise where it would be unconscientious to assert it, and the conduct of the claimant may be such as to make it inequitable to order an account. It says that this is not just an "all or nothing" defence, but is something capable of being taken into account by the Court in the exercise of its equitable discretion (per *Warman* at [29]: the remedy must be fashioned to fit the nature of the case and the particular facts) and matters relating to what is inequitable may also be relevant to whether the defendant should account for the entire profits (e.g. *Warman* at [33]-[34]).

335. Reference was also made to Gageler J in *Foresters*, where he was considering what circumstances might render accounting for the full profits identified in the identificatory stage unconscionable. He referred, at [92], to "*those cases in which equitable relief might be withheld on established discretionary grounds by reference to disentitling conduct of the plaintiff*".

336. In oral opening reference was made to *Clegg v Edmondson* and *Grundt*; however as will be apparent from the preceding section, those are essentially laches/acquiescence cases.

337. In closing the case advanced had (again) moved somewhat. Despite the microscopic treatment of the facts on conduct, conduct was taken together with delay and with the consideration of the caselaw being entirely focussed on the delay/sitting on hands aspects. That was reflected in the oral presentation of the case, with Mr Cogley explicitly dealing with the two compositely, saying delay and conduct are "*in fact a corollary each of the other*" and "*delay equals conduct, conduct equals delay*".

338. In oral opening I specifically raised with Ms Fatima by reference to an article by Professor Conaglen, that one reason for the lack of analysis on this point might be because accounts of profits have historically been conducted by Masters (and such cases are less likely to have been reported). Ms Fatima's robust response was that:

> "In my submission it would be inconceivable if there were such a significant point being raised at that sort of level for somebody not to have taken it up, given how fundamental it is to the whole architecture of this part of the law. It is not something which is a small little point which could have been developed, you know, in the dark without anybody noticing. It just isn't that sort of a point. It is incredibly important in terms of the rationale for the taking of the account."

339. There seems to me to be much force in that riposte; it seems extremely implausible that such a point would not have emerged to the extent of being the subject of an appeal to a Judge, mentioned in any reported judgment or any published commentary, including practitioner texts.

340. However even if it were the case that the argument had somehow lurked "off-camera", the present case has provided an excellent opportunity for exploring as a matter of analysis why such an allowance should be made – and I have specifically invited the parties to do that. The Defendants have chosen not to engage meaningfully with that invitation and that opportunity.

341. It is however important that this judgment deals carefully with a matter which plainly is so close to the hearts of the Defendants, and where - viewing matters emotionally rather than analytically - one can entirely understand why they should feel this. To the Defendants, who have plainly worked extremely hard in pursuit of the Recovery Services, it feels wrong that the fruits of that endeavour should go to someone who not only never lifted a finger to help, but who they believe acted - at best - as a dog in the manger and - at worst - in ways which had the capacity to positively impede their work.

342. There are however a number of principled problems with the argument. Some were identified in the Claimants' oral opening, thus:

> "does it have to be unlawful and, if it's unlawful, does it have to be criminally unlawful or is it enough if it's a breach of the civil law? If it is a breach of the civil law, if you sort of cascade down, does it have to be a breach of duty owed to the defendants or can it be a breach of duty owed to anyone, to a third party? Does that breach of duty to a third party have to have some relevance to the facts? What is the degree of relevance to the facts if you're in that territory of being in a third party? Does it have to be deliberate? Is it okay if it's negligence or accidental?... Does the conduct need to have succeeded?"

343. These are important questions and the fact that they are not easy to answer so as to produce a principled result gives cause for caution.

344. So too does a consideration of the principle which ought logically to be at the forefront of such an argument in the context of an equitable remedy: the "clean hands" defence. It is striking that in a case where so very much has been made of conduct issues, this principle has never been invoked by the Defendants and is not mentioned in either of their very lengthy written documents.

345. A consideration of the principle explains that absence. The issue was considered in *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 (Ch), drawing on an earlier summary by Andrew Smith J in *Fiona Trust & Holding Corp v Privalov* [2008] EWHC 1748 at paragraphs 17 to 20. CF Partners had given certain confidential information about another company (Tricorona) to Barclays in the context of a proposed acquisition, and Barclays and Tricorona had used that confidential information to establish a strategic partnership between themselves. CF Partners sued both Barclays and Tricorona for breach of confidence, and both defendants raised a "clean hands" defence relying on CF Partners' own misuse of confidential information belonging to Tricorona. At [1122], Hildyard J summarised the relevant principles:

> "(1) The party relying on the doctrine must show that the party seeking the relief has been guilty of or responsible for some misconduct which is "sufficiently closely connected" with the equitable relief sought (citing Lord Scott in *Grobelaar v News Group Newspapers* [2002] 1 WLR 3024 at para 90).
>
> (2) Whether the misconduct is sufficiently closely connected to the relief sought depends on the facts of each case, but the test commonly cited is that it must have an "*immediate and*

> *necessary relation to the equity sued for*" (citing Eyre CB in *Dering v Earl of Winchelsea* [1775–1802] All ER Rep 140; ER Vol 29).
>
> (3) The misconduct must be "*in some way immoral and deliberate*" and not trivial. However, "*the court will assess the gravity and effect of misconduct cumulatively, so that, while the elements of misconduct taken individually might be too trivial for the maxim to be applied, they might be sufficient taken together*".

346. Reference was also made to:

a. The judgment of the Court of Appeal in *The Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328 at para 158 (Aikens LJ), a case concerning dishonest evidence given by the claimant during trial:

> "Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought."

b. Spry: "Principles of Equitable Remedies" which suggests that it must be shown that the claimant is seeking "*to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief*".

347. Hildyard J held that there had been wrongdoing by CF Partners, and that there was a connection. But he rejected the defence, holding that the information which was the subject of CF Partners' claim was "*of very considerably greater overall scope and quality than the information it misused*". In other words, even though there was misconduct in relation to closely related subject matter, there was a sufficient difference between the claimant's wrongdoing and that of the defendants that the defence was not available. He concluded:

> "The maxim does not, in my view, enforce manners, or require apology; it is reserved for exceptional cases where those seeking to invoke it have put themselves beyond the pale by reason of serious immoral and deliberate misconduct such that the overall result of equitable intervention would not be an exercise but a denial of equity."

348. This judgment has been repeatedly cited in the years which have followed. This last passage is cited at 22-024 and 23-050 of Civil Fraud and referenced by Snell at 5-010.

349. It is also worthy of note, and feeds back into the analysis here, that the principle has been held to be unavailable where the party invoking the maxim was itself guilty of misconduct. That was the case in *UBS AG (London Branch) v Kommunale Wasserweke Leipzig GmbH* [2014] EWHC 3615 (Comm), per Males J at [706]; upheld on appeal at [2017] EWCA Civ 1567, at [170]–[177]. In this context – an account of profits – one is of course operating in an area where the remedy has been awarded precisely because of

a serious degree of wrongdoing and where, as already noted, the courts have emphasised the need for a deterrent approach.

350. All of this goes to demonstrate the impossibility of there existing a principle such as that for which the Defendants tacitly contend.

351. In truth and in addition there is a lack of logic in this argument in the context of an account of profits. The nature of the account of profits is to retrieve for the claimant profits which should have been his. They were never the defendants' to enjoy. On that basis, even if the principal had (for example) so acted that profits were less than they would have been if he had not interfered, the person injured is himself. So if (and this was the main pleaded allegation where there appeared to be nexus between conduct and outcome) Mr Jaffe had so acted that the sale of VDP had produced a smaller profit than otherwise and hence a smaller payment for Recovery Services, *prima facie* (and unless there were an antecedent profit sharing agreement) he would have cut off his nose to spite his face.

352. The only other person who could have a claim in relation to such actions would be the Family (in relation to whom he is said to have acted in breach of fiduciary duty). But there is no reason why that should affect the account vis a vis the Defendants.

353. Finally, there is another significant issue with this argument. It is that misconduct allegations relate only to Mr Jaffe. While it has been commonplace during the litigation to refer to the individual UBOs as a shorthand for the companies which they control, that would not change the fact that in order to penalise SCPI for its conduct it would be necessary to establish a basis for piercing the corporate veil. No such attempt was made. The Defendants repeatedly elided the two as if it was a truism that Mr Jaffe's conduct was that of SCPI. For example in opening it was said "*SCPI was, in its capacity as general partner in VDP, a fiduciary. SCPI's fiduciary duties were owed to its investors, i.e. NWVF on behalf of ... the Family. To the extent that Mr Jaffe was prioritising his own interests over those of the Family, therefore, he was doing so in breach of fiduciary duty.*" As a matter of law that does not follow.

354. I should perhaps also touch on the (again tacit) argument that even if (i) delay alone cannot affect the account and (ii) conduct alone cannot affect the account nonetheless "delay+conduct" can. The reason why this should be the case has never been enunciated. It remains an essentially visceral contention. In the arguments which surrounded the disclosure and amendment issues prior to trial Mr Cogley contended that it was inconceivable that a judge of this court would conclude that Mr Jaffe's conduct was not relevant if he had done the various things alleged – and in particular if he had (as alleged) been paid by Mr Anisimov for giving evidence in court against the Family's interests.

355. The argument is one which could only have any coherence if one were looking in this connection for a quasi-quantitative hurdle to be surmounted. On that basis if one needed, say, 75 points worth of bad things to qualify for an equitable allowance, 25 points of delay and 50 points of bad conduct could be added together. But that is not the way the analysis works. Both points are ones which are in principle (at least at this stage) unavailable. Even were they available what would matter in each case is a qualitative connection between the factor and the profits. Two things of different kinds

cannot be aggregated in this way – particularly when even aggregated one cannot discern an impact on the profits.

356. It follows that I conclude that there is no authority for the proposition that an aggrieved principal's behaviour – however unpleasant or annoying - can be reflected in the amount awarded by way of account of profits. This is so whether the conduct issues are considered alone or together with delay. I add one rider here. It might be the case that if conduct did impact on the amount of profits, and if the defaulting fiduciary would in any event be entitled to an allowance (for example by way of antecedent profit sharing agreement) it might well be appropriate to make some further allowance to reflect the fact that but for the conduct the fiduciary would have been entitled to more by way of profit-share. However that is not this case – in part for the reasons outlined above (including because of the absence of attribution of the conduct of Mr Jaffe. to the Claimants) and in part for other reasons to which I will come.

357. Consequently, whatever the facts relating to conduct they cannot affect the recovery ordered. I will consequently deal with the factual aspects of the conduct issues in the "Contingent Issues" section of the judgment.

Pre-existing agreement

358. The next issue concerns the relevance of a pre-existing agreement: if the Defendants had an agreement with Mr Jaffe whereby they were entitled to 50% of the proceeds of the Recovery Services, should that be reflected wholly or in part in the Court's approach to the account?

359. The Defendants' case is that it should – to the extent of a 50% allowance. Reliance was placed in particular on the judgment of Arden LJ in *Murad*:

> "an account of profits…is a procedure to ensure the restitution of profits which ought to have been made for the beneficiary and not a procedure for the forfeiture of profits to which the defaulting trustee was always entitled for his own account."

360. It was submitted that the reason why no allowance was made on that basis in *Murad* was that because Mr Murad did not disclose the set off arrangement, he did not openly make the contribution which would have formed the basis for the profit share agreement. Mr Cogley submitted that Arden LJ's reasoning recognises that where there is no speculation, because there was an agreement in existence, then this can and should limit the account, as an account is "*not a procedure for the forfeiture of profits to which the defaulting trustee was always entitled for his own account".*

361. Reference was also made to *Chirnside v Fay* [2007] 1 NZLR 499 where Gault CJ said at [131]: "*As a general rule a fiduciary must not be allowed to benefit from a breach of fiduciary duty unless there has been some antecedent agreement for profit sharing.*"

362. In closing particular emphasis was put on *Keystone v Parr* [2019] EWCA Civ 1246 [2019] 4 WLR 99. Mr Parr had been a director of and a shareholder in Keystone Healthcare Ltd ("Keystone"); he had sold his shares to Keystone Healthcare Holdings Ltd ("Holdings") as part of a restructuring; however, in breach of fiduciary duty, Mr Parr failed to disclose to his principal his participation in a fraud on the company. He

sold his shares to his principal and received payment. However, had he disclosed his fraud, then by the antecedent terms of the articles of association and the shareholders' agreement, he would have been obliged to sell his shares at a 50% discount. As the Court of Appeal put it, the purchaser "*thus paid 50% more than it would have done if the true facts had been known. The difference between the price paid and the discounted price was an unauthorised profit in the hands of Mr Parr, which equity requires him to disgorge to Keystone.*" The account of profits awarded was for the 50% difference, not the entire purchase price. In short, the antecedent agreement was given effect.

363. I consider that the authorities go this far: where there is an antecedent agreement which limits the principal's interest – for example in the case of a joint venture - the fiduciary need only account for profits in respect of the principal's interest. They do not however purport to lay down any principle as regards cases where there is an agreement which does not limit the principal's interest.

364. I should note that there was a degree of argument on this point by reference to the Partnership Act with the Claimants urging caution on partnership cases because of the provisions of s.42 Partnership Act 1890 (which specifically provides that a partner in that situation shall be entitled to *"such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets"*) and the Defendants contending that since the Partnership Act was a consolidating Act that made no odds and highlighting liberal references to such cases in the later authorities such as *Murad*. I was not persuaded that this conflict took matters any further. While the partnership cases do provide examples of accounts being taken they do so specifically when there is an antecedent agreement akin to one limiting the principal's interest – because that is the nature of the partnership agreement. And here the antecedent agreement changes when the partner leaves the partnership, providing a clear natural temporal break – one where the nature of the asset essentially changes from one in which the former partner has a share to one where he does not.

365. However although I conclude that the present case is not properly to be regarded as one of antecedent agreement, this leaves open the possibility that a similar allowance might be made by reference to skill and effort.

Allowance for skill

366. As to this point, which is a significant point in this case perhaps the best starting point for consideration of this is Conaglen's 2020 article, where he says this:

> "While it seems courts in Australia may be more willing to grant such allowances than courts in England, authority on when such an allowance is appropriate remains 'scanty'. There is, necessarily, an element of discretion or 'judgment' in determining whether allowances should be made in a particular case, particularly for the fiduciary's time, effort and skill, and what allowance might be reasonable in the circumstances of that case. That decision depends heavily on the circumstances of the particular case, and so it is difficult to formulate any general rule, but a significant factor in the scant authority that exists appears to be whether the profit would not have been generated without the exercise of time, effort and skill, and whether it was

> reasonable - such that the court would have approved it if asked in advance - to pay someone to exercise that time, effort and skill without which the profit would not have been generated. If that is the case, the work can be considered a legitimate expense in generating the profit, and thus deducted as a just allowance in the accounting process.
>
> If granted, the allowance covers reasonable or 'fair remuneration' for the work done in generating the profit, rather than an estimate of what the particular defendant could have negotiated as remuneration for that work. If the fiduciary could have negotiated a better rate of pay for the work which generated the profit, the failure to take that step is the fiduciary's own fault and so does not further diminish the amount of the profit for which he or she must account. In *O'Sullivan v Management Agency and Music Ltd*., the Court of Appeal indicated that this remuneration could potentially include a profit element, but it is important to recognise that Fox L.J. explained this on the basis that the '*allowance could include a profit element in the way that solicitors' costs do*'. In other words, what was accepted was that the remuneration could go beyond mere recovery of expenses out of pocket (disbursements and the like) and could extend to 'profit costs' which would include payment for the expenditure of professional skill and labour. This approach anchors the decision as to the amount of the allowance to a reasonable sum for the work which was needed to generate the profit, bearing in mind relevant market conditions, rather than it being a free-floating discretion to divide the profit between principal and fiduciary in some arbitrary proportion. In this way, an allowance for time, effort and skill, like allowances for other expenses which are determined to have been appropriately incurred in generating the relevant profit, is part of the calculation of the net profit which has been made in breach of fiduciary duty."

367. The comparison between the approach of the Australian and English Courts is made by reference to the Guinness case. The vast majority of the caselaw which underpins the reasoning is from Australia or New Zealand.

368. One notable exception is the case of *O'Sullivan v Management Agency & Music* [1985] 1 QB 428. Mr O'Sullivan was a young composer who claimed that agreements (including those for exclusive management) that he had entered into with the defendants were void as unreasonable restraints of trade, obtained by undue influence.

369. The Court held this:

> "Once it is accepted that the court can make an appropriate allowance to a fiduciary for his skill and labour I do not see why, in principle, it should not be able to give him some part of the profit of the venture if it was thought that justice as between the parties demanded that. To give the fiduciary any allowance for his skill and labour involves some reduction of the profits

> otherwise payable to the beneficiary. and the business reality may be that the profits could never have been earned at all, as between fully independent persons, except on a profit sharing basis. But be that as it may, it would be one thing to permit a substantial sharing of profits in a case such as *Phipps v. Boardman* [1967] 2 A.C. 46 where the conduct of the fiduciaries could not be criticised and quite another to permit it in a case such as the present where, though fraud was not alleged, there was an abuse of personal trust and confidence. I am not satisfied that it would be proper to exclude Mr Mills and the M.A.M. companies from all reward for their efforts. I find it impossible to believe that they did not make a significant contribution to Mr O'Sullivan's success. It would be unjust to deny them a recompense for that. I would, therefore, be prepared as was done in *Phipps v. Boardman* to authorise the payment (over and above out of pocket expenses) of an allowance for the skill and labour of the first five defendants in promoting the compositions and performances and managing the business affairs of Mr O'Sullivan, and that an inquiry (the terms of which would need to be considered with counsel) should *469 be ordered for that purpose. Such an allowance could include a profit element in the way that solicitors' costs do.
>
> In my view this would achieve substantial justice between the parties because it would take account of the contribution made by the defendants to Mr O'Sullivan's success. It would not take full account of it in that the allowance would not be at all as much as the defendants might have obtained if the contracts had been properly negotiated between fully advised parties. But the defendants must suffer that because of the circumstances in which the contracts were procured."

370. The other authorities to which reference is made as supporting this proposition are: *Phipps v Boardman* at p 1018; *Re Macadam* [1946] Ch. 73, 82-83 "*If I can be satisfied … that they were the best persons to be directors I do not think it would be right for me to expect them to do the extra work for nothing*."; *Re Berkeley Applegate (Investment Consultants) Ltd.* [1989] Ch. 32, 50-51; Heydon et al., Meagher Gummow & Lehane's Equity, [5-280].

371. The point as it stands on the English authorities is perhaps best summarised in *Re Berkeley Applegate* by Mr Edward Nugee QC (Sitting as a Deputy High Court Judge):

> "The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom

> the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in In *re Marine Mansions Co.,* L.R. 4 Eq. 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v. Nesbitt*, 14 Ves. Jun. 438); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Phipps v. Boardman* [1964] 1 W.L.R. 993)"

372. I therefore conclude that there is authority which supports the proposition put forward by Professor Conaglen. An allowance may be made in equity for the skill and labour put in by the defaulting fiduciary, and that while the court will look carefully at the circumstances before granting any such allowance, cases where (i) the work done by the fiduciary would otherwise have had to be done by another and/or (ii) the work done has benefitted the property which forms the basis of the account are ones where such an allowance may be appropriate.

The relevance of the company to whom duties were owed: Mr Marson

373. A final issue of principle on which legal issues arise relates to Mr Marson. LOI 14 enunciates the issue thus: "*Is the maximum sum for which the Third Defendant is liable to account limited to amounts constituting fees (net of expenses) that he has received for the Recovery Services since 25 May 2011?*"

374. The Defendants contend that Mr Marson should not be required to account for any part of his profits which take the form of carried interest rather than simple "management fees". The basis for this submission is that unlike the other Individual Defendants, who were affiliated to SCPI, which was pursuing the full opportunity, Mr Marson only had a relationship with Revoker. He therefore only breached duties which he owed to Revoker, has been found liable only to Revoker, and has to account for profits received by him only due to such a breach. That means that Revoker is entitled only to profits earned relating to the part of the larger opportunity that Revoker had. That opportunity it is said was confined to earning management fees – it was never going to receive any carried interest. In those circumstances, it is said that there is no sufficient connection between Mr Marson's additional profits and his breach.

375. It is said that awarding "*any greater account against Mr Marson would unjustly enrich Revoker with profits which it was not pursuing*".

376. Tempting as that argument is on one level, it would appear to be analytically unsound and I reject it. Mr Marson's profits are acquired by him essentially because of his breach. If an account of profits is there to take back from a defaulting fiduciary profits received in connection with its breach all profits would seem to be in scope. That is consistent with the approach to profits which the principal could not itself have earned. It is hard to see, simply as a matter of first principles, why the reasonable relationship test would not be satisfied.

377. Furthermore essentially this argument was deployed in *Keystone v Parr* (outlined above). On appeal, Mr Parr submitted: "*there was a mismatch between the company to which the fiduciary duty was owed (Keystone) and the company which made the overpayment (Holdings)*". Among other things, Holdings would not have been the

beneficiary of the right to purchase the shares at a discount: "*There were thus no circumstances in which Holdings could have benefitted from the 50 per cent discount*".

378. The Court of Appeal held (citing cases including *Regal* and *Murad*) that the "supposed mismatch" was no bar to an order requiring Mr Parr to account for the 50% profit he had earned: "*The fact that Keystone itself would not have made the profit is irrelevant*".

379. This approach would seem to follow logically from the proposition that a fiduciary must account for profits earned from his breach even if the principal would not have been in a position to earn those profits himself.

380. As I have found Phase 1, Mr Marson "*obviously only gained the opportunity to be involved [in the Recovery Services] via his own recruitment to be employed by Revoker*". In those circumstances, to limit his account to management fees only rather than to the much greater remuneration he was able to earn by way of carried interest would be artificial and unjustified. I accept the submission that his carried interest remuneration is "reasonably connected" to the breaches and should be included within the scope of the account.

