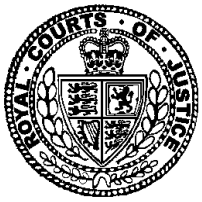

Neutral Citation Number: [2023] EWHC 364 (Ch)

Case No: CR-2017-003513

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

7 Rolls Building
Fetter Lane
London, EC4A 1NL

24 February 2023

Before:

MRS JUSTICE JOANNA SMITH DBE

Between :

(1) GREIG WILLIAM ALEXANDER MITCHELL
(2) KENNETH MELVIN KRYS
(JOINT LIQUIDATORS OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION)) **Applicants**

- and -

(1) SHEIKH MOHAMED BIN ISSA AL JABER
(2) MASHAEL MOHAMED AL JABER
(3) AMJAD SALFITI
(4) JJW HOTELS & RESORTS UK HOLDINGS LIMITED
(5) JJW LIMITED (REGISTERED IN GUERNSEY) (IN LIQUIDATION) **Respondents**

Mr J Curl KC (instructed by **Clyde & Co LLP**) for the **Applicants**
Miss C Stanley KC and Mr L Lucan-Wilson (instructed by **Baker & McKenzie LLP and Mishcon de Reya**) for the **First, Second and Fourth Respondents**

Hearing dates: 3, 4, 8 – 12, 15 February 2021, 26 July 2021, 21-22 September 2021, 20 September 2022 and 6, 7, 10 – 14 October 2022

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on Friday 24 February 2023 by circulation to the parties or their representatives by email and release to the National Archives

Mrs Justice Joanna Smith:

INTRODUCTION

1. The claims in this case are brought by the liquidators of a BVI company, MBI International & Partners Inc (in liquidation) ("**the Company**"), which has been in liquidation since 10 October 2011 ("**the Liquidation**"). They arise out of a series of alleged transactions and acts dating from between late 2008 and 2016, which it is said by the Applicants give rise to claims of breach of statutory and fiduciary duty, breach of trust and negligence against the directors of the Company, in respect of both the pre- and post-liquidation periods, together with claims of knowing receipt and unlawful means conspiracy against various of the Respondents.

2. It is an important feature of this case that the directors of the Company at all material times, the First Respondent ("**the Sheikh**") and his daughter the Second Respondent ("**Ms Al Jaber**"), remained in post pursuant to section 175 of the BVI Insolvency Act 2003 ("**The IA 2003**") after the date of the Liquidation.

3. The proceedings were commenced by an application issued in May 2019 by the Company's former liquidator ("**Ms Caulfield**"), pursuant to an order of ICC Judge Barber dated 10 June 2019 giving the English court's assistance further to a Letter of Request from the BVI Court dated 14 February 2019 ("**the Letter of Request**"). Jurisdiction for the proceedings followed an order made by Registrar Derrett on 9 June 2017 recognising (i) the liquidation as a foreign main proceeding in accordance with the UNCITRAL Model Law on Cross-Border Insolvency ("**the Model Law**") as set out in Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("**the CBIR 2006**"), and (ii) Ms Caulfield as foreign representative.

4. Under Article 21 of the Model Law, wide ranging relief may be granted to the foreign representative, who can apply to the English courts for relief in accordance with the powers exercisable by insolvency practitioners in English insolvency proceedings. The Letter of Request was made under reciprocal arrangements between England and the BVI embodied in this jurisdiction in section 426 of the Insolvency Act 1986 ("**the IA 1986**"). Section 426 of the IA 1986 permits and the Letter of Request requests, this court to apply, to the extent necessary, the law of the BVI and/or of England and Wales to the current proceedings.

5. On 28 July 2017, Ms Caulfield signed a witness statement in support of applications for orders pursuant to Article 21 of Schedule 1 to the CBIR 2006 that (amongst others) the Sheikh and Ms Al Jaber (i) attend at court to be examined on oath pursuant to s.236 IA 1986 as to the dealings and affairs of the Company ("**the s.236 Examinations**"); and (ii) produce all books, papers and records in their custody or control relating to the dealings and affairs of the Company. The Sheikh and Ms Al Jaber attended private examinations on oath in 2018 (in the case of the Sheikh, there were two s.236 Examinations, one in April 2018 and one in November 2018). The Sheikh also produced three witness statements dated 4 May 2018, 17 May 2018 and 1 November 2018.

6. On 8 July 2019, Ms Caulfield was replaced as liquidator by Greig Mitchell ("**Mr Mitchell**") and Kenneth Krys ("**Mr Krys**") (together "**the Liquidators"**), pursuant to an order of the Eastern Caribbean Supreme Court.

7. As at the date of trial, the Third Respondent ("**Mr Salfiti**"), former in-house legal counsel of a group of companies controlled by the Sheikh, was no longer a party to the proceedings, the Liquidators having entered into a settlement agreement with him pursuant to a Consent Order dated 27 August 2020.

8. The Fourth Respondent ("**JJW UK**") is a UK-registered company incorporated on 17 June 2016.

9. The First, Second and Fourth Respondents will be referred to together herein as "**the MBI Respondents**". It is their case that JJW UK is owned and controlled by the Sheikh's children.

10. The Fifth Respondent ("**JJW Guernsey**" but often called JJW Limited in the contemporaneous documents) was placed into compulsory liquidation in Guernsey on 31 July 2020. It was not represented at the trial.

PROCEDURAL HISTORY

11. This action has had something of a chequered history.

12. The trial listed with a time estimate of 10 days was due to commence in a 5 day window starting on 1 February 2021. The first court sitting day was 4 February and thereafter the trial proceeded to timetable, with the Liquidators calling their witness evidence, until the day on which the Sheikh was due to give evidence. On the morning of that day (9 February 2021), a list of corrections ("**the List of Corrections**") to the Sheikh's four witness statements was served, prompting an application from the Liquidators to amend their Re-Amended Points of Claim. The List of Corrections was subsequently followed up by service on 15 February 2021 of the fifth witness statement of the Sheikh.

13. The court dealt with the Liquidators' amendment application over the course of several days, delivering a judgment on 12 February 2021. On the same day, the court heard evidence from the expert witnesses in BVI law.

14. Further proposed (revised) amendments were produced by the Liquidators on 15 February 2021 and in circumstances more fully set out in my judgment permitting those amendments ([2021] EWHC 912 (Ch)), the trial was then adjourned and the Court of Appeal subsequently ruled on one aspect of the amendments ([2021] EWCA Civ 1190). A final Re-Re-Amended Points of Claim ("**the PoC**") was served by the Liquidators further to the Court of Appeal's decision.

15. The trial was listed to resume on 26 July 2021. The court heard witness evidence from Mr Zahy Deen for the MBI Respondents, but thereafter the trial was adjourned again for a period of four weeks owing to (as it appeared at the time) the temporary ill health of the Sheikh (see [2021] EWHC 2130). Unfortunately, however, when the matter came back to court on 21 September 2021 a last minute application was made again for an adjournment and, following further investigation overnight, it transpired that the Sheikh was seriously ill and had been taken to hospital. I adjourned the trial again (see [2021] EWHC 2572 (ChD)), making an order on 22 September 2022 setting out a regime for the instruction of a joint UK medical expert to provide a report addressing issues identified in the order and (at the request of the MBI Respondents, consented to by the Liquidators)

setting up a confidentiality club to ensure privacy in respect of the details of the Sheikh's medical condition. A detailed medical report was subsequently produced in November 2021.

16. The trial was re-listed for May 2022, but, in light of the content of the medical report, the parties agreed that this date was unrealistic and the trial was adjourned again by consent, as recorded in an order dated 13 June 2022. It was re-listed for October 2022 with a PTR due to take place on 20 September 2022. At the PTR the court was provided with an updated medical report and a further application was made to adjourn the trial, which, in circumstances where I could see no prospect on the evidence of the Sheikh ever being well enough to give evidence at trial, I refused ("**the PTR Decision**"). I also refused an application for permission to appeal from that decision.

17. Against that background, the trial resumed on 6 October 2022 and the MBI Respondents closed their case by (amongst other things) formally inviting me to admit the Sheikh's witness statements into evidence and indicating that they did not intend to call any further oral evidence. It remained only for the parties to make their closing submissions over the course of the next 7 days (a period of time upon which both parties agreed given the complexity of the legal arguments in this case).

18. Before closing submissions, I sought to explore whether any appeal against the PTR Decision had been lodged and, if so, what, if any, implications that might have on the continuation of the trial. It transpired (as recorded in my ruling of 7 October 2022), that an appeal had only been filed on 4 October 2022, that a request had been made to expedite the appeal, but that (inexplicably, to my mind) the Court of Appeal had not been informed of the imminent resumption of the trial and the Liquidators had not been informed that an appeal had been filed. As explained in more detail in my ruling, I was very concerned by this state of affairs and sought submissions from the parties as to how the court should proceed in such circumstances. Ultimately, neither party sought an adjournment and, for the reasons explained in my ruling, I determined that the proper course was to continue with the trial.

19. Upon the conclusion of closing submissions, the MBI Respondents invited me to postpone work on this judgment pending a decision from the Court of Appeal on their application for permission to appeal the PTR Decision and both parties agreed to provide me with further additional documents which would be of assistance in preparing the judgment, including an agreed chronology, a revised list of issues and a "route map" through the numerous authorities on which the parties relied, which ultimately ran to well over 150. These documents were subsequently provided on 16 November 2022.

20. On 26 October 2022, the Court of Appeal heard the MBI Respondents' application for permission to appeal the PTR Decision and refused permission ([2022] EWCA Civ 1454).

THE BACKGROUND TO THE CLAIMS

21. The claims involve complex corporate structures and disputed transactions, together with non-admissions (on both sides) as to the authenticity of various key documents about which I shall have to make findings of fact in due course.

22. Owing to the fact that many of the companies with which I am concerned have very similar names, and so as to avoid confusion, I attach to this judgment at Appendix A an agreed glossary of the main companies featuring in these proceedings together with agreed definitions which I have used in this judgment. I note, however, that the contemporaneous documents are not always consistent in the abbreviations they use to describe these differing companies and that the pleadings also use different definitions.

23. In light of the substantial dispute of fact between the parties, I do not intend in this section to set out any substantial detail around the disputed transactions, which I shall do in the context of considering the evidence in due course. For present purposes, however, I set out below undisputed facts concerning the identity of the MBI Respondents together with a history of the Liquidation as gleaned from the available contemporaneous documents. Save where I have stated otherwise, there are no issues between the parties as to the authenticity of any of the documents referred to in this section.

The Company and its Directors

24. The Company was incorporated under the laws of the British Virgin Islands ("**BVI**") on 24 July 1990 under the name JJI International Inc and was allocated company number 32692. As at 10 December 2020, its registered office was CITCO BVI Ltd ("**CITCO**"). On 21 March 1995 it was re-named MBI International Inc. On 2 January 2004, it was re-named MBI International & Partners Inc. The Company was re-registered as a business company under the provisions of the BVI Business Companies Act 2004 ("**the BCA 2004**").

25. The Sheikh is an international businessman and the founder and Chairman of a large number of companies operating in the commercial property, finance, hospitality and food industries. Since 1 June 2001, he has been a *de jure* director and the sole shareholder in the Company, which is one of a global network of companies which the Liquidators allege to be under his ownership and control and refer to as "**the MBI Group**". There is a dispute between the parties as to the precise structure of this group from time to time, but I note that in his first s.236 Examination, the Sheikh gave evidence that MBI is an acronym for his own name, Mohamed Bin Issa, and that this explains the name of the MBI Group. I shall adopt this definition of the Sheikh's network of companies as and when appropriate.

26. Ms Al Jaber was (according to the Register of Directors of the Company dated 16 July 2008) the only other director of the Company from 18 May 2006. She is not a shareholder in the Company. She is, or has been, the *de jure* director of a number of companies in the MBI Group.

The Fourth Respondent

27. JJW UK (incorporated on 17 June 2016, as referred to above) is wholly owned by MBI International Group UK Holdings Limited ("**MBI UK**"), another UK-registered company also incorporated on 17 June 2016. The Sheikh was a director of JJW UK from 6 May 2021 until 29 April 2022 and a director of MBI UK from 17 June 2016 until 2 March 2017. Ms Al Jaber was a director of JJW UK from 2 March 2017 to 6 September 2021 and of MBI UK from 7 October 2019 to 29 April 2022. At all times until 29 April 2022, the Sheikh was registered as a "person with significant control" of MBI UK, which appears to be within the MBI Group.

28. The most recent filed accounts of JJW UK for the year ended 31 December 2019, as approved by its Board on 30 September 2020, show that it has cash at bank of some £2 billion.

The Fifth Respondent

29. JJW Guernsey is a Guernsey registered company incorporated on 1 September 1992. The Sheikh and Ms Al Jaber were *de jure* directors. According to its share register, two shares were issued upon its incorporation. On 15 September 1992, one of these shares was transferred to the Sheikh and the other to Mr Francisco Fuentes Cano. On 31 August 1993, further to a board meeting of JJW Guernsey, a further 98 shares were issued, all in favour of the Sheikh. On 27 May 1994, Mr Cano transferred his one share to Khalid Bin Issa Al Jaber, a relative of the Sheikh. On 27 May 2004, Khalid Bin Issa Al Jaber transferred this one share to the Company.

30. Thus, according to JJW Guernsey's share register, the Company became a minority shareholder in JJW Guernsey on 27 May 2004, holding one share, whilst the Sheikh held the remaining 99 shares. I pause to observe that whilst this is reflected in the documents, it is not the Liquidators' case in these proceedings. The Liquidators contend (by reference to a disputed document) that the Company wholly owned JJW Guernsey until around January 2009.

The IPO

31. In around 2007, the Sheikh instructed White & Case to advise on a potential restructuring of various entities owned or controlled by the Sheikh (also described in the MBI Respondents' evidence as the "**MBI Companies**"). This restructuring was to involve a public offering of shares ("**the IPO**") in a BVI company called JJW Hotels & Resorts Holding Inc ("**JJW Inc**") together with a major bond issue by JJW Inc. JP Morgan appears to have been involved in providing advice on the proposed IPO, together (possibly) with Merrill Lynch.

32. The plan for the IPO was to combine all of the MBI Companies' hospitality operations under JJW Inc. It was intended to fund various major development and acquisition projects. The choice of the BVI for the IPO does not appear to have been unusual at the time.

JJW Hotels and Resorts Holding Inc ("JJW Inc")

33. JJW Inc was incorporated on 9 September 2008 in the context of the IPO with an authorised share capital of 100 million shares. As at 10 December 2020, its registered agent was Maples Corporate Services (BVI) Ltd ("**Maples BVI**").

34. The Sheikh was the sole director of JJW Inc until 23 December 2016. Thereafter, MBI International Holdings Inc ("**MBI International Holdings**") was the sole director of JJW Inc until 6 February 2018, at which point MBI International Holding Group Inc ("**MBI International Holding Group**") took over as sole director. The Sheikh was the majority shareholder of JJW Inc (holding 88.8% of the shares) at all material times until 23 December 2011, when those shares were transferred to MBI International Holdings. The remaining 11.2% of the shares in JJW Inc are of considerable importance in the context of these proceedings.

35. The MBI Respondents disclosed the Consolidated Financial Statements for JJW Inc as at 31 December 2016 on 3 February 2021, just before the commencement of the trial ("**the 2016 JJW Inc Accounts**"). The independent audit report dated 15 May 2017 and provided by Ernst & Young Egypt is addressed directly to the Sheikh. The Consolidated Balance Sheet (which includes figures for JJW Inc and numerous other companies in Europe which, according to Note 1, appear to be owned by MBI International Holdings) shows assets of €1,457,259,000 and surplus shareholders' funds (described by Ernst & Young as "Total owner's equity") of €681,876,000. The ultimate owner is identified in the Notes as MBI International Holdings, which it is clear from Note 10 has introduced close to €600,000,000 into JJW Inc, albeit without interest or any repayment terms.

The 2009 Share Transactions

36. In the Autumn of 2008, there is evidence in the form of an email chain between lawyers acting for the Sheikh (dated from 14 November 2008 to 8 January 2009) that discussions were taking place in respect of the transfer of the Company's stake in JJW Portugal SA ("**JJW Portugal**"), a stake of 25.99% of the total share capital of JJW Portugal valued at "1,559,990?" (Euros, it is assumed), together with a debt owed by JJW Portugal in the sum of "3,350,015.94?", to JJW Inc in exchange for new shares in JJW Inc ("[the Company] will contribute both its stake in JJW Portugal and its receivable in JJW Portugal to [JJW Inc] i.e. a total amount of 4,910,005.94? in exchange for new shares"). An email of 23 December 2008 indicates an intention that JJW Guernsey, the Sheikh and JJA Beteiligungsverwaltungs GmbH ("**JJAB**"), an Austrian entity, would each contribute existing stakes in Erste Wiener Hotel AG ("**Erste**"), another Austrian entity) to JJW Inc in return for (respectively) stakes in JJW Inc worth 567,755,628.98, 11,812,054.46 and 32,420,534.56 (Euros it is again assumed). As confirmed in an email of 6 January 2009, the number of shares to be issued to JJW Guernsey, the Sheikh and JJAB would be 567,556, 118,120 and 324,205 respectively. Draft subscription letters were prepared by Maples and Calder ("**Maples**").

37. An email of 8 January 2009 from White & Case to Maples confirms that draft documents provided "are fine" and that White & Case is meeting with the Sheikh that afternoon such that he will be able to "sign those of the attached documents of which he is a signatory". White & Case note that it would be very helpful if "the exact same documentation" could be prepared for "the contribution of 99 shares by [the Sheikh] and 1 share by [the Company] in [JJW Guernsey]", albeit that White & Case says that it does not yet have the valuation of the transfers and asks for documents "with blanks for the number of shares to be issued and the valuation of the transferred shares".

38. By a letter signed by the Sheikh and dated 8 January 2009, the Company applied for 80,000 shares in JJW Inc at a cost of €100 per share, a total of €8,000,000 consideration, "payable by transfer to [JJW Inc] of 1 share in [JJW Guernsey]…". According to the Register of Members of JJW Inc ("**the JJW Inc Register**"), these 80,000 shares were issued to the Company under Certificate Number 3, together with a further 49,100 shares, also issued to the Company under Certificate Number 7, on the same date. The Share Register for JJW Guernsey ("**the JJW Guernsey Register**") records the transfer away from the Company of one share in JJW Guernsey to JJW Inc on 8 January 2009.

39. Accordingly the Company owned 129,100 shares in JJW Inc from 8 January 2009 ("**the 129K Shares**").

40. Also on 8 January 2009, the Sheikh himself applied for 7,920,000 shares in JJW Inc for the total consideration of €792,000,000 payable by transfer to JJW Inc of 99 shares in JJW Guernsey. The JJW Inc Register shows that these 7,920,000 shares were issued to the Sheikh under Certificate number 2, together with a further 118,120 shares, also issued to the Sheikh under Certificate Number 5 on the same date. The JJW Guernsey Register records the transfer away from the Sheikh to JJW Inc of 99 shares in JJW Guernsey on 8 January 2009. Accordingly, the Sheikh owned 8,038,120 shares in JJW Inc from 8 January 2009.

41. The minutes of a Board meeting of JJW Guernsey held on 8 January 2009 at 6pm ("**the January 2009 Minutes**"), at which the Sheikh and Ms Al Jaber acting as directors are recorded as being present, record their approval of the transfer of shares in JJW Guernsey to JJW Inc. The background to the transfer is set out in the following terms:

> "3.1 The Chairman explained that [the Sheikh] owned 99 ordinary shares in [JJW Guernsey] and [the Company] owned 1 share in [JJW Guernsey] and that together these constituted the entire issued share capital of [JJW Guernsey].
>
> 3.2 The Chairman explained that [the Sheikh] and [the Company] (together the "**Sellers**") wished to sell their entire holdings in [JJW Guernsey] to [JJW Inc] (the "**Buyer**") in exchange for shares in [JJW Inc] equal in value to their respective holdings of shares in JJW Guernsey (the "**JJW Share Exchange**").
>
> 3.3 It was further noted that the Company wished to transfer to [JJW Inc] shares that it owns in [Erste] in exchange for shares in [JJW Inc] ("**the Erste Share Exchange**")"

42. The January 2009 Minutes evidence a resolution that the secretary of JJW Guernsey be instructed to make the necessary entries in the register and records of JJW Guernsey to reflect the JJW Share Exchange and to issue a single share certificate to JJW Inc in respect of the shares in JJW Guernsey that were being transferred under the JJW Share Exchange. The effect of the JJW Share Exchange appears to have been to transfer ownership of all the issued shares in JJW Guernsey to JJW Inc.

43. The January 2009 Minutes also evidence a resolution to approve the Erste Share Exchange, pursuant to which JJW Guernsey transferred shares in Erste to JJW Inc in exchange for 56,556 shares of €100 each in JJW Inc.

44. The minutes of a second board meeting of the JJW Guernsey Board held on 8 January 2009 at 8pm record that the purpose of the meeting was to consider and, if appropriate, approve the application for one share in JJW Guernsey by the Sheikh. This was approved and explains the fact that the JJW Guernsey Register evidences that one additional ordinary share in JJW Guernsey was issued to the Sheikh on 8 January 2009, although the reasons for this remain unclear.

45. The documents from 8 January 2009 to which I have referred are not challenged. In summary, they evidence that on that day:

i) The Company's 1 share in JJW Guernsey was exchanged for 80,000 shares in JJW inc;

ii) The Sheikh's 99 shares in JJW Guernsey were exchanged for 7,920,000 shares in JJW Inc;

iii) JJW Guernsey's shares in Erste were exchanged for 567,556 shares in JJW Inc; and

iv) JJW Inc held 100 of JJW Guernsey's 101 issued shares, with the Sheikh holding the minority shareholding of 1 share in JJW Guernsey.

46. The minutes of a Board meeting of JJW Guernsey held on 18 March 2009 ("**the 18 March 2009 Minutes**"), at which the Sheikh and Ms Al Jaber acting as directors are recorded as being present, record a resolution approving the transfer of 567,556 held by JJW Guernsey in JJW Inc to the Company for consideration of €56,755,600 "to be paid on demand by [the Company] to [JJW Guernsey] in such way that is mutually agreed by the [Company] and [JJW Guernsey]…".

47. Pursuant to a transfer agreement dated 18 March 2009 ("**the JJW Guernsey Transfer**") 567,556 shares in JJW Inc were transferred from JJW Guernsey to the Company in consideration for €56,755,000. Pursuant to a similar transfer agreement of the same date ("**the JJAB Transfer**") 324,205 shares in JJW Inc were transferred from JJAB to the Company in consideration for €32,420,500. The authenticity of these transfer agreements (to which I shall refer collectively as "**the March 2009 Transfers**") was originally, but is not now, in dispute. I note that the JJW Guernsey Transfer is explicitly referred to in the 18 March 2009 Minutes which have themselves never been disputed.

48. The legal effect of the March 2009 Transfers is in dispute, in particular, whether they were effective to transfer unconditional legal and beneficial title to the shares or whether they operated only to transfer bare title, the beneficial title continuing to vest in JJAB and JJW Guernsey respectively. However, subject to that dispute, the combined effect of the March 2009 Transfers was to transfer 891,761 shares in JJW Inc ("**the 891K Shares**") to the Company, a transfer which was registered on 18 March 2009, as evidenced by Share Certificates numbered 8 and 9 (for 567,556 shares and 324,205 shares respectively). Taken together with the 129K Shares, the Company was, from 18 March 2009, the registered holder of 1,020,873 shares in JJW Inc ("**the JJW Inc Shares**"), which amounted to 11.2% of the total issued shares in JJW Inc.

49. The minutes of a Board meeting of JJW Guernsey held on 27 March 2009 ("**the 27 March 2009 Minutes**"), at which the Sheikh and Ms Al Jaber acting as directors are recorded as being present, record a resolution to approve the transfer of the Sheikh's one ordinary share of £1 in JJW Guernsey (issued to him on 8 January 2009) to JJW Inc. The minutes record that JJW Guernsey has issued share capital of £101 divided into 101 ordinary shares. As at this date, the entirety of this issued share capital was in the hands of JJW Inc.

50. The evidence includes two Demand Letters from JJW Guernsey and JJAB dated 22 December 2009 ("**the Demand Letters**") seeking payment (respectively of €56,755,600 and €32,420,500 plus interest), by 18 February 2010, from the Company, which sums are said to be "due by way of consideration for the shares transferred to you", i.e. the 891K Shares. Both Demand Letters are signed by the Sheikh and refer to the fact that the shares have been "conditionally transferred", one of the letters says that the "beneficial ownership" of the shares has been conditionally transferred. The Liquidators require the

MBI Respondents to prove these Demand Letters and I shall return to them in more detail in due course.

51. The Liquidators also require the MBI Respondents to prove a letter dated 30 June 2010 signed by the Sheikh ("**the June 2010 Letter**") from the Company to JJW Guernsey in the following terms:

> "We write this letter with reference to the Demand letters dated 22nd December 2009 according to which you demanded the purchase price of the transferred shares in the amounts of €56,755,600 and €32,420,500 plus interest representative of both transfers.
>
> However, as the IPO of [JJW Inc] is no longer proceeding as planned and as the same was to be the only source of payment for the outstanding share purchase, we hereby inform you that the shares will be transferred back to [JJW Guernsey] with immediate effect.
>
> Finally, please note the Share Certificates are enclosed for you to kindly carry out the necessary reversal of ownership".

52. There is no equivalent letter to JJAB, but the Demand Letter from JJAB asserts that beneficial interest in the shares transferred by that company "has now reverted to JJW Ltd[1] being the originating shareholder".

53. It is the MBI Respondents' case that share certificates to effect the return of the 891K Shares were included with the June 2010 Letter and that the Company, acting by the Sheikh, executed stock transfer forms ("**the Share Transfer Forms**") on 6 July 2010 transferring the 891K Shares in JJW Inc to JJW Guernsey. There is no evidence of any signed instruments of transfer from this date and it is common ground that JJW Guernsey was not in fact entered onto the JJW Inc Register as owner of the 891K Shares until 8 March 2016.

The 2010 Proceedings

54. In proceedings in England commenced in the commercial court in 2010 by Standard Bank Plc against the Sheikh ("**the 2010 Proceedings**"), a freezing order was obtained on 16 August 2010 in respect of the Sheikh's assets. In an affidavit sworn on 29 July 2011 ("**the Sheikh's 2011 Affidavit**"), the Sheikh provided evidence of his assets (including by reference to a Schedule of Assets exhibited at SMAJ-4). Very little of the evidence that was available to the court in the 2010 Proceedings is available to the court in this trial. However, in addition to the Sheikh's 2011 Affidavit and its exhibit, I was referred by both sides to the judgment of Burton J following the substantive trial of the action (*Standard Bank PLC v Sheikh Mohamed Bin Issa Al Jaber* [2011] EWHC 2866 (Comm)) which recorded evidence to the effect that the Company's total assets were US$4 billion and that it had a net annual income of US$301 million.

55. The Company was wound up on 10 October 2011 pursuant to an application made on 22 July 2011 by Unicredit Bank Austria AG ("**Unicredit**"), which relied on the existence of a debt owed to it by the Company of €4,340,965.10. The application was supported by Immoconsult Ares Leasinggesellschaft mbH ("**Immoconsult**") which asserted a claim

[1] i.e. JJW Guernsey.

(at that time) of €6,321,838 based on a guarantee subject to the laws of Austria, given by the Company on behalf of JJW Hotel Im Palais Schwarzenberg betriebsgmbH ("**JJW Austria**") in respect of a lease of hotel premises in Vienna. The Company did not appear at the hearing of the application on 10 October 2011.

56. The Sheikh's evidence (given in support of a subsequent application to terminate the Liquidation ("**the Termination Application**")) is that the Unicredit debt was in fact discharged in August 2011 and that there was no debt owing to Immoconsult.

57. By order of the Eastern Caribbean Supreme Court, David Kinnon ("**Mr Kinnon**") of RHSW (BVI) Limited was appointed liquidator of the Company on 11 October 2011.

58. On 13 October 2011, Mr Kinnon wrote to CITCO enclosing a copy of the winding up order and saying this:

> "Please note that in accordance with section 175 of the [BVI IA 2003], the Liquidator has custody and control of the assets of the Company from the commencement of the Liquidation, and the directors and officers of the Company remain in office but cease to have any powers functions or duties other than those required or permitted under the Act or authorised by the Liquidator. For the avoidance of doubt no authority granted by the Liquidator presently exists and I therefore ask that until further notice the registered agent desists from taking instructions from the directors or otherwise acting in accordance with their wishes".

59. Mr Kinnon listed various documents which he required by return including the register of members, the register of directors, the register of charges, minutes of meetings and the Company's most up to date financial statements of management accounts.

60. On 27 October 2011, Immoconsult submitted a claim in the Liquidation for €6,548,038.06.

61. On 21 November 2011, Mr Kinnon wrote to the Sheikh asking for information about the Company, including the preparation of a Statement of Affairs.

62. Mr Kinnon provided his first report to creditors on 9 December 2011 identifying that he had not yet received a Statement of Affairs from the directors and pointing out the difficulties he had already encountered in obtaining information which ought reasonably to be at hand from the Sheikh. It is clear from this report that the Sheikh had instructed Mr Kissock Laing ("**Mr Laing**"), a partner at Harneys, a law firm in the BVI, to advise him in connection with the Liquidation. Mr Kinnon records that he has already had two meetings with Mr Laing at which he had expressed his frustration at the unsatisfactory level of response from the directors of the Company.

63. On 23 December 2011 (as recorded in the JJW Inc Register), MBI International Holdings Inc ("**MBI International Holdings**") was registered as shareholder of 8,038,120 shares in JJW Inc. These shares, which had prior to this date been owned by the Sheikh, were transferred to MBI International Holdings by the Sheikh apparently pursuant to a resolution of JJW Inc. A copy of this Resolution ("**the December 2011 Resolution**"), in an almost illegible form, was available at the trial albeit that it was (originally) challenged as a document by the MBI Respondents. They no longer maintain that challenge in circumstances to which I shall return in due course.

64. On 27 February 2012, Mr Kinnon emailed Mr Falak Yussouf ("**Mr Yussouf**"), the chief financial officer of MBI & Partners UK (described by himself in his s.236 Examination as CFO of the MBI Group), (copying in Mr Laing), referring to a meeting that had taken place in December 2011 and setting out the information that remained outstanding in relation to the Company. This included the Statement of Affairs. By this stage it appears that Mr Kinnon was aware that an application to release the Company from liquidation was to be made, because he points out that the information will be required for use in the preparation of that application. Mr Kinnon chased up the outstanding information in a further email dated 7 August 2012 to Mr Yussouf (again copied to Mr Laing).

65. By way of an email dated 20 September 2012, from Mr Yussouf to Mr Kinnon, Mr Yussouf referred to his "direct instruction from [the Sheikh]", pointing out that the Sheikh was not happy with the delay in lodging the Termination Application with the BVI Court.

66. By letter dated 13 April 2013, Immoconsult amended its claim in the Liquidation to €52,320,124.74.

The Termination Application

67. On 10 October 2013, the Sheikh made the Termination Application to the Eastern Caribbean Supreme Court for an order that the liquidation be terminated. Two affidavits were filed in support; an affidavit sworn by the Sheikh dated 10 October 2013 ("**the Sheikh's 2013 Affidavit**") and an affidavit sworn by Mr Yussouf dated 28 October 2013. Mr Kinnon, as an officer of the court, was neutral.

68. The Sheikh blamed an "administrative oversight" for the fact that the application by Unicredit had not been brought to his attention and, amongst other things, the Sheikh swore that the Company "is strong and solvent". The effect of his evidence (taken together with a correction made by Mr Yussouf in his affidavit) was that at the date of entry into Liquidation, the Company was a minority shareholder in JJW Guernsey, through its 11% shareholding in JJW Inc, the 100% shareholder in JJW Guernsey. JJW Inc was described by the Sheikh as "the holding company of a number of companies in the organizational structure of my network of companies". Mr Yussouf also confirmed in his affidavit that "[t]he Company is an 11% shareholder in [JJW Inc] and [the Sheikh] is the 89% shareholder". The Sheikh undertook to meet the costs of the Liquidation to the date of the application and to ring fence the assets in liquidation for the benefit of the creditors in the event that their claims were valid for a period of 3 years after termination of the Liquidation.

69. In a letter dated 21 October 2013 to Mr Yussouf, Mr Kinnon recorded his understanding of the asset position of the Company in the following terms:

> "The sole asset of the Company is its minority shareholding in JJW Limited[2] of which Sheikh Mohamed holds the remaining majority shareholding. The

[2] In light of the content of Mr Kinnon's report to creditors on 30 October 2013, this appears to be a reference to JJW Guernsey and thus a misunderstanding of the factual position as set out in the Sheikh's 2013 Affidavit and in the affidavit of Mr Yussouf.

> value of that asset is in excess of the total amount of claims in the liquidation…"

70. On 30 October 2013, the Eastern Caribbean Supreme Court dismissed the Termination Application. The Honourable Justice Edward Bannister QC ("**Judge Bannister**") recorded in his judgment that the Unicredit debt had not been settled, that Mr Kinnon had admitted Immoconsult's claim (which was subject to litigation in the Austrian courts) for a nominal US$1 only and that he had declined to admit a further claim from Galeana Telecommunications Investment Inc ("**Galeana**"). He went on to say that Mr Kinnon estimated the value of the Company's assets "at variously 150 million United States dollars and separately 100 million United States dollars" based on the director's estimate of the value of the hotel group as a whole, but unsupported by any audited financial statements or professional valuation. However, Judge Bannister expressed the view that each of Immoconsult and Galeana had made out good *prima facie* claims, that the Company had been put into insolvent liquidation on the basis of an unsatisfied and valid claim by an admitted creditor and that, in the circumstances, there were no valid grounds for acceding to the application.

71. For the sake of completeness I observe that any evidence from Mr Kinnon as to the value of the Company that may have been available to the court at the hearing before Judge Bannister and any evidence as to how that valuation was arrived at has not been made available to this court. However, it is clear from the proposed grounds of appeal dated 13 November 2013 that Mr Kinnon had provided evidence of value in the sum of £100,000,000 (or US$ 160,000,000) and that he had confirmed that "the Company was not therefore insolvent at the date of entry into liquidation".

72. In a second report to creditors dated 30 October 2013, Mr Kinnon set out his views on the status of the Liquidation up to the date of dismissal of the Termination Application. Amongst other things, he recorded that he had still not received a signed Statement of Affairs from the directors of the Company but he set out the results of his research to date. I shall return to this in more detail later in this judgment, but for present purposes I note that he says this about the asset position of the Company:

> "The Company's sole asset comprises its investment in the entire issued share capital of JJW Hotels and Resorts Inc (i.e. JJW Inc) which in turn owns 1,020,873 shares in JJW Limited (i.e. JJW Guernsey), representing 11.2% of JJW Limited's entire issued share capital."

73. I infer from this that while Mr Kinnon clearly understood that the Company owned shares in another company, he had misunderstood the detail. In fact, the evidence of both the Sheikh and Mr Yussouf in their affidavits was that the Company had an 11.2% shareholding in JJW Inc, which was in turn the 100% owner of JJW Guernsey. Mr Kinnon valued the Company by reference to its supposed 11.2% interest in JJW Guernsey in the sum of US$ 167.9 million, i.e. more than the US$ 139,844,415 nominal total he applied to the claims from creditors. By this time, the Unicredit claim had been "settled in full under a settlement agreement to which the Liquidator was not party and in whose negotiation the Liquidator took no part" (Mr Kinnon later records that this was further to the engagement by the Sheikh of legal advisers to negotiate settlement, presumably with the consent of Mr Kinnon.) The remaining claims came from Immoconsult and Galeana. Mr Kinnon advised creditors that "Self-evidently, no final adjudication of creditor claims and no distribution of amounts realised whether by sale of the Company's sole asset or

whether by contribution from the Company's ultimate beneficial owner will be made until the ultimate resolution of each creditor's claim". However it was his view that the Company was "robustly solvent".

74. It is noteworthy that in his second report to creditors, Mr Kinnon referred to the two meetings he had had with Mr Laing in the early stages of the Liquidation and went on to say that he had "had infrequent meetings with him since then".

75. In a proof of claim dated 5 November 2013, Galeana submitted an amended claim in the sum of US$67.9 million.

76. On 13 November 2013, Mr Laing drafted appeal documents in respect of the decision of Judge Bannister.

Events in 2014, 2015 and early 2016

77. By an order of the Eastern Caribbean Supreme Court dated 28 March 2014, Mr Kinnon was removed as liquidator and replaced by Ms Caulfield, a managing director of Krys & Associates (BVI) Ltd trading as ("**Krys Global**"), from 31 March 2014. The Notes to a draft Statement of Affairs originally prepared by Ms Caulfield and her team suggest that the claims from Galeana and Immoconsult were rejected for dividend purposes by Ms Caulfield on 31 March 2014.

78. Also on 31 March 2014, Mr Kinnon emailed Ms Caulfield (attaching his second report to creditors) saying that he would send a pack of materials over to her. Mr Kinnon explained that Mr Yussouf, Mr Salfiti and Dr Christoph Kerres ("**Dr Kerres**") (a legal adviser in Austria holding power of attorney on the liquidator's behalf in relation to matters in Austria) had arrived the previous day to take part in discussions with Ms Caulfield.

79. Ms Caulfield met with Mr Kinnon and her lawyers on 2 April 2014, before meeting with (amongst others) Mr Yussouf, Mr Salfiti and Dr Kerres.

80. On 29 April 2014, the Sheikh was granted leave to appeal the decision of Judge Bannister.

81. Thereafter a formal notice of appeal was prepared dated 19 May 2014. By this stage, Harneys had been replaced by Sabals as the Sheikh's legal representatives. Submissions in support of the appeal were prepared on the Sheikh's behalf by John Carrington KC in September 2014. They recorded (amongst other things) that (i) "[the Company's] business prior to the commencement of liquidation was to provide management and commercial services to associated companies and it held 11% of the shares of a holding company"; (ii) the Company was substantially solvent even if the claims of Immoconsult and Galeana were admitted in full (the claim by Unicredit having been settled after the commencement of the Liquidation); (iii) there was no cogent evidence of a risk of dissipation of assets and (iv) the Sheikh had offered in evidence to retain assets in the Company for a period of 3 years to meet the Immoconsult and Galeana claims.

82. In a letter dated 23 June 2014 to the Sheikh, Ms Caulfield sought to protect the Company's assets (apparently believing these to be a shareholding in JJW Guernsey):

> "The sole asset of the Company is its shareholding in [JJW Guernsey]…the holding company for a portfolio of real estate and hotel property investments.

> It is my understanding that you are the ultimate beneficial owner of [JJW Guernsey].
>
> In order to protect the interests of the creditors in the liquidation of the Company, I am entitled to register my interest in the Register of Shareholders of [JJW Guernsey] and to formally inhibit any sale of the assets of [JJW Guernsey] where such a sale would be to the detriment of the creditors of the Company. However, as an alternative, and as discussed with Mr Salfiti of your office, I am prepared to accept an undertaking from the directors of [JJW Guernsey], as a duly certified resolution of the board, in the terms of the attached draft".

There is no evidence of any response having been received to this letter.

83. In a letter dated 1 July 2014, Ms Caulfield provided formal notification to the Sheikh of his obligation "as a former officer of the Company to submit a Statement of Affairs of the Company". Ms Caulfield attached the relevant form which she said she had completed with the information available to her. She asked the Sheikh to make any amendments he saw fit and to return the form by 14 July 2014. From the attached draft Statement of Affairs it is clear that Ms Caulfield has a similar misunderstanding as to detail as that held by Mr Kinnon on 30 October 2013; she records in the draft that the Company had a 100% shareholding in JJW Inc which she values at US$ 134,219,910. She explains in the attached Notes that JJW Inc owned an 11.2% shareholding in JJW Guernsey and that the asset value had been calculated by reference to an 11.2% share in JJW Guernsey having regard to the audited financial statements of that company for the year ended 31 December 2012 and an exchange rate as at 13 October 2011 (i.e. apparently the same approach to valuation as had been adopted by Mr Kinnon).

84. By an email dated 16 July 2014, Ms Sarah Duncan of Krys Global ("**Ms Duncan**") forwarded to Messrs Salfiti and Yussouf Ms Caulfield's letter of 1 July 2016 together with its attachments. Ms Duncan pointed out that completion of the Statement of Affairs was a "statutory requirement and therefore mandatory" and said that "for ease, I have completed the form as per the date of the winding up". She requested that the form be amended as necessary, signed by the Sheikh, and returned by 31 July 2014.

85. Following a discussion between Ms Caulfield and Mr Yussouf, a further draft Statement of Affairs was prepared and provided by Mr Yussouf under cover of an email to Ms Caulfield dated 1 August 2014. Amendments had been made to the draft Statement of Affairs so as to reflect an 11% shareholding in JJW Inc (as opposed to a 100% shareholding) and a value of that shareholding of US$ 134,219,910. No creditors other than Unicredit, Immoconsult, Galeana and JJW Inc (for a debt of US$ 10 million) were identified. The claims of Immoconsult and Galeana continued to be identified as "disputed". The estimated total surplus was now put at US$ 116,317,296. The Notes to the Statement of Affairs had been amended in respect of the valuation. They now stated that "[JJW Inc] owns a 100% shareholding in [JJW Guernsey] and [the Company] owns 11.2% of [JJW Inc]". The value of this 11.2% shareholding is amended, but continues to be calculated having regard to the audited financial statements of JJW Guernsey albeit at as 31 December 2011.

