Neutral Citation Number: [2023] EWHC 428 (Comm)

Case Nos: CL-2022-000330 and CL-2017-000323

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

Date: 28/02/2023

IN THE MATTER OF A PART 8 CLAIM

Claim No CL-2022-000330

B E T W E E N:

Before :

MR JUSTICE FOXTON

- -

Between :

SMA INVESTMENT HOLDINGS LTD
(for whom BKV Limited claim to be entitled to give instructions) — **Part 11 Applicant / Additional Party**

- and -

(1) HARBOUR FUND II LP
(2) ORB ARL
(3) STEWARTS LAW LLP — **Part 11 Respondents/ Part 8 Defendants / Part 20 Claimants**

and others

AND IN THE MATTER OF GERALD MARTIN SMITH
AND IN THE MATTER OF THE CRIMINAL JUSTICE AT 1988

Claim No CL-2017-000323

B E T W E E N :

(1) THE SERIOUS FRAUD OFFICE
(2) MR JOHN MILSON AND MR DAVID STANDISH
(as joint Enforcement Receivers in respect of the realisable property of Gerald Martin Smith) — **Applicants**

- and -

(1) LITIGATION CAPITAL LIMITED
(a company incorporated in the Marshall Islands)
& 45 others including
SMA INVESTMENT HOLDINGS LTD) — **Respondents**

- -

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Daniel Saoul KC, **Richard Hoyle** and **Lorraine Aboagye** (instructed by **Harcus Parker LLP**) for Harbour Fund II LLP, the Viscount and Stewarts Law
Anthony Peto KC and **Alina Gerasimenko** (instructed by **St Paul's Solicitors**) for **Minardi Investments Limited**

Hearing date: 10 February 2023
Further written submissions: 14 and 16 February 2023

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Judgment Approved

by the court for handing down (subject to editorial corrections)

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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.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 28 February 2023 at 14:00.

The Honourable Mr Justice Foxton:

1. This hearing was listed to determine the following applications:

    i) the application of the parties represented by Harcus Parker LLP (**the Harcus Parker Parties**) for an order transferring shares held by SMA Investment Holdings Ltd (**SMA**) on bare trust for the beneficiaries to the Harbour Trust (**the Shares**) to trustees I have previously appointed to that trust (**the New Trustees**);

    ii) the application issued on the instructions of BKV Limited (**BKV**), which claims to be a director of SMA and authorised to represent it, to challenge the jurisdiction of the court to hear a claim brought by the Harcus Parker Parties seeking relief against SMA (that claim having been brought by way of a Part 20 claim in proceedings commenced against the Harcus Parker Parties and in which the Harcus Parker Parties seek the same order for transfer of the Shares); and

    iii) the Harcus Parker Parties' application to continue a worldwide freezing order (**the WFO**) which I granted on a "without notice" basis against SMA in relation to the assets it had been found to be holding as bare trustee for the Harbour Trust.

2. The applications were listed for ½ a day. In the event:

    i) on 8 February 2023, solicitors acting for Minardi Investments Limited (**Minardi**) wrote to Harcus Parker LLP saying that they intended to intervene in the Part 20 Claim, to wish they would be joined, for the purpose of resisting the order for transfer of the Shares, and seeking an adjournment of the hearing to allow time for new counsel to get up to speed;

    ii) no one was instructed to appear by BKV in support of its jurisdictional challenge;

    iii) the Harcus Parker Parties also issued an application for summary judgment on its claim for an order requiring SMA to transfer the Shares.

3. I heard argument on the adjournment application, but reserved judgment. I also permitted the Harcus Parker Parties to make full submissions on the other applications (because these overlapped extensively with their submissions on the adjournment application), while acknowledging the very real difficulties which Minardi's recently instructed counsel team had in offering any effective response to those submissions. I also made an order for the service of short supplemental submissions.

4. Finally, I made an order continuing the WFO and ordering that legal title to the Shares be transferred to the New Trustees on an interim basis (to be held subject to further order of the court) and reserved judgment on all other points, including the adjournment application made by BKV.

THE CONTEXT IN SUMMARY

5. The context in which the issues considered in this judgment arise will be familiar to all those who will read it, save for Minardi's new counsel team, but unfortunately a proper understanding of that context is essential to the fair resolution of the matters in issue. By way of a very brief background summary:

   i) The disputes originate in dealings between two thoroughly dishonest individuals, Dr Gerald Martin Smith and Mr Andrew Ruhan, in 2003. Their dealings led to extremely hard-fought litigation, in which two other individuals who I have found to be thoroughly dishonest, Mr Simon Cooper and Mr Kevin McNally, featured prominently, and in the course of which various assets moved from Mr Ruhan's control to Dr Smith's control in circumstances involving dishonest breaches of fiduciary duty by Messrs Cooper and McNally.

   ii) Dr Smith has twice been convicted of separate offences of dishonesty, and on the second occasion the Serious Fraud Office obtained a confiscation order over his realisable assets in the sum of £40m. However, Dr Smith's propensity to dishonesty and obfuscation, and the legal chaos generated by his dealings with Mr Ruhan and the subsequent litigation, made identifying Dr Smith's realisable property a challenging task.

   iii) In circumstances which I will have to consider in more detail, in 2017 Mr Justice Popplewell gave directions for a trial intended to resolve competing claims to assets which had changed control during the litigation against Mr Ruhan.

   iv) That litigation has resulted in two significant trials before me. The first – the so-called Directed Trial – took place between January and March 2021, and was subject to a judgment reported at [2021] EWHC 1272 (Comm) (**the Directed Trial Judgment**), a heavy interlocutory judgment reported at [2021] EWHC 1273 (Comm) and a lengthy consequential judgment reported at [2021] EWHC 2803 (Comm). The only party to obtain permission to appeal against findings made in that judgment was Phoenix (who received permission only on a limited part of its case). That appeal was dismissed on 20 January 2023 (*Phoenix Group Foundation v Harbour Fund II LLP* [2023] EWCA Civ 36).

   v) The second significant trial determined "upstream" issues relating to ownership of some of the assets in the Directed Trial, in proceedings brought by HPII against Mr Andrew Ruhan and Mr Anthony Stevens. Judgment was handed down on 23 February 2022, following a trial starting in late November 2021 and finishing in January 2022: *Hotel Portfolio UK Ltd v Ruhan* [2022] EWHC 383 (Comm), with another significant consequentials judgment, [2022] EWHC 1695 (Comm). There has been no appeal by Mr Ruhan against that decision, although there is an outstanding appeal on issues of quantum by Mr Anthony Stevens.

6. It might have been expected that those judgments would bring an effective end to this long-running set of claims. However, that has not proved to be the case. There have been a series of hearings and applications arising from various aspects of the litigation or offshoots of it, each generating a large volume of associated paper applications. These have included judgment on a substantial Part 8 Claim brought, inter alia, by Mr Thomas and Mr Taylor,

but with funding from companies linked with Dr Smith and Mr McNally, in circumstances in which Mr Thomas had been adopting positions which favoured the interests of associates of Dr Smith and Messrs Cooper and McNally: *Ticehurst, Taylor and Thomas v Harbour Fund II LLP* [2022] EWHC 3053 (Comm).

7. There are a number of reasons why the extensive judicial resources already devoted to the resolution of these disputes has not led to any abatement in the demands they continue to make on the court's time. To some extent it reflects the inherent complexity of the underlying facts, which themselves reflect the propensity of some of the leading players for dishonest and opaque dealings. However, I am satisfied it is to a very significant extent the result of the refusal of a number of the key protagonists to accept the court's decisions. This has led to a number of strange alliances:

   i) At the Directed Trial, Minardi was said to be owned by Mr Anthony Stevens (who I later found to be acting as a nominee for Mr Ruhan pursuant to a dishonest arrangement they had put in place and operated over many years). Minardi's claims were opposed by Messrs Thomas and Taylor, who were represented by Mr Crossley of St Paul's Solicitors. At the hearing, it was Minardi's case that Messrs Cooper and McNally had acted in dishonest breach of trust in transferring assets to SMA. It was Mr Crossley's submission that Dr Smith had been and was continuing to be thoroughly dishonest in his dealings.

   ii) After the Directed Trial, Mr Thomas began to adopt positions in his capacity as a trustee of the Harbour Trust which were opposed to the interests of the Harbour Trust, and favourable to those of persons linked with Dr Smith and Messrs Cooper and McNally. He received litigation funding from companies linked with those individuals.

   iii) In 2021, a company called Marlborough Developments Ltd (**MDL**) commenced proceedings in the Chancery Division against Mr Ruhan claiming some £800m. The statement of truth for MDL was signed by Mr Anthony Smith, Dr Smith's brother and another individual whose evidence on oath I have been unable to accept (*Milson and Standish v Gerald Martin Smith and the Estate of Phyllis Smith* [2023] EWHC 255 (Comm)). The basis on which Mr Anthony Smith could have personal knowledge of the matters asserted in the Particulars of Claim is not immediately apparent, although I was told that that was the reason why he has signed the statement of truth. However, it is not necessary to get into the issue of whether or not the statement of truth was appropriately made at this stage.