Part 4: Fashioning the account

381. I now turn to deal with the relevant factual issues which can impact on the ambit of the account. The first two issues were covered by List of Issues 15, but in the event effectively covered two points. The first was the factual aspect of the "*magnitude of the breach*" issue. The second was the "*transformation of the opportunity*".

Original scope of the breach found

382. Here the Defendants submitted that the objectionable acts for the purposes of assessing sufficient connection were the disloyal acts and preparatory steps found at Phase 1. Further or alternatively, it was said that if the breach touched upon any MBO, it was the MBO that was still being pursued by Claimants at the time of the breach, the door having been shut on any MBO actually to provide the Recovery Services. On this basis it was said that the MBO was one to monetise Mr Jaffe's claim that he had a contract with the Family and that MBO was not exploited by Defendants.

383. The Defendants submitted that those breaches were minor, within the panoply of what the reported cases illustrate, and in any event the consequences that flow from them are minor. They suggest that the only relevant consequence of the breach was that by virtue of their disloyal preparation the Defendants were able to continue providing the Recovery Services on an ad hoc basis after the break-up, without interruption. For that they received management fees. The profits for which they should be required to account were therefore such of the management fees as resulted from their ability to "*hit the ground running*" by virtue of their preparation and that on this basis the limit of the account ordered should be to a maximum of six months' management fees.

384. This argument was premised on a consideration of the Phase 1 judgment. The Defendants contended that:

   a. The Judgment effectively rejected the allegation that "*pursuant to a common design, [Ds] broke with the Salford Group and persuaded the Family to instruct*

and pay them instead". Specifically it is said that I did not find that the Claimants' business had been diverted to the Defendants.

b. I rejected the case that Mr Rukhadze "*intentionally stalled the discussions with the Family and sought to turn the Family against the Salford Group in order to create leverage for the purposes of re-negotiating his own terms with Recovery Partners and/or Revoker and/or taking the opportunity to provide the Recovery Services for the Defendants*".

c. I rejected the case that on 16 April 2011 Mr Rukhadze "*had now proposed that the Family terminate its relationship with Revoker*" and I made no finding that the Defendants had caused the Family to terminate the relationship, or write its solicitors' letters of 25 May 2011 by which it made clear that the Family no longer wished to work with Mr Jaffe.

d. I found only that there had been a wrongful resignation in that, the Defendants carried out certain preparatory acts whilst in office which were disloyal, and carried out certain other acts of disloyalty, which acts rendered the resignation unlawful.

e. Those disloyal acts were only oral and written discussions by the Defendants amongst themselves and limited interaction with third parties, namely:

(1)Mr Marson; asking Diana Miftakhova to bring in her contract of employment;

(2)Mr Rukhadze canvassing the name "Hunnewell" from March 2011;

(3)The May correspondence looking to a seamless transition to New Revoker.

(4)Mr Alexeev's instruction to US tax advisers (Morgan Lewis) in October 2010 to leave a letter of engagement unspecific as to what they actually needed to do, the implication being that he was leaving open the possibility that he might seek the firm's advice for the benefit of the Defendants alone rather than Revoker.

(5)Disparagement of Mr Jaffe to or around the Family, none of which was found to have resulted in the Defendants obtaining the business opportunity.

385. As I have noted above, the legal target at which this argument is shooting is essentially illusory. There is no basis for adjusting the account simply on the basis of characterising the breach as a small or minor breach. The closest the argument comes to gaining traction is in relation to the contention that these findings operate as a perimeter for a quasi-causal link. However (as I have noted) the authorities do not seem to support such an argument either. This is not a case of a discrete breach in relation to specific assets, where such arguments do work.

386. This argument is also misconceived on the basis of the findings in the judgment – it involves "reading down" the judgment to a considerable degree. The first point is as to

diversion. The simple point is this. I did not find that the breach of fiduciary duty was the diversion of the business opportunity. I found breach of duty in the wrongful resignation. For the purposes of the Phase 1 dispute there was no necessary live issue as to whether the business opportunity was diverted; the focus was on whether a breach of fiduciary duty was established and I could get there via diversion or by another route. I did find a at [417-418] and [424] a breach of fiduciary duty which related to the MBO which I had found at [352] and [370].

387. However the business opportunity was not really in issue – it was the opportunity to provide the Recovery Services to the Family for a substantial fee. There was no issue as to what that comprised. I did find that this business opportunity was that of SCPI and I also found that it was a live business opportunity.

388. The argument now pursued that there was no business opportunity at all is one which was argued (in essence though not in the exact same terms) and dismissed at Phase 1. This is absolutely clear from [384] of the judgment which says this:

> "It is true that the context for much of the negotiation at this time was Mr Jaffe discussing his effective withdrawal from the project and on occasion he (particularly in documents for internal consumption) took an exasperated tone and spoke about finality; however, in essence the nature of this position was clear. Mr Jaffe was negotiating with Mr Rukhadze (and to an extent the Family) the terms on which he would either allow Mr Rukhadze to take over what was essentially an SCPI opportunity or keep the opportunity. He was not actively pursuing it as a sole goal on the same basis as had been done originally, but he was pursuing it in the sense of trying to monetise the value of the opportunity. He intended to keep it if he could not monetise it. That is clear from the correspondence in May 2011, including Mr Munro's statement: "*Revoker still intends to pursue this opportunity*". The Claimants had emphatically not abandoned their interest in that opportunity; even if the way in which it was being actively pursued was different to how it had originally been anticipated."

389. At the next stage, there was no issue that Hunnewell and the Defendants ultimately performed the services which the MBO comprised. In that sense therefore, there was a diversion.

390. Further I did not simply find that there were certain preparatory steps. The key passage in the judgment says this:

> "[424] …I conclude that each of the Individual Defendants breached their fiduciary duties: Mr Rukhadze to SCPI, RP and Revoker, Mr Alexeev to SCPI and Revoker and Mr Marson to Revoker alone. That breach consisted of what was in essence a bad faith resignation. There was certainly a resignation with intention to compete, but the necessary element of disloyalty to give a liability in respect of acts done post resignation is provided by the preparatory steps which the Defendants took before their resignation and the disloyalty involved in their failing, while

> notionally acting for SCPI/RP/Revoker, to support the entities to whom they owed fiduciary duties, and in actively aligning themselves with the Family and away from their respective companies at the key point in the timeline."

391. Earlier I had made clear that:

> "[421] (viii) By mid-April 2011 the Park Street team had actively or passively made clear that they were prepared to continue providing the Recovery Services if the Family severed ties with SCPI; this was inherent in the fact that they involved themselves in assisting the Family to evaluate SCPI's proposal and that the evidence strongly suggests that Mr Marson assisted them to retain legal advice…
>
> [422] …there is no doubt in my mind that, in the context of the fiduciary duties owed these actions amounted to disloyalty, particularly when taken together with the actions which the Defendants were taking to make themselves ready to continue the Recovery Services in a post SCPI world."

392. There is also (albeit in the context of conspiracy) a finding that there was:

> "an agreement at least on the part of the three Individual Defendants to continue with the Recovery Services and to attempt to acquire a contract for those services with the Family. …Messrs Rukhadze, Alexeev and Marson wanted the Recovery Services and were prepared to scupper any lingering chance of an SCPI deal by letting the Family know that they would do the business if SCPI were sent packing."

393. The ingenious attempts by Mr Cogley to take the acts of preparation away from any chance of a deal with SCPI therefore involve a very partial and incomplete view of the facts. It may not be possible to conclude on the balance of probabilities that the Defendants actually positively caused the Family to terminate the relationship with SCPI/Mr Jaffe. The deal which SCPI had sought may have been over, as Mr Jaffe effectively agreed in his evidence in this phase, before the date when the resignations took place. He may have been facing the prospect of monetising the opportunity or settling for a very different deal. However the Defendants essentially encouraged and colluded in the Family's disenchantment with SCPI/Mr Jaffe - the more so in that they allowed the Family to know that they were an alternative. This was part and parcel of the disloyalty which I found. If Mr Jaffe could never, by the time of the resignations, have landed the deal for the Recovery Services, that was a state of affairs brought about by the Defendants' previous disloyalty.

The "transformation of the opportunity"

394. This point was encapsulated in List of Issues 15 thus:

> "To what extent did the Responsive Receipts have any or a sufficient degree of connection to the breaches found by the

> Judge so as to fall within the account, including by reference to any change in nature or scope of the Recovery Services in relation to:
>
> 15.1. The recovery of assets in Georgia which had been expropriated by the Government of Georgia or which had been the subject of Mr Kay's certificate of inheritance (paragraph 26(1), 29(2)).
>
> 15.2. Mr Berezovsky's claim against the Family (paragraph 26(2)).
>
> 15.3. The recovery of Mr Patarkatsishvili's assets from Mr Anisimov (paragraph 26(3), 29(1)).
>
> 15.4. The recovery of assets held in NWVF (paragraph 29(3)).
>
> 15.5. The recovery of assets relating to Fisher Island (paragraph 29(4))."

395. Again this was an area where the pleaded case itself transformed by the time of closing.

396. The pleaded case was that the position on the key issues was transformed by the Defendants skill and effort (RAPS 26). The idea is that those issues became so fundamentally different from what was envisaged at the time of the breach that each one ceased to be sufficiently connected to the Recovery Services. It was said that in terms of subject matter, one chapter of the Recovery Services came to a close and another opened and specifically, some of the workstreams that the Defendants continued with after the Termination Date had completed, wholly or in part, by October 2012, and in some instances well before.

397. The transformational events were said to be:

   a. The settlement with the government of Georgia;

   b. The outcome of the Abramovich/Berezovsky trial and the settlement with Mr Berezovsky which followed;

   c. The change in the position as regards Mr Anisimov and the improved settlement negotiated;

   d. The settlement of the Gibraltar litigation.

   e. The availability of funding for development at Fisher Island and the successful conclusion of long-running bankruptcy proceedings in Florida.

398. This pleaded case formed very little part of the case in written opening or in closing. For example, one of the few mentions of Mr Kay in the Defendants' written closing was a reference to the handing over of documents to his lawyers after the closure of Salford Georgia and there were only four passing references to Fisher Island. In oral closing transformation featured as one of an amalgam of features feeding into a temporal cut off. To the extent that it was pursued I reject it.

399. The first point is that the MBO for the Recovery Services was not well defined or static. The nature of the project was such that change was likely to occur – indeed it was because of the type of challenges that it would throw up that the Mr Jaffe and the Defendants were needed. In Phase 1 Mr Rukhadze said that "*The Recovery Services were so detailed, so changeable and the various work-streams were so inter-related that it was impossible for anyone who was not familiar with the details or the day to day events to make a useful contribution*". Mr Marson referred to them changing on a daily basis.

400. The essence of the MBO was identifying, recovering, managing and selling Badri's assets. Mr Rukhadze accepted that "*any recovery services in the world, whether it was in Peru or Afghanistan or in Georgia, would do those four things, yes, so in that sense, yes, it is the same*".

401. It was a broad mission before and after the breach and before and after October 2012. In a letter dated 9 October 2008, written by Mr Rukhadze he indicated that "*Salford will play an active role in recovery and post-recovery management stages for Badri Patarkatsishvili's assets on the Family's behalf*". Nothing changed in that respect by the time the IRSA was entered into (at around the time that the Defendants now say the opportunity was transformed). The IRSA was framed in broad terms: the Overriding Objective was "*recovering AP Assets, prudent management of the Managed Assets, where appropriate, and timely sale of the Recovered Assets*". Clause 3.1.1 provided that the Defendants would "*perform the Mandatory Tasks*" and "*carry out such other recovery tasks in relation to AP Assets as it considers reasonable in light of the Overriding Objective*".

402. So far as the main work strands at the time of breach were concerned, I was persuaded on the evidence that far from transforming post breach, what happened was effectively a natural continuation of the work which had been done before. While Mr Jaffe's view that everything had been sorted out on his watch and that the Defendants had simply been left to pluck the ripe fruit was somewhat of an overstatement, the reality is that by May 2011 the main areas were either set fair or well set up for future resolution.

403. Thus:

a. The settlement with the government of Georgia: this came out of the recovery work in relation to the Georgian government, which had started in 2008. Imedi had been constantly sought - albeit at times without much apparent hope. Thus while the settlement agreement with the Georgian Government formally ceded the Family's claims there was still a provision *"IG and her daughters request to be given ownership of Imedi TV"*. Georgia's election of a new government in 2012 gave the Defendants a fresh opportunity to negotiate its return, but nothing changed in the nature of the activity or work required by the Defendants to get Imedi back for the Family. Mr Rukhadze was acute enough to spot the opportunity afforded by the change of government; but this is an angle which would always have been taken.

b. The recovery of the NWVF assets was said to be transformed by the outcome of the Abramovich/Berezovsky trial and the settlement with Mr Berezovsky which followed: however this litigation was essentially one of the moving parts throughout the recovery process. The litigation had begun before Badri's death

– the action was [2007] Folio 942 in the Court's list. The settlement was an organic development from the trial. As for the settlement of the Gibraltar litigation my Phase 1 Judgment expressly recognised the Gibraltar litigation as a key strand of the Recovery Services.

c. The change in the position as regards Mr Anisimov and the improved settlement negotiated: It was said that by October 2010 the process of recovery vis a vis Mr Anisimov was complete, or so everyone thought. This was really all about the value to be put on Metalloinvest. Seeking to identify Badri's stake in Metalloinvest and trying to recover it was part of the aims of the Recovery Services from 2008 onwards. The improved settlement simply reflected the evidence unearthed as a continuing part of the Recovery Services. There was no transformation.

404. The "transformation" case in closing was put primarily on the basis that profits earned from projects where Mr Jaffe became the Family's adversary were not sufficiently connected to the breach. This effectively circles back to conduct. It does not deal with the nature of the business opportunity at all. The real allegation is not that the business opportunity changed but that the work involved in it was increased or made more difficult by Mr Jaffe's conduct. The question of conduct has, of course, already been dealt with as a matter of principle.

405. I conclude (LOI 15-16) that there was no material change in nature or scope of the Recovery Services as pleaded which could affect the question of the degree of connection to the breaches or so as to give rise to a question of whether the account should be limited.

Insufficient connection: October 2012 "or such other date as the Court may determine"

406. LOI 17 encapsulates the argument that there came a point in time by which sufficient connection had ceased. This is really a reiteration of points made another way – as acknowledged in the Defendants' closing: "*this result can be reached in a number of different ways, recognising the relevant case-law.*" It was put thus orally:

> "When we're looking at these dates, they're not looked at through the lens of transformation or delay, unconscionable conduct or scope, they're an amalgam of all of those features and factors. So, for example, in Warman, there was an amalgam of features and factors that led to the two years".

407. To the extent that this was advanced as a discrete issue, I am confident that there is no basis for that approach. It appeared to be a reverse engineered analysis designed rather to pull forward the closing point of the account to a point when the Defendants would have to make no payment than to reflect a temporal cut off deriving from a principle. The application of accepted principles may lead to a conclusion that for reason A sufficient connection disappears by date Y and that for reason B it would disappear by date Z, leading to a consideration of whether date Y or Date Z or indeed date X is the appropriate date to terminate the account. This is what happened in *Warman*. But unless those principles can be engaged the point cannot arise. This does not therefore fall to be dealt with as a separate issue.

Insufficient connection: RBS funding

408. The question as to the recoverability of the one remaining Responsive Investment, the RBS litigation funding venture, all turns on the question of sufficient connection. As I have noted above, there is no very clear assistance in the authorities. Derivative profits are conceptually capable of falling within the ambit of the account, but by no means always will do so.

409. On this point I conclude that there is no sufficient connection. The caution expressed by Lord Millett as to not eliding concepts with tracing is one factor in my thinking here. So too is the approach in *Warman* and a number of the other authorities where, even in the context of the same business opportunity, a line is drawn; it is much more difficult to see how a subsequent venture unrelated to the original project should be seen as having sufficient connection.

410. That approach is only reinforced by the Claimants' approach to this, skilfully as it was put. The Claimants hinged their case on Mr Marson's evidence, pointing out that there were a number of points of connection:

a. The idea to invest in litigation funding arose from the Defendants' work on the Recovery Services.

b. The opportunity to invest in the RBS litigation was brought to them by Mr Huntley, who was known to them through his work on the Recovery Services. The knowledge of Mr Huntley was meaningful in that Mr Marson's evidence was that he would "almost certainly not" have followed up the opportunity if it had been brought to him by anyone else.

c. At the point the Defendants were approached about the opportunity, the claimant group had lost the confidence of the litigation funding market such that no "mainstream" commercial lender would have given the group or the Defendants funds to invest. In functional terms therefore the very substantial credit extended to them by the Family as an advance on their entitlement to remuneration under the IRSA was key to their ability to pursue this opportunity.

d. Some of the remaining funding came from Arabica, a company associated with Mr Huntley. As Mr Rukhadze put it, Mr Huntley had "skin in the game".

e. Of the remaining funding, a large proportion came from Traktat, an entity which received part of Mr Alexeev's earnings from the Recovery Services as well as loans from the Family.

411. On this basis the Claimants submitted that in every respect, therefore, this was an investment intimately – and, therefore, "reasonably" - connected with the opportunities and benefits derived from the relevant breach of duty.

412. I find myself unable to accept this submission. The Claimants' approach here is almost a reflection of the Defendants' approach elsewhere - it amounts to piling together a number of points, none of which individually would suffice. There may be a question as to whether one can combine a number of points which would not alone be enough; and one might say that analytically if they do each provide a connection one should be

able to aggregate them. There is an obvious resemblance here to the argument discussed earlier in relation to the equitable allowance. The argument here might be said to be slightly stronger, in that one is aggregating more similar things (apples and pears rather than apples and oranges, perhaps).

413. But in the end it seems to me that that resemblance is an important one – in both cases the exercise being performed is to analyse whether there is sufficient connection. Thus ultimately when one asks why is there sufficient connection there ought to be a clear answer. In relation to this item I conclude that there is not. This is not a case of tracing. This is not a case of continuation of business. There is an obvious disjunction. There is also a difficulty in drawing a really principled line between this and the other investments which were not pursued; although it is fair to say that those investments were only partly dropped on the basis of a lack of sufficient connection (there was plainly an issue with the values of the investments also).

414. In particular:

a. The fact that the idea came to the Defendants via a connection to the Recovery Services cannot really assist. It was not part of the Recovery Services. It was a connection the Defendants would have had, historically even without them;

b. The litigation funding idea may have been prompted by the huge amount of litigation experienced as an incident of the Recovery Services, but that litigation was not itself part of the Recovery Services and the concept of litigation was certainly distinct;

c. As for what might be termed "the Huntley connection" (ie the fact that the opportunity came to the Defendants in some sense via Mr Huntley) this, although striking, is analytically not a real connection because there is no connection between Arabica and the Defendants, or the Family. Even if one pierces the corporate veil (which is probably not permissible) Mr Huntley was never *per se* a part of the Recovery Services, though he was retained by the Family in matters directly related to them. Further in making the approach in relation to this opportunity Mr Huntley effectively wore another hat – he was acting quasi-personally.

415. The most substantial connection is the source of the funds via the Family and via Traktat. But even if one regards the funds as being from the Recovery Services (rather than, as was the case for the Family portion a loan by way of advance) I would regard the disjunction of subject matter sufficient to take it outside the ambit of connection. This is not a funding (which becomes a profit) which has any real link with the breaches which form the basis of the account. Further the loan might well have been given in any event; if the Family loans because they want to do the Defendants a favour, the mere fact that the Defendants are also performing the Recovery Services cannot suffice to connect the payment for account purposes.

416. I also note that some of the third-party funding (depending on the approach adopted (FIFO or purpose based) either about US$4.2 million or $9.5 million of $13.4 million third party funding, in total) came from Tri-Star, a completely unconnected third party affiliated with Mr Shvidler, who gave clear evidence of his decision to fund the Defendants on account of his relationship with Mr Rukhadze and his respect for his

abilities as a businessman. He also made clear that the loans he made were nonetheless not "mates' rates" deals. In essence the connection with the Family had made the connection, Mr Rukhadze's abilities prompted him to take the risk at all; but after that it was business. Indeed, Mr Marson in one email characterised Mr Shvidler's loans as "typically expensive".

417. Since the amount of this funding would not be material to my decision on this point I do not need to consider whether the FIFO or purpose based approach is to be preferred.

418. Overall I do not consider that the connections established are sufficient to provide the nexus required as a matter of law in relation to the RBS Litigation funding.

Alleged profit-sharing agreement

419. The factual issue as to what has been referred to as "the profit-sharing agreement" or the "50/50" agreement (LOI 19-20) relates to the Defendants' case that:

a. In 2008 Mr Rukhadze and Mr Jaffe entered into a profit-sharing agreement, whereby Mr Rukhadze would receive 40% of the profits from the Recovery Services project (meaning both carried interest and the monthly distributions that were made by Revoker).

b. Later, when Mr Alexeev joined the project, it was agreed that he would receive 10% of the profits, but that Mr Rukhadze's share would remain unaltered, such that the Park Street team's share would be 50%.

420. There are issues both as to the existence of the agreement and as to its terms (50/50, 54/46 and so forth). But there are two threshold points. The first relates to abuse of process. The second relates to the meaning of "*antecedent profit sharing agreement*".

421. As to the first, this is reflected in LOI 19 which asks whether it is an abuse of process for the Defendants to assert any such agreement at this stage in proceedings. This is a point which was not pursued with much enthusiasm, and since it is not one which can have an effect on outcome I put it to one side.