86. Further discussions between Mr Yussouf, Mr Salfiti and Ms Caulfield appear to have taken place as to the content of the Statement of Affairs because on 12 August 2014, Ms Duncan sent a further version to Mr Yussouf and Mr Salfiti referring to such discussions. The revised version now referred to an "Investment in subsidiary – 11% shareholding" in addition to identifying that the Unicredit claim had been settled. In the Notes, it is now stated that "[JJW Inc] owns a 100% shareholding in [JJW Guernsey] and [the Company] owns 11.2% of [JJW Inc] which was valued on 31 December 2011 at US$134,219,910".

87. Ms Duncan chased Messrs Yussouf and Salfiti by email on 2 September 2014 for a signed copy of the Statement of Affairs and the signed resolution provided under cover of the letter of 23 June 2014 "as a matter of urgency". In the same email Ms Duncan asked for information about a potential claim from Mr David Britt ("**Mr Britt**"), a creditor and ex-employee of the Company. Ms Duncan chased again in an email of 1 October 2014 saying that if the signed Statement of Affairs had not been received "within the next 10 days, I can see we will have no option but to make a report to the effect that the Sheikh has failed to co-operate with the Liquidator".

88. The Statement of Affairs was eventually signed by the Sheikh on 31 December 2014 ("**the Statement of Affairs**"). Under the heading "Assets specifically pledged" the final version identified "investment in subsidiary – 11% shareholding" and valued that shareholding at US$ 134,219,910. However, it made no reference elsewhere to any liability being attached to the 11% shareholding. It identified no preferential creditors and although JJW Guernsey was identified as having a non-preferential claim, that was still valued at US$ 10,000,000. In circumstances where both the Immoconsult and the Galeana claims were said to be "disputed", the Statement of Affairs estimated a net surplus for members of US$ 116,317,296. There appear to have been no Notes attached to the final version of the Statement of Affairs, such that the Sheikh provided no signed confirmation of the information that had previously been set out in those Notes. Notwithstanding the requirement in section 277(3) IA 2003, there is no evidence of the Sheikh having provided a verifying affidavit in respect of the Statement of Affairs.

89. On 14 January 2015, the Eastern Caribbean Court of Appeal rejected the Sheikh's appeal against the dismissal of the Termination Application. Unfortunately, despite efforts made by the Liquidators, it has proved impossible to locate a copy of the judgment.

90. Pausing there, it is the Liquidators' case that, having failed in his attempts to terminate the Liquidation, this is the point at which the Sheikh ceased to cooperate with Ms Caulfield and that he instead "took steps to misappropriate or otherwise prevent the realisation of the Company's assets".

91. On 21 January 2015, Ms Caulfield wrote to CITCO, referring to two previous letters, dated 7 April 2014 and 16 May 2014 respectively, and asking for the provision of information on an urgent basis. It appears from Ms Caulfield's letter of 16 May 2014, that the request for documents made by Mr Kinnon in his letter of 13 October 2011 had not been complied with. Email exchanges between CITCO and Ms Duncan followed between 21 and 23 January 2015. These show that Ms Duncan was now very keen to have "most urgently" a copy of the register of charges. In an email of 23 January 2015 to Ms Duncan, Mr Salemon Weyers of CITCO stated that the Company was "no longer active in our system". Copies of the registers of directors and members were attached, but Mr Weyers stated that "there is no register of charges in our records for this

company". As for the other documents requested, CITCO appears to have provided further documents in the form of bank statements to Ms Duncan on 30 January 2015.

92. On 10 February 2015, Ms Caulfield wrote to the Sheikh in the following terms:

> "Representatives of the Company, Amjad Salfiti and Falak Yussouf have advised of the possible existence of a secured charge over the assets of the Company in favour of JJW Limited [i.e. JJW Guernsey]. In the event that such a security exists please provide evidence of this to me within 14 days of the date of this letter."

93. There is no evidence of any response to this letter and (notwithstanding the wording of the Statement of Affairs, to which I shall return later in this judgment) I find that, given its terms, this was the first time that it had been intimated to either Ms Caulfield or Mr Kinnon that the Company's shareholding in JJW Inc may be subject to security.

94. Also on 10 February 2015, Ms Caulfield wrote to Maples BVI as agent for, amongst others, JJW Inc, asking for the Register of Members, the Register of Directors and any minutes of resolutions or members' meetings. There is no evidence of any reply to this letter, although from a later letter dated 8 March 2016, it seems that Maples BVI advised Ms Caulfield that they were unable to provide the requested information and suggested that a request be addressed directly to JJW Inc. On 23 July 2015, Ms Caulfield wrote to JJW Inc, c/o Maples BVI, seeking the same information for a company identified as JJW Hotels & Resorts 011 Inc[3]. It is apparent from Ms Caulfield's letter of 8 March 2016 that no response was received from JJW Inc and accordingly Ms Caulfield again chased Maples BVI by letter dated 23 July 2015 for the information in that letter which she requested pursuant to section 282(1) of the IA 2003.

95. On 16 September 2015, Ms Caulfield wrote to the Sheikh with an update on the administration of the Liquidation. She informed him that a claim from Mr Britt in the sum of US$ 279,269.90 had been accepted and that a hearing had been set for 15 February 2016 for Immoconsult's application for its claim to be admitted in the Liquidation. Ms Caulfield asked for funds to pay Mr Britt's claim and warned the Sheikh that due to the "current lack of funding" she would not be represented by legal counsel at the Immoconsult hearing, a point she repeated in an email to the Sheikh's Austrian lawyer on 14 January 2016.

96. On 21 December 2015, Mr Daniel Perkins ("**Mr Perkins**") of Maples emailed Ms Martina Jovovic ("**Ms Jovovic**"), at the time an employee of MBI UK, ("**the Perkins Email**"). This email is subject to a notice to prove from the MBI Respondents and I shall return to it later. For present purposes suffice to say that the Liquidators rely on the Perkins Email as evidence of a desire on the part of the MBI Respondents to backdate instruments of transfer. It is an email that was obtained by the Liquidators owing to the fact that it had been exhibited to an affidavit sworn by Ms Jovovic in other proceedings in the High Court (claim number BL-2019-000160) ("**the 2019 Proceedings**") on 15 July

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[3] It seems from her letter of 8 March 2016 that Ms Caulfield may have sent similar letters seeking information from JJW Inc, and JJW Hotels & Resorts 002 Inc, but they are not in evidence. It also seems that the reference to JJW Hotels & Resorts 011 Inc may have been an error – the letter of 8 March 2016 refers to JJW Hotels & Resorts 001 Inc.

2019 (as explained in the first and fourth statements of Mr Krys). Both the Sheikh and JJW Guernsey were parties to these proceedings.

97. On 2 February 2016, Mr Krys met the Sheikh in London ("**the February 2016 Meeting**"). Amongst other things, Mr Krys says that he sought to explore with the Sheikh the existence of a charge or security over the 891K Shares. Mr Krys did not refer to the February 2016 Meeting in his written evidence at all (referring to it only under cross examination), but it was mentioned by Ms Caulfield in her affidavit of 2 May 2017 in which she said that the Sheikh indicated "that the Company was worthless as the assets of the Company had been pledged".

98. On 3 February 2016, Mr Krys wrote to Mr Salfiti and Mr Yussouf referring to a meeting of the previous evening (which I infer is the meeting involving the Sheikh), seeking a payment which appears to have been in respect of the Immoconsult hearing on 15 February 2016. Mr Krys notes that there is much to be done and little time in which to do it and says that he wishes to "maximise the opportunity for a successful resolution".

99. On 15 February 2016, absent any opposition from Ms Caulfield, the BVI court ordered that Immoconsult's full claim of €52,320,124.74 (being US$ 72,227,730 as at 22 April 2014) be admitted in the Liquidation plus interest of 6% above EURIBOR. I can only infer that the steps that Mr Krys was inviting Mr Salfiti and Mr Yussouf to take in his email of 3 February 2016 had not been taken, an inference which is borne out by an email from Ms Caulfield to the Sheikh's Austrian lawyer dated 23 March 2016, pointing again to the lack of funding and to existing unpaid invoices.

The Alleged 2016 Disposition

100. In a resolution dated by hand 29 February 2016 ("**the February 2016 Resolution**") (albeit originally dated "July 07 2010", a date which was crossed out), and signed by the Sheikh as sole director of JJW Inc, reference was made to the March 2009 Transfers, the Demand Letters and the June 2010 Letter (referred to as "**the Acknowledgement Letter**"). Paragraph 2.8 of the resolution notes that "In line with the Acknowledgement Letter, the following share transfer instruments from Partners wishing to transfer shares in the Company ("the Transferring Shares") to [JJW Guernsey] have been received by the Company and reviewed by the Director". The proposed transfers of the 891K Shares from the Company to JJW Guernsey are set out in a table. The February 2016 Resolution goes on to record at paragraphs 2.9 and following that:

> "2.9 it is not a requirement of British Virgin Islands law that the Instruments of Transfer be dated and the Instruments of Transfer are not dated but the Director has nonetheless ascertained that the Instruments of Transfer were signed for and on behalf of the transferor on the 6th day of July 2010 (the "Signing Date");
>
> 2.10 accordingly, beneficial ownership of the Transferring Shares transferred to [JJW Guernsey] on the Signing Date;
>
> 2.11 notwithstanding that the Instruments were signed on the Signing Date and notwithstanding that the Intention of Partners was that the Instruments of Transfer would be registered on the register of members of the

> Company..., owing to an administrative oversight the Register of Members has never been updated to reflect the transfer of the Transferring Shares; and
>
> 2.12 it is proposed to now formally approve the transfer of the Transferring Shares and accordingly approve the update to the Register of Members required to reflect the transfer of the legal ownership of the Transferring Shares."

101. The Resolutions passed were in the following form:

> "3.1 the Instruments of Transfer are each in a form consistent with the Company's articles of association and the Act and the transfer of the Transferring Shares to [JJW Guernsey] is authorised and approved by the directors;
>
> 3.2 the Old Share Certificates be cancelled and a new share certificate be issued to [JJW Guernsey] in respect of the Transferring Shares; and
>
> 3.3 the registered agent of the Company, Maples Corporate Services (BVI) Limited, be and is hereby authorised and instructed by copy of these resolutions to:
>
> (a) update the Company's Register of Members to reflect the transfer of the Transferring Shares to [JJW Guernsey]; and
>
> (b) issue a new share certificate to [JJW Guernsey] in respect of the Transferring Shares and to affix the Seal of the Company to such Share Certificate in accordance with the articles of association of the Company."

102. On 8 March 2016, legal title to the 891K Shares in JJW Inc was transferred from the Company to JJW Guernsey. Share Certificates No. 11 and 12 (bearing Mr Salfiti's stamp) were issued by JJW Inc reflecting the new registration in the name of JJW Guernsey. It is the Sheikh's evidence that formal registration of JJW Guernsey as owner of the 891K Shares was "a mere administrative formality" to correct the administrative oversight that had occurred in July 2010.

103. The date of two undated Share Transfer Forms (signed by the Sheikh), transferring the 891K Shares in JJW Inc to JJW Guernsey is in dispute. These share transfers are not challenged as evidence of their content but the Sheikh says that he executed the Share Transfer Forms personally on 6 July 2010, while the Liquidators allege that they did not exist prior to 2016 when they were created retrospectively to provide evidence of a transaction that had never in fact taken place.

Further requests for information made by Ms Caulfield

104. On 8 April 2016, Ms Caulfield received a letter from Maples BVI advising that they did not fall within the categories of person under section 282(1) of the IA 2003 to whom notice could be sent requesting information about the Company. They asked for an explanation as to why that section was said by Ms Caulfield to be applicable to them. This prompted a reply from Ms Caulfield dated 26 April 2016 conceding that Maples BVI was not a person to whom notice could be given under section 282 IA 2003 but

making a further request for information pursuant to section 100(2) BCA 2004, on the basis of the Company's entitlement to information as a member of JJW Inc. Ms Caulfield made a similar request direct to JJW Inc (amongst others) on 27 April 2016 and again on 3 June 2016 (now threatening an application to the court to compel production of documents). It would appear from an affidavit sworn by Ms Caulfield on 20 September 2016 that a member of Ms Caulfield's team received an email from Maples BVI on 4 May 2016 advising that Maples BVI was awaiting confirmation from JJW Inc, JJW 001 and JJW 002 that it could provide the information requested. There is no evidence of any such confirmation ever having been given and I find that Maples BVI never provided the information sought by Ms Caulfield.

105. On 4 May 2016, Ms Caulfield followed up on a letter she had written to Praxis Trust Limited ("**Praxis**") on 15 March 2016, asking for information as to whether the Company was a current or previous registered member of either JJW Guernsey or JJW Investment Limited (another Guernsey company). The letter notes that Praxis was the Registered Agent on record for those companies. By email dated 10 May 2016, Praxis provided Ms Caulfield with a Register of Members for JJW Investments Limited and confirmed that the Company was a previous member of JJW Guernsey (as Ms Caulfield records in her letter of 11 May 2016). In her letter of 11 May 2016, Ms Caulfield seeks more information about both JJW Investments Limited and JJW Guernsey "as a matter of urgency". There is no evidence of any further information having been provided by Praxis and it resigned as "Corporate Secretary" to JJW Guernsey with effect from 30 September 2016 in a letter dated 10 October 2016.

106. On 31 August 2016, Ms Caulfield wrote to CITCO, saying this:

> "My investigations into the affairs of the Company revealed that the Company may own shares in a BVI domiciled company called Gulf Jadawel Limited ("Jadawel"). Citco BVI Limited is the registered agent of Jadawel on record".

Accordingly, Ms Caulfield sought information as to whether the Company "is a current or previous member of Jadawel".

107. On 6 September 2016, Ms Caulfield wrote to seven additional companies, including Jadawel International Inc, with a similar request.

108. Pausing there, no evidence has been put before the court as to the nature of Ms Caulfield's investigations into Gulf Jadawel Limited ("**Gulf Jadawel**") or Jadawal International Inc (or indeed any of the other six companies she was interested in), or why she thought that the Company might have a shareholding in those entities.

Ms Caulfield's application to the English court

109. On 20 September 2016, Ms Caulfield swore an affidavit in support of an application to obtain information from the Sheikh and his companies and registered agents. In her affidavit,

i) she identified six letters which she had sent to the Sheikh regarding the assets and liabilities of the Company and she noted that the only response she had received was the Statement of Affairs;

ii) she set out the correspondence she had had with Maples BVI, CITCO and Praxis;

iii) at paragraph 7, she stated that the Company owns 11.2% of the issued share capital in JJW Inc;

iv) at paragraph 8 she referred to her request for information about the Company's potential shareholding in Jadawel International Inc, noting that emails had been received in respect of this request from CITCO between 31 August 2016 and 1 September 2016. Although these were exhibited to Ms Caulfield's affidavit, they do not appear to be in evidence before this court.

v) at paragraph 13, she stated (without reference to any exhibits) that "The Company owns 99 shares in a Guernsey domiciled company called JJW Investment Limited representing 99% of its issued share capital". A share Register for JJW Investment Limited dated 5 May 2016 in evidence in these proceedings (showing that the Company was issued with these shares on 28 August 2008) and a resolution of the sole director of JJW Investment Limited dated 3 January 2017 supports this conclusion.

vi) She concluded that despite "countless letters and emails to the Sheikh" she had received no response and had scant information regarding the assets and liabilities of the Company.

110. On 11 October 2016, Wallbank J granted permission of the BVI Court to Ms Caulfield to take such steps as she may be advised in order to obtain recognition of her appointment as liquidator of the Company in England and Wales.

111. On 2 May 2017, Ms Caulfield swore an affidavit in support of an application for recognition of the Company in Great Britain pursuant to the provisions of the CBIR 2006 together with recognition of herself as "foreign representative" and liquidator of the Company in Great Britain. In this affidavit, Ms Caulfield recorded that the Sheikh had not communicated directly with her during the course of the Liquidation but had relied on Mr Yussouf and Mr Salfiti. However, she stated that since the Sheikh's appeal was dismissed in January 2015, both men "have become entirely uncooperative". She went on to set out her understanding as to the assets and liabilities of the Company noting that she had become aware that there was a suggestion that the Company's 11.2% interest in JJW Inc was a "secured asset". She records, however, that despite enquiries of CITCO, the Sheikh and his associates "no further information has been received in relation to the supposed charge".

112. On 22 May 2017, the Liquidators' BVI lawyers, Campbells, wrote to the Sheikh informing him of an imminent hearing in London. The Sheikh was requested to provide information in response to a long bullet point list.

113. The CBIR Order was made on 9 June 2017 by Registrar Derrett, as referred to above.

114. On 20 June 2017, Ernst & Young, Cairo, wrote to Dr Alexander Petsche of Baker & McKenzie, the Sheikh's lawyer ("**Dr Petsche**"), confirming that "the Company never owned any assets of any real substance, neither directly or indirectly" and that it "holds only a small percentage (about 1.43%) in [JJW Inc], which is largely indebted". This

was followed up by a further letter from Ernst & Young, Cairo dated 30 June 2017 (again addressed to Dr Petsche) stating that (amongst other things):

i) they had been auditors of JJW Guernsey for more than 10 years;

ii) JJW Inc had been founded in late 2008 as the holding company of JJW Guernsey "to carry an IPO" designed to further a large acquisition in France;

iii) The shareholder of JJW Inc "was structured without an actual payment of the shares…the minority shareholders were pledging its shares against the payment, which was expected, from the IPO result";

iv) By the end of 2009 the acquisition of the French deal was in question and "the IPO was no longer on the table";

v) In 2010 and 2011 JJW Inc was struggling and needed a cash injection from its shareholder;

vi) In 2012, MBI International Holdings was the only financial support to JJW Inc. From 2013 JJW Inc's debt to MBI International Holdings was amounting to approximately €600 million;

vii) Since 2014, Ernst & Young had been asking the directors of JJW Inc to find a way to capitalise the company;

viii) By the end of 2016, Ernst & Young had been so concerned about the status of JJW Inc that they were unable to continue as auditors absent a restructuring. JJW Inc's management agreed to a restructuring.

115. I pause to observe that the existence of the €600 million debt to MBI International Holdings appears to be borne out by the JJW Inc 2016 Accounts, disclosed at the outset of the trial.

The 2017 Transfers

116. The JJW Inc Register records a transfer on 23 June 2017 of the 891K Shares from JJW Guernsey to MBI International Holdings, whose total shareholding in JJW Inc of 8,929,881 was consolidated on that date into a single share certificate, number 15. The only other shareholder in JJW Inc was the Company in respect of the 129K Shares.

117. The minutes of a meeting of JJW Inc (attended by Mr Yussouf as CFO of "the Group" and Mr Salfiti as in house counsel of "the Group") dated 17 July 2017 refer to a debt of €600,000,000 owed by JJW Inc to MBI International Holdings ("**the July 2017 Minute**"). This debt is evidenced by the 2016 JJW Inc Accounts to which I have already referred. A Letter of Demand dated 30 June 2017 from MBI International Holdings (signed by the Sheikh) to JJW Inc requests settlement of this debt within 21 days of the letter. A copy of this letter was sent to Maples BVI as Registered Agent of JJW Inc by Ms Jovovic under cover of an email dated 30 June 2017. The July 2017 Minute states that the issue of the debt is now crucial in light of the demand letter. Ms Andrea Sebesteny-King attending the meeting on behalf of JJW Inc declared that JJW Inc was not in a position to pay the debt and that all possible avenues would need to be explored.

It was agreed that there should be a meeting with Ernst & Young on 27 July 2017. No evidence is available as to this meeting.

118. On 27 July 2017, the Board of Directors of JJW Inc met. Once again Messrs Yussouf and Salfiti were present, together with Ms Sebesteny-King. In addition, Mr Emad Ragheb of Ernst & Young ("**Mr Ragheb**") also attended. The preamble to the minutes record that MBI International Holdings has assigned its debt to JJW UK. In the circumstances, it is recorded that, on the advice of the auditors, it is "in the best interest" of JJW Inc, its shareholders, employees and creditors, "to proceed with the offer to acquire a 100% of [JJW Inc], taking over all the assets and liabilities by [JJW UK]" ("**the July 2017 Resolution**"). On the face of things, this appears to be the restructuring advised by Ernst & Young.

119. On 28 July 2017, Ms Caulfield signed a witness statement in support of applications for orders pursuant to Article 21 of Schedule 1 to the CBIR 2006 that the Sheikh, Ms Al Jaber, Mr Salfiti and Mr Yussouf (i) attend at court to be examined on oath as to the dealings and affairs of the Company; and (ii) produce all books, papers and records in their custody or control relating to the dealings and affairs of the Company. This witness statement referred to much of the content of the affidavit of 2 May 2017, stating that she believed that the Company has "significant direct and indirect assets in various jurisdictions including a shareholding in a BVI company called [JJW Inc] worth $134,219,910". Ms Caulfield stated that the realisation of this asset would be more than sufficient to satisfy the claims of the unsecured creditors of the Company.

120. Pursuant to an Order made by Registrar Barber on 29 August 2017, Mr Yussouf and Mr Salfiti attended at the offices of Clyde & Co, solicitors for Ms Caulfield, on 14 November 2017 for interview. Although the Sheikh and Ms Al Jaber had both agreed to attend an interview with Ms Caulfield within 11 weeks of the 29 August 2017 Order, they nevertheless failed to attend similar interviews. Accordingly, they were both subject to Orders made by Deputy Registrar Mullen dated 13 December 2017 to attend the court for a private examination on oath on 26 April 2018 and, within 21 days, to produce to Ms Caulfield "all books, papers and records" in their possession and/or control in respect of the assets of the Company. No documents were produced in response to this order.

121. On 29 November 2017, Clyde & Co wrote to Maples noting the absence of any satisfactory response to Ms Caulfield's earlier requests for information and informing Maples that the Sheikh had been requested to provide a letter authorising Maples to answer questions and provide copies of documents sought. The letter set out a detailed list of questions to which Ms Caulfield required a response. No response was received and a chasing letter was sent on 17 May 2018, to which there was, again, no response.

122. On 12 December 2017 (the day before the hearing of 13 December 2017 before Deputy Registrar Mullen), Dr Petsche emailed Ms Caulfield's solicitors disclosing various copy documents for the first time ("**the Petsche Email**"). These included the JJW Guernsey Transfer, the Demand Letters, the June 2010 Letter, a certificate of incumbency for JJW Inc and the Share Transfer Forms. The Petsche Email purported to provide answers to various questions that the Liquidators had been asking for some time. Amongst other things, it explained that (i) the purchase price for the 891K Shares under the March 2009 Transfers was never paid, that the Company accordingly wrote the 30 June 2010 Letter stating that it would retransfer the 891K Shares and that "on 6 July 2010, the Company signed the respective instruments of transfer. However due to an administrative oversight

the registration of the retransfer of the shares was only effected on 8 March 2016"; (ii) based on this retransfer, the Company "only holds 129,112 shares" in JJW Inc (i.e. 1.43% of shares and not 11.2% of shares) as was evidenced by the Certificate of Incumbency, but that (iii) by the July 2017 Resolution it was resolved that "100%" of JJW Inc will be acquired by JJW UK, a company that was "fully owned" by MBI International Holdings. The documents attached to the Petsche Email were sent to Dr Petsche by Ms Jovovic under cover of an email dated 17 November 2017, which she also copied to the Sheikh. The summary of the transactions evidenced by the documents attached to the email is said to be "As instructed by HE Sheikh Mohamed". Accordingly, I find that, given the significance of the documents enclosed with it and the explanations provided, the Petsche Email can only have been sent on the instructions, and with the approval, of the Sheikh.

123. The Sheikh attended a private examination before ICC Judge Barber by video link on 26 April 2018. He was cross-examined by Mr Curl. He did not produce any documents and the examination was adjourned.

124. I shall return to the substance of the transcripts of the various examinations later in this judgment. Suffice to say for present purposes that the Sheikh's failure to answer certain questions led to an order made by ICC Judge Barber requiring the Sheikh to file and serve witness statements supported by a statement of truth detailing identified information. She also listed a further private examination of the Sheikh in order to deal with additional queries. This second examination took place on the same day as Ms Al Jaber's (adjourned) private examination, namely 1 November 2018 before Deputy ICC Judge Schaffer.

125. The Sheikh subsequently provided three witness statements to Ms Caulfield dated 4 May 2018, 17 May 2018 and 1 November 2018 respectively. The JJAB Transfer, the July 2017 Minute and the July 2017 Resolution were attached to the 4 May 2018 statement for the first time. By the time of service of the Sheikh's third witness statement, Mr Salfiti had come off the record for the Sheikh and had been replaced by Kidd Rapinet as his lawyers.

126. On or about 19 September 2018 Mr Britt provided Ms Caulfield with copies of documents including documents which purported to be (i) the Auditor's report and financial statements of the Company as at 31 December 2006 ("**the 2006 Accounts**"); (ii) the Auditor's report and financial statements of the Company as at 31 December 2007 ("**the 2007 Accounts**"); and (iii) the Auditor's report and financial statements of the Company as at 31 December 2008 ("**the 2008 Accounts**").

127. A few days later on or about 26 September 2018, Salim Khoury ("**Mr Khoury**"), also a creditor and ex-employee of the Company, provided Ms Caulfield with an additional copy of the purported report and financial statements as at 31 December 2007. The MBI Respondents require the Liquidators to prove these financial statements, which I shall refer to together as "**the Company Accounts**", although no competing sets of accounts have been produced. I shall return to consider their content later in this judgment.

128. On 15 November 2018, letters of consent were provided by the Sheikh for CITCO and Maples BVI to provide Ms Caulfield with documents relating to the affairs, business and assets of the Company. On 26 November 2018, further letters of consent were provided by the Sheikh to CITCO, Maples BVI in respect of the Company and to Albecq Group in respect of JJW Guernsey. Mr Krys' evidence (which I accept) is to the effect that

despite letters from Clyde & Co to Maples BVI dated 23 November 2018 and 4 December 2018 together with further letters from his own firm dated 9 July 2020 and 31 July 2020, no response was ever received from Maples BVI. Although CITCO responded with a limited number of documents, those documents were of no assistance to the Liquidators. It is common ground that the Liquidators made no applications in the BVI against these offshore service providers for the disclosure of documents.

129. Ms Caulfield was replaced on 8 July 2019 by Greig Mitchell and Kenneth Krys pursuant to an order of the Eastern Caribbean Supreme Court.

130. By letters dated 11 June 2020 and 12 June 2020, Baker & McKenzie, acting at that time for the MBI Respondents, wrote to the Maples Group, to Albecq Group and to Praxis seeking information held in connection with (amongst other things) the Demand Letters and the June 2010 Letter (asking for evidence of receipt of these documents) and the share transfer forms (asking for files, documents and other information maintained by each firm in connection with these documents). These letters were copied to Mr Zahy Deen, identified as Head of Legal for MBI & Partners UK. There is no evidence of any response to these letters. Mr Deen's evidence, which appears likely to be correct on this point, is that nothing was provided by the Maples Group in response to Baker & McKenzie's letter.

A SUMMARY OF THE CLAIMS

131. The core factual circumstances on which the claim is based may be divided into the period pre-liquidation of the Company and the period post-liquidation. The PoC has been amended on several occasions and has come in for considerable criticism at trial. However, I set out below, by way of a high level summary only, the key claims in these proceedings.

132. An agreed list of the detailed issues that remained outstanding at the start of closing submissions ("**the List of Issues**") is attached to this judgment at Appendix B. Owing to their length I shall not set them out here, but I shall have close regard to them throughout this judgment and shall endeavour to set out my conclusions on each issue as and when necessary. In so doing I should make clear that whilst it would be impractical to mention every argument and authority on which the parties relied in their (extremely lengthy and detailed) submissions, I have taken all of those arguments into account in determining the issues.

The Pre-Liquidation Claims

133. At the pre-liquidation stage, the Liquidators rely:

i) first, on the alleged disposition of the Company's assets between 31 December 2008 and 18 March 2009 ("**the Alleged 2009 Disposition**"). It is the Liquidators' case that on 31 December 2008, the Company Accounts showed that it had assets of US$3,636,609,000 but that "nothing has been accounted for" in respect of those assets, which had disappeared as at the date of the Liquidation. The Liquidators invite the court to infer that those assets were disposed of prior to the Liquidation such that the Company was insolvent.

ii) second, on the combination of the Alleged 2009 Disposition and the March 2009 Transfers. It is alleged that, if the March 2009 Transfers are authentic (as is now accepted by the Liquidators), then the consequence of these share transfers is that the Company owned absolutely the 891K Shares at the commencement of the Liquidation, acquiring in the process an unsecured indebtedness in respect of the 891K Shares in the total sum of €89,176,100. Again, the Liquidators invite the court to infer that these events taken together rendered the Company insolvent.

iii) third, on the assertion that if the Demand Letters and the June 2010 Letters are copies of genuine documents recording genuine transactions, then the Company was insolvent by 22 December 2009 or 30 June 2010 at the latest, in that it could not satisfy the sums demanded by JJW Guernsey or JJAB GmbH.

134. It is the Liquidators' case that in the pre-liquidation period, the Sheikh and Ms Al Jaber acted in breach of their duties as directors of the Company, and/or in breach of trust "in denuding the Company of its assets". Key to these claims is the authenticity of the Company Accounts. By reference to the 31 December 2008 Company Accounts, in particular, the Liquidators assert an entitlement to recover equitable compensation in the sum of circa US$ 3.6 billion in respect of this claim.

135. The Liquidators accept that if they cannot establish their case as to the Alleged 2009 Disposition, then the March 2009 Transfers take matters no further in the pre-liquidation period; those transfers are not sufficient on their own to establish that the Company was insolvent, as alleged, on a date after 31 December 2008 and prior to 18 March 2009. Thus the combined claim is parasitic on the 2009 Disposition claim. Furthermore, the third proposition on which the Liquidators rely as set out in paragraph 133 above does not appear to go anywhere on its own and the Liquidators never suggested otherwise. The March 2009 Transfers do, however, have relevance in the context of post-liquidation events: as I have already indicated, the Liquidators say that their effect was to vest the 891K Shares absolutely in the Company, whereas the MBI Respondents say (amongst other things) that completion of the March 2009 Transfers was conditional upon the payment of consideration for the transfer of the 891K Shares.

The Post-Liquidation Claims

The Alleged 2016 Disposition

136. At the heart of the Liquidators' claim in respect of the post-liquidation period is an alleged void disposition in 2016 procured by the Sheikh and Ms Al Jaber in breach of duty and/or in breach of trust, pursuant to which it is alleged that the 891K Shares said by the Liquidators to be held by the Company further to the March 2009 Transfers were transferred away to JJW Guernsey by the issue of two share certificates number 11 (567,556 shares) and 12 (324,205 shares) for no consideration ("**the Alleged 2016 Disposition**"). It is common ground that the 891K Shares were registered in the name of JJW Guernsey on 8 March 2016. The Liquidators allege (in paragraph 53A of the PoC) a failure on the part of the Sheikh "to act honestly and in good faith" in connection with this transaction.

137. As I have already indicated, particularly controversial in the context of this claim, is (i) the date on which the Share Transfer Forms underpinning the Alleged 2016 Disposition were signed by the Sheikh – his case being that they were signed in 2010 (i.e. prior to the

Liquidation), the Liquidators' case being that they were signed in 2016, long after the Liquidation; and (ii) the Liquidators' case that the Sheikh and Ms Al Jaber continued to owe duties as directors following the Liquidation and that they acted in breach of those duties and/or in breach of trust or fiduciary duty in connection with the Alleged 2016 Disposition. In particular, the Liquidators contend that the Sheikh has continued to act "as if he were the controlling mind of the Company" and that he has continued to deal or purport to deal with the Company's assets "as if they were his own", notwithstanding that since the date of the Liquidation the Liquidators, and their predecessors, have been the only persons with a right to custody or control of the Company's assets.

138. The Liquidators allege that the Sheikh's knowledge is to be imputed to JJW Guernsey and that it therefore received the 891K Shares on 8 March 2016 as a constructive trustee. They say it is therefore liable to account on the basis of knowing receipt.

The Surrender/Delivery up and Failure to Disclose Claims

139. In conjunction with their claim in respect of the Alleged 2016 Disposition, the Liquidators claim that upon the commencement of the Liquidation, and in breach of fiduciary duty (alternatively breach of trust), the Sheikh and Ms Al Jaber failed to deliver up and/or to surrender the 891K Shares and the 129K Shares (together "**the JJW Inc Shares**") to the Liquidators. These breaches are said to be ongoing.

140. Further, the Liquidators allege a failure on the part of the Sheikh only, since the date of Liquidation, to account "for his stewardship of the Company and its assets" in the periods both pre- and post- Liquidation. It is alleged that his deliberate failure to disclose correct particulars of the registered title to the JJW Inc Shares until 9 February 2021 was a breach of duty and/or a breach of trust that had as its object the prevention of the Liquidators' realisation of the JJW Inc Shares.

Unlawful Means Conspiracy

141. The Liquidators allege that from around January 2015, the Sheikh and Ms Al Jaber, JJW Guernsey and/or (on or after its incorporation on 17 June 2016) JJW UK combined together to cause loss to the Company by unlawful means, namely "by failing to deliver [the JJW Inc Shares] into the custody and control" of Ms Caulfield. This claim is of particular significance to the Liquidators because it provides scope for recovery from JJW UK, which is not liable under the equitable claims identified above.

Equitable Compensation/Damages

142. By reason of the various heads of claim referred to above, the Liquidators contend that the Company has lost the value of the JJW Inc Shares and they seek equitable compensation (and, in respect of the alleged unlawful means conspiracy, damages) which it is said should be calculated by reference either to the Sheikh's own valuation of the JJW Inc Shares at the commencement of the Liquidation (in the total sum of circa US$134,219,910 as set out in the Statement of Affairs) or (as a cautious minimum) by reference to the Sheikh's own evidence of the value of JJW Inc as set out in the 2016 JJW Inc Accounts (in the total sum of €76,841,743 taking a notional proportionate value per share) or such other amount as the court thinks just.

Allegations of Dishonesty

143. As I have said, in paragraph 53A of the PoC, the Liquidators make an allegation of failure to "act honestly and in good faith" against the Sheikh in relation to the Alleged 2016 Disposition, in particular in relation to the completion of share transfer forms and registration of the 891K Shares. Particulars of the Sheikh's alleged knowledge are then set out over seven sub-paragraphs.

144. At the outset of the trial, the MBI Respondents expressed concerns around the scope of this allegation and the potential for a broader case on dishonesty to be alleged by the Liquidators, a case which it was said had not been adequately pleaded. These concerns resulted in the provision of an additional skeleton argument on the first day of the trial.

145. By way of brief background, the Liquidators made an application at the PTR in December 2020 for permission to include a general plea of dishonesty in the PoC, which application was refused by Ms Joanne Wicks KC sitting as a Deputy High Court Judge on the grounds of inadequate particularisation. Upon sight of the Liquidators' skeleton argument for trial, the MBI Respondents sought to put down a marker that the pursuit of a wide-ranging case in fraud was not open to the Liquidators, pointing out that the PoC does not advance any claim in fraud or dishonesty save at paragraph 53A, and contending that even the conspiracy claim is equivocal as to whether fraud or dishonesty is being alleged. The MBI Respondents also pointed out that there was no allegation of forgery of any of the documents whose authenticity had not been admitted by the Liquidators.

146. The MBI Respondents said that paragraph 53A was understood, by virtue of submissions made on behalf of the Liquidators at the PTR, to be "a defensive pleading to take the claim against the Sheikh…outside the indemnity provision in Article 19 of the Company's Articles" and it is fair to say that during opening submissions, the Liquidators did not seek to disabuse the MBI Respondents of their understanding as to the purpose of paragraph 53A of the PoC. The Liquidators' pleading mirrors the wording in section 57(2) of the BVI International Business Companies Act ("**the IBCA**") which identifies the circumstances in which an individual will not be able to take advantage of the indemnity provisions in section 57(1).

147. However, whatever the reason for the inclusion of paragraph 53A, the MBI Respondents clearly recognised that it was a plea of dishonest conduct that would have to be met at trial. As their skeleton argument said, it was "a specific allegation in relation to a specific act which the Sheikh did" (i.e. bringing about a 2016 share transfer at a time when the Company was in Liquidation). Their main concern, as they explained, was that it should not be used at trial to support "widespread allegations of dishonesty that relate to entirely different causes of action which predate the 2016 disposition significantly". It was specifically submitted that the allegation of lack of honesty as pleaded in paragraph 53A "must be confined to the particulars therein mentioned". In her oral submissions, Miss Stanley KC on behalf of the MBI Respondents said this: "[t]o the extent that [the Liquidators] seek to open any kind of case in fraud **beyond the specific allegations that he's made about dishonesty in the new paragraph 53A** of [the PoC] I will strenuously object to it…" (**emphasis added**). The court was not invited to strike out the plea at 53A on the ground of a lack of particularisation.

148. In responding to these submissions, Mr Curl KC on behalf of the Liquidators, expressly disavowed any intention to open a wide-ranging case in fraud (beyond what was pleaded

in paragraph 53A), confirmed that the Liquidators were not making out a positive case of forgery in respect of any documents and went on to deal with a specific point as to the Liquidators' response to a limitation defence which I do not need to address at this juncture.

149. I ruled on the issue, recording the Liquidators' position and directing that (beyond the matters already pleaded, which included paragraph 53A) "there should be no **other** allegations of dishonesty or fraud made against the Respondents that have not been properly and fully pleaded" (**emphasis added**).

150. Following the Sheikh's List of Corrections, various further amendments were made to the Liquidators' PoC. Some of these were challenged in the Court of Appeal and did not survive. However, a new paragraph 82B of the PoC was not appealed to the Court of Appeal. That paragraph alleges that the Sheikh failed to disclose particulars of the registered title to the JJW Inc Shares and that this failure "had as its object the prevention and/or frustration of [the Liquidators'] ability to take steps to realise the Company's assets for value" and was done for "a collateral purpose", and that "the Sheikh knew that such a failure to disclose would prejudice the liquidation estate". Mr Curl says that this is obviously an allegation of conscious wrongdoing and that the MBI Respondents recognised it as such in their Reply (albeit at the same time asserting that it was "embarrassing and vexatious"). No attempt was made by the MBI Respondents to strike out this pleading and it was subjected to detailed analysis in closing submissions.

151. At the outset of the closings, Miss Stanley again raised concerns around the extent to which the Liquidators intended to rely on unpleaded allegations of dishonesty. She reminded me of the importance of a proper pleading of dishonesty (see *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 per Buckley LJ at [268B]) and she again expressed concern that paragraph 53A was being relied upon as a freestanding claim in dishonesty. In response, Mr Curl pointed out that it has at all times been understood by the Sheikh that he is facing a case of dishonesty. Mr Curl pointed to submissions made on the Sheikh's behalf at the various adjournment applications emphasising the seriousness of the allegations that the Sheikh is facing in the proceedings, together with my judgments on those applications which reflected these submissions. There is no doubt that, when seeking to persuade the court to adjourn the proceedings, the MBI Respondents were quite content to refer to the fact that the Sheikh was facing "serious allegations of dishonesty".

152. Doing the best I can to find a way through this hotly disputed area, I find that on balance the plea in paragraph 53A is well understood, sufficiently pleaded, and strictly confined on its facts – as was conceded by the MBI Respondents at the time of opening submissions. It plainly does not give rise to a freestanding cause of action because it is not referred to in the agreed List of Issues and I can find no reference back to it in the later paragraphs of the PoC which allege breach. It therefore seems to be of extremely limited compass. It is referred to on only three occasions in the Liquidators' 146 page closing submissions. Nevertheless, as I have said, the MBI Respondents plainly understood the need to address the factual allegation of dishonesty referred to in paragraph 53A and accordingly, there can be no prejudice to them in my dealing with that allegation.

153. The plea in paragraph 82B, appears to me to be somewhat different in the sense that it does give rise to an allegation of breach of duty and/or a breach of trust. It is an

unconventional plea (at least in paragraph 82B.d) owing to the apparent intermingling of a plea in negligence and a plea of conscious wrongdoing. No application has ever been made to strike it out and although it was (rather surprisingly) suggested in closing that it was still open to the MBI Respondents to appeal the inclusion of this amendment in the PoC, there has been no appeal over the course of the 2 years or so since I gave permission for this amendment and no attempt by the MBI Respondents to address any concerns they may have had around this paragraph in the intervening period. The PoC was finalised by the Liquidators after the Court of Appeal decision on the contested amendments and no further action was taken by the MBI Respondents. It is wholly unsatisfactory to be faced now (as I was) with the suggestion that the MBI Respondents remain in a position to choose whether to appeal this amendment, depending upon the outcome of these proceedings.