   iv) At the Directed Trial, Mr Crossley said "there are many strange bedfellows in this case. We all seem to be swapping alliances as we go". That was certainly true of Mr Crossley, who now acts for MDL. Mr Crossley has confirmed that Dr Smith is providing "consultancy services" in respect of the MDL litigation. Somewhat surprisingly, for very many reasons, Mr Ruhan consented to judgment in the full amount of MDL's claim. I have since granted a worldwide freezing order against MDL and Dr Smith, on the basis that there is a real risk that these proceedings and the resulting judgment are collusive in nature, reflecting co-ordinated activity

between those behind MDL (including Dr Smith) and Mr Ruhan to frustrate the judgment obtained by HPII.

v) It has become apparent that MDL is being partially funded by companies linked with Mr Anthony Smith, including a vehicle which funded Mr Thomas' pursuit of the Part 8 claim. MDL has a subsidiary known as Pro Vinci Recoveries Ltd, a name well-known to those who have had cause to follow Dr Smith's affairs.

vi) Mr Crossley also acts for MDL in relation to proposed proceedings against Mr Sodzawiczny, who obtained an arbitration award against Messrs Cooper and McNally and Dr Smith, on the basis of extensive findings as to their dishonesty. There are ongoing and hotly contested proceedings in which Mr Sodzawiczny seeks to enforce that award (although it is Mr Crossley's evidence on affidavit that Messrs Cooper and McNally are not involved with the MDL action).

vii) As I have stated, Mr Crossley is now Minardi's solicitor, on the basis that MDL has acquired ownership of Minardi as a consequence of the undefended judgment obtained by MDL against Mr Ruhan. He told me that Dr Smith was assisting with Minardi's application but that his instructions come from Mr Charles Bryce and Mr David Almond. Mr Bryce was receiving payments from funds under the control of Dr Smith and his ex-wife Dr Cochrane back in 2012 and 2014 (together with Mr Thomas and Mr Taylor). Mr Almond gave evidence for Dr Smith in Mr Sodzawiczny's arbitration against Messrs Cooper and McNally and Dr Smith. In the affidavit which I asked him to swear, Mr Crossley said he had "receive[d] significant input from Dr Smith, who is a retained consultant by MDL", such that "communications where I, as the retained solicitor, am involved are typically three or four-way conversations" with emails passing between him and his client "or their consultant Dr Smith".

viii) Mr Crossley had moved from arguing in 2021 that the effect of my judgment in the Directed Trial was that the assets should be transferred away from SMA and distributed, to arguing the exact opposite.

THE ADJOURNMENT APPLICATION

8. At the forefront of Minardi's application for an adjournment was that "it was unfortunate that Minardi was not served with either the Main Proceedings SMA Application nor made a party to the Part 20 SMA Claim when it was brought, where it should have been clear to all parties that Minardi has an interest in the outcome of those applications/claims".

9. In what might be thought a particularly bold submission, Minardi submitted that the Harcus Parker Parties had not "seen fit to notify Minardi or add Minardi to their application". It was later said:

> "As a matter of practicality, Minardi has only recently become aware of these applications and has newly instructed representatives. Minardi needs time in order to present its position properly".

10. Although Mr Peto KC and Ms Gerasimenko would not have known this, this was very far from the case. Mr Crossley has been acting for MDL since at least 19 May 2022 (when he sent Mr Ruhan a "letter before action" on MDL's behalf). By October 2022 (although probably much earlier), Mr Bryce, from whom Mr Crossley says he is taking instructions on behalf of MDL, was involved in the proposal to transfer Minardi from Mr Ruhan into MDL's control. The only commercial purpose of doing so would have been to try and make something of Minardi's rights under the LICSA, and the only basis on which those rights would have commercial value is in so far as Minardi's claims could form the basis of some form of claim to the assets held by SMA on bare trust. From October 2022, Minardi was supporting the claims of both Mr Thomas and BKV to be the lawful directors of SMA.

11. BKV has communicated via a Mr Miah, someone linked to Mr McNally and who, on his own account, has "worked closely" with Mr McNally for many years and who is also a director of Devonhirst, another company linked with Messrs Cooper and McNally. BKV is, according to Mr Miah, owned by Messrs Thomas, Taylor and Orb (although as is Orb is *en désastre*, the circumstances in which it purported to acquire shares in BKV are unclear). Each of Messrs Thomas, Taylor and Orb were parties to and bound by the outcome of the Directed Trial, and Messrs Cooper and McNally were notified of the Directed Trial and are bound by its outcome.

12. On 13 October 2022, St Paul's Solicitors wrote to Harbour Fund II LLP on behalf of MDL referring to the Part 8 application issued by Messrs Thomas and Taylor and saying that they supported it. From October 2022, Minardi sent letters asserting, in effect, an interest in the assets held as nominee by SMA given its claims under the LICSA. Those communications were sent by Minardi using a ProtonMail email address, a form of email long used by Dr Smith. I have no doubt that Dr Smith was closely involved in the formulating of Minardi's claims, together with or on behalf of those now behind MDL.

13. By 24 October 2022. St Paul's Solicitors had already been identified as Minardi's solicitors on certain documents. However, Richard Slade and Company were still on the record for Minardi on 9 November 2022, when they were served with a copy of the Harcus Parker Parties' application for an order for the appointment of the New Trustees and a transfer of SMA's legal title in the Shares to them. I have no doubt that this information was shared by Richard Slade and Company with those now behind Minardi. Richard Slade and Company sent a legal representative to the hearing of the Part 8 application on 14 and 15 November. The Harcus Parker Parties also provided notice of their application directly by email to Minardi on 10 November. In response on 11 November, Minardi adopted essentially the same argument as it now wishes to adjourn this hearing to advance.

14. I have no doubt that those behind Minardi (then and now) received a full report of events at the hearing of the Part 8 Claim on 14 and 15 November, and were aware of the Harcus Parker Parties' application for an order transferring the legal estate in the Shares from SMA, and that this application had been supported by counsel for Messrs Thomas and Taylor. Minardi was notified of the WFO I made on 14 November. Minardi referred to the other orders I had made at that hearing in an email to the Enforcement Receivers (**the ERs**) on 22 November. On the same day, Richard Slae and Company came off the record for Minardi, and Mr Ruhan was identified as the relevant point of contact.

15. On 24 November 2022, the Harcus Parker Parties issued an application in the Directed Trial proceedings to the same effect as the Part 20 claim issued in the Part 8 claim (something which they had said that they would do at the hearing on 14 and 15 November 2022).

16. It is clear that those behind Minardi read the judgment on the Part 8 Claim which I handed down on 30 November 2022 (an email sent in Minardi's name on 6 December 2022 confirmed that they had read the judgment). Draft orders circulated after the judgment included, in the version produced by the Harcus Parker Parties, an order requiring SMA to transfer legal title in the Shares to the New Trustees. I have no doubt that those behind Minardi were aware of the draft orders. On 7 December 2022, Minardi was given notice of a consequentials hearing fixed for 14 December. In response, on 12 December 2022, Minardi once again trailed the legal arguments which it now wishes to adjourn the hearing to advance. Minardi chose not to be formally represented at the consequentials hearing, although I have no doubt that those behind Minardi were kept fully up-to-speed as to what matters were raised, and how they were resolved. Minardi asked that a letter be placed before me, which it was. The effect of the letter was that Minardi did not have legal representation in England and Wales and would need time to deal with the points that the Harcus Parker Parties were raising. At the hearing, I gave directions for this hearing to determine the applications made by the Harcus Parker Parties in both the Part 20 Claim and the Directed Trial for the order requiring SMA to transfer legal title to the Shares to the New Trustees, and to deal with the jurisdiction challenge which BKV had issued in SMA's name. The next step, so far as correspondence in Minardi's name is concerned, was the letter of 8 February 2023 referred to at [2(ii)] above.

17. Against this background, it is clear that Minardi has been aware for months of the orders which the Harcus Parker Parties were seeking, aware of what its own position in relation to those orders would be, and aware that the court was being asked to make those orders, at the hearing on 14/15 November, at the consequentials hearing on 14 December, and then at this hearing. It has had ample time to be ready to advance those arguments (which it has outlined in correspondence, and advanced in proceedings brought against SMA, but as to the bona fides of which I make no findings, in the Republic of the Marshall Islands). The reality is that those behind Minardi, who have been in control of it from October 2022, have had ample opportunity to ready themselves for this hearing, but have failed to do so.

18. It would be possible to stop there. However, we are past the time in this litigation in which it is appropriate to pull punches. It is clear that co-ordinated activity has been undertaken as part of a rear-guard action by individuals who are dissatisfied with the outcome of the litigation in some or other respects, which at various stages has involved at least Dr Smith, associates of Mr McNally, and Mr Thomas. I am satisfied that this co-ordinated activity has extended to the steps taken or promoted by Mr Thomas in the run-up to the Part 8 claims (which entities connected with Dr Smith and Mr McNally funded), the recent claims by Minardi and the steps taken by BKV (whose activities were supported by Mr Thomas, and which is linked to a known associate of Mr McNally, Mr Miah). It is no coincidence that, having issued a jurisdictional challenge in SMA's name, and instructed English solicitors (Kastle Solicitors Ltd) and leading and junior counsel to represent SMA, BKV sought through their solicitors to adjourn this hearing on 3 February 2023 (to allow the issue of who had authority to represent SMA to be determined in the Marshall Islands proceedings)

and/or to vacate it on the basis that the time estimate was not enough. I ruled that such an application would have to be made at the hearing (on 3 February). It was only then, on 8 February, that Minardi appeared on the scene. About 30 minutes later, Kastle Solicitors Limited wrote saying that they were not instructed in relation to the Harcus Parker Parties' applications due to be heard on 10 February. The following day, BKV wrote to the court stating that it had been unable to secure representation, and asking the court to adjourn the hearing.

