Neutral Citation Number: [2022] EWHC 1695 (Comm)

Case No: CL-2018-000226

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2022

Before :

MR JUSTICE FOXTON

- -

Between :

(1) HOTEL PORTFOLIO II UK LIMITED (in Liquidation) **(2) ELIZABETH ALEXANDRA AIRD-BROWN (as Liquidator of Hotel Portfolio II UK Limited (in Liquidation))**	**Claimants**
- and -	
(1) ANDREW JOSEPH RUHAN **(2) ANTHONY EDWARD STEVENS**	**Defendants**
- and -	
(1) PHOENIX GROUP FOUNDATION **(2) MINARDI INVESTMENTS LIMITED** **(3) TANIA JANE RICHARDSON**	**Interested Parties**

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James Pickering QC and **Samuel Hodge** (instructed by **Spring Law Limited**) for the **Claimants**
The First Defendant in person
Sebastian Kokelaar and **Stephen Ryan** (instructed by **Richard Slade & Company**) for the **Second Defendant**
Joshua Viney (instructed by **Clintons**) for Ms Richardson

Hearing dates: 21 and 22 June 2022
Draft Judgment to the parties: 27 June 2022

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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.

.....
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 Monday 04 July 2022 at 10:00am.

Mr Justice Foxton:

A INTRODUCTION

1. This judgment addresses consequential issues arising from my judgment handed down on 23 February 2022 ([2022] EWHC 383 (Comm): "**the Judgment**"). The unfortunate delay since the Judgment was caused by the difficulties of finding a slot of sufficient length for which the parties were available and when I was sitting in the Commercial Court. That extended period has allowed the parties to seek to narrow the issues. A number of the points previously in issue have now been resolved, but a significant number of issues remain outstanding. The topics which I now have to determine are:

    i) What declarations, if any, should be made to give effect to the Judgment?

    ii) HPII's application to join Grenda Investments Ltd ("Grenda") to the Judgment (for the purpose of binding Grenda to the findings in the Judgment) under CPR 19.2.

    iii) What the parties described as quantum issues:

        a) The principal amount for which judgment should be entered against the Defendants.

        b) The time for payment.

        c) Whether interest should be awarded on a simple or compound basis, at what rate and (if compound interest is to be ordered), with what rests?

    iv) Costs and related issues:

        a) Should the costs order be joint and several?

        b) What sum should the Defendants be ordered to pay by way of a payment on account of costs?

        c) The time for payment.

        d) Whether I should order interest on costs.

    v) Applications for permission to appeal and what, if any, conditions should be imposed on any permission granted.

    vi) The position so far as Ms Richardson is concerned.

B WHAT DECLARATIONS, IF ANY, SHOULD BE MADE?

The applicable principles

2. Both parties relied on the summary of the relevant principles given by O'Farrell J in *Office Depot International (UK) Ltd v UBS Asset Management (UK) Ltd* [2018] EWHC 1494 (TCC), [49]:

> "49. As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court's power to grant declaratory relief is discretionary. The court has to consider whether, in all the circumstances, it is appropriate to make such an order: *Financial Services Authority v Rourke* [2001] EWHC 704 per Neuberger J:
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> > 'It seems to me that when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.'"

3. The court will only grant declaratory relief where the terms of the declaration sought are specified with sufficient precision: *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [92]-[93] (Lord Scott).

The parties' cases

4. HPII sought eight declarations on the basis that they were necessary and would serve a useful purpose:

   i) Declaration 1: that from the moment of the Cambulo Madeira Transaction, in the subsequent sale of the Hyde Park Hotels, and in the investment of the profits, Mr Ruhan retained a secret beneficial interest in the Hyde Park Hotels and their proceeds of sale.

   ii) Declaration 2: that Mr Stevens, Euro Estates, Cambulo Madeira and CLGD held their interests in property and corporate entities relating to the Hyde Park Hotels as Mr Ruhan's secret nominees.

   iii) Declarations 3 and 5: as at the time of the Cambulo Madeira Transaction and as at the date of the sale of the Lancaster Gate and Kensington Hotels, Mr Ruhan was in fraudulent breach of his fiduciary and statutory duties.

   iv) Declaration 4: from the moment of the Cambulo Madeira Transaction, the Hyde Park Hotels were beneficially held by Mr Ruhan on constructive trust for HPII and thereafter the relevant net proceeds of sale to which Mr Ruhan (through his nominees) was prima facie entitled were beneficially held by Mr Ruhan on constructive trust for HPII.

   v) Declaration 6: that Mr Stevens dishonestly assisted Mr Ruhan's breaches of fiduciary duty as referred to in declarations three and five.

   vi) Declaration 7: that Phoenix and Grenda were set up as nominee entities for Mr Ruhan and held assets beneficially for Mr Ruhan (with various sub-declarations as to the nature of Grenda's participation in certain transactions).

vii) Declaration 8: that at the time of the Geneva Settlement, Mr Stevens and Phoenix were acting as Mr Ruhan's nominees such that any benefits they stood to receive pursuant to the Geneva Settlement (including the shares in Minardi and any money paid pursuant to the Loan Note) were to be received and held for the ultimate benefit of Mr Ruhan.

5. HPII argues that it would be convenient, useful, and appropriate to grant all the declarations sought and that the proposed declarations accurately sum up the key conclusions of the Judgment and make definitive pronouncements, in clear and precise terms, as to important matters addressed within it. It contends that making the declarations will promote certainty as to the Judgment's conclusions, which will be of use in relation to enforcement and other post-judgment matters.

6. For his part, Mr Stevens (who, through Mr Kokelaar, took the lead on this aspect of the argument for both Defendants) says that the court should only grant declarations where there is a good reason for doing so. He argues that the declarations sought by HPII do not serve any useful purpose. It would not be appropriate for the court to make declarations simply to clarify the terms of the Judgment, and in many respects the declarations sought extend beyond the matters determined in the Judgment or are vague and imprecise in their terms.

Proposed declarations 3, 5 and 6

7. I am satisfied that declarations in these terms would serve no useful purpose (and Mr Pickering QC was unable to suggest one) and I am not willing to make them. The breaches of fiduciary duty committed by Mr Ruhan and the dishonest assistance in those breaches on the part of Mr Stevens appear clearly from the Judgment and the monetary relief ordered.

Proposed declarations 1, 2, 4 and 7

8. One complexity in this case was that the business dealings in which Mr Ruhan (with the assistance of Mr Stevens) was involved were conducted with the involvement of a significant number of corporate entities. In the submissions and evidence in the case, there was an understandable tendency to refer to interests in "the Hyde Park Hotels" without specific consideration of the precise ownership structure through which the buildings and the land they were sitting on were held. However, it would not be appropriate to grant declarations on that basis. Further, the court was required to consider the various business dealings and the entities involved in them in two very different contexts:

i) First, the court was concerned with the issue of whether Mr Ruhan had in fact breached his fiduciary duties to HPII, and in what respects. In particular, this required me to determine whether Mr Ruhan breached the fiduciary's duty not to place themselves in a position where their interest and duty conflict, by dealing with the company in their own interest; whether Mr Ruhan breached the fiduciary's duty not to make an unauthorised profit from property which is subject to the fiduciary relationship; whether Mr Ruhan was in breach of his duty under s.317 of the Companies Act 1985 because he was directly or indirectly interested in a proposed contract with HPII without disclosing that interest and whether there had been a breach of s.320 of the Companies Act

1985 on the basis that Mr Ruhan had acquired non-cash assets of HPII without the requisite approval.

ii) Second, the court reviewed a number of transactions whose role in the case was *evidential*, HPII relying on them for what they showed about the nature of Mr Stevens' relationship with Mr Ruhan (for example that entities notionally controlled by Mr Stevens were providing funding for Mr Ruhan's projects).