154. In closing, Miss Stanley dealt in detail with every aspect of paragraph 82B. She did not suggest that I should not consider the allegation of knowledge in 82B.d, instead she said simply that 82B.d is said to support a claim of breach of duties that were not in fact owed and that it could and should be dismissed on that basis. It is agreed between the parties in the List of Issues (*Issue 21*) that I must determine the allegations set forth in paragraph 82B, and accordingly I intend to do so.

155. Two final points arise in this context. First, I observe that it is an important part of the Liquidators' case, acknowledged as such by Miss Stanley in her closing submissions, that the Sheikh is an unreliable witness, that he lied during the s.236 Examinations and that he has lied in his witness statements, including (amongst other things) in respect of the ownership from time to time of the JJW Inc Shares. Had he been available to give evidence there is no question that he would have been "put through the ringer" in cross examination (to adopt Miss Stanley's phrase). One of the issues that I am asked to decide (*Issue 20*) expressly requires me to determine whether the Sheikh made a factual assertion about the JJW Inc Shares, which all parties accept would not have been consistent with the true facts. The question of the weight to be attached to the Sheikh's existing evidence is an issue that I must deal with in detail in due course.

156. Second, it is worth noting that when the parties engaged in a debate over the scope of the dishonesty claim on the first day of trial, the MBI Respondents also raised a further point as to the admissibility of evidence given by Mr Krys in his first statement in these proceedings as to the content of an affidavit sworn by Ms Jovovic, in separate legal proceedings ("**the 2019 Proceedings**") involving the Sheikh ("**the Jovovic Affidavit**"). Ms Jovovic is not a witness in the present proceedings, but Mr Krys sets out extracts from the Jovovic Affidavit in his statement making allegations of fraud and backdating of documents against the Sheikh which go well beyond the case pleaded by the Liquidators. As I recorded in the ruling I gave on the subject, Mr Curl made clear that he did not resile from the position taken previously by the Liquidators at the PTR (i.e. that it was not the Liquidators' case that the Jovovic Affidavit was, without more, evidence of the truth of its content, but rather that it evidenced the investigations made by the Liquidators, gave context to the provenance of documents provided by Ms Jovovic and provided a forewarning of the questions that would be posed to the Sheikh in cross examination as to his credit). In all the circumstances, I have not treated the content of the Jovovic Affidavit as admissible evidence in these proceedings and I have put its content out of my mind.

THE EVIDENCE

Approach to the Evidence

157. In closing:

i) both parties invited me to draw adverse inferences from the absence of factual witnesses;

ii) the Liquidators submitted that I was entitled to, and should, draw evidential presumptions against the MBI Respondents by reference to the principle in *Armory v Delamirie* (1721) 1 Str 505 and on the grounds that they were fiduciaries who had failed to maintain or disclose proper records. On this latter point, it was the Liquidators' case that they need prove nothing more than that the Sheikh and Ms Al Jaber were the Company's fiduciaries in order to shift the burden onto them to show what they have done with the Company's property;

iii) both parties addressed me on the application of the well-known guidance in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) given by Leggatt J (as he then was) at [15]-[22]; and

iv) both parties made submissions about the burden of proof.

158. It is common ground that on procedural matters of this type, the court must apply English law, notwithstanding that BVI law applies to the substantive issues of law to which I shall have to turn later in this judgment.

Adverse Inferences

159. It is open to the court to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue, but who is not called by a party who might reasonably have been expected to call that witness, without any adequate reason being given for his or her absence. Reliance was placed on the well-known authority of *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, per Brooke LJ at page 340.

160. Miss Stanley also drew my attention to a more recent analysis of the evidential "rule" by Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 at [150]-[154], where I note that she took the view that the rule is "fairly narrow" in compass and that the drawing of inferences is "not something to be lightly undertaken". However, I need not consider that judgment in any more detail in circumstances where Lord Leggatt JSC (giving a judgment with which the other members of the Supreme Court agreed) has recently provided clear guidance on the point in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 at [41]:

> "41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible,

> tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations can be assessed cannot be encapsulated in a set of legal rules".

161. I shall return to the specific inferences I am invited to draw by each side in a moment, but I make the preliminary observation that it is a somewhat unusual feature of this case that the main protagonist, in the form of the Sheikh, has been unable to give oral evidence owing to his continuing poor state of health. The court has not therefore had the benefit of hearing cross examination on the Sheikh's witness statements. Obviously, in the circumstances, it would be inappropriate for the court to draw any adverse inference by reason purely of the Sheikh's failure to give evidence and Mr Curl did not suggest otherwise. Indeed, I am satisfied that prior to his illness the Sheikh was ready, willing and able to appear at the trial in person to give evidence and that, had he been fit enough to do so, he would have given evidence at the resumed trial.

Armory v Delamirie

162. I turn next to consider Mr Curl's submissions on *Armory v Delamirie*, the famous case of the jewel, the chimney sweep who found the jewel and the pawnbroker with whom the jewel was left for valuation. The pawnbroker failed to return the jewel and was not permitted, when sued, to assert that the chimney sweep could not prove its value. Mr Curl submits that the principle to be extracted from this case is that where a defendant causes evidential uncertainty, the court is entitled to draw evidential presumptions against that defendant.

163. In my judgment, however, that is not an entirely accurate articulation of the principle, which was considered very recently in *Wright v McCormack* [2022] EWHC 2068 (QB) by Chamberlain J. As in this case, there was a dispute between the parties as to the conditions under which the *Armory* principle applied. In addressing that dispute, Chamberlain J said this:

> "128 In *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) at [164] Leggatt J (as he then was) described two related principles. The first was that the difficulty in estimation of loss should not deprive a claimant of a remedy. The second was the Armory principle, that "where the defendant has destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court will make presumptions in favour of the claimant".

164. At [129] the Judge noted that this formulation was helpful because it distinguishes the *Armory* principle from the more general principle that difficulty in estimating loss should not deprive a claimant of a remedy. At [130] he then went on to identify that:

> "130…Leggatt J's formulation suggests that a separate and stronger principle enables the court to determine uncertainty as to the extent of loss against the defendant where he has "destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence". These words seem to me to connote some form of morally culpable conduct on the part of the defendant which contributed to the absence of evidence. If there were no such culpability, it is difficult to see why it would be justifiable to make presumptions against the defendant…"

165. This formulation plainly requires something more than (the rather nebulous concept of) "causing evidential uncertainty". There must be a destruction of evidence or some form of wrongful (morally culpable) conduct which contributed to the absence of evidence - a clear breach of duty would seem to be enough (see *Keefe v Isle of Man Steam Packet Co Ltd* [2010] EWCA Civ 683, per Longmore LJ at [19]-[20]).

166. In this case, the Liquidators submit that the *Armory* principle applies because the Sheikh and Ms Al Jaber are fiduciaries by reason of their role as directors of the Company. Essentially it is said that they have duties to maintain and disclose proper records of their dealings with Company assets and that it is not necessary even to plead a failure to comply with that duty – all that is necessary is for the Liquidators to establish that the Sheikh and Ms Al Jaber were the Company's fiduciaries for the burden to shift to them to show what they have done with Company property.

167. In support of this proposition, the Liquidators rely upon *GHLM Trading Limited v Maroo* [2012] 2 BCLC 369, a case in which it was alleged against the directors of GHLM that the credit entries in their directors' loan accounts could not be justified. Newey J (as he then was) considered in detail the authorities in support of a submission that the burden of proof was on the directors, as fiduciaries, to justify the credit entries, accepting at [148] that "much as a trustee 'must show what he has done with [trust] property' it is incumbent on a director to explain what has become of company property in his hands". At [149] he went on to say:

> "In the circumstances…**once it is shown that a company director has received company money**, it is for him to show that the payment was proper…" (**emphasis added**).

168. The words that I have highlighted in bold appear to me to be of particular importance in this case, where, in the context of the Alleged 2009 Disposition, the Liquidators suggest that they need do no more than assert (by reference to the Company Accounts) that very substantial assets were paid away from the Company, for the burden of proof to shift to the Sheikh and Ms Al Jaber to establish what they have done with those assets. However, as I shall return to in a moment, the MBI Respondents have put in issue the question of whether those assets were ever in fact owned by the Company and that, to my mind, is a matter which must be established by the Liquidators before there can be any resort to the making of evidential presumptions or the shifting of the evidential burden.

169. That a *prima facie* case must first be established also finds support in *Re Mumtaz Properties Ltd* [2012] 2 BCLC 109, where Arden LJ was concerned with the situation in

which contemporaneous documentation is likely to have existed but has not been disclosed. As she said at [15]-[17]:

> "[15] That was the predicament in this case. The liquidator could not show that Munir and Zafar were de facto directors from the company's books and papers because the directors had not handed over the necessary documents to the administrators. The judge held, in the context of Munir's denial that he was a de facto director despite the fact that he had acted as chairman of the meeting convened to pass a resolution for voluntary liquidation, that, had it been necessary to do so, he would have been entitled to draw adverse inferences against the respondents to the proceedings…
>
> [16] The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. **The evidence of the liquidator established a prima facie case** and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers.
>
> [17] Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available" (**emphasis added**).

Gestmin

170. Turning then to *Gestmin*, at [15]-[21] of the judgment, Leggatt J made various observations as to the fallibility of human recollection, leading to his conclusion that:

> "[22]…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of the witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

171. Mr Curl submits that in the present case, the primary focus must be on the mind and motivations of the witnesses, in particular the Sheikh and Ms Al Jaber, at all relevant times as revealed by the contemporaneous documents. He draws my attention to the

observations of Males LJ in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019 4 WLR 112 at [48]:

> "[48] In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

172. Mr Curl submits that against the background of these authorities, I should decide this case by reference to the documents and the inherent probabilities.

173. In response to these submissions, Miss Stanley drew my attention to *Martin v Kogan* [2020] FSR 3, in which the Court of Appeal considered the question again. At [88] Floyd LJ said this:

> "[88] *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed….But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

174. Floyd LJ went on to refer to *Simetra* as a paradigm example of a commercial case in which "a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud".

175. The present case is not a commercial case involving abundant documentation. However, it is also not a case in which the court has a great deal of oral evidence from witnesses as to relevant events (many of which occurred more than 10 years ago). Furthermore, for reasons to which I shall return in a moment, the documentary evidence falls within a limited compass; this is not a case in which the court is faced with thousands of potentially relevant documents. The key documents (a number of which are not admitted) can be listed quite shortly. Owing to his illness, the witness evidence from the Sheikh is all to be found in witness statements and in addition the court has affidavits sworn by the Sheikh in these (and other) proceedings together with transcripts of evidence given at s.236 Examinations, which have been admitted into evidence. The only witness evidence from Ms Al Jaber is to be found in the transcript of her s.236 Examination and her witness statement prepared at the time of that examination, both of

which have also been admitted into evidence. The MBI Respondents have called oral evidence from only one witness of fact in support of their defence.

176. Against that background, it seems to me that it is extremely important in this case for the court to evaluate all of the available evidence, with a view to determining the weight to be attached to it and the inherent probabilities. The absence of evidence, including any appropriate inferences that may be drawn from the absence of evidence, may also be material. For the most part, there is little scope for a comparison of direct oral evidence with contemporaneous material. I shall need to make findings about the authenticity of key documents and, having made those findings, weigh up their significance in the context of the evidence as a whole.

177. I agree with Mr Curl that the available contemporaneous documentary evidence is inevitably of significance in determining the mind and motivations of the Sheikh and Ms Al Jaber, although it is not the only evidence. Their witness evidence in one form or another must be tested against the contemporaneous documents and a determination reached as to the weight it should carry. In the end, there is no substitute for a full and careful evaluation of all the evidence that is before the court. I do not read *Gestmin* as disapproving of such an approach and, to my mind, it is the only approach to be taken in a case of this sort, consistent with the guidance in *Martin v Kogan*.

Burden of Proof

178. Unusually, I have had submissions from both sides on the issue of the burden of proof. Indeed, the MBI Respondents consider that in this case the outcome may turn on where the burden of proof lies on the main issues, submitting that the burden of proof will be "particularly relevant" when it comes to loss. The question of burden of proof was sometimes merged during the course of submissions with the correct approach to be taken to the documents in respect of which notices to prove have been served under CPR 32.19. It is important that I untangle these issues before going any further.

179. The principles as to the approach to be taken to the burden of proof are uncontroversial and may be summarised briefly as follows:

i) The general rule is that, so far as the persuasive burden is concerned, "where a given allegation, whether in the affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on that party" (see *Phipson on Evidence* (19th Edition) at [6-06] and *Emmanuel v Avison* [2020] EWHC 1696 (Ch) per Birss J at [54]).

ii) The party bearing the persuasive, or legal, burden will generally also bear the evidential burden, i.e. the burden to adduce sufficient evidence for the matter to be determined by the court.

iii) The standard of proof in civil cases is on the balance of probabilities. The court must seek to determine whether, "on the evidence, the occurrence of the event was more likely than not". The inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities. This simply means that "[the] more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it" (*In Re H (Minors)* [1996] AC 563 per Lord Nicholls at 586G-H).

iv) If a party bears the legal onus of proof, the service by that party on the other party of a notice to prove documents pursuant to CPR 32.19 cannot operate to shift the legal burden (see *Emmanuel v Avison* at [57]).

180. The effect of serving a notice under CPR 32.19 requiring a party to "prove" a document was considered by Norris J in *Redstone Mortgages Limited v B Legal* [2014] EWHC 3398 (Ch) at [57] and [58]:

> "Requiring a party to "prove" a document means that the party relying upon the document must lead apparently credible evidence of sufficient weight that the document is what it purports to be. The question then is whether (in light of that evidence and in the absence of any evidence to the contrary effect being adduced by the party challenging the document) the party bearing the burden of proof in the action has established its case on the balance of probabilities…The question is therefore whether any evidence as to the provenance of the document has been produced, and if it has then whether (although not countered by any evidence to the contrary) such evidence is on its face so unsatisfactory as to be incapable of belief".

181. Criticism of the evidence about the authenticity of a document cannot amount "to a covert and unpleaded case of forgery". Any such case would need to be set out fairly and squarely in the pleadings (See *Redstone Mortgages* at [58]).

182. In the context of the approach to take to documents which are the subject of a notice to prove, I was also taken by Mr Curl to authorities concerned with the assessment of secondary evidence (the question in this case being whether the party in receipt of a notice to prove has proved the original documents by reference to secondary evidence in the form of copies). Although this situation was once governed by the "best evidence rule", it is "clear law that no such rule exists today, at least in civil actions" (see *PRA v Goodinson* [2021] 1 WLR 5249, per Warby LJ at [33]); the rule against the admission of hearsay evidence in civil proceedings having been abolished by section 8 of the Civil Evidence Act 1995.

183. In any case where a party seeks to adduce secondary evidence of the contents of a document (such as a copy of that document, for example), it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. As Jonathan Parker LJ said in *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563 at [85]:

> "In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. Where the party seeking to adduce the secondary evidence could readily produce the document, it may be expected that (absent some special circumstances) the court will decline to admit the secondary evidence on the ground that it is worthless. At the other extreme, where the party seeking to adduce the secondary evidence genuinely cannot produce the document, it may be expected that (absent some special circumstances) the court will admit the secondary evidence and attach such weight to it as it considers appropriate in all the circumstances. In cases falling between those two extremes, it is for the court to make a judgment as to whether in all the circumstances any weight

> should be attached to the secondary evidence. Thus, the "admissibility" of secondary evidence of the contents of documents is, in my judgment, entirely dependent upon whether or not any weight is to be attached to that evidence. And whether or not any weight is to be attached to such secondary evidence is a matter for the court to decide, taking into account all the circumstances of the particular case".

184. It is no surprise that ultimately the approach to be taken by the court to the question of "proof" of documents which have been challenged by way of a CPR 32.19 notice is an evaluative, fact sensitive approach.

The Liquidators' Witnesses

185. The Liquidators called two factual witnesses, Mr Krys and Mr Salfiti.

Mr Krys

186. Mr Krys is a very experienced insolvency practitioner with approximately 30 years' experience; he has overseen a number of substantial liquidations in the BVI. He is the executive chairman and founder of Krys Global and since 8 July 2019 he and Mr Mitchell have been appointed as joint liquidators of the Company. Prior to that date (and at all times from 31 March 2014) Ms Caulfield, an employee of Krys Global, had been the appointed liquidator of the Company. Ms Caulfield reported to Mr Krys during her time as liquidator and he covered for her during two periods of maternity leave. Accordingly, it was his evidence that he has had a "working knowledge" of the investigations into the business and affairs of the Company at all times since Ms Caulfield's appointment, together with an active risk management role.

187. Mr Krys provided four witness statements to the court. The first, dated 18 March 2020, was his main witness statement and was plainly designed to provide the background to the Liquidation. Unfortunately, far from concentrating on the direct evidence that Mr Krys was able to give, it engaged in a recitation of the documents, including from time to time, as he accepted, his observations, opinions and assessments regarding those documents:

> "Q…what you have done in your witness statements is seek to describe what you think might have happened, your opinion about what might have happened, based on the documents you've read?
>
> A. Yes, it's using our, again, professional judgment in looking at documents and trying to assess them."

188. Somewhat inexplicably (and despite his express confirmation that he was aware of the need to put before the court all of the relevant facts within his direct knowledge), Mr Krys' written evidence omitted to deal with the one meeting that Mr Krys himself had attended with the Sheikh on 2 February 2016, failed to set out his thought processes in arriving at the conclusion that a number of the key documents in dispute were in fact genuine and also omitted to deal with various documents which formed part of the history of the Liquidation which cast the MBI Respondents' case in a potentially different light from that shone on it by Mr Krys. When asked about various of these omissions, Mr Krys' response was that he had not referred to evidence in his statement "[b]ecause I knew I was going to be crossed and giving evidence" or because "nothing came out of

it", explanations which appear to me to be peculiar to say the least given Mr Krys' considerable experience and understanding of the court process.

189. On balance, I do not consider that these omissions were deliberate attempts to mislead the court on the part of Mr Krys, who generally presented as an honest and experienced witness (he is an office holder in the BVI). However, there is no doubt that they suggested a somewhat partisan approach to his evidence together with a willingness to allow his legal team to set the agenda for that evidence. Indeed, Mr Krys accepted in his evidence that "most" of his first statement had been provided by legal counsel and included "what they thought was the critical information that we had received and would like in a witness statement". In my judgment this was an entirely inappropriate approach to adopt.

190. Furthermore, owing perhaps to the fact that Mr Krys has not had a close involvement with the Liquidation until recently (and had no involvement of any kind with it between October 2011 and March 2014 when Ms Caulfield replaced the original liquidator, Mr Kinnon), I formed the clear impression that he was not always on top of the conclusions that his predecessors had reached in the Liquidation (or their rationale for arriving at those conclusions) and that his observations, opinions and assessments of the documents had been informed by the focus that had been placed in the drafting of his statement by his legal team on documents and evidence which appeared supportive of the Liquidators' case – another indicator of partiality. This focus led to Mr Krys being cross examined about documents which had not been disclosed by the Liquidators and to a raft of new documents being disclosed over the weekend of 6/7 February 2021.

191. It was also regrettable that Mr Krys' first statement focussed a considerable degree of attention on setting out extracts from earlier evidence given by the Sheikh, Ms Al Jaber, Mr Salfiti and Mr Yussouf at their s.236 Examinations, apparently with a view to pointing up inconsistencies in the MBI Respondents' evidence. Mr Krys acknowledged in cross examination that these passages had effectively been chosen by his lawyers as being "particularly relevant". This is neither a legitimate exercise for a witness statement owing to the fact that it has the appearance of arguing the case, nor, it seems to me, an appropriate exercise of an office holder's obligations (whether an office holder in the BVI or in this jurisdiction). Once again it adds to the overall impression of a less than impartial witness.

192. Mr Krys' second witness statement dated 26 November 2020 was designed to explain the steps taken by the Liquidators to obtain a copy of the judgment of the Caribbean Court of Appeal dismissing the appeal in the Termination Application and to put into evidence documents that were referred to at the Sheikh's second s.236 Examination. Mr Krys was not cross examined on this statement, although Miss Stanley sought to draw a not entirely flattering comparison between the efforts expended by the Liquidators in trying to get a copy of the judgment and their efforts in trying to obtain information about the Company.

193. Mr Krys' third witness statement, also dated 26 November 2020, addressed the steps that the Joint Liquidators have taken to confirm the current status of the JJW Inc Shares. His fourth witness statement, dated 14 December 2020, was designed to put in evidence documents that had been provided by Ms Jovovic, to which I have already referred.

194. As I have said, I consider Mr Krys to be an honest witness with a great deal of experience of conducting liquidations. In so far as he was able to give evidence orally from his own

direct knowledge and experience, I accept that evidence. Nevertheless, the approach taken to the preparation of his written statements was wholly misguided. To the extent that much of his written evidence amounts to little more than inadmissible opinion evidence as to the effect of documents, apparently formulated by his lawyers, I attach no weight to it.

195. A consistent criticism of Mr Krys from the MBI Respondents has been that he has failed properly to consider the information available to him, to identify gaps in that information and to take appropriate steps to fill those gaps. Further, that notwithstanding his acknowledgement of a duty on his part to exercise "professional scepticism", he has failed to pursue obvious lines of enquiry. In circumstances where, for reasons to which I shall return, there has been no need for me to consider the MBI Respondents' case on contributory negligence, I do not need to consider these points further in that context. However, I shall return in due course to steps taken by the Liquidators in their administration of the Liquidation.

Mr Salfiti

196. Mr Salfiti was, before entering into a compromise with the Liquidators, the Third Respondent in these proceedings. He is a solicitor of the Senior Courts of England and Wales and was admitted to the roll of solicitors on the 1 December 1994. At the time of preparation of his witness statement in these proceedings (which pre-dates his compromise with the Liquidators) he was a partner in John Street Solicitors LLP. He is now a consultant solicitor at BA International Solicitors.

197. In about 2006, Mr Salfiti had conditions placed on his ability to practice by the SRA and in 2008 he was suspended from practice for 3 months for failing to report the serious misconduct of a trainee in his firm (at that time Salfiti & Co).

198. In about 2009 or 2010, whilst working as a consultant at McFaddens LLP, Mr Salfiti met the Sheikh and began a long working relationship with him, first in his role as consultant at McFaddens LLP and then in about 2012 as a consultant with MBI & Partners UK Ltd ("**MBI & Partners UK**"). In April 2014, he commenced employment with that company as its "Senior Legal Adviser". Between 21 May 2014 and 18 July 2016 he was also a statutory director of MBI & Partners UK and between 5 June 2014 and 18 July 2016 he was a statutory director of another UK company connected with the Sheikh: JJW Hotels & Resorts Ltd.

199. Mr Salfiti (together with Mr Yussouf) was the subject of a s.236 Examination on 14 November 2017. A transcript of his evidence was made available to the court in these proceedings by the Liquidators. At the time of the Sheikh's first s.236 Examination in April 2018, Mr Salfiti appears to have been dealing with the proceedings on behalf of both the Sheikh and Ms Al Jaber.

200. Mr Salfiti was dismissed by the Sheikh as legal adviser on 23 October 2018 and is now subject to proceedings brought against him (i) by the Sheikh and others in the High Court alleging deceit, breach of fiduciary duty and conspiracy and (ii) by MBI & Partners UK in the County Court alleging conspiracy, the making of bribes and breach of fiduciary duty. At the time of this judgment, the court has no information as to the progress of these proceedings.

201. Notwithstanding his primary involvement in the UK operation of the MBI network of companies, Mr Salfiti also had some involvement in dealing with issues arising in the Liquidation of the Company, although the full extent of that involvement is in dispute.

202. I found Mr Salfiti to be a wholly unsatisfactory witness. Not only did he try to argue the case for the Liquidators, but he also gave evasive and obviously dishonest answers to questions posed to him. By way of example, it became clear under cross examination that his witness statement gave an inaccurate impression around his suspension from practice and the conditions placed on his certificate. Similarly, the evidence in his witness statement to the effect that he had only ever been "peripherally" involved in proceedings in the BVI relating to the Company and that he had acted merely as a "postbox" was fatally undermined in cross examination having regard to the contemporaneous documents. Evidence he gave in his s.236 Examination as to the knowledge and involvement of Ms Al Jaber in the affairs of the business also appeared at odds with evidence he gave (for the first time) in re-examination about Ms Al Jaber's desire to understand "what's happening" and to be "updated".

203. I agree with Miss Stanley's submissions that Mr Salfiti plainly had grounds to hold a grudge against the Sheikh and showed himself in evidence to be entirely unreliable. In the circumstances it seems to me that it would not be safe to accept his evidence save in so far as it consists of admissions or is supported by contemporaneous corroborative documents, other reliable sources of evidence or the inherent probabilities.

Potential witnesses not called by the Liquidators

204. The MBI Respondents submit in their written closing submissions that there are at least four individuals that could and should have been called by the Liquidators and they invite me to draw adverse inferences by reason of the Liquidators' failure to adduce such evidence. The individuals concerned are Mr Britt and Mr Khoury, both former employees of the Company and (together) the source of the Company Accounts, Mr Kinnon and Ms Jovovic. In addition, during her oral closing, Miss Stanley submitted that there was also no explanation for the absence of Ms Caulfield and Ms Duncan. I could not detect a specific inference that I was invited to draw in relation to Ms Duncan, but in so far as Ms Caulfield was concerned, the key inference that I was invited to draw was that she could not have given evidence (truthfully) that she had in fact tried, or wanted to, realise the JJW Inc Shares. I was invited to draw a similar inference in relation to the failure to call Mr Kinnon to give evidence, together with an inference that Mr Kinnon would not have been able to support the Liquidators' case that the Company Accounts were genuine.

205. I shall return to the detailed submissions as to the inferences that I should draw when dealing with relevant issues in due course.

The MBI Respondents' Witnesses

206. The MBI Respondents adduced oral evidence from only one witness, Mr Zahy Deen. In addition, they invited the court to admit into evidence the five witness statements prepared on behalf of the Sheikh, a witness statement from Mr Ippolito, a French lawyer working for White & Case in Paris ("**Mr Ippolito**") and a letter dated 26 November 2020 from Mr Ragheb in respect of which a hearsay notice was served.

Mr Deen

207. Mr Deen is a solicitor who has been employed by MBI & Partners UK as Head of Legal since March 2019. He explains in his first witness statement dated 19 June 2020 that he represented the MBI Respondents and JJW Guernsey from August 2019 until January 2020 and that as Head of Legal he has had primary responsibility for assisting in the production of evidence for the MBI Respondents in these proceedings. He explains (i) the difficulties that he encountered in producing evidence during the Covid 19 Pandemic; (ii) the existence of letters seeking documentation from entities providing corporate and secretarial services to relevant companies within the MBI Group; (iii) the electronic document investigations that he had intended to make before discovering that records of emails produced prior to 2016 were likely to be "entirely inaccessible"; (iv) the additional difficulties he has encountered by reason of the lack of any automated central document management system in the Sheikh's business; and (v) the continuing investigations into emails and electronic documents.

208. Mr Deen was not an impressive witness. I found his evidence to be frequently confused and sometimes evasive. A couple of examples will suffice:

i) When being asked about the identity of the ultimate beneficial owner of the MBI Group he initially refused to answer the question on the basis that he needed to take instructions and then, upon an intervention from the court, he said that his understanding was that the beneficial owners of the Group were the Sheikh's children. However, he subsequently acknowledged that the Sheikh was the ultimate beneficial owner of JJW Guernsey and having been shown further documents he then accepted that in reality he could not say whether the Sheikh is the ultimate beneficial owner of the MBI Group: "yes, yes yes, I never worked it out and I am not the best person to ask as well…I need to look into it in order for me to give accurate information".

ii) Mr Deen initially denied working for the Sheikh notwithstanding the contemporaneous evidence showing him to have been on the record for the Sheikh in these proceedings between 9 August 2019 and 16 January 2020. Later, however, his own evidence indicated a clear working relationship; he confirmed that he spoke to the Sheikh several times a week and that he took direction from the Sheikh on a regular basis. It is clear from that evidence, and I find, that Mr Deen acted as the Sheikh's agent and his main conduit with his external lawyers.

iii) Despite his statement focussing on the steps he had taken to produce documentary evidence, he was unable to provide any real detail as to what he had done and when it was put to him that various investigations had not happened his response was "I really can't remember…I am not sure if that case or other case, but I think we couldn't go before 2014. I might be wrong…I really can't remember…". In similar vein he could not remember whether he had been involved in searching for, or instructing a search for, additional documents shortly before trial.

iv) Mr Deen's evidence about whether or not Maples BVI would have provided him with information had he requested it from them was extremely confused. On the one hand he made it clear that he would request and "they would provide", on the other he appeared reluctant to accept that if he had asked for a copy of the JJW Inc Register they would have provided it to him.

209. Mr Deen's evidence was of limited value in any event – he has only been employed since 2019 and has no first-hand knowledge of any of the material events in this case. However, in the circumstances that I have identified, and save for admissions made against the interests of the MBI Respondents or where it is supported by contemporaneous material or the inherent probabilities, I do not consider that I can safely rely on Mr Deen's evidence.

The Sheikh

210. The Sheikh describes himself as "an international businessman and the founder and Chairman of a large number of companies operating in the commercial property, finance, hospitality and food industries" around the world.

211. The Sheikh's evidence on which the MBI Respondents seek to rely is to be found in five different statements and in his List of Corrections. His first three statements (dated 4 May 2018, 17 May 2018 and 1 November 2018) date back to 2018 when the Sheikh was required to provide evidence in connection with his s.236 Examinations. His fourth statement, dated 19 June 2020 was made in these proceedings and (as he says in his fifth statement) was "intended to be [his] main evidence and to deal with all the key issues in these proceedings".

212. The List of Corrections provided to the court on the morning of 9 February 2021 is not verified by a statement of truth. It corrects various statements made in the Sheikh's first, third and fourth statements. It concludes with an apology to the court for "the previous inaccuracies and omissions" in his earlier witness statements and it states that "while I believed those statements to be true, complete and accurate when I signed them, I realise now that I made some mistakes or omitted information in some cases".

213. The Sheikh's fifth statement dated 15 February 2021 was produced "to supplement and explain" the List of Corrections. Again it apologises for inaccuracies in his earlier statements saying that these had only come to his attention "very recently", that he had not previously understood the significance of various issues in the proceedings and that had he done so he would have "given them greater attention and would have caused documents relating to them to be reviewed earlier". The Sheikh concludes saying that he would "never seek to mislead the court or to sign a statement of truth on a document containing information that [he] knew to be false".

214. In addition to the Sheikh's five statements admitted into evidence at the invitation of the MBI Respondents, the court also has before it in the bundles (i) the Sheikh's 2011 Affidavit sworn in the 2010 Proceedings in the commercial court, designed to provide an update on his asset position in circumstances where a Freezing Order had been made against him ("**the 2011 Affidavit**"); (ii) the Sheikh's 2013 Affidavit sworn in support of the Termination Application; (iii) a transcript of evidence given by the Sheikh at his first s.236 Examination on 26 April 2018; (iv) a transcript of evidence given by the Sheikh at his second s.236 Examination on 1 November 2018; and (v) a third witness statement dated 20 July 2019 made in the 2019 Proceedings involving Ms Jovovic ("**the July 2019 Statement**").

215. Having regard to all of this evidence, the Liquidators submit that "given the demonstrable unreliability of the Sheikh's word both orally and in writing, including when sworn, it is improbable in any event that his oral evidence would have carried much weight had he

given oral evidence". Miss Stanley submits in response that it would be improper for the court to infer that the Sheikh would not have been able satisfactorily to explain the inconsistencies in his evidence, or to infer that he knowingly gave incorrect evidence to the court in his s.236 Examinations or in his witness statements in these proceedings, given the provision of his List of Corrections in advance of the first occasion on which he was due to give evidence. She points out that the Sheikh has frankly admitted the previous inconsistencies in his evidence and apologised for them. In her written skeleton she went so far as to say that where "the Liquidators have not agreed to give the Sheikh the chance to go into the box and further explain himself" it would be "unprincipled and wrong for the court to assume that [the Sheikh] could not further explain himself if there was cause for him to do so". I reject this submission which appears to me (having regard to the procedural history and in particular the PTR Decision) to be a mischaracterisation of events.

216. I am not in any event persuaded by either of these approaches to the Sheikh's evidence, in so far as they each appear to be inviting me to draw inferences as to the likely credibility of the Sheikh had he in fact given oral evidence. Absent witness evidence from the Sheikh, and given what I have already said about the approach the court must take to the evidence generally, there is no need for me to infer what might have happened had the Sheikh given evidence, and it would not be appropriate to do so. All the court can sensibly do in the circumstances is seek to determine the weight to be given to his statements, both having regard to the content of the statements themselves and in light of all the other available evidence.

217. Miss Stanley submits that the Sheikh's evidence (as corrected) should be given significant weight, that he is the only witness before the court who was closely involved with the Company in 2009/2010 and that, where he has not been afforded the opportunity to give live evidence owing to his ill health, the court should be slow to draw adverse conclusions about his evidence. She points to evidence given by Messrs Yussouf and Salfiti in their s.236 Examinations to the effect that they regard the Sheikh as "honest" (Mr Salfiti in fact said "as honest as can be for a businessman"; Mr Yussouf has not been called to give evidence).

218. However, having considered all of the evidence and submissions with care, I do not consider that I can sensibly attach any real weight to the Sheikh's evidence, save in so far as it is corroborated by undisputed contemporaneous evidence, is consistent with the inherent probabilities or is contrary to the interests of the MBI Respondents. I set out my detailed reasons below.

The Statements as a whole

219. Looking first at the Sheikh's statements as a whole, it is clear from the List of Corrections that whilst they are all relatively concise, nevertheless they contain numerous inconsistencies, as therein identified. I need not set these out in any detail. The most striking concerned his evidence as to the ownership of the JJW Inc Shares (and in particular the 129K Shares), and, given that the parties have identified this as one of the Issues the court must decide (*Issue 20*), I shall address it here by way of illustration.

220. In his first statement, expressly provided pursuant to a court order of Registrar Barber dated 26 April 2018 requiring a statement setting out "the name of the UK entity that

now holds the shares in JJW Hotels & Resorts Holdings Inc [i.e. JJW Inc]", the Sheikh said in terms that JJW UK[4] had acquired "all the shares of JJW Inc" and provided an explanation as to how this had taken place (this reflected evidence he gave in his first s.236 Examination to the effect that the JJW Inc shares were "100% owned…by [JJW UK]"). The assertion that all of the JJW Inc shares were transferred to JJW UK pursuant to a resolution of JJW Inc dated 27 July 2017 was repeated in the Sheikh's fourth statement, a statement prepared for him by Baker & McKenzie as his main evidence in these proceedings. It was not until the List of Corrections and then his fifth statement that the Sheikh formally changed this evidence, saying that, in fact, JJW UK acquired "the assets and liabilities" of JJW Inc rather than the shares and that the 129K Shares were listed as being held by the Company.

221. An important aspect of the Sheikh's explanation for the inconsistencies in his statements is that he was not close to the detail, that he believed what he was saying at the time and, further, that he has been let down by various of the individuals within his organisation to whom he had delegated responsibility. On close analysis, I do not accept this explanation. Indeed, the Sheikh's own evidence is not always entirely consistent as to the extent of his involvement in his various businesses. In his third statement he says that he is "a details man when it comes to the nuts and bolts of the businesses" but that he relies on others in relation to legal, tax, structural and accounting matters and he says that he has been let down by his in-house legal and financial team over the last few years. In his fourth statement, however, he says that in 2016 he was "operating a large business with lots of employees, at least eight active offices across various jurisdictions, and a large amount of overseas travel". This, he records, meant that he was "**not always** aware of the **precise** details of every matter concerning my business" (**emphasis added**) – the obvious inference being that he was usually aware of such details. This evidence is entirely inconsistent with his pleaded case that in 2011/2012, owing to his illness, he "stepped down from the day to day running of the business including the companies which are the subject of these proceedings".

222. The available evidence of other witnesses (not all obviously hostile to the Sheikh) suggests that (at the relevant times) the Sheikh was involved on a daily basis with his business. Thus the transcript of Mr Yussouf's s.236 Examination records that he confirmed that the Sheikh is "quite hands on", that this has been the case "from day one" and that this is "[a]t a micro level", evidence which fits with the Sheikh's assertion that he is closely involved with the "nuts and bolts". In response to a question as to whether he would say that the Sheikh knows more than anybody else about the business of the MBI Group, Mr Yussouf responded "[t]otally. You know – he manages it". Later he described the Sheikh as calling "all the shots" and keeping "most of the information to himself". In his own (first) s.236 Examination, the Sheikh accepted that Mr Yussouf, as chief financial officer, knew what was going on in the business.

223. In the transcript of Ms Al Jaber's s.236 Examination she says the same thing:

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[4] The statement in fact says that "JJW Hotels & Resorts Holdings Inc acquired all the shares of [JJW Inc]", but the reference to JJW Hotels & Resorts Holding Inc was plainly a genuine mistake as was clear from the remainder of the statement and from a correction made by his third statement - the reference should have been to the Fourth Respondent, JJW UK.

> "Q. Who made decisions in the MBI Group? A. My dad. Q. Does he still make the decisions in the MBI Group? A. I would think so. Q. Is there anyone else you can think of who would make those decisions? A. No".

224. Mr Ippolito's statement (which the MBI Respondents invite me to accept) confirms that the Sheikh provided instructions "direct" to Mr Ippolito and that "sometimes we would speak on a daily basis". The evidence provided by Mr Salfiti in the witness statement he prepared when he was still a defendant to the proceedings was in a similar vein, describing the Sheikh as exercising "close control over almost every aspect of his business empire", evidence which he repeated in his s.236 Examination.

225. In light of this evidence, I find that on balance the Sheikh has sought in parts of his own evidence to distance himself from the daily operations of his business, to suggest that he was often not really apprised of the details and to blame others for various "oversights" – thereby enabling him to attempt to explain away the inconsistencies in his statements and other evidence. However, having regard to the inherent probabilities and given the other available evidence to which I have referred, I find that, at all material times, the Sheikh was closely involved with, and in control of, every aspect of his businesses. Accordingly, the suggestion that he did not know what was going on, or that he left important matters concerning those businesses to be dealt with by others, simply does not ring true.

226. Furthermore, I am bound to say that I treat with a good deal of scepticism the submission that I should accept the Sheikh's (heavily amended) evidence as credible and true just because it is submitted that he has frankly admitted his errors and apologised for them. The Sheikh saw fit to provide his List of Corrections (which substantially altered his case) on the morning of the day on which he was due to commence his evidence, thereby effectively derailing the trial. He gave no explanation in the List of Corrections as to why he had left matters so late and his fifth witness statement is vague on this subject, stating that:

> "[i]t was not until shortly before the trial that my attention was focused on the details of [the July 2017 transaction] and that I carefully reviewed documents that showed that in fact legal title to the [129K Shares] had not been transferred"

and that:

> "…if I had fully understood the significance of these issues earlier, I would have given them greater attention and would have caused documents relating to them to be reviewed earlier"

and that:

> "The fact that my previous statements were incorrect came to my attention very recently".

227. On their face, these proceedings make a claim for in excess of US$ 3 billion against the MBI Respondents. Leading counsel has been instructed from the outset and the Sheikh signed the statement of truth on his Defence as long ago as September 2019. That Defence expressly sought to deal with the ownership of the 129K Shares by a cross

reference to the Petsche Email of December 2017 which expressly asserts that 100% of the JJW Inc Shares had been acquired by JJW UK. The fact that the Liquidators' original pleaded case (based on the Sheikh's own evidence at his s.236 Examination) was to the effect that a resolution had been passed by JJW Guernsey in July 2017 does not (contrary to Miss Stanley's submissions in closing) affect this analysis one jot.

228. Simply put, the Liquidators were plainly seeking to explore what had become of the 129K Shares; the idea that the Sheikh (who, prior to his serious illness in mid-2021, was intimately involved in every aspect of his business) would not have concentrated on this issue until the very last minute is not credible. At the very least I would have expected a more detailed statement explaining exactly how and when the significance of the issue came to his attention, why he had not focussed on it before and why relevant documents have been produced so long after the event. Of potential significance in this context is Mr Deen's admission that he was aware of the central importance of the issue of ownership of the JJW Inc Shares to the proceedings. It is inconceivable, in my judgment, that the Sheikh's internal legal adviser understood the importance of this issue, but that the Sheikh did not.

229. To my mind, the fact that the Sheikh has corrected his earlier statements is not an indicator in the circumstances of this case that I should attach weight to his List of Corrections and to his fifth statement. Far from it. The extent and breadth of the obvious inconsistencies in his statements and his failure to provide any credible explanation for those inconsistencies supports the proposition that, save in so far as they give evidence contrary to his interests or consistent with reliable evidence and inherent probabilities, I should attach no real weight to any of the Sheikh's witness statements. Given the Sheikh's absence from the trial, however, I must go on to consider the Sheikh's statements in their context.

The Sheikh's statements in context

230. Turning then to a comparison of the Sheikh's statements in these proceedings (as corrected) with other available evidence, perhaps the most striking thing is the inconsistency between (i) the evidence in the Sheikh's 2013 Affidavit to the effect that the Company was strong and solvent and that it was "the 11% shareholder of JJW Inc"; the submissions made to similar effect on his behalf in pursuit of the appeal against the BVI court's refusal to terminate the Liquidation; and the content of the Statement of Affairs; and (ii) his evidence in these proceedings that the 891K Shares in JJW Inc were held by the Company on a "conditional basis" and that, in any event, the 891K Shares were transferred back to JJW Guernsey in June 2010 albeit that there was a failure to register the transfer.