19. I have no doubt that the approach taken by those behind Minardi and those behind BKV (to extent that they are different), was co-ordinated, and represented a calculated attempt to delay the hearing and the orders which the Harcus Parker Parties seek. Those individuals should be in no doubt as to the importance which the court attaches to ensuring that its processes are not misused and its orders are complied with, and the full range of the court's powers to serve these ends.

20. Clearly these factors tell strongly against any adjournment. However, I accept that they are not the only factors. The fact remains that Minardi's counsel team were not in a position to deal fully with the many considerations in play, because those behind Minardi had chosen not to instruct them in time. Whatever else might be said about the conduct of those behind Minardi, one cannot question their wisdom in their choice of advocates, Mr Peto KC dealing with what was clearly a very challenging hearing, before an interventionist and troubled tribunal, with authority and grace. Were the relevant consideration the predicament of the advocate, rather than the conduct of the client, the case for an adjournment would be much stronger. As it is, I do not feel it would be appropriate to decide the issue on the basis of Minardi's conduct alone, without first considering at rather greater length how the issues which Minardi seeks to advance fit into the history of this litigation.

THE LITIGATION CONTEXT IN MORE DETAIL

The scope of the Directed Trial

21. On 22 June 2017, a CMC took place before Mr Justice Popplewell, at which Phoenix, Minardi and LCL were all represented. The order made:

    i) required the SFO and the ERs to issue an application to determine their contention that the Relevant Assets (including the Shares) were the realisable property of Dr Smith, to name LCL, SMA, Dr Cochrane and Mr Anthony Smith as respondents to that application, and to give notice of the application to other interested parties; and

    ii) provided that "any of the Interested Parties … that wish to be joined to the SFO Application to assert a proprietary claim to or interest in" the Relevant Assets, to challenge the contention that they were the realisable property of Dr Smith "or to contend that they have a claim or claims or that there are issues in a claim or claims which they have which can conveniently be disposed of together with the SFO Application" to give notice, and thereafter to serve a document providing particulars of their claim.

22. The SFO and ERs' application was issued on 26 June 2017.

23. Further directions were given on 13 December 2017 for the relevant parties to serve responsive documents. In giving directions, the Judge held that the SFO had established a good arguable case that the Relevant Assets constituted the realisable property of Dr Smith ([2017] EWHC 3335 (Comm)).

24. A substantial CMC was heard in April 2018 at which Phoenix, Minardi and LCL were once again represented. At this hearing, the court joined a number of interested parties to the litigation relating to the Relevant Assets, including Dr Smith and Phoenix and Minardi, and made provision for a notice to be published and served on various parties, including Mr Ruhan, Mr Cooper and Mr McNally, notifying them of the issues to be determined, their opportunity to participate and that they would be bound by the result.

25. The order required the parties to notify "any proprietary claim or claim under the Criminal Justice Act 1988 … in relation to the Relevant Property which they wish to asset *or any argument they wish to make in relation to any such proprietary or 1988 Act claim"* (emphasis added). It also provided:

> "Save to the extent that any such application is granted, the said parties and non-parties shall be debarred from (i) contending that they have a proprietary claim or claim under the 1988 Act in relation to the Relevant Property which takes priority over the claims included within the Paragraph 11 issues".

26. The Paragraph 11 issues included:

> "a the extent to which the Relevant Property …. constituted realisable property of Dr Gerard Smith …
>
> b the proprietary claims and/or claims made pursuant to the 1988 Act to the Relevant Property [pleaded by various parties including LCL]
>
> …
>
> d the Stewarts' application".

27. This last was a reference to a claim by Stewarts for a lien over the Relevant Assets, which Popplewell J included within the Directed Trial because what was asserted was "parasitic on the form of proprietary interest of those against whom the charge of lien is being alleged": [2018] EWHC 2862 (Comm). The Judge made clear that:

> "The primary objective of the directed issue … is to deal as swiftly and efficiently as possible with the entitlement to specific assets".

28. It is important to note the following aspects of the directions for the Directed Trial:

i) Those asserting an entitlement which it was alleged would have priority over any claim of the SFO under the 1988 Act were required to assert that claim (which was not limited to claims of a direct proprietary interest).

ii) The language of the order extended not simply to proprietary interests, but proprietary claims and *any arguments which a party wish to make in relation to a proprietary or 1988 Act claim."*

iii) Those challenging the priority of the proprietary claims of others over their claims, or asserting the priority of their own claims, were required to advance their arguments.

iv) Reflecting that framework, the issues in the Directed Trial included not just competing claims to the beneficial ownership of assets, but also arguments for various forms of allowance alleged to be subject to liens over the Relevant Assets which were said to have priority over the proprietary interests of others or the claim of the SFO.

The parties to the Directed Trial

SMA

29. In an email to the court of 9 February 2023, BKV asserted that "it is unclear whether SMA was ever properly made a party to the SFO case; even if it was, it is absolutely clear that it wasn't represented, and its position put to the court". Given that submission, it is necessary to set out the history of SMA's involvement in the Directed Trial.

30. Up to 6 May 2016, the shares in SMA were held by Dr Cochrane, Dr Smith's ex-wife but someone who has remained a close business and personal associate of Dr Smith, and who has featured in many of the arrangements which Dr Smith has orchestrated. On 6 May 2016, Dr Cochrane purported to transfer the shares in SMA to LCL. At the Directed Trial, I found this transaction to be void, having been effected at an undervalue and been entered into for the purpose of putting the assets beyond the reach of persons who might make claims to them. I also found that the shares in LCL were held on behalf of Dr Smith.

31. SMA was a party to this litigation from the outset. It was made subject to a restraint order made by Mr Justice Popplewell on 23 May 2016. The Judge made an order for alternative service on SMA by way of service of Stewarts Law, the solicitors then acting for SMA. This was done.

32. In November 2016, LCL was also made subject to the restraint order. LCL delivered the share certificates in SMA to the ERs' solicitors. On 7 December 2016, the ERs were appointed by Mr Justice Popplewell as receivers of the shares, securities and membership rights of SMA, and they collected in its books and records from the London office from which SMA's affairs were administered.

33. The SFO's statement of case was served by courier on SMA's usual place of business on 23 October 2017 (pursuant to CPR 6.20(1)(c)(i)). Harbour's statement of case was served on SMA's registered office in the Marshall Islands.

34. At this stage, SMA's sole director (as it has been from March 2014) was Nominee Service Holdings, whose director, at least from 2016, was Dr Gail Cochrane. LCL was the sole

shareholder of Nominee Service Holdings. I found that Dr Smith was the beneficial owner of Nominee Service Holdings.

35. In April 2018, the ERs changed the address of SMA to their address.

36. On 17 March 2021, the ERs appointed themselves directors of SMA.

37. However, on 6 May 2021, during the period after circulation of the draft judgment and before hand-down, LCL purported to appoint Mr Thomas and BKV as SMA's directors.

38. In summary therefore:

    i) SMA was party to the Directed Trial proceedings from the outset.

    ii) LCL, who claim to be the shareholders in SMA, Dr Cochrane, who I have found was the shareholder and Dr Smith, for whom I have found Dr Cochrane was holding the shares, were all parties to the Directed Trial proceedings throughout and able to take any steps they sought fit to advance SMA's interests as they saw them.

    iii) Mr Thomas, later appointed as a director of SMA (albeit the validity of that appointment is in dispute) was party to the Directed Trial proceedings throughout.

    iv) Mr Ruhan, Mr McNally and Mr Cooper, if they are the individuals now orchestrating the actions of the BKV faction in relation to Minardi, were all notified of the Directed Trial and of the final status of any rulings made at that trial. They chose not to participate (albeit Mr Ruhan did participate through his nominee, Mr Stevens).

39. So far as SMA is concerned, therefore, this is not a case of an entity's interests not having been advanced in litigation. It is a case of those who were active participants in the litigation, and well-placed to advance any points they wished to advance, choosing not to do so, but now seeking to relitigate the case through SMA.

Minardi

40. Minardi was represented by leading and junior counsel at the CMC before Popplewell J in December 2007 and at all hearings thereafter.

Minardi's stance in the litigation leading to and at the Directed Trial

41. On 29 November 2017, Minardi served a statement of case.

    i) Minardi asserted a proprietary right in the Shares on the basis that the LICSA effected an equitable assignment and that SMA undertook to give directions to the joint liquidators to facilitate the transfer of assets to Minardi under the LICSA.

    ii) It alleged that, if the Relevant Assets were Dr Smith's realisable property, nonetheless Minardi's rights under the LICSA had to be respected. This is a significant claim, reflecting the fact that, to the extent that any party wished to assert

that another party's proprietary interest was subject to its personal claim, it had to make that case at the Directed Trial.

iii) It asserted that Minardi had a significant interest in the issue of whether the Relevant Assets were the Realisable Property of Dr Smith, because "if it is not, then the proceeds from its realisation would in due course be available …. to satisfy their claims under … the LICSA". The implicit converse of that proposition is to be noted.

iv) In what has been a *leitmotif* of Minardi's submissions then and now, it also alleged that "the applicants should not be permitted to take any benefit conferred on Dr Smith (through SMA and Dr Cochrane) by the Geneva Settlement without honouring the obligations created by … the LICSA".