422. There is then a threshold point, which is this: the principle as to antecedent agreements which I have outlined above relates effectively to agreements which define the extent of the principal's interest. This is not such a case because whatever the state of play as regards agreements to remuneration/division of the spoils, they were or would have been agreements under the umbrella of SCPI (or its successor). So SCPI had the business opportunity and was to contract with the Family; 100% of the interest in the MBO was that of SCPI. The principle as to antecedent agreements therefore is not engaged.

423. To an extent therefore the factual issue might be said to be irrelevant. However quite aside from the question of whether it is contingently relevant if I prove to be wrong on that point, it has seemed to me that the existence of such an agreement might well be relevant to the question of the quantification of any allowance as to skill. I therefore deal with this point below.

424. The starting point is the 40% deal. The Claimants accept that: "*it was 'agreed' prior to the split that Mr Rukhadze would receive 40% of the profits from the Recovery Services, in the sense that Mr Jaffe agreed to allocate that share.*"

425. The Defendants' case was that there was then in existence a binding agreement for 50% not conditional upon any global deal, relying in particular upon the Kira Gabbert spreadsheets (referred to at [122] of the Phase 1 judgment). These were, as Mr Jaffe agreed, "*where entitlements were recorded*". Reliance was also placed on Mr Jaffe's evidence in relation to them, as well as his evidence in these proceedings, in particular the following passage:

> "I do accept that I promised to Irakli initially 40% for him and his team, then it was increased to 46% and then I was willing to increase it to 50% should we agree on everything else."

426. Reliance was also placed on a number of references in passing in the correspondence to 50/50. In addition, the Defendants relied on the fact that in the Reply in the Revoker proceedings (i.e. the proceedings which Mr Jaffe brought against a number of the former Revoker executives) Mr Jaffe refuted a case advanced by Mr Nagle that the profit shares recorded in the Kira Gabbert spreadsheets were interim arrangements – he said specifically that they were "binding".

427. On this point my conclusion is that the Defendants' position is not entirely correct; it pays too little regard both to the overall complexity of the relationships and to the lack of focus by these parties on formal contracts or the English Law requirements for a contract. The reality is that the situation as between SCPI and the Family and Mr Jaffe and Mr Rukhadze was in a state of flux. And just as SCPI did not quite achieve an agreement with the Family, despite coming close at times, so too did the position as regards entitlements of the Park Street Team remain some way short of a contract.

428. This was reflected by the Defendants' own case in Phase 1; that directly contradicted the profit-sharing case now advanced. At that time the Defendants said that *"the Salford Principals attempted to negotiate [...] an agreement between themselves as to how the proceeds of the Recovery Services would be divided between them"* and that *"the commercial terms of [that negotiation] were never concluded"*. That case is inconsistent with the assertion of a concluded agreement and also reflects the reality of the developing situation.

429. This is reflected also in the evidence. The Kira Gabbert spreadsheets show in essence what Mr Jaffe was prepared to pay at any given point in relation to the business then due to result in any payments into SCPI. There seems to have been no process of formal agreement. The SCPI executives spoke of the shares as "entitlements". But the shares were moved without any formal process. The spreadsheet reflected the realities of who was contributing to the current paying projects and the likely division of the spoils. Mr Jaffe thought of them as in some sense binding, as he said in the Revoker litigation. But nothing was fixed.

430. The problem for the Defendants is that the Recovery Services had not been formalised with the Family. The shape of what was to be done and how things would move forward was not in place; without that, an agreement as to entitlements in respect of that work could not be in place. It would be a case of putting the cart before the horse.

431. However, the set up as regards current projects, and the negotiations as to how matters would be formalised if and when an agreement was achieved set up a background against which the likely agreement can easily be discerned. The reality of the situation is that, while no formal agreement was in place, there was a common understanding in the run-up to the breaches that Mr Rukhadze would receive or have a right to dictate the allocation of somewhere in the region of 50% to the Park Street Team in relation to the outcome of the Recovery Services.

432. This was reflected in Mr Jaffe's email to Mrs. Gudavadze on 28 January 2011 that:

> "had this issue not being dragged on by Irakli, and you not been drawn into this by him and the final agreement with Revoker had been executed this issue would be far behind us now - Irakli and his team would have perfected their interest in 50% of the recovery proceeds…"

433. This reflects the reality on the ground. Mr Jaffe was not embedded in Park Street. Mr Rukhadze and his team worked better with the Family than Mr Jaffe did. Mr Jaffe would not put in the bulk of the detailed work; Mr Rukhadze and his team would.

434. If all had gone forward absent a breach (and there were no other changes in the interim), that is what would most likely have happened. But there was no agreement. There was no substance to which an agreement as to future revenues arising from the Recovery Services could attach. And matters did not go forward on that basis – because the Defendants breached their fiduciary duties.

Estoppel

435. That common understanding provides the launching point for the Defendants' late case on estoppel. This case was a late amendment introduced in August 2021. However it did not feature at all in the Defendants' closing submissions. This is probably because as the Claimants submitted, any representation or consensus that could have had this effect would also necessarily have created the binding, unconditional contract for which the Defendants contend. It followed that the estoppel case added nothing to the analysis.

Skill, time and risk

436. This issue was put thus in the List of Issues:

> "Did the Individual Defendants bring to the Recovery Services skills which made them "uniquely well-suited" to carrying out those Services as alleged at paragraph 31 of the Defendants' Re-Amended Position Statement; were they "entirely dedicated" to the Recovery Services project as alleged at paragraph 32 and did they take "significant financial, commercial and personal risk" as alleged at paragraph 32A?"

437. In the light of my conclusions above the formulation of the issue is perhaps not entirely apt. However, I shall consider the formulation agreed before passing on to the part of it which has real potential to impact in this case.

Unique skill

438. This point put me, and doubtless many of those present in court, in mind of the disciplines involved in recruitment and applications for new roles. The Claimants' single biggest point was that the evidence on this lacked any substantive content. There were repeated references to the Defendants' work and skill, but evidence-based examples (of the STAR/SOAR type) were not given.

439. Each of the Defendants was cross examined in detail on this point. Their evidence as to "uniquely well suited" was not impressive. The point was made to them that despite repeated references in their statements to their skill and their contribution to the recovery of assets they had given no specific examples.

440. Mr Baumann was also examined on this subject. Again the point was made that the statement he gave did not progress beyond generalities. Like the Defendants he was unable to identify specific regards in which the Defendants had demonstrated particular skill.

441. Similarly, Mr Blazquez accepted that his evidence did not describe Mr Rukhadze doing anything specific or significant and that much of his knowledge was indirect knowledge via Mr Rukhadze and Mr Marson. His impression that Mr Rukhadze had many skills was based on a lengthy interaction but was just that – an impression, not fortified by specific evidence.

442. A point repeatedly made was that little weight could be given to the Defendants' assertions of great skill as businessmen when they fared so poorly in their dealings with the Family. In particular:

    a. The so-called "*Hunnewell Term Sheet*" of October 2011, on their own evidence, represented a significant step down from the term sheet previously agreed by SCPI.

    b. They agreed the IRSA and the DoT at times when the Family had the upper hand. The Defendants themselves described its terms as being to the Family's benefit and to their own detriment.

443. I was not minded to give much weight to this submission. As I have noted elsewhere it appears to be unwise to underestimate the Family's commercial abilities and the balance of power was always tilted in their favour.

444. To the extent that it did matter however, the cross-examination of the Defendants disclosed a number of aspects which would have made me unwilling to attribute any unique or exceptional skill to the Defendants. Both the drafting of the IRSA and the Defendants' handling of it in relation to termination appeared to verge on the inept. For example:

    a. The IRSA was a badly conceptualised and drafted agreement in circumstances where there was plainly plenty of time to get it right. The IRSA was a development of the original Term Sheet concept; there was then a draft produced by Olswang; that was followed by nearly a year of negotiation.

b. The fact that the Defendants then seemed to have had so little handle on the way the process under the IRSA actually should work was not impressive. Nor was the fact that, when they came to try to audit the accurate financial position, they concluded that they simply could not do so.

c. These were not the only problems with the IRSA; it contained at least one redundant clause to which the Defendants said they had not paid attention: clause 6.1.2, which dealt with the "BB Settlement Amount".

d. While the Defendants tried to sell the February 2018 letter as a tactical victory (per Mr Alexeev: "*it produced the result that we managed to move much faster in a more definitive way to complete the deed of termination"*) it appears to have been sent without any proper thought as to just how risky a strategy it was. Given that pursuant to the unambiguous provisions of the IRSA, the Family was the only party that had the right to terminate it was very strongly arguable that the letter was a repudiation and that they deprived themselves of their contractual entitlement to carried interest on the portions of the definition of the Proceeds that held the most value. That then sent them into the negotiation for the DoT at a distinct disadvantage.

e. Similarly the DoT seemed not to have been well understood by the Defendants – for instance they agreed to deduct $4m for the "Revoker Payment", in an apparent reference to the indemnity at clause 4 of the IRSA, which did not in fact apply where Mr Jaffe or the Claimants had brought a claim against the Defendants as opposed to the Family.

445. I have not accepted below certain aspects of the Defendants' evidence regarding their thinking about the DoT and specifically the figures in the Annex; however if I were wrong about that, the evidence that they did not think carefully about the sums in the DoT Annex would only go to reinforce the impression that unique skill was not demonstrated.

446. The Defendants were also examined in detail on the progress of recovery of specific assets. In relation to this again their answers as to their contribution were not impressive.

447. A good example related to Mr Marson whose written evidence "sold" his legal expertise and value high. His evidence when closely examined, however, offered little evidence of this. His role as a lawyer in relation to the supervision of litigation appeared to have been no more than a matter of co-ordination and reporting. He referred in vague terms to having input on strategy, but was apparently unable to assist me with concrete examples of this. His recollection of matters he claimed to have read was poor – for example in relation to Arabica – a relatively recent aspect of the case and therefore not an unfair test. As for his involvement in assessing the litigation funding where he might have been expected to add some real value it was startling to discover that he was unaware that the RBS case centred on a statutory provision.

448. Similarly the Defendants made much of Mr Rukhadze's skill in negotiating loans from Mr Abramovich to the Family and in bringing about an end to the Berezovsky proceedings by devising a cunning costs mechanism. But the evidence did not really bear out the skill aspect. As to the first aspect, Mr Shvidler was clear that the loans to

the Family were business, though connections got them and Mr Rukhadze through the door to state his case. As for the latter Mr Shvidler's terse comment *"you don't need to be Einstein to create that idea"* rang very true. The reality appears to be that the idea was one whose time had come: following Gloster J's damaging August 2012 judgment, Mr Berezovsky urgently needed money to pay Mr Abramovich, and he was always likely to look favourably on a deal at this point. Of course the finalisation of the deal was not entirely easy: there were questions of credibility and access (which Mr Rukhadze had) and persistence and diligence (which he also had in large measure). But the unique skill aspects were not demonstrated.

449. Likewise in relation to Imedi the Defendants made much of Mr Rukhadze's contribution to the return of this asset. However the evidence suggested that the main factor in its return was a political one – the change of government in 2012. While Mr Rukhadze's good sources of information, connections and determination doubtless made a contribution this appears to have been at the level of facilitating/speeding the outcome. It was not a case of winning back an otherwise unwinnable asset.

450. There was accordingly force in the submission that all three of the Individual Defendants failed to demonstrate any unique skill. Much of their work appeared to involve very high-level input and iteration of concepts together with the delegation, to others, of the day-to-day running of litigation or business.

Risk

451. Issue 21 also asks whether the Defendants took significant financial, commercial and personal risk? Although in terms of analysis this question engages most nearly with the delay issue (as informing the question of inequitability) it can sensibly be dealt with at this point.

452. The evidence on personal risk was not persuasive, bearing in mind the context. Certainly there were a number of factors relied upon. For example, for Mr Rukhadze, who as the most prominent of the Defendants was most in line to receive hostility, the following factors were mentioned:

a. He was unable to travel to Georgia (his home country) between August 2008 and September 2011 following the bombing of his car and continuing harassment from the authorities; was placed on a "black-list" by the authorities during this period and had to live as a split family whilst his son remained in school in Georgia;

b. His cousin was imprisoned for two months in an attempt to exert pressure in relation to the arbitration seeking the return of Imedi;

c. Throughout the Recovery Services he has had to deal with people including hardened criminals approaching him with various demands;

d. He has been told more than once that an opponent of the Family wanted to get rid of him or that he was not safe;

e. Damaging and untruthful articles falsely connecting him with murders and assassination attempts have been published, which he strongly believes were sponsored by the Family's adversaries;

f. He has not felt safe to travel to Russia (where he has family, friends and business contacts) since 2012.

453. The essential problem here is that the risk is one which the Defendants agreed to in becoming involved in the Recovery Services initially. This was part of the picture – Mr Rukhadze moved to England in 2008. Nothing has changed in that respect. In addition, while I accept a degree of personal risk, this appears to have been avoidable and manageable personal risk. It is not a question of the Recovery Services necessarily involving undertaking a physically perilous mission.

454. As for financial and commercial risk again I accept a degree of risk, but that degree has to be assessed. And when assessed I conclude that the risk taken was not really akin to the authorities, in particular the mining cases. In those cases a very significant outlay was required to get the businesses started. The investors might have been ruined if things had not gone well. Here there was commitment to the project. There was a degree of commercial risk in that the Defendants for some time did not know how well remunerated they would be. They did loan the Family money at certain points. But that does not mean that there was a real risk - they were effectively betting on a certainty. As Mr Shvidler made clear the Family:

> "were and they are, by the way, billionaires, billionaires, billionaires, they just didn't have control of those billions, and the whole point was they wanted to get this control and for that they needed cash and they needed to somehow settle with Berezovsky, with Anisimov, with [etc.]"

455. So while Mr Rukhadze lent the Family over £1 million, and the Family did not finally repay all of this until 2016 there was no real risk; it was not (as pleaded) a risk that "*the entire estate might end up insolvent and his money would not be repaid.*" Similarly while the Defendants were often and over a considerable period confronted with significant shortfalls in funds which created real issues for them in pursuing the Recovery Services and which necessitated the Individual Defendants using their contacts to assist the Family, these were effectively simply cash flow problems – and the way in which they were capable of being dealt with demonstrated the confidence of all concerned that there would be a positive outcome in the end.

Necessary skill and effort

456. However having said all of this I am satisfied that there is a relevant, less focussed, question (effectively within the ambit of the pleaded issues) to which the answer is yes. The formulation spoke of unique skills. However as I have indicated above, while an allowance may often reflect something unique or highly skilled, there is also material which justifies a conclusion that an allowance is permissible for doing, with requisite (but not necessarily unique) skill, that which needed to be done.

457. In the context of this endeavour this, it appears to me, is exactly what was happening. I am not persuaded by the Claimants' characterisation of the situation – that everything

had been done before 2011, and all that remained was to pick up the fruit as it dropped from the tree. Much had been done, it is true. But one can test it this way: could the Family simply have proceeded without help? The answer to this is plainly no. This was never contemplated by them, the Defendants or Mr Jaffe.

458. An illustration of this is found in the appearance of Mr Hauf in Phase 1; as I found there at [132] *"[i]t became apparent, as the Family's problems multiplied, that they required a full-time adviser to assist them in dealing with the issues they faced.*" Further when Mr Hauf was involved it was clear that he needed back up in the form of a more extensive team [139]. It is also interesting to recall that Mr Hauf, in considering the job, equated the job to that of CEO of an established international company (the job he would have to leave to take it on).

459. Nothing changed in this regard as things moved into 2011-2012. The litigation was not over. The opposition was not over. The adversaries were manifestly ones who could not be discounted. Doubtless on any analysis the Family would have ended up with something, but without a team fighting their corner, and marshalling their teams, it seems likely that the other interested parties would have annexed considerably larger amounts of the assets.

460. One example may be said to be the Anisimov/Metalloinvest situation where one may see three aspects of skill. The first is the grinding attention to detail in evaluating the documents which came to light after the original deal. The second was the seizing of the opportunity presented by Mr Anisimov wishing to terminate the agreement. The third was the involvement of Mr Shvidler (essentially for Mr Abramovich). Essentially dogged determination, hard work and a certain amount of strategic thinking ultimately paid off. As the result was a better settlement than Mr Anisimov wanted, it also engages Issue 22 (as to whether the Defendants created additional value and/or preserved and enhanced the value of assets).

461. Further one can see at a higher level, essentially from the skill set that Mr Jaffe had assembled in the Defendants, what he thought would be necessary going forward. Like Mr Hauf he considered it necessary to have a team. Mr Rukhadze had good connections and a lot of relevant knowledge, and (as the evidence demonstrated) an ability to get on with people in this milieu. He could operate at CEO level, like Mr Hauf or Mr Jaffe. He could and had created ties to significant players. The fact that he has twice been an unsatisfactory witness before me is nothing to the point – success in the two different arenas plainly depends on very different things.

462. Here one might return both to the Imedi and Berezovsky points dealt with above: both of these required skills and connections which many of those reading this cannot aspire to. They were not unique skills – other individuals might have been found with them – but they were valuable.

463. Then Mr Alexeev brings diligence, focus and considerable commercial understanding. Mr Marson has legal knowledge slated to the commercial side, but with sufficient familiarity with litigation to operate as "point man" with litigation lawyers. He also has a willingness to do a lot of the day to day business.

464. Having read and listened to the evidence both as to the early stages of the Recovery Services (in Phase 1) and as to the completion of those services (in Phase 2) I am

persuaded that the Defendants did make a significant contribution to the Recovery Services and that without their work – including their work after 2011 - the outcome for the Family would have been somewhat less favourable. I conclude that it would be unjust to deny them some recompense for that. I also conclude that to do so would err on the side of overcompensating the Claimants.

465. The question then becomes whether it is possible to ascertain what the allowance made should be. The Defendants advocated a 40% allowance, based essentially on the profit-sharing agreement. In my judgment that is the wrong approach. There is no valid (in the sense of legally enforceable) profit-share agreement. The cases caution against analysing by reference to what would have happened had there been no breach (See for example *Murad* at [76], *Regal* at 144G-145A, *Boardman* at 154F-G).

466. Analytically we have moved from a determined figure based on the past and hypothetical future agreement to a realm where something akin to the *Boardman* and *O'Sullivan* approach is to be aimed at.

467. In relation to this approach the Defendants offered no assistance; doubtless for sound tactical reasons. However this opened the door for the Claimants to argue that the Defendants have failed to quantify the allowance they claim or to advance any case as to the value of their contribution; nor did they put forward any expert evidence of the market rate that would be payable for services of the kind they provided. The Claimants therefore submit that I should refuse any allowance since I have been given no tools with which to calculate what level of allowance would be appropriate. They also point out that in *Gray*, Asplin J refused to make an allowance for the defaulting fiduciary's work over seven years in part because he had put forward no properly evidenced case as to the value that should be attributed to that work. At [213] she observed: "*in my judgment, there is insufficient evidence before the court upon which to do so [i.e. to make an allowance] with sufficient certainty. Mr Ward's rule of thumb is not an appropriate basis for doing justice*". (Mr Ward was an accountant (not instructed as an expert) who had given evidence on behalf of Mr Gray in that case.)

468. However I am not minded to follow this counsel of despair. Such authority as there is shows that in this context of fashioning an equitable allowance (which can have more than one input factor) courts are prepared to be robust.

469. Here it seems to me that there are a number of indicators which can point me to a sufficiently fair and robust conclusion. They are these:

a. The expectation was always that the Individual Defendants would do the lion's share of the hard work in performing the Recovery Services;

b. Mr Rukhadze had previously been remunerated based on a percentage – and a not insignificant percentage in the region of 40-50% as described above;

c. Mr Alexeev, while originally employed on a salary, expected a percentage participation of some sort – in the range of 10% (Phase 1 judgment [335]);

d. Mr Marson's previous employment had been just that; but he had been anticipating some share in proceeds (running to the low millions) as he gained in status and value within the Recovery Services (Phase 1 judgment [429]);

e. Mr Hauf was looking for a payment in the region of US$15 million gross plus expenses and claimed to have been told "*don't do it for much less than £100 million*". An early draft of an Engagement letter was structured around a US$700,000 per annum fee, with a US$10 million Success Fee and 0.5% of the value of the recovered assets.

470. I bear in mind that the *O'Sullivan* and *Boardman* approaches indicate that I should be aiming to approximate to the value of the services, but not to take full account of the Defendants' contribution or to award them "*at all as much*" as they might have obtained if they had not breached their fiduciary duties.

471. On this basis I conclude that the value of the Defendants' services must be considered to run into the tens of millions and that on any analysis that is what the Family (or SCPI) would have had to pay to receive equivalent services. That value can be sensibly approximated by way of a percentage. I conclude that an appropriate percentage in this context is 25%.

The Defendants' conduct of the litigation

472. The Claimants submitted that if I were otherwise minded to make any allowance to the Defendants I should pause and ultimately stay my hand because of the Defendants' conduct of this litigation. The Claimants point to *Gray* in support of the submission that a defaulting fiduciary's "conduct of the litigation" is relevant to the Court's decision as to whether to exercise its discretion to grant an allowance. The Claimants pointed in particular to the Defendants' attack on Mr Jaffe's conduct which *"has on any view greatly lengthened and increased the costs of these proceedings, despite not being able to identify any clear basis in case-law or principle for the legal relevance of any such factual allegations".*

473. The Claimants also submitted that the way in which the case advanced strayed outside the pleaded case, particularly in respects in which permission to amend had been sought and refused and sought to recast the Phase 1 findings was a relevant feature. The Claimants also pointed to what they see as serious disclosure deficiencies and deficiencies in the way in which the Defendants approached the taking of the account including provision of documents to the accounting experts.