9. So far as the first of these two categories is concerned, it was necessary for me to consider and make a determination as to the role in which Cambulo Madeira acquired rights under the BSA (the contract with HPII under which the transfer of the relevant assets took place and which was alleged to constitute the self-dealing with HPII). In relation to that issue, I made the following findings:

"The position of corporate entities alleged to be under Mr Ruhan's control

15. The only breaches of fiduciary duty pleaded by HPII are breaches by Mr Ruhan, and the only breaches of fiduciary duty which Mr Stevens is alleged to have dishonestly assisted are breaches by Mr Ruhan. There is, thus, no case that companies to whom assets or the proceeds of assets were transferred themselves owed fiduciary or equitable duties to HPII, and that Mr Stevens dishonestly assisted those breaches. Nor were such questions of analysis as might have arisen on that basis explored by the Defendants.

16. I can well understand why the case was conducted in this way. HPII's pleaded case was that the companies in question received and held the assets as nominees or bare trustees for Mr Ruhan (paras. 33 and 64 of the Re-Amended Particulars of Claim). In cases in which a company is used to hide the involvement of a fiduciary in a transaction with the beneficiary, a court may well conclude that the corporate entity was acting as nominee for the fiduciary (see for example *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 and *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 as analysed by Lord Sumption in *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [31]-[33]). To the extent that, for this reason, the findings and analysis below involve an element of simplification, that reflects the manner in which the case was argued by the parties at trial (which in turn, I am satisfied, reflected the reality of the position on the facts)."

10. At [131(vi)] I found:

"HPII's case that Euro Estates or Cambulo Madeira acquired the Hyde Park Hotels as Mr Ruhan's nominee (see [15]-[16] above) does not preclude the possibility of Euro Estates holding other assets in Mr Stevens' interest."

11. At [224] I stated:

"I accept that when a director receives or disposes of the company's property in breach of fiduciary duty, the company is in principle entitled to trace the asset or its proceeds for the purposes of asserting a proprietary claim: *JJ Harrison (Properties) Ltd v Harrison* [2002] BCC 729, [25]-[28]. This case has been argued on the basis that, if the nominee case succeeds, there was beneficial receipt by Mr Ruhan: see [15]-[16]. Any proprietary claim by the beneficiary might be

> defeated because it ceases to be possible to identify the proceeds of the trust property and/or because the trust property (or property which represents it) is acquired by a bona fide purchaser for value."

12. Finally, at [288] I found:

> "Third, if the position of the corporate recipient of the property (Cambulo Madeira) is brought into the analysis at this point, and it is treated as having received the property beneficially but with the fiduciary's notice attributed to it (cf [15]-[16] above), then the payment of the profits away by the corporate body would be a breach of the type-2 constructive trust which arose by reason of its knowing receipt, and if the dishonest assistant assisted that breach, it would be liable: see [277] above. I cannot see why a different result follows if (as is the assumed position here) the corporate vehicle receives as nominee for the fiduciary, who committed a breach of fiduciary duty in acquiring trust property, and then uses the profits for their own purposes, the dishonest assistant assisting at both stages."

13. Against this background, I am satisfied that it would be appropriate to grant declaratory relief in respect of this particular aspect of my findings. It was an issue which had to be determined in order to arrive at the conclusions I reached. It may also be relevant to any proprietary claims which arise hereafter, and also to the issue on which I have granted Mr Stevens' permission to appeal (see below). Accordingly, the declarations I propose to make are to the following effect:

    i) That Cambulo Madeira, in entering into the BSA and acquiring rights thereunder, was acting as Mr Ruhan's nominee.

    ii) That Cambulo Madeira, in receiving and/or disposing of the proceeds of sale of CLGD following its sale to Minerva, was acting as Mr Ruhan's nominee.

    iii) That Cambulo Madeira was acting as Mr Ruhan's nominee in receiving and/or disposing of 80% of the £115.2m of dividends paid to it by CPHL following the sale of the Kensington Hotel by CPHL to De Vere.

    iv) That the beneficial interest of Mr Ruhan in the rights and assets held for him by Cambulo Madeira as his nominee, as referred to in (i) to (iii) above, was subject to a constructive trust in favour of HPII.

14. The particular form of the third declaration reflects the fact that there was no attempt at the trial to advance a claim to the 20% share of the amount received by Cambulo Madeira which was then paid to Wellard, nor were Wellard or Mr Michael Stevens offered the opportunity to become parties to the case so as to argue their own position. There are a number of legal analyses which could be used to rationalise that outcome, but as neither HPII nor the Defendants raised an issue in relation to this (HPII not advancing its case by reference to 100% and the Defendants not arguing it was 100% or nothing), I do not believe it is necessary to explore the issue further.

15. I am not presently persuaded that it would be appropriate or necessary to make any further declarations. At least on the basis of the position as it currently appears, the other transactions and corporate involvements which I had to consider had an evidential role,

looking at the ostensible position as maintained by Mr Ruhan and Mr Stevens as to who had the ultimate economic interest in particular transactions and who was "calling the shots", and testing that against the contemporaneous documents. It was not necessary for that purpose to determine the precise legal analysis applicable to the role of each entity, nor did I hear argument on that issue. It was not necessary, for example, to determine whether an entity was acting as nominee for Mr Ruhan, or received the asset in circumstances in which Mr Ruhan's knowledge was attributable to it, and therefore subject to Mr Ruhan's (and ultimately HPII's) proprietary claim, or whether it was controlled by Mr Ruhan through a relationship of some other kind further up the corporate chain.

16. Nor am I persuaded that HPII needs anything more than the declarations which I am presently willing to grant. However, I accept that this is a complex case, and that it is difficult to foresee every issue which might arise. Nor was there an opportunity at the consequentials hearing to explore every aspect of the declarations sought. I am therefore willing to include a liberty to apply in the order so far as the issue of declaratory relief is considered. However, that is not intended to allow an opportunity to re-argue the issues raised at this hearing.

Proposed declaration 8

17. This raises a more complex issue, because the issues which are the subject of proposed declaration 8 arose not only in the proceedings brought by HPII against Mr Ruhan and Mr Stevens, but also between some of the parties to the earlier SFO Proceedings and between Ms Richardson and Mr Ruhan in the proceedings in the Family Division. The status of the so-called Geneva Settlement raised a number of case management challenges in those sets of proceedings, due to the absence of all relevant parties. That led Mostyn J, and led me, to conclude that the issue was best determined once, for all purposes, in this action, with all interested parties being "bound in" to the outcome.

18. Given this particular background, I am satisfied that it would be appropriate to record my findings as to the nature of the Geneva Settlement in a declaration. By way of a reminder, my factual findings were as follows:

> "176. On 4 August 2015, following a round of settlement discussions between the Orb Claimants and Mr Ruhan, Stewarts (for the Orb Claimants) wrote to Memery Crystal (acting for Mr Ruhan) saying that 'Mr Ruhan's pre-condition/requirement to settlement is that it be structured in a manner that transfers the majority of any cash sum to Mr Stevens … Leaving aside whether this is commercially acceptable, it is structurally unworkable and possibly illegal. Our clients have sought and received advice that a settlement on this basis, where a payment is demanded by Mr Ruhan to go to Mr Stevens which is not commensurate with Mr Stevens' claims, is potentially criminal'.
>
> 180. Draft agreements were produced by Akin Gump on 21 April 2016 and the various settlement agreements which constitute the Geneva Settlement were executed in Geneva on 29 April 2016. A signed consent order dismissing the Orb Proceedings with no order as to costs was sealed on 6 May 2016. The documents included a loan note issued by Dr Cochrane under which Dr Cochrane agreed to pay £73,750,000 to Phoenix by 31 December 2017 and

a document entitled the 'Liquidation Inter-Creditor Settlement Agreement' (the 'LICSA') which was entered into between a company called SMA, Phoenix, Minardi and Dr Cochrane.