231. Should I attach any weight to the Sheikh's most recent, corrected, statement notwithstanding these inconsistencies, as the MBI Respondents invite me to do? In my judgment, I should not, for the following main reasons.

The 2013 Affidavit

232. The Sheikh was asked about his 2013 Affidavit at length in his first s.236 Examination. In the first instance he said that the affidavit had been prepared by his lawyer, who would have read it to him. He went on to say "I will not sign anything if it is not true". However,

under questioning about the statement in the 2013 Affidavit that the Company was the 11% shareholder in JJW Inc, he said "This is half the story" and went on to explain, in a somewhat confused and disjointed fashion, that there had been plans for an IPO, that the shares had been transferred to the Company pursuant to those plans and that when the IPO failed, the shares were given back in 2010. When he was then asked to what he was referring in the 2013 Affidavit when he said the Company was "strong and solvent" he said that the Company owed a "personal debt" to "MBI", i.e. a "group company debt". He was wholly unable to explain why that had not been mentioned in the 2013 Affidavit and eventually he appeared to suggest that there must have been an error in the drafting of the 2013 Affidavit by his lawyer.

233. In his third witness statement, the Sheikh sought to explain why, in his words, the s.236 Examination on 26 April 2018 had been "less than satisfactory" and it is here that he provides an explanation for the inconsistency between his 2013 Affidavit and the case he advanced during that examination. Amongst other things he asserts that he "wholly relied" on Mr Salfiti and Ms Jovovic for the information in the 2013 Affidavit and that Mr Salfiti told him that "the affidavit contained technical matters and not to worry about them". This explanation is largely repeated in his fourth statement, where he acknowledges that the 2013 Affidavit was "incomplete…and should have been clearer", but effectively blames Mr Salfiti and Ms Jovovic for the error.

234. Having regard to the inherent probabilities and the other contemporaneous evidence, I find these explanations entirely unconvincing. The Sheikh originally said in his s.236 Examination that the 2013 Affidavit had been read to him and that he would not have signed it if it had not been true. It was plainly very important to the Sheikh to succeed in terminating the Liquidation of the Company; in an email from Mr Yussouf to Mr Kinnon dated 20 September 2013, Mr Yussouf refers to the "direct instruction" from the Sheikh "who is not happy at all because of the huge delay [in making the application to terminate]". Against that background, the idea that he would have regarded the content of the 2013 Affidavit as "technical" and not something he need concern himself with seems extremely unlikely.

235. In any event, the contemporaneous documents in the form of two emails dated 9 October 2013 show that far from relying "wholly" upon Mr Salfiti, the Sheikh was providing instructions direct to his BVI lawyer, Mr Laing. The emails were sent to Mr Kinnon and Mr Yussouf, copying in Mr Salfiti, and it is clear from their content (which include a reference to verbal instructions "by HE [His Excellency]" and the observation that "as HE explained he needs to put the facts in his own words") that (i) Mr Laing had direct contact with the Sheikh over the preparation of the Affidavit; (ii) the Sheikh was keen to put the substance of the affidavit into his own words; and (iii) the Sheikh was focussing his attention on the drafting of specific paragraphs. There is nothing in the contemporaneous evidence to support the proposition (made by the MBI Respondents in closing) that owing to his poor eyesight, the Sheikh would have required others to explain its contents, with the ancillary risk that it might not be accurately explained and mistakes would not be picked up.

236. In my judgment, the Sheikh's statements attributing the preparation of the content of the 2013 Affidavit to Mr Salfiti and Ms Jovovic are plainly unreliable and I reject them. I accept in light of the contemporaneous evidence, that Mr Salfiti's evidence in his witness statement to the effect that the 2013 Affidavit was prepared by Harneys is correct and I find that his evidence that he might have been involved to a very limited extent in

reviewing the statement and checking points but that the Sheikh did not rely on him to draft the affidavit is also likely to be correct. I also note in this regard that Miss Stanley did not expressly put to Mr Salfiti in cross examination the Sheikh's case that he had wholly relied on Mr Salfiti and Ms Jovovic for the information in the 2013 Affidavit, that they had told him it was "technical" and that they were to blame for the errors in that affidavit[5].

237. Miss Stanley suggests that this is an issue on which the Liquidators should have called Ms Jovovic, apparently inviting the court to infer that she was not called because she would have given evidence that was adverse to the Liquidators' case. I reject that submission and decline to draw any such inference. Here it is plain from the contemporaneous documents alone that the Sheikh's case as to the circumstances in which the 2013 Affidavit was prepared is unsustainable (and this conclusion is unaffected by the available evidence of the Sheikh's eye condition).

The Statement of Affairs

238. The Statement of Affairs was signed by the Sheikh in December 2014 and is said by the MBI Respondents not to be an inconsistent statement. In particular, they rely on the fact that the Company's shareholding in JJW Inc is referred to in a section headed "Assets Specifically Pledged", which it is said is entirely consistent with the Sheikh's case in these proceedings that JJW Guernsey had continuing ownership rights in relation to the JJW Inc Shares by reason of the conditional nature of the March 2009 Transfers.

239. In his fourth statement, the Sheikh asserts however, that the Statement of Affairs did <u>not</u> in fact reflect the Company's asset position at the time because "no amount is stated as being claimed against the shareholding in the list of assets…and the remainder of the Statement of Affairs does not make any reference to a liability being attached to the [JJW Inc Shares]. The only reference to JJW Guernsey…is to a liability for US$10 million, which relates to an entirely separate transaction". The Sheikh explains this away on the basis that he is not an expert in technical paperwork, he was suffering problems with his vision and the document was in any event prepared by Mr Salfiti upon whom he placed reliance. It remains the Liquidators' pleaded case that the Statement of Affairs was prepared by Mr Salfiti.

240. However, once again, the contemporaneous documents (many of which were only produced by the Liquidators during the trial in circumstances to which I shall return in a moment) tell a different story, as is clear from the chronology set out above. I note in particular that although Mr Salfiti appears to have been involved in discussions with Ms Caulfield over the content of the Statement of Affairs, Mr Yussouf carried out the lion's share of the work – he was directly involved in amending the draft that came originally from Ms Caulfield and in arriving at the terms of the final version to be signed by the Sheikh. His amendments appear to have been carefully made with a focus on correcting errors in Ms Caulfield's understanding.

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[5] Ms Stanley simply posed the very general question: "Do you understand that it's [the Sheikh's] case that he relied upon you to explain to him legal documents in relation to the company in liquidation?" to which Mr Salfiti responded "That's not true though". There were no follow up questions as to the preparation of the 2013 Affidavit.

241. Whilst the Sheikh acknowledged Mr Yussouf's involvement in the Statement of Affairs in his List of Corrections (served after relevant contemporaneous documents had been provided by the Liquidator), nevertheless he said nothing about relying on Mr Yussouf and nor did he suggest that Mr Yussouf, the CFO, had made an error in making amendments to the Statement of Affairs. In my judgment, the involvement of Mr Yussouf undermines the Sheikh's explanation for what he says in his fourth statement is an error in the Statement of Affairs - the Sheikh has done nothing to provide any alternative explanation and Mr Yussouf has not been called to give evidence at trial. In so far as Mr Yussouf gave evidence at his s.236 Examination on this subject, it was clear that although he was aware of the case that the Sheikh is now running, he was not familiar with the details of how it could be said that an error had been made in the Statement of Affairs (in other words he was not aware of the details of the Sheikh's current case as to security); when he was asked to whom the Company owed money for the shares, he responded "that's the bit I'm not sure".

242. In the circumstances, the Sheikh's evidence about the preparation of the Statement of Affairs is plainly unreliable. The MBI Respondents' case that the Statement of Affairs was originally drafted by Ms Caulfield and/or Ms Duncan takes matters no further in circumstances where it is now clear that their draft was heavily amended by Mr Yussouf. I reject the suggestion that, absent any clear reference to the Company's assets being subject to security in the Statement of Affairs, nevertheless the original inclusion of reference to the Company's shareholding in JJW Inc in the section of the form headed "Assets specifically pledged" by Ms Caulfield and/or Ms Duncan indicates that they were already aware that the JJW Inc Shares were encumbered. The chronological documents tell a different story, as I have identified above. In Mr Yussouf's s.236 Examination he asserted that the Sheikh had told Ms Caulfield that the Company owed money for the JJW Inc Shares, although he was unable to identify when this information had been imparted to Ms Caulfield and, as I have already said, he was unable to provide any detail.

The section 236 Examinations

243. As will already be clear, evidence given by the Sheikh to the court in respect of his s.236 Examinations was in various respects inconsistent with the evidence he now invites the court to accept in his List of Corrections and his fifth statement.

244. The MBI Respondents submit that the court should be very slow indeed to draw any negative inferences about the Sheikh's credibility from his answers to the questions posed during his s.236 Examinations, essentially because he was given no forewarning of the questions that were posed, his eyesight did not permit him to read the bundles in advance and the questions were asked in a confusing fashion.

245. I do not accept these criticisms – at the heart of the questions posed of the Sheikh were some fundamental issues about the ownership of the JJW Inc Shares – these were questions which the Liquidators had been raising in correspondence with the Sheikh for some time, as evidenced in Ms Caulfield's affidavits. At his first s.236 Examination the Sheikh was assisted with the bundles by a lawyer from Baker & Mackenzie (who, incidentally had been copied in to the Petsche Email) and he was represented by Ms Timmins of counsel, instructed by Mr Salfiti.

246. In his third statement, the Sheikh asserts that he was "poorly prepared" for the first s.236 Examination, that he was reliant upon the advice of Mr Salfiti and Ms Jovovic and that neither of them saw fit to bring to his attention "the various requests by letter received from the Liquidator containing her requests for information in relation to MBI Liquidation". He asserts that he was "ignorant of those requests" and that he was not alerted to the existence of the proceedings or the likely range of the Liquidator's enquiries until "very late in the day". I reject that evidence which I consider to be extremely implausible. I have already found that the Sheikh was in daily control of his businesses and I have also found that the Petsche Email can only have been sent on the instructions of the Sheikh. That email was plainly designed to address questions that Ms Caulfield had been posing of the Sheikh and his group of companies. It is inconceivable, in the circumstances, that the Sheikh was not fully aware of the nature and detail of her requests. I observe that the Sheikh does not explain what he means by "very late in the day" and that he does not suggest that he was not aware, for example, of the Order of Deputy Registrar Mullen on 13 December 2017, the day after the Petsche Email was sent. The Sheikh's protestations concerning his lack of preparedness for the first s.236 Examination are echoed in his protestations in his fifth statement as to his lack of preparedness for and understanding of the issues to be raised at trial. They simply do not ring true.

247. In the circumstances, I also reject the Sheikh's evidence in his third statement that during the first s.236 Examination he did not answer some of the questions because "I had genuinely thought that the question was not relevant to the liquidation" and that he had not received advice as to the consequences of not answering questions. Again, this evidence appears designed to distance him from any real understanding of the issues arising in the Liquidation. I find that the Sheikh well understood the nature of the information that the Liquidators had been seeking for some considerable time and I see no reason why he could not have familiarised himself with the key documents on which he relied (as attached to the Petsche Email) in advance of the first s.236 Examination. Whilst the Sheikh's eyesight was undoubtedly poor, I do not accept that there was any real excuse at this first s.236 Examination for the Sheikh (i) to provide inaccurate or misleading evidence, as he in fact did; or (ii) to fail to answer questions which were plainly relevant given the Liquidators' enquiries to date.

248. At his second s.236 Examination (prior to which he had prepared two witness statements in May 2018, together with another statement which he signed on the day of the examination), the Sheikh was represented by Kidd Rapinet LLP and Ms Hilliard KC. The suggestion in closing that given his eyesight he would not have been able to read the bundles in advance finds no support anywhere in the evidence. In any event, he was being questioned about issues which had been raised with him previously and, in respect of which, it is to be inferred that he had now received advice from Kidd Rapinet and from counsel. ICC Judge Schaffer expressed the view that the questions being asked of the Sheikh were "very simple", that they had been "fairly put by counsel" and that the Sheikh had answered "vigorously" as to his position. Nonetheless, as had been the case at the first s.236 Examination, inconsistencies again arose as to the status of the shares in JJW Inc and whether there had been a share transfer, as the MBI Respondents accepted in closing.

249. I do not draw specific inferences from the s.236 Examinations, but I do consider that the inconsistencies between the Sheikh's evidence at those Examinations and his List of Corrections and fifth witness statement, together with the untruths he told about the first

s.236 Examination in his third witness statement, support the conclusion that I can attach no real weight to the Sheikh's evidence (whether as given orally in his s.236 Examinations or in writing in his various witness statements).

Conclusion on the Sheikh's Evidence

250. In light of the above analysis, save for admissions made against the interests of the MBI Respondents and save where it is consistent with contemporaneous documents and the inherent probabilities, I cannot attach any real weight to the Sheikh's evidence. That evidence shows a pattern of blaming others (without proper justification) for "errors" and "oversights" which I consider to have been well within the Sheikh's own control, together with attempts to distance himself from the detail. I consider that his evidence must at all times be tested against the (unchallenged) contemporaneous evidence and the inherent probabilities.

251. In arriving at this conclusion I should make plain that I have had no regard to the many various extracts from previous judgments in other cases on which the Liquidators have sought to rely with a view to undermining the Sheikh's character and impugning his conduct. Miss Stanley submitted that these judgments were inadmissible in accordance with the principle in *Hollington v Hewthorn & Co* [1943] KB 587, and I agree. That rule renders the judgment of another tribunal inadmissible to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. As Christopher Clarke LJ made clear in *Rogers v Hoyle* [2014] EWCA Civ 257 at [39]:

> "findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge") and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor the expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard".

The foundation of the rule in *Hollington v Hewthorn* is "the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone" (Christopher Clarke LJ at [40]).

252. In the recent decision of *Ward v Savill* [2021] EWCA Civ 1378, the Court of Appeal declined to depart from the established principles enshrined in the rule. Sir Julian Flaux C (with whom Elisabeth Laing and Warby LJJ agreed) observed at [85] that "the rule in *Hollington v Hewthorn* represents a well-established principle of law which this court should follow".

253. In the absence of the Sheikh at the trial, there was no opportunity for him to seek to explain any findings of fact that the court has made previously in other cases as to his credibility or conduct. I bear in mind that I cannot know precisely what arguments were

addressed to the court in these other cases, or what influenced the court in arriving at its conclusions. In so far as the court has previously taken the view in other proceedings that the Sheikh's evidence is not credible, it has done so on the particular facts of the case then before the court. I do not consider that it would be just in all the circumstances to have regard to anything that has been said in these judgments and, even if I were not bound by the rule in *Hollington v Hewthorn*, I do not consider that it would be necessary or appropriate to attach any weight to them. The need to ensure a fair trial militates strongly in favour of disregarding these judgments in all the circumstances of this case. I have arrived at a conclusion as to the approach to be taken to the Sheikh's evidence without recourse to anything that has previously been said about him (including, as Miss Stanley put it in closing "all the prejudice that has been heaped on [him]"), but rather by having regard solely to the available evidence in this case, including my analysis of his own evidence as set out above.

Ms Al Jaber

254. Ms Al Jaber served no witness statement in these proceedings and did not appear at trial. All that the court has in evidence from her is a short witness statement dated 1 November 2018 filed on her behalf in connection with her s.236 Examination (which it is accepted by the MBI Respondents is admissible as to the truth of its contents) and a transcript of that examination.

255. Unsurprisingly, perhaps, given that she is a defendant to these proceedings, the Liquidators invite me to draw an adverse inference from her absence at trial. I shall return to this in a moment when dealing with Ms Al Jaber's position in more detail.

Mr Ippolito

256. Mr Alexandre Ippolito is a lawyer qualified to practise in France and a partner in the Paris office of White & Case LLP, where he has worked since 1997. He provided a witness statement dated 19 June 2020 in respect of which a hearsay notice was given by way of a letter of the same date. The Liquidators made no application to cross examine Mr Ippolito and no objection was taken by the Liquidators to the admission of his statement. No notice was given by the Liquidators that they intended to attack his credibility by calling any evidence (pursuant to CPR 33.5).

257. I have no reason to suppose that the evidence in Mr Ippolito's statement is anything other than truthful.

Mr Ragheb

258. Mr Emad Ragheb is now Chairman and CEO of Vision for Investments and General Trading.

259. On 26 November 2020, he provided a letter to the Sheikh (i) confirming the involvement of Ernst & Young in a proposed IPO in around 2008; (ii) confirming his belief in the accuracy of the letter sent by Ernst & Young's Cairo office on 30 June 2017 in connection with JJW Inc; (iii) confirming his belief in the accuracy of the letter sent by Ernst & Young's Cairo office on 20 June 2017 in connection with the Company; and (iv) commenting on the authenticity of the Company Accounts.

260. On 4 December 2020, the MBI Respondents served a hearsay notice in respect of this letter and it is their case that Mr Ragheb has declined to give a witness statement or to attend to give oral evidence. No application has been made by the Liquidators to cross examine Mr Ragheb and no objection was taken by the Liquidators to the admission of the letter into evidence. No notice was given by the Liquidators that they intended to attack his credibility by calling any evidence (pursuant to CPR 33.5).

261. While I have no reason to suppose that Mr Ragheb's letter is unreliable in so far as it gives evidence of matters within his own knowledge, important aspects of the letter appear to involve speculation and opinion evidence – in particular his opinion that the Company Accounts "are not genuine". Furthermore, whilst it is clear from the contemporaneous documentary evidence that Mr Ragheb was involved in matters relating to JJW Inc (and was present at the JJW Inc Board Meeting on 27 July 2017 at which the Board made the July 2017 Resolution), Mr Ragheb frankly concedes that he was "not involved much" in the Company's business, a concession which seems to me to be important in the context of his stated "understanding" as to the asset position of the Company. Mr Ragheb does not say how or where he obtained this understanding or indeed what the level of his involvement with the Company was (if any).

262. In the circumstances, it seems to me that I shall need to take care over the weight to be attached to different aspects of Mr Ragheb's evidence. I certainly do not consider that his letter can simply be taken at face value without further analysis.

Potential witnesses not called by the MBI Respondents

263. In closing, the Liquidators invite me to draw six adverse inferences by reason of the absence of (i) Ms Al Jaber; (ii) Messrs Daniel Perkins and Richard May (both of Maples); (iii) anyone from Ernst & Young; (iv) the authors of key documents whose authenticity is challenged and/or unnamed individuals who might have been able to speak to key documents.

264. I note that no invitation was made to me to draw any adverse inference from the absence of Mr Yussouf, although I consider his absence to be particularly striking. At no time was he criticised by the Sheikh in his statements (unlike, say, Mr Salfiti), suggesting that the Sheikh reposes trust and confidence in him, and the evidence is clear that he was involved in the Termination Application and that he completed the Statement of Affairs. However, the explanation for the lack of any such invitation may perhaps be gleaned from the fact that the Liquidators have always pleaded that the Statement of Affairs was prepared by Mr Salfiti.

265. The inferences which I am invited to draw are somewhat involved and go rather beyond the relatively straightforward inference that an identified witness's evidence on a particular issue would likely have been unhelpful. I shall return to them when I deal with the various issues to which they are relevant.

The Documentary Evidence

Disclosure

266. Pursuant to an Order dated 16 October 2019, disclosure in this matter was to be provided in accordance with the provisions of Model B; in other words the parties were to disclose

"key documents on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statements of case" and "key documents that are necessary to enable the other party to understand the claim or defence they have to meet". It would appear that this order was made at the behest of the Liquidators.

267. In circumstances where the Liquidators complain as to the failure of the MBI Respondents to provide them with relevant documents in the Liquidation, I am bound to say that the rationale for their decision to propose Model B disclosure is something of a mystery. I would have thought that they would have taken the opportunity to cast a wide net in requiring disclosure from the MBI Respondents. However, the consequence of that decision has been that relatively limited disclosure was provided by each side and that very shortly before, and during, the trial, additional documents came to light.

268. Disclosure of new documents was provided by the MBI Respondents on the evening of the first day of the trial window, a few additional documents were provided during Mr Krys' cross examination on Day 2 of the trial (Bundle KK) - justified by Miss Stanley by saying that she had "caused" a search to be made. This in turn led to a train of enquiry on the part of the Liquidators which led to the disclosure of yet further documents by the Liquidators (Bundle G, running to 620 pages) on Day 3 of the trial.

269. It seems clear that, in these unusual and somewhat unsatisfactory circumstances, the court is unlikely to have the benefit of an entire (and complete) suite of contemporaneous documents upon which to rely in order to resolve questions of disputed evidence. However, as will be clear from the section of this judgment dealing with the background to the claims, the court has been provided with a chronological run of documents to which I have had regard in arriving at my conclusions. The fact that this chronological run may be incomplete does not mean that I may not rely upon it whether for the purposes of resolving disputed evidence or otherwise. The court can only decide this case on the basis of the evidence that it has before it.

Notices to prove documents served pursuant to CPR 32.19

270. The Liquidators served a CPR r.32.19 notice to prove documents at trial on 31 December 2020. The MBI Respondents served two such notices on 16 December 2020 and 31 December 2020 respectively. Some of the original challenges have fallen away during the course of the trial, but some (concerning critical documents) remain.

271. The MBI Respondents continue to require the Liquidators to prove:

i) the Company Accounts, i.e. the consolidated financial statements for the years ended 31 December 2006, 2007 and 2008 (*Issue 35*);

ii) two organigrams of the MBI Group ("**the 2009 Organigrams**") (*Issue 39(b)*);

iii) a document entitled "Dispute Sheikh Mohamed Bin Issa Al Jaber /Austrian Airlines – MBI Counterclaim" (*Issue 39(c)*); and

iv) an email from Mr Salfiti to Ms Jovovic dated 6 July 2018 (*Issue 39(f)*).

272. The Liquidators require the MBI Respondents to prove:

i) the Demand Letters (*Issue 37*); and

ii) the June 2010 Letter (*Issue 38*).

273. Although the Liquidators originally required the MBI Respondents to prove the March 2009 Transfers, Mr Curl conceded in closing that this was no longer necessary. The Liquidators (who have no visibility around the events that took place prior to the Liquidation) now accept that the March 2009 Transfers are authentic and constitute admissible evidence of their contents (this concession removes *Issues 4 and 36*).

274. In respect of the remaining "challenged" documents, each side merely puts the other to proof of the authenticity of the documents rather than advancing a positive case of forgery or adducing any evidence to establish that the documents in issue are inauthentic.

275. Having regard to the authorities to which I have referred on the approach to be taken by the court and having regard to the available evidence, I make the following findings.

276. The Company Accounts have, on balance, been "proved" such that I can attach weight to the copies produced by the Liquidators. I say that for the following reasons:

i) The Liquidators' inability to produce the original versions of the Company Accounts is readily explicable by reason of the fact that the complete books and records of the Company are not in their possession or control (save where they have been obtained from elsewhere). There is no suggestion that the Liquidators have ever had the original versions of the Company Accounts in their possession or that they could readily have produced the original versions at this hearing (particularly in light of various facts to which I shall return in a moment). In this context, it is important to remember that the Liquidators have come "as stranger[s] to the affairs of the company which has sunk to its financial doom" (see *In Re Rolls Razor Ltd (No. 2)* [1970] Ch 576 per Megarry J at 591G-H).

ii) The available meta data for the 2007 Accounts shows that they were created on 25 November 2008, i.e. just under 10 years prior to Mr Britt's provision of that copy document to Ms Caulfield in September 2018. If the 2007 Accounts are not authentic (or contain false or misleading information), then Mr Curl is right to submit that this was a very long game indeed by whoever it was that fabricated them. The meta data for the other two sets of accounts shows only the date in 2018 when they were downloaded from the sharing platform to which they had been uploaded and so takes matters no further. However, I accept that, given the Company Accounts are in similar form, the fact that the 2007 Accounts were created in November 2008 (as would be anticipated if they are copies of genuine documents) renders it more likely that the 2006 and 2008 Accounts were also created contemporaneously.

iii) At no time have the MBI Respondents produced any competing versions of the Company Accounts.

iv) The Sheikh and Ms Al Jaber were ordered to produce "all books, papers and records in his possession and/or his control" by Deputy Registrar Mullen on 13 December 2017, but have never produced any alternative accounts, have not suggested that any attempt has been made to locate alternative accounts and have never explained why not. I am not in a position to say whether the 13 December 2017 order was complied with, but it seems to me that the proper inference from the failure to

produce any alternative accounts in response to this order is that neither the Sheikh nor Ms Al Jaber had any alternative accounts in their possession or control.

v) The MBI Respondents do not suggest that the Company would not have had any accounts for the relevant period, but they do not explain what has happened to the genuine versions of the accounts if, as they suggest, the Company Accounts on which the Liquidators seek to rely are not authentic. Of course, if the Company Accounts are authentic documents, then the failure on the part of the MBI Respondents to produce competing versions is readily explicable.

vi) Looking closely at the Sheikh's evidence on the subject of the Company Accounts (which he refers to in his fourth statement as "the Supposed Accounts"), he goes no further than to say that he "[does] not recall ever having seen the Supposed Accounts before they were produced by the Joint Liquidators in these proceedings" and that owing to the source of the information (i.e. Messrs Britt and Khoury) he has "always had concerns" as to their legitimacy. He relies heavily upon the letter from Mr Ragheb dated 26 November 2020. However, I do not consider that letter to be capable of bearing the weight that the MBI Respondents seek to ascribe to it, for reasons I shall come to in a moment.

vii) As to Mr Britt and Mr Khoury, it is suggested by the MBI Respondents that I should infer that the Company Accounts are not authentic documents owing to the fact that (a) copies were only obtained from these gentlemen; (b) they are creditors of the company; (c) Mr Krys confirmed that the Liquidators are in contact with Mr Britt (although he gave no similar confirmation in relation to Mr Khoury); and (d) no explanation has been given for not calling them. I am not prepared to draw this inference. The MBI Respondents' scepticism over the motives of Mr Britt and Mr Khoury is perhaps understandable given that the Sheikh appears to have fallen out with them, but the suggestion that, as creditors, they might have wished artificially to inflate the size of the liquidation estate (a suggestion put to Mr Krys in cross examination) was rejected by Mr Krys who said he thought it was "never the case" that creditors would approach a liquidation in that way. I accept that evidence, no doubt based on Mr Krys' many years of experience. Furthermore, I am not swayed by Miss Stanley's submission that it is "incredibly surprising" that Messrs Britt and Khoury were not asked by the Liquidators whether the Company Accounts were genuine; I would have thought that the act of handing over the Company Accounts without comment clearly indicates what the answer to any such question would have been. Finally I note that there is no evidence to suggest any form of conspiracy between these two gentlemen. Bearing in mind all of the available evidence, I cannot see that the suggested inference would be appropriate.

viii) Mr Ragheb is no longer employed by Ernst & Young and when he prepared his letter on 26 November 2020 he no longer had access to Ernst & Young's files and could not review those files to confirm whether the Company Accounts are real (as he points out). His evidence about these accounts is that he does not remember seeing them before, and this is perhaps unsurprising in circumstances where he also says that he "was not involved much with [the Company's] business". However, he nevertheless expresses the "view" that they are "not genuine". He gives no reason for arriving at this view beyond his suggestion that they "seem to have been produced by cut and paste". No attempt appears to have been made to find out what was meant by this statement and Mr Ragheb has refused to give evidence. I can see

no obvious signs of the Company Accounts having been the subject of a "cut and paste" exercise and Miss Stanley did not submit that they were. Notably, Mr Ragheb does not say that he has ever seen any alternative versions of the Company Accounts, or that the Ernst & Young stamp on the 2008 Accounts is not genuine, or that there is anything about their content that he finds suspicious. In all the circumstances, I do not consider that I can attach any real weight to Mr Ragheb's evidence in this regard. Similarly, the fact that Mr Ragheb says that he has always understood that the Company "never owned any assets of value" does not appear to me to take matters any further in circumstances where Mr Ragheb has not explained either the source of this understanding or how long he has held the understanding for. The letter from Ernst & Young dated 20 June 2017 which says something similar was not written by Mr Ragheb but by an unidentified member of "his team" – it also does not explain where the information contained in it has come from and it is in any event unclear how such statement can be reconciled with the contemporaneous documents from 2008/2009 to which I have already referred.

ix) Importantly, it is clear from what Mr Ragheb says that an existing partner at Ernst & Young would have access to their files and would be able to check the genuineness or otherwise of the Company Accounts.

x) The MBI Respondents submit that the burden of approaching Ernst & Young rests on the Liquidators and not upon them and they point out that now the Sheikh has no power to require Ernst & Young to assist in searching for documents. However, in my judgment this submission needs to be seen in the context of exchanges on 1 November 2018 between Deputy ICC Judge Schaffer and the Sheikh, and his Leading Counsel at that time. I need not set out the relevant extracts from the transcript of the s.236 Examination in full, but suffice to say that (i) the Sheikh was plainly reluctant to sign a consent form inviting Ernst & Young to disclose relevant material relating to the Company, even though Judge Schaffer considered the request for a consent form to be "not unreasonable"; (ii) Judge Schaffer made it clear that the genuineness of the Company Accounts (one of which he noted had an Ernst & Young stamp) "has to be looked into by [the Sheikh]"; (iii) Judge Schaffer made clear that he was leaving it to the Sheikh and his legal team to make enquiries and that he was not going to make an order for the provision of "consents" in circumstances where he had been told that might create embarrassment for the Sheikh in his professional relationship with Ernst & Young; (iv) Judge Schaffer suggested that all that needed to be done was to send a copy of the disputed Company Accounts to Ernst & Young "and say 'Is this your document?'"; and (v) Judge Schaffer pointed out that solicitors and counsel then acting for the Sheikh were very experienced and would know the type of questions that should be posed to Ernst & Young. In my judgment, this had nothing to do with whether the Sheikh had power to compel Ernst & Young to give evidence and everything to do with whether the Sheikh was willing to assist the Liquidators in seeking the necessary information.

xi) There is no evidence from the MBI Respondents to explain how they progressed the question of the Company Accounts with Ernst & Young after this hearing, or indeed whether they took any action at all. I can only infer that (aside from obtaining the letter from Mr Ragheb who is no longer at Ernst & Young and so cannot provide the necessary information) no attempt was made to follow the

recommendations made by Deputy ICC Judge Schaffer. Absent any explanation for this failure, and in all the circumstances set forth above, I also infer (as I was invited to do by Mr Curl) that the evidence that would have been provided by Ernst & Young (had they been consulted, as they should have been) would not have assisted the MBI Respondents and, in particular, would not have established that there were alternative sets of accounts in existence. The MBI Respondents have chosen to require the Liquidators to prove the Company Accounts in circumstances where they know the Liquidators to have difficulties in obtaining information and where they have apparently failed to take the most basic of steps within their power to obtain the information (notwithstanding the terms of the court order of 13 December 2017 and the clear indications given by Deputy ICC Judge Schaffer).

xii) I reject the suggestion by the MBI Respondents that the Liquidators should have sought to check the Company Accounts with Ernst & Young. Although it should have been in his statement, I accept Mr Krys' evidence, which struck me as credible, that (i) with his experience of looking at audited accounts he had examined the Company Accounts and concluded that they were genuine for the reasons he gave; and (ii) he was aware that auditors "don't hand over files" such that there are usually "significant costs and significant delays" experienced in trying to obtain audit files. I certainly do not consider that the fact that the Liquidators did not make their own enquiries is sufficient (in light of all the evidence to which I have already referred) to support a finding that the Liquidators have not proved the Company Accounts.

xiii) It was suggested by the MBI Respondents in cross examination of Mr Krys that the reference on the 2007 Accounts to Ernst & Young's office in Amman, Jordan was suspicious given the letter from Ernst & Young Cairo of 30 June 2017 confirming that they had been the auditors to JJW Guernsey for a period of 10 years until 2016. Mr Krys' response, which appeared reasonable, was that JJW Guernsey is not the same company and the differing offices "did not set off an alert on my side". I do not consider this evidence to raise any concern around the authenticity of the Company Accounts and I note that Mr Ragheb does not suggest in his letter that a reason for the Company Accounts not being genuine was because the 2007 Accounts referred to Ernst & Young's office in Jordan.

xiv) During his second s.236 Examination, the Sheikh did not assert that the Company Accounts were not real documents, rather, upon being shown the 2006 Accounts, he said that they were "a presentation we used to make", although he denied the truth of the content. He did not explain why a presentation was being given in respect of information which (he now says) is inaccurate. He gave a similar answer in relation to the 2007 Accounts ("maybe it was a presentation"), saying that their content was not correct. On the subject of the 2008 Accounts, which are stamped "[a] member of Ernst & Young Global, Cairo Egypt 16 October 2009" (the very same stamp as appears on the letter from Ernst & Young dated 20 June 2017), the Sheikh said that he did not remember seeing the document before and again said that its content was wrong.

xv) In all the circumstances I do not consider the evidence in relation to the authenticity of the Company Accounts to be so unsatisfactory as to be incapable of belief.

277. I do not understand the 2009 Organigrams to be central to the Liquidators' case. However, I find that they are proved and so may carry evidential weight. My reasoning is as follows:

i) The 2009 Organigrams (which have document references "MBI Group Organogram 110209.xls" and "JJW Group Organogram post structure 11.02.09.xls") were attached to Mr Krys' second statement, and he explains that (together with a number of other documents) they were provided to Ms Caulfield by Mr Britt at the same time as he provided copies of the Company Accounts. They each show a complex structure of corporate entities sitting beneath a box containing the Sheikh's name, albeit that the "post structure" version shows a change to the structure shown in the "MBI Group" Organigram.

ii) The 2009 Organigram appears to be in similar form to another organigram, included in the D Bundle shortly before the trial (which is not challenged) which was exhibited to the Sheikh's Fourth Affidavit in the 2010 Proceedings at SMAJ-4 as the final page to a schedule of assets and entitled "Organogram of MBI Group (July 2011)" ("**the 2011 Organigram**").

iii) I can see no reason why Mr Britt would have provided inauthentic organigrams to Ms Caulfield and none was suggested to me by the MBI Respondents.

278. The document entitled "Dispute Sheikh Mohamed Bin Issa Al Jaber /Austrian Airlines – MBI Counterclaim" was not relied upon by the Liquidators in presenting their case and accordingly, I need deal with it no further.

279. The email from Mr Salfiti to Ms Jovovic dated 6 July 2018 was attached to the Jovovic Affidavit. Whilst there is no reason to suppose that the email is not authentic, nevertheless I did not understand the Liquidators to invite me to rely upon it for the truth of its content (for the same reasons that they did not seek to rely upon Ms Jovovic's Affidavit itself). It was not referred to in the Liquidators' closing submissions. Again I need deal with it no further.

280. The Demand Letters and the June 2010 Letter have not been proved and, on balance no weight can safely be attached to them. My main reasons are as follows:

i) Original versions of the Demand Letters and June 2010 Letter have never been produced. Copies were first provided to the Liquidators under cover of the Petsche Email. The MBI Respondents have never sought to explain what has happened to the hard copy originals, beyond submitting in closing that the events with which they are concerned date back over 10 years.

ii) The Sheikh refers to the Demand Letters and the June 2010 Letter in his various statements, but I agree with the submissions made by Mr Curl that when these documents are seen in the context of the unreliable nature of the Sheikh's evidence, the fact that he has expressly referred to them (or "proved them", as Miss Stanley put it) takes matters no further, absent some other form of reliable evidence.

iii) Indeed, there is a very stark inconsistency between these letters and the content of the Sheikh's 2013 Affidavit, which does not refer to these documents but instead asserts that the Company is the 11% shareholder in JJW Inc. No satisfactory

explanation has ever been provided by the Sheikh as to this inconsistency and I have already addressed the obvious unreliability of his statement that he wholly relied upon Mr Salfiti and Ms Jovovic for the content of his 2013 Affidavit.

iv) The 2013 Affidavit was prepared with the assistance of Mr Laing of Harneys. If the Sheikh had suggested to him that the 891K Shares had in fact been returned to JJW Guernsey and if he had shown Mr Laing the Demand Letters and the June 2010 Letter (which would clearly have been relevant to such a case) then I have no doubt that the 2013 Affidavit would have looked very different. Indeed, I suspect that the Company would have had little basis for seeking to terminate the Liquidation.

v) These documents were never mentioned by the Sheikh until they were sent to Ms Caulfield's solicitors under cover of the Petsche Email on 12 December 2017. That email confirms that neither Dr Petsche nor his firm was involved in any of the transactions to which it refers and that his explanation of events is "based solely on my understanding of the documents and the information I received from the corporate records of the company". There is no explanation as to where these "corporate records" were found and why they were not made available, either to the BVI court, or to Ms Caulfield, previously.

vi) The Demand Letters and the June 2010 Letter were sent to Dr Petsche by Ms Jovovic under cover of her email of 17 November 2017 which she also copied to the Sheikh. The summary of the transactions evidenced by the documents attached to the email is said to be "As instructed by HE Sheikh Mohamed". The email provides no explanation as to why these transactions and documents have never been referred to previously.

vii) The MBI Respondents' case as to how the Demand Letters and June 2010 Letter were provided to Dr Petsche has changed over time. Upon being requested to provide the meta data for these documents, the MBI Respondents' solicitors stated that Dr Petsche's recollection was that he had received the documents in hard copy and that he had been unable to locate an electronic copy in his files. The Liquidators requested the "hard copies" referred to, but none was supplied. It has subsequently become clear (upon disclosure of Ms Jovovic's email of 17 November 2017) that in fact Dr Petsche did not receive hard copies – instead he received electronic copies of the documents on 17 November 2017. The meta data for these documents has never been produced by the MBI Respondents.

viii) The Demand Letters (from JJW Guernsey and JJAB) and the June 2010 Letter (from the Company) all contain the same misspelling ("*Maples and Cadler*") despite purportedly dating from December 2009 and June 2010 respectively. They were all signed by the Sheikh, as he confirms in his fourth statement, but he "cannot recall" signing any of these documents, although he says that he would not have signed a document that was clearly marked with an incorrect date. It is inherently improbable that documents created six months apart would include the same spelling error in relation to the name Maples and Calder.

ix) There is no evidence from anyone as to the provenance of these documents or the circumstances in which they were created. Mr Deen asserts in his statement that, in the context of collecting evidence, he had "identified a limited number of former

employees of Sheikh Mohammed who may have been authors of the Demand Letters and the June 2010 Letter" and says it was his intention to have their emails investigated. However, when giving oral evidence he said that he could not remember the identity of these "former employees", initially denying that the Sheikh could have produced the documents, but then equivocating. His statement goes on to say that, by reason of the implementation of a new filing system in 2015, "there is a real possibility that records of certain emails produced before the start of 2016…are now entirely inaccessible", although he does not say that this would apply to the "former employees" he had identified. Under cross examination, Mr Deen confirmed that there was no contemporaneous evidence about the Demand Letters or the June 2010 Letter, notwithstanding that he had looked for it.

x) Notwithstanding the letters from Baker & McKenzie dated 11 June 2020 to Maples BVI, the Albecq Group and Praxis specifically seeking information on behalf of the Sheikh in relation to any records of receipt or sending of these documents, none has been forthcoming.

xi) Although the Defence refers to advice from Ernst & Young in relation to the IPO at around the end of 2009 and goes on to plead that the Demand Letters were made "following such advice", the letter from Ernst & Young dated 30 June 2017 which deals with the failure of the IPO, does not mention the existence of the Demand Letters or the June 2010 Letter.

xii) Mr Ippolito's evidence that he was aware that "there was some kind of restructuring in 2009 or 2010 following the abandonment of the IPO", is vague, unspecific and certainly not enough to "prove" these documents.

xiii) Looking solely at the documents, and having regard to the statement in the June 2010 Letter (which is consistent with the MBI Respondents' pleaded case) that the IPO was "the only source of payment for the outstanding share purchase", it is impossible to understand why demands for payment were made in December 2009 (i.e. at a time when, according to the letter "the IPO was no longer on the table"). As the Sheikh says in his evidence "Without the funds that the IPO had been projected to raise, the Company was unable to pay the considerable consideration of €89,176,100 due to JJW Guernsey and [JJAB]" under the Transfers". If, as the Demand Letters suggest, there had been an assignment to JJW Guernsey of JJAB's interests, it is unclear why the Sheikh continued to take the view that consideration is owing to both companies. There is also no explanation as to why a demand for payment by 18 February 2010 appears simply to have been ignored until June 2010 when a very different approach was taken.

xiv) Miss Stanley points out that the Demand Letters and the June 2010 Letter were referred to in the 29 February 2016 Resolution, and this is really her best point in proving these documents. However, this resolution was made years after the date of these documents and accordingly is insufficient, in my judgment (absent anything more concrete), to satisfy the court that they have been proved. That is particularly so in circumstances where, as I shall return to later, the February 2016 Resolution makes assertions about the date of signing of the Share Transfer Forms which I consider to be untrue.

xv) These documents appear to be self-serving documents produced for the first time without explanation many years after they are said to have been signed. They contain various oddities which have not been explained by the MBI Respondents. I should make clear, however, that I make no finding as to the circumstances in which these documents were created and no finding of forgery or fraud in relation to them. I need not (and absent a properly pleaded case of forgery I should not) go so far as to infer that these documents are not genuine. My determination that they have not been proved is dependent upon my analysis that the available evidence as to these documents is on its face so unsatisfactory as to be incapable of belief.

xvi) In all the circumstances, there is no real need for me to draw any inference by reason of the absence of witnesses capable of speaking to the circumstances of the creation of the Demand Letters and the June 2010 Letter as I was invited to do by Mr Curl. However, it does seem to me that, in all the circumstances, I can properly infer that if the documents had been capable of proof by someone other than the Sheikh (for example by a witness from Maples) then, given their importance to the MBI Respondent's case, such a witness would have been called to give such evidence.