474. A the end of the day I was not persuaded that I should not make the allowance which otherwise seemed called for because of these points. The conduct issue was never the subject of a strike out allegation and will be reflected in costs. While the approach to the case was not as confined to the limits of the pleading as might have been hoped, there was a potential relevance for credibility, depending on where I went on some of the issues. Most of these issues might just be seen as having some impact on credibility – even if the chance of that having a significant impact seems always likely to have been a remote one. Again the impact of that will be felt by the Defendants in costs. The approach to the Phase 1 judgment was as I have found wrong, but not improper. As for the procedural complaints (disclosure, provision of documents, focus on the account and so forth), these are points which would themselves require days of argument - particularly given that the Defendants would seek to argue that the pot was calling the kettle black. As is so often the case as trial judge it is simply impossible to gain a sufficiently clear view of the balance of merit in the strongly held views on the

procedural issues to conclude that there has been some wrong done – let alone sufficient wrong to disentitle the Defendants to an allowance.

Connection issues: conclusion

475. In the light of the foregoing analysis I conclude that:

a. There was no relevant transformation of the opportunity;

b. Mr Jaffe's conduct is irrelevant to the fashioning of the account. Because of the emphasis which was put on this point I will however deal with the conduct issues in an appendix to the judgment;

c. Mr Jaffe's delay is not relevant to the fashioning of the account;

d. There was no legally relevant profit sharing agreement;

e. However the Recovery Services required some (generalised but not unique) skill and a good deal of effort – which the Defendants both had and demonstrated in their pursuit of the Recovery Services. Had the Defendants not performed the Recovery Services some other person or persons would have been retained and remunerated for that work.

f. The Defendants' conduct of the litigation has not been such as to disentitle them to that allowance;

g. Accordingly an allowance of 25% should be made from the sum which would otherwise be recoverable by the Claimants.

The expert issues

476. So far as concerns the expert issues, there are a number of very granular points which were dealt with in great detail in closing submissions in writing. What follows sets out a fairly high level summary of my determinations, and a statement of the result which follows from that. The overarching picture is this:

Item	Claimants' case	Defendants' case
Cash Responsive Receipts	116.8	109.2
Less Responsive Expenses	(17.9)	(38.5)
DoT Assets:		
GMPG	30	17.3
Maestro	4.5	0.3
Rustavi	61.8	17.5
Tidjicka/Benahavis	11.7	5.4
Zurgovani	6.15	6.15
Responsive Investments:		
RBS Litigation	49.99	0

TOTAL	**263.04**	**117.35**

Forensic accounting

477. I should note that there was a fairly determined attempt by Ms Fatima to persuade me that Mr Davies had not acted as a neutral expert in that he did not make sufficiently clear the fact that all his answers were predicated on the assumptions he made and had taken on the role of advocate for his clients' case, for example by adopting Mr Rukhadze's evidence as fact or by his resistance to extrapolation.

478. I do not accept this submission; at the same time I can entirely understand the reason why this submission was made. I do tend to agree that (i) the overriding qualifications which were inherent in Mr Davies' approach do not necessarily come across clearly in relation to each individual issue analysed and that it would certainly be natural for a reader who was not reading closely and critically to miss that point (ii) Mr Davies' report cross referred to the evidence of the Defendants without actually setting out the qualifications in that evidence, so that the reader who did not pursue the cross reference would miss those qualifications.

479. I do not consider that this was a particularly helpful approach for an expert to take; nor was the instruction which had been given to that effect a particularly helpful use of an expert witness. My impression was that Mr Davies was not entirely happy with the resulting product.

480. I do however entirely accept Mr Davies' evidence that he did not intend to mislead the court; the difficulty was created by his instructions and by a lack of reflection on his part as to constraints and difficulties under which I would come to the exercise.

481. This conclusion is reinforced by one of the very interesting things about the forensic accountancy evidence. This was that despite their very differing styles, and the lack of agreement on result, there was a firm refusal of both experts to disrespect the other's approach. So, Mr Barton, dealing with Mr Davies' approach, stated:

> "I consider the BTA to be a reasonable starting point, and I note that when it comes to Responsive Receipts, Mr Davies states that he supplements the BTA work by checking other sources to see if they indicate any receipts which the Defendants have not recognised. I agree that testing receipts for understatement is an important part of the forensic accountant's role in this case (as is the testing of expenses and other deductions for existence and reasonableness)."

482. In cross-examination he put it thus: *"Mr Davies and I weren't dramatically off in our approach, but there were differences."*

483. And similarly, Mr Davies said:

> "Mr Barton and my approaches are different. I mean, I have followed what the defendants have presented in the DAPS and looked to identify whether I could find support for the

> expenditure …. And Mr Barton has adopted a different approach. We both have said it's up to the court to determine what is allowable or not. I've been told to make assumptions and I have. Mr Barton has done something different."

484. It might be said that as a result of his instructions Mr Davies was asking a "*question expecting the answer yes*" while Mr Barton was asking a "*question expecting the answer no.*".

485. The essence of the difference was summarised by Mr Davies in his evidence when he said:

> "I think I wouldn't be able to form a view on whether the expenditure had been performed in accordance with the recovery services work .. because that would involve knowledge that simply wouldn't be available to me. I mean, it's the defendants' case that is the case [that money was spent in the Recovery Services] but I simply couldn't form a view on that… I would have to tell the Court that I can't form a view on the assumption."

486. Based on his natural approach, reinforced by his instructions he could not go further. Mr Barton, with a different mindset and different instructions, reached a different conclusion.

Responsive Receipts

Cash Responsive Receipts

487. The differences between the parties' experts in relation to the quantification of the Cash Responsive Receipts were limited. They agree that there were Responsive Receipts of $109,214,000, but Mr Barton's view was that the total should include various additional items totalling $7,786,000.

488. It is fair to say that many of the disputed items concern sums which were clearly received by the Defendants, but which Mr Davies has been instructed were referable to particular expenses. The Claimants submit that the correct accountancy treatment of such sums would be to include them as Responsive Receipts but to identify a corresponding Responsive Expense. If the sums were treated in that way, they suggest that the result would be to expose the absence of any adequate evidence that any such expense was incurred and/or that it would qualify as a Responsive Expense in any event.

489. In the end I am not persuaded that there is a single "approach based" solution to these points. Slightly different and nuanced issues arise for individual items. I therefore identify below the relevant heading for the disputed item and the amount which is in dispute, followed by my brief reasoning for the answer at which I arrive.

490. *Asset management fees ($3.082m)*: Mr Davies reconciled the management fee payments which are observable in the BTA to issued invoices. Those invoices are sequentially numbered. Following that reconciliation, Mr Barton identified a number of gaps in the sequential numbering, suggesting that certain invoices are missing. The Defendants subsequently gave instructions to Mr Davies about the nature of the missing invoices.

However, a number of points remain unexplained. The difference between Mr Barton and Mr Davies on this issue is:

Asset	**Davies ($'000)**	**Barton ($'000)**	**Difference ($'000)**
Fisher Island	2,250	3,306	1,056
Rustavi	2,250	3,306	1,056
Rissa/Borjomi	5,670	6,670	1,000
Vano	430	400	(30)

491. In relation to this item I prefer the Claimants' case as regards the first three items, essentially on a burden of proof basis. The BTA does disclose gaps in the invoices. As regards Fisher Island and Rustavi there is evidence which indicates that the Family were paying $1m for each asset in respect of that year. This is seen in (i) a contemporaneous reference in a budget-related email from Mr Ershikov to the Family (and despite the sequential numbering of invoices revealing a missing invoice in that period); and (ii) the fact that Mr Davies does not include any fees for the period from 31 December 2017 to 20 April 2018.

492. The reasoning as regards the additional $1m in respect of Rissa/Borjomi is similar. While there is no email budgeting for these sums there are sequential invoices missing apparently in respect of the periods October-December 2014 and October-December 2015.

493. I will also accept Mr Barton's approach to fees received in relation to Vano Chkhartishvili; he counts $30,000 less than Mr Davies.

494. *Annex 1 receipts ($2.015m)*: These are the sums set out in Annex 1 to the DPS. Here I substantially find for the Defendants. A number of the arguments are speculative and were advanced without a proper factual challenge having been made at trial.

495. The largest item concerns JSC Maudi, "*one of AP's Georgian investments*", which was sold by the Family in February 2016. The Defendants say that Mr Rukhadze and Dioskuria each received $613,657 by way of "*carried interest due from the Family*". While it might be said that Maudi was mentioned specifically in Mr Rukhadze's May 2010 Term Sheet, there was no real challenge to Mr Rukhadze's evidence which explained the deep roots of this deal which related to Georgian real estate and which had essentially been taken over by Frank Hunnewell (an early investor of Mr Rukhadze's) during Badri's battles with the Georgian government.

496. I do however find for the Claimants in relation to the final paragraph of the Annex, which says that "*in 2018 Otar Rukhadze received $325,000 by way of carried interest in Zurgovani LLC*". Zurgovani was mentioned in the May 2010 Term Sheet, and was a DoT Asset. To the extent that "carried interest" was paid in respect of it, the Defendants should obviously account for it. The explanations given by Mr Rukhadze for the exclusion of this sum were not in this context convincing.

497. The other main item concerns payments of $462,719.91 received by a company called Startnet, owned by Mr Rukhadze, from Maudi, Zurgovani, and Mrs. Gudavadze. The Defendants' pleaded case is that those sums were "*used to pay expenses in connection with the Family's Georgian assets, and costs and fees in respect of the administration of Startnet*". It is their evidence that Startnet was used as a 'cashbox' for Badri during his lifetime and that these payments related to pre-IRSA arrangements and all funds were used to lend money to RIG/Rustavi. While none of those expenses have been substantiated, that evidence has not been challenged. Accepting that evidence therefore, the lack of substantiation becomes insufficient to allow a successful challenge to the exclusion of these sums from the total Responsive Receipts.

498. *Loan repayments to Mr Rukhadze ($700,000)*: Mr Rukhadze's evidence was that he made interest free loans to the Family in 2009 which were repaid in 2011 and 2016. The challenges to this evidence were limited – going to the absence of disclosure (in this context a false point because of the period of the disclosure obligation agreed) and to whether Mr Rukhadze was mistaken in his recollection. In this case there was also consistent evidence in the form of late emerging evidence of the payments to the Family and the fact that the relevant spreadsheet summarising Mrs Gudavadze's Valartis bank statements did categorise the payments from the Family as Loan repayments.

499. That being the case, although there were some oddities, such as the fact that a significant proportion of these sums had apparently been repaid to Mr Rukhadze's father and that repayments were made in 2016 even though the loans were allegedly advanced by Mr Rukhadze in 2009 is not sufficient to sustain the Claimants' case.

500. *Grassdale loan ($500,000):* This concerns a sum of $500,000 loaned to Hunnewell BVI by BILI Management and subsequently written off. It was the unchallenged evidence of Mr Marson that the Family waived a loan to the Defendants in an amount corresponding to an onward loan, at the Family's request, by the Defendants to Grassdale, which was also written off. There is also some corroborative evidence – a text message between Mr Marson and Mrs. Gudavadze which occurs on the right day and appears to acknowledge an onward transfer to "Georgia". While not 100% clear I would regard the evidence here as sufficiently strong to sustain the Defendants case. In any event, even ignoring this text message, absent a challenge to the gravamen of Mr Marson's evidence on this subject, the points which could be made against this item – for example that that the underlying loan agreement did not support this approach are insufficient to sustain the Claimants' case.

501. *Family expense payments ($431,000):* A similar position pertains as regards this item. Mr Marson gave evidence in his third statement that "*the amounts received from the Family or in connection with the Recovery Services in this period included other payments received from the Family or entities associated with the Family to meet expenses incurred in connection with our work on the Recovery Services.*". Similar evidence was given by Mr Rukhadze – who dealt specifically with sums of

US$126,000. Given that fact and the fact that otherwise there is simply a "face-off" of assumptions between the experts, I find for the Defendants on this item.

502. *2013 waived loans ($343,000):* Again as regards this item there was unchallenged evidence from Mr Marson to the effect that on around 30 June 2013 the Family waived 6 loans made to the Defendants (between October 2011 and June 2013) the majority of which were paid directly as salary and bonuses to those working on the Recovery Services in what would become Hunnewell Georgia. Mr Davies's evidence was accordingly that he had accepted that these sums were balance neutral on instructions. While Mr Barton's assessment of these Responsive Receipts was not challenged in cross-examination, such a challenge was unnecessary when the factual basis of Mr Davies' approach was not in issue.

503. *Other items ($512,000):* With one exception, the remaining items turn on essentially the same issue concerning on the one hand unchallenged factual evidence and on the other a difference between the experts on the need for proper evidence of a corresponding expense in order to treat an observable receipt as balance neutral. As regards these items they fall to be excluded as Responsive Receipts.

504. The exception is $62,000 attributable to the salary Mr Alexeev was paid by Tidjicka between May 2018 and October 2018. Given that the Defendants accept that Mr Alexeev's salary prior to April 2018 is a Responsive Receipt, I would consider that there was no need for a formal challenge on a point where there is simply no logical distinction. The position could logically be different slightly later, after the Tidjicka transfer, but Tidjicka was not transferred to the Defendants until October 2018, so there is no relevant difference between salary payments made before or after April 2018.

505. Consequently the figure at which I arrive for Cash Responsive receipts is: US$112.683 million**.**

Non-cash Responsive Receipts

506. The next issue concerns the non-cash responsive receipts, and is reflected in List Of Issues 8: "*Where Responsive Receipts falling within the scope of the obligation to account consist of assets or benefits other than cash, what is their value?*". This brings us to the valuation evidence in relation to the DoT Assets.

507. The first issue concerns the question of the correct date. In terms of the law there is no issue between the parties. It is common ground that the correct approach is to take the value at the date which best does justice between the parties. *Global Energy Horizons Corp v Gray* [2016] EWHC 2232 (Ch), [143]. Following an adjustment of the Claimants' position, the battle lines are broadly drawn as a decision between (i) the date of acquisition of the asset or (ii) 27 March 2020 (the date settled on as in practical terms proximate to trial).

508. For obvious reasons there are attractions to settling on the date of 27 March 2020, and instinctively it would seem logical to adopt the same date for all assets. However that approach is not possible, because the parties are now agreed, as regards one of the assets, Rustavi, that the correct date is the date of acquisition. It is therefore necessary to make a decision on date for each asset separately.

509. One other point should be dealt with by way of introduction. That is the status of the figures in the DoT Annex. That is because one obvious difference of approach between Mr Taylor on the one hand, and Mr Mitchell and Mr West on the other hand, is that Mr Taylor has placed some weight on the figures agreed for the purposes of the DoT. Mr Mitchell and Mr West, consistently with the Defendants' position that no real weight can be placed on the document at all, have not placed any weight on the DoT figures.

510. The Defendants' position was that:

a. The inclusion of this Annex as a physical part of the executed version of the agreement was in fact an oversight, and once its inclusion had been spotted both parties agreed to remove it.

b. Even when it was attached, it played no contractual role.

c. The document did not represent any attempt to ascribe an accurate market value to any of the assets and the Annex was not based on any formal or detailed appraisal of the value of the assets.

d. The contemporaneous exchanges demonstrate that the individual values were not dealt with individually, but rather the emphasis and focus was on the bottom line, meaning the cash element that would be paid to the Defendants.

e. The figures are therefore meaningless and no weight should be given to them.

f. If any weight were to be placed upon it, that would have to be across the board and not to cherry pick from it but rather look at it for all the DoT Assets.

511. The Claimants unsurprisingly place considerable weight on the DoT Annex as providing at least some evidence of the value of assets; the more so in light of the fact that the Defendants insist that the agreement was negotiated at arm's length.

512. I accept elements of both parties' positions on this. I agree with the Claimants that it provides at least some evidence and that it cannot be said to be meaningless. It is odd and regrettable that the document was not provided to Mr West at the outset, with the result that he selected and devised his valuation approach in ignorance of it. I do not accept, however, the Claimants' criticism of Mr West and Mr Mitchell for their ongoing unwillingness to place weight on it; having spent so much time thinking about the issues without it, and having it introduced with a number of uncertainties and ambiguities attached to it, I can readily understand that they would regard it as more hindrance than help from their perspective.

513. It does however present a different aspect to me, faced with the exercise which I have to perform and with the DoT Annex "in play" from the outset of my consideration. Faced with considerable disparities both in approach and result I consider that there is some assistance to be gained from the DoT annex. That assistance is however limited for a number of reasons. One is that the relevant dates which I have to consider are not the dates of the DoT. The other is that the evidence, while unclear as to what the DoT Annex did represent, did seem to me to be clear in indicating that it was not intended as a truly arms' length or reliable valuation of those assets individually. There were a number of moving parts. One is that it was essentially a "guesstimate" valuation; it did

not reflect any formal valuation or assessment. The second was that in putting it together the parties were focussed, not on the individual items, but on the overall result; consequently, even assuming a starting point of a fairly reliable figure, the final figure for an asset might move up or down in a somewhat arbitrary fashion to compensate for movement elsewhere in the equation – or for external negotiation factors.

514. Having said that, I do not regard the result reached as being meaningless. I accept the submission that the figures were clearly not arbitrary, in the sense of having no meaningful relation to the value of the assets. Whatever was done to reach the figures, the parties to the DoT regarded the exercise of producing them as a useful one – otherwise they would not have done this. Mr Marson confirmed in oral evidence that the Defendants "*knew roughly what the assets were worth*" or "*knew what the market would likely pay for those assets at that point in time*" and ascribed an approximate value accordingly. They thus ascribed figures, they debated them, they horse-traded about figures. The document acted as an aide memoire as to what had been said and how an overall figure had been reached.

515. The sense is that each party had a range of possible valuations (depending in part on a subjective view of the asset's future prospects – on which the parties might well differ) and they exchanged views on these both individually and globally until, bearing in mind each party's view of each asset and the overall position, they were comfortable. It might well have been the case that if then cross-examined on the individual assets, both sides would have said that at least one individual figure was way out of kilter with its real value; but (as with any successful settlement outcome) this was a roughness that they could live with, given the rest and the overall result.

516. Where this leaves me is with a document which has to be treated with very considerable caution, but which should provide some form of broadly helpful reality check (albeit with riders) against the analyses of the experts.

517. One further point with which I should deal is the Claimants' submission that the figures in the document should be regarded as conservative rather than generous figures. This is said to be on the basis that the values of $50m, $30m, and $7.4m adopted for Rustavi, Imedi and Benahavis respectively represented an $87.4m offset against the Defendants' cash entitlement and hence every dollar attributed to one of the DoT Assets was a dollar subtracted from the Defendants' final cash payment. The Claimants say that because assets are inherently less liquid than cash, it would be commercially nonsensical if the values attributed to those payments in kind were higher than the true realisable value of the assets: if anything, one would expect the values fixed in such a situation to incorporate a discount.

518. As a matter of pure logic I accept this argument. However, as a matter of commercial reality I find myself unable to do so. That approach neglects the fact that the Defendants were bargaining with the Family, who wanted to minimise cash payments - and who, history has demonstrated, were not to be underestimated as negotiators.

519. The final introductory point with which I should deal before passing on to the individual valuation issues is the status of Traktat.

520. Traktat is Mr Vladislav Alekseev's (i.e. Mr Alexeev's father's) company. There was an issue as to whether it should be counted as a related party – the Defendants contending

that it should not, for the purposes of making further investments or loans. This was on the basis that where Traktat has chosen to make a further investment or loan with its funds (whether on Mr Alexeev's suggestion or not), the fruits of that transaction are for Traktat (and its owner, Mr Vladislav Alekseev), not for Mr Alexeev.

521. That is not an argument which I accept. Mr Alexeev has been content from the outset of Phase 2 of this litigation to treat those Responsive Receipts received by Traktat as part of his remuneration for the purpose of taking the account. He was also clear in his evidence that he discussed with his father how Traktat's money could or should be invested, and that he had directed part of his remuneration to go to Traktat. It was accepted also that Traktat's "*primary purpose is [...] to collect the benefits from the recovery services*", and that Mr Alexeev's share of the proceeds of the Recovery Services included the share allocated to Traktat. It was also accepted that he was a person of significant influence over Traktat and that any judgment obtained in these proceedings would be enforceable against Traktat. Finally Mr Alexeev also accepted that Traktat debt would be 'related party debt' for the purpose of financial accounting rules.

522. In the light of all of this evidence I regard it as the better view that Traktat should be treated as a related party.

Valuation issues

523. I will approach these in order of financial significance. The key issues between the parties can be usefully summarised in tabular form thus:

Asset		Claimants' valuations of Defendants' Interest			Defendants' valuations of Defendants' Interest		
		Deed of Termination (20 April 2018)	**Date of acquisition**	**27 March 2020**	**Deed of Termination (20 April 2018)**	**Date of acquisition**	**27 March 2020**
Deed of Termination Assets							
1.	Maestro	**$4.496m**	**$4.496m**	**$4.496m**	GEL 1.27m to 2.89m or **$0.521m** to **$1.186m**	GEL 0.3m to 1.66m or **$0.091m** to **$0.502m**	GEL 0.3m to 1.66m or **$0.091m** to **$0.502m**
2.	GMPG	**$30m**	No separate valuation at this date	**$30m**	**$17.3m** (**$20.3m** under alternative approach)	No separate valuation at this date	**$11.4m** (**$3.8m** under alternative approach)
3.	Rustavi		**$61.829m**			**$17.512m**	

	Asset	Claimants' valuations of Defendants' Interest			Defendants' valuations of Defendants' Interest		
		Deed of Termination (20 April 2018)	**Date of acquisition**	**27 March 2020**	**Deed of Termination (20 April 2018)**	**Date of acquisition**	**27 March 2020**
4.	Zurgovani	**$6.1495m** (valuation agreed)	No separate valuation at this date	**$1.7905m** (valuation agreed)	**$6.1495m** (valuation agreed)	No separate valuation at this date	**$1.7905m** (valuation agreed)
5.	Tidjicka	Market Value (Property): **€6.8m** (**€6.6m** alternative valuation)	Market Value (Property): **€7.05m** (**€6.8m** alternative valuation)	Market Value (Property): **€9.95m** (**€8.3m** alternative valuation)	Market Value (Property): **€4.1m**	Market Value (Property): **€4.042m**	Market Value (Property): **€4.228m**
		Ds' Interest: **$11.614m**	Ds' Interest: **$10.28m**	Ds' Interest: **$11.707m**	Ds' Interest: **$8.227m**	Ds' Interest: **$6.884m**	Ds' Interest: **$5.384m**
Responsive Investments							
6.	RBS	N/A	*None provided*	**$54.398m** (valuation agreed)	N/A	**Nil**	**$54.398m** (valuation agreed)

Rustavi Steel LLC (by valuing the interest in Tolanius Beheer BV)

524. As already noted, this asset is a large metallurgical complex, owned by Rustavi Steel LLC, which is located near Tbilisi, and produces primarily metal rebar and hot rolled seamless pipes for the construction and oil industries. In relation to this asset the parties agreed that the date of acquisition - 3 December 2019 - was the appropriate date for taking the value. A valuation at this date has the advantage of avoiding distortions caused by value extraction by way of partial repayment of very high-interest related-party loans.