181. The nature of Mr Ruhan's involvement in the negotiations which culminated in the Geneva Settlement, and the true beneficiary of the rights acquired under the Loan Note and the LICSA, were issues in the proceedings between Ms Richardson and Mr Ruhan in the Family Division. In his skeleton argument for that hearing, Mr Ruhan said that the rights acquired by Mr Stevens or his companies through that settlement reflected his entitlement to 10% of any further recoveries made by Mr Ruhan from the Qatar Project pursuant to the terms of the TSA.

182. Mr Ruhan was cross-examined about these subjects in the course of the Family Division proceedings before Mostyn J. As Mostyn J records at [2017] EWHC 2739 (Fam), [55], Mr Ruhan said that he had not been involved in negotiating the figures which appeared in the Loan Note.

183 The Defendants suggest that it is inherently improbable, after his experiences with Mr Cooper and McNally, that Mr Ruhan would have used a nominee to receive any proceeds of a settlement with the Orb Claimants. However, if Mr Stevens had been acting as Mr Ruhan's nominee up to 2015, then the die was essentially cast so far as he was concerned. In any event it is not suggested that Mr Stevens (unlike Mr Cooper and Mr McNally) had done anything to show he was not worthy of Mr Ruhan's trust. Further, by this time Mr Ruhan was heavily involved in matrimonial proceedings, in which context the question of what assets Mr Ruhan had was very much a live issue. If HPII's case is made out, Mr Ruhan and Mr Stevens were essentially "bound together" by this point.

…

337. Mr Ruhan also relies on the Geneva Settlement of April 2016, by which he came to give up his claims against the Orb Claimants and Dr Smith, as an act of detrimental reliance. However:

iv) The structure of the Geneva Settlement – under which all rights went to companies notionally controlled by Mr Stevens under what I have found to be a continuation of the nominee scheme – reflected these concerns."

19. With the benefit of hindsight, and given the matters in [17] above, it would have been helpful if I had been clearer in my findings so far as the Geneva Settlement is concerned in the Judgment. In summary, I was satisfied on the evidence:

i) That the rights and assets acquired under the Geneva Settlement – the shares in Minardi, the Loan Note and the rights under the LICSA - were acquired for Mr Ruhan's benefit, in settlement of the proceedings in which Mr Ruhan faced claims and was bringing his own counterclaims.

ii) Both to continue the nominee scheme already in place, and given that he was involved in proceedings in the Family Division in which the extent of his assets

was a very live issue, Mr Ruhan wanted it to appear that the benefits derived from the settlement of the litigation were being acquired by Mr Stevens or entities connected with Mr Stevens rather than by himself.

iii) However, the reality was that this was simply a continuation of the same nominee scheme in which the recipients of the assets and rights under the Geneva Settlement were acting as Mr Ruhan's nominees (cf [15]-[16] of the Judgment). In particular, Mr Ruhan was using Mr Stevens and corporate entities ostensibly linked to Mr Stevens (in this case Phoenix) to hide the fact that he was the beneficiary of the rights acquired under the Geneva Settlement transactions which he had obtained as part of the settlement of the litigation to which he was a party.

iv) The conclusion that Phoenix and Mr Stevens were not intended themselves to acquire any beneficial interest in any assets and rights acquired under the Geneva Settlement is consistent with the fact that they gave Mr Ruhan nothing in return for such a benefit. I rejected the evidence that there had been such a quid pro quo ([168]-[175] and [188]).

v) Equally, there could be no commercial rationale for Mr Ruhan having an economic interest in assets owned by Phoenix which did not derive from his own assets or the settlement of his own litigation.

vi) In these circumstances, I am satisfied that Mr Stevens and Phoenix were acting as Mr Ruhan's nominee in acquiring rights and assets under the Geneva Settlement.

20. My conclusion is consistent in its effect with the findings made by Mostyn J in the Family Division proceedings, *Richardson-Ruhan v Ruhan* [2017] EWHC 2739:

> "75. My findings are as follows. Based on the evidence I have set out above I am satisfied on a strong balance of probability that in relation to the agreement reached on 29 April 2016 Mr Stevens acted as the husband's nominee. This is not a case where the husband's lies can be explained as being an example of a false bolstering of an otherwise truthful case, or where he has tried to cover up matters that would bring upon him shame or disgrace. The lies were told in order to conceal the truth. The other evidence which I have set out strongly supports this finding.
>
> 76. It follows that inasmuch as the documents proclaim that Mr Stevens (or his creatures) were genuine parties to the agreements then they are shams. I am satisfied that the test for a sham … is fully met. The true agreement was made between Dr Smith and the husband, as I have sought to explain."

21. In these circumstances, I am satisfied that it would be appropriate to make a further declaration to the following effect:

> "In negotiating and entering into the agreements which comprises the Geneva Settlement, Mr Stevens and Phoenix were acting as Mr Ruhan's nominees such that any assets and rights acquired by Phoenix under those agreements were to be received and held for Mr Ruhan."

The wording reflects the fact that it has never been part of HPII's case that Mr Stevens directly acquired rights or assets under the terms of the Geneva Settlement (although it did contend that Mr Stevens was acting as Mr Ruhan's nominee in relation to the Geneva Settlement, which I accepted).

C SHOULD GRENDA BE JOINED TO THE PROCEEDINGS UNDER CPR 19.2?

22. CPR 19.2 provides:

> "(2) The court may order a person to be added as a new party if –
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
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> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

23. CPR 19.2 can be used to join parties to proceedings after judgment has been handed down. In *Dunwoody Marketing v Prescott* [2007] EWCA Civ 461, an order for joinder was made after judgment, in circumstances in which the claimant partnership had been transformed into a limited company, and the limited company wished to obtain the benefit of the injunction granted against the defendant in respect of that business. At [23], Lawrence Collins LJ held that the power rising under CPR 19.2 could be exercised after judgment. However, the Court held that the company did not have the benefit of the same covenants as the partnership which had been the basis for the grant of injunctive relief and therefore could not take the benefit of the injunction (i.e. it was not a successor in title to the right which the injunction had been granted to uphold).

24. CPR 19.2 has also been applied:

i) to join a defendant to proceedings which had settled on the basis of a *Tomlin* order, for the purpose of court proceedings to enforce the terms of the settlement (*Starlight Shipping Co & ors v Allianz Marine & Aviation Versicherungs AG* [2011] EWHC 3381 (Comm), [50]-[54]); and

ii) to join a third party to proceedings in which judgment had already been given for the purposes of determining certain issues which would arise thereafter in relation to tracing relief and enforcement (*Billington v Davies & Ors* [2017] EWHC 1654 (Ch), [24]-[27]).