281. The MBI Respondents originally challenged an email exchange (*Issue 39(a)*) and a list of MBI Companies (*Issue 39(g)*), challenges which I did not understand to be maintained in closing – indeed the MBI Respondents themselves sought to rely upon the email exchange in their closing submissions. Further, the Perkins Email (*Issue 39(e)*) was originally challenged by the MBI Respondents but it was conceded in closing that, in circumstances where it had been positively relied upon in submissions by them, it could no longer be challenged. Similarly, the MBI Respondents originally challenged the December 2011 Resolution (*Issue 39(d)*), dropping that challenge in closing and (for the first time) advancing a positive case in relation to it. I shall return to this later. For present purposes I observe that the approach of the MBI Respondents to these documents appears to me to have been somewhat opportunistic.

282. The Perkins email should never have been challenged in circumstances where the Sheikh had expressly engaged with it and relied upon it in other proceedings before Mr Hochhauser KC (sitting as a Deputy High Court Judge), as was clear from his July 2019 Statement in those proceedings – disclosed very late in the day. The December 2011 Resolution was tacitly accepted by the Sheikh in the final paragraph of his List of Corrections where he made the positive assertion (without explanation) that although the resolution included his signature, he had not dated it; yet the challenge to the document was maintained until the MBI Respondents' closing submissions, when an entirely new forensic case was developed by reference to it. The court has never been provided with an explanation for these inappropriate challenges and I consider them to be an example of the Sheikh changing his position upon it appearing that he might gain a tactical advantage by so doing. This is consistent with findings I have already made about the Sheikh's general approach to this litigation.

The Experts

283. The Liquidators and the MBI Respondents each called distinguished expert witnesses in the field of BVI law and procedure.

284. The Liquidators called Mr Michael Fay KC, a partner in Agon Litigation in the BVI. Mr Fay is in full time practice in the BVI. He was appointed as one of Her Majesty's Counsel in March 2013 and since 2011 he has sat as a Deputy High Court Judge of the Eastern Caribbean Supreme Court and as Deputy Judge of the Eastern Caribbean Court of Appeal. Amongst other things he is a fellow of the Chartered Institute of Arbitrators and has sat on various formal and informal committees to advise the BVI Government on company law, insolvency, arbitration and the creation of the commercial court. His practice is predominantly corporate law, insolvency and dispute resolution (in particular disputes relating to corporate law, insolvency, commercial disputes, fraud and trusts). He is an experienced expert who is frequently asked to provide expert evidence on BVI law for use in legal and arbitral proceedings in jurisdictions outside the BVI.

285. The MBI Respondents called Mr Thomas Lowe KC, an English qualified barrister called in 1985 and appointed as a silk in 2008. He is a member of Wilberforce Chambers in London with full practising certificates in both the BVI and the Cayman Islands. His practice is predominantly in company law and insolvency and he has acted in many cross-border disputes.

286. There was barely any disagreement between the experts, as their Joint Report made clear. Accordingly, they were subjected to very little in the way of cross examination, albeit that I held a short "hot-tubbing" session during which I was able to ask them questions designed to clarify my understanding of their reports. This was most helpful.

287. Mr Fay's report strayed into some areas which were outside the scope of his instructions and/or trespassed on territory which is strictly a matter for this court. Where that was the case, I have disregarded his evidence.

BVI LAW

288. It is common ground that the applicable law in this case is principally that of the BVI: the issues in the case concern the duties of directors of a BVI company, in relation to the management and control of BVI companies (see *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316).

289. It was common ground between the experts that:

i) The BVI is a British Overseas Territory which has its own constitution based on separation of power, with an independent judicial branch.

ii) By virtue of the Supreme Court Order 1967 (SI 1967/223 as amended by SI 1983/1108 and SI 2000/3060) which continues to apply, the courts and tribunals in the BVI are part of the Eastern Caribbean Supreme Court. The Privy Council is the final appellate court for the BVI.

iii) The principles of English common law were imported into the BVI by virtue of the Common Law (Declaration of Application) Act, Cap 13. Many BVI statutes are modelled on English statutes.

iv) As a result, the assumption is that until the date of adoption, BVI statutes incorporate "the intellectual freight" associated with the English legislation such as case law interpreting the statute in question and other interpretive material. Thus

170 years of English case law on the jurisdiction to wind up companies is used to interpret the BVI statutory regime, because it closely follows English 19th Century legislation.

v) The doctrine of judicial precedent applies in the BVI as it does in England and there is a comparatively small body of domestic common law.

vi) Where there is no applicable BVI case law, the BVI court will look for assistance to other Caribbean, English and/or Commonwealth authorities.

vii) English and Commonwealth case law is persuasive rather than binding but, as a general rule, BVI courts follow English and/or Commonwealth authorities to the extent that they are not inconsistent with either BVI statutory provisions or binding BVI authority, and provided they do not interpret or apply foreign statutory provisions that have no equivalent in the BVI.

290. It was also common ground that issues of evidence and procedure are however to be determined having regard to English law.

291. For the sake of completeness I should add at this point that the March 2009 Transfers are governed by Guernsey law. Neither party has adduced any evidence of Guernsey law and it is common ground that, in so far as may be necessary, the court should proceed on the basis that Guernsey law is the same as English law.

THE LAW: DIRECTORS DUTIES PRE-LIQUIDATION

292. Section 109 of the BVI Business Companies Act 2004 ("**the BCA 2004**") provides that the business and affairs of a company shall be managed by, or under the direction or supervision of, the directors of the company who will have "all the powers necessary" for that purpose. Section 109(3) provides the caveat that this is "subject to any modifications or limitations in the memorandum or articles". There are no such provisions in the memorandum and articles of association of the Company.

293. It is common ground that the duties owed by the directors of a BVI company pre-liquidation are set out in sections 120 to 125 of the BCA 2004. Relevant provisions are as follows:

> "120. (1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.
>
> …
>
> 121. A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company.
>
> 122. A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation,

> (a) the nature of the company;
>
> (b) the nature of the decision; and
>
> (c) the position of the director and the nature of the responsibilities undertaken by him.
>
> ...
>
> 124. (1) A director of a company shall, forthwith after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the company, disclose the interest to the board of the company".

294. The scope of the statutory duty of care under section 122 BCA 2004 is tempered by section 123 which provides that a director is entitled to rely upon the books and records of the Company and on professional or expert advice, subject to the caveat that the director is acting in good faith, has made proper inquiry where appropriate and has no knowledge that such reliance is not warranted.

295. The experts are agreed that the duties in the BCA 2004 are derived from English common law and a BVI court will interpret these duties by reference to the common law and fiduciary responsibility. Thus in *Antow Holdings Limited v Best Nation Investments Limited* BVIHCMAP2017/0010 21 September 2018, the Court of Appeal of the Eastern Caribbean Supreme Court expressly made reference to the common law in considering the scope of the enquiry under section 120(1) of the BCA 2004:

> "[23]. The salient observation is that a section 120(1) enquiry is largely, though by no means entirely, a subjective one. The courts have adopted a non-interventionist attitude when reviewing business decisions. The authorities uncontroversially establish this. Jonathan Parker J in *Regentcrest plc (in liquidation) v Cohen and another* elucidated that good faith is ascertained by reference to actual subjective state of mind. He stated:
>
> > "The duty imposed on directors to act bona fide in the interests of the company is a subjective one...**The question is not whether viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind.** No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interests; but that does not detract from the subjective nature of the test." (**My emphasis**).
>
> [24]. *Regentcrest plc* further expanded on the words of Lord Greene MR in the case of *Re Smith & Fawcett Ltd* where he held that directors must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interest of the company, and not for any collateral purpose."

> [25]. Nonetheless, a section 120(1) enquiry has an objective overlay as bona fides cannot be the sole test, "otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational". The courts will look for independent, objective evidence to test the director's claim to be acting bona fide.
>
> [26]. Where there has been a failure by a director to consider the separate interests of their company or a challenge by an applicant on the "good faith" of a director, the test then becomes an objective one. In *Charterbridge Corporation, Ltd v Lloyds Bank Ltd. and Another*, Pennycuick J held that the proper test in the absence of actual separate consideration of the interests of the company, is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. As stated in *Colin Gwyer & Associates Ltd and another v London Wharf (Limehouse) Ltd and others*, "[t]he effect is therefore to substitute an objective test for the normal subjective one".

296. The Court of Appeal in *Antow Holdings* (at [22]) expressly recognised that the duties of directors to a company (as prescribed in the statute) are fiduciary in nature. In *Estelle Wheatley v Darwin Blyden (BVIHCV 2012/302 12 April 2017)* Ellis J (sitting in the High Court) cited with approval the well-known judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 in which he held at page 18 that:

> "A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence".

297. Provided a director does not act in bad faith, that his act is *intra vires* the company and the company is not insolvent, an act done by the director at the behest of the shareholders is the company's act and the company has no claim in law against the director (see *Ciban Management Corp v Citco (BVI) Ltd* [2020] 3 WLR 705, a decision of the Privy Council on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court).

THE DUTIES OWED BY THE SHEIKH AND MS AL JABER

The Sheikh

298. The Liquidators plead in paragraph 61 of the PoC that the Sheikh and Ms Al Jaber owed statutory duties under the BCA 2004 "and/or fiduciary and other duties at common law" and they then go on to identify those duties by reference to the duties of directors under English law, i.e. the Companies Act 2006, sections 171-177. The duties pleaded include duties which also appear in sections 120-125 of the BCA 2004, but do not exactly replicate the BVI statutory provisions; some are quite different from those provisions.

299. In the Defence, it is admitted that between the date of the coming into force of the BCA 2004 and the date of the Liquidation, the Sheikh owed duties to the Company as set out in sections 120-122 of the BCA 2004.

300. Miss Stanley sought to make something of the discrepancy between the precise wording of the BVI statute and the English statute (as set out in the PoC) in closing, but I cannot see that anything really turns on this point. The key duty on which the Liquidators seek to rely in this case is the duty to act in good faith and in what the director believes to be the best interests of the company. That duty is clearly a duty that was owed by the Sheikh under the BCA 2004 (as he has admitted) and it is clearly pleaded. Equally, the standard of care applicable to the Sheikh is admitted in the Defence as the standard of care set forth in section 122 BCA 2004, although the MBI Respondents contend that reliance will be placed on section 123 BCA 2004, to which I have referred above. I note also in this context that, as is clear from *British Virgin Islands Commercial Law*, 4th Edition, Harney Westwood & Riegels, at 2.284 "[t]he duties of directors specified in the BVI Business Companies Act 2004 are not intended to be exhaustive…Directors are fiduciaries, and as such remain subject to applicable common law and equitable rules which regulate them as such".

301. In any event, there can be no doubt, in my judgment, that prior to the Liquidation, the Sheikh owed duties to the Company as set forth in sections 120-125 BCA 2004 (*Issue 11*).

302. In paragraphs 63-65 of the PoC, the Liquidators identify the matters to which the Sheikh and Ms Al Jaber were to have regard "[d]uring such time as the Company was either insolvent or of doubtful solvency", assert that the Company's circumstances at or around the time of the Alleged 2009 Disposition were such that these requirements were engaged and plead that any failure to consider the interests of the Company and its actual, prospective or contingent creditors, failure to consider any very material interest or any decision that was perverse or irrational is to be judged by an objective standard. As a matter of law, it is clear that the BVI courts have taken a similar approach to the English court to issues such as these and that, as Mr Lowe KC confirms in his report, the BVI court "interprets these duties by reference to the common law". However, for reasons to which I shall turn in a moment, there is no need for me to consider these paragraphs any further in this judgment.

Ms Al Jaber

303. Although she originally accepted that she owed a duty to the Company *qua* director prior to its Liquidation, Ms Al Jaber subsequently amended her defence so as to "not admit" any such duty (notwithstanding that it is common ground that she has been registered as a director of the Company since 18 May 2006). Ms Al Jaber's case, as set out in her defence (and verified by a statement of truth), is essentially that she "did not know at any material time that she was a director of the Company".

304. In his report, Mr Lowe KC responds to the question of whether Ms Al Jaber had the duties of a director "if she was unaware of having been appointed as a director", saying this: "I believe a BVI court would follow what I understand to be the position in England: the appointment of a person as a director of a company does not take effect unless the person properly agrees to the appointment" (a statement which was not challenged by Mr Fay KC). I was referred to *Re British Empire Match Co Ltd* (1888) 59 LT 291 which is support for this proposition; Kay J held at page 292 that a person who had "never agreed to be a director", "never was a director". I did not understand Mr Curl to suggest otherwise.

305. In the circumstances, the first question for this court in considering whether Ms Al Jaber owed duties to the Company in the pre-liquidation period must therefore be whether there is any evidence to show that Ms Al Jaber knew that she was a director of the Company during this period and had agreed to undertake that role.

306. Looking first at the available contemporaneous documents:

i) In or around September 2006 and December 2007 Ms Al Jaber signed her consent "for and on behalf of [the Company]" (as a member of JJW Guernsey) to meetings of JJW Guernsey to be held on 28 September 2006 and 20 December 2007 respectively.

ii) On 28 September 2006, Ms Al Jaber attended the annual general meeting of JJW Guernsey "by way of proxy representing [the Company]".

iii) In or around December 2007, Ms Al Jaber accepted the Company's proxy for a meeting of JJW Guernsey on 20 December 2007.

iv) On 31 December 2008, Ms Al Jaber signed her consent "for and on behalf of [the Company]" to a meeting of JJW Guernsey on the same date. Also on 31 December, Ms Al Jaber accepted the Company's proxy in respect of the meeting and attended the meeting "by way of Proxy representing [the Company]".

v) On 8 January 2009 and 18 March 2009, Ms Al Jaber attended the Board meetings of JJW Guernsey as a director of that company. The minutes of the 18 March 2009 Resolution record that "[t]he following interests of the Directors were NOTED:

> "[the Sheikh] and Mashael Mohammed Al Jaber are both directors of [the Company]".

307. Having regard to the inherent probabilities, I consider it to be unlikely that Ms Al Jaber did not appreciate that she was a director of the Company, given the level of her involvement on its behalf evidenced by this material, including the express declaration of her interest as a director in the Company at the meeting on 18 March 2008.

308. Indeed, Ms Al Jaber's statement of 1 November 2018 made in connection with her s.236 Examination and handed to the court on the morning of that examination, appears to me to provide confirmation that she **was** aware of her role as director. Prior to its preparation, Ms Al Jaber had instructed the Senior Litigation Partner at Kidd Rapinet LLP, Mr Richard Tymkiw, to advise and represent her. If her evidence was that she did not know that she was a director of the Company, one would have expected that she would say as much. Instead, her statement said this:

> "1. …I was appointed to the Board of MBI International and Partners Inc. (now in liquidation) (and now termed "the Company").
>
> 2. I am advised by [the Sheikh] and truly believe that my appointment to the Board of the Company was solely to enable me to step in should for any reason [the Sheikh] be unable to control or manage the business of the Company. My services as such were never needed…I am aware that [Ms Caulfield] seeks information from me relating to the liquidation of the Company and its assets if any. I was not privy to nor had any knowledge of

> those circumstances which led to the liquidation of the Company and all material facts and matters thereafter…
>
> 3. I resigned from the Company but cannot recall the date of my resignation…I do not have any books, papers or records in my possession relating to the Company or its assets. I also do not have any books, papers or records relating to the Company or its assets within my control".

309. The MBI Respondents submit however, that the court should have close regard to evidence given by Ms Al Jaber during her s.236 Examination. In particular, they say that her lack of knowledge of her role as director of the Company is clear from the transcript of that examination. Having looked closely at the relevant extracts from the transcript, I disagree. In circumstances where I have no other evidence from Ms Al Jaber, it is important that I set out the relevant evidence given during her examination in some detail.

310. Ms Al Jaber gave the following evidence:

i) She did not remember when the Sheikh had told her that she was a director of the Company solely to enable her to "step in" if necessary (a reference to the content of her short statement).

ii) She "always knew" that her appointment was solely to enable her to "step in". In response to the question "How did you know that", she said (referring to the Sheikh) "[a]s his daughter, as how I was introduced to the Company. **But he did repeat that to me, I think, recently**" (**emphasis added**).

iii) In response to the question "When did you find out you were a director of the Company?", she said "[r]ecently, when this came up. When he told me that I was a director for this company. I've been a director for so many companies for, I would think, this reason. And I wouldn't be able to tell if it was, when or for how long or when I was there, for instance…". Ms Al Jaber went on to say "…when it was relevant to me that's when I was informed. But I think a couple of months ago and then I was informed".

iv) Later, Ms Al Jaber said "I don't know when I was appointed and when I resigned". When it was put to her that her evidence was that she "didn't know about [her role as director] until this year" she said "I knew I was a director of a number of companies, but I wouldn't be able to tell you the names or when I was appointed…".

v) Ms Al Jaber was then asked if she remembered signing any documents. The following exchange took place:

> "A. I've signed a number of documents throughout the years. I just sometimes I'm given by the legal department and I just sign it.
>
> Q. Do you read those documents before you sign them?
>
> A. I try to, but I don't understand most of them.
>
> Q. Why do you sign documents that you don't understand?
>
> A. It's because I'm (inaudible) the legal department and my dad.

> Q. When you say legal department, do you mean Mr Salfiti?
>
> A. Yes, yeah."

vi) Later, Mr Curl asked Ms Al Jaber what she understood a director's duties to be. The following exchange then took place:

> "A…I would be appointed a director in case my dad cannot perform his duties, that I would help. Basically I was just signing papers. I wasn't active at all.
>
> Q. What do you… understand…a director is supposed to do?
>
> A. My role, because I was never, or I don't remember being a sole director. So I was a director with my dad or with someone else…
>
> Q. Do you know any other companies that you are a director of?
>
> A. I know there's a number but I can't tell you, I'm sorry".

311. At one point during the s.236 Examination, Leading Counsel for Ms Al Jaber, presumably acting on instructions, made the following observation to Deputy ICC Judge Schaffer:

> "…it is fairly clear that Ms Al Jaber does things that her father asks her to do. I don't think there is any dispute about that…I don't think there is any suggestion that she does things without talking to her father first and that she took this appointment for any other reason than her father wanted her to take the appointment".

312. Doing the best I can to make sense of the evidence in the transcript and bearing in mind the content of Ms Al Jaber's Statement, the contemporaneous evidence and the inherent probabilities, I find that on balance:

i) Ms Al Jaber knew about her appointment as director of the Company at the time she was appointed, even if she subsequently forgot and was only reminded of it shortly prior to the s,236 Examination.

ii) Ms Al Jaber was prepared to take on the appointment at the request of the Sheikh and always knew that she was doing so to assist him, if necessary. It is to be inferred that she was content to undertake any actions in relation to that role that were requested of her by the Sheikh.

iii) Ms Al Jaber understood that her appointment would involve her signing documents, which she in fact did, in her role as director. Although she did not always understand what these documents said, she tried to understand them. Ms Al Jaber also attended meetings in her capacity as director of the Company and in her capacity as director of JJW Guernsey.

iv) Ms Al Jaber was aware that she had been appointed director of a number of companies even if she could not remember their names at the time of the examination (a feature which is perhaps unsurprising given the similarity of the names of various of the companies within the MBI Group of companies and the

length of time that had (by then) gone by since her appointment as director to various of those companies). The fact that she could not remember their names in 2018, does not mean that she was not aware of her appointments at the relevant time.

v) That Ms Al Jaber had the knowledge to which I have referred, is entirely consistent with, and explains, both the content of her witness statement and the fact that she appears expressly to have noted her role as director of the Company as part of a declaration of interests at the Board Meeting of JWW Guernsey on 18 March 2009.

313. In light of these conclusions, it is not strictly necessary for me to draw any inference by reason of Ms Al Jaber's absence from the trial, as I was invited to do by the Liquidators. However, I observe that no evidence has been tendered by the MBI Respondents to explain her absence. On the face of the PoC, Ms Al Jaber is a defendant to (amongst other things) a very substantial claim of breach of duty and accordingly it is difficult to understand why she did not tender any written evidence. For the first time in closing, Miss Stanley explained that there had been no need to call Ms Al Jaber when it was still anticipated that the Sheikh would give evidence and that, when that changed following the PTR, the MBI Respondents would not have been able to persuade the court to permit evidence from Ms Al Jaber so close to trial (although Miss Stanley did not suggest that any such evidence had in fact been obtained). Miss Stanley went on to explain (again for the first time) that Ms Al Jaber was 7 months pregnant at the date of the closing submissions, has had two high risk pregnancies in the past and "wants to prioritise her health and that of her unborn baby".

314. I have no reason not to accept this explanation, but it does seem to me to be too little, too late. There is no medical evidence to support a suggestion that it would be dangerous for Ms Al Jaber to give evidence and while Miss Stanley is correct that she would have had difficulty in persuading me to admit late evidence from Ms Al Jaber after the PTR, (i) there is no suggestion of steps having been taken to obtain such evidence at any stage; and (ii) that does not begin to address the question of why no witness statement was ever obtained from her in the proceedings in any event, notwithstanding that she could be expected to have relevant evidence. Given that she is a defendant, I find it difficult to see how the evidence of the Sheikh could have been regarded as sufficient on its own to protect her interests, particularly where she was seeking to advance a positive case that she did not know that she was a director of the Company.

315. In all the circumstances, had it been necessary to do so, I would have been prepared to draw an adverse inference from Ms Al Jaber's failure to give evidence, as I was invited to do by the Liquidators, namely that she has not tendered any evidence because her evidence would have been to the effect (contrary to her pleaded case) that she was aware of her appointment as director of the Company at the time of her appointment (even if she had subsequently forgotten about it) and was prepared to take whatever steps in relation to that appointment she was requested to take by the Sheikh.

316. Where I have found that Ms Al Jaber knew that she was a director of the Company, I also find that she owed the same duties to the Company as were owed by the Sheikh (*Issue 11*). In this regard I note the observation of Sedley LJ in *In Plus Group v Pyke* [2002] 2 BCLC 201 at [84] to the effect that:

> "I see no reason why the law should assume that any directorship is merely cosmetic. A directorship brings with it not only voting rights and emoluments but responsibilities of stewardship and honesty, and those who cannot discharge them should not become or remain directors".

317. In closing, the Liquidators sought to argue that Ms Al Jaber had abrogated her responsibilities as a director of the Company, pointing out that this was in itself a breach of duty to exercise independent judgment and drawing my attention to *Secretary of State for Trade & Industry v Griffiths; Re Westmid Packing Services Ltd (No. 3)* [1998] BCC 836, per Lord Woolf MR at 842B to the effect that "total abrogation of responsibility" is not permissible. Although this is part of the Liquidators' pleaded case, it was, as I understood it, raised in the PoC purely as a defensive plea by the Liquidators in response to a claim by the MBI Respondents to an indemnity (and is to be found in *Issue 33*, which concerns the claim to an indemnity) and no attempt was made to rely upon it until closing. In any event, I need address it no further in light of the findings I have made later in this judgment.

THE ALLEGED 2009 DISPOSITION

318. The PoC pleads that until a date after 31 December 2008 and prior to 18 March 2009, the Company was "the top holding company" for a group of companies known as the MBI Group. In particular, it is alleged that the Company was "the ultimate parent company" of Jadawel International, a Saudi limited liability company ("**Jadawel**"), AJWA Group ("**AJWA**"), a group of Middle Eastern companies and JJW Guernsey.

319. The Liquidators point to the Company Accounts, and in particular a set of consolidated financial statements within the 2008 Accounts which include a consolidated balance sheet under Note 16: "Supplementary Information". The balance sheet begins with the statement that: "The assets, liabilities and owner's equity of the Group by entity as of 31 December 2008 and 2007 are presented below as supplemental information". In addition to the Company, the balance sheet provides information for three entities, namely "Jadawel", "JJW" and "AJWA". The figures show: (i) the total assets of the Group amount to US$3,646,609,000; (ii) surplus shareholders' funds (i.e. "total equity") amount to US$2,480,789,000; (iii) gross profit for the year totals US$223,437,000; and (iv) net income for the year totals US$340,557,000.

320. Note 1 to the Consolidated Financial Statements provides further information as follows:

> "MBI International & Partners Inc. ("MBI") is a company organized under the laws of the British Virgin Islands (BVI), and is primarily owned by Sheikh Mohamed Bin Issa Al Jaber.
>
> MBI and its subsidiaries which are owned by Sheikh Mohamed (the Group) comprise of MBI and the following entities:
>
> • Jadawel International (Jadawel), founded in 1982, a Saudi Limited Liability Company that owns, operates and leases residential compounds in the Central and Eastern Regions of Saudi Arabia.

> • JJW Limited (JJW)[6], founded in 1988, a Guernsey company that owns, operates and manages hotels and golf courses in Europe and the Middle East. Included in the European portfolio are hotels such as the Grand Hotel in Vienna, the Hotel Balzac and Hotel De Vigny in Paris as well as the Pinheiros Altos Golf and residential resort in Portugal.
>
> • AJWA Group, founded in 1992, specializes in the production of food (mainly oil, grains and frozen vegetables) in Saudi Arabia and Egypt. AJWA's restructuring was completed in 2008 and has now merged with Ajwa Food Industries Egypt which is fully listed on the Egypt stock market. It is actively seeking new opportunities at the level of the Middle East region".

321. The 2006 Accounts refer to Jadawel, AJWA and JJW Guernsey as the "three principal operating subsidiaries of the MBI Group" and contain similar wording to that set out above in Notes 1 and 16 to the Consolidated Financial Statements. The 2007 Accounts contain similar wording at Notes 1 and 17. The content of the Company Accounts is the only evidence on which the Liquidators rely in support of the Alleged 2009 Disposition; they advance no evidence of ownership by the Company of the three entities identified in the Company Accounts other than what appears in those Accounts and they have no evidence whatever of any transfers away.

322. The Liquidators' case as pleaded in the PoC is that "on a date after 31 December and prior to 18 March 2009" the Company disposed of the entirety of its interests in Jadawel, AJWA and JWW Guernsey. It is said that the disposal of Jadawel and AJWA was to an "unknown transferee or transferees" and that the disposal of JJW Guernsey was to JJW Inc, of which the Sheikh was the sole director. Paragraph 40 of the PoC pleads that "save for the transfer to the Company of the [JJW Inc Shares], the Company received no incoming consideration for the transfer away of its interests in Jadawel, AJWA or JJW Guernsey under the 2009 Disposition".

323. On the assumption that the March 2009 Transfers are held to be genuine documents (as has now been conceded), it is said that the Company gave up its ownership interests in Jadawel, AJWA and JJW Guernsey, worth in excess of US$3 billion, in exchange for an indirect interest in 11.2% of the shares in JJW Guernsey via the JJW Inc Shares which resulted in an indebtedness of in excess of €891,000,000. It is the Liquidators' case that the Alleged 2009 Disposition "caused the Company to be denuded of assets worth US$3,646,609,000 for a consideration that was worth very significantly less than the value of the consideration provided by the Company" such that the Company was rendered insolvent.

324. The date of 31 December 2008 is chosen having regard to the date of the 2008 Accounts (year ending 31 December 2008). The date of 18 March 2009 reflects the date of the March 2009 Transfers, which transferred shares in JJW Inc to the Company.

325. Before turning to the issues identified by the parties in respect of the Alleged 2009 Disposition, I observe that one looks in vain at the Liquidators' closing written submissions for any real assistance on this cause of action or for an answer to the issues identified by the parties. In his oral closing, Mr Curl was candid that the Alleged 2009

[6] All parties accept that this is a reference to JJW Guernsey.

Disposition is "heavily reliant on inferences" and it is clear that essentially the Liquidators invite the court to infer (absent reliance on any evidence other than what appears in the Company Accounts) that assets worth US$3.6 billion were transferred away from the Company on an unknown date to an unknown recipient or recipients. In my judgment, however, the court has insufficient material on which to make such an inference and (more importantly) the court has available contemporaneous evidence which gives the lie to the underlying premise – namely that the Company in fact owned each of these three entities absolutely.

326. Before turning to this evidence, I note that the Amended Reply indicates that the Liquidators' case rests on the assertion either (i) that where there has been a failure on the part of the Sheikh and Ms Al Jaber to deliver up books and records to the Company "inferences must be drawn" against them; or (ii) that as directors and fiduciaries of the Company, the Sheikh and Ms Al Jaber are obliged to account for their conduct of the Company's affairs and "to the extent they do not, inferences must be drawn against them". As I read this pleading, it seeks to bring into play the principles to which I have already referred in the context of looking at the Liquidators' submissions on *Armory v Delamirie*.

327. However, in the context of the Alleged 2009 Disposition, and for reasons I have already intimated, this pleading appears to me to put the cart before the horse. The MBI Respondents dispute that AJWA, Jadawel and JJW Guernsey were ever owned by the Company. In my judgment, the Liquidators clearly bear the burden of proving on balance that the Company was their ultimate owner before they can invite the court to draw any inferences of the type identified. For reasons I set out below, the Liquidators have been unable to satisfy that burden on the evidence and so there is no need for me to go on to consider the question of inferences.

328. The first issue identified by the parties in the List of Issues is whether, until at least 31 December 2008, Jadawel, AJWA and JJW Guernsey were all wholly owned subsidiaries of the Company (*Issue 1*). The Liquidators' claim as pleaded is dependent upon each of these entities being wholly owned by the Company and each of these entities being disposed of by the Company. As I have said, in my judgment, this is a matter which the Liquidators must prove.

329. It became clear at trial that the Liquidators' case that JJW Guernsey was wholly owned by the Company until at least 31 December 2008 is misconceived. On the contrary:

i) According to the January 2009 Resolution of JJW Guernsey, as at that date the Sheikh owned 99 shares in JJW Guernsey, while the Company owned only 1 share.

ii) This is borne out by JJW Guernsey's Register (the authenticity of which is not challenged by the Liquidators). The Company became a minority shareholder in JJW Guernsey on 27 May 2004, holding one share, whilst the Sheikh held the remaining 99 shares.

iii) Further evidence for this state of affairs is to be found in (a) the Annual Return for JJW Guernsey signed by the Sheikh in 2006; (b) a written resolution of JJW Guernsey signed by the Sheikh as a member on 31 December 2008; and (c) an email from Pauline Crouzillat of White & Case, Paris, dated 8 January 2009 (exhibited by Mr Krys to his second statement) to Matthew Gilbert of Maples BVI,

> which expressly asks for documentation to be prepared "for the contribution of 99 share (sic) by [the Sheikh] and 1 share by [the Company] in [JJW Guernsey]".

330. No attempt was made by the Liquidators to dispute this evidence in closing.

331. Against that background, Note 1 to the 2008 Accounts, which refers to "MBI and its subsidiaries **which are owned by Sheikh Mohamed**" (**emphasis added**), can only be understood (at least in relation to JJW Guernsey) as a reference to entities owned by the Sheikh and not the Company. Indeed that is the natural meaning of the words used, particularly in light of the fact that the preceding sentence in Note 1 expressly deals with the Sheikh's ownership of the Company[7]. During his cross examination, Mr Krys admitted that the wording of the Company Accounts "seems to accept that the subsidiaries are owned by Sheikh Mohamed". He went on to say that "…they are in his personal name but they are, in effect, part of MBI". I agree with Miss Stanley that it is very hard to see how the Liquidators' case on the Alleged 2009 Disposition can survive this concession. Although Mr Krys went on to suggest that the Sheikh might have held these subsidiaries "as nominee" or in "some sort of trust relationship", he accepted that he "[did] not know".

332. It has never been the Liquidators' case that the Sheikh owned AJWA or Jadawel, or that he holds them as nominee or pursuant to any kind of trust arrangement and no such case is made out on the existing pleading.

333. It has always been the MBI Respondents' case, as set out in their Defence, that "[t]he Company never owned shares in Jadawel and AJWA and accordingly interests in those companies were never part of the corporate structure underneath the Company prior to 18 March 2009 or at all". The 2009 Organigrams appear to bear this out. In particular, the MBI Group Organigram identifies various companies with names beginning "Ajwa…" but they are all shown as sitting beneath the box containing the Sheikh's name, none is shown as sitting beneath the box containing the name of the Company. The same applies to two companies with Jadawel at the beginning of their names (Jadawel International Inc (BVI) and Jadawel International Ltd (Saudi)).

334. Furthermore, the Sheikh gives evidence in his fourth statement that share registers have been obtained for two Saudi Arabian entities called Ajwa Group for Food Industries Holding Co Ltd and Jadawel International Co Ltd. These share registers (which are not challenged by the Liquidators) show that since 1994 (in the case of Ajwa Group for Food Industries Holding Co Ltd) and 1999 (in the case of Jadawel International Co Ltd) the shares in these companies have not been held by the Company. The present status of the shareholding in Jadawel International Co Ltd is that the Sheikh owns 50% of the shares (and has always done so). In the case of Ajwa Group for Food Industries Holding Co Ltd, since 1999, 90% (or more) of the shares have been held by a holding company called Ajwa Group for Food Industries GCC Holding Co (a state of affairs which also seems to be borne out by the MBI Group Organigram from 2009).

335. The Liquidators have not sought to suggest that the information in these share registers is inaccurate or that the companies to which they relate are not the AJWA and Jadawel mentioned in the Company Accounts and to which they refer in the PoC - indeed, the

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[7] "MBI International & Partners Inc ("MBI") is a company…primarily owned by Sheikh Mohamed Bin Issa Al Jaber".

Liquidators have never set out any positive case as to the specific identity of the entities referred to in the 2008 Accounts, or produced any documents relating to them – save for the 2009 Organigrams which do not support their case. The Liquidators' case is solely premised upon the content of the Company Accounts and, in light of the unchallenged documentary evidence produced by the MBI Respondents and the content of the 2009 Organigrams, I find that the Liquidators' case as to AJWA and Jadawel is also misconceived.

336. Indeed it is worth noting that although Mr Kinnon originally concluded in his first report to creditors of 9 December 2011 that AJWA, Jadawel and JJW Guernsey were all ultimately owned by the Company, by the date of his second report in October 2013, he had changed his mind:

> "Further research confirmed that the Company was not the controlling company within the MBI group of companies. The MBI group of companies is not a "group" in any statutory sense, but comprises a number of companies under the ultimate control of His Excellency [the Sheikh]
>
> The Company's sole asset comprises its investment in the entire issued share capital of [JJW Inc which in turn owns 1,020,873 shares in JJW Limited, representing 11.2% of JJW Limited's entire issued share capital".

337. While Mr Kinnon's understanding of the asset position of the Company appears to have been flawed (for reasons I have addressed earlier in this judgment), nevertheless he does appear to have satisfied himself that the Company did not own AJWA, Jadawel or JJW Guernsey. Furthermore, there is no suggestion in his reports that he was of the view that AJWA, Jadawel or JJW Guernsey had recently been disposed of by the Company. Somewhat inexplicably, Mr Krys confirmed in cross examination that no steps have been taken by the Liquidators to ascertain what research was carried out by Mr Kinnon or what information he might have had available to him which led to the views expressed in his reports.

338. During her closing submissions, Miss Stanley submitted that Mr Kinnon was a "missing" witness and that, absent any explanation from the Liquidators as to his absence, the court should infer that Mr Kinnon would not have supported the Liquidators' case that the Company Accounts were genuine. Whilst I do find Mr Kinnon's unexplained absence surprising as it appears plain that he might have been expected to have relevant evidence to give at trial, I nevertheless do not consider this to be an appropriate inference. The fact that Mr Kinnon concluded, as I have done, that AJWA, Jadawel and JJW Guernsey were not owned by the Company does not mean that the Company Accounts are not genuine – rather it suggests that the interpretation I have put on the wording of those accounts is the correct one. A more appropriate inference to my mind, and one that I do make in all the circumstances, is that Mr Kinnon's evidence was unlikely to support the Liquidators' case as to the ownership of AJWA, Jadawel and JJW Guernsey and therefore was equally unlikely to support the inferences that the court is invited to draw from the content of the Company Accounts.

339. Finally, it is clear from the chronological run of documents that Ms Caulfield investigated, or tried to investigate, the position in relation to two companies with the word "Jadawel" in their name. However, the Liquidators have adduced no evidence from Ms Caulfield as to why she thought that these two entities might have been owned by the

Company. With respect to Mr Krys, Ms Caulfield was the obvious person to call to give evidence as to the investigations she had undertaken into the Company's business and the conclusions she had arrived at as a consequence of those investigations and yet no explanation has ever been provided for her absence.

340. For all the reasons set out above, I find that the Liquidators have not established that until at least 31 December 2008, Jadawel, AJWA and JJW Guernsey were all "wholly owned subsidiaries of the Company". On the contrary; the available evidence shows that (with the exception of a single share owned by the Company in JJW Guernsey) these companies were not owned by the Company. In the circumstances, there is no question of drawing adverse inferences against the Sheikh and Ms Al Jaber, no need for me to address the question of whether the Company disposed of its interests in Jadawel, AJWA and JJW Guernsey on a date after 31 December 2008 and prior to 18 March 2009 (*Issue 2*) and no need for me to consider whether the Company was thereby rendered insolvent (*Issue 3*).

341. Furthermore,

i) where it is accepted by the Liquidators that in the event of failure on the Alleged 2009 Disposition, they cannot succeed in relation to the claim involving the combination of the Alleged 2009 Disposition and the March 2009 Transfers, I need not go on to consider whether such combination rendered the Company insolvent (*Issue 8*).

ii) where I have found that the Demand Letters and the June 2010 Letter are not proved, I also do not need to consider whether the Company was insolvent by 22 December 2009 or 30 June 2010 (*Issue 9*).

iii) the need to consider the defence of limitation in relation to this claim falls away (*Issue 32*). It was not submitted by the Liquidators that the allegation in paragraph 55B of the PoC (at 55B.a) as to the alleged duty on the part of the Sheikh following Liquidation to account for his stewardship of the Company prior to the commencement of the Liquidation took matters any further. As was clear from the Liquidators' closing submissions, (and aside from its relevance in the context of the *Armory v Delamirie* point to which I have already referred) this allegation appears to have been relied upon largely as a means of seeking to postpone limitation in relation to the Pre-Liquidation Claims. I shall briefly return to it later, however, when dealing with the allegation of a duty to account on the part of the Sheikh and Ms Al Jaber in the post-Liquidation period.

342. For the sake of completeness, and on the question of insolvency, the available evidence in the form of the consolidated financial statements in the 2008 Accounts (which include a breakdown of the Company's individual asset position in Note 16), record total assets of the Company as US$ 227,655,000 and "total owner's equity" of US$ 181,655,000. This figure of US$ 181 million is reflected in a schedule of worldwide assets produced by the Sheikh to the English court in the 2010 Proceedings. Even on the Liquidators' case as to the effect of the March 2009 Transfers, they resulted in the Company acquiring an unsecured debt of €89 million – still leaving the Company in a profitable position, having regard to that evidence. There is no evidence of any other significant creditors at the time of the March 2009 Transfers.

343. Finally, whilst I have already found that the Sheikh and Ms Al Jaber owed duties to the Company prior to the Liquidation (*Issue 11*), I reject the Liquidators' case that the Sheikh and Ms Al Jaber acted in breach of duty or in breach of trust as alleged in paragraphs 77-79 of the PoC (*Issues 11, 12 and 13*). There could be no breach of duty or breach of trust in circumstances where there was no Alleged 2009 Disposition. As the MBI Respondents correctly pointed out, there is no plea that in agreeing the March 2009 Transfers, the Sheikh or Ms Al Jaber breached their duties or caused loss.

344. In all the circumstances set out above, the Pre-Liquidation Claims fail and the claim for equitable compensation of US$ 3,646,609,000 is dismissed.

THE LAW: DIRECTORS DUTIES POST-LIQUIDATION

345. Section 160 of the IA 2003 provides that the liquidation of a company commences at the time at which a liquidator is appointed, as provided in section 159…". At that point the liquidator takes on the powers and duties provided for by the IA 2003:

> "184. (1) In performing his functions and undertaking his duties under this Act, a liquidator, whether appointed by resolution of the members or by the Court, acts as an officer of the Court.
>
> (2) A liquidator is the agent of the company in liquidation.
>
> 185. (1) The principal duties of a liquidator of a company are
>
> (a) to take possession of, protect and realise the assets of the company;
>
> (b) to distribute the assets or the proceeds of realisation of the assets in accordance with this Act; and
>
> (c) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with this Act;
>
> (2) The liquidator shall, subject to this Act and the Rules, use his own discretion in undertaking his duties.
>
> (3) A liquidator also has the other duties imposed by this Act and the Rules and such duties as may be imposed by the Court.
>
> 186. (1) A liquidator of a company has the powers necessary to carry out the functions and duties of a liquidator under this Act and the powers conferred on him by this Act".