525. The difference between the valuers was significant here. Mr Taylor reached a figure of nearly US$62 million, while Mr Mitchell reached a figure of US$17.5 million. That disparity was to some extent reflected in the historic figures associated with Rustavi which could be gleaned from the evidence. The figure ascribed to Rustavi in the DoT Annex (some eighteen months before the acquisition) was US$50 million. As noted above when marketing for a sale of Rustavi had taken place in 2017 the offers generated were for US$16 million (GCF) and US$25 million (unnamed Russian bidder). The Defendants (understandably) placed a good deal of emphasis on these figures. They submitted (rightly) that *"offers received after such a marketing process are obviously relevant given that they indicate the best price that market participants are willing to pay to acquire an asset at that point in time."*. The problem with their heavy reliance

on these figures was that the date for the valuation was not early 2018, but 3 December 2019 – nearly two years later. Those figures therefore have to be viewed in the light of what had happened in the interim.

526. In the period shortly before the acquisition there were three incidents which were of relevance. The first was the Lomi-3 project. This was new steel melt shop comprising a new electric arc furnace, vacuum processing and oxygen plant. The project cost US$27 million and was seen by the Defendants as a critical step in developing the high-potential international seamless pipes stream. As Mr Mitchell put it: "*Management expected Lomi 3 would generate US$12.5 million EBITDA in 2021 for Rustavi promising a fundamental step change in the Company's performance.*" Anything labelled a fundamental step change plainly has the potential to impact positively on the value of Rustavi. Mr Mithcell also accepted that Lomi-3 would be of great significance to a buyer.

527. The second relevant factor was the preparation of documents pursuant to which the asset (the equity in Tolanius and related debt) was transferred to the Defendants. In those documents, the equity and debt together were given the value of $20 million. Thus, the minutes of a meeting of the directors of Park Street dated 28 November 2019, noted that the debt and equity in Rustavi transferred under the DoT was valued at $20 million, split $6.5 million to equity and $13.5 million to debt; and under the deed of transfer of the Tolanius shares, dated 3 December 2019, the price was identified as $6.5 million (consistently with the board minutes).

528. The third relevant incident was the execution of a $66m loan facility to Rustavi by TBC Bank at 100% LTV.

529. The central difference between the experts related to the valuation approach, with Mr Taylor adopting a DCF approach and Mr Mitchell a multiples approach. The reality is that there were issues which could be raised with either approach – and those issues are fully reflected in the closing submissions. Both approaches require the generation of critical figures (discount factors or multiples). Into both of these there is the scope for errors to creep, in particular when an expert is operating with less than complete information or in relation to a company which is in a state of flux.

530. Overall I considered that the criticisms of Mr Mitchell's approach – in the particular circumstances of this case - were stronger than the criticisms of Mr Taylor's DCF approach. I also considered that Mr Taylor's performance in cross-examination was more robust and convincing.

531. Mr Mitchell did not disagree that a DCF approach would potentially be appropriate ("*I don't actually say there's anything wrong with using a DCF approach*"). Mr Mitchell's decision to adopt a multiples approach seemed in part to have been driven by the decision to adopt this approach for the DoT date of valuation (which later became redundant).

532. There was also a Lomi-related problem with the multiples approach, because it is based on existing financial results; and Mr Mitchell accepted that because of the potential future impact of Lomi-3, Rustavi's financial performance up to the date of acquisition would potentially not be representative of its likely financial performance in future. In this context Mr Taylor's approach which utilised management figures (albeit working

rather than audited) seemed to me to provide a basis closer to the live status of the business.

533. The analysis leading to the multiple used for the 2019 date was also not entirely clear. In relation to December 2019, Mr Mitchell selected an EV/EBITDA multiple of 2.95x-3.0x. That multiple would be below the "low" end of the range he identified from his comparable companies, of 3.5x-8.6x (excluding one company which he removed as an "outlier" when calculating his averages). My impression was that the comparables he had used were dubious, leading to adjustments which had a high risk of inaccuracy. That compounded a problem with the benchmarks against which he checked his original 2018 multiple, which seemed to be somewhat skewed towards the GCF offer and that the figure arrived at erred on the low side.

534. The reasons given for the lowness of the multiple were also not particularly robust. Mr Mitchell relied on:

a. Declines in steel prices. However while this was a concern for Rustavi, it would plainly have affected multiples for all steel producers and would not explain why Rustavi's would be unusually low;

b. Delays in securing an exemption from US steel tariffs: however Rustavi had minimal business in the US so this should have tended to raise it against other comparables; and

c. Steel dumping by Iranian producers: Again while this was a concern for Rustavi, by June 2019 draft anti-dumping legislation had been approved, which was due to enter into force on 1 January 2020, a fact that would obviously have been relevant to the market's perception of Rustavi's prospects at the end of 2019.

535. There was also, it seemed to me, an oddity in the multiples when one looked by way of very rough cross check at the Lincoln assessment, which used multiples of 2.5-3x EBITDA (implying US$35-45 million Enterprise Value or US$20-30 million Equity Value). This would suggest relatively little movement in terms of Rustavi's value – despite the transformative impact of the Lomi-3 project.

536. A similar point was made by Ms Fatima in cross examination by reference to the small movement Mr Mitchell had made by way of multiple between his 2018 valuation and his valuation for the date of acquisition. While Mr Mitchell did defend his view by reference to the remaining risks involved at this stage of the project, he implicitly accepted that his reading across of sector decrease factors (discussed above) did not fully accommodate the Lomi factor. As such I accepted the submission that his increase in multiples between 2018 and late 2019 did not reflect the potential for Lomi proportionately.

537. However overall my impression was that the Taylor approach was also not without its faults and that it produces a figure which is somewhat too high. A sense check against the DoT valuation, the actual 2018 offers and the transfer documentation all give pause for thought. It would have been helpful to have Mr Taylor's considered views on these as a cross check; it was apparent in cross examination that he had not looked at them and may not have been shown them.

538. Tending in the other direction (supporting Mr Taylor's figure) is, of course, the loan documentation. However as at the 2019 valuation date, there was only an indicative term sheet (with no binding terms), which had been issued with no due diligence having been undertaken. On that basis I was not persuaded that anything reliable could be drawn from this term sheet as to whether or not (or in what amount) the bank might be prepared to lend once it had carried out its due diligence. It is perhaps noteworthy that as at the March 2020 valuation date, the outstanding loan debt to TBC was $36.918 million.

539. Consistently with this, there did seem to me to be force in some of Mr Mitchell's criticisms of some of the assumptions taken in Mr Taylor's DCF approach – e.g as regards maintenance capex and corporation tax. The Claimants say that these criticisms are speculative, but we are here operating in the territory of judgment. Having heard the experts being cross-examined my impression was that Mr Mitchell's approach on these issues was (on the whole) the more prudent.

540. I highlighted some points which seemed to chime with Mr Mitchell's approach. For example:

a. *Tax:* the assumption in the cash flow that Rustavi would never pay any tax seemed too optimistic. Whilst there was no immediate tax burden on Rustavi, such tax would have been payable once the Defendants (as shareholders) sought to take money out of the business as dividends, it was likely based on the Rustavi projections that profits would be available for dividend payments and I concluded that it is not a safe assumption that there will not be changes to the tax regime. At the very least there should have been a tax payment cash outflow included for the terminal year (reflecting the cash flows to perpetuity). This would be consistent also with Mr Taylor's inclusion of tax in the WACC calculation;

b. *Maintenance capex:* I accept the submission that it was unrealistic to think that no maintenance would be needed for any of the machinery or plant at Rustavi. Some new equipment was being installed, but the existing equipment required maintaining, and the new equipment would also need maintaining once installed. However, some adjustment was made for this in the final year and I was certainly minded to think that this was a suitable adjustment;

c. *Discount for capex:* Mr Taylor's DCF model discounted not only the revenues, but also the capex cash outflows. While Mr Taylor had plainly given this some thought, I was minded to accept the submission that this was not appropriate here, where the levels of investment capex were very significant from the outset compared to EBITDA, and were not fundable by the cash flows from the business;

d. *Discount rate of 20%:* my impression was that the basis for this figure did not appear robust (being based on two somewhat stale sources). I concluded that taking this and the need to reflect tax outflow risk within the discount figure, I would prefer Mr Mitchell's 22.5% figure.

541. When producing the draft judgment I anticipated that adjustments for such matters would be relatively straightforward and would result in a figure which adjusted Mr

Taylor's figure downwards somewhat but was probably also higher than the figure at which Mr Mitchell had arrived adopting a multiples approach. That was the impression conveyed by Mr Mitchell's statement in his supplemental report that if his adjustments were made *"the EV decreases from US$80.4 million to US$33.6 million. This is within the range implied by the valuation in my First RS Report."*

542. I had hoped that on this basis the parties would simply be able to rework the figures to arrive at the appropriate valuation. However, in doing so it has become apparent that on the experts' reading of my indications as to the individual factors, the result produced is entirely out of step with what I had anticipated, producing a figure (US$3 million) which is significantly below that at which Mr Mitchell arrived using his comparables approach, and which I had concluded was too low.

543. The Defendants have naturally submitted that the parties have had a chance to put in their evidence on Rustavi and the logic of the draft should be followed through.

544. I am not persuaded that this is the correct course. The reasons why this is the result are likely to be complex. It seems entirely possible that in looking at the points outlined as discrete individual items above (that being substantially how they were dealt with in evidence and submissions) and without the benefit of a live spreadsheet I have not understood exactly how they interrelated in the calculation. At trial this was but one of a huge number of issues which had to be covered, and the focus was on the prior point of valuation methodology.

545. To conclude that the result arrived at by a literal reading of the above indications is the correct result would create an internal inconsistency with my earlier reasoning. I am satisfied that this would not be a desirable course. The appropriate way of dealing with this – in particular where, as I have noted, these are matters of judgment – would be to iterate results in the light of further consideration of the individual factors. The way to do that is not via the corrections process, but via consequentials, and with the benefit of further input/evidence from the experts.

546. I therefore conclude in relation to Rustavi that:

a. The preferable method of calculating value is via the DCF model;

b. However Mr Taylor's approach requires some adjustments in relation to some or all of the items identified above, bearing in mind how those items may interrelate;

c. There will have to be (at least) further submissions in relation to these items and how they feed into the calculation in practice. It may well be necessary to have some further evidence from the experts to further illuminate these aspects.

Teleimedi LLC and other related entities (by valuing their interested in Georgian Media Production Group Limited (GPMG)

547. GMPG owns various media assets in Georgia including TeleImedi LLC ("Imedi"), which operates a TV channel in Georgia, GDS TV LLC, another Georgian TV channel and Radio Imedi LLC, a radio station network in Georgia. At the time of the valuation

dates, GMPG had yet to be transferred to the Defendants. The transfer was completed in August 2021.

548. There is no doubt that the question of valuation as regards this asset is an unusual one, because Imedi is loss making – but at the same time is acknowledged to have a political value. The question is really whether the political value translates into a financial value. In the end I am persuaded that it does have a value. The best evidence appears to be that the value is around US$30 million.

549. The essential problem with Mr West's approach in relation to Imedi is that it attempts to value the asset purely on a financial basis and based on very sub-optimal material.

550. Dealing with the second factor first, it was not seriously in issue that the financial records of GPMG were too unreliable to enable a standard valuation approach to be robust or reliable. They do not comply with IFRS 10. The four audited financial statements were all subject to auditor's disclaimers. The initial response to requests for such documentation was a denial that any such documentation existed. Mr West was initially unclear as to what documents he should be using. What information there was, appeared in a drip-feeding fashion right up until October 2021. There remained complete obscurity about GPMG's subsidiaries.

551. The result is that Mr West's approach, which is necessarily one which carries a degree of imprecision with it, even when the base materials are close to perfect, is driven into a series of assumptions, omissions and likely errors. It follows that while there is always a strong pull to follow an analytical approach in this case any reliance on such analysis would be unsafe. The figures produced can only be unreliable.

552. I appreciate that Mr West tried to do his best with the material he was given and that valuing based on political considerations is not really part of his remit. It would however have been more helpful if, given the issues with a conventional approach, which he did accept, he had grappled with equal determination with that side of the issue. His approach - which came close to washing his hands of this endeavour - has left me with a real issue, in circumstances where it seems plain to me that Mr Rukhadze's evidence that Imedi has *"huge political value"* is correct.

553. This is because Mr Taylor's approach, which went close to the other extreme, was also reliant on less than entirely satisfactory materials. His primary approach was to look at the DoT Annex and the value ascribed by the Company D put option of 31 October 2016 – both of which gave a value of $30m. Mr West did not regard this as an unreasonable approach, though he was clear that it was not one which he would have followed himself, without performing a series of cross checks by reference to the financials.

554. By way of background: by a Call Option dated 31 October 2014 Company D acquired (for $7.5 million) the right to acquire 51% of GMPG from Ms Gudavadze (plus, on completion of the option, the reimbursement of 60% of funding that Ms Gudavadze had provided to the company since the signing of the call option). By the Put Option dated 31 October 2016 Ms Gudavadze could require Company D to purchase all of the shares in GMPG from her for US$30 million.

555. As I have indicated, I am not minded to put much weight on the DoT Annex, save as a sense check. And as the Defendants pointed out, there are all sorts of things which can be said about the put option derived valuation:

a. While under the Put Option, there was nominated a "Put Option Price" of $30 million, the contractual machinery was a great deal more complicated than that. It included a mechanism for Company D to provide funding to GMPG via Ms Gudavadze ("Put Option Party Funding"), and in default of provision of such funding, for Ms Gudavadze to provide it herself ("IG Put Option Interim Funding"). On completion of the Put Option, the $30 million price was payable along with repayment by the Company to Ms Gudavadze of any IG Put Option Interim Funding.

b. Further, if Ms Gudavadze served a notice to complete the put option, Company D did not have to complete, but could walk away on what was effectively a drop-hands basis.

c. If Ms Gudavadze served a put option notice, and Company D decided not to complete (in circumstances where the call option was not exercised), Ms Gudavadze would retain the $7.5 million Call Option Price, would retain the GMPG shares and any receivables and would not have to repay any Put Option Party Funding to Company D. However, there would be no additional burden on Company D (so it would not have to pay the $30 million or reimburse any IG Put Option Interim Funding).

d. Company D was therefore not ever committed to paying US$30 million. It was only committing to the non-return of its previously paid $7.5 million and any interim funding that it wanted to commit.

e. When Ms Gudavadze served her put option notice in April 2021 Company D failed to complete, so forfeited the $7.5 million and any interim funding it had put in to GMPG.

556. Nonetheless I would not accept the submission that the $30m figure in the Put Option is meaningless. I do consider that its worth as a value is somewhat enhanced by the co-incidence with the DoT figure; whatever may be said about the process which arrived at that figure, the co-incidence of two transactions giving that figure, both involving parties who have some reason to understand the unique value of the asset, does provide some indication of value. Further, given that Imedi was loss making in real terms, the preparedness of the Defendants to trade that value of their pay-out for it, is suggestive of a very significant value.

557. Left to myself I would have tended to the view that the value of Imedi was higher than the figures given by Mr West, but somewhat lower than the figure of US$ 30 million. I am not persuaded that Mr Taylor's cross check on value, performed via cash inputs, really assists - save to the extent that it is suggestive of a significant value. As such Mr West's comments on it, which indicate a slightly lower value around US$25 million, do not seem a safe basis for moving the value figure.

558. I would also have tended to the view that the value of Imedi might well fluctuate over time depending on the political state of affairs, which could impact on the likelihood of

a willing buyer (or buyers). However I am not an expert valuer. I would therefore very much have valued any insights which Mr West was able to give. In the absence of such insights it seems to me that I am left with no real choice but to say that the case made for the figure of US$30 million is the stronger case on the evidence and find that to be the value of Imedi.

Studio Maestro LLC (by valuing their interest in Media Finance Group BV)

559. Maestro operates a TV channel in Georgia, primarily covering news. Media Finance Group ("MFG") is Maestro's holding company. The transfer of MFG to the Defendants was completed in late 2020. Although the business of Maestro is now to some extent bound up with that of Imedi, they are valued separately, and both experts agree that the value of Maestro is substantially less than that of Imedi. However there remains a considerable gap between them – with the Defendants arguing that Maestro was worth at the most US$1.186 million while the Claimants contended for a value of US$4.496 million, based on the 2016 option by which the Family's interest was purchased.

560. Here I prefer the arguments of the Defendants, and a valuation date of 27 March 2020.

561. The basic problem for the Claimants is that the unchallenged evidence given by Mr Rukhadze about this was that there was no attempt by the parties to this agreement to determine a market value for the purposes of the SPA and it did not matter to the Defendants what value was put in; they simply took the figure from the 2016 option agreement. So no weight could be put on the appearance of that figure in that document.

562. Looking at the history of the transaction it is clear that Maestro was acquired because it was seen as synergistic with Imedi and because the Family did not want a competitor to buy it. The evidence is that they had not invested in Maestro and had reduced and narrowed its programming, focussing investment instead on Imedi. Maestro had become only a news channel with lower revenues and viewing figures. As an independent business, it had become at best marginal. That is a very significant difference from Imedi, which remains a significant player in the Georgian media. The fact that Maestro made no appearance in the Annex to the DoT as part of the Defendants' remuneration (despite the fact that the DoT terms included an obligation to transfer it to the Defendants) is suggestive.

563. Mr Taylor accepted the multiples applied by Mr West, if that approach were appropriate.

Benahavis/Tidjicka

564. Tidjicka SL is the owner of the Benahavis Hills Country Club complex outside Marbella, Spain. The complex comprises luxury villas, a club house offering hospitality services, and undeveloped land. The differences in valuation largely relate to the underlying development value of the land.

565. Under the DoT, Benahavis – which was owned by Marbella RE Group Ltd and Tidjicka – was transferred to Park Street Capital on 19 October 2018. Since 20 December 2019, the Defendants' interest in Tidjicka and Benahavis has been held through RTK Amsterdam BV.

566. As to valuation date, there is no issue of value extraction in respect of Benahavis, so there appears to be no good reason not to take the most recent valuation date. Both sides' experts have taken that date as the primary valuation date and have arrived at valuations for other dates by using a price index. Valuing the asset via the most recent date therefore appears to produce the best result both in terms of choosing a realistic date in the circumstances and in minimising adjustments which can detract from the accuracy of the exercise. The Claimants positively advocated this as the correct date; the Defendants advanced no positive case in relation to Benahavis specifically submitting that date of acquisition was appropriate for all the DoT Assets. I will therefore use the 2020 date.

567. Before I move on to the substantive issues I should note that both sides expressed disquiet about the other side's expert evidence. The Defendants took issue with the fact that expert evidence on this point was given by Mr Taylor, relying on D&P reports as to the valuation of the land. It was submitted that limited – if any – weight ought to be placed on that evidence in circumstances where those reports were not prepared as expert reports for the Court, did not comply (or even purport to comply) with the Part 35 requirements, and where the Claimants were unwilling to expose Mr Whittingham (or anyone else from D&P) to cross-examination.

568. The Defendants pointed in particular to the facts that:

a. It was not clear who had actually undertaken the work – Mr Whittingham signed the letters and attended the experts meeting (possibly with Mr Smith), but the appraisals themselves had been prepared by Mr Smith; and at least two others were involved (Mr Clarkson and Mr Gladstone) though their roles were unclear.

b. As a result of the use of D&P the approach to the key issue of comparables was opaque.

c. It was unclear whether D&P had been provided with all the relevant documents.

d. D&P had been instructed to assume a particular set of build costs associated with the development rather than to undertake any form of assessment themselves.

e. The Joint Statement asserted that Mr Whittingham had spoken to "*the original architects and design team*" who were said to have confirmed that the original scheme, at the time, was considered effective and profitable in circumstances where the expert confirming the truth of the Joint Statement (Mr Taylor) had not had the conversation in question and the conversation in question was not referred to in either of the reports Mr Whittingham had signed.

569. The Claimants for their part took issue with:

a. The expertise of Ms Seal, who accepted that she had no expertise of her own in relation to the Spanish property market;

b. Ms Seal's reliance on undocumented work of Mr Stevens of Savills' Madrid office and his numerous unidentified "*network of agents and specialists*";

c. The opacity of some of her evidence, for example that having based her opinion on construction costs on third-party information which she had withheld on the grounds of confidentiality, she had given no thought to whether she could present more information that could be tested in open court in a way that preserved its confidentiality.