25. However, the purpose of the proposed joinder in all of these cases was essentially *forward looking* – to allow the new party to enforce relief granted if it had succeeded to the rights of the former claimant, or to allow a new party to be bound by (and have the opportunity to be heard in relation to) matters which had yet to be determined but which would arise in post-judgment proceedings. By contrast, the purpose of the joinder application in this case is essentially *backward-looking* – to bind Grenda to findings which have already been made, in proceedings in which it was not a participant and did not have an opportunity to be heard. That appears to me to involve a very different situation to those previously considered. The general rule is that only the parties to litigation are bound by the determinations made in it. As Sales J noted in *Seven Arts*

Entertainments Ltd v Content Media Corp plc [2013] EWHC 588 (Ch), [73], the "basic rule" is that "before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it", continuing "the importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to the rule". It would be surprising if the strict test for determining whether someone was privy in interest to a party to litigation could be circumvented by joining them to the proceedings after trial.

26. It is not necessary in this case to consider whether it could ever be appropriate to join a new party to proceedings after judgment for such a purpose, in circumstances in which the new party was not a successor in title to or privy in interest with an existing party (an issue which, at this hearing, was left for another day). Even if there is such a jurisdiction, it must be a very rare case in which it would be appropriate to exercise it, and there are two reasons why it would be particularly inappropriate to make such an order in this case.

27. First, those findings which relate to Grenda fell into category 2 as referred to in [8] above – they were matters relied upon by way of evidence in establishing the facts in issue (or, as it is sometimes put, evidentiary facts) rather than constituting ultimate facts. Neither the nature of these findings, nor the manner in which the court was able to approach them (see [15]) would make it appropriate to join Grenda for the purposes of seeking to bind it to the Judgment.

28. Second, the issue of which parties should be joined to the trial which culminated in the Judgment was specifically considered at a joint CMC/PTR with the related litigation commenced by the SFO and others. HPII did not itself apply to join Grenda at that hearing, but the issue of whether Grenda should be joined was specifically raised by counsel for Mr Stevens. The complication which had to be grappled with was that the same issue raised by HPII by way of an evidentiary fact (that Grenda was beneficially owned or controlled by Mr Ruhan) was also the key issue in litigation commenced by Mr Phillip Barton against Grenda. However, as all parties recognised, it was not feasible or fair at that stage to join Mr Barton to the trial for the purposes of binding him into any such determination. In those circumstances, the decision was taken not to join either Mr Barton or Grenda to the trial, given the difficulties which might follow if this issue had been decided between Grenda, Mr Stevens and Mr Ruhan but not as between Grenda and Mr Barton. It would not be appropriate to reverse that decision now, nor am I persuaded that the decision taken at the CMC would not have been taken in the same way with the benefit of hindsight. As I commented at the time, this was simply another of the many “rough edges” in this litigation, which involved a huge number of overlapping claims between different parties, but which it was not practicable to try in a single hearing.

D QUANTUM ISSUES

In what principal sums should judgment be entered?

29. Subject to one point, both Defendants accepted that:

i) Mr Ruhan is to be ordered to account for £7.76m in respect of profits arising from the sale of the Lancaster Gate Hotel, and £94.5m in respect of profits arising from the sale of the Kensington Hotels.

ii) Mr Stevens is to be ordered to pay equitable compensation in the same amounts.

30. However, the Defendants originally contended that HPII should have to give credit for any recoveries made from the settlement reached with the Settlement Parties. HPII accepted that that was correct as a matter of principle but it is the evidence of Mr Russell that HPII has not and will not make any recoveries at all from that settlement.

31. HPII had refused to produce the settlement agreement on the basis that its terms were confidential. However, with some encouragement from the court, HPII approached the Settlement Parties, and it was agreed that a redacted form of the document could be produced, which would show any transfers being made to HPII, or any liabilities or claims foregone in HPII's favour. Having reviewed that document, Mr Kokelaar confirmed that the credit point was no longer being pursued.

Time to pay

32. Mr Ruhan has asked the court to allow him 90 days to pay the judgment debt, pointing to the size of the amount which he has been ordered to pay, and saying that he would like time to put some proposals to HPII. The difficulty with this argument is that:

i) Mr Ruhan has been aware of the size of HPII's claim since the commencement of this litigation;

ii) Mr Ruhan has been aware of the outcome of the litigation since 14 February 2022, when the draft judgment was provided to the parties – over 4 months; and

iii) Mr Ruhan has, therefore, had ample time to take whatever steps he wishes to take in response to the judgment debt.

However, there was no evidence before the court of any steps which it might be open to Mr Ruhan to take in the next 90 days which would ensure the orderly payment of the judgment debt which it would not have been possible to take before.

33. Accordingly, I am not persuaded that the time for payment should be fixed for any period longer than 28 days (a period which is itself 14 days longer than the default position, and which I have ordered in the light of the size of the debt and the fact that Mr Ruhan is an individual defendant).

34. Mr Stevens has advanced a different argument: that the person with primary responsibility to make HPII "whole" is Mr Ruhan, the court having found that Mr Stevens dishonestly assisted Mr Ruhan's breaches of fiduciary duty in failing to account for the profits from the on-sale of the Hyde Park Hotels. Mr Kokelaar argues that:

> "Under the terms of the order sought by HPII Mr Ruhan will be required, belatedly, to account for the profits. Any sums which HPII recovers from Mr Ruhan pursuant to the order for an account will reduce its losses, and therefore Mr Stevens' liability to pay equitable compensation. Accordingly, HPII cannot simultaneously require Mr Ruhan to account for £102,260,000 plus pre-judgment

> interest, whilst claiming the same amounts against Mr Stevens by way of compensation for loss.
>
> It is suggested that the appropriate way to deal with this is to stagger the orders, so that Mr Ruhan is ordered to account first, with Mr Stevens thereafter being ordered to pay as equitable compensation the difference between what HPII obtains pursuant to such an account and what it would have obtained had Mr Ruhan accounted for the profits in full upon receipt of the profits in 2006/2008."

35. However, HPII has been "out of its money" for many years, and I have found that Mr Ruhan and Mr Stevens are both liable to make HPII whole. It will frequently be the case that a claimant has claims against more than one defendant, in which recovery from one defendant will serve to reduce the amount recoverable from another. However, the court does not generally require a claimant to pursue enforcement activity against one defendant first (regardless of the respective advantages of enforcing against one defendant rather than another or the potential prejudice of delaying enforcement against a particular defendant). Further:

    i) it is open to Mr Stevens and Mr Ruhan to exchange information on any steps they have taken to discharge their respective judgment debts; and

    ii) HPII has undertaken to inform each of Mr Stevens and Mr Ruhan of any recoveries recovered in respect of the judgment debt from the other.

36. In these circumstances, I am not persuaded that it would be appropriate to subject HPII to yet further delay over and above that which has already elapsed in obtaining compensation from Mr Stevens. Mr Stevens will also be given 28 days to pay.

Interest

37. HPII seeks an award of compound interest against both Defendants.

38. There can be no serious debate that the court has jurisdiction to award compound interest against Mr Ruhan. Courts of equity have jurisdiction to award compound interest where money has been obtained and retained by fraud (and, even in the absence of fraud, where a trustee or fiduciary defendant has withheld or misapplied trust money and/or improperly profited from the trust): *Westdeutsche v Islington LBC* [1996] AC 669; *Black v Davies* [2005] EWCA Civ 531. This is such a case. It has also been held that compound interest can be awarded on claims for equitable compensation: *Watson v Kea Investments Limited* [2019] 4 WLR 145 (although there may be circumstances in which this would not be appropriate because the court's order already reflects the use which might have been made of the funds: *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, [141]-[142]).