346. The status of a director after a company has gone into liquidation is set out in section 175(1)(b) of the IA 2003:

> "175. (1) Subject to subsection (2), with effect from the commencement of the liquidation of a company
>
> (a) the liquidator has custody and control of the assets of the company;

> (b) the directors and other officers of the company remain in office, but they **cease to have any powers, functions or duties other than those required or permitted under this Part**;
>
> (c) unless the Court otherwise orders, no person may
>
> > (i) commence or proceed with any action or proceeding against the company or in relation to its assets, or
> >
> > (ii) exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the company;
>
> (d) unless the Court otherwise orders, no share in the company may be transferred;
>
> (e) no alteration may be made in the status of or to the rights or liabilities of a member, whether by an amendment of the memorandum or articles or otherwise;
>
> (f) no member may exercise any power under the memorandum or articles, or otherwise, except for the purposes of this Act; and
>
> (g) no amendment may be made to the memorandum or articles of the company.
>
> (2) Subsection (1) does not affect the right of a secured creditor to take possession of and realise or otherwise deal with assets of the company over which that creditor has a security interest.
>
> (3) Any thing or matter done or purported to be done in contravention of subsection (1) is void and of no effect"
>
> (**emphasis added**).

347. Thus, from the commencement of a liquidation, the liquidator has "custody and control" of the assets of a company. Whilst the directors and other officers of a company that has gone into liquidation remain in office pursuant to the provisions of section 175 IA 2003, they cease to have any powers, functions or duties other than those "required or permitted" under Part VI of that Act (i.e. the Part concerned with "Liquidation").

348. The duties "required or permitted" under Part VI appear to be extremely limited. Duties exist pursuant to the specific provisions of section 77 in the context of an execution process (which is not relevant here) and a person who has been an officer of the company may be required to prepare and submit a statement of affairs and must do so in the prescribed form (see Part VI, section 225 and Part XI, sections 276 and 277). However, Part VI of the Act contains no other express duties. Neither expert was able to identify any other powers, functions or duties that are "required or permitted" under Part VI. Mr Lowe points out, and it is not in dispute, that a liquidator can require a director to provide documents and attend for questions, but the obligation to do so arises under Part XI, section 282.

349. I was not taken to any material that explained the rationale in the BVI for retaining directors in post in the period after Liquidation. It is relevant to note that this is not the case in English law, where a director's appointment would appear to be terminated

automatically by a compulsory liquidation (see *McPherson & Keay: The Law of Company Liquidation*, 5th Edition at 7-049). As I shall come to in a moment, under English law, directors do however remain in post on an administration or creditors' voluntary liquidation.

350. Notwithstanding the statutory regime identified above, the Liquidators in this case contend that the Sheikh and Ms Al Jaber continued to owe duties as directors post-Liquidation (*Issue 15*). That contention is advanced in a number of different ways:

i) First, relying primarily upon the recent case of *Re Systems Building Services Group Ltd (in Liquidation)* [2020] All ER (Comm) 565, the Liquidators say that the Sheikh and Ms Al Jaber continued to owe the duties they had *qua* directors pre-liquidation in the period post-liquidation ("**the *Re Systems Building Services* Argument**"). Put shortly, in *Re Systems Building Services*, ICC Judge Barber held that, in circumstances where a company had entered administration and the effect of the (English) Insolvency Act 1986 was that administration did not of itself operate to remove directors from office, the general duties of directors under sections 170-177 of the 2006 Act continued to survive.

ii) Second, further or alternatively, the Liquidators say that the Sheikh and Ms Al Jaber each owed a fiduciary duty to the Company ("**the Fiduciary Duty Argument**"), alternatively each was a constructive trustee ("**the Constructive Trust Argument**") liable to account to the Company, as if they owed such a fiduciary duty, after the commencement of the Liquidation:

   a) in respect of any property of the Company that remained in either of their hands or under their control, or in the hands or under the control of a corporate entity over which either of them was able to exercise control, or in respect of which they had otherwise taken stewardship either directly or indirectly; and/or

   b) in respect of any property of the Company in respect of which either of them set up or purported to set up a beneficial title of their own or a beneficial title adverse to the rights of the Company.

iii) Third, the Liquidators contend that at all times following the Liquidation the Sheikh owed duties as a director of the Company to account to the Company acting by its Liquidators for (i) his stewardship of the Company and its assets prior to the commencement of the Liquidation; and (ii) his stewardship of any assets that remained in his hands or otherwise under his custody or control ("**the Duty to Account Argument**"). These are duties that the Liquidators contend were fiduciary in nature, being "an incident of the Sheikh's fiduciary duties" arising by reason of his general duties as a director and, as such, could only be discharged by the provision of "honest, full, accurate and candid information given with reasonable care and skill".

The *Re Systems Building Services* Argument

351. Turning first to the *Re Systems Building Services Group* Argument, I must begin with the views of the experts as to the powers and duties of directors post-liquidation in the BVI.

352. Mr Fay is clear in his report that in light of the provisions of section 175 of the IA 2003, "the directors of [the Company] did not have any power or authority to manage the business and affairs of [the Company] from the moment liquidators were appointed…". In his report, Mr Fay does not directly address the question of any duties which may be owed by directors post-liquidation, although he does observe that the requirements of the IA 2003 to assist and/or provide information to a liquidator "are not relevant to the question as to whether the director has any power and/or authority to manage the business and affairs of the company post-liquidation".

353. Mr Lowe explains in his report that a director's duties after a company has gone into liquidation are set out in section 175 IA 2003 and that although directors remain in office upon liquidation of the company, they cease to have any powers, functions or duties beyond those required or permitted under Part VI of the Act. In their joint report, as I have said, the experts did not consider there to be any substantive difference between their views.

354. Perhaps unsurprisingly, Miss Stanley did not ask Mr Fay about the issue of post-liquidation duties in cross-examination. However, Mr Curl asked Mr Lowe whether, for Part VI of the IA 2003 to be effective, directors must "owe a duty to act consistently with the liquidator's right to custody and control", to which Mr Lowe responded that, as a matter of common law, it is necessary for directors to "turn over property they hold on behalf of the company" and, if asked, to prepare a statement of affairs, but that "Part VI doesn't require them to do anything else". In response to a question from me as to whether a director owes fiduciary duties post-liquidation if he continues to hold company property, Mr Lowe responded "No…what happens when a company goes into liquidation is that the board becomes completely *functus officio*, doesn't have any further functions".

355. Mr Lowe described the wording of section 175 as "curious" given that "it's pretty well established that the board loses all their powers" on liquidation and that as such "they don't have any duties because they have no powers". I asked him what duties were "required" under Part VI and he responded that he saw none that he considered to be material. He also confirmed that he was aware of no cases in the BVI dealing with the potential for there to be any duties required or permitted under Part VI and observed that "…in the BVI - I don't believe anybody thinks that directors retain any functions or powers once a company's in liquidation, and they can't have any duties because there's nothing they can do". Later Mr Lowe said that in such circumstances "[t]heir duties have to be matters of common law. Property, intermeddling, or something like that". Mr Curl did not seek to suggest to Mr Lowe that the position in the BVI is analogous to that in an English administration or creditors' voluntary liquidation or that, therefore, the principle in *Re Systems Building Services* would be applied by analogy in the BVI.

356. During the hot-tubbing session, Mr Fay indicated that he was not fully in agreement with Mr Lowe as to directors' duties post-liquidation, but the area of his disagreement was restricted to his view that "directors retain a duty owed to the company, not in property law but as directors, not to deal with the assets of the company". He thought this was a duty that arose because directors are fiduciaries, but ultimately he said that this was really the same duty that Mr Lowe had identified as arising by reason of the operation of the common law. Mr Lowe did not appear to disagree with this. Aside from this specific fiduciary duty not to deal with assets of the company, Mr Fay did not suggest that he disagreed with Mr Lowe's view that upon liquidation a company's directors become *functus officio* in the BVI.

357. Pausing there, the evidence of the BVI experts was accordingly to the effect that owing to the terms of section 175 of the IA 2003, the powers and duties of a company's directors effectively cease upon the liquidation of that company, save where a director holds company property – in which case he will have a duty (whether a fiduciary duty or a duty at common law) not to deal with that property, but to turn it over. Neither expert provided support for the proposition advanced on behalf of the Liquidators in closing that, contrary to their evidence, the duties of directors *qua* directors as set forth in sections 120-124 BCA 2004 continue to be owed to a company in the BVI post liquidation. Furthermore, neither of the experts appeared to agree with the proposition advanced by the Liquidators in opening that duties of the kind that it is alleged continued to be owed in this case following the Liquidation must be "required" for the purposes of Part VI of the IA 2003.

358. I accept the evidence of the BVI experts and reject the submissions made on behalf of the Liquidators, which appeared to me to overlook that evidence in seeking to push the boundaries of a director's duties following liquidation far beyond those identified in the statute. I also observe that, as Miss Stanley pointed out, the duties identified in sections 120-124 of the BCA 2004 are expressly said to apply to a director of a company "when exercising his powers or performing his duties". It is difficult to see how those duties could possibly apply where a director's powers and duties have been expressly removed by section 175 of the IA 2003.

359. In light of my findings as to BVI law, I need not deal in any detail with the submissions of the parties as to the position in English law. However, having heard argument on *Re Systems Building Services*, I simply make the following observations. *Re Systems Building Services* is an English authority decided by reference to the English insolvency regime. It concerned the duties of directors following administration and creditors' voluntary liquidation in the context of that specific statutory framework, which includes various provisions not present in the BCA 2004 - provisions which persuaded ICC Judge Barber of the "reach" of sections 171-177 CA 2006. While one of the reasons given by ICC Barber (at [54]) for her decision was that the IA 1986 makes it clear that a company's entry into administration or creditors' voluntary liquidation does not, of itself, result in the removal of directors from office (an analogous situation to that pertaining under the BVI statute), nevertheless her reasoning included other factors which would not apply in the context of analysis of the specific provisions of the BVI statute. In particular, she accepted the submission (at [59]) that "[i]n an insolvency context, first and foremost of a director's duties is the duty expressly preserved by section 172(3) of the CA 2006: to have regard to the creditors as a whole". This is not a duty that is preserved on a liquidation under the BVI statute and I note also that the wording in sections 120-124 of the BCA 2004 to which I have drawn attention in the previous paragraph of this judgment, is not present in the CA 2006.

The Fiduciary Duty/Constructive Trust Argument

360. The view of the experts, to which I have already referred, is that there is a duty post-liquidation (whether it be characterised as a fiduciary duty or not) not to deal or "intermeddle" with company property and to account for that property. As Mr Fay remarked: "I'm not sure there is a difference in the nature of the duty that's owed as a fiduciary to the nature of the duty that Mr Lowe contends is owed as a trustee. I think it's the same duty, and we're really arguing about what you call it".

361. The experts did not suggest that the position in BVI law was any different from the position under English law in this regard. Mr Lowe put the matter in his report thus: "Insofar as a director is in possession of property that belongs to the Company, he should deliver that up to a liquidator. That is simply a matter of property."

362. The Liquidators plead the liability on the part of a company director to account for company property in the alternative – either as an incident of a fiduciary duty or by reason of their liability as constructive trustees (as if they owed a fiduciary duty).

363. Every case in which a question arises as to the existence of a fiduciary relationship is fact specific and requires careful examination of the circumstances to see whether a fiduciary relationship exists (see *In Plus Group v Pyke* [2002] 2 BCLC 201 per Brooke LJ at [75]). A fiduciary relationship is not an all or nothing question and fiduciary obligations may arise which are tailored to the context of the particular relationship between the parties. In *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] 1 CLC 216, Leggatt LJ (as he then was) repeated the cautionary words of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd* [1994] CLC 918 at 950 that:

> "The phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case".

364. The necessary examination must take place within the framework of the powers and duties of (in this case) a director, which the BVI law lays down. Of course a director ordinarily falls within the settled categories of relationships which give rise to fiduciary duties; the fiduciary duties undertaken by a director while the company is solvent are an incident of his role as director – i.e. his appointment with authority to manage the affairs of the company in circumstances which give rise to a relationship of trust and confidence (see *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] 1 CLC 216 per Leggatt LJ at [157]-[158]).

365. However, the question that arises here is whether those fiduciary duties (or, more accurately a specific fiduciary duty to account for company property) can survive following liquidation of the company.

366. As Mr Curl submitted, a fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary" (see *Bristol & West v Mothew* [1998] Ch 1 at 18 and Finn, *Fiduciary Obligations* (1977) page 2). However, as Leggatt LJ said in *Sheikh Tahnoon* at [157]: "if this is right, it simply begs the question of how to determine when a person is subject to fiduciary obligations if not by analysing the nature of their relationship with the person to whom the obligations are owed". Leggatt LJ went on at [159] to identify the circumstances in which fiduciary duties will typically arise:

> "fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person…The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be in the best interests of their principal. This is the core of the obligation of

> loyalty which Millett LJ in the *Mothew* case [1998] Ch 1 at 18, described as 'the distinguishing obligation of a fiduciary'".

367. Against that background, and where I have accepted the view of the experts that a director in the BVI is effectively divested of his powers and duties following a liquidation, it is very hard to see how, ordinarily, his fiduciary duties could persist. The framework of duties which gave rise to the relationship of trust and confidence prior to the liquidation has been stripped away as a consequence of the operation of the relevant BVI statutory provisions.

368. A director in such circumstances is excluded from the decision making process and excluded from participation in the company's affairs – he has no "position" as a director in any meaningful sense. The Liquidators are appointed in his place. With the removal of a director's powers comes also removal of his functions and duties. In this regard, in my judgment he is, in the ordinary course, in an analogous situation to that of the director in *Plus Group* who had been excluded from the company's affairs such that, as Sedley LJ said (at [90]), his duty to the claimants had been "reduced to vanishing point" and his role was:

> "entirely nominal, not in the sense in which a non-executive director's position might (probably wrongly) be called nominal but in the concrete sense that he was entirely excluded from all decision making and all participation in the…company's affairs. For all the influence he has, he might as well have resigned".

369. However, in this case I am not concerned with fiduciary duties in the ordinary case. I am concerned with the specific proposition that, during the course of his stewardship of the company, a director has obtained custody and control of company assets, which custody and control continues following liquidation (at least in the sense that the director is able improperly to take control of, or "deal" with, the assets). It is in this very specific circumstance (adverse dealing with company assets) that I am invited to find that a duty as a fiduciary or a liability as a constructive trustee (as if a fiduciary duty was owed) continues to exist.

370. In his closing skeleton argument, Mr Curl did not really seek to distinguish between the Fiduciary Duty Argument and the Constructive Trust Argument. Instead he noted the fact that there was little difference in substance between the experts on the point and he said this: "the inquiry of primary relevance is not into the label but instead the basis on which a defendant has assumed responsibility for the assets in question and how they have dealt with them". It was clear from his oral submissions that, notwithstanding the various alternatives in the PoC, the Constructive Trust Argument had assumed the position of the Liquidators' primary case.

371. The question raised by the Constructive Trust Argument is whether a director who meddles (without authority) with company property post-liquidation, will be liable as a constructive trustee (or as if he were a constructive trustee) such that he has an obligation to account for that property. For reasons which I shall turn to now, the Constructive Trust Argument is in fact closely bound up with the existence of a fiduciary relationship.

372. In the well-known case of *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400, Millett LJ expressly identified (at page 408) that "directors and other fiduciaries", although not strictly trustees, are nevertheless in an analogous position where they abuse

the trust and confidence reposed in them to obtain their principal's property for themselves. He observed that they are "properly described as constructive trustees". He went on (at 408-409):

> "Regrettably, however, the expressions "constructive trust" and "constructive trustee" have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust.
>
> ….
>
> The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be "liable to account as constructive trustee." Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions "constructive trust" and "constructive trustee" are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are "nothing more than a formula for equitable relief": *Selangor United Rubber Estates Ltd. v Cradock* [1968] 1 WLR 1555 at p. 1582 per Ungoed-Thomas J".

373. In the case of a director, any liability he may have as constructive trustee in dealing with the company's property is clearly an incident of his fiduciary duties *qua* director, i.e. where the director deals with company property, he owes a fiduciary duty expressly *in relation to* that property. By reference to the two categories identified by Millett LJ, he will be a category 1 constructive trustee. This was expressly recognised by the Supreme Court in *Williams v Central Bank of Nigeria* [2014] AC 1189, where at [9] Lord Sumption referred to the two distinct categories of constructive trust, observing that the first category "comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without formal appointment". He called these people "de facto trustees", noting that "[o]thers, such as company directors, are by virtue of their

status, fiduciaries with similar obligations" and he went on (at [10]) to cite with approval "the clear and entirely orthodox statement of the different categories of constructive trustee" made by Ungoed-Thomas J in *Selangor* and (at [ll]) the similar language used by Millett LJ in *Paragon Finance*.

374. Mr Lowe pointed out in his report that the English distinction between class 1 "institutional" constructive trusts and class 2 "remedial" constructive trusts has been adopted in the BVI case law. This is clear from a number of BVI authorities to which he referred, including *Comodo v Renaissance Ventures Ltd* BVIHC (Com) 0045/2013, per Green J at [53] (which expressly cites *Paragon Finance* and *Williams*) and *Zhao Long v Endushantum Investments Co Ltd* BVIHC (Com) 151/2017 per Green J at [22]-[23]. Mr Fay observed in his report that where an asset has been disposed of in breach of trust or in breach of fiduciary duty "there is no material difference between BVI law and English law" and he said that he could see no likelihood that the BVI court would differ from the approach taken by the English court. Mr Lowe opined that although a director is not in the strict sense a trustee of assets under BVI law because the director has no legal or beneficial title to corporate assets, he may "nevertheless be treated for some purposes as a trustee". Mr Fay referred to a decision of the Antigua and Barbuda High Court of Justice in *Stanford International Bank Limited (In liquidation) v Vingerhoedt* ANUHCV 2012/0319, in which Wallbank J (who now sits in the BVI) said at [7]:

> "It is well established that, in consequence of the fiduciary character of their duties, directors are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust".

375. Against this background, Mr Curl submits that where directors have assumed stewardship of company assets as a function of their fiduciary role as directors, they are category 1 constructive trustees of those assets (or to be treated as such) and are liable to account for those assets even after liquidation of the company. This is because, under BVI law, a director who retains control over a company's property post-liquidation *continues to hold it* in a fiduciary capacity, i.e. in the capacity in which he originally received it or had control over it. Mr Curl prays in aid the decision of the Supreme Court in *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857, in which (in connection with arguments focusing on the construction of section 32 of the Limitation Act 1980), Lord Briggs, giving the judgment of the court, observed (at [19]) that the defendant directors of the claimant company "had been its fiduciary stewards from the outset". Mr Curl says that this case is of general application on this point of principle.

376. It seems to me, although it is not entirely clear, that this is the "fiduciary" duty to which Mr Fay was referring in his evidence; not a continuing fiduciary duty owed by reason of the general duties of a director (which I have rejected), but a fiduciary duty specifically owed by reason of the continuing stewardship of assets which originally commenced at a time prior to the liquidation. Certainly that analysis does not appear to be inconsistent with Mr Lowe's view that there would be a duty post liquidation to account for company assets "as a matter of property", a view he did not explain or elaborate upon.

377. Miss Stanley accepted in closing (i) that a company director has fiduciary duties of stewardship; (ii) that a company director may be treated as liable to make equitable compensation for breach of duty or to give an account; and (iii) that the misapplication of company property by a director who transfers that property to himself is "a gross

breach of fiduciary duty" in circumstances where "he will hold that property on a constructive trust". It was her case, however, that the fiduciary duties of stewardship owed by a director cannot continue where the liquidator becomes the fiduciary steward upon liquidation.

378. Furthermore, Miss Stanley sought to persuade me that the Liquidators' analysis more generally is misconceived[8]. In particular, Miss Stanley submitted (i) by reference to *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705 and extracts from Underhill & Hayton *Law of Trusts and Trustees* 20th Edition that a person cannot be a trustee (including a constructive trustee) unless he holds title to property (a point she described as possibly one of the two most important legal points in this case); (ii) that *Williams* and *Burnden* are both concerned with statutory interpretation and do "not rewrite the law of trusts" – by which I understood her to mean that they are not authority for the proposition that a director without title to property could be liable as a constructive trustee; and (iii) that a director is treated as being a trustee, i.e. in possession of property "for the purposes of limitation and limitation only".

379. It is not my understanding of the Liquidators' case that they allege that the directors of a company with fiduciary stewardship of assets are, as a matter of law, trustees in the sense of owning legal title. On the contrary, they point the court to judicial statements of the highest authority (including *Williams*) which support the proposition that directors in such a position may owe duties of due administration *analogous or similar* to those owed by a trustee. Further support for this may be found in *Underhill & Hayton* at 1.4:

> "A person who deals with property owned by another but over which he has control as agent or as bailee or as attorney under a power of attorney for another person, is not a trustee of the property, although in relation to particular property he may in certain circumstances owe duties of due administration similar to those owed by a trustee, as in the case of a company director for example";

and at 3.8, where *Underhill & Hayton* acknowledge that a constructive trust may be needed where:

> "the original property was not held by the defendant on an express trust though under his control as a company director or other fiduciary".

380. Mr Curl also drew my attention to the judgment of Nourse LJ in *In re Duckwari Plc* [1999] Ch 253 at 262:

> "It is convenient to start with the judge's comparison of the purchase with an unauthorised investment by a trustee. The assets of a company being vested in the company, the directors are not accurately described as trustees of those assets. Nevertheless, they have always been treated as trustees of assets which are in their hands or under their control. The principle is best stated by Lindley L.J. in *In re Lands Allotment Co.* [1894] l Ch. 616, 631:

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[8] This was notwithstanding a paragraph in her skeleton argument which acknowledged that if, after liquidation, directors hold property belonging to the company, they can be required to hand it over "as a matter of property" and that "[t]he company is the beneficial owner and is therefore entitled to call for it and the director will hold it as a class 1 constructive trustee".

> "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been liable to make good moneys which they have misapplied upon the same footing as if they were trustees ...".

381. In the circumstances, I am not clear what the relevance of Miss Stanley's first point really is; it appears to me to be boxing at shadows. I accept Mr Curl's submission that a director who has stewardship of company property may be treated as liable as a category 1 constructive trustee if he misapplies that property.

382. In the circumstances, I do not consider Miss Stanley's second and third points to take matters further.

383. In *Williams* the Supreme Court held that the word "trustee" in section 21 of the Limitation Act 1980 (as defined in section 38(1) of that Act and in section 68(17) of the Trustee Act 1917, which extended the definition of "trust" and "trustee" to include implied and constructive trusts) did not encompass a party who was liable to account in equity simply because he was a dishonest assister in a breach of trust and/or a knowing recipient of trust assets (i.e. a category 2 constructive trustee) because this category does not involve "true trustees" or even fiduciaries with similar obligations to true trustees.

384. However, in his judgment (with which Lord Hughes JSC agreed), Lord Sumption focused (at [7]-[11]) on the "law relating to constructive trustees", setting out the well-known statement of principle by Lord Selborne LC in *Barnes v Addy* (1873-1874) LR 9 Ch App 244 at 251 and going on to say at [9] that "[i]t is clear that Lord Selborne LC regarded as a constructive trustee any person who was not an express trustee but might be made liable in equity to account for the trust assets as if he was". Against this background he went on to make the observations to which I have already referred, approving Ungoed-Thomas J's identification of the two categories of constructive trust in *Selangor* (a case which was not concerned with limitation) and similar statements from Millett LJ in *Paragon Finance.* In considering the nature of category 1 trustees Lord Sumption expressly observed (as I have already said) that company directors owe "very similar obligations" to trustees by reason of their fiduciary status. Only having considered the law on constructive trusts did he turn to consider the "relevance of the distinction" between the two categories of constructive trust to limitation. Lord Neuberger also adopted the judgment of Millett LJ in *Paragon Finance* at [54]-[56].

385. *Burnden* was also concerned with the true interpretation of section 21 of the Limitation Act 1980, in particular, whether it was applicable by analogy to company directors, who were entrusted with the stewardship of a company's property (in this case, shares in a trading subsidiary) and owed fiduciary duties to the company, as beneficiary of the trust, in respect of that stewardship. Lord Briggs (with whom the other members of the court agreed) said at [11] that it was common ground that:

> "as directors of an English company who are assumed to have participated in a misappropriation of an asset of the company, the defendants are to be regarded for all purposes connected with section 21 as trustees. This is because they are entrusted with the stewardship of the company's property and owe fiduciary duties to the company in respect of that stewardship".

Lord Briggs cited *Paragon Finance* and *Williams* as authority for the proposition in the final line.

386. I agree with the Liquidators that it is clear from this paragraph that the nature of the stewardship assumed by a company director is critical to the decision that section 21 applies. That this is so becomes even clearer at [19] where Lord Briggs provides the following explanation as to his approach:

> "…in the context of company property, directors are to be treated as being in possession of the trust property from the outset. It is precisely because, under the typical constitution of an English company, the directors are the fiduciary stewards of the company's property, that they are trustees within the meaning of section 21 at all…if their misappropriation of the company's property amounts to a conversion of it to their own use, they will still necessarily have previously received it, by virtue of being the fiduciary stewards of it as directors".

387. Whilst the Supreme Court decided in *Burnden*, as Miss Stanley correctly points out, that a director is to be regarded as a trustee *for the purposes of the 1980 Act*, she sought in her submissions to play down the extent to which both *Williams* and *Burnden* recognise stewardship duties on the part of directors which are "very similar to" the duties of a constructive trustee, existing regardless of the limitation position. As Lord Briggs put it in [18], section 21 of the 1980 Act is primarily aimed at express trustees but is applicable to company directors "by what may fairly be described as a process of analogy".

388. The defendant directors in *Burnden* argued for the purposes of limitation that they had neither received nor converted to their use the shareholding in question because that property had at all times been in the possession of corporate entities. However, Lord Briggs rejected that argument and held (at [22]) on the assumed facts that the defendants had converted the shareholding and that:

> "[b]y the time of that conversion the defendants had previously received the property because, as directors of the claimant company, they had been its fiduciary stewards from the outset".

389. The question for me is whether the stewardship duties that it is accepted directors will have as a function of their appointment as directors can continue post-liquidation under BVI law such that an action for breach of fiduciary duty/liability as a constructive trustee may be brought in respect of a director's adverse dealings with company assets. This is unlikely to be a scenario that occurs regularly, although I accept that company directors may have both the opportunity and the motive to deal with company property adversely to a liquidation after the commencement of that liquidation.

390. In light of my analysis of the authorities (which it is accepted would be applied by a BVI court), I am persuaded that the obligations of fiduciary stewardship owed by directors are capable of continuing post-liquidation in respect of company property (albeit in a much reduced form and applicable only in circumstances where unauthorised dealing with company assets occurs), whether they are described purely as fiduciary obligations or as giving rise to liability as a constructive trustee. In so far as Mr Lowe's evidence was to the effect that no such duties could continue to exist (whatever the circumstances), I reject that evidence. Mr Fay's articulation of the existing duty on directors post liquidation – not to deal with the assets of the company - an articulation with which Mr Lowe did not

really appear to disagree - seems to me to be in line with the authorities and I accept that evidence.

391. I do not consider that the fact that the liquidator has "custody and control" of the assets of the company pursuant to section 175 of the IA 2003, as Miss Stanley pointed out, affects this conclusion. The underlying rationale for the obligation of fiduciary stewardship on a director post-liquidation under BVI law is the need to hold to account a director who seeks to exercise control over company property and engages in unauthorised dealing with that property. In such a situation, the liquidator (who should be the fiduciary steward) will quite obviously have been deprived of that stewardship.

392. The potential for the continued existence of such obligations appears to me to be rooted firmly in the original assumption of responsibility by a director, as fiduciary steward, for company property. If a director (operating under BVI law) retains a company's property post-liquidation (which of course he should not do) then I accept that (always subject to the specific circumstances) he continues to hold it in a fiduciary capacity. If, without authority, he subsequently deals with that property adversely to the liquidation (or if he deals with property over which he is still able to exercise control), then he will have breached his fiduciary duty of stewardship and he must account for the property as if he were a constructive trustee.

393. In arriving at my conclusion on this issue, I have been fortified in my approach by reference to two strands of authority to which I was referred by the Liquidators which emphasise the existence of fiduciary duties by reason of the assumption of responsibility. Where fiduciary duties have been held to be owed to a company by (i) a shadow director who deals with the assets of a company acting as if he were a director (see *Vivendi SA v Richards* [2013] BCC 711); and (ii) a retired director who exploits, after his retirement, a business opportunity belonging to the company (see *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704), it is very difficult to see why a *de jure* director dealing adversely with company property after liquidation may not also owe a fiduciary duty in relation to his dealings with that property.

394. In *CMS Dolphin*, Lawrence Collins J said this:

> "[95] In English law a director's power to resign from office is not a fiduciary power. A director is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the company. So also in English law, at least in general, a fiduciary obligation does not continue after the determination of the relationship which gives rise to it (see *A-G v Blake (Jonathan Cape Ltd, third party)* [1998] 1 All ER 833 at 841, [1998] Ch 439 at 453, varied on other grounds [2000] 4 All ER 385, [2001] 1 AC 268 (HL)). For the reasons given in *Island Export Finance Ltd v Umunna* a director may resign (subject, of course, to compliance with his contract of employment) and he is not thereafter precluded from using his general fund of skill and knowledge, or his personal connections, to compete".
>
> [96] In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property.

> He is just as accountable as a trustee who retires without properly accounting for trust property. In the case of the director he becomes a constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest, and exploited it by resigning from the company.

395. The pre-retirement assumption of stewardship of the business opportunity in *CMS Dolphin* appears to me to be analogous to the pre-liquidation assumption of responsibility in respect of property which a *de jure* director then continues to hold or to misapply post-liquidation.

396. Standing back, and considering the coherence of the parties' respective arguments, I agree with the Liquidators that it would be surprising if the liability of a director under BVI law for misappropriation of, or unauthorised dealing with, company assets could be extinguished solely by reason of the relevant dealing having taken place after liquidation of the company (notwithstanding his or her continuing status as a director).

397. I have already observed that the existence of fiduciary duties will depend upon the circumstances of the relationship between the relevant parties. Whether a fiduciary duty of stewardship in relation to the preservation of company property is owed on the facts of this case and whether there has been a breach of that duty will depend on the specific facts, including the questions of whether the directors were in possession or control of that property and whether the directors set up any beneficial rights to the property that were adverse to those of the Company.

398. Before moving on, I should finally address the Liquidators' additional contention that a director under BVI law owes a fiduciary duty, after liquidation of the company, in respect of property of the company which is in the hands, or under the control, of a corporate entity over which that director is able to exercise control, or in respect of which he has otherwise taken stewardship.

399. I did not understand Mr Curl's closing submissions to address this proposition and accordingly I deal with it only briefly. In his report, Mr Lowe opined that he did not see "any duty as a matter of BVI law that a person who is a director of another company can be required to deliver up property belonging to that other company" and that accordingly he did not know of "any BVI duty which would require the Sheikh to "deliver" [the 891K Shares]" upon their transfer into the possession or control of another entity. Mr Fay did not take issue with this. In circumstances where the point was not pursued by the Liquidators in closing, I accept Mr Lowe's evidence and reject the suggested existence of this alleged duty.

The Duty to Account Argument

400. As presented in closing submissions, I did not understand this argument to be central, or indeed of any real additional significance to the Liquidators' case. Indeed, as I shall return to in a moment, the only breach of this alleged duty is pleaded as a failure to disclose particulars of the registered title to the JJW Inc Shares, rather than a failure to account. The Liquidators' closing skeleton argument contained no discrete submissions as to the law that I should apply in relation to this distinct argument and there is nothing in the expert evidence to assist. I was not addressed on the law in relation to any duty to disclose other than in the context of the Liquidators' arguments on limitation, in respect

of which the focus appears to have been on the duty of a director to disclose his or her own wrongdoing.

401. In their closing submissions, the MBI Respondents contended that there is no free-standing duty to disclose upon fiduciaries, but that a duty will only arise (on the law as it presently stands) when the director is exercising his or her powers or duties and has, or should, conclude that disclosure of his or her wrongdoing is in the best interests of the company and required as part of their duty of loyalty (see *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244). Having reserved their position as to whether *Item Software* was correctly decided, the MBI Respondents nevertheless contended that if there are no powers or duties to exercise (as they say is the case after liquidation), then there can be no duty on the part of a director to disclose wrongdoing.

402. It is a principle of common law, binding on this court, that a director has a duty to disclose his own wrongdoing. Mr Fay referred to this principle in his report, noting that although he was not aware of any particular BVI authority on the point, he had little doubt that the BVI court would apply English case law and in particular, *Tesco Stores Ltd v Pook* [2003] EWHC 823 (Ch) and *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244. Mr Lowe did not disagree. However neither expert expressly sought to consider the question of whether this duty continued post-liquidation, or indeed whether there was any more general duty to disclose information post-liquidation. Given their evidence, to which I have referred at some length above, it is to be inferred that neither thought that such duties could continue after liquidation.

403. In *Item Software* at [41]-[44], Arden LJ made clear, that the duty to disclose wrongdoing is a corollary of the "fundamental duty to which a director is subject", namely a director's duty to act in good faith in the interests of the company, i.e. his duty of loyalty. In circumstances where I have found that none of the ordinary statutory or fiduciary duties of directors continue under BVI law following liquidation (save for the very particular duty of fiduciary stewardship to which I have referred), it is difficult to see that a duty of disclosure which is purely a facet of those duties can nevertheless survive.

404. In closing Mr Curl did not provide me with any justification for the continuation of this duty of disclosure post-liquidation other than that it was part of the "fiduciary obligation of single-minded loyalty" and that the absence of such a duty would be a "recipe for abuse". However, this presupposes the existence of a fiduciary obligation of loyalty which I have found to have fallen away under BVI law upon liquidation.

405. I have considered whether the fact that there may be a continuing obligation of fiduciary stewardship in respect of company assets would itself support a continued duty of disclosure, always bearing in mind that, as Arden LJ observed in *Item Software*, equitable principles are "dynamic and capable of application in cases where [they] have not previously been applied". However, it seems to me that before I could determine that such a duty exists under BVI law in a novel situation such as this, I would need proper grounds for doing so (particularly given the very clear terms of section 175 IA 2003 as to the cessation of the director's "powers, functions or duties"). None has been suggested. I cannot see that a duty of disclosure of wrongdoing, much less some more general duty of disclosure, is a necessary adjunct to the limited and fact specific obligation of fiduciary stewardship that I have identified.

406. Furthermore, the MBI Respondents drew my attention to *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), a decision of Newey J (as he then was) in which he said this at [193]:

> "As was mentioned in *Brandeaux Advisers (UK) Ltd v Chadwick* [2011] IRLR 224 at [47], *Item Software v Fassihi* is a somewhat controversial decision. Arguably it breaks new ground in treating a fiduciary duty as prescriptive rather than merely proscriptive. Its result can perhaps now be justified also by reference to s 172 of the Companies Act 2006, which came into force on 1 October 2007. The duty to promote the success of a company which that provision imposes can be said to be expressed in prescriptive terms (a director '*must act* in the way he considered, in good faith, would be most likely to promote the success of the company'; my emphasis)…"

407. I observe that the BCA 2004, sections 120 to 122 are not expressed in similarly prescriptive terms and do not therefore provide any additional justification for adopting a prescriptive approach under BVI law.

408. For the reasons I have identified, I do not consider there to be (i) any duty on a director under BVI law to disclose his own wrongdoing after the date of liquidation of the company; or indeed (ii) any wider more general duty of disclosure. I should add that in so far as this argument was, on occasions during the trial, characterised by the Liquidators as a "duty to co-operate", such a case was not pleaded and for all the reasons set forth in the next section, must be rejected.

THE POST-LIQUIDATION ALLEGATIONS

The claims for Delivery Up and Failure to Disclose

409. Before turning to the meat of the Post-Liquidation Allegations, which concerns the Alleged 2016 Disposition, I should first address the allegations made by the Liquidators that:

i) the Sheikh, and/or Ms Al Jaber breached their duties to the Company and/or committed a breach of trust in failing to deliver up, and/or in failing to surrender custody and control to the Liquidators (and their predecessors) of, the JJW Inc Shares upon the commencement of the Liquidation and at all times thereafter ("**the Delivery Up Claim**") (*Issue 19*[9]); and

ii) the Sheikh failed (until 9 February 2021) to disclose correct particulars of the registered title to the JJW Inc Shares despite being under a duty to do so by reason of his fiduciary duty of stewardship, which obliged him to account to the Liquidators for his stewardship of any assets of the Company "that remained in his hands or otherwise under his custody or control or that he was aware were not under the custody or control of the liquidator" ("**the Failure to Disclose Claim**") (*Issue 21*).

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[9] Issue 19 refers only to a breach as at the commencement of the Liquidation, whereas the PoC at paragraph 80 expressly refer also to an ongoing breach "from 10 October 2011 to date").

The Delivery Up Claim

410. This claim has been articulated in two very different ways by the Liquidators:

i) In opening, this claim was described as "a slightly more nuanced account of the way the Liquidator puts this claim; in short, causing a void disposition was doing something to invade the Company's beneficial title and that was a failure to surrender custody and control to the liquidator, and, as such, it is a breach of fiduciary duty, such duties continuing after the commencement of the liquidation". Mr Curl submitted that the claim "isn't as crude as the paraphrase "delivery up claim" might tend to indicate. This is talking about control that's being asserted in relation to assets over which only the liquidator is entitled to have custody and control". This articulation caused the MBI Respondents to suggest in closing that this was not a claim of failure to do anything, but rather an allegation as to the commission of a positive act, namely entry into the Alleged 2016 Disposition. In the circumstances, the MBI Respondents noted that it appeared that the pleaded claim had been abandoned.

ii) In closing I sought to explore with Mr Curl what the Sheikh and Ms Al Jaber should have done to deliver up the shares to the Liquidator:

> "Mrs Justice Smith: What should they have done to surrender the custody and control of the shares to the Liquidator?
>
> Mr Curl: …So the short answer to your Ladyship's question is that the Sheikh and Ms Al Jaber should have provided co-operation, which means responding to correspondence, explaining what your position is in relation to an asset".
>
> Mrs Justice Smith: So this claim is about failure to co-operate?
>
> Mr Curl: It's a failure to co-operate and provide true information".

iii) Later on, the transcript records a further exchange on the point:

> "Mrs Justice Smith: So the complaint is that there was a failure to co-operate with the liquidator by informing the liquidator of any encumbrances…
>
> Mr Curl: Yes. So essentially, there is a dispute over who is entitled to those assets. Instead of engaging properly with that process, as he was required to do, after a period of confusion and non-co-operation, the majority of the assets were transferred away."

411. The very different articulation of the point in closing appears to rely heavily upon a duty to co-operate, notwithstanding that, as I have already observed, no duty of co-operation with Ms Caulfield is pleaded in the post-liquidation period. Instead it is pleaded that there is a duty to "deliver up or otherwise account" for assets, whether or not specific demand has been made for those assets.

412. The MBI Respondents respond to this point, in a nutshell, as follows: they say that upon Liquidation the shares were in the custody and control of the liquidator (section 175(1)(a) IA 2003 provides that the liquidator has custody and control of the assets of a company,

while section 185 of the same Act provides that the liquidator is agent of the company in liquidation and sets out his duties, including to "take possession of, protect and realise the assets of the company") and that, in any event, whichever articulation of the Liquidators' case one chooses, it is not properly pleaded. They also point out that shares cannot generally be converted, seized, or "delivered up" owing to the fact that a share is not a chattel, but a *chose in action* (see *OBG v Allan* [2008] 1 AC 1 per Lord Hoffman (dealing with conversion) at [94]-[106] and *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270 per Staughton LJ at 305B: "I do not see how one can seize an intangible"). A share can be transferred but it cannot be "delivered".

413. I agree with the submissions of the MBI Respondents. I consider it to be deeply unsatisfactory to be presented with two such remarkably different articulations of the Liquidators' case in opening and in closing. Neither articulation is adequately foreshadowed in the PoC. Further and in any event, I have dismissed the submission that, under BVI law, directors continue to owe general duties *qua* directors post-liquidation. The liquidator becomes the fiduciary steward upon liquidation of the company, and although I have found that it is possible in the right circumstances for the directors under BVI law to continue to owe a duty of fiduciary stewardship in relation to property in their possession or control, that duty is of extremely limited compass and does not, in my judgment, involve a continuing duty of co-operation or, indeed, of "delivery up" of shares. Section 225 IA 2003 provides that a relevant person may be required by the liquidator to prepare a statement of affairs of the company (as occurred in this case), but Mr Curl has not addressed me on how any alleged duty to co-operate could co-exist with the specific provisions of that Act. Neither expert has suggested the existence of a stand-alone duty to "deliver up".