570. I considered that both sets of criticism were not without force and I would make two points in relation to it. The first is a general point. It is of course hardly unknown for an expert to be supported by others within their organisation, or sometimes outside it. This can be a perfectly acceptable and efficient way of producing expert evidence. However a party adopting this course must ensure that the report thus produced does comply with CPR Part 35. Furthermore the expert in question must satisfy themselves that they are in a position to give expert evidence on the issues which remain live.

571. Often the materials which are triaged by others form relatively uncontentious background to the main issues. However where contentious issues arise which relate to a matter dealt with by another member of the expert team, the expert should not be tendered on that point unless they can satisfy themselves that they can themselves properly master and give the relevant evidence. That may require an application to call an additional expert. However failure to do so may result in the relevant issue being considered to be one on which relevant expert evidence has not been tendered.

572. The second point is the particular point in relation to this case. As will appear below because of the approach which both parties took to this part of the expert exercise I have at points been driven to come to conclusions on the basis of material which is not really adequate, or to reach a decision between the evidence with less help than I should have had in evaluating the expert evidence.

573. Turning then to the issues, for the 27 March 2020 valuation date, the key areas of dispute pertain to (i) which development plan should be used, (ii) how to assess gross development value ("GDV") by reference to comparable properties, and (iii) how costs should be calculated.

574. As to the first issue, the Defendants submitted that basing the assessment on the 2005 plan was unrealistic when planning permission had long since expired and the scheme had not been built; and when those charged with managing the site had concluded that the plan was not feasible or realistic. They pointed in particular to a memo dated 22 September 2016, in which Hunnewell had explained to the Family the need to abandon the original plan, e.g.: "*...the original plan has proven unrealistic in both pricing and costing*"; "*…the underlying architectural design appears unsound. The remaining parcels of land are on very steep terrain making construction of standalone villas (as planned) either physically impossible or prohibitively expensive*"; "*No real-life buyer will accept such projections [i.e. the 'original' build-out architecture, prices and costs] as realistic*"; "*The original architectural plan MUST be materially revised*".

575. On this issue it seemed to me that the answer did not depend upon any particular expertise such that either expert's views should be regarded as more eligible or more prone to be excluded than the other's. On careful consideration of the evidence I conclude that the correct basis must be the 2005 plan. For one thing, there was no other proper basis for the assessment. The 2005 plan provided the kind of detail which would enable a value to be placed on the scheme. Certainly it would be unrealistic to value

based on a 2021 development plan which had not even been formulated as at the March 2020 valuation date.

576. Given a choice I am sure that any hypothetical buyer would have used a previously consented scheme which had certain evidence of practicality in the form of a successful Phase 1 sales process in 2015 and which had formed the basis for a JLL valuation report in October 2017. Indeed that JLL valuation was the product of the Defendants' own instructions – they formed the view that they wanted a valuation of the site, and they used the old scheme.

577. While it is certainly the case that the 2005 scheme had not been completed, there were plainly a number of reasons for this including the financial crisis and the Family's many issues after Badri's death. It is the case that the Defendants' report to the Family made all of the points rehearsed above, but it does read somewhat as if (understandably) one concern was keeping costs down.

578. To this extent my conclusion on this does not depend in any significant measure on the way in which the experts gave live evidence. However I would add that I did not find Ms. Seal's mode of dealing with these issues very helpful. In particular I found her suggestion that the 2021 plan was a proxy for a plan that a purchaser would have come up with utterly unrealistic, when taken with her acceptance of the obvious proposition that a hypothetical purchaser might come up with an infinite number of ways that someone could have approached this plot of land.

579. As to GDV, in terms of general approach I found the proposition that this should be based on the most local comparable properties in Benahavis far more persuasive than a comparison by reference to the wider Malaga region. The wider Malaga region would bring into the equation far too many wild card factors – the difference between coastal towns and inland locations, transport links and views for example. I was persuaded that, particularly in the holiday/second home market at which this site must be aimed, the wider pool would create unacceptable variables and be likely to produce a less robust result. It would only be appropriate if the narrower option could not produce sufficient data for a meaningful result.

580. When it came to comparables the situation was not a happy one. While I accept that the absence of D&P left the evidence unable to be clarified as much as would have been desirable (i) Ms. Seal offered no comparable for the old plan and (ii) her own method of producing a comparable was even more obscure, not least since she was unable to recall where any of her 26 comparable properties were located or how far away they were from Benahavis. The impression with which I was left was that she had essentially subcontracted this part of the process to Mr Stevens - who was not himself a Costa del Sol specialist.

581. I therefore conclude that the better evidence is that offered by Mr Whittingham and spoken to by Mr Taylor.

582. The final issue is the costs. I accept the Claimants' submission that costs should be based on the figures derived from the 2017 JLL report with Mr Whittingham's "conservative adjustments". An exhaustive costs assessment recently compiled by JLL's Spanish office offers a good source of information and one which a hypothetical buyer would be likely to rely upon. There are of course criticisms which can be made

of those costings – and the Defendants have duly made them. For example the construction costs D&P extracted from that were (at €1,101 per sqm) substantially lower than the construction costs that phase 1 had incurred (of €2,049 per sqm).

583. However the Defendants' experts did not grapple with an alternative based on the JLL report costs. The only alternative offered as a matter of expert evidence was to rely upon a blend of Ms. Seal's experience (which did not relate to this geographical area at all – Ms. Seal has no experience of construction costs in Spain) and confidential material obtained from Mr Stevens, who was not himself a Costa del Sol expert, and had thus relied on consultations with other, unidentified individuals active in the Spanish property market in circumstances where Mr Stevens's analysis is not available for the Court to test.

584. In the event while the JLL figure may not be accurate, there do seem to be reasons why the Phase 1 cost may equally not be a safe guide (it being described by the Defendants in 2016 as "*unreliable for the purposes of comparison*"), not least because of the problems which Phase 1 encountered.

585. In the end therefore I consider that the better evidence on this point is that provided by Mr Whittingham.

586. I therefore conclude that the correct value for Benahavis is US$11.707 million.

Zurgovani LLC;

587. This is a Georgian real estate company that previously constructed, rented and sold condominium type settlements. Its main assets were two land parcels that were sold in December 2017 for a total amount of $3.4m. The beneficial interest in Zurgovani's shares was transferred to the Park Street Partnership on 14 September 2021. The agreed value of that interest at the 20 April 2018 valuation date was US$6.1495 million.

588. It follows that the valuations at which I arrive for the Responsive Receipts (excluding Rustavi) are as follows:

Asset	Value of Defendants' interest
Imedi	$30.0m
Maestro	$0.2965m
Benahavis	$11.707m
Zurgovani	$6.1495m
Subtotal	**$48.153m**

Responsive Investments

589. This question effectively dropped out of the equation. Only one Responsive Investment remained in issue – the RBS Litigation Funding. The value of it was agreed at US$49.9

million; but I have concluded it is not within the ambit of the account because it was not sufficiently connected to the Defendants' breaches.

Responsive Expenses

590. The question of what Responsive Expenses have been incurred by the Defendants in providing the Recovery Services which fall to be taken into consideration in determining the scope of the account is reflected in LOI 12.

591. The Defendants submitted that since the only business of the Defendants was the Recovery Services the fact that expenses were on the face of Bank Statements answered the question as to whether they were Responsive Expenses. The Claimants submitted that there remained a role for testing those expenses, and that is what Mr Barton did.

592. The issues between the experts can be summarised thus:

	Mr Davies $'000	**Mr Barton $'000**	**Difference $'000**
Hunnewell UK	5,015	4,814	201
Hunnewell Ukraine	236	0	236
Hunnewell Georgia	8,008	7,128	880
Hunnewell BVI	1,638	1,520	118
Hunnewell BVI Partner Expenses	531	468	63
Third Party Consultancy Fees	6,530	3,984	2,546
Third Party Liabilities	16,500	0	16,500
Totals	**38,458**	**17,914**	**20,544**

Third party Liabilities: the Georgian partners and Ms Miftakhova

593. I will deal first with the main item of difference between the experts – the US$16 million said to be payable to the Georgian partners ("Third Party Liabilities" above).

594. The Defendants' case was that Mr Rukhadze's evidence was that, shortly after agreeing the IRSA in September 2012, and once it became clear what remuneration the Defendants would potentially receive from the Family, Mr Rukhadze orally agreed the four local Georgian partners would be remunerated for their work on the Recovery Services in the amount of up to $5 million each. This was similar to other arrangements he had had with the four local Georgian partners.

595. The Claimants challenged the agreement on the basis that it was too vague a promise to be binding, alternatively that there was no agreement. The Defendants contended that neither point had been pleaded and amounted to an allegation of dishonesty.

596. As to this threshold point, I am not persuaded that the point is not one which is open to the Claimants. While there was not a specific pleading to this, there was a general joinder of issue and it might well be said that the question of vagueness was one which is a point of law.

597. On the basis that the argument is open to the Claimants, I consider that their case on this point is the stronger. Here the evidence does suggest some form of agreement, but not a binding agreement in the terms contended for. Here one might well see an analogy to Mr Jaffe's views as to the existence of a deal on the Term Sheet remarked on at [238] of the Phase 1 Judgment.

598. While the Defendants spoke of "*Mr Rukhadze's strong evidence … that the agreement was binding and he regarded it as an absolutely 'concrete promise'*" that was not really consistent with his evidence, viewed overall and based on all sources of that evidence. Looking at things somewhat nearer the time Mr Rukhadze in 2014 said in an email to Mr Alexeev and Mr Marson (neither of whom contradicted him) that his Georgian partners were "*not benefiting from the recovery work*". In his witness statement his evidence was that he was "*not close to the specific mechanics of the agreements, which I left to our advisers*". But there is no evidence from such advisers.

599. There are other factors which militate against the agreements contended for. One significant one is the absence of any payment. Another is the fact that the first written evidence of this alleged agreement was an exchange of emails between Ms. Miftakhova and Mr Shonia dated 28 June 2018, which sought "parameters" for such agreements – a terminology which suggested that the terms of any understanding were very far from fixed. That is a point which Mr Davies accepted. A third is the fact that the evidence of one of the partners, Mr Vepkhvadze, is not consistent with the agreement which Mr Rukhadze describes and which is pleaded; he describes a 50/50 partnership agreement.

600. I do accept that there may have been some informal understanding, and that that understanding may have been similar to that had operated for many years including money received in respect of Maudi and Hotel Adjara. I do accept that Mr Rukhadze probably told his Georgian partners that he intended to distribute some of his proceeds from the Recovery Services to them, after they were earned. However that does not mean that there was a binding agreement. That is also consistent with Mr Marson's (admittedly hearsay) evidence: his impression was that Mr Rukhadze "*wanted to pay them out of any upside that he personally would get*".

601. From an English Law perspective (and no case on Georgian law was pleaded in this regard) the evidence therefore does not support a binding agreement.

602. There was also a case run that loans which had been made to these individuals in the sum of US$4 million could count as Responsive Expenses. This is not sustainable. Mr Davies accepted that a repayable loan cannot be an expense.

603. As regards Ms. Miftakhova, the evidence was that the sum in question was agreed to be paid after the Recovery Services were complete – at approximately the time that the

DoT was signed. In effect this was a bonus to Ms. Miftakhova for her good work. Mr Marson's evidence was "*it's an expense in the sense that it's a payment being made out to someone for having done the work*". However, that is an artificial way of looking at the payment. An expense is something that had to be paid as part of the Recovery Services. This payment was an *ex gratia ex post facto* bonus. It was not an expense.

Hunnewell UK

604. The difference here is between US$201,000 and US$10,000. Mr Marson's evidence on this was not challenged, and I find that this was a Responsive Expense.

Hunnewell Ukraine

605. The difference here is $236,000: This substantially concerns payments made to a Mr Keffler. While there may have been some aspects of Mr Keffler's work which were referable to the Recovery Services, it was clear from Mr Marson's evidence that the work conducted by Hunnewell Ukraine was multifaceted. Mr Davies had been instructed to assume that all of the sums claimed in respect of Hunnewell Ukraine were Responsive Expenses, without any supporting documentation, which was said to have been unavailable following the company's liquidation in 2018. Mr Barton's evidence on Hunnewell Ukraine – essentially that he was not prepared to accept items where he had not been able to test even a sample of them - went unchallenged in cross-examination. I accept the Claimants' case that these expenses should not be allowed.

Hunnewell Georgia

606. The amount in issue here is $880,000. The issue again is as to whether all of these expenses can properly be treated as referable to Recovery Services. Mr Marson gave equivocal and contradictory evidence on these expenses which made clear that there had been no good reason for attributing them to the Recovery Services. Mr Davies treated the Hunnewell Georgia office expenses as Responsive Expenses on the basis of Mr Marson's written evidence, which he had misinterpreted. In cross-examination, Mr Barton was not challenged on his treatment of the Hunnewell Georgia expenses. To the extent that Mr Barton has not found support for such categorisation, the expenses of the Hunnewell Georgia office should not be deducted from the account.

Hunnewell BVI and Hunnewell BVI Partner Expenses

607. These small amounts did not appear to be substantially disputed by the Claimants. I find for the Defendants on these items.

Third Party Consultancy fees (Messrs Nagle, Keffler and Hauf)

608. I prefer Mr Barton's analysis on this point. Third Party Consultancy fees are not of their nature to be assumed to be Responsive Expenses. Looking at the work done by those individuals the case that the payments to them related to Recovery Services work appears unsustainable.

   a. Mr Nagle's consultancy agreement did not provide for him to perform Recovery Services work, as Mr Davies accepted.

b. Mr Keffler was largely involved in seeking out new business opportunities for the Defendants rather than in Recovery Services activities. Mr Barton was not challenged on his assessment of either Mr Nagle or Mr Keffler's consultancy fees in cross-examination.

c. No invoices have been provided for Mr Hauf's fees, and Mr Davies's treatment of these as Responsive Expenses relied on his instructions that "*no invoices were submitted as the monthly payment was stipulated in the consultancy agreement*". Mr Barton's view was that it would be irregular to make monthly payments under a professional services contact without invoicing, and that these sums should be excluded from the account as a result. It is also noteworthy (and supportive of this approach) that the Defendants had disclosed further supporting evidence in respect of consultancy payments to Mr Nagle, Mr Keffler and Mr Blazquez, but had been unable to do so in respect of Mr Hauf.

Conclusion: Responsive Expenses

609. I therefore conclude that the Responsive Expenses are US$18,296,000, composed as follows:

Expense category	**$'000**
Hunnewell UK	5,015
Hunnewell Ukraine	0
Hunnewell Georgia	7128
Hunnewell BVI	1,638
Hunnewell BVI Partner Expenses	531
Third Party Consultancy Fees	3,984
Third Party Liabilities	0
Totals	**18,296**

Deductible Costs

610. Similar issues arise with regard to deductible costs (LOI 13). These are the what the Defendants say are "*operational and other costs and expenses in connection with the investments and assets and also the wider operations of the Defendants […] which have been absorbed at the operational level of Hunnewell UK, Hunnewell BVI (including Hunnewell Georgia), Park Steet (GP), Park Steet Capital, Park Street Litigation, Park Street Partnership and Park Street Capital LUX*".

611. Mr Barton has calculated the General Deductible Costs (without accepting that they are to deducted from the account) at $5.371m, whereas Mr Davies calculated them at $6.251m.

612. The overarching issue is whether these should be deducted at all. The Claimants say that in circumstances where they now seek an account in respect of the Responsive Receipts and the investment in the RBS Litigation, it is unnecessary to make any deduction from the General Deductible Costs since the vast majority of the General Deductible Costs that the Defendants have claimed were incurred from 1 May 2018 onwards (c $5.7m) – i.e. after the DoT and after the RBS investment had been made. Further the Claimants say that these expenses should be generally scrutinised when *ex hypothesi* they do not qualify as operational expenses incurred in relation to the Recovery Services and are in reality more in the nature of overheads.

613. The Claimants submit that it would be impermissible for the Defendants to claim a proportion of their general overheads without having discharged their burden of proving that those costs can be attributed to any relevant profits for which they are required to account. In this regard they cited *Hollister Inc v Medik Ostomy Supplies Ltd* [2013] Bus LR 428, [74].

614. The Defendants' response was to say that Mr Barton's approach was wrong in that he had "*worked on the basis that there are no other costs in relation to those assets*" and that that involves taking just part of the picture.

615. However this is to ignore the burden of proof point within *Hollister*. It is not that one ignores other costs – it is that it is for the Defendants to link those costs with profits for which they are entitled to account. The Defendants have not undertaken that exercise – and in the circumstances where the costs in question do generally seem to post-date the relevant profits, there was probably a good reason for that.

616. Accordingly, the Defendants cannot rely on the deductible costs.

617. If they had been in principle recoverable there were then a number of disagreements between the experts on the amounts. Simply for completeness, on these my conclusions would be that these were not separately challenged by the Claimants and would therefore fall to be accepted.

Conclusion: fashioning the account

618. It follows that I conclude that at least the following amounts are recoverable by the Claimants pursuant to the account (with a further amount to be included once the valuation of Rustavi has been ascertained.

Item	**Sum found**
Cash Responsive Receipts	$112.683m
Less Responsive Expenses	($18.3m)
DoT Assets:	

GMPG	$30m
Maestro	$0.2965m
Tidjicka/Benahavis	$11.707m
Zurgovani	$6.1495m
Responsive Investments:	
RBS Litigation	$0m
TOTAL	**$142.536m**

From the figure which results an allowance of 25% will then require to be made, in accordance with my decision at paragraph 471 above.

Part 5: Contingent Issues

The 50/50 agreement: revocable, revoked or not?

619. In the event that I am wrong about the issue as to the so-called Profit-Sharing Agreement, the question then arises as to the revocability of that agreement. The Claimants' case was that Mr Jaffe had an unfettered discretion to revoke Mr Rukhadze's entitlement. The Defendants characterise this case as implausible, saying that there is no way that Mr Rukhadze would have taken on such a risky and time-consuming project, or made unsecured loans to the Family – Mr Jaffe's client – from his own funds, if he had thought that whether he would be remunerated for it at all was entirely at the whim of Mr Jaffe.

620. In a sense this comes back to the conclusion which I have already reached. There is no sign of the parties ever having put their minds to this point – and one likely reason for that is that it was understood that there was no entitlement (as I have found earlier).

621. This is consistent with [202] of the Phase 1 Judgment, which provided:

> "…the real point is that absent any agreement, the decision as to what would happen to the shares was [Mr Jaffe's] as it had historically been his decision who acquired carried interest in assets and to what extent."

622. This is one of the areas where Mr Rukhadze's evidence was unsatisfactory. He initially asserted that his own profit share would not have been revocable even if he had resigned and had nothing to do with the Recovery Services, and suggested that Mr Jaffe would have been entitled to his share of the profits from the Recovery Services even if he had gone to work for Joseph Kay.

623. At the same time Mr Jaffe's evidence had its own unsatisfactory features – veering into an unheralded suggestion that his agreement with Mr Rukhadze was subject to "bad leaver" provisions. This may have reflected a visceral sense of what I conclude is the correct analysis, but it was plainly wrong, and unhelpful in the context of the pleaded case.

624. The reality is that there was no agreement. I conclude that if there had been an agreement it would have been one that provided for revocation in the event of breach. Accordingly the argument as to revocability goes nowhere.

Mr Jaffe's Conduct

625. As already noted, for the Defendants Mr Jaffe's conduct is the gravitational centre of this case. For the reasons explained in the operative part of the judgment that is a view with which I disagree. However, given the centrality of it to the Defendants' minds it is important that they have a record of my conclusions on the main issues. The level of detail involved in the arguments is such that even in this "Contingent Issues" section, it would unbalance the section. The detail of my consideration of the conduct related issues is therefore included in an Appendix to this judgment.

626. I should note that there are some allegations which were not pleaded and which were pursued as going only to credibility. The Claimants have urged me, by reference to *JN Dairies Ltd v Johal Dairies Ltd* [2010] EWCA Civ 348 not to make any findings on these points; that it would be "simply wrong" to do so. However these points were placed squarely in issue at least in terms of credibility and Mr Jaffe gave witness evidence on them, including by way of witness statement. While on the view of the law I have taken, credibility is not significant and accordingly they are not relevant, they could conceivably become so. I therefore regard it as the better course to deal with them to some extent.

627. However it is fair to note that had these points been pleaded as substantive issues it is likely that there would have been further disclosure and more material in play. It is also possible that in relation to one of them Mr Jaffe might have taken a different view as to answering questions on this subject during the course of trial. My conclusions on these points are therefore reached on a partial evidential picture; they must therefore be taken to be somewhat provisional and are noted below to be provided with that qualification.

628. As appears from that Appendix, I conclude that:

a. Mr Jaffe is certainly, as the Defendants contended, a strategic operator. I accept the submission that his thought process was dominated by his own financial interests and how they could best be furthered.

b. As a businessman in the world in which he operates the concept of leverage was often important and he would frequently discuss using what he perceived as his leverage. In his dispute with the Family, the main leverage that he perceived himself as having was SCPI's position as manager of the VDP assets. He also from time to time perceived or analysed the various pieces of litigation in which the Family was involved which concerned those assets as offering leverage.

c. Following the Defendants' breach Mr Jaffe was certainly angry at the position which he found himself in and he expressed himself freely as to wishing to make the lives of the Defendants (and on occasion the Family) burdensome to them.

d. More important to him however was his own bottom line. At any given point his actions seem to have been directed by that overriding objective. In general

he weighed the different possibilities of how to benefit himself and pursued that course.

e. None of Mr Jaffe's conduct adversely affected the amount recovered pursuant to the Recovery Services.