39. Mr Kokelaar argues, however, that it would not be appropriate to make an award of compound interest against a dishonest assistant in respect of an order for equitable compensation made against them. He argues (by reference to the judgment of Lord Denning MR in *Wallersteiner v Moir (No 2)* [1975] QB 373, 388) that the rationale for ordering a trustee or fiduciary to pay compound interest simply does not apply to the dishonest assistant who has not received or misused any funds itself.

40. A number of first instance cases have held that compound interest can be ordered in respect of orders for equitable compensation against dishonest assistants: *FM Capital Partners Ltd v Marino & Ors* [2019] EWHC 725 (Comm), [27]-[35] (Cockerill J); *Tuke v Hood* [2020] EWHC 2843 (Comm), [155]-[157]; [635]; [686] (and then [2021] EWHC 74 (Comm), [34]-[35]) (Jacobs J); and *CMOC Sales Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm), [163]-[169] (His Honour Judge Waksman QC). The Privy Council has approved that view (on an obiter basis) in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, [185]. I have decided that I should follow those authorities. I deal with the issue of whether I should give permission to appeal on this issue below.

41. Mr Kokelaar advances an alternative argument, again by reference to Lord Denning MR's judgment in *Wallersteiner v Moir (No 2)*, namely that if a dishonest assistant can be ordered to pay interest on a compound basis, it should be limited to cases in which the beneficiary would itself have used the funds in a trade or business (with the element of compounding being intended to compensate for that loss of use). He argues that as HPII was in liquidation at that time, there has been no such loss of use because if HPII had been paid the equitable compensation at an earlier point in time, the money would have been used to settle creditor claims and account for the surplus to shareholders.

42. However, I am not persuaded that the jurisdiction to award compound interest where equitable compensation is ordered in favour of a beneficiary is limited to cases in which the beneficiary would have put the compensation to some commercial use. Compound interest reflects the commercial value of money – it is both the cost paid by those having to borrow it, and the return expected by those investing or saving it, whether they are trading entities or not. That is as true of companies which have ceased to trade as it is of those who are still deploying their funds in business activities. That commercial reality is reflected in s.49(3) of the Arbitration Act 1996 (awards of compound interest being routinely made in commercial arbitrations). In many ways, it is the "default" rule of awards of simple interest in court proceedings which is the anomaly. Nor am I persuaded that it is necessary for the court, before awarding compound interest for equitable compensation, to engage in a complex counterfactual enquiry as to what the beneficiary would have done with the money if paid sooner – for example as to whether HPII, in a scenario in which it would have had a surplus of assets over liabilities, would have continued to operate or been wound up in a solvent liquidation.

43. That brings me to the question of rates and the frequency of rests. HPII argues for a rate of 3.5% above base, with half-yearly compounding. The Defendants suggest that a figure of 2% over base would be appropriate with annual compounding. As to this:

    i) I remind myself that HPII had ceased operations when the relevant transactions in breach of duty took place, and was seeking to achieve an orderly winding up for the benefit of its creditors and/or shareholders. I was unable to make any finding on the evidence that HPII would itself have sought to exploit the commercial opportunity presented by the Hyde Park Hotels, or indeed undertaken any alternative commercial activity "but for" the breaches of fiduciary duty which Mr Ruhan committed and in which Mr Stevens dishonestly assisted. I reject HPII's argument that I should assess compound interest on the basis that, but for the breaches of fiduciary duty, Mr Ruhan would have been deploying his commercial acumen so as to exploit the funds in question for HPII's benefit in ongoing trading.

ii) However, as I have noted at [42], compound interest reflects the commercial value of money. I have decided that in HPII's particular circumstances, an award of compound interest which appropriately reflected the commercial value of its funds, rather than a rate which assumed some alternative commercial activity with the funds on its part of which it has been deprived, is appropriate.

iii) In these circumstances, I am satisfied that a rate of 2.5% over Bank of England base rates with six-monthly rests is appropriate.

E COSTS

44. Both Defendants accept that they must pay the costs of and incidental to the proceedings on an indemnity basis.

Should the costs order be joint and several?

45. The Defendants (through Mr Kokelaar) argue that they should not be jointly and severally liable for all of HPII's costs, although it is accepted "that the bulk of the costs incurred will be common to the claims against both Defendants". With the exception of the costs of the two Deeds of Indemnity, I am satisfied that a joint and several costs order is appropriate:

i) The claims arose out of, and concerned, a dishonest scheme, with Mr Ruhan and Mr Stevens being "in it together" from the outset to the end. The common front that Mr Ruhan and Mr Stevens maintained throughout the litigation inevitably required HPII to sue both of them together.

ii) The Defendants adopted a common position on the key issues throughout the litigation including at trial, each adopting the other's evidence for the purposes of his own case.

iii) The defence of the litigation, like the fraud which gave rise to the litigation, was essentially a joint endeavour, which the costs order should reflect.

iv) In any event, those issues on which a particular Defendant ran a discrete point were very limited in their scope and in the time they took.

46. HPII accepts that the costs of obtaining the two Deeds of Indemnity which were provided, one to each Defendant, in response to their applications for security for their individual costs, should be subject to separate costs orders.

Payment on account

47. There is no dispute that the court should order payments on account of costs in HPII's favour under CPR 44.2(8). As the commentary to the White Book notes at 44.2.12:

> "*Necessarily, the determination of a "reasonable sum" involves the court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of a compromise of those proceedings. In a case of any complexity, the evidence and submissions arguably relevant to that exercise may be extensive. The court has to guard against the risk that it may be drawn into costly and time-consuming*

> *"satellite" litigation. There is no rule that the amount ordered to be paid on account should be the "irreducible minimum" of what may be awarded on detailed assessment (**Gollop v Pryke**, (Warren J)) .... [A] reasonable sum would often be one that was an estimate of the likely level of recovery subject, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range if the range itself is not very broad. In determining whether to order any payment and its amount, account needs to be taken of all the relevant factors including the likelihood (if it can be assessed) of the claimant being awarded the costs they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."*

48. HPII filed evidence in the form of the thirteenth witness statement of Mr Russell of Spring Law dated 25 May 2022 to the effect that its costs of these proceedings come to some £3,258,878.80, excluding the costs of providing the Deeds of Indemnity. Arriving at that figure has understandably required the allocation of certain categories of costs incurred for more than one purpose, and the exclusion of costs which would not be recoverable on assessment. Mr Russell explained in his witness statement and a detailed appendix the steps which have been taken to identify the recoverable costs of these proceedings for the purposes of the payment on account application (it being HPII's position that a pragmatic approach has been adopted for this purpose, without prejudice to HPII's entitlements on any detailed assessment). This has involved:

    i) excluding in their entirety HPII's costs in unsuccessfully seeking to resist applications for security for costs and in seeking fortification;

    ii) splitting certain heads of costs on a 50:50 (or in some cases 75:25) basis as between these proceedings and the SFO Proceedings;

    iii) allowing for costs recovered from the respondents to certain s.236 applications; and

    iv) excluding the costs of preparing material which in the event was not deployed.

49. My general impression is that Mr Russell had conducted a careful and conscientious exercise with a view to arriving at the costs recoverable in these proceedings. However, it will be apparent that doing so had involved a number of judgments, and it is possible that a Costs Judge might reach different conclusions on these issues to those reached by Mr Russell.

50. In addition, Mr Kokelaar has raised issues of principle as to whether certain categories of costs are capable of being "costs of and incidental to the proceedings" for the purposes of s.51 of the Senior Courts Act 1981.

51. First, the costs of the application to restore HPII to the register for the purpose of pursuing these claims. I see scope for argument as to whether or not these fall within s.51, and in my view that issue of principle is best assessed by a Costs Judge who will have greater visibility as to the purposes of the restoration application (and how far it was also concerned with other claims). I will therefore remove these (in the amount of £13,000) for the purposes of the payment on account application.