414. Mr Curl relies upon *Re Ahmed* [2018] EWCA Civ 519 in support of the proposition that it is possible to deliver up shares, notwithstanding that a share is intangible property. However, I find it difficult to see what real relevance this has in light of his articulation of this claim. In any event, looking at *Re Ahmed* in more detail, I accept Miss Stanley's submission that *Re Ahmed* is quite clearly distinguishable. As Gloster LJ observed at [47], the duties of a constructive trustee "depend on the context". In *Re Ahmed*, that context included that the transfers of minority shareholdings in three companies made by the bankrupt to the first appellant, and then by the first appellant to the second to fourth appellants, were made with actual notice of the existence of a bankruptcy petition. This was a classic constructive trust case involving transfer of title to the appellants and serious dishonesty; the court held that, on the facts, there was an immediate obligation upon the appointment of the trustee in bankruptcy to restore the shares to the estate.

415. This claim against the Sheikh and Ms Al Jaber is very different. There is no suggestion that either the Sheikh or Ms Al Jaber has ever had title to the JJW Inc Shares; they were not registered in their names and (unlike a chattel) they could not be improperly retained following the Liquidation because, at that point they passed automatically into the "custody and control" of the Liquidators. As Sir Andrew Morritt C said in *In re MK Airlines Ltd (in Liquidation)* [2013] Bus LR 169 at [14]-[15]: "…the property right remains vested in the company but its custody and control passes from the directors to the administrators or liquidators on appointment and without the need for any further action on their part". I have seen nothing to suggest that the position is any different under BVI law. Any improper and unauthorised dealing with the JJW Inc Shares would be liable to result in a breach of fiduciary duty and a liability to account as a constructive

trustee for reasons I have explained and I accept that in those specific circumstances an immediate obligation to restore the estate would arise (see *Re Ahmed* at [51]), but there can have been no general duty to "deliver up" shares which were already in the custody or control of the Liquidators.

416. Furthermore, there is no allegation of any dishonesty (prior to the very specific and limited allegation of dishonesty on the part of the Sheikh in causing the Alleged 2016 Disposition). Mr Curl has not explained how or why directors without title to shares could owe a general duty to "deliver them up", whether at the commencement of the Liquidation, or at any point thereafter, particularly where I have found that their statutory duties cease to exist. He has also not explained how such directors would go about "delivering" shares in which they have no title.

417. In reply to Miss Stanley's submissions, Mr Curl specifically drew my attention to the pleaded obligation to "otherwise account" to the Liquidators, submitting that his case is not solely for delivery up but also for an account of stewardship of assets, pointing out that paragraphs 72 to 76 in the PoC "are apt to capture a failure to inform the Liquidator about the nature of the company's rights to the shares, including not mentioning the security". This appears to bleed into the claim against the Sheikh alone that he failed to disclose correct particulars of the registered title to the JJW Inc Shares in breach of duty and/or breach of trust.

418. I shall return to the claim of failure to disclose in a moment. For present purposes, I consider that the Liquidators have failed to establish any general duty to "deliver up" shares, or to co-operate with the Liquidators as now alleged, but never pleaded. The original articulation of this claim in opening appears to me to add nothing to the allegation that the Alleged 2016 Disposition was void. Furthermore, as I have already indicated, I accept the evidence of Mr Lowe that under BVI law there can be no duty on the part of the Sheikh to deliver up shares following the purported transfer of legal title, by registration, to JJW Guernsey (a separate legal entity). In all the circumstances, I dismiss this claim.

<u>The Failure to Disclose claim</u>

419. Although this claim asserts against the Sheikh an obligation to disclose correct particulars of the registered title to the Company's Shares by reason of his alleged ongoing obligations of fiduciary stewardship, and although paragraph 82B of the PoC, in which this plea is made, asserts a breach of this obligation of fiduciary stewardship and a breach of trust, the particulars identifying these breaches each rely expressly <u>only</u> upon breach of a director's statutory duties (in fact the duties identified in the English statute).

420. I have found that, after liquidation, there are no ongoing statutory director's duties under BCA 2004 section 120; this includes duties to have regard to creditors, which the Liquidators accept is a duty arising *qua* director. Thus, in so far as this allegation of failure to disclose is dependent upon the existence of such duties, it is dismissed. In so far as it is premised upon a duty to disclose wrongdoing, it is also dismissed for the reasons I have identified above.

421. However, although it might be said to be ambiguous given the way in which the particulars to the plea are drafted, there does appear to be an assertion of breach of the duty of fiduciary stewardship by reason of a failure to disclose. This plea is itself

confusing, not least because, while the breach of duty is pleaded as a failure to disclose, the duty of fiduciary stewardship is pleaded as a duty to account both for the Sheikh's stewardship prior to commencement of the Liquidation and for his stewardship of any "assets of the Company that remained in his hands or otherwise under his custody or control or that he was aware were not under the custody or control of the Liquidator".

422. As I understood Mr Curl's submissions in closing, this duty to disclose was once again developed on the assumption of a duty to co-operate:

> "Mr Curl…So essentially, there is a dispute over who is entitled to those assets. Instead of engaging with that process, as he was required to do, after a period of confusion and non-co-operation, the majority of the assets were transferred away".

Mr Curl also described the Failure to Disclose Claim as "conceptually the same" as the failure to Deliver Up claim.

423. I can deal with this briefly. I have rejected the existence (after Liquidation) under BVI law of both a free-standing duty of co-operation, and any continuing duty to disclose wrongdoing. The experts provided no support for any such duty. I can find nothing in the submissions of the Liquidators to support any other general duty "to disclose", and again, I have already rejected the existence of such duty. I cannot see that the limited fiduciary obligations of stewardship which I have accepted may exist as a matter of BVI law following liquidation, extend to some broad and general obligation "to disclose", and neither expert has suggested the contrary.

424. As for the alleged duty "to account", it is common ground that (as *Snell's Equity* 34th Edn sets out at 20-12) "anyone who holds assets for others in a custodial fiduciary capacity" may be required to account for the "due administration" of those assets (see also *Libertarian Investments v Hall* (2013) 17 ITELR 1 per Lord Millett NPJ at [167]-[168]). There is no dispute that this is also the position under BVI law. Thus, while the Sheikh and Ms Al Jaber owed fiduciary duties as directors prior to the commencement of the Liquidation, they were accountable for their stewardship of the Company's assets.

425. However, as the MBI Respondents point out, there was never any formal request for an account (prior to the claim in the PoC for "all necessary orders and accounts to give effect to [a declaration that the Alleged 2016 Disposition is void]") and none is pleaded. There is no suggestion that the Sheikh or Ms Al Jaber were asked to account for their custodial stewardship of the JJW Inc Shares prior to the Liquidation, and no suggestion that a formal account has been demanded, or refused, since the Liquidation. The Liquidators did not seek an account at the time of the s.236 Examinations.

426. In any event, I do not consider that the specific (and very limited) fiduciary obligations of stewardship in relation to company property which I have identified above mean that there is, on the facts of this case, any general obligation to account in the extremely broad terms pleaded in the PoC. Absent adverse dealing or misapplication of the JJW Inc Shares by the Sheikh or Ms Al Jaber contrary to the interests of the Company, those shares were in the "custody and control" of the Liquidators pursuant to section 175 IA 2003. I cannot see how the Sheikh or Ms Al Jaber could possibly owe a general (custodial) duty to account in such circumstances and neither expert has suggested otherwise.

427. The particulars of breach in paragraph 82B of the PoC do not allege a failure to account, but rather an ongoing failure to disclose "particulars of the registered title" to the JJW Inc Shares, at all times prior to 9 February 2021. The Liquidators appear to be treating the concept of an account, for the purposes of this allegation, as encompassing a general duty of disclosure, and yet they have showed me no legal basis on which I could properly accept that approach.

428. Accordingly, I can see no basis for a general duty in the terms pleaded (*Issue 15(a)*) and there can have been no breach of such duty. Furthermore, I cannot see that the pleaded failures amount to a breach of trust and Mr Curl has not made any submissions to the contrary, nor was there any relevant expert evidence. I do not consider that the plea of "knowledge" on the part of the Sheikh that his failure to disclose would prejudice the liquidation estate and was therefore in breach of his statutory duties takes matters any further in circumstances where I have found that he has no such statutory duties; there is no pleaded justification for a cause of action in negligence beyond the duties identified in the statute and no basis whatsoever for a finding that the Sheikh was acting without reasonable care and skill.

429. I am bound to say that, standing back, the Delivery Up Claim and the Failure to Disclose Claim appear to me to be little more than an attempt to find alternative ways of advancing the Liquidators' main case as to the Alleged 2016 Disposition, i.e. the failure to co-operate, deliver up or disclose was with a view to dealing adversely with the JJW Inc Shares. In my judgment, even if they were legally sustainable, they really add nothing to the Liquidators' main case. The only exception to this is the claim in relation to the Sheikh's dealings with the 129K Shares, which are not covered by the Alleged 2016 Disposition. I shall return in a moment to the question of whether there was a breach of fiduciary duty/liability in constructive trust in relation to these shares, but for present purposes I again fail to see any basis on the pleaded claim for finding a general duty to deliver up or to disclose.

430. Finally, I note that the Failure to Disclose Claim is put solely on the basis of a failure to disclose "registered title" to the JJW Inc Shares. It is unclear to me why there would be any obligation to disclose to the Liquidators information which (i) is in the books and records of another separate legal entity; and (ii) should have been readily available to them by reason of their stewardship of the assets of the Company.

431. The Failure to Disclose claim is dismissed. There is now no need for me to go on to consider the MBI Respondents' defence of limitation in respect of the Delivery Up Claim and the Failure to Disclose Claim.

The Alleged 2016 Disposition

432. The Liquidators assert that the Alleged 2016 Disposition is void and they seek relief in equity from the Sheikh and Ms Al Jaber for breach of trust/fiduciary duty. In opening, Mr Curl described this claim as "the centrepiece" of the Liquidators' claims and he articulated it in this way:

> "[The Sheikh and Ms Al Jaber] were under a fiduciary duty not to treat the shares as if they did not belong to the company. So, in other words, they had to respect the company's ownership of the shares. To the extent they didn't, to the extent they did invade the company's beneficial title, or to the extent

> they did set up a title adverse to the company's, they breached their fiduciary duty. That is the way the case is put".

433. In short, although the Liquidators do not challenge the authenticity of the February 2016 Resolution, they assert that it does not accurately record what took place in 2010. They say that there is no evidence of any share transfers in 2010 (whether the Demand Letters and the June 2010 Letter are treated as authentic documents, or not) and they positively assert that the Sheikh (or someone acting on his instructions) completed the Share Transfer Forms and caused registration of the transfer of the 891K Shares to JJW Guernsey on 8 March 2016, which had the effect of transferring title away from the Company (the Company having both legal and beneficial title at the commencement of the Liquidation). It is alleged that this was not done by the Sheikh honestly, or in good faith, or in the best interests of the Company.

434. The MBI Respondents' defence to the Alleged 2016 Disposition, in summary, is as follows:

i) The February 2016 Resolution accurately reflects the true position – namely that the Share Transfer Forms were signed on 6 July 2010 but not registered, such that although the Company was the legal owner of the 891K Shares (because it remained the owner on the JJW Inc Register), nevertheless JJW Guernsey was the beneficial owner – the 2010 transfer complied with the terms of section 54(1) BCA 2004 and so was effective as a matter of BVI law to transfer the beneficial interest in the 891K Shares to JJW Guernsey at that time. The Alleged 2016 Disposition is not void because it was merely regularising an intended transfer back of the 891K Shares to JWW Guernsey in 2010 which had failed by reason of an "administrative oversight".

ii) Neither the Sheikh, nor Ms Al Jaber owed any duties to the Company in their capacity as directors of the Company, nor can it be said that they are to be treated as trustees in respect of the 891K Shares.

iii) Because they did not owe any duties, neither the Sheikh nor Ms Al Jaber have acted in breach of duty/breach of trust after the commencement of the Liquidation.

iv) In any event, Ms Al Jaber had no involvement with the Alleged 2016 Disposition and so cannot be said to be in breach of any duty she may have owed to the Company.

v) In 2016, the Liquidator, Ms Caulfield, is to be treated as the trustee of the Company – if the Sheikh and Ms Al Jaber have any liability it can only be as dishonest assisters, on the grounds that they procured or assisted Ms Caulfield to commit an innocent breach of trust. That would require a plea of dishonesty, which is not made in this case.

vi) The acts of the Sheikh in completing the Share Transfer Forms and causing registration of the 891K Shares on 8 March 2016 are acts of registration by JJW Inc, procured by the Sheikh acting in his capacity as director of JJW Inc, not as a constructive or other trustee.

vii) At the time of registration of the 891K Shares in March 2016, JJW Guernsey was already the beneficial owner of the shares (for reasons other than that a transfer had

occurred in 2010) such that the perfection of title by arranging for registration cannot be impugned.

Relevant BVI Law as to transfer and ownership of shares

435. The experts agree that the relevant statutory provisions regarding ownership of shares are contained in the BCA 2004 at sections 41-43. In summary:

i) Section 41 provides that the company shall keep a register of members, containing (amongst other things) the names and addresses of the persons who hold registered shares in the company, together with the date on which the name of each member was entered in the register.

ii) Section 42(1) provides that the entry of the name of a person in the register of members as a holder of a share in the company "is *prima facie* evidence that legal title in the share vests in that person".

iii) Section 43 provides the BVI court with jurisdiction to rectify the share register, where information required under section 41 is omitted or inaccurately entered, on the application of a member of the company or any person who is "aggrieved" by the omission or inaccuracy.

436. Accordingly, the experts agree that the legal proprietor of shares is the person whose name is entered into the share register and that such person will remain the legal proprietor for as long as his name remains in the share register. As Lord Collins observed in *Nilon Ltd v Westminster Investments* [2015] UKPC 2 at [39] (in the context of considering the circumstances in which a claim for rectification under section 43 BCA 2004 may be brought) "[t]here is no doubt that the legislation is primarily concerned with legal title".

437. Mr Lowe observed in his report that registered shares are transferrable subject to any limitations or restrictions in the memorandum or articles of the company (section 52(1) BCA 2004). Pursuant to section 54:

> "(1) Registered shares are transferred by a written instrument of transfer signed by the transferor and containing the name and address of the transferee;
>
> …
>
> (3) The instrument of transfer of a registered share shall be sent to the company for registration.
>
> (4) Subject to the memorandum or articles and to subsection (5), the company shall, on receipt of an instrument of transfer, enter the name of the transferee of the share in the register of members unless the directors resolve to refuse or delay the registration of the transfer for reasons that shall be specified in the resolution.
>
> (5) The directors shall not pass a resolution refusing or delaying the registration of a transfer unless this Act or the memorandum or articles permit them to do so.

> …
>
> (8) The transfer of a registered share is effective when the name of the transferee is entered in the register of members.
>
> (9) If the directors of a company are satisfied that an instrument of transfer has been signed but that the instrument has been lost or destroyed, they may resolve
>
> > (a) to accept such evidence of the transfer of the shares as they consider appropriate; and
> >
> > (b) that the transferee's name should be entered in the register of members, notwithstanding the absence of the instrument of transfer."

438. Prior to a share transfer becoming effective, legal title to the shares is inchoate, as Mr Lowe pointed out (see *In re Fry* [1946] Ch 312 per Romer J at 316). A person is entitled to be registered if the original owner of the shares has agreed to transfer legal title. Mr Fay confirmed in cross examination that the delivery of an executed instrument of transfer has the effect of transferring the beneficial interest. Once agreement to transfer the shares has been made (and proved) the transferee has the right to be entered on the register and, if necessary, to apply for rectification (see *Nilon* at [39]-[40] and [51]).

439. Under BVI law, there is an evidential (rebuttable) presumption that MBI International Holdings is currently the beneficial owner of the 891K Shares. Mr Lowe explained in his oral evidence, and I accept, that BVI cases identify this as a "strong prima facie presumption" such that "cogent" evidence is needed to rebut it (see *Chen v Ng* [2017] UKPC 27 (on appeal from the BVI) at [40]-[42] and *Ng v Peckson Ltd & Chen* BVIHCMAP2019/0011 at [25]-[26])[10].

440. The question for this court is whether the Liquidators have adduced cogent evidence to rebut the existing presumption, and in this context, I have no doubt that the burden of proof lies with them. They seek to make out a positive case, contrary to the evidence of the Sheikh, that the Share Transfer Forms were completed in March 2016 (and not in July 2010) and that the purported transfer to JJW Guernsey at that time was therefore void pursuant to IA 2003 section 175(3); they are required to prove that case to the requisite standard. Furthermore, where I have found that the Sheikh and Ms Al Jaber were not subject to duties to "deliver up" or "to disclose" post-Liquidation, it is difficult to see how the Liquidators can possibly rely on the *Armory v Delamirie* principle in connection with this claim.

Discussion

441. Key to this issue is (i) the legal question of whether the Sheikh and Ms Al Jaber owed any duties after the commencement of the Liquidation and (ii) the factual question as to the date on which the Share Transfer Forms were signed. I have already held that it is

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[10] The Company would have benefitted from this presumption as from 18 March 2009 when it was entered on the Register as a shareholder in JJW Guernsey, and JJW Guernsey would have benefitted from the presumption from 8 March 2016 until the 891K Shares were registered in the name of MBI International Holdings.

possible for a fiduciary duty to exist depending on the specific circumstances of the case and, accordingly, I must turn first to consider the evidence.

442. The Sheikh's (very vague) evidence in his fourth statement (unaffected by the List of Corrections) is that:

> "At some point it came to my attention that the registration of JJW Guernsey as the owner of the Transferred Shares had not been properly effected in 2010, when the 2009 Conditional Transfer was unwound. I do not recall when I discovered that information or who informed me…I still always considered JJW Guernsey to have ownership rights over the Transferred Shares from July 2010, when the Conditional Transfer was unwound, regardless of whether this had been formally recorded through registration".

443. The Sheikh does not deal with the February 2016 Resolution in his witness statements, but, as a document, it is unchallenged. It evidences that the Sheikh, acting as sole director of JJW Inc, recorded the existence of the Demand Letters and the June 2010 Letter and stated that (undated) instruments of transfer in respect of the 891K Shares had been received by JJW Inc and reviewed by the Sheikh, who had "ascertained that the instruments of transfer were signed for and on behalf of the transferor [i.e. the Company] on the 6th day of July 2010".

444. Pausing there, there is no explanation in the February 2016 Resolution itself as to precisely when the Share Transfer Forms had been provided to JJW Inc, where they had come from and who had provided them. Nor is there any explanation as to how the Sheikh satisfied himself that the Share Transfer Forms had been signed on 6 July 2010. No signed instruments of transfer bearing that date have been produced. The Sheikh's evidence in his fourth statement says only this[11]:

> "Share transfer forms to transfer the Transferred Shares[12] back to JJW Guernsey were executed by me personally on 6 July 2010, and are at pages 87-88. As far as I was concerned at the time that was the end of the matter, and the 2009 Conditional Transfer[13] had been fully and effectively unwound when I signed those documents on 6 July 2010. I left it to others who were more accustomed to dealing with corporate administrative issues to effect the registration of JJW Guernsey as the owner of the Transferred Shares. Unfortunately the correct steps were not taken at the time, and so the Transferred Shares remained legally registered in the Company's name even after the 2009 Conditional Transfer had been unwound".

445. The versions of the Share Transfer Forms exhibited to this evidence are signed versions – the clear implication being that these are the versions that were signed by the Sheikh in July 2010, albeit that they carry no date. There is no explanation as to how he was in a position to remember and assert that he had signed the Share Transfer Forms on 6 July 2010, notwithstanding that in the February 2016 Resolution it is specifically recorded that this had to be "ascertained", not a word that would usually be deployed where recollections are clear. There is no evidence as to how the Sheikh went about

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[11] This evidence was not amended by the List of Corrections.

[12] The 891K Shares in JJW Inc.

[13] The March 2009 Transfers.

"ascertaining" the date of signature. I also note the contrast between the Sheikh's evidence on this issue (namely that he knows the date on which the documents were signed, notwithstanding that they are undated) and his evidence about the Demand Letters and the June 2010 Letter (namely that he cannot recall signing them but would not have signed documents marked with an incorrect date). There is no explanation as to why the Sheikh, an experienced international businessman, would have signed, but not dated, the Share Transfer Forms, or indeed why he would not personally have been keen to check that the transfer (on his own evidence in these proceedings, important owing to the failure of the IPO) was registered.

446. The February 2016 Resolution goes on to record that "owing to an administrative oversight" the Register of Members for JJW Inc was never updated to reflect the 2010 transfer. There is no explanation as to what this "administrative oversight" might have been, and the MBI Respondents have produced no evidence to explain the circumstances of the "administrative oversight". The Sheikh's evidence, to which I have referred above, does no more than say that "the correct steps were not taken at the time". There is no indication as to who was tasked with undertaking these steps or why that person omitted to carry them out. There is no correspondence evidencing that the signed Share Transfer Forms were provided to JJW Inc, or its agent, Maples, or indeed to JJW Guernsey, or its agent Praxis, in July 2010. I consider the suggestion by the Sheikh in his evidence that this administrative oversight was so inconsequential that he does not remember how or when it came to his attention to be utterly implausible.

447. The February 2016 Resolution is signed by the Sheikh. Under his signature appears the handwritten date "July 07, 2010", which has been crossed through and replaced with the handwritten date "29 Feb 2016". The only reference anywhere in the Sheikh's evidence to the February 2016 Resolution is in the final paragraph of his List of Corrections which seeks to give new evidence to the effect that whilst the February 2016 Resolution includes his signature "I did not date [it]". No evidence is provided as to the circumstances surrounding the February 2016 Resolution and there is no attempt to explain how the original hand written date was included in the document, why it was crossed out and replaced with a new date, or whose handwriting it might be. I am bound to say that, absent any explanation for this whatsoever, I am inclined to accept the Liquidators' submission that this reveals the Sheikh's contemporaneous thinking, i.e. that he needed to "paper" the transfer transaction so as to give the appearance that it took place in 2010. I am also inclined to accept the Liquidators' submission that the February 2016 Resolution was not attached to the Petsche Email (despite having been sent to Dr Petsche by Ms Jovovic under cover of her email of 17 November 2017) owing to it being recognised by the Sheikh that it had the potential to alert the Liquidators to the possibility of a reverse engineered transaction.

448. As for the steps that were taken following the February 2016 Resolution, the Sheikh's evidence is as follows:

> "…the Joint Liquidators assert that my former in-house solicitor, Amjad Salfiti…completed share transfer forms and procured the registration of JJW Guernsey as the registered shareholder of the Transferred Shares on 8 March 2016. If this is correct, I do not recall Mr Salfiti taking such steps. In any case it is unlikely that I would have considered such actions to be a substantive issue at the time. As I have explained above, I had considered JJW Guernsey to have ownership rights over the Transferred Shares since

> July 2010, when the Conditional Transfer was unwound. On that basis, its registration as the owner of the Transferred Shares was a mere administrative formality".

449. Once again, I consider this to be extremely implausible. Aside from the fact that this evidence is wholly inconsistent with the Sheikh's 2013 Affidavit as to the Company's ownership of the 891K Shares, it is very difficult to believe that the Sheikh would not remember to whom he had tasked the steps of dealing with the "administrative oversight". Even assuming that his case as to the transfer of the 891K Shares in July 2010 is correct, the need to regularise the position had required a detailed resolution of JJW Inc (which he did not mention anywhere in his statements, as I have said) and the formal registration of title.

450. Against the background of that evidence, I must determine whether, on balance, the Liquidators have satisfied me that, as they allege in the PoC, the "the Sheikh or some person(s) acting on the Sheikh's instructions, completed the Share Transfer Forms and caused registration of 891,761 of the Company's Holding BVI Shares to be transferred or purportedly transferred to JJW Guernsey on 8 March 2016" and whether, in doing so, the Sheikh did not act honestly, or in good faith or in the best interests of the Company.

451. Having considered all of the available evidence with care and having assessed the inherent probabilities (including having regard to the fact that, as identified in *In Re H (Minors*), the more serious the allegation, the less likely it is that the event occurred), I am so satisfied (*Issue 6*).

452. I agree with the Liquidators that a proper understanding of the chronology in this case tells a compelling story. I have set it out in detail above, but the headline points that I take from the chronological evidence are as follows:

i) Whether the Demand Letter and June 2010 Letters are proved or not, it is undisputed that at all material times prior to the failure of the Termination Application, it was his case that the Company owned outright the 891K Shares.

ii) In his 2011 Affidavit in the Standard Bank 2010 Proceedings, he confirmed that the Group structure charts provided at that time were "complete and up to date". The 2011 Organigram was attached at the final page of the Group structure charts and clearly identified that 89% of the shares in JJW Inc were held by the Sheikh, while 11% were held by "MBI BVI", i.e. the Company. The Sheikh's 2011 Affidavit confirmed that he had been advised of his continuing obligation to provide a truthful account to the court and reflects his indignation at the suggestion that there had been "opacity" in relation to his accounts as to his corporate structure and holdings.

iii) The 2011 Affidavit was sworn on 31 July 2011, just over a year after the Sheikh now says he signed the Share Transfer Forms. Yet, he makes no mention of that event in his affidavit, despite its purpose being to provide details as to his assets in the context of an application to discharge a freezing injunction. If, as the Sheikh now says, he had always considered JJW Guernsey to have ownership rights over the Shares, one might legitimately ask why he didn't say as much in his Affidavit. Taken at face value, the 2011 Affidavit proves that the Sheikh believed in July

2011 that the Company still owned the 891K Shares. The Sheikh has not sought to suggest that this affidavit was not prepared in accordance with his instructions.

iv) It appears that the Sheikh continued to believe this when he swore his 2013 Affidavit in support of his Termination Application. I have already addressed in detail the evidence around the creation of this affidavit, which I consider was plainly prepared with the Sheikh's input and on his instructions – insofar as the Sheikh now gives evidence to the contrary, I consider that evidence to be untrue. As I have identified, the 2013 Affidavit confirmed that the Company had an 11% holding in JJW Inc, a fact which was also confirmed in a statement from Mr Yussouf.

v) Pausing there, I infer that the Sheikh saw fit to lie about the circumstances of the preparation of the 2013 Affidavit in circumstances where it does not now fit with the evidence he wishes this court to accept. In my judgment this is a good indicator that the Sheikh's more recent evidence is unlikely to be true. However, I must obviously go on to consider the other available evidence and the inherent probabilities.

vi) The Sheikh continued to maintain that the Company held 11% of the shares in JJW Inc at his appeal against the dismissal of his Termination Application. Mr Carrington KC, acting on the Sheikh's behalf, submitted to the Court of Appeal that "[the Company's] business prior to the commencement of liquidation was to provide management and commercial services to associated companies and **it held 11% of the shares of a holding company**" (emphasis added). As had been the case at the hearing of the original application, the appeal was premised on the solvency of the Company and the Court of Appeal was informed that the Sheikh undertook "not to transfer the assets of [the Company] for a period of 3 years following the termination of the liquidation"; the clear implication being that he considered that the Company had assets which could be transferred.

vii) In the period prior to a decision on the appeal (i.e. the second half of 2014), the Sheikh was, as I have found, involved in the preparation of the Statement of Affairs, which he signed on 31 December 2014. Although the reference to an 11% shareholding by way of "Investment in subsidiary" with a total value of US$ 134,219,910, appeared under the heading "Assets specifically pledged", JJW Guernsey was listed as a creditor for only US$ 10 million in the attached table of creditors (although it was specifically stated that there was no security for this debt), and the estimated surplus assets available after payment of preferential creditors was identified as US$ 134,219,910, while the net surplus to members was identified as US$ 116,317,296. In my judgment this was consistent with the terms of the 2013 Affidavit. I agree with the Liquidators that the contemporaneous evidence is not consistent with Mr Salfiti and Ms Jovovic being entirely to blame for the content of this document (as the Sheikh initially contended), an assertion from which the Sheikh partially backtracked having seen that evidence, saying instead in his List of Corrections that the amendments to the draft Statement of Affairs were made by Mr Yussouf (although there is no suggestion in the List of Corrections that Mr Yussouf might be mistaken as to the information that he included in the Statement of Affairs). I have already found that at this time the Sheikh was in control of his business and I consider it to be inherently improbable that he would not have considered the content of a Statement of Affairs in the

context of a Liquidation (which he was still challenging) to be of the utmost significance.

viii) Following the dismissal of his appeal in January 2015, all the available evidence indicates that the Liquidators are correct in their contention that the Sheikh changed course. From this point, it was clear that the Company's assets would have to answer to the Company's creditors' claims in the Liquidation. I find that the Sheikh's strategy now became focussed upon retaining the value in those assets for himself and his group of companies. I consider this to be the only available inference in light of the evidence to which I shall now turn.

ix) Under a month after the dismissal of the appeal, Ms Caulfield wrote to the Sheikh noting that she had been advised by Mr Salfiti and Mr Yussouf "of the possible existence of a secured charge over the assets of the Company in favour of [JJW Guernsey]". Ms Caulfield asked for evidence of this charge within 14 days, but nothing was forthcoming. The Demand Letters, the 10 June 2010 Letter and the Share Transfer Forms were not sent to her, and nor was she informed of their existence. It was not suggested to her that although the Company had been registered as owner of the JJW Inc Shares in 2009, steps had been taken to reverse that position in 2010. A similar point may be made about the February 2016 Meeting, in respect of which Ms Caulfield recorded that the Sheikh had said that the Company was "worthless as the assets of the Company had been pledged", while Mr Krys' oral evidence, which I accept, was that the Sheikh was not able to explain what he meant in saying that there was a charge over the 891K Shares: "he was not able to clarify what he meant by it or provide any documentation or any evidence in that regard". This meeting was less than a month prior to the February 2016 Resolution.

x) The evidence shows that the Sheikh ceased to fund Ms Caulfield's conduct of the Liquidation, leaving her without funding at an application by Immoconsult that its claim be admitted in the Liquidation.

xi) On 21 December 2015, the Perkins Email was sent to Ms Jovovic. The subject matter is "Signed docs". It reads as follows:

> "Martina,
>
> Apologies for the slight delay in coming back on this – we have been looking through the original files to see if we can locate signed documents from 2011, but have been unable to do so.
>
> Unfortunately as a matter of BVI law we cannot backdate instruments of transfer and so simply dating the documents 2011 is not valid. I have therefore reattached the execution versions of the resolutions and instruments of transfer and would suggest that these be resigned and dated with today's date. We will then prioritise updating the register of members and issuing a share certificate.
>
> If it is a material problem for the transfer to be effective as of today's date (as opposed to 2011) then we should try and schedule a call to discuss how to deal with this. It is possible to do so but it is not straightforward.

Best

Dan".

xii) This document, originally attached to the Jovovic Affidavit made in the 2019 Proceedings is no longer the subject of challenge. The Liquidators' case is that it shows that by December 2015, the Sheikh had decided to deal with the 891K Shares and had sought to determine whether it was possible to backdate instruments of transfer to facilitate this course of action. Maples refused to backdate the documents, but did refer to the possibility that a transfer could become effective from some earlier date (perhaps a reference to the provisions of section 54(9) BCA 2004). The Liquidators also contend that this email evidences the fact that the necessary transfer forms were not in existence as at December 2015.

xiii) I am bound to say that I do not consider the Perkins Email to be quite the "golden bullet" suggested by the Liquidators. In closing, Miss Stanley made the forensic point that, looking at the paragraph in the Jovovic Affidavit to which it was exhibited makes it clear that the Perkins Email is referring to a transfer of the Sheikh's own shares in JJW Inc, which Ms Jovovic says occurred in December 2015 albeit that she maintains the Sheikh wished to backdate to 2011[14]. Furthermore, Miss Stanley points out that in so far as Ms Jovovic says in her Affidavit that Mr Perkins drafted a resolution for the Sheikh to sign, that was the December 2011 Resolution and not the February 2016 Resolution. Whether what Ms Jovovic says is true or not (and I make no finding one way or the other), Miss Stanley appears to be correct in saying that the Perkins Email is not dealing with the transfer of the 891K Shares or the backdating of the February 2016 Resolution. However, that does not, to my mind, mean that it is of no significance.

xiv) As Mr Curl pointed out in his reply, as part of their very late disclosure, the MBI Respondents disclosed a witness statement from the Sheikh dated 18 July 2019, prepared in the context of the 2019 Proceedings in which Ms Jovovic had sworn her affidavit. Over the course of a number of paragraphs, the Sheikh deals with the allegations made by Ms Jovovic, but in doing so he appears also to deal with the Perkins Email and the February 2016 Resolution in what Mr Curl described as a "portmanteau way", in other words as if he understood Ms Jovovic's allegations also to be relevant to the transfer recorded in the February 2016 Resolution. I should record that, in this statement, the Sheikh denies any wrongdoing.

xv) On the available evidence, I find that the Sheikh sought advice from Maples about the potential for backdating transfers in December 2015 (as is clear from the Perkins Email) and that it is inherently probable that he also sought their advice in relation to the 891K Shares to resolve what the 2016 Resolution describes as "an administrative oversight"; further that, on balance, Maples prepared the February 2016 Resolution, which appears to be in similar form to the December 2011 Resolution - which (belatedly) the MBI Respondents assert <u>was</u> prepared by Maples. The February 2016 Resolution has all the hallmarks of having been professionally, and carefully, drafted. It was Maples that updated the register on 8

[14] This is denied by the MBI Respondents and I have no regard to the truth or otherwise of the Jovovic Affidavit for reasons I have already identified.

March 2016 in accordance with the authority and instructions provided further to the February 2016 Resolution. I accept Mr Curl's submission that on the balance of probabilities, in preparing the February 2016 Resolution and updating the register, Maples was at all times acting on the instructions of the Sheikh.

xvi) It follows that I accept that, on balance, by December 2015, or shortly thereafter, the Sheikh had decided to take action in respect of the 891K Shares, despite having sworn to the BVI court that they were owned by the Company and available for its creditors in the Liquidation.

xvii) The fact that the Sheikh continued to maintain, when asked by the Liquidators, including at the meeting on 2 February 2016, that the Company was subject to "security" or to a "charge" without giving any details of the same, supports the proposition that at this time he was searching for ways in which to maintain control over the 891K Shares and that his subsequent actions in respect of the Share Transfer Forms were not honest. Had he genuinely recalled that he had signed those forms in 2010 (as he now says in his evidence), the obvious thing to do would have been to inform the Liquidators. He did no such thing.

xviii) There has been no explanation from the MBI Respondents as to when or how the documents attached to the Petsche Email of 12 December 2017 were discovered, an email which suggested <u>for the first time</u> that JJW Guernsey had retained beneficial title. Importantly, although the JJW Guernsey Demand Letter and the June 2010 Letter were attached to this email (and thus provided to the Liquidators for the first time), the February 2016 Resolution was not. The email simply asserted, without supporting evidence, that the Company had signed instruments of transfer on 6 July 2010, further to the intention expressed in the June 2010 Letter. I infer from the fact that Dr Petsche did not attach the February 2016 Resolution to this email (notwithstanding that it had been sent to him by Ms Jovovic) that the Sheikh (who had been copied in to Ms Jovovic's email to Dr Petsche and, in my judgment, was providing instructions) was concerned at the time as to the possibility of the February 2016 Resolution alerting the Liquidators to unorthodox activity on his part, in particular that it would have revealed the reverse-engineered nature of the 2016 transfer of the 891K Shares, particularly given the crossed out date immediately after the Sheikh's signature. This may also be the explanation for the fact that attention was not drawn to it in the Sheikh's witness statements.

453. In all the circumstances, I find that the February 2016 Resolution was designed to address the fact that the Share Transfer Forms had <u>not</u> been signed in July 2010 and that no steps had been taken at that time to effect any transfer[15]. In particular:

i) I reject the Sheikh's evidence that he signed the Share Transfer Forms in July 2010. I have identified above all of the areas in which the Sheikh's evidence is, in any event, deficient on this point. Given the number of questions arising on his evidence in respect of the February 2016 Resolution and the undated Share Transfer Forms, I cannot accept the Sheikh's bare assertions. I consider it to be highly unlikely that he would remember signing those forms in July 2010 in circumstances where he

[15] I make no finding as to what Maples did or did not know about the Share Transfer Agreements or the date on which they were signed, it being clear from the February 2016 Resolution that it was the Sheikh who had "ascertained" that they had been signed on 6 July 2010.

says he does not remember signing the Demand Letters or the June 2010 Letter and where he appears to remember nothing about how he came to discover the "administrative oversight". Even the carefully worded terms of the February 2016 Resolution itself (that the date had been "ascertained") are inconsistent with the Sheikh having a clear recollection that he signed the Share Transfer Forms in July 2010. I can only infer that the Sheikh has no honest explanation in respect of any of the obvious questions I have raised and that, save that he professes to have a clear recollection of the date on which he signed the Share Transfer Forms, he has sought to hide behind a lack of recollection as to key events and/or the suggestion that such events were of no real significance. I reject this evidence. I also infer, as invited to do by Mr Curl, that had anyone else within the Sheikh's organisation been in a position to give evidence about a transfer having taken place in 2010, such person would have been tendered as a witness. In this context I note that Mr Salfiti's evidence in his statement is that (although he was not involved in the March 2009 Transfers) he saw no evidence of them during his employment. Having regard to the inherent probabilities, I accept that this is true.

ii) Aside from the recent evidence of the Sheikh, there is no other evidence of the Share Transfer Forms having been signed in July 2010. Unlike the transfer which the MBI Respondents positively assert took place in 2011, as evidenced by the December 2011 Resolution, there is no resolution dating back to 2010 authorising or approving the transfer of the 891K Shares. There are no contemporaneous documents referring to such a transfer and no correspondence sending transfer documents to JJW Inc or to Maples BVI, their agents. In the circumstances, I decline to draw any inferences by reason of the failure on the part of the Liquidators to call Ms Jovovic (as the MBI Respondents invited me to do). On the admissible evidence at trial there is no reason to suppose that she would have had valuable evidence to give as to the date on which the Share Transfer Forms were signed.

iii) Importantly, the existence of a transfer in July 2010 is entirely inconsistent with the Sheikh's own evidence in his 2011 Affidavit, his 2013 Affidavit and the evidence of Mr Yussouf in his affidavit of 2013. The court has received no satisfactory explanation for this inconsistency, has dismissed any suggestion that others are to blame, and is forced to conclude that the Sheikh has given dishonest evidence in these proceedings with a view to defending the claims against him.

iv) I note that the MBI Respondents have not chosen to call anyone from Maples to give evidence, despite the issue of the date of signature on the Share Transfer Forms being at the heart of the case against them. No explanation has been proffered for this decision, and no suggestion has been made that relevant representatives of Maples would not have been available to attend trial. I infer that evidence from appropriate individuals at Maples, including Mr Perkins and Mr May, would not have been supportive of the Sheikh's evidence and, in particular, would not have established any evidence of Share Transfer Forms from July 2010 in the files of Maples. Indeed, had Maples held such instruments of transfer in their files, it is inconceivable that the February 2016 Resolution (drafted by Maples) would not have referred to that fact.

v) In all the circumstances, in my judgment, the weight of the available evidence supports the Liquidators' case that the Share Transfer Forms were signed by the Sheikh in 2016 and not 2010.

454. As for the registration of the 891K Shares, I reject the Sheikh's evidence that he regarded the registration as a pure administrative formality and that he does not recall who was tasked with giving effect to the registration, specifically that he does not recall whether it was Mr Salfiti. As I have said, I consider this to be highly unlikely. In his witness statement Mr Salfiti denies having anything to do with the registration of the 891K Shares and says that although his "stamp" appears on the share certificates he did not place his stamp on them; he suggests that someone else may have had access to his stamps. I do not need to resolve this particular factual issue and it does not form part of the Liquidators' pleaded case. There can be no doubt that the Sheikh caused the registration of the 891K Shares.

455. I am not impressed by the MBI Respondents' argument that the case, as pleaded, is focussed on 8 March 2016, albeit the resolution of JJW Inc is dated 29 February 2016 and states that Share Transfer Forms have already been received (signed but not dated). Whilst the relevant paragraph in the PoC could be read as asserting that both the Share Transfer Forms were "completed" and the registration effected on 8 March 2016, it is equally possible to read that paragraph as an assertion that the Share Transfer Forms were completed and that they were then registered (as they were) on 8 March 2016. I am not inclined to find that this allegation fails on a pleading point of this sort. It is not suggested by the MBI Respondents that they have not fully understood the nature of the allegation that is being made against them or that they are in any way prejudiced in dealing with it. The Sheikh has addressed that allegation in his evidence.

456. Pausing there, I find in all the circumstances that the Sheikh signed the Share Transfer Forms in 2016 and that he did not act honestly, or in good faith, in doing so and in causing the transfer of the 891K Shares (or purported transfer) to JJW Guernsey on 8 March 2016, pursuant to the February 2016 Resolution. Further he did not act in the best interests of the Company. I find that the Sheikh believed (as he had maintained on a number of previous occasions) that the 891K Shares were owned by the Company absolutely but that (following his unsuccessful appeal in the Termination Application) in his dealings with Ms Caulfield and Mr Krys he sought to maintain that the 891K Shares were subject to "security". He did not inform Ms Caulfield or Mr Krys of his intentions in relation to the 891K Shares or of the February 2016 Resolution until long after the event. There is no question that the Sheikh had not received authority from Ms Caulfield to transfer the 891K Shares away from the Company and no question that he would have appreciated that, had he asked for authority, it would not have been given.