42. In its position paper served on 31 January 2018, Minardi alleged that if, contrary to its submissions, Harbour was entitled to *Berkeley Applegate* relief, its claim should be subordinated to Minardi's rights under the LICSA.

43. In its skeleton argument for the Directed Trial, served on 8 January 2021, Minardi alleged that clause 2.3 of the LICSA gave Minardi a right to 50% of distributions to creditors (save for certain named exceptions) and 50% of shareholder distributions, with Phoenix being entitled to the remaining 50% of shareholder distributions under clause 2.4. It was accepted that clause 2.3 of the LICSA "merely imposes a personal obligation on SMA to ensure that 50% of any distributions made to creditors of the Arena HoldCos under its control are paid to Minardi" (that word "merely" being important). However, it was contended that clauses 2.3, 2.4 and 2.6 of the LICSA effected an equitable assignment of shareholder distributions to Phoenix and Minardi, alternatively just to Phoenix. In relation to that second argument, it was said that "P&M's rights do not rest merely in contract but are proprietary in nature".

44. P&M also addressed the position where there was no equitable assignment, contending:

> "However, even if there was no equitable assignment, this would not impact upon P&M's rights to receive the distributions from SMA that they are entitled to pursuant to the LICSA unless (a) anyone else obtained a proprietary interest in the shares in the Arena Holdcos pursuant to the Isle of Man Settlement, and (b) that proprietary interest was unaffected by the terms of the Geneva Settlement. For the reasons explained in Part 4 below, neither of those conditions are satisfied. Accordingly, SMA (whose shares are held by the Enforcement Receivers to the order of the Court) is contractually bound, and can be compelled if necessary, to pay the distributions from the Arena Holdcos to P&M pursuant to the terms of the LICSA and any rights any of the Participating Parties obtained pursuant to the Geneva Settlement are subject to that contractual obligation."

45. As developed in the skeleton, that alternative submission involved various arguments:

i) For various reasons, Harbour did not acquire a proprietary interest in the Relevant Assets at the time of the IOM Settlement.

ii) The Harbour Trust did not extend to the amounts payable to Minardi under the LICSA.

iii) Harbour acquired any interest subject to the LICSA by virtue of clause 6.2 of the Harbour Funding Agreement.

46. Minardi also advanced its case that even if the Relevant Assets were Dr Smith's, the SFO was obliged to apply those assets to satisfy Minardi's claims under the LICSA, and that any *Berkeley Applegate* relief should be subordinated to its claim.

47. Relief sought, as identified in the conclusion of the skeleton, included:

i) a declaration that Minardi was entitled under the LICSA to 50% of all distributions from the Arena HoldCos to creditors controlled by SMA;

ii) an order directing the ERs to cause SMA to pay such distributions to Minardi; and

iii) similar relief in relation to distributions from the Arena HoldCos to shareholders.

48. The Settlement Parties' skeleton submitted that Minardi's rights under the LICSA were personal and/or that the Harbour Trust had priority over them, and that the SFO was not required to give effect to Minardi's personal claims. In oral opening, Mr Saoul QC submitted:

> "Then one more point that Phoenix and Minardi take is that they say that even if -- and this is a new point in their skeleton -- even if they say they are unable to establish their own equitable rights under the LICSA they say that the distributions that the LICSA says are payable to Phoenix on liquidation of the Arena companies cannot fall within the Harbour Trust. It is effectively a backdoor proprietary argument; it might not be ours but it is not yours either. That doesn't work, and I will develop this shortly when I come to Phoenix and Minardi's case, but simply put whose rights are they saying they were, is one question, but it doesn't work because the trust bites over the shares in the companies. You cannot exclude from that distributions or half of the distributions on liquidation. That is the whole point of a trust that bites over the shares, and you can't effectively try to place a personal claim to assets above a proprietary claim in that way, it would undermine the entire point of proprietary rights."

49. Mr Lord QC, then appearing for Minardi and also for Phoenix, responded:

> "My Lord, with the greatest respect to Mr Saoul, that is simply wrong. Rights to the distributions went to Phoenix. Whether or not they are equitable assignment or not there was a contractual obligation on the part of SMA to pay those distributions to Phoenix. The Orb claimants, through whom Harbour and Stewarts claim, gave up those rights and Harbour and Stewarts are bound by that agreement."

50. I interjected at this point querying the legal mechanism by which Minardi's argument was said to take effect:

> "I don't know whether and, you know, whether there is room for any *Tito v Waddell* principle of benefit and burden type argument. But if the deal that got the beneficial interest from the Ruhan side was obtained on the basis that he or someone to whom he owed a debt, depending on what your particular case theory is, would get the, you know, up to 75 million of the proceeds of the distributions, then the law of Plum and Duff comes into play. I think these are all matters to be explored on closing, but I think on both sides there may be more unpacking on this point that than we have had in opening."

51. Forewarned of these issues, and of the centrality of the question of how Phoenix and Minardi's personal claims could be asserted in priority to any equitable proprietary interest of the Harbour Trust, in its initial written closing submissions Minardi advanced the following arguments:

    i) The Harbour Trust only extended to the amounts left after payment of the amounts due to Phoenix and Minardi (**P&M**) under the LICSA and the Loan Note. That argument was advanced both as a matter of construction, and because SMA had entered into the LICSA as trustee with the beneficiaries' consent, albeit at this stage this last point was distinctly underdeveloped.

    ii) Phoenix had a proprietary interest in the future distribution of any surplus from the Arena HoldCos which had priority over any other interests.

    iii) The SFO was obliged to take steps to permit P&M to recover the amounts due to them under the LICSA and the Loan Note.

    iv) SMA had a personal obligation to ensure Minardi received 50% of distributions to controlled creditors (but Minardi had no rights to distributions to shareholders).

52. In an important paragraph, P&M submitted:

> "However, as P&M pointed out at para. 120 of their skeleton argument, it is important to keep the significance of this issue in perspective. Even if the Court holds that the LICSA did not effect an equitable assignment of all future distributions of surplus in the liquidations, SMA remains contractually bound to procure that such distributions are paid to Phoenix. It is now under the control of the Enforcement Receivers and they will doubtless ensure that SMA performs its contractual obligations as and when a distribution is made. *The question whether the LICSA effected an equitable assignment of the right to receive such distributions only becomes relevant if the Court were to find that other parties have proprietary claims to the distributions.* For the reasons set out below no party has any such claim following the Geneva Settlement, alternatively no claim which ranks ahead of P&M."

    (emphasis added).

53. This paragraph recognised that if other parties did have a proprietary interest in the distributions, the question of whether Phoenix itself had a proprietary interest would be a

significant issue. That is because, whatever else the ERs might do, they would not be in a position to use someone else's property to meet SMA's personal obligations.

54. In the Settlement Parties' written closing, they addressed what they described (correctly) as a "new and unpleaded point on the basis that if the LICSA did not effect an equitable assignment and gave rise only to a mere contractual right against SMA, this still somehow entitled them to prevail." They submitted that the argument (and a hypothetical example floated by the Court in relation to it) "risks blurring the boundaries between the equitable proprietary rights of the beneficiary of the trust (Harbour) with the personal rights acquired by the third party against the trustee." They submitted:

> "Nothing in the bilateral personal relationship between the third party to the trust, and the trustee prevents the beneficiary from collapsing the trust and calling in the trust property. Depending on the facts, the effect may be that the third party's rights against the trustee may be worthless because the trustee has no assets against which the third party can enforce his personal claim, but that is a risk the third party takes by failing to bargain for proprietary rights, and flows from the structure of rights and obligations that have been agreed."

55. They cited an article by Professor Lionel Smith which gives the following example:

> "Let us again assume that our trustee holds a fee simple estate in trust and, acting properly in pursuance of his duties, contracts for the installation of a new roof. The roofer is a trust creditor. What we see in the common law, however, is that this creditor, just like a personal creditor of the trustee, has no direct access to the trust assets. Let us assume everything goes well. Either the trustee pays the roofer out of the trust assets, perhaps writing a cheque on a bank account held in trust; or, the trustee pays out of his own assets, and then, as is his right, reimburses himself out of trust assets. This shows us that the trustee can direct trust assets towards the trust creditor. Now assume things do not go well: the roofer does not get paid. In the common law, he must sue the trustee. Moreover, he does not sue him 'as trustee'. Trustees are not understood to have a 'trust capacity'. He just sues him. If the roofer gets a judgment, it is not a judgment against the trustee 'as trustee'; it is just against the trustee. And, most revealingly, if the roofer comes to execute upon his judgment, he has no more right than would a personal creditor of the trustee to execute the judgment against the trust assets."

56. The Settlement Parties argued that:

> "This structural point also makes inappropriate any read over of principles concerning benefit and burden, or as the Court referred to it in its more informal guise, the law of plum and duff … The upshot is that if the Court finds that Harbour / the Orb Claimants acquire equitable proprietary rights arising at either the point in time of the IOM Settlement, or the point in time of the Geneva Settlement, and on the other hand Phoenix's rights against SMA are merely personal, then P&M's contention at paragraph 120 of their skeleton argument is wrong."