629. As regards the key pleaded issues on conduct (and the key unpleaded issues) also:

a. As regards NWVF Mr Jaffe pursued the possibility of a sale to himself covertly;

b. He also pursued retained interest transactions. While he did not favour all the deals which offered this feature, the two deals which he promoted were ones which offered him a retained interest;

c. Viewed from an English Law perspective it appears that the pursuit of that retained interest created a conflict of interest, which was not disclosed and which would have been a breach of fiduciary duty;

d. His conduct did not however cause the loss of sales and the Sistema deal was the best available at the time;

e. As regards the Imlek/RFC deal Mr Jaffe's change of position on currency did cause the deal to fail. However that change of position was not done with any intent to cause damage – rather the reverse;

f. Mr Jaffe did unilaterally and secretly appoint liquidators for VDP and that action appears on its face to have been contrary to the VDP Articles;

g. His action in appointing liquidators was not done with the intent of disrupting the recovery of value, but because he saw it as the best way of achieving the sale which he considered most beneficial to the investors as well as himself;

h. The liquidation did not materially damage the value of the assets;

i. Mr Jaffe did attempt to broker a deal between Mr Berezovsky and Mr Anisimov, and he did so with mixed motives, one of which was to create trouble for the Family. However, there was no effect on the success of the Recovery Services, though it did create extra work for the Defendants;

j. Mr Jaffe's interview with the Russian prosecutor was given by him as part of his new alliance with Mr Anisimov, not to gain leverage over the Family or to impede the Recovery Services;

k. Mr Jaffe's evidence had an impact on the Russian prosecutor's actions. But the evidence overall does not support the conclusion that the steps taken by the Russian prosecutor affected the price of the assets, in particular Borjomi;

l. Mr Jaffe gave witness statements in support of Mr Anisimov's case as part of his realignment of loyalties, a realignment in which his vexations as well as his perceived best interests played a part. That evidence was very different in overall impression from what he had previously said. He knew his evidence could negatively affect the Family; but that was not his principal motivation.

There is insufficient evidence to conclude that that evidence impeded or affected the settlement with Mr Anisimov;

m. As to the unpleaded allegations regarding payments made to Mr Jaffe, to the extent credibility was relevant I would (on the basis of the evidence before me) have concluded that it was the existence of the new alliance with Mr Anisimov that resulted in Mr Anisimov paying Mr Jaffe.

Mr Jaffe's delay

630. Here the argument was, as I have found, closed. But even if it had been open, I would have found that the remedy was not barred, essentially because here one is looking at a very different vista to that which has pertained when delay has "bitten" in the authorities. As I have outlined above, in the cases where laches/acquiescence has been found (i) the profits have been made by the risky process or investment, and (ii) a clear knowledge of the conduct of the business can be shown, such that it can be said that the claimant had chosen not to accept the risks, but has rather sat on his hands until it became apparent whether there would be profits.

631. The basic point which one sees from the authorities is that in the usual case a party has a period of time within which to decide whether or not to bring proceedings – this is what a limitation period is for. There must be some particular inequitability to require earlier action. In the cases that inequitability has gone beyond waiting and seeing.

632. The present case is not equivalent to such cases. The Recovery Services were not inherently risky. While working in this milieu may carry risks, and I note above the evidence to that effect, the Recovery Services per se were not risky in the sense we see in the authorities. Nor was there the risk of no outturn. It was well known to all that there were assets – many of them. Mr Shvidler's evidence was clear: on any analysis the family were billionaires. Or as he put it in another passage, the Family were asset rich but cash poor. There was no uncertainty. Realistically there would be some (very significant) recovery.

633. The paradigm case for the operation of the delay principle is seen in the mining cases, and other similar cases, where up front commercial risk or investment was required to pursue the opportunity. As I have indicated above, this was not such a case. The element of real serious commercial risk shouldered by the Defendants and deliberately dodged by Mr Jaffe was lacking.

634. Further while I do (as urged by Mr Cogley) treat *Davies* with a degree of caution, I do tend to agree with the deputy judge in that case that there is a distinction between the maintenance of a right (as per *Clegg*) and a clear shot across the bows as to future litigation – as here and in *Davies*. I should make clear that the outcome does not hinge at all on this latter point; that simply adds weight to a conclusion that I would have reached otherwise.

635. There is also a real sense in the laches/acquiescence cases of the unconscionability deriving in part from the delayer avoiding making his or her own contribution, whether by way of investment or shouldering of real risk. Again, this is not really the case here. In large measure Mr Jaffe was not even dodging work he would otherwise have personally done; it was the essence of the Individual Defendants' original discontent

that the model for the Recovery Services via SCPI was one where Mr Jaffe retained overall direction but did not put in the hard yards. Accordingly what Mr Jaffe is seeking to recover is very much what he would have been entitled to (though Mr Rukhadze might well take issue with the description "earned").

636. A huge amount of time, attention and money was focussed on the question of Mr Jaffe's ability to start the litigation earlier than 2016. As is apparent from the above that entire argument rested on an extremely slim foundation. Ultimately the point has proved completely irrelevant.

637. Had it been relevant and live I would have tended to the view that Mr Jaffe was financially able to commence some form of litigation earlier than he did, but that the case that he could have afforded to commence this heavy litigation was not made out. One part of this was the absence of certain material which would have had to come from Mr Jaffe, and which he was unwilling to provide in any acceptable form. However the other was a consideration of his outgoings. Any such discussion would have required a detailed consideration of his expenditure which was essentially unfeasible within the constraints of the trial and the myriad other issues – and was ultimately not attempted. In essence the evidence showed that Mr Jaffe did not have significant independent means; he was dependent on the loans which came to him via Mr Anisimov and which he might have been able to raise elsewhere. While those loans were for significant sums and (as noted below) I was not minded to accept Mr Jaffe's evidence as to the purposes of those loans, the evidence disclosed showed that Mr Jaffe had a number of significant outgoings. Further as I have noted at the outset of this judgment this is highly expensive litigation. The sums loaned by Mr Anisimov would not cover the Defendants' incurred costs for Phase 2.

638. Further even had the delay principle been more at large and even had it been on the facts possible for me to conclude on the balance of probabilities that it had been possible for him to commence proceedings earlier, I would in any event have concluded that he essentially took a commercial and strategic decision to wait, at least until the outcome of the VDP carried interest litigation, before he did so and that decision was a reasonable one given (i) the ramifications of the litigation within the VDP litigation (ii) the demands of that litigation and other litigation which remained live and (iii) the likely financial demands of this litigation.

Appendix: Mr Jaffe's Conduct

Introduction

1. I do not intend to give reasons on all the issues raised, in part because this section does not, on my primary reasoning, arise and in part because quite significant portions of the case on conduct were not pleaded.

2. There is a lengthy history to some of these allegations. I have set it out in my judgment on the amendment application in August of 2021 ([2021] EWHC 2057 (Comm)). In essence however, last spring disclosure was sought on some of these issues (such as whether Mr Jaffe was paid by Mr Anisimov to give evidence to the Russian Prosecutor). I refused that disclosure as not going to any pleaded issue ([2021] EWHC 1621 (Comm)). An attempt was then made to amend the pleadings to advance that case. I refused that application. However notwithstanding this, the points were still raised in opening, in cross-examination and in closing. Ultimately Mr Cogley agreed that where the points were not pleaded they amounted only to matters going to Mr Jaffe's credibility. Since Mr Jaffe's credibility does not even arguably affect any of my conclusions on the operative issues (no submission was made in closing that Mr Jaffe's credibility affected any such issue) this is therefore a complete side-show.

3. To the extent that it does matter, however, I deal with the bulk of the conduct allegations below.

Conduct Part 1: conduct said to have affected recovery

NWVF

4. The position as to NWVF is the most significant area of the case on conduct because it was only in relation to NWVF that it was ever pleaded that Mr Jaffe's actions did any quantified harm. The pleading at 29(3)(c) of the RAPS was that "*his actions damaged the value and the ultimate sale price of the assets by hundreds of millions of dollars*." The key allegations in terms of damaging the assets are that:

   i) his attempts to resist the sale of VDP assets "*deterred many credible buyers*".

   ii) the voluntary liquidation of VDP materially damaged the value of the assets.

   iii) his evidence led to the imposition of freezing injunctions by the Russian authorities, which caused almost all the buyers to withdraw from the Borjomi sales process and damaged the value.

   iv) his "*failure to manage the situation*" regarding the debt secured against the Balkan assets and his evidence to the Russian authorities resulting in the imposition of freezing orders over the Balkan assets led to the sale of those assets being at a significant discount.

5. The starting point is that, as already noted SCPI was, in its capacity as general partner in VDP, a fiduciary. SCPI's fiduciary duties were owed to its investors, i.e. NWVF on behalf of the Family.

6. SCPI was required by the VDP Articles to sell the assets prior to the end of the extended term, failing which, as liquidating trustee, it was required either to sell them "*on the best terms available*" or to distribute them *in specie*.

7. As is also noted, Mr Jaffe did not want to do either of those things in 2011/ 2012 because he believed that the economic conditions were not right and that the assets (particularly Borjomi) were worth far more than could be achieved for them at that time – and that if a sale was delayed his own carried interest would be far greater. He therefore caused SCPI to seek a further extension to the term, in March and May 2012 (despite the term already having been extended to its backstop date of 1 July 2012). NWVF was not obliged to do so and it did not. The Defendants' own perspectives appear to have been at least one part of the reason why this attitude was taken.

8. I do accept the evidence that Mr Jaffe's view at this point was that selling was simply a bad idea for everyone because a sale would be at an undervalue. Hence his characterisation of a premature sale as a crime. Here two factors aligned: Mr Jaffe's own interests in the sense that his carried interest would be more valuable if a sale at a higher price were obtained, and also what he perceived as the interests of VDP – and hence SCPI's fiduciary duty. Rightly or wrongly Mr Jaffe believed that he was doing the best for VDP by pressing for a delay in the sale.

9. Mr Jaffe was not a lone voice on this: minutes of an Investment Committee meeting on 11 October 2011 recorded Mr Nagle's view that "*in the current environment, a sale of all VDP assets with a deadline of 1st July 2012 may have a significant impact on valuation and transaction terms. This deadline gives VDP no luxury to see difficulties out and VDP has to stay engaged even on bad deals (e.g. lower price and tough SPA's)*".

10. It is not in issue that with his attempts to extend proving unsuccessful Mr Jaffe sought to pursue (i) leveraged transactions to purchase the assets himself, or (ii) transactions whereby he would be retained as manager by, and in some cases co-invest with, the purchaser ("retained interest transactions").

11. The documents show that:

    i) In a text on 6 November 2011, Mr Jaffe told Mr Fomichev that they could earn over $1 billion if they bought VDP's assets with a loan from Sberbank.

    ii) Mr Jaffe was sent a term sheet by Sberbank dated 8 December 2011 for a loan of up to EUR 255m to a company owned by SCPI for the purposes of acquiring Borjomi, with SCPI named as a buyer. The term sheet referred to the possibility that the loan amount would be adjusted for the value of Bambi, another VDP asset. Mr Jaffe immediately forwarded that term sheet to Mr Tatarchuk, and to Mr Fomichev.

12. Mr Jaffe says that he did this openly; but that was certainly not evidenced by the documents. His evidence was that he had done so during without prejudice discussions, in which the Family, Mr Rukhadze and Mr Nagle were involved. The fact that this suggestion emerged so late rendered it less credible than it perhaps would have been if it had been suggested at any time before Day 4-5 of the Phase 2 trial. It was certainly

not the flavour of his text messages with Mr Fomichev, who appeared to suggest that Mr Jaffe's "*consultations and negotiations*" were behind a veil.

13. As to retained interest transactions Mr Jaffe was having discussions about retained interests with prospective purchasers up to August 2012. While it appears to be the case that there were a number of retained interest offers he did not favour and that he did not simply seize on the first offer which provided this feature, the evidence does suggest that he did not simply probe potential purchasers for their best price, leaving SCPI out of the equation. Moreover he did favour offers made by some of the parties who were offering him a retained interest transaction and/or co-investment by SCPI.

14. In particular he favoured:

    i) The offer of Standard Capital (which was backed by Mr Palikhata, a Ukrainian oligarch) dated 18 June 2012 which provided that key Salford people would be retained, and proposed co-investment by SCPI of $25m on the same terms as Standard Capital. Its position was that the bid price would be adjusted downwards if Salford's senior management did not remain in place.

    ii) Sistema's offer similarly provided, that Sistema intended to offer "*senior management of the Borjomi group the right to acquire up to 20% of the shares in the Company at the price paid by us for the Borjomi Group*" as well as stock options. Mr Nagle said in his resignation letter that included Mr Jaffe, that it had been agreed as a condition precedent, and that it had been negotiated by Mr Jaffe alone without Citi present. I do not consider that this is a material issue. However I would accept that was probably the case.

15. It is also the case that Mr Jaffe was thus placing himself in a situation of conflict of interest. His own case tacitly acknowledged that he was at the very least sailing very close to the wind on this. He accepted that there was a potential conflict of interest. Mr Nagle and Mr Blyumkin were plainly uncomfortable about it, with the latter saying on 22 June "*This is the most obvious conflict of interests I have ever seen Eugene. I don't believe you would think otherwise.*"

16. I consider that there was a conflict of interest. As a matter of English law the routes out of this conflict were (i) Mr Jaffe removing himself from the decision-making process (such that there would cease to be a conflict) or (ii) fully informed consent on the part of the purchaser. Neither of these things seems to have happened. However no one has ever brought a claim against him in this regard..

17. Probably the key allegation is that on at least one occasion Mr Jaffe's actions actively caused an asset sale to fall through. In this regard the Defendants relied on a number of passing emails such as:

    i) Mr Nagle telling Mr Blazquez in a discussion on 28 May 2012 that the latter had said that if left to Mr Jaffe it would be 12-18 months before the assets were sold.

    ii) Mr Ashurov (a Salford executive who was on the board of Borjomi) telling Mr Rukhadze during a discussion on 20 August 2012 that Mr Jaffe would not sell anything until he was able to "*steal*" IDS-Borjomi.

iii) Mr Blyumkin's regular remonstrations to Mr Jaffe internally by text message, for example, on 29 May 2012: "*...in bad times you passed on 3 reasonable deals that would deliver us returns but that was not enough for YOU*".

18. None of these appear to make good the allegation. The nearest approach is the last of these emails; but it does no more than say that Mr Jaffe wanted a better price than certain deals offered. There is no particularity or considered assessment of the deals referred to.

19. More to the point was what was described in opening as Mr Jaffe's "*sabotage of the sale of Imlek*" to Royal Friesland Campina ("RFC"). The more moderate (pleaded) allegation was that Mr Jaffe pushed for unrealistic terms. As to that deal it is clear that:

i) Mr Jaffe knew that RFC's position was that it would only enter into a dinar-denominated deal, and that is what had been agreed with RFC in the MoU which was reached in February 2012.

ii) In May 2012 (two months prior to the expiry of the term of VDP) Mr Jaffe pressed for a Euro deal.

iii) It would appear that he did so because there had been a fall in the Dinar which would impact the value of the deal for the Fund.

20. The allegation underpinning both iterations of the case is that he must have known that this would cause the deal to fall apart, which is what happened. So far as this is concerned, I was not persuaded that this was the case, particularly in the light of a contemporaneous note of a conversation between Mr Nagle and Mr Blazquez which indicates that "*Eugene Jaffe was not expecting FC to react in this way*" to Mr Jaffe's insistence on denominating the price in Euros.

21. It may be that Mr Jaffe's decision was, with the benefit of hindsight, a poor one, since RFC were at that stage the only deal in town and this was at a time when the Family were in real need of money, particularly in the context of their ongoing litigation with Boris Berezovsky and in light of VDP's debt issues in the Balkans. It may well be that it was a decision made with his own interests as well as those of the Family in mind.

22. It may also be that Mr Jaffe should have let the IC know what was going on – since the first the IC heard about the deal falling through was when it was announced in the press. It does appear that Mr Jaffe "sanitised" the story telling the IC that RFC had "walked"; which was only very partially accurate.

23. But *prima facie* if this strategy had worked it would have benefitted the Family more than it would have benefitted himself. I do not consider that the evidence justifies any finding that Mr Jaffe did this with the intention of hurting the Family. On the contrary, since his interests were aligned with those of the Family, I am persuaded that he acted with both his and their interests in mind. So far as the pleaded case is concerned, I accept that Mr Jaffe pushed for terms which turned out to be unrealistic and indeed pursued a high-risk strategy. I accept that he did so deliberately. However, I do not accept that he did so with any nefarious or harmful intention.

Appointment of liquidator over VDP's assets

24. As to the second allegation – that Mr Jaffe unilaterally decided to put VDP into liquidation and thereby materially harmed the assets, the position appears to be this.

25. There was a series of negotiations between SCPI, Mr Jaffe and NWVF in autumn of 2012 to seek to settle the dispute which had by then arisen as to whether SCPI was required to distribute the VDP assets to NWVF *in specie*, having failed to sell any of them during the extended life of the partnership.

26. On 19 October 2012, following a series of offers, NWVF offered to pay SCPI $130m in return for a distribution.

27. The Defendants assert that that offer was "*on any objective view more than reasonable*". Mr Jaffe asserts that it was "*a very low offer which was a result of a completely compromised process, completely engineered by the defendants and New World Value Fund*".

28. The question of whether the offer was a good one was not a pleaded one. Had it been pleaded I would not consider it material. Nor do I consider that I have adequate evidence to make a decision on this point if it had been pleaded.

29. The reason it has been the subject of debate is to find an inferential case that Mr Jaffe can only have been so insistent upon rejecting the offer because he thought he would receive more money through an alternative course of action. Given that the Defendants say that no legitimate course of action would result in the receipt of more money, it follows that what he had in mind must have been illegitimate. This is again unpleaded and a considerable stretch. It is perfectly credible that Mr Jaffe rejected the offer because he did not trust the process and because he had (rightly or wrongly) formed a view that his carried interest was worth more than the offer made.

30. At the end of the day the issue is really only backdrop to Mr Jaffe's decision to put VDP into liquidation and the questions of (i) whether that was done "*with the intention of disrupting the recovery of value from the assets*" and (ii) whether his actions damaged the value and ultimate sale price of the assets.

31. As to the former point the evidence relied on by the Defendants as to the offer, and also the evidence relied on by the Claimants as to the events which preceded it (in particular the Defendants' actions over the summer and early autumn of 2012 – such as the leaking of the NWVF letter and the attempts to take control of the Borjomi auction process) tend to come together to produce a very credible case negating intent to disrupt the recovery process. What appears to have happened was a very torrid and hostile period, at the end of which (or, as the Defendants put it, the crescendo of which) Mr Jaffe was more or less at the end of his tether. I conclude that he put VDP into liquidation because (again rightly or wrongly) it seemed the last sensible option open to him. I accept that he saw the liquidation as actually providing a route to selling the assets rather than as one which would impede their sale.

32. In particular it seems likely that Mr Jaffe saw the best prospect of ensuring the completion of the Sistema deal through this means. He knew that the investors were not going to agree to it while he was in office as Liquidating Trustee, so he caused the term

sheet to be executed then appointed liquidators, hoping that they would rubber stamp it. That this was the intention is clear from the fact that Mr Jaffe caused the term sheet for the Sistema deal to be executed by Borjomi's parent company (Rissa) on the same day that the liquidators were appointed.

33. It also seems very credible that Mr Jaffe saw this as a means to derail an arbitration which NWVF had on 18 October 2012, five days earlier, commenced to resolve the dispute concerning its request for a distribution *in specie*, in support of which they were on the verge of seeking to appoint a receiver when Mr Jaffe commenced the liquidation.

34. It is accurate to say that Mr Jaffe unilaterally and secretly appointed liquidators. Mr Jaffe did not tell anybody what he was planning to do. While perhaps understandable in context this was on its face in breach of the VDP Articles, which required SCPI to consult the IC on all major management decisions under clause 4.3.6.

35. However I do not accept that this proves that he was not acting in the interests of the VDP investors. Again, Mr Jaffe seems to have had complete faith in his own assessment of the best course – for himself of course – but also in his judgment for the best realisation of value. This was, in effect, not dissimilar to a shareholder dispute about the best way forward for a company.

36. Turning then to the second question: did the liquidation materially damage the value of the assets? The answer to this question is no – and nor was this actually argued in closing. What was argued was that the appointment also cost the Family in excess of $27m in the liquidators' fees and disbursements, which it would not have had to pay had Mr Jaffe not taken this course. That appears to be correct, but this is not a pleaded issue. The second complaint pursued is that it caused the Defendants a huge amount of additional work and made their job more difficult. Again this may well be true, and I would accept the Defendants' evidence on this. But that is the lesser limb of the pleaded case on conduct.

The attempted deal with Boris Berezovsky

37. The Defendants allege that in mid-July 2012, while the parties were waiting for the judgment of Gloster J in the Commercial Court Action, attempts were made by Mr Jaffe to bring about a settlement between Mr Berezovsky and Mr Anisimov on terms that the latter would acquire the former's interest in NWVF. Mr Cotlick says that Mr Jaffe expressly presented that proposal by saying that it would put pressure on the Family by preventing them from selling VDP's assets and thereby starving them of funds. He says that a further meeting was arranged at the Four Seasons Hotel the following day to discuss that proposal, and that negotiations between the parties' legal representatives continued until 28 August 2012, but that it ultimately came to nothing.

38. The critical point here is that the Defendants say that while these attempts were not successful, this would have been catastrophic for the Recovery Services and offers a prime example of Mr Jaffe trying to hamper the work from which he now seeks to benefit. It is not a case of bad conduct actually affecting recovery, but bad conduct intended to affect the recovery.