52. Second, solicitor's costs incurred in arranging funding and ATE insurance. Mr Kokelaar argued that funding costs are not recoverable (referring to *Hunt v RM Douglas (Roofing) Ltd* (1987) The Times, 23 November, cited in *Motto & Ors v Trafigura Ltd and Anr* [2012] 1 WLR 657, [105], [107]) because such costs are ultimately attributable to litigant's need to fund the litigation as opposed to being a cost of the litigation. In reliance on an observation in *Motto*, he argues that legal costs in negotiating or arranging funding are similarly irrecoverable. Mr Hodge (who argued the costs issues on HPII's behalf) accepts that this is an arguable point, and one best determined by a Costs Judge. I have therefore left these costs out of account when assessing the amount of the payments on account.

53. Third, he suggests that the costs in row 5 of schedule 2 of the appendix were undertaken by the liquidator in general factual investigations and are not recoverable. However, I am satisfied that a proportion of that work was concerned with pre-action investigation of the claims against the Defendants, and to that extent is recoverable. The issue of what the right proportion is raises the same issue of judgment which applies when allocating other heads of recorded costs between different purposes.

54. Fourth, he argues that costs incurred in connection with section 236 applications are not recoverable because they are costs of other proceedings. I accept that a party who, for example, seeks to pass on the claim brought against it to a third party in another set of proceedings cannot recover the costs incurred in the second set of proceedings as costs of and incidental to the first set (*Aiden Shipping v Interbulk* [1986] 1 AC 895, 981). However, s.236 proceedings are not substantive proceedings, but applications to enforce the liquidator's statutory right to obtain documents from certain categories of persons who are under a legal duty to assist the liquidator in the liquidation. Where (as here) the purpose of seeking the documents under s.236 is to investigate and advance a legal claim, I see no reason why these are not costs of and incidental to that claim. The purpose of such applications is very similar to that of applications for third party disclosure under CPR 31.17, 'subject access requests' under the Data Protection Act 2018 which are an increasingly common feature of litigation or *Norwich Pharmacal* applications. Subject to issues of reasonableness and proportionality, I do not see why costs of these kinds incurred for the purposes of litigation are not capable of being costs "incidental to" that litigation The documents obtained through the s.236 requests in this case were vital to HPII's case, producing a number of documents which shed crucial light on the true position, including documents to which one or other defendant was a party which had not been disclosed by them (see e.g. Judgment, [125]). I see no reason why this head of costs would not be recoverable on a detailed assessment.

55. Making the adjustments I have indicated, with some rounding down, I will reduce HPII's headline costs figure for payment on account purposes to £3,000,000. So far as that figure is concerned:

    i) The hourly rates are in line with current Commercial Court guidelines.

    ii) While Mr Ruhan has suggested that the percentage of partner time at 45% is too high, it is necessary to have regard to the use of a small, boutique, firm of solicitors by HPII, with Mr Russell as an ever-present in a lean team. That model can sometimes involve a higher proportion of partner time but a lower overall level of costs than using a medium or large city firm. Viewed in this context, I am not persuaded the 45% figure is too high (and I note that it is considerably

less than the 69% of partner time incurred by Mr Stevens, who also instructed a small, boutique, firm of solicitors).

iii) I accept that the post-judgment costs of £383,238.22 seem high given the relative lack of activity over that 4 month period and I have concluded it would be appropriate to make an adjustment in my starting point to allow for a potential reduction in this figure on detailed assessment (reducing it to £2.9m).

56. I have taken the other matters into the account, and the issues which might arise as to the allocation of the costs of common work streams between different cases, in arriving at a percentage figure. While HPII has an order for indemnity costs, that of itself will not impact on the allocation issues (otherwise a claimant who incurred common costs in two sets of litigation and obtained orders for indemnity costs in both would be recovering more than the costs actually incurred), albeit it will have a positive impact so far as HPII is concerned when issues of reasonableness are raised.

57. Taking all of these matters into account, I am satisfied that it is appropriate to order a payment on account of costs excluding the costs of the Deeds of Indemnity of 70% of £2.9m, and I will round the resultant figure to £2m. A payment on account in that amount will be made against both Defendants on a joint and several basis. Once again, HPII has undertaken to keep each Defendant informed about any payment made by the other.

58. So far as the Deeds of Indemnity are concerned, Mr Hodge asks the court summarily to assess those costs now. As this figure is in the nature of a disbursement, there is limited scope for the Defendants to challenge these costs. The burden lies on the Defendants to establish that they were unreasonably incurred and the figure of the 10% is in line with my own experience of costs of this kind. However, in circumstances in which I am not summarily assessing the entirety of the costs, I have decided I should order an interim payment on account of these costs as well, but one which reflects the limited scope for dispute. Accordingly:

i) Mr Ruhan will be required to pay £108,000 (90% of £120,000) by way of a further interim payment in respect of the costs of the Deed of Indemnity provided in his favour; and

ii) Mr Stevens will be required to pay £162,000 (90% of £180,000) by way of a further interim payment in respect of the costs of the Deed of Indemnity provided in his favour.

Time for payment

59. The Defendants have been aware of the level of HPII's costs since the Pre-Trial Checklists were filed for the PTR in October 2021, and have been aware of the outcome of the trial since 14 February 2022. Accordingly I see no reason to grant any period longer than 28 days for payment on the costs order.

Interest on costs

60. I am satisfied that the Defendants should be required to pay simple interest on recoverable costs incurred by HPII from the date of payment. The Defendants faintly argued that no

order was appropriate in this case because HPII's costs had been met by a funder. However, I am satisfied that it would not be appropriate to take this issue into account. This is a case in which funds have been expended to meet HPII's legal costs under a commercial arrangement entered into by HPII to secure funding for those costs. That arrangement (which might have been a loan, but in this case would have involved assigning a share of HPII's recovery to the funder) does not mean that HPII has not been "out of pocket" in respect of legal costs (and indeed the logical extension of the contrary argument would be that HPII should recover no costs at all because such a claim would fall foul of the indemnity principle).

61. For these reasons, I am satisfied that it is appropriate to make an order in terms of paragraph 16 of HPII's draft order under which:

    i) Simple interest on costs will be paid at 2% over the Bank of England base rate from the date of payment of such costs by the claimants to their legal representatives until 28 days from the hand-down of this judgment.

    ii) Interest under the Judgments Act 1838 is payable on the overall outstanding balance of the amount ordered to be paid on account, to run from 28 days from the date of hand-down of this judgment to the date of payment.

    iii) Simple interest will continue run on the balance of costs recoverable by the claimants (above the payment on account) at 2% above the Bank of England base rate for a period of 12 weeks from the date of hand-down of this judgment and at the Judgments Act 1838 rate thereafter.

Release of the Deeds of Indemnity

62. The Deed of Indemnity provided in respect of Mr Ruhan is hereby released.

63. The Deed of Indemnity provided in respect of Mr Stevens will be released within 28 days from the date of hand-down of this judgment unless in that period Mr Stevens applies for the Deed of Indemnity to remain in place, in which case the Deed of Indemnity will remain in place until the application has been determined, and thereafter as determined by the court.