57. After the Settlement Parties had completed their opening submissions, P&M belatedly responded to that argument with a "supplementary note", which picked up on Professor Smith's example and pointed to the fact that he suggested that the trustee was entitled to an indemnity from the trust fund for the costs of paying the roofer. They also asserted that such a right of indemnity gave rise to a lien over the trust assets which had priority over the claims of the trust beneficiaries, to which the creditor was subrogated. It was said that *Phoenix's* claim against SMA under the LICSA was susceptible to such an analysis. No argument was advanced by reference to Minardi's rights under the LICSA.

58. In short, this was a very late surfacing of an argument which fell full-square within the scope of the Directed Trial – that the interests of the Harbour Trust were subordinate to SMA's right to a lien over trust assets to meet its liabilities under the LICSA, and to P&M's entitlement to be subrogated to those rights. This was an argument no different to those of parties claiming an entitlement to an allowance against the trust assets, which gave rise to a lien and had priority over the proprietary claims of other parties. In a rather bashful footnote, reference was also made to Phoenix (but, once again, not Minardi) being able to obtain an order for specific performance against SMA.

59. In the course of P&M's oral closing submissions (Day 21), I had the following exchange with Mr Lord QC:

> "Mr Lord Even if the LICSA doesn't effect an equitable assignment it doesn't matter. The shares are in the hands of the enforcement receivers **[I interpolate at that point to note Minardi's recognition that it was the ERs who were the owners and controllers of SMA]** and if necessary, they can be compelled to pay the distributions to Phoenix … SMA are parties to the LICSA. They have agreed to its terms. They have agreed to direct the joint liquidators to pay the surplus to Phoenix and they must honour the contractual promise.
>
> Foxton J What, even if someone else has a proprietary interest?
>
> Mr Lord Well, if your Lordship finds that somebody has a prior interest that means that doesn't have to be honoured, *then that would be a different position* **[emphasis added]** and we will come on to that. But, just as things stand, SMA is obliged, first of all, to direct the joint liquidators so that the payment goes direct to Phoenix. But, if and insofar as that didn't happen, then they must account, if there is any amount outstanding under the loan note, for that amount to Phoenix.
>
> Foxton J All you have against them is a personal right. You just get to sue them in debt or damages, don't you?
>
> Mr Lord Or for specific performance.
>
> Foxton J Specific performance of obligations to pay money is -- unless you are talking about, you know, some specific fund which, in effect, the

promisee has proprietary ownership, you don't get specific performance of promises.

Mr Lord But the injunction, or the specific performance we would be seeking, was a direction. It is not going to be necessary on the facts of this case, but a direction, a further direction to the joint liquidators to pay us.

Foxton J If you didn't get an equitable assignment under the LICSA, on what basis does the court grant discretionary relief that treats you as though you had?

Mr Lord Because that is what the parties bargained for.

Foxton J Parties who bargain -- well, they bargain but if someone made a promise to you that may have conflicted with obligations they owed as a trustee to someone else on this hypothesis, proprietary claims will generally trump personal claims. You would get to enforce whatever rights you have against SMA but, if they are holding assets on trust, you won't be able to reach those trust assets in your enforcement efforts. Why would the court grant you an injunction to improve your position on this hypothesis against an insolvent SMA?

Mr Lord There is no evidence, I don't think, my Lord, that SMA is insolvent.

Foxton J If they owe you this huge claim and all the assets they have are held on trust for someone else, they are, aren't they?

Mr Lord Yes, but that would be subject -- we are coming onto -- which we will come to, which is our (inaudible) note.

Foxton J The point about Professor Smith's roofer.

Mr Lord Yes

Foxton J The short answer is you are subrogated to the trustee's proprietary lien. But I am not sure that simply cutting straight to say, well, you can injunct the performance of these promises of itself is going to short circuit this.

Mr Lord, I think part of the confusion may be any assumption that SMA is insolvent. SMA is a company that is in existence, whose shares are held by the enforcement receivers. **[I would repeat my interpolation**]. Now, if it were to receive the distributions when it shouldn't have done and they should have come to you, then, ignoring for these purposes -- and we will come on to it -- anybody else's proprietary rights, in my submission we would be perfectly entitled to go to the court and to say, ‘that money is ours, please can we have it’. Because that is what was agreed. One only gets into the further complication of proprietary rights either if SMA was insolvent and then there were other creditors and whatever. But we are not in that territory -- *or if somebody else has a prior proprietary right*

[emphasis added[. In those circumstances, we are in the roofer example, and we will come to that, my Lord ….

Foxton J I am going to need more help on that argument we have just been through, I think, from all parties. It is my fault. It is not one I have absorbed and been able to think about at an earlier stage. At least at first blush, I am trying to work out how it fits into the general position as a matter of law. Perhaps we will come back to it. It is dealt with in your written closing, just give me the references Mr Lord.

Mr Lord My Lord, it is dealt with originally in paragraph 120 of our skeleton argument. I don't know if your Lordship has that. If your Lordship has that, we say:

'If there was no equitable assignment, this would not impact upon P&M's rights to receive the distributions from SMA that they are entitled *to, unless anyone else obtained a proprietary interest in the shares in the Arena holdcos pursuant to the Isle of Man settlement.*'

Then you are fairly and squarely into the roofer example.

B: 2 "That proprietary interest was unaffected by the 3 terms of the Geneva settlement." Which is the roofer example. **[emphasis added]**

Foxton That is everything else we are arguing about. Why shouldn't I be leaving you to pursue your – I have no idea what countervailing interests might pop up if you are seeking to enforce a personal claim by injunction against SMA, effectively requiring them to hand over the proceeds. I am afraid one paragraph tucked away in the many hundreds of pages of written submissions I have had in this case, I suspect that there is a rather large point lurking here, if we ever got to it.

Mr Lord Well, I will think about it further, my Lord. In my simple way of thinking of things, which may not be helpful, it was simply that the enforcement receivers are in control of SMA; they are holding the shares in SMA as enforcement receivers and as officers of the court and they will do the right thing.

Foxton J This will sound like a terrible cop out but how does that fall within the scope of the directed trial of determining a proprietary interest in assets?

Mr Lord You have a fair point there, my Lord.

Foxton J Right.

Mr Lord What is before your Lordship are the proprietary claims.

> Foxton J If there were personal claims before me, the resolution of which would be capable of impacting on other parties, that would have had to have been covered by the advertising process, for example. For all I know, there may be a load of other people who say, well, on certain case hypotheses I have a personal claim against SMA. Messrs Thomas and Taylor, in effect, I think, say they have one but they are entitled to bring it into account in the adjustment of the interests under the Harbour trust against Orb. So the idea that I should make an injunction or specific performance now to let you scoop the pool, without having heard from any of them and without that forming a part of the directed trial, doesn't seem –
>
> Mr Lord I am not making an application for an injunction. That may be the short answer to that point. *Of course, it is different if the shares in SMA are held on trust either at Isle of Man -- sorry, the shares in the Arena 21 holdcos are held on trust either at Isle of Man or following Geneva, because then we are in the roofer example*. **[emphasis added]**
>
> Foxton J Good. Well, I think we may have run that hare to earth. What you are entitled to say is that is one of the weapons we say we have in our armoury, even if it isn't a weapon that, perhaps, isn't for this trial but is for another day".

60. The exchanges with Mr Lord QC did not stop there, but the extensive passage set out above captures their flavour sufficiently. It is important to note that, throughout, P&M's "roofer" argument was advanced by reference to Phoenix's rights under the LICSA and not Minardi's.

61. In reply, Mr Saoul QC stated that, "faced with these obvious problems, what Phoenix have sought to do in this trial is to transform their personal rights into proprietary or quasi proprietary rights," identifying a number of ways in which they had gone about this. In relation to the roofer case, he submitted:

> "What we then have is the new case based on subrogating into the trustee's right of indemnity; the roofer, as it has become known in this case. It is time now for the roofer to go and darken someone else's doorstep, my Lord. It is raised for the first time in supplemental notes after written closings. We have now had a bit more time to think about it and I want to make some additional points. I want to make the point that we do take the pleading point, we do take the point that it is raised so late, and my Lord will see why. The arguments I advance are in my submission clearly meritorious. But if my Lord was to have any doubt about that the problem is that it is all taken at the last minute and there are actually Jersey law issues which we have investigated. So let me address them".

62. Mr Saoul QC then advanced a series of arguments as to why this point was not open or was without merit:

i) No personal claim by Phoenix against SMA had ever been intimated and there was no viable claim (Minardi was not mentioned because Minardi had not tried to formulate such a claim as a basis for reaching through to the assets held by SMA on trust).

ii) SMA did not enter into the LICSA *qua* trustee of the trust held on sub-trust for the beneficiaries of the Harbour Trust.

iii) Harbour did not consent to SMA entering into the LICSA and SMA had no authority, qua the Harbour Trust, to do so, so this was not a properly incurred liability.

iv) SMA would not be entitled to an indemnity anyway if and to the extent that it was in breach of trust, which it was by reason of the substantial diversion of assets held by it on trust at the behest of Dr Smith and Dr Cochrane.

v) Subrogation should be refused as a matter of discretion.

63. It will be clear quite how extensively the issue of how far P&M could set up personal claims against Harbour's proprietary interest, if it established one, was canvassed. As these passages make clear:

i) The issue of whether, if P&M had purely personal rights under the LICSA, there was nonetheless an entitlement to P&M's part to look to the assets held by SMA on bare trust to meet those liabilities, which had priority over the claims of the Harbour Trust, was absolutely in play at the Directed Trial.

ii) It was accepted that the answer to this question could differ depending on whether or not someone else had a proprietary interest in the assets held by SMA or not.

iii) To the extent that they did not (which P&M submitted was the case because they submitted that the Harbour Trust only extended to any net proceeds after the liabilities of SMA under the LICSA had been satisfied), and there was a conflict of personal claims, it was accepted that this was not a matter for this trial. That included claims for specific performance of SMA's obligations (on the hypothesis that the assets it held the legal title to were not assets of the Harbour Trust, but SMA's assets).

iv) However, if I upheld the proprietary claim of the Harbour Trust, P&M's answer (and its only answer) was the combination of the trustee's right to indemnity, a lien and subrogation (the "roofer" example).

The Judgment

64. In the Directed Trial judgment, [326] I noted that:

> "In the event that the LICSA does not affect an equitable assignment, P&M have advanced various arguments as to why it is said that they can nevertheless recover the

> distributions referred to in clauses 2.3 and 2.4 of the LICSA. One of these contentions – that the Court could and should make orders for specific performance of Dr Cochrane's and SMA's obligations under the LICSA – was not pursued in oral closing submissions as a ground for asserting a proprietary interest in Relevant Property (without prejudice to such personal claims as might arise, which did not form part of the Directed Trial). However, two arguments were".

65. The clear effect of that paragraph, reflecting the manner in which P&M had conducted its case, was that if, as I had held, the Harbour Trust had an equitable proprietary interest in the assets held by SMA as nominee, P&M had abandoned any argument that a claim for specific performance provides a basis for reaching through to that interest and asserting, in effect, priority over it. It cannot have been understood as permitting P&M to advance only one part of its case as to how their personal claims under the LICSA could trump the Harbour Trust's equitable proprietary interest, while saving another, as originally put forward in the Directed Trial, for a rainy day. For this purpose, there was no difference between the specific performance argument and the roofer argument.

66. At [329], I acknowledged the force of the commercial point which lay at the heart of P&M's submissions then, and lies at the heart of Minardi's submissions now:

> "At paragraph 8 of their closing, P&M submitted that the Settlement Parties should not be able to 'take the benefit of the release of Mr Ruhan's claims free of the burden of the Loan Note and the LICSA'. I understand the commercial appeal of that argument, to which I have given careful consideration. However, for it to succeed, a legal principle must be identified which can give it effect, otherwise the argument ignores what in commercial as well as legal terms is the very real distinction between the position if P&M had obtained proprietary rights in assets held by Dr Cochrane or SMA in the settlement negotiations, and position if P&M obtained only personal rights. The former, so far as they had priority, would reduce the extent of the assets recovered by the Orb Claimants, and hence subject to the Harbour Trust. The latter would not. While in land law, there are contexts in which a principle of no benefit without burden' may subject those who acquire an interest in property to the obligation to perform a negative personal covenant associated with it, I was not referred to any legal principle which would make the rights of Harbour and the Orb Claimants in the Harbour Trust conditional upon the discharge of any positive personal covenants assumed by Dr Cochrane and/or SMA."

67. I first dealt with P&M's argument that the Harbour Trust did not extend the amounts payable under the LICSA and rejected it. The existence, and determination, of that argument is important, because one of the arguments which Minardi now seeks to advance before me is that the Harbour Trust does not extend to the property and amounts payable under the LICSA.

68. I then noted that:

> "In a supplement to their written closing, P&M sought to bridge the divide between personal and proprietary claims through a further argument, contending that whilst they had only personal claims against Dr Cochrane (or SMA), they were subrogated

> to a proprietary right which Dr Cochrane or SMA had over the recovered assets in respect of their entitlement to an indemnity from trust assets against any personal liability. I now consider that argument, and whether it was fairly open to P&M at the time it was raised."

69. I then addressed that argument at length:

i) I noted it had not been raised until a very late stage.

ii) I noted that there had been little argument before me as to whether P&M had personal claims against SMA, of what kind and in what amount. That was not because, as Minardi now asserts, the time for articulating such claims had yet to arise. If, as Phoenix has sought to do in closing, it was alleged that such claims were capable of having proprietary effects on or priority over Harbour's equitable proprietary interest, then the Directed Trial was the time when they had to be formulated.

iii) I reviewed the LICSA and was not persuaded that there was any breach of an obligation by Phoenix capable of giving rise to a claim in damages, on the facts as I had found them (in that SMA giving a direction to liquidators would not change the legal duties of those liquidators, or permit them to override Harbour's equitable proprietary interest). I concluded that "P&M have failed to persuade me that they have a claim against SMA under the LICSA capable of supporting the first stage in their indemnity/subrogation argument."

iv) I accepted that SMA had assumed such obligations as it owed under the LICSA as bare trustee, and held that I was "satisfied that Harbour was content to allow the 2012 Proceedings to be settled on the basis which had been discussed in Geneva, with whatever consequences that might have, albeit there was no evidence that it had specifically been asked to or had signed off on the relevant terms."

v) I noted that because of "the late stage at which the indemnity argument was raised … the key questions of whether SMA was itself in breach of the Harbour Trust, and if so, what the amount of its liability was, were not addressed." However, I noted that it was clear that SMA was party to the transfer of assets out of the trust assets, which formed part of the extensive "looting" of the Transferred Companies at the behest of Dr Smith in the period between the IOM Settlement and the Geneva Settlement. I found that those were matters on which the beneficiaries of the Harbour Trust "were entitled to rely upon as reasons why no indemnity should be available to SMA, or at least to limit the amount of such an indemnity."

vi) I noted that the late stage at which the argument had been run did not allow me to quantify the amount of the looting. I would add at this stage that, given the extensive volume of documentation placed before me at the Directed Trial, it would have been possible to resolve that issue within the Directed Trial if raised in time, and my strong view on the basis of the material I did see is that the degree of looting may well have exceeded the amount of SMA's liability under the LICSA. Indeed Phoenix, in its skeleton argument for the Court of Appeal, asserted that "upon taking

> control of the Arena structure [sc. through SMA] Dr Smith and Dr Cochrane embarked upon a campaign to strip the companies of their assets, causing circa £83.5 million to be misappropriated".

vii) For these reasons, I was unable to conclude on the evidence before me that SMA would be entitled to an indemnity against the Arena HoldCos to which P&M might be subrogated, even if they were able to establish a personal claim against SMA.

70. The result was the argument failed. It is important to note how central the issue considered in the Directed Trial Judgment was. It was common ground then, as now, that SMA had no assets other than the Relevant Assets from which to discharge its obligations under the LICSA (whatever they might be). If the court found that those assets were owned beneficially by the Harbour Trust, then anyone with a purely personal claim against SMA faced the difficulty of identifying how those claims could have priority over the Harbour Trust. Mr Peto KC made much of the fact that Minardi's claims had only arisen *after* the Directed Trial Judgment. However, even if that is the case, it was the inevitable consequence of the Directed Trial Judgment that SMA would not be in a position to perform the obligations it had assumed. There has been no new event which would not have been expected during the Directed Trial, and which somehow justifies re-setting the litigation clock.

The Order

71. To give effect to the Directed Trial Judgment, I made a number of orders including the following declaration (emphasis added):

> "The interests in the following assets are held by their legal owners on the terms of the Harbour Trust *and are to be applied and apportioned between the beneficiaries, namely Harbour, Orb arl, and Messrs Thomas and Taylor, in accordance with those term*s (save as set out below):
>
> a. The shares in the Arena Companies (as set out in Schedule 2 to this order);
>
> b. Such future distributions as may be paid or payable to the shareholders of the Arena Companies."

72. I also declared:

> "Save insofar as set out above or below, the claims pursued by the parties at the Directed Trial are dismissed and none of the said parties hold any equitable or proprietary interests in any of the Relevant Property or the IUAs."

73. There was no provision making the distribution of the assets subject to claims of Phoenix or Minardi, because the only claims advanced in support of such a contention had failed.

The Appeal

74. Phoenix sought permission to appeal my rejection of its argument that the Harbour Trust did not extend to the amounts payable by SMA to Phoenix under the LICSA and that its personal claims could "reach through" to the assets held on the terms of the Harbour Trust.

75. Phoenix identified the arguments on which it was seeking permission to appeal as follows:

> "In the alternative, Phoenix argued that, even if the LICSA, on its true construction, did not effect an equitable assignment of SMA's right to receive the surplus, and it therefore did not have any proprietary interest in it, the fact remained that SMA had agreed (with the authority of the Orb Claimants, Harbour and Stewarts) as part of the Geneva Settlement that the surplus would be paid to Phoenix (up to the value of the Loan Note). The surplus therefore did not form part of the Harbour Trust and there was no reason why SMA should not honour its contractual obligation under the LICSA to take all necessary steps to ensure that the surplus was paid to Phoenix (and could, if necessary, be compelled to do so).
>
> In the further alternative, Phoenix argued that it was entitled to be subrogated to SMA's right as trustee to be indemnified out of the trust assets, and the equitable lien associated with it, in respect of its liability under the LICSA."