39. So far as concerns this allegation, it was common ground ultimately that Mr Jaffe was acting as an intermediary between Mr Anisimov and Mr Berezovsky, and that he

wanted the negotiations to succeed, and for Mr Anisimov to become an investor in NWVF. Mr Jaffe's evidence on the source of the idea was not clear. At one point he said that he could not remember where the proposal came from, and at another he said that the idea came from Mr Anisimov. I did not find Mr Jaffe's evidence on this point to be clear or convincing. I do accept Mr Cotlick's evidence that it was Mr Jaffe who made the proposal. I would also accept that it is likely he did so at least in part in order to seek to put pressure on the Family; albeit, as Mr Cotlick put it, "*Mr Jaffe was primarily trying to serve his own purposes*".

40. Mr Cotlick's 2013 evidence might also be said to gain some support from Mr Nagle's witness statement, also produced for the Anisimov proceedings, and verified in these proceedings, in which he said that he had a meeting with Mr Jaffe on 6 July 2012, in which Mr Jaffe told him of a similar proposal. That slightly different proposal reflects a slightly more nuanced and to my mind credible motivation, namely that in addition to piling pressure on the Family he and Mr Anisimov were natural allies. Having said that I also tend to the view that Mr Nagle's evidence has to be treated with caution, as I have noted above. Whether the proposal included mention of the loan, or whether this was a later recollection by Mr Nagle, is more dubious.

41. Either way however the attempt to bring about a deal did not affect Recovery.

42. Accordingly I conclude that Mr Jaffe did attempt to broker a deal between Mr Berezovsky and Mr Anisimov, and he did so with mixed motives, one of which was to create trouble for the Family. However, there was no effect on the success of the Recovery Services, though it did create extra work for the Defendants.

Interview with Russian prosecutor

43. It is common ground that on 29 June 2012, Mr Jaffe gave an interview to the Russian prosecutor who was conducting a criminal investigation into Mr Berezovsky. As to this interview there was an unpleaded allegation that in the course of the interview, Mr Jaffe told the prosecutor that Mr Berezovsky was an investor in NWVF, and provided detail as to the nature and location of VDP's assets, when they would be sold, and where the sale proceeds would be paid.

44. The parties joined issue on whether Mr Jaffe gave the interview because he was legally obliged to, having received a summons and that, having been summonsed, he told the truth or whether he engineered the summons as part of a strategy to impede the recovery of assets, effectively because of his disenchantment with the Family and the Defendants after the breach.

45. There is no doubt that in June 2011, Mr Jaffe had sent a number of texts to Mr Fomichev which at least flirted with the possibility of getting the Family in trouble with the Russian authorities:

    i) "*RA buying Fund and Russians freezing proceeds (I am sure RA and you can get some back). To be honest, I plan to initiate the discussions on the second part. I will be merely cooperating with Russian authorities who approach me first.*"

ii) "*Have them write a letter to Salford. / Them, who? / Those who want to freeze BB money? We will cooperate*."

iii) "*Our best leverage is when we get close to cash – helping Russians freeze it or … We play cool as if we will do something and they will probably prefer to settle last minute. If there is a comprehensive deal between BB and Family (if it will last) it could be a comprehensive settlement with all of us, including on Revoker. We must play cool and make sure they start panicking when well over $1bn start coming in.*"

iv) "*Russians going after Inna will be very strong move. Now they will have a very good reason / excuse to do it. She is really afraid of it. I really wonder what is VA position.*"

46. However Mr Jaffe did not do so at the time. He says now that this was part of his "bad thoughts". I accept this evidence. Had Mr Jaffe been going to do such a thing one would expect him to have done so at the time – or given his tendency to express his thoughts quite freely – for there to be some sign of this around the time of the June 2012 meeting. However what happens is something different. There is an outpouring of bitterness (which is on any realistic assessment quite understandable). There is then a year's silence. There is then a trip to Russia for another reason (a meeting with Mr Palikhata); and the meeting occurs then. On this version of the timeline Mr Jaffe's case that he was summoned out of the blue appears very credible.

47. However the Defendants say that an entirely different complexion is put on this by the fact that there were a number of other trips to Russia in this period when this did not happen and the fact that Mr Jaffe was apparently associating with Mr Anisimov (who was in conflict with the Family) at this stage.

48. In particular the Defendants contended that the evidence suggests that he was paid by Mr Anisimov. A huge amount of time and effort was devoted by the Defendants to this point. However since it was one of the points which was unpleaded and pursued only as a matter going to Mr Jaffe's credibility it is one of the areas where the evidence base was incomplete.

49. The inference sought by the Defendants is said to arise because there were two payments made to Mr Jaffe (the first via a company in Mr Jaffe's wife's name) by Mr Anisimov of $2 million and $10 million, at the times of the prosecutor interview and Anisimov evidence respectively. The US$2 million was paid pursuant to a purported loan agreement (later written off) which Mr Jaffe accepts was a sham.

50. The Defendants also continued to advance a case (for which permission was refused but which persisted as part of the credibility case) that the interview was given illicitly, arguing that if it was not, why did Mr Jaffe not tell others about it? If acting in good faith, they say, Mr Jaffe would immediately after the interview have convened a crisis meeting with his SCPI colleagues and also NWVF, to tell them what had happened and to consider what steps they could urgently take to safeguard the assets.

51. At the end of the day I do not consider, for the reasons which I have given, that evidence which goes to Mr Jaffe's credibility is of any practical moment. However I would accept a certain amount of the Defendants' case on this. On the basis of the limited materials

available I do regard it as more likely than not that Mr Anisimov paid Mr Jaffe for aligning himself with Mr Anisimov. I do not consider that it is relevant, nor do I have material to establish whether the payment was specifically for giving evidence, or more general alignment (though I would if pressed conclude the latter, because payment for such a relatively inconsequential interview as I conclude below it was, seems unlikely), or whether the evidence which Mr Jaffe gave was untrue. I do consider that Mr Jaffe's slightly uncharacteristic reticence after the event supports the tentative conclusion that the evidence giving was part of an alignment with Mr Anisimov. Mr Jaffe had adopted a new strategy and he did not want to broadcast it.

52. But in a sense the case which the Defendants have now advanced undermines their pleaded case. The pleaded case is that Mr Jaffe arranged the interview to gain leverage over the Family. What I conclude the evidence establishes is that Mr Jaffe gave evidence as part of a realignment of his loyalties, and that that step was initiated (directly or indirectly) by Mr Anisimov in pursuance of his agenda.

53. Further the case as to the effects of the evidence was not in my judgment sustained on the evidence. In the first place when one looks at the information given it does not bear out the case that this was key evidence, in particular in relation to the identification of Mr Berezovsky as an investor in NWVF (the pleaded allegation), which then triggered freezing relief. The Defendants' case is that the Russians wanted *evidence* from someone on the inside and this is what Mr Jaffe gave them. However, it does appear that the Russian authorities already had such evidence.

54. That is because Mr Fomichev himself had already given them an interview in October 2010. Mr Fomichev's evidence was far more detailed than Mr Jaffe's. He had provided details of the Itchen Trust, and indicated that it "*owns 37% of business share in other trust which is the controlling company: New Value Fund*", calculating the value of Mr Berezovsky's "*current 37% of share*" as "*around 370 millions of US dollars*". Mr Alexeev accepted that Mr Fomichev's interview notes contained more detail than Mr Jaffe's. That interview was evidence, if the authorities wanted evidence.

55. Looking at the transcript of Mr Jaffe's interview, which was very much focussed on Mr Berezovsky, it appears that he identified that Mr Berezovsky "*lays a claim to 50% of the monetary funds which will be transferred into the account of the NWVF company from the fund 'VDP' after the sale of the assets*". Mr Jaffe did not say that Mr Berezovsky had a stake in the VDP assets, although he mentioned the initial (2001) plan for a partnership between Badri and Mr Berezovsky.

56. It was suggested in the run up to the case that the smoking gun in the interview was the absence of mention of the economic divorce between Badri and Mr Berezovsky i.e. failing to clear Badri of continuing involvement with Mr Berezovsky. However the idea of this as a central feature of the interview does seem unlikely given that it is not even mentioned in the note; this suggests either that it was not mentioned, or it was regarded by the note-taker as insufficiently important to mention. Certainly the pleading put forward by the Family in the Berezovsky proceedings suggests that it was common knowledge at the time.

57. I note however that the case that Mr Jaffe told the prosecutor about NWVF's assets and Mr Berezovsky's interest in them, and how it was intended to sell them, was not the

pleaded case against Mr Jaffe, being an iteration of the argument which effectively emerged in closing.

58. What Mr Jaffe did do was give the prosecutor confirmatory evidence and also information as to the current state of play and timeline.

59. The second part of the pleaded case concerns the imposition of the freezing orders. I conclude that Mr Jaffe's evidence, confirmatory as it was, did not cause the orders. It does appear likely that Mr Jaffe's evidence had some relevance to the timing of the orders. Whether it was a "but for" cause even of the timing in the way alleged by the Defendants is far more dubious, given that a Russian MP had applied to the Prosecutor General's office on 20 August 2012 "*concerning possible assets belonging to Mr Berezovsky in the territory of Russia and Ukraine (namely IDS Borjomi Assets)*". It was closely following on that, on 5 September 2012, the Moscow offices of Borjomi were searched.

60. The real question is whether, as the Defendants allege, that had "*catastrophic effects, particularly as regards Borjomi.*" I am not persuaded that any negative effect was made out on the evidence. Mr Alexeev suggested that the Russian freezing orders "*were a big deal because they impacted the price*" at which Borjomi could be sold. That was simply assertion however and I do not have evidence to support it. The way in which it was put in closing was that "*as a knock-on effect, the field of possible purchasers for the assets shrunk to Russian parties who were comfortable dealing with such attacks by the state*" and "*the Family and the Defendants on their behalf had to sell Borjomi immediately*". But that argument is also not (on balance) supported by the evidence and fails to reflect the reality that there was already a sale process under way, that Alfa Bank and Sistema were the existing main bidders and that they both maintained (and in Sistema's case, offered to increase) their bids after the freezing orders had been imposed.

61. The Defendants contended in closing that the terms to which the Family ultimately had to agree with Alfa were far less favourable than they would otherwise have been, for example Alfa insisted on them retaining a substantial minority interest in order that they would retain a share of the risk if attacks continued, and as security for the extensive warranties and representations which they were required to give to Alfa. They pointed to the sale being based on an enterprise value of $460 million and the fact that in later proceedings commenced by Mr Jaffe in the BVI in support of his unsuccessful claim for carried interest, he claimed that Borjomi was in fact worth $1.261 billion. The latter point is not persuasive – it is entirely credible (or even to be expected) that Mr Jaffe would put an unrealistically high valuation on Borjomi in that context. As to the former point the link between the freezing order and the terms was not made out. It was contradicted by Mr Mtibelishvily's clear evidence as to the effect that the freezing orders had no impact on the process and Mr Kabanovsky's evidence that Alfa's bid did not change as a result of the freezing orders.

62. I therefore conclude that the pleaded case of damage caused by Mr Jaffe's evidence to the Russian prosecutor is not sustained.

Balkan Debts

63. In the pleaded case and in opening the Defendants submitted that during the time when it was managing the VDP assets, SCPI allowed large bank loan facilities with Komercijalna and Raiffeisen, secured over VDP's Balkan assets, to go into default, such that the banks threatened to foreclose on the assets. It was also said that after Mr Jaffe's appointment of Liquidators, the Family had to provide nearly EUR 20m at short notice in early 2013 to pay down the Komercijalna loan.

64. Though pleaded as a positive case based on intent, in opening the Defendants backed off from that case saying that they did "*not know whether Mr Jaffe allowed this to happen intentionally in order to exert further pressure on the Family, or negligently*". The point was not put to Mr Jaffe. When it was put to Mr Petrovic, no criticism was made of him (as the manager of the relevant assets) for that debt position.

65. Further the case on diminution was not pursued with the case in closing being that the freezing order made work with the assets considerably more difficult.

66. The case on conduct as regards the Balkan assets therefore fails.

Conduct Part 2: alleged attempts to impede recovery

67. The next aspect of conduct relied upon is Mr Jaffe's assistance to Mr Anisimov. This is not conduct which is said to have had any impact on the actual recoveries made. It is simply alleged as conduct by which he (unsuccessfully) sought to impede the recovery of value from projects which were critical to the success of the Recovery Services. It is therefore conduct which on the analysis set out in the main part of the judgment can have no impact on the taking of the account.

68. By early 2013, the Family had issued their substantial claim against Mr Anisimov. The claim concerned the use that was made of $600m that was received by Badri from the proceeds of the sale of RusAl, a large formerly state owned Russian aluminium company (the "RusAl Proceeds"). The important part of that claim for present purposes was that out of the RusAl Proceeds, $250 million was used to partially fund the acquisition (by a company owned by VA) of a 50% interest in Mihalovsky GOK ("MGOK"), a very large Russian iron ore company. The remaining source of finance for the purchase came from elsewhere, including a large bank loan from VTB Bank. The 50% shareholding in MGOK ultimately became a 20% share in Metalloinvest, a much larger iron ore company. The Family's case was that Badri and Mr Anisimov had agreed that they would own the shares in MGOK (and therefore that they subsequently owned the interest in Metalloinvest) 50:50. Alternatively they said that Badri had loaned Mr Anisimov the money, so they had an alternative case of commercial loan with interest. Mr Anisimov's defence was that Badri had agreed to give him half of the RusAl Proceeds (ie $300m) for "*sins of the past*", i.e. to satisfy a moral obligation which arose from him allowing Badri to acquire some aluminium assets at an undervalue and the $250 million used as part of the MGOK purchase came from Mr Anisimov's half of the RusAl Proceeds.

69. When witness statements came to be exchanged in the VA proceedings, Mr Jaffe provided three witness statements for Mr Anisimov in which he said, in summary, that:

i) Badri had told Mr Jaffe that he "owed" Mr Anisimov for "*sins of the past*" in reference to the sale of VA's aluminium assets at an undervalue.

ii) Badri had told Mr Jaffe on two separate occasions in 2004 that he had agreed to "give" 50% of the RusAl Proceeds to Mr Anisimov.

iii) Mr Jaffe did not understand Mr Anisimov and Badri to have any joint business interests apart from the Kulevi Port and Mr Anisimov controlling the RusAl Proceeds.

iv) Mr Jaffe could not say confidently whether or not Mr Badri ever had an interest in Metalloinvest (then known as MGOK).

v) However, based on a discussion he had with Badri in 2005, he believed Badri did not have any such interest at that stage.

70. The Defendants' case is that that is starkly inconsistent with what Mr Jaffe had said to them, and to the Family and its lawyers, during many key and strategy meetings at the time when they were all providing the Recovery Services together. I broadly accept that there was an inconsistency in the overall tone and thrust of Mr Jaffe's evidence with the approach he seems to have taken at an earlier point. How great that inconsistency actually was and how much of the inconsistency derives from a different emphasis from the Defendants' own (probably not entirely perfect) recollections is not clear to me.

71. It does appear that:

i) Mr Jaffe never mentioned to them any of the matters set out above.

ii) There were regular meetings of the Revoker team and at least at some of these, Mr Jaffe listed on a flipchart the people who they believed were holding assets for the Family. That list included Mr Anisimov, and beside it was written Metalloinvest and a value for Badri's interest of over $1 billion.

iii) Mr Jaffe participated in discussions with the Family as to the way in which the carried interest for the Recovery Services would be calculated, which were premised on the idea that the Family were likely to recover over $1 billion from Mr Anisimov (which would only have been the case if they were able to establish that Badri had an interest in Metalloinvest).

iv) Mr Jaffe and Mr Rukhadze met with Mr Anisimov together on several occasions, and prepared together for such meetings, again without Mr Jaffe ever mentioning the recollections that he referred to in his evidence.

v) Mr Jaffe never took overt issue with Mr Rukhadze's evidence in Gibraltar that he believed that Mr Anisimov had held very substantial interests for Badri in Russia pursuant to an investment made between 2004 and 2005 (which could in context only have been Metalloinvest).

vi) Mr Jaffe sent Mr Rukhadze a text in late 2009 complaining that, after deduction of loans and expenses, the Family would receive only $200 – 300m from Badri's investment in Metalloinvest.

72. I am not persuaded by Mr Jaffe's suggestion that whenever he mentioned Badri's interest in Metalloinvest being worth $1-1.5 billion, he stressed that that was only one possibility and that it was equally possible that he had no interest at all. At the same time I do conclude that both Mr Jaffe and Mr Rukhadze were aware that there were possibilities which were not so clear cut, and that the position on Metalloinvest was probably susceptible of argument. I note that in early 2012 Mr Rukhadze was also somewhat nuanced: "*Badri would often say that he was waiting for money from VA and that VA was managing money for him, but he did not explain what he meant by this in any detail.*"

73. I conclude that when Mr Jaffe was acting for the Family he made as little of these doubts as he could – he was aiming at the best case; but when he realigned himself with Mr Anisimov he racked his brains to think of what he knew or thought he recalled which aligned with his new loyalties. A number of the phrases used by him are redolent of such a process of constructive memory: "*I think that it is important to mention that, particularly in the early days of my relationship with Badri and Mr Berezovsky, I did not understand in full the details of all of Badri's business affairs*"; "*I was sometimes unclear about what assets were owned and by whom*"; "*I therefore cannot say confidently whether or not Badri ever had any interest at any time in MGOK*". In a later witness statement in the same proceedings, he said he "*did not know [...] how much of the Rusal proceeds remained outstanding between the two men*", but that he "*entertained the possibility that Mr Anisimov may have held an interest in Metalloinvest on behalf of Badri*".

74. As for the allegation that Mr Anisimov paid Mr Jaffe for his evidence, this is another point which was relevant to credibility only, since permission to amend was refused. It is accordingly another point where the evidence base was incomplete and my views on what I have seen and heard must be read with that rider. Here I would (if credibility were relevant) come to a similar conclusion to the conclusion I reached on the US$2 million payment. I would not consider that it is more likely than not (let alone an irresistible inference) that Mr Anisimov paid Mr Jaffe to give this evidence. However, nor would I consider the payment was entirely unrelated to Mr Jaffe's alignment with Mr Anisimov.

75. My impression was that Mr Anisimov was prepared to assist Mr Jaffe because Mr Jaffe was prepared to assist him, including by giving witness statements and, if necessary, giving evidence at trial. Mr Jaffe may have had some business plans relating to bottling and confectionery in his eye, as he suggested, but the absence of any moves to follow up on them suggests that this is not particularly likely. Nor do the transactions have the hallmarks of a commercial loan. I conclude they were payments made to cement Mr Jaffe's change of loyalties; and that one manifestation of the loyalty expected was the provision of witness statements for the litigation.

76. As to his motivation for giving the evidence, I accept that it is not credible that Mr Jaffe simply wanted to see justice done. I do not accept that he acted because he considered that "*certain positions being taken by the Family … in those proceedings were wrong and [he] wanted the court to have available to it the information which [he] had about the events in question.*"

77. He may genuinely have felt that the Family were behaving in an underhand fashion; but it seems likely that that perception was driven more by a sense of his own wrongs than a specific concern for Mr Anisimov.

78. Again however the evidence does not suggest that Mr Jaffe did this with the intent of impeding the Recovery Services; his intent was to further his own interests. It does however follow that regardless of his intention Mr Jaffe was aware that his actions would potentially deprive the Family of such funds as they were hoping to recover from Mr Anisimov. A late and unpleaded argument was raised that Mr Jaffe's evidence "*was of sufficient potency to mean that Mr Anisimov could get away with paying 750 million rather than 1.25 billion*" to the Family by way of settlement is not sustained by any evidence base.

79. I do conclude that the evidence suggests that when it suited his aims to be on the Family's side, Mr Jaffe made the most of his positive recollections in encouraging the Family to pursue Mr Anisimov on the basis that Badri had an interest in Metalloinvest; but when it suited him more to be aligned with Mr Anisimov at the Family's expense, he was perfectly prepared to maximise his recollections of all the factors which might tend in the other direction, with the effect that his position appeared notably different. It is possible, but appears unlikely, that both of these positions can have reflected Mr Jaffe's genuine understanding of the position at the time when he expressed them.

Salford Georgia

80. Finally, as regards Salford Georgia, which carried out work on the Recovery Services (as well as on separate projects managing Badri's assets in Georgia) the Defendants' case is that in July 2011 – while the parties were in the process of seeking to negotiate, through solicitors, an amicable handover of its operations from SCPI to Mr Rukhadze – Mr Jaffe, despite having no interest in pursuing the projects which that office was working on – took it over and closed it down, firing the individuals who worked there, and removing all of the documents. The key point relied upon at the end of the trial is that he then passed some of that material to the lawyers who were acting for Mr Kay facilitating confidential Family documents falling into the hands of a key adversary of the Family.

81. To the extent the points raised about the closure itself remained live I accept the Claimants' case that Mr Jaffe was perfectly entitled to close Salford Georgia – it was after all an SCPI office. From his perspective (and he was the UBO of SCPI) the position was that the manager of his Georgian office had "gone rogue" and he therefore decided to remove him from that position and shut down that part of the operation.

82. While the allegation regarding passing the documents to Mr Kay's lawyers remained live, the answer to it is essentially the same. The relevant materials were SCPI's property. SCPI was therefore technically entitled to do what it wished with them. However Mr Jaffe's fig leaf for this unattractive action – that he handed the documents over to Mr Kay's lawyers for safe keeping – does not appear credible. As the Defendants pointed out if the lawyers were handed the documents pursuant to a client relationship with Salford (for safe keeping) – they would then (at least as a matter of English law) be in a conflict position: they would be in possession of material relevant to Mr Kay's interests, but would be impeded in referring to it, without in turn breaching the duties they would have owed to Salford. Further while Mr Jaffe has contended that

he gave the material to the lawyers because he instructed them to advise him on certain issues of Georgian law, it is notable that he was not prepared to waive privilege in relation to that. Yet further the contention that Mr Jaffe was using them to store documents and computers on behalf of SCPI, seems lacking in credibility, when there are doubtless storage companies who could perform this role.