457. In making these findings, I make it clear that I have no intention of going beyond the Liquidators' case as set out in paragraph 53A of the PoC. In particular, I make no findings as to the genesis of the Demand Letters and the June 2010 Letter (beyond my finding that they have not been proved), not least because it does not matter to my conclusions above whether they are genuine or not. If genuine, they do not have the effect of transferring beneficial interest in the 891K Shares, a point I shall address in a moment, and they are not significant in the context of my findings as to the date on which the Share Transfer Forms were signed. The fact that they are mentioned in the February 2016 Resolution might suggest an inference that, like the Share Transfer Forms, they have been created after the event in order to "paper" the transaction - however, I do not need to make such a finding and do not do so.

458. Pulling the threads together, where (as I have found) there is cogent evidence that the Share Transfer Forms were not signed in 2010, there can have been no transfer of the

beneficial interest in the 891K Shares to JJW Guernsey at that time. As Mr Lowe acknowledged in his report, it would only be "if it is established that the 2010 Transfer Instruments were executed on behalf of the Company on 6 July 2010" that JJW Guernsey would have an "inchoate legal title" on that date. Where I have found that the Share Transfer Forms were not signed until 2016, the Company retained both the beneficial and the legal ownership of the 891K Shares until that time (subject only to the additional arguments of the MBI Respondents as to the true interpretation of the March 2009 Transfers and the existence of some form of security, to which I shall turn in a moment). As Mr Fay said in his report, if the Sheikh signed the Share Transfer Forms on or after the date of the commencement of the Liquidation, "then the effect of section 175 [of the IA 2003] would be that he would not have authority to do so on behalf of [the Company] and the share transfer forms would be void and of no effect".

The Asset position of the Company as at the date of the Liquidation

459. Turning next to the seventh argument raised by the MBI Respondents, and assuming no valid transfer of the 891 Shares in 2010, I must now consider the asset position of the Company as at the date of Liquidation. In particular, I must address the following key issues:

i) What was the effect of the 2009 Share Transfers, and in particular, did they have the effect of transferring unconditional ownership of the 891K Shares to the Company (as alleged by the Liquidators) (*Issue 5*);

ii) At the commencement of the Liquidation on 10 October 2011, did the Company own absolutely the 1,020,873 JJW Inc Shares, or did JJW Guernsey have security over, or beneficially own, the 891K shares? (*Issue 14*).

460. A variety of arguments raised by the MBI Respondents are encompassed within these issues.

The Interpretation of the March 2009 Transfers

461. It is common ground that, although the March 2009 Transfers are governed by Guernsey law, neither party has sought to adduce evidence of Guernsey law and (notwithstanding the denial in the Defence that the March 2009 Transfers should be construed by reference to English law), I am to approach their interpretation on the assumption that Guernsey law is the same as English law.

462. Neither party referred me to any relevant authorities on interpretation. However, in my judgment, the authorities as to contractual interpretation generally are very well known and can be taken as read; in particular the trilogy of cases: (i) *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; (ii) *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and (iii) *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. Having regard to those cases, I must use all the tools of linguistic, contextual, purposive and common sense analysis at my disposal in seeking to discern the meaning of the March 2009 Transfers whilst disregarding subjective evidence of any party's intentions.

463. In closing, the MBI Respondents submitted that I must "look at the situation on the ground" at the time of the formation of the March 2009 Transfers, by which I understood them to mean that evidence as to the purpose of the transfers is relevant to the exercise of construction.

464. The background to the March 2009 Transfers, as is confirmed by the evidence of Mr Ippolito, appears to have been the intended IPO designed to fund major development and acquisition projects. The MBI Respondents rely upon Mr Ippolito's evidence to the effect that: "…it would have made sense for the transfer of the hospitality operations of [JJW Guernsey] to a British Virgin Islands holding company to have been conditional on the IPO going ahead, and for it to be unwound when the IPO did not take place, but I was not given any indication as to what had happened to those operations after the IPO was abandoned".

465. However, I do not regard this evidence as probative of anything. It is clear from his statement that Mr Ippolito has no knowledge of the circumstances surrounding the March 2009 Transfers, was not involved in their preparation and is unable to say more than that he can see that conditionality in the transfers "would have made sense". In fact there is nothing in the terms of the March 2009 Transfers which seeks to make transfer of the 891K Shares conditional upon the success of the IPO.

466. The MBI Respondents also rely upon the terms of the EY Cairo letter of 30 June 2017 which appears to confirm that payment for the 891K Shares was expected to be achieved "from the IPO result". As I shall come to in a moment, this appears to be consistent with the MBI Respondents' pleading as to the purpose of the March 2009 Transfers. I accept that the March 2009 Transfers were taking place against the background of the IPO and that payment for the transferred shares was expected to be recovered in the context of the IPO. This is consistent with Mr Ippolito's evidence to the effect that "The IPO was intended to be an offering of the minority shareholding in [JJW Inc] only, and it was envisaged that Sheikh Mohamed would retain the majority shareholding". I accept that this is both admissible and relevant factual matrix evidence in connection with the construction of the March 2009 Transfers.

467. During closing submissions, Mr Curl drew my attention to the assertions of the MBI Respondents in the Defence to the following effect:

i) "Sheikh Mohamed believed at all material times in 2009, based on advice from White & Case and Ernst and Young (EY), that the IPO would generate significant profits for the shareholders of [JJW Inc]"; and

ii) "At or around the end of 2009 Sheikh Mohamed was advised by EY that the IPO would not go ahead, and that the Company would therefore not be able to pay the Consideration. **The entire rationale and purpose of the SPAs was to enable the Company to generate returns in the BVI from the IPO and to use those returns to pay the Consideration to JJW Guernsey and JJW Austria**. Now that the IPO was not taking place, that purpose was entirely defeated" (**emphasis added**).

468. Mr Curl submits that this is pleaded factual matrix evidence to which I may have regard in the event of ambiguity in the wording of the March 2009 Transfers. In particular he points to the fact that this is the MBI Respondents' own case and that it reflects the instructions of the Sheikh (who was effectively operating "on both sides" of the transfers)

as to their underlying rationale and purpose. I agree. Indeed, this pleaded case appears to me to be consistent with the evidence to which I have already referred and which I was expressly invited to take into account by the MBI Respondents. It also reflects the evidence given by the Sheikh in his fourth statement.

469. The March 2009 Transfers are both extremely short documents. They give the impression of having been drafted with the benefit of some legal assistance, albeit that there is no evidence as to how they were prepared. In each case, they are signed on behalf of both the sellers and the Company by the Sheikh, operating under different "hats".

470. Turning to the wording of the JJW Guernsey Share Transfer, clause 2 provides as follows:

> "2. **TRANSFER OF SHARES**
>
> 2.1 The Sellers [sic] hereby irrevocably transfers its legal and beneficial interests in the Company Shares to the Buyer free from Encumbrance in consideration of €56,755,600.00 (the "Consideration") to be paid on demand by the Buyer to the Seller in such way that is mutually agreed by the Buyer and the Seller.
>
> 2.2 Upon receipt of the Consideration by the Seller, completion of the transfer of the Company Shares pursuant to this Agreement shall take place immediately, when
>
> 2.2.1 the Seller shall deliver to the Buyer a share transfer form duly executed by the Seller in respect of the Company Shares in favour of the Buyer and procure that the Company shall register such transfers and issue and deliver to the Buyer a certificate representing the Company Shares in the name of the Buyer; and
>
> 2.2.2 the Seller shall, at the request of the Buyer, do and execute or procure to be done and executed all such acts, deeds, documents and things as may be reasonably necessary to give effect to this Agreement."

471. Similar wording is found in the JJAB Share Transfer, save that the typographical error ("Sellers" rather than "Seller") in clause 2.1 is not present and the consideration is expressed to be €32,420,500.

472. The Liquidators contend that the wording of clause 2 in the March 2009 Transfers had the clear and obvious effect of transferring unconditional ownership in the 891K Shares to the Company, essentially because of (i) the unqualified reference in clause 2.1 to an irrevocable transfer of legal and beneficial ownership; (ii) the provision that consideration is to be paid "on demand"; and (iii) the fact that pursuant to clause 2.2 completion is to take place "immediately when" the steps in clauses 2.2.1 and 2.2.2 have been satisfied.

473. The MBI Respondents disagree. They argue that "a transfer would not take place until the consideration under the agreement had been paid", because the parties had agreed that there was no "completion" until that moment. They say that such a construction also accords with the fact that no specific time for payment was stipulated in the SPAs; no time was required as the property would not pass until payment was in fact made.

474. I have considered the competing arguments with care and I am bound to say that, given the potential significance of this issue to the 2016 Disposition Claim, it is somewhat regrettable that I was not addressed on the point in more detail. Until Mr Curl's oral closing submissions, neither party suggested that there might be any ambiguity in clause 2 and neither party made any submissions as to how any ambiguity might be resolved. As I have said, I was referred to no authorities on the point.

475. Nevertheless, I have arrived at the following conclusions as to the true construction of clause 2.

476. Looking first at the pure exercise of linguistic and contextual analysis in light of the authorities, it seems to me that, although not without difficulty, the wording of clause 2 is not apt to create a transfer conditional upon payment of consideration. In particular:

i) The wording of clause 2.1 is clear – it expressly provides, without qualification, that the transfer is irrevocable and that it includes both the legal and beneficial interests of the Sellers. The transfer is to be "free from Encumbrance" which suggests an intention to ensure that the Buyer in the shape of the Company has the absolute entitlement to use the shares in any way it sees fit. Absent the provisions in clause 2.2, there could really be no argument to the contrary and no ambiguity.

ii) Furthermore, as Mr Curl points out, clause 2.1 contemplates that the consideration will not be paid at the same time as the transfer, but that it will be paid "on demand" by a mechanism to be agreed by the parties. The reference to payment on demand is antithetical to the case that the transfer was conditional upon payment being made. If receipt of payment by the transferee were a condition precedent of the irrevocable legal and beneficial transfer of title to the Company, then it is difficult to see why there would need to be any reference to payment "on demand" at all.

iii) Turning to clause 2.2, how, if at all, does it affect the position? In particular, does it operate to undermine the clear meaning of clause 2.1? In my judgment, it is immediately obvious that a difficulty arises when one turns to focus on clause 2.2, by reason of the opening words: "Upon receipt of the Consideration by the Seller". It is these words which provide potential support for the MBI Respondents' construction and it is these words which they contend must govern the "completion of the transfer".

iv) However, although I consider there to be ambiguity by reason of these opening words, doing the best I can on the wording alone, I agree with the Liquidators that "receipt of the Consideration" is not in fact expressed clearly in this clause as a condition precedent of "completion". Reading the whole of clause 2.2, "completion" appears to me to be intended to take place "immediately when" the steps identified in sub-clauses 2.2.1 and 2.2.2 have been satisfied. Conditions precedent are not ordinarily accepted by the court unless they are clear – here the necessary clarity for the condition precedent proposed by the MBI Respondents does not, in my judgment, exist.

v) Furthermore, the existence of a condition precedent in the form of payment of the consideration would be inconsistent with the natural and obvious wording of clause 2.1. In my judgment, very clear words would be necessary to override the clear intention expressed in clause 2.1. The words of clause 2.2 do not achieve this.

vi) In addition, there is nothing in the wording of clause 2 to suggest that it was intended that the legal and beneficial interests should be split (as Miss Stanley's submissions appeared sometimes to suggest), such that, while the legal interest could pass, the beneficial interest would remain with the Seller (indeed the wording of clause 2.1 appears to me expressly to negative such a possibility). Thus, Miss Stanley's submission that there was "a clear reservation of beneficial interest intended under the [March 2009 Transfers] until the purchase price was paid" finds no support whatever in the terms of those documents. Further, the submission that the transfers "would be the necessary evidence required to displace the presumption [by reason of registration] that the Company beneficially owned the shares" is wholly unsupported by any evidence whatever. If the MBI Respondents wished to rely upon this as relevant factual matrix evidence it should have been pleaded and evidenced.

vii) Of course the difficulty with the Liquidators' reading of clause 2 is that it gives no rational meaning or purpose to the words "Upon receipt of the Consideration by the Seller" at the outset of clause 2.2. If the receipt of the consideration is not a condition precedent and consideration is simply payable on demand at some time in the future (as the Liquidators contend), what was the purpose of these words? They appear to add nothing. I have been unable to come up with any satisfactory answer to this question and none was suggested to me by Mr Curl. It may very well be that their presence is an incidence of poor or ill-considered drafting or that this is a somewhat unusual example of a case in which the Sheikh (who was on both sides of the transfers) was not overly concerned to focus on the issue covered by clause 2, or its clarity, when signing for each party. Whilst the court should be reluctant to treat contractual words as otiose, I consider that these are the sort of circumstances in which it might be justified in doing so.

viii) Looking at the remainder of the March 2009 Transfers, there is little in the context which assists one way or the other.

ix) Does the need (on the Liquidators' construction) effectively to put a line through the opening words of clause 2.2, militate in favour of the MBI Respondents' construction? In my judgment it does not. I have already said that these words do not clearly operate so as to create a condition precedent. Furthermore, I do not consider that either (i) the fact that no specific time was stipulated for payment; or (ii) the tense of clause 2.2, as Miss Stanley argued, points in favour of a condition precedent. In my judgment the fact that payment was "on demand" militates <u>against</u> a condition precedent. As for the tense used in clause 2.2, I fail to see that there is anything in the use of the words "shall deliver" in paragraph 2.2.1 to negate the Liquidators' contention that completion takes effect under clause 2.2. when the requirements in 2.2.1 and 2.2.2 have been met. The drafting is, admittedly, not ideal, but, standing back, I fail to see that the tenses used is of sufficient significance to affect the conclusions I have arrived at above.

477. Given the ambiguity around the opening words of clause 2.2, it is all the more important that I pay close attention to any available (and admissible) evidence as to the purpose of the March 2009 Transfers and the question of business common sense.

478. As to purpose, I agree with Mr Curl that the MBI Respondents' pleaded case (to which I have referred above) provides admissible evidence as to the accepted background to the

March 2009 Transfers, together with their purpose. The Defence pleads the purpose of the March 2009 Transfers in general terms (also supported by the evidence to which I have referred) which has not been disputed by the Liquidators. I accept the MBI Respondents' evidence as to the purpose and rationale for the IPO.

479. That evidence appears to me to be strongly supportive of the Liquidators' construction. The intention behind the transfers (as the MBI Respondents confirmed again in their written closing submissions) was that the Company would generate profits from sale of the 891K Shares in the IPO, which profits it would then use to pay the consideration for the transfers. As Mr Curl pointed out, this would not have worked if the beneficial interest in the shares had remained with JJW Guernsey and JJAB – which would themselves have been entitled to any profits made from the sale of the 891K Shares. Save for seeking to rely upon the Sheikh's evidence, the MBI Respondents do not have any real answer to this point, which appears to me also to provide strong support for the proposition that the construction for which the Liquidators contend is the most "commercial".

480. The Sheikh's evidence is that it was always his understanding that completion of the Transfers would only take place upon payment of the consideration due to the Company and that, pending such payment, JJW Guernsey would continue to have "ownership rights". Notwithstanding submissions from the MBI Respondents to the contrary, I am not permitted to have regard to the Sheikh's subjective intentions or understanding; I do not consider that the fact that he was acting on both sides of the transaction affects that position. Accordingly, I attach no weight to his evidence on this point. I also observe that his evidence is not even consistent with the Defence which pleads that the March 2009 Transfers were concluded on the "mutual assumption or agreement" that "if the IPO did not go ahead, the SPA could be terminated on the basis that the Shares continued to belong **or would then belong**" (**emphasis added**) to JJAB or JJW Guernsey.

481. Even if I am wrong in the preceding paragraph, I have looked in vain at the contemporaneous documents for anything reflecting the Sheikh's evidence as to his understanding at the time. The 18 March 2009 Minutes of JJW Guernsey at which the resolution was made to enter into the March 2009 Transfers, provide no support for the proposition that any conditionality was in contemplation. In particular, paragraph 3.2 of the minute simply records that:

> "The Chairman [the Sheikh] then informed the meeting that the Company [JJW Guernsey] wished to transfer its entire holding in [JJW Inc] (the "**Buyer**") for a consideration of €56,755,600.00 to be paid on demand by the Buyer to the Company in such way that is mutually agreed by the Buyer and the Company (the "**Transfer**")."

The minutes then set out steps sufficient to effect "completion" within the terms of clauses 2.2.1 and 2.2.2 of the JJW Guernsey Share Transfer. No similar minute is available for JJAB, but I infer that the approach to the transaction would have been identical. Whilst the December 2009 Demand letters refer to a conditional transfer (and one makes reference to the conditional transfer of the beneficial ownership) they are some 9 months after the March 2009 Transfers and, even if I had accepted them as proved, they would be inadmissible as to the true interpretation of the March 2009 Transfers. The same applies to the vague reference to shares having been "pledged" in the EY Letter of 30 June 2017.

482. Further, if the Sheikh had always understood the March 2009 Transfers to be conditional, there is no explanation for the wording of the February 2016 Resolution, which appears to be inconsistent with such an understanding, providing as it does that "beneficial ownership of the Transferring Shares transferred to [JJW Guernsey] on the Signing Date", i.e. beneficial ownership transferred from the Company to JJW Guernsey on 6 July 2010. If the Sheikh had truly believed that the March 2009 Transfers were conditional and that beneficial ownership had never been transferred, it is wholly unclear why the February 2016 Resolution was couched in these terms. Finally, I have already addressed the fact that the Sheikh's evidence on this point cannot be reconciled with the content of his 2013 Affidavit or the submissions made on his behalf to the BVI court.

483. In all the circumstances set forth above, I find that, on their true construction, the March 2009 Transfers had the effect of transferring unconditional ownership in the 891K Shares to the Company.

484. The MBI Respondents have three further strings to their bow: first they rely upon the 2009 Demand Letters and the June 2010 Letter as evidencing a new agreement to re-transfer the Shares to JJW Guernsey. In essence they say that the effect of the June 2010 Letter was to evidence an agreement that the March 2009 Transfers would no longer have any contractual effect and that there was no longer any requirement to pay consideration. I have already found that these documents have not been proved but, even assuming for these purposes that the MBI Respondents had been able to prove these documents, I would not have accepted this argument for the following reasons:

i) The Demand Letters say nothing about the re-transfer of the 891K Shares; on the contrary, they purport to demand payment pursuant to clause 2.1 of the March 2009 Transfers.

ii) Despite being referred to as "the Acknowledgement Letter" in the February 2016 Resolution, the June 2010 Letter cannot in my judgment be regarded as representing "the acceptance by the Company of offers by JJW Guernsey, leading to an agreement between the Company and JJW Guernsey that the shares would in fact be transferred in lieu of payment of the purchase price under the [March 2009 Transfers]", as alleged by the MBI Respondents. Although the June 2010 Letter is written "with reference to" the Demand Letters, it expressly rejects any entitlement to payment of the consideration for the shares. Instead, it simply informs JJW Guernsey of an intended re-transfer of the shares. It is not the acceptance of an offer made in the Demand Letters.

iii) I reject the suggestion that the reference in the Demand Letters to conditionality "should be taken to include the possibility of return of the shares rather than payment of the demand". There is nothing in the terms of the Demand Letters (or indeed in the terms of the March 2009 Transfers themselves) to support such a reading. I also reject the (entirely unsupported) suggestion that this was "clearly how the [March 2009 Transfers] were understood by JJAB and JJW Guernsey". At its highest, the June 2010 Letter expresses an intention on the part of the Company to re-transfer the 891K Shares to JJW Guernsey. The June 2010 Letter is not evidence of an agreement to re-transfer the 891K Shares, just as it is not evidence that such re-transfer in fact took place. That the Sheikh was acting on both sides of the transaction again does not assist where (on the only available

evidence in the form of the Demand Letters and the June 2010 Letter) each side appears to be adopting a different approach.

iv) Notwithstanding the fact that the Sheikh was a director of both the Company and JJW Guernsey, there is no evidence that the June 2010 Letter (which was addressed to JJW Guernsey at its registered address - at the time, Praxis), was ever sent to, or received by, JJW Guernsey's agents. Mr Deen's evidence is that the MBI Respondents' solicitors expressly asked Albecq Group (the corporate services provider to JJW Guernsey) for any information it might have about the June 2010 Letter, under cover of a letter dated 11 June 2020. No evidence was provided by way of reply to show that the June 2010 Letter had ever been received.

v) Further, as Mr Curl correctly points out, although there is a reference in the June 2010 Letter to the fact that "the Share Certificates are enclosed for you to kindly carry out the necessary reversal of ownership", there is no reference to any signed instruments of transfer (the instruments necessary to effect any transaction), let alone any suggestion that such instruments are enclosed. There is also no evidence that any signed instruments of transfer were ever sent to, or received by Maples, agents of JJW Inc.

vi) The Sheikh's evidence is that he personally executed the Share Transfer Forms on 6 July 2010 and that he "left it to others who were more accustomed to dealing the corporate administrative issues to effect the registration of JJW Guernsey as the owner of the Transferred Shares". He goes on to say that "unfortunately the correct steps were not taken at that time, and so the Transferred Shares remained legally registered in the Company's name even after the 2009 Conditional Transfer had been unwound". As I have already said, there is no evidence as to the identity of the individuals who were tasked with effecting registration and thus no evidence that anyone saw the Share Transfer Forms that the Sheikh says he signed on 6 July 2010.

vii) It is common ground that the 891K Shares were not in fact re-registered in the name of JJW Guernsey until 2016.

viii) Given the absence of any witness evidence from Praxis, Albecq Group, Maples or anyone else to the effect that the June 2010 Letter was received, or indeed that the signed Share Transfer Forms were received, but for one reason or another not acted upon, I infer that the intention expressed in the letter was never put into effect.

485. Second, the MBI Respondents contend that JJW Guernsey and JJAB would always have retained an equitable interest in the 891K Shares by virtue of a vendors' lien, such that, as Miss Stanley put it in her oral closing, those companies would retain "security by way of a lien". It is common ground that a vendor's lien, albeit arising most commonly in the sale of land, also applies to sales of personal property, including shares. BVI law in this regard appears to be on all fours with English law.

486. Miss Stanley referred me to Halsbury's Laws, Vol 68 at 860 and *Barclays Bank PLC v Estates & Commercial Ltd* [1997] 1 WLR 415 per Millett LJ at 419-420:

> "As soon as a binding contract for sale of land is entered into the vendor has a lien on the property for the purchase money and a right to remain in

> possession of the property until payment is made. The lien does not arise on completion but on exchange of contracts. It is discharged on completion to the extent that the purchase money is paid…Even if the vendor executed an outright conveyance of the legal estate in favour of the purchaser and delivers the title deeds to him, he still retains an equitable lien on the property to secure the payment of any part of the purchase money which remains unpaid. The lien is not excluded by the fact that the conveyance contains an express receipt for the purchase money".

487. Reading on from this passage, it is plain that the lien arises by operation of law and independently of the agreement between the parties. It is capable of being excluded "where its retention would be inconsistent with the provisions of the contract for sale or with the true nature of the transaction as disclosed by the documents" (page 420B-C). Later, Millett LJ went on to say that "the intention of the parties is to be objectively ascertained from the documents that have been executed and that what is required to exclude the lien is that there should be a clear and manifest inference that it was the parties' intention to exclude it" (page 421 E-F).

488. In my judgment, the terms of the March 2009 Transfers, objectively construed, plainly exclude the existence of the lien for which the MBI Respondents contend. Clause 2.1 expressly provides that the transfers will take place "free from Encumbrance". Encumbrance is a defined term which "includes any mortgage, charge, pledge, lien, hypothecation, security interest, trust arrangement, option or other third party interest whatsoever". This is extremely broad and expressly includes reference to a lien. The terms of the March 2009 Transfers give rise to a clear and manifest inference that it was the intention of the parties to extinguish any possibility of a lien. That this is so is entirely consistent with the rationale and purpose of the March 2009 Transfers to which I have already referred. The existence of the lien would have prevented a sale of the 891K Shares by the Company in the IPO and use of the proceeds of sale to pay the consideration, thereby thwarting the purpose and rationale for those transfers.

489. Third, the MBI Respondents say that JJW Guernsey was entitled to be registered as beneficial owner by reason of the delivery of the share certificates back to JJW Guernsey under cover of the June 2010 Letter; they argue that this had the effect of creating an equitable mortgage over the 891K Shares. In their Defence they assert that JJW Guernsey "…accepted the shares as security for the consideration due from the Company". I disagree. Aside from the fact that I have found that the June 2010 Letter is not proved, I consider the wording of the June 2010 Letter to be antithetical to the creation of an equitable mortgage and there is no evidence whatsoever that JJW Guernsey "accepted the shares as security".

490. In closing, Mr Curl relied upon the fact that, under BVI law, there is a writing requirement for the creation of a charge over shares, pointing to sections 66 and 161 BCA 2004. He submitted that, accordingly, it is not possible under BVI law to create an equitable security merely by the deposit of title documents. However, as Miss Stanley correctly pointed out, neither expert has given evidence specifically on this point. Indeed, Mr Fay opined in his report that the "relevant principles of BVI law on delivery are common law principles" and confirmed that there was no material difference between BVI law and English law in this respect. I accept his evidence. It would be neither fair nor just to permit the Liquidators to rely upon points of BVI law in closing never before identified by the experts or raised with the MBI Respondents.

491. In the circumstances, I approach this issue on the basis that BVI law is the same as English law.

492. Mr Curl points out that, as is clear from JJW Inc's Articles of Association, its shares are not bearer shares and delivery of possession of the certificate does not create a possessory security – a transfer of legal title is only effective when the name of the transferee is entered in the register of members. This is consistent with Mr Lowe's observation in his report, which I accept, that "[t]he possession of the registered share certificates has no legal significance under the BCA". Nevertheless, Mr Curl accepts that, under English law, it remains possible that delivery of a share certificate may give rise to security by way of an equitable charge or equitable mortgage.

493. The circumstances in which an equitable security may arise were addressed by Buckley LJ in *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584 at 594-595 in the following terms:

> "An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage. An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless **demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so**…An equitable charge which is not an equitable mortgage is said to be created **when property is expressly or constructively made liable, or specially, appropriated, to the discharge of a debt or some other obligation**, and confers on the chargee a right of realisation by judicial process, that is to say, by the appointment of a receiver or an order for sale… It is not, I think, necessary to determine in the present case in what circumstances there is a true distinction between these two types of charge or precisely where it lies" (**emphasis added**).

494. Buckley LJ went on to say that whether a particular transaction gives rise to an equitable charge or mortgage under English law "must depend upon the intention of the parties ascertained from what they have done in the then existing circumstances" (at 595F-G).

495. Turning then, to the terms of the June 2010 Letter, the words used clearly envisage that the reversal of ownership will take place only upon appropriate steps being undertaken (for which purpose the Share Certificates are provided): "…please note the Share Certificates are enclosed **for you to kindly carry out the necessary reversal of ownership**" (**emphasis added**). I do not read these words as expressing a binding intention to set aside the 891K Shares or to appropriate the 891K Shares to the discharge of the consideration and nor do I read them as providing the Share Certificates as security for the consideration due to JJW Guernsey (cf. *Harrold v Plenty* [1901] 2 Ch 314). I have already found that there is no vendor's lien to secure payment of the consideration and in my judgment, clear words would be required to create an equitable mortgage over the shares. There are no such clear words in the June 2010 Letter, which is a letter from the Company and cannot possibly evidence the acceptance by JJW Guernsey of the 891K Shares as security. I agree with Mr Curl, that, at most, the June 2010 Letter contains an offer by the Company to re-transfer the 891K Shares instead of paying the consideration outstanding. It does not manifest an intention to create security. Accordingly, contrary

to the submissions of the MBI Respondents, JJW Guernsey did not have the rights of a secured creditor to take possession of, or otherwise deal with, assets of the Company pursuant to section 175(2) IA 2003.

496. It is common ground that the March 2009 Transfers were registered in the name of the Company in accordance with clause 2.2.2. It follows from the findings I have made above that on 18 March 2009, the Company became the irrevocable and unconditional legal and beneficial owner of the entirety of the 891K Shares, subject only to payment of the consideration as an unsecured debt (*Issue 5*). The terms of the Demand Letters and the June 2010 Letter, even if proved, did not affect that position. Accordingly, and turning to *Issue 14*, at the commencement of the Liquidation, the Company owned absolutely the 891K Shares in JJW Guernsey which had been transferred by the March 2009 Transfers. JJW Guernsey had no security over the 891K Shares and retained no beneficial interest in those shares. In addition, as is now common ground, the Company also owned absolutely the 129K Shares (acquired on 8 January 2009) as at the commencement of the Liquidation.

Duties of the Sheikh and Ms Al Jaber

497. I can now deal with these briefly. I have already found that, under BVI law, a director will owe a duty of fiduciary stewardship not to deal adversely with company property after liquidation and he will have liability as a constructive trustee if he does so. In my judgment, the Sheikh owed such a duty in so far as he dealt (adversely to the Company's interests) with the 891K Shares by causing them to be transferred to JJW Guernsey in 2016, including by signing the Share Transfer Form (*Issue 15*). I consider that the purported transfer away of the Company's 891K Shares was a breach of that duty by the Sheikh (*Issues 16 and 17*). I reject the submission that the only liability on the part of the directors could be as dishonest assisters to a breach of trust by Ms Caulfield.

498. I also reject the MBI Respondents' case that the acts of the Sheikh in completing the Share Transfer Forms and causing registration of the 891K Shares on 8 March 2016 are acts of registration by JJW Inc, procured by the Sheikh acting in his capacity as director of JJW Inc. The Share Transfer Forms, signed, as I have found, in 2016, were signed by the Sheikh "For and on behalf of MBI International & Partners Inc", i.e. the Company in Liquidation. In so doing, the Sheikh was holding himself out as having the authority and power to sign on behalf of the Company, which he did not. It was this act, pursuant to which the Sheikh asserted control over the 891K Shares, which enabled the Sheikh to "ascertain" that the instruments of transfer had been signed and thus to cause registration to occur. I note also that in the February 2016 Resolution, the Sheikh discloses that he is "a director of MBI International & Partners Inc", without any indication that the Company is in fact in liquidation or that he has no power to transact any business of the Company, much less to sign instruments of transfer. In all the circumstances I consider it to be wholly artificial to take the view that the Alleged 2016 Disposition was in fact procured by the Sheikh acting purely in his capacity as director and agent of JJW Inc. Had he not "taken control" of the 891K Shares in signing the Share Transfer Forms acting or purporting to act in his capacity as director of the Company, the February 2016 Resolution would not have been possible.

499. Turning to the allegations in so far as they seek to implicate Ms Al Jaber, I accept the MBI Respondents' case that there is no evidence that Ms Al Jaber had any involvement with the Alleged 2016 Disposition. She did not take part in the February 2016 Resolution

and she does not feature in any of the chronological documents to which I have referred above. The MBI Respondents rely upon *Perry's Case* 34 L.T. (NS) 716 for the proposition that a director cannot be fixed with liability in respect of misfeasances committed by his or her co-directors of which he or she has no knowledge. I did not understand the Liquidators to challenge this statement of English law and it was not suggested to me that it would have no application under BVI law.

500. Indeed, Mr Curl candidly accepted in closing that there was no case on the evidence against Ms Al Jaber alone, although he suggested that her involvement was to be inferred. I disagree. There is no evidence from which I can properly infer her involvement and I decline to do so. The available evidence is that, as Mr Krys records in his first statement, Ms Al Jaber had minimal involvement in the running of the Company. It appears that she sometimes signed documents as requested by the Sheikh, but there is no evidence whatsoever that she was asked to sign any documents in connection with, or to become involved in any way in, the 2016 Disposition and no evidence from which I could possibly infer that she was even aware of that disposition. I note that in the witness statement prepared by her in advance of her s.236 Examination she stated that she was not privy to and had no knowledge of the circumstances which led to the liquidation of the Company "and all material facts and matters thereafter". I have seen nothing to contradict this evidence.

501. Accordingly, I reject the Liquidators' case that Ms Al Jaber acted in breach of duty/breach of trust in relation to the transfer of the 891K Shares (*Issues 16 and 17*). There is no basis on which it could be asserted that she exercised control over Company assets, or that she did so adversely to the Company's interests. The claim against Ms Al Jaber in relation to the Alleged 2016 Disposition is accordingly dismissed.

Conclusion on the Alleged 2016 Disposition

502. With the exception of Ms Al Jaber's defence, the MBI Respondents' defences on this issue fail and accordingly I find that the Alleged 2016 Disposition, by which I mean the signing by the Sheikh of Share Transfer Forms on behalf of the Company on or around 29 February 2016 and the registration of JJW Guernsey as the owner of the 891K Shares in JJW Inc on 8 March 2016 was void (*Issue 7*) pursuant to section 175(3) of the IA 2003. I understood Miss Stanley to accept in closing that if the MBI Respondents were unsuccessful in their defences to this claim, then the logical outcome was that the Alleged 2016 Disposition was void. It is common ground that this is the case whether the question is approached under section 127 Insolvency Act 1986[16] or section 175 IA 2003. I shall refer to the Alleged 2016 Disposition for the remainder of this judgment as the Void Disposition.

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[16] Where recognition is granted to a foreign office-holder under the CBIR, the English court may in principle apply section 127 IA 1986 to all dispositions of the Company's property from the commencement of the foreign insolvency, not merely from the date of recognition in England (see *In Re Atlas Bulk Shipping A/S* [2012] Bus LR 1124, per Norris J at [23]-[24] and *Moser v Olusoji* [2020] EWHC 1865 (Ch) per ICC Judge Jones at [16]-[21], applying *In Re Atlas* in the context of section 284 IA 1986, the equivalent provision to section 127 in personal insolvency).

THE 129K SHARES

503. The PoC plead "breach of trust" in relation to "any other post-liquidation purported dealing" with the JJW Inc Shares in circumstances where those shares were in the "custody or control" of the Sheikh and Ms Al Jaber "and they dealt with them adversely to the interests of the liquidation". It is now common ground that the 129K Shares have at all material times been in the "custody and control" of the Liquidators pursuant to section 175 IA 2003. However, as I understand their submissions, the Liquidators allege that in engaging in what they describe as a campaign of misinformation about the ownership of the 129K Shares, the Sheikh acted in breach of fiduciary duty/breach of trust.

504. In my judgment, this allegation immediately encounters two difficulties: the first is that it appears to have been advanced in the context of the Delivery Up Claim and the Failure to Disclose Clam, which I have already addressed. There was no free-standing duty either to "deliver up" or to disclose the registered title to the 129K Shares. Neither expert said anything to support the proposition that misinformation could be regarded as adverse dealing with property so as to give rise to a fiduciary duty and I was not shown any authority (whether BVI or English) to support such a proposition. It is not suggested that there has been any breach of a statutory duty to provide specific information, and no "requirement" was identified in the statute to that effect. This in itself would have been enough for me to dismiss this allegation. The second difficulty is that, as I understood the Liquidators' submissions in closing, they really seek to re-open the case that was pleaded by way of amendment following the provision by the Sheikh of his List of Corrections, but then rejected by the Court of Appeal in *Mitchell v Al Jaber* [2021] EWHC 912 (Ch).

505. A review of the lengthy sections of pleading that were crossed through following the Court of Appeal's decision establishes that many of the points made by the Liquidators in closing as to an alleged campaign on the part of the Sheikh as to "misinformation and misdirection", were made in those (now excised) sections (which concentrated on a plea of false misrepresentation). In particular, the Liquidators sought to persuade me (i) that the Sheikh has consistently misled them, including in the statements he made orally and in writing in the context of the s.236 Examinations and in his statements made in these proceedings – statements in respect of which the Sheikh has immunity from suit (see *Al Jaber v Mitchell p*er Asplin LJ at [103] and [111]); (ii) that the misleading information was provided as part of a "deliberate strategy" with a view to "concealing" the true position in relation to the legal title to the JJW Inc Shares (and in particular the 129K Shares) and (iii) that if the Sheikh had intended to give an accurate account he would readily have been able to obtain information from Maples. Yet these are all allegations that are crossed through in the PoC. The Liquidators' submissions on these points appear to me to go beyond anything that is currently pleaded, whilst trespassing far into the territory of the disallowed amendments. They seek to rely upon dishonesty on the part of the Sheikh which is not pleaded: there is no pleaded case that the Sheikh has deliberately concealed information as to the 129K Shares from the Liquidators, or that (with a view to keeping the Liquidators in the dark) he has deliberately refused to authorise Maples BVI to provide information to the Liquidators, as I was invited to infer. These allegations go beyond the allegation of "failure to disclose" in 82B of the PoC and I consider that permitting this cause of action to be advanced in closing would inevitably

cause prejudice to the MBI Respondents (see *Lowe v Machell Joinery* [2011] EWCA Civ 794 per Lewison J at [74]).

506. In the circumstances, I need not consider this issue further. I have already found that the Sheikh provided erroneous information to the Liquidators as to the transfer of the JJW Inc Shares to JJW UK (*Issue 20*) in the context of considering the weight to be attached to the Sheikh's evidence. However, on the case as pleaded by the Liquidators, there is no scope for this allegation of breach of trust/breach of duty in relation to the provision of misinformation. At its highest, the pleaded case involves an allegation that the Petsche Email provided misleading information which was not corrected until the provision of the List of Corrections at trial, together with an allegation of a failure to disclose the registered title to the JJW Inc Shares. I do not consider those facts to bring the Liquidators within the narrow compass of the fiduciary duty of stewardship not to deal adversely with the Company's property identified above – in particular I reject any suggestion that they are sufficient to warrant a finding of adverse dealing with the 129K Shares (as opposed to actions adverse to the interests of the liquidation, which is the way the point is pleaded in the sub-paragraphs to 82B). In any event, the 129K Shares have always remained in the legal and beneficial ownership of the Company.

507. I reject the claim of breach of trust/breach of duty in relation to the 129K Shares.

THE KNOWING RECEIPT CLAIM

508. The knowing receipt claim is consequential upon the Void Disposition and involves only JJW Guernsey, which was unrepresented at trial. The claim, as pleaded, is that JJW Guernsey received or purported to receive the 891K Shares under the Void Disposition, that the knowledge of the Sheikh in relation to the Void Disposition is to be imputed to JJW Guernsey on the basis that "the Sheikh has at all material times been the controlling mind of JJW Guernsey" and that JJW Guernsey is therefore liable to account as a constructive trustee for its knowing receipt of the 891K Shares.

509. The Defence of the MBI Respondents does not admit that the Sheikh was the "controlling mind" of every entity in the MBI Group, but it also does not plead to the allegations and claims made against JJW Guernsey. A Points of Defence which included a defence on behalf of JJW Guernsey was served in September 2019 prior to its liquidation. In the absence of representation, I had no submissions on behalf of JJW Guernsey.

510. Turning first to the question of whether the Sheikh was the controlling mind of JJW Guernsey, such that his state of mind is to be attributed to that company, I find that, in all the circumstances to which I have referred in this judgment, he was. The Sheikh accepts in his evidence that he was a director of JJW Guernsey "throughout the events and periods which are subject to consideration in these proceedings". Mr Curl relied upon the proposition that where a third party is pursuing a claim against a company arising from the misconduct of a director, employee or agent of the company (in this case the Sheikh), then the rules of agency will normally suffice to attribute to the company not only the act of the director but also his or her state of mind where relevant (see *Bilta (UK) Ltd (in Liquidation) v Nazir (No 2)* [2016] AC 1 at [204]-[205]). There is no suggestion that English law on this subject would not apply in the BVI, and indeed, during closing, Miss Stanley confirmed that she was prepared to proceed on the basis that the test of attribution of knowledge under BVI law is the same as under English law.

511. Pausing there for a moment, *Issue 10*, as identified by the parties invited the court to determine whether the Sheikh was the controlling mind of every entity in the MBI Group, including the Company and/or JJW Inc and/or JJW UK and/or JJW Guernsey and/or MBI International Holdings. I cannot see any possible need to determine whether the Sheikh was the controlling mind of every entity in the MBI Group and the Liquidators have not, in any event, identified all of the entities they are referring to. In so far as the identified issues require me to identify whether the Sheikh was the controlling mind and will of various specified companies, I propose to do so only where that question is relevant to the issue at hand, as it is to the issue of attribution of knowledge in the context of a claim in knowing receipt.

512. For a claim in knowing receipt under English law, it is necessary to establish:

> "…first, a disposal of [the claimant's] assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to the breach of fiduciary duty" per Hoffman LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 ALL ER 685, at 700f-h.

513. In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, it was held that "the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt" (per Nourse LJ at page 455). Nourse LJ pointed out at page 448 that "while a knowing recipient will often be found to have acted dishonestly, it has never been a prerequisite of the liability that he should". As Buckley LJ observed in *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 ALL ER 393 at 405:

> "…if the directors of a company in breach of fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds".

514. The Court of Appeal recently considered the authorities on knowing receipt in *Byers v Saudi National Bank* [2022] 4 WLR 22, concluding (per Newey LJ at [18]) that:

> "Liability in knowing receipt thus derives from the combination of 'the beneficial receipt…of assets which are traceable as representing assets of the plaintiff' and 'the recipient's state of knowledge' having been 'such as to make it unconscionable for him to retain the benefit of the receipt'. Neither is