F PERMISSION TO APPEAL AND CONDITIONS ON ANY APPEAL

Permission to appeal

64. Mr Ruhan does not seek permission to appeal.

65. Mr Stevens seeks permission to appeal on the following grounds:

    i) Grounds 1 and 2 challenge my conclusion that Mr Stevens could be ordered to pay equitable compensation for dishonest assistance in relation to Mr Ruhan's failure, in breach of fiduciary duty, to account to HPII for the profits made from the on-sale of the Hyde Park Hotels

    ii) Ground 3 seeks to challenge my conclusion that, if HPII elects to seek such relief, Mr Stevens is obliged to account for the amounts of £1,000,000 and £500,000 paid to him by Mr Ruhan as the quid pro quo for his dishonest assistance.

iii) Ground 4 seeks to challenge my conclusion that the claim against Mr Stevens is not time-barred

iv) Ground 5 seeks to challenge my decision that compound interest can be awarded against someone who dishonestly assists a breach of fiduciary duty.

Grounds 1 and 2

66. In expressing my conclusions on this issue at [296], I observed:

> "I have not found the answer entirely satisfactory or wholly intuitive:
>
> i) It might be said that the success of the argument elides many of the distinctions between claims for an account of profits and claims for equitable compensation, despite the very different nature of those two remedies and the legal regimes which govern them.
>
> ii) In substance, HPII's complaint here is that Mr Ruhan abused his position as a fiduciary to make a profit which HPII would not have made for itself, and that Mr Stevens dishonestly assisted him in that. It might be said that, as a matter of substance, that is a claim for an account, and it should carry whatever legal consequences follow from that categorisation.
>
> iii) In certain factual scenarios, including this one, the argument might be said to come close to rendering the dishonest assistant liable for the profits made by the fiduciary even though English law has not chosen to render dishonest assistants directly so liable, and to permit such a claim "as of right", notwithstanding the "strong" discretion which exists in determining whether to order the dishonest assistant to account for their profits and (perhaps) without the benefit of the more exacting causation test which would have applied to such a claim.
>
> iv) The result might be thought particularly strict, because of the consequences which follow from applying the causation test set out in [293] above to claims for dishonest assistance in the breach of purely custodial duties (as opposed to a test considering the effect on the beneficiary of the acts of dishonest assistance)."

67. Against this background, it should come as no surprise that I am persuaded that Mr Stevens has a realistic prospect of success on this issue, and that it is appropriate to grant permission to appeal. However, I should recorded that I received extensive written submissions on this issue in support of the application for permission to appeal advancing arguments and referring to authority and commentary which had not featured at the trial. Mr Kokelaar graciously, but in my view entirely accurately, accepted that at trial, "on aspects of this your Lordship did not receive the assistance that he ought to have received." The exercise of seeking to referee the extensive passage of further play heralded by Mr Kokelaar's new submissions, in circumstances in which I had already blown the whistle and declared the winners (of the first leg at least), seemed wholly artificial, particularly in circumstances in which I was already satisfied that permission to appeal should be granted. The unsatisfactory outcome, however, is that the appeal will be advanced by reference, at least in part, to arguments not raised before me, and to the extent they are

willing to entertain such arguments, the Court of Appeal will not have a judgment from the trial judge considering them.

Ground 5

68. Ground 5 concerns an issue which has not been the subject of Court of Appeal authority, and in which the arguments (in so far as they concern the nature of liability in dishonest assistance and the differences between the position of the dishonest assistant and the fiduciary) are likely to overlap with those raised by grounds 1 and 2. While it may be questionable whether the direction of travel will be in favour of narrowing the circumstances in which an assessment of interest which properly reflects the time value of money is available (cf [42] above), I accept that the point is arguable at a conceptual level and I grant permission to appeal in respect of it.

Ground 3

69. In circumstances in which there is no challenge to the court's jurisdiction to award an account of profits against a dishonest assistant in respect of the benefits realised through that dishonest assistance, I am not persuaded that it is realistically arguable that (as it was put by Mr Kokelaar) "the conclusion that the court should not exercise its discretion not to order an account" of the sums paid by Mr Ruhan in return for Mr Stevens' dishonest assistance was wrong. The character of the payments in issue here is very far removed from the profits realised by the dishonest assistant from chartering vessels to third parties which were in issue in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 252 on which Mr Kokelaar relies. The very fact that the sums were paid by the fiduciary in return for the dishonest assistance satisfies the requisite causation test. The exercise of the discretion whether or not to order an account was primarily a matter for the trial judge. Accordingly permission to appeal is refused on this ground.

Ground 4

70. Ground 4 seeks to challenge my conclusion that the claim against Mr Stevens was not time-barred.

71. First, it is said that I erred in law at Judgment, [316] in concluding that "the fact that the relevant person exercising reasonable diligence was a liquidator, who had various duties to investigate, made no meaningful difference to the issue of whether HPII was reasonably put on notice of something which merited investigation" (to quote from Mr Stevens' skeleton). In fact, the conclusion I reached was as follows:

> "There was some debate before me as to whether the fact that HPII was under the control of a liquidator for part of the relevant period had any effect on what constituted 'due diligence', it being the Defendants' submission that the liquidator's statutory duty to make enquiries as to what claims the company may have effectively imposed a higher standard. I observed in *Granville Technologies Ltd v Infineon Technologies Ltd* [2020] EWHC 415 (Comm), [56] that the fact that a company was in liquidation, and hence no longer trading, might well be relevant in some cases to the issue of whether it was put on enquiry as to the possibility of a claim (because, as in that case, the existence of potential claims of the relevant kind were a matter of discussion among those active in the relevant industry). The argument in this case was the rather different one that the liquidator (in effect) had to do more to reach the 'reasonable diligence standard. *Whatever*

> *the position might be in a case in which the liquidator's special powers offered avenues of investigation not open to ordinary litigants, I am not persuaded on the facts of this particular case that the liquidator's statutory duty to investigate claims makes a meaningful difference to the issue of whether HPII was reasonably put on notice of something which merited investigation (by whatever means)*."

(emphasis added).

72. It will be apparent that my decision was that, on the particular facts of this case, in determining whether the relevant "trigger" for investigating a potential claim had occurred, I was not persuaded that the fact that HPII was (effectively) under the control of liquidators made a meaningful difference to the analysis. That was not a conclusion of law, simply a recognition that the potential significance of this factor will vary from case to case, and it was not significant in this case. That assessment was part of my evaluation of the evidence and was pre-eminently a matter for the trial judge. I am satisfied that an appeal against that conclusion has no realistic prospect of success. That is also the case so far as the attack on my evaluation of the evidence on this issue more generally is concerned. I therefore refuse permission in ground 4.

Conditions on the appeal and stay of execution

73. Mr Stevens asks the court to stay execution of the Judgment and the costs order pending the determination of the appeal, under CPR 52.16 or the court's inherent jurisdiction.

74. HPII invites the court under CR 52.6(2) to impose the following conditions on the grant of permission to appeal:

    i) That Mr Stevens be required to provide security for the Judgment debt (with full disclosure as to source of funds).

    ii) That Mr Stevens be required to pay the payment on account of costs which I have ordered.

    iii) That Mr Stevens be required to provide security for HPII's costs of the appeal.

75. I will take the application for a stay of execution first. In *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474, [13] and [14], the Court of Appeal noted that the general rule is that a stay of a judgment will not be granted pending determination of an appeal, but that:

    i) The court has an unfettered discretion;

    ii) No authority can lay down rules for its exercise;

    iii) It is relevant that the appellant may be unable to recover from the respondent the sum awarded in the event of judgment being set aside on appeal;

    iv) The proper approach is to make the order which best accords with the interests of justice;

v) The court has to balance the alternatives to decide which is less likely to cause injustice; and

vi) Where the justice of letting the general rule take effect is in doubt, the answer may well depend on the perceived strength of the appeal.