76. The arguments raised included:

i) That "even if the surplus does, as a matter of construction, fall within the Harbour Trust, there would still be nothing to prevent SMA from complying with its contractual obligations under the LICSA to take all necessary steps to ensure that the surplus is paid to Phoenix, and to direct the Joint Liquidators accordingly." It did not take the position that no appeal was necessary on this issue, because the time to advance claims of that kind had yet to arise, or somehow, they would still be open at a further trial.

ii) That "even if Phoenix [sc. the Harbour Trust] did not acquire a proprietary interest in the surplus as a result of the Geneva Settlement, the fact remains that SMA is contractually bound to do everything in its power to ensure that Phoenix is paid its entitlement under clause 2.4, and the beneficiaries of the Harbour Trust can have no valid complaint about it doing so (having authorised the settlement). That contractual obligation is a sufficient basis for Phoenix's claim. There is no need to have recourse to any other legal principle."

iii) That "at para. 333 of the Judgment, and again in his reasons for refusing permission to appeal on this ground, the learned Judge observed that the subrogation argument was first raised by Phoenix in closing submissions at the Directed Trial. That is correct, and Phoenix acknowledges that this was regrettable. However, the learned Judge allowed Phoenix to run this argument at trial, despite opposition from the Settlement Parties (as recorded in para. 335), and dealt with it substantively". I interpolate that Phoenix's argument was not that the argument had been raised too soon, but too late.

iv) That I erred in concluding that Phoenix did not have a claim against SMA under the LICSA in respect of which SMA was entitled to be indemnified out of the trust fund, and "that, if the learned Judge was right, there remains the possibility that such a claim could arise in the future" (implicitly recognising that the issue of entitlement in principle fell to be determined at the Directed Trial, even in respect of breaches of the LICSA obligations in the future).

v) That the lack of evidence as to the value of looted assets did not matter, because those losses were sustained before the constitution of the Harbour Trust (i.e., a legal argument).

77. Permission to appeal on both grounds was refused:

> "Ground 2 arises on the basis that the LICSA did not effect an equitable assignment in favour of the applicant. On that basis, any surplus formed part of the Harbour Trust and the applicant has no proprietary right thereto. This is not inconsistent with what the judge said at [178] where the judge was dealing with the equitable rights of others. Once the trust was fully constituted by the Geneva Settlement, there were no equitable rights of others which prevented the right to any surplus from forming part of the trust.
>
> Ground 3 was raised for the first time in the appellant's closing submissions in the court below. This was far too late, notwithstanding that the judge dealt with it as best he could on the material available."

78. The basis for refusing permission to appeal on ground 2 is important. It reflected my rejection of P&M's argument that their entitlements under the LICSA fell outside the scope of the Harbour Trust, such that SMA could satisfy them without infringing upon the equitable proprietary interest of the Harbour Trust.

79. In its appeal on the equitable assignment issue, Phoenix argued that only acceptance of its equitable assignment argument would give effect to what it contended was the commercial purpose of the Geneva Settlement.

80. As permission to appeal was refused, it was not necessary for the Settlement Parties to raise any of their other objections to this argument by way of a respondent's notice. However, Minardi now seeks to "bank" those findings which were favourable, for the purposes of its argument, even though the Settlement Parties have not had any opportunity to challenge them on appeal.

MINARDI'S ARGUMENTS

81. At this point it is necessary briefly to outline the arguments which Minardi seeks an adjournment to advance at some future hearing. It contends:

i) It is entitled to an order for specific performance of SMA's obligations under the LICSA to make payments and effect transfers to Minardi.

ii) Granting such an order would not infringe the findings made at the Directed Trial because the Harbour Trust does not extend to Minardi's entitlements under the LICSA, albeit it is at the same time contended that, in order for SMA to be in a position to perform its obligations under the LICSA, the assets which I have determined were held by it on the terms of the Harbour Trust need to be applied to Minardi's benefit.

iii) That Minardi has a claim for damages against SMA for which SMA is entitled to an indemnity from trust assets.

THE ADJOURNMENT APPLICATION RE-VISITED

82. I now turn to the question of whether there should be a yet further hearing in this case, two years on from the Directed Trial, to determine whether or not Minardi should be permitted to advance the claims it now seeks to advance. Mr Peto KC suggested that the importance of the issue to Minardi, and the limited delay and time necessary to resolve it (his estimate reducing from two days to a day and a half) made a short adjournment the only fair course. But before acceding to this siren call, however attractively presented, it is essential I keep the following matters in mind:

i) the number of years for which this case has been ongoing;

ii) the extensive steps Popplewell J and I took to ensure that the Directed Trial represented a final determination of the existence, extent and encumbered or unencumbered nature of the proprietary interests in the Relevant Assets (e.g., by identifying whether Relevant Assets were subject to liens);

iii) the level of costs which have been and continue to be incurred in the litigation, fast eroding the value of any surviving assets, with many costs orders not being discharged by the parties against whom they are made;

iv) the scale of the attempts to frustrate the court's determination;

v) the extent to which huge amounts of court time continue to be consumed in this litigation and the attempt to open new fronts; and

vi) the close association with Minardi of Dr Smith.

83. It is immediately apparent, without scope for serious argument, that Minardi's claims represent the clearest and most obvious attempt to relitigate the issues raised at the Directed Trial, and the clearest abuse of process for that reason.

84. The specific performance case seeks to resurrect the allegation of specific performance of obligations which:

i) paragraph 120 of P&M's opening, in a passage not quoted by Minardi, accepted was conditional upon Harbour not establishing an equitable proprietary interest in the assets held by P&M; and

ii) was only maintained in P&M's closing (a) in relation *to Phoenix* and (b) which was raised only in a footnote in P&M's supplemental note in closing, and which Mr Lord QC accepted (rightly, if it matters) once again in oral closings could only assist if the Harbour Trust failed to establish an equitable proprietary interest in the assets for which SMA held the legal title.

85. However, the Harbour Trust *did* establish an equitable proprietary interest in those assets. If it was suggested that a claim for specific performance could be asserted which would have priority over that interest, that had to be asserted at the Directed Trial or not at all.

86. So far as the damages claim is concerned, all that is said is that Minardi's claims were not explored at the Directed Trial. This was because Minardi did not seek to raise them in support of the indemnity argument. If the P&M legal team had wished to advance the same argument on behalf of Minardi as it did on behalf of Phoenix, the court would have dealt with it. The suggestion that the argument was not advanced because Minardi understood the ERs would "do the right thing":

i) is legally incoherent: it is not "the right thing" to hand over property subject to the Harbour Trust to satisfy SMA's obligations, unless a sound legal basis for doing so is identified;

ii) impossible to reconcile with the fact that Phoenix (which was in the same beneficial ownership and had the same legal team) did advance these arguments;

iii) is impossible to reconcile with the fact that the ERs were arguing that there was no right to an indemnity; and

iv) was expressly challenged by the Settlement Parties in closing.

87. Minardi's new legal team submit that the argument that:

> "Minardi and/or SMA could and should have argued the indemnity point at the Directed Trial … is absurd:
>
> i) A necessary ingredient of establishing a trustee indemnity is establishing that there is a personal claim against the trustee. It was made clear to P&M that the Directed Trial was not the forum for arguing and establishing personal claims. It is therefore difficult to see how it could have pursued this argument fully at the Directed Trial therefore (rather than simply giving notice of it).
>
> ii) SMA was the only party which could (and should) have made arguments about a trustee indemnity arising as a result of potential future liabilities. However, this was made impossible by the fact that it was represented first by Stewarts and then controlled by the ERs. Both had a clear conflict of interest, it was not in their interests to argue that if SMA was a trustee of the shares in the Arena HoldCos, it should be entitled to a trustee indemnity in respect of any future claims against it under LICSA."

88. As to this:

i) To the extent that Minardi wanted to contend that it was entitled to assert rights in priority to the equitable interest of the Harbour Trust, and a personal claim was an element in that analysis, it was indeed required to assert it at the Directed Trial. Numerous contractual rights said to have proprietary consequences were raised at the Directed Trial, including promises in the Harbour IA. One of the reasons given for rejecting Phoenix's indemnity claim was its failure properly to establish the personal claim which was its starting point. Phoenix recognised the final effect of its failure to do so by seeking permission to appeal against the Directed Trial judgment, but permission was refused.

ii) I have noted that the party who claims to be SMA's sole shareholder, and to have been its sole shareholder throughout the Directed Trial (LCL), was party to the Directed Trial, as was Dr Cochrane, the director of its corporate director, and Dr Smith, the beneficial owner of SMA. Further, Phoenix was able to and did raise the indemnity argument at the Directed Trial without needing SMA to do so for it, and Minardi is seeking to raise the argument itself without relying on SMA to do so.

89. It is also helpful to consider the relief which Minardi seeks. While Minardi submits that its "primary position is that the relief it seeks by its claim for specific performance would not do any violence to the Judgment or Consequentials Order" (and the word "primary" is never without significance in this case), the relief sought by Minardi in its application notice is as follows:

> "That the Court declare and/or clarify that the assets identified at paragraphs 4a. and b. and Schedule 2 of the Order of Mr Justice Foxton dated 11 June 2021 (the "Consequentials Order") do not and were not intended to include any assets or distributions due to Minardi under the terms of the Liquidation Inter-Creditor Settlement Agreement dated April 2016 (respectively the "Minardi Assets" and "LICSA") and were not intended to include directions regarding the Minardi Assets;
>
> Further or in alternatively, that the Court declare that the rights obtained by the Harbour Trust beneficiaries, namely Harbour, Orb arl, and Messrs Thomas and Taylor, in the assets identified at paragraphs 4a. and b. of the Order of Mr Justice Foxton dated 11 June 2021 (the "Consequentials Order") are subject to SMA's contractual obligations to Minardi under the LICSA.
>
> Further or alternatively, that the Court declare SMA is entitled to a trustee indemnity from the shares of the Relevant Companies in respect of any claims made against SMA pursuant to LICSA, including but not limited to Minardi's civil claim against SMA in the Marshall Islands (case no. 2022- 02128 HCT/Civ/Maj)."

90. The extent to which Minardi is simply seeking to-argue the matters raised at the Directed Trial Judgment could not be clearer.

91. For these reasons, I am satisfied that Minardi should not be granted an adjournment, for the purpose of advancing arguments which would be an abuse of the process of the court.

THE MERITS

92. My conclusion that it would be an abuse of process for Minardi to raise these arguments now is sufficient to dispose of them. However, I am in any event satisfied that the claim for specific performance against SMA is hopeless on the merits:

    i) SMA was never the beneficial owner of the shares in the Arena HoldCos but held them on the terms of the Harbour Trust.

    ii) Equity would not order SMA to perform obligations which would place SMA in breach of its obligations as trustee nor to make payments to persons other than the creditors to whom they are in fact due, notwithstanding the obvious duties of the Joint Liquidators (**JLs**) as officers of the court to ensure that the debts of creditors were paid.

    iii) SMA does not hold even legal title to the Reserved Assets (which are identified in the LICSA) which are owned by other subsidiaries or companies. Those companies are themselves under the control of the JLs as officers of the court, with clear obligations as to how to deal with those assets which would not extend to using them to fulfil SMA's promises, and one of them, Atlantic Investments, is not part of the Arena structure at all.

93. The inherent difficulties with Minardi's argument (which are no doubt the reasons why it was not pursued at the Directed Trial) emerged with some clarity in Phoenix's argument in the Court of Appeal:

    i) Snowden LJ pointed out that "the distribution of cash from the Arena HoldCos is the statutory responsibility of the liquidators in fact", to which Phoenix's counsel replied "well indeed my Lord. That is right, of course", going onto state "I accept entirely that there would have been a limit to what SMA, as the sole member of the company, would have been able to do, or would have been within its power given that the liquidations are under the control of the liquidator".

    ii) Snowden LJ noted that clause 2.4 contemplated that "an asset of one Arena Holdco is going to be transferred not to a creditor of that company but to a creditor of a different company" (viz SMA) "which is unconventional, shall we say, for a liquidator to do."

    iii) Snowden LJ observed that if a liquidator had been directed to pay 50% of amounts due to certain other creditors to Minardi, the response would have been "there is no way on earth I am going to do that", to which Phoenix's counsel responded "it is difficult to see how the liquidators could have complied with that … It is difficult to see how the liquidators could lawfully comply with that". Snowden LJ agreed: "How could they have possibly thought that would be a direction that could be complied with".

94. Those difficulties themselves raise real and unanswered questions as to what was in the mind of the parties to the LICSA when it was signed – whether it was anticipated that Dr

Smith and Dr Cochrane would procure compliance by SMA with its terms, regardless of the equitable proprietary interests of other parties (just as they had acted in contravention of such interests in the period between the IOM and Geneva Settlements), or whether it was thought that SMA could procure the liquidators to act in a particular way, whatever their legal duties might. It was uncertainties of that kind which underlay my observation in the Directed Trial Judgment, [246]:

> "I do not believe it would be appropriate for me to approach the LICSA with any form of pre-disposition as to the strength of one or other party's negotiation position, as to the type of deal towards which the parties were aiming or as to what would constitute a 'fair' outcome to a dispute which was so singular both in its content and in the means by which it was pursued."

95. That leaves only Minardi's claim for damages, which is dependent on breach, indemnity and subrogation arguments which were raised by Phoenix, but late, at the Directed Trial, and which failed, and were not raised by Minardi at all.

SMA's APPLICATION

96. As I have stated, the Harcus Parker Parties have applied against SMA for an order requiring it to transfer the Relevant Property to the New Trustees (**the Transfer Order**). That application has been made both in the Directed Trial (to which SMA is a party for the reasons set out at [29]-[39] above) and in the Part 20 Claim brought in the Part 8 Claim.

97. BKV, purporting to act for SMA, has applied to set aside the order for service of the Part 20 Claim out of the jurisdiction on the basis that these issues should be resolved in proceedings commenced against SMA in the Marshall Islands. I will assume, without deciding, that BKV is indeed authorised to give instructions on SMA's behalf, and I will treat BKV's application as involving an application for a stay of the Harcus Parker Parties' application for the Transfer Order in the Directed Trial as well as an application to set aside the order for service out.

98. Taking BKV's application for an adjournment first, I am satisfied that there is no reason BKV could not have presented its case at this hearing had it wished to. The hearing date was agreed to by BKV on 20 December. I am satisfied that BKV's failure to engage in the hearing is simply another move in the games which those behind Minardi and SMA are intent on playing: see [10]-[19] above. Accordingly, its application for an adjournment is refused.

99. I am satisfied that BKV's application to set aside service out, and its deemed application for a stay, are hopeless and should be dismissed:

    i) SMA is clearly a necessary or proper party to the Part 8 Claim, in which relief is sought in relation to assets in which they held legal title with the result that the application falls with the gateway in PD6B paragraph 3.1(4). The claim also falls within the gateway in PD6B paragraph 3.1(12), as the Harbour Trust is governed by the law of England and Wales.

ii) The application for an order that SMA transfer the legal title is not only highly arguable but unanswerable, as Mr Crossley recognised back in July 2021.

iii) The centre of gravity of the dispute is England and Wales, there have already been extensive proceedings here, and SMA's own place of business was here. There is clearly a proper case for service out and for the same reason it would not be appropriate to stay the application in the Directed Trial proceedings:

a) The Directed Trial proceedings have been underway in England and Wales since 2018, and the Part 8 Proceedings since early 2022.

b) The Settlement Parties have sought the Transfer Order as part of the Directed Trial. The only reason it was not made immediately after the trial was to allow for possible appeals, but the only appeal for which permission was given has failed.

c) The Harbour Trust is governed by English law, as was the IOM Master Settlement Deed, the IOM Security Deed, the IOM Confidential Deed and the LICSA.

d) SMA's involvement arose from English court proceedings, and its place of business was England.

e) The proceedings in the Marshall Islands all post-date the Directed Trial proceedings and are subject to outstanding jurisdictional challenges.

f) In any event, I am satisfied that the Marshall Islands proceedings have been instigated by parties bound by the Directed Trial judgment in an effort to mount a collateral attack on that judgment.

100. I am also satisfied that the Harcus Parker Parties are entitled to summary judgment in respect of the relief they seek against SMA. On the basis of the decisions taken at the Directed Trial and in the Part 8 Claim, SMA can have no defence to the application that it deliver the Shares which it has only ever held as a bare trustee to the New Trustees appointed by the court:

i) The only matters raised by Mr Miah for BKV effectively seek to assert possible claims by Minardi, or Messrs Cooper and McNally, against SMA which could be discharged from the Shares or their proceeds. However, in circumstances in which I have held that any such claims had to be advanced at the Directed Trial, this can provide no answer to an order requiring SMA to hand over assets in which it has no beneficial interest. That is true for SMA (which was a party to the Directed Trial, as were those who claim to be its beneficial owners) as it is for Minardi, Mr Cooper and Mr McNally.

ii) The court has already ordered that the assets held by SMA as bare trustee are to be applied and apportioned in accordance with the terms of the Harbour Trust, subject to the specific adjustments in the Consequentials Order.

iii) I am satisfied that SMA seeks to resist the transfer at the behest of those bound by the Directed Trial Judgment, simply to facilitate a collateral attack on its outcome. SMA's attempt to resist the Transfer Order is itself an abuse of process.

iv) So far as Messrs Cooper and McNally are concerned, no arguable claim against SMA arising under an obligation assumed by SMA *qua trustee* of the Harbour Trust assets has been identified.

101. It follows that the injunction I granted on an interim basis on 7 February 2023 should be made final.

102. Finally, I am satisfied that BKV should be joined to the proceedings for costs purposes, and permission granted to serve an application for costs under s.51 of the Senior Courts Act 1981 on BKV. There is an arguable basis for a third-party costs order against BKV, which can only be tried in this jurisdiction. I am willing to make an order for alternative service of that application by email. There is clearly an urgent requirement for the court to address BKV's activities in relation to this litigation, and to do so in the context of closely related issues which are before the court on 7 March.

CONCLUSION

103. As will be apparent from the foregoing, there is a real risk in this case that individuals who are bound by, but unhappy with, the outcome of the Directed Trial have been and are continuing to instigate proceedings and applications in these proceedings and elsewhere to challenge the outcome of the Directed Trial or by way of a collateral attack on its conclusions. The scale of these activities and the legal costs and court time they are consuming, mean that considerable vigilance will be required on the court's part to ensure that its judgments are respected and its processes are not abused.

104. If activities of this kind continue, there will need to be careful consideration of a number of matters, including:

i) whether there are any individuals who may have breached court orders and undertakings and, if so, whether the court's committal jurisdiction should be engaged;

ii) whether officers of the court should be given control of any companies which have changed hands in questionable circumstances, and which are being used in this process;

iii) whether further injunctions could or should be granted against individuals where there is a sufficiently arguable case that they are engaged in activities intended to challenge a judgment which is binding upon them;

iv) the consequences of undischarged costs orders in the litigation to date; and

v) who has been funding these various applications and whether any orders against the funding parties or those controlling them would be appropriate.