76. It had been my understanding at the hearing (and it was clearly Mr Kokelaar's understanding when arguing his application for a stay of execution) that HPII was willing to undertake that any recovery made in respect of the Judgment would be paid into court pending the determination of the appeal, although no such undertaking was offered in respect of the payment on account of costs. HPII subsequently suggested that this offer was limited to the position where Mr Stevens was ordered to pay the Judgment sum as a condition of pursuing his appeal, and did not apply if no such condition was imposed. As this:

i) The same risk of lack of repayment of the Judgment sum arises whether it is paid as a condition of being permitted to bring an appeal or in response to enforcement. In my view, HPII's concession in the context of its conditions application reflected a recognition of a risk of prejudice to Mr Stevens which applies equally in the present context, and my refusal of a stay of execution of the Judgment is conditional on any recoveries in respect of the Judgment debt obtained from Mr Stevens (but not from Mr Ruhan) being paid into court. If HPII is not willing to offer such an undertaking, then a stay of execution will be imposed so far as Mr Stevens is concerned.

ii) However, I am not persuaded that there is a sufficient risk of HPII (which is under the management of officers of the court) failing to comply with any order the court might make to repay the payment on account if Mr Stevens' appeal succeeds for that to constitute a sufficient reason to stay execution of the costs order, which involves a much lower amount. In any event, the prospect of Mr Stevens reversing that costs order in full, in circumstances in which he will have lost on the issue of liability, time-bar and been held liable for an account of profits, is remote.

77. Mr Stevens has adduced no evidence whatsoever in support of the stay application. He has been noticeably coy about his assets and even his domicile. There is no material which would allow the court to form a view as to how far Mr Stevens would suffer irreversible prejudice if no stay of execution was granted, or to measure the prejudice which HPII would suffer in seeking to enforce against Mr Stevens' assets if execution was put on hold for a prolonged period. In these circumstances, there is no material before the court which could justify a departure from the general rule. The mere size of the judgment debt cannot of itself be sufficient.

78. I therefore turn to the first two parts of HPII's conditions application. In relation to the applicable principles:

i) The power will only be exercised where there is a compelling reason for doing so: see CPR 52.18(2). It has been noted that it is likely to be an "unusual, and perhaps rare, case in which it will be appropriate to make" such an order: *Dumford Trading AF v OAO Altantrybflot* [2004] EWCA Civ 1265, [9].

ii) Guidance on relevant factors to be taken into account by the court was given by Christopher Clarke LJ in *Merchant International Company Limited v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2016] EWCA Civ 710, [37]:

> "(a) The essential question is whether or not there is a compelling reason to make payment in of the judgment sum, plus costs and interest (or some part thereof) a condition for further pursuit of the appeal – hereafter "a security payment order";
>
> (b) Whether there is a compelling reason is a value judgment to be made on the particular facts of the case under consideration
>
> (c) The fact that a judgment has been entered against the appellant and no stay has been sought or granted does not mean that, as a matter of course, compliance with the judgment should be made a condition of appeal nor does it alone, afford a compelling reason for a payment order
>
> (d) On the contrary, the power…was not designed to be no more than an alternative means of securing enforcement and is only to be exercised with caution;
>
> (e) Whilst every case depends on its particular facts the court is likely to find there to be a compelling reason to make a security payment order which has the effect if the judgment debtor has in the past (*Dumford Trading*) or is likely in the future (*Wittman*) to take steps to denude itself of assets or to put assets beyond the reach of normal enforcement processes.
>
> … The fact that a defendant takes such steps or adopts such stratagems may itself be something from which the court can infer that he is likely (if need be) to put asset out of reach for the sole purpose of avoiding having to satisfy the judgment.
>
> (f) There may be a compelling reason to make a security order even if it is not established that the appellant has acted as in (e) above. This may be the case if there are considerable practical difficulties in effecting execution."

iii) In *Sebastian Holdings Inc v Deutsche Bank AG* [2014] EWCA Civ 1100, [34] Tomlinson LJ stressed that:

> "…it is inappropriate to use the power to impose conditions on an appeal simply as a means of securing enforcement of the judgment debt. That plainly is not the touchstone of the jurisdiction. The touchstone is rather the taking of steps out of the ordinary course of business with a view to frustrating the normal enforcement process."

79. In this case:

i) I have found that Mr Stevens was a key party to a dishonest scheme to help Mr Ruhan make and apply profits in breach of fiduciary duty, which scheme was adhered to over a very lengthy period. However, no finding has been made that he has taken steps in relation to *his own assets* to render them less susceptible to execution. HPII has at no stage sought freezing order relief against Mr Stevens.

ii) The equitable compensation award made against Mr Stevens does not relate to amounts received by him (and, on the contrary, HPII accepted that there had been no beneficial receipt by Mr Stevens).

iii) While I have no evidence as to Mr Stevens' wealth, the effect of the evidence at trial, and my findings accepting HPII's case on this issue, were that Mr Stevens was not a man of any particular financial substance, and that he was very much the junior partner to Mr Ruhan, reduced at times to borrowing relatively small amounts of money from him, and to making plaintive complaints at Mr Ruhan's delay in reimbursing him for relatively small expenses. The suggestion that he would be able to discharge the full amount of the judgment debt for principal and compound interest in order to pursue an appeal which I have found to be clearly arguable is highly improbable. I am not persuaded this is a "could pay but won't pay" case.

iv) I am satisfied that the overall effect of the orders I have made – refusing a stay of execution which will allow HPII to proceed down the enforcement path, but allowing Mr Stevens to pursue his appeal for which he has been granted permission in the meantime – fairly balances the competing interests of the parties. If HPII's enforcement efforts reveal evidence of steps taken by Mr Stevens to make enforcement more difficult, or if Mr Stevens defaults on the payments on account of costs I have ordered, it will be open to HPII to seek relief from the court to address the risk of dissipation, and to make an application to the Court of Appeal in relation to Mr Stevens' appeal.

v) I am not persuaded that it would be appropriate in this context to distinguish between the costs liability and the principal and interest liability. HPII will be able to move to execution of both.

vi) For these reasons, I am not persuaded that a compelling reason for imposing either of the disputed conditions has been made out.

80. There is no dispute that I should require Mr Stevens to provide HPII with security for its costs of the appeal. HPII seeks security in the sum of £150,000. Mr Stevens has suggested £120,000 is sufficient. I am satisfied that security in the sum of £150,000 is appropriate, particularly having regard to the fact that the appeal will now include ground 5, which was not "in play" when the estimates were produced. I am not willing to order that Mr Stevens must inform HPII of the source of the security, provided it is provided in a form reasonably acceptable to HPII. That would be an attempt to use the CPR 52.18 process as an adjunct to execution.

G THE POSITION OF MS RICHARDSON

81. The terms of the order so far as Ms Richardson are concerned are agreed, save for one issue: the time within which Mr Ruhan should be required to pay her costs. In correspondence, Mr Ruhan appears to have agreed a 14 day period, but it is his submission that he understood that this was subject to the argument he was raising at the hearing that he should be given 90 days to seek to arrive at a general proposal in relation to his liabilities arising from the litigation.

82. I am satisfied that these costs too should be paid within 28 days, for the reasons I have given, and because it will ensure that Ms Richardson and HPII stand in the same position. Subject to that amendment, I am content to make an order in the agreed terms.

H CONCLUSION

83. As I have stated, the time periods in this judgment will run from the date of hand-down. The parties are asked to draw up an order giving recording its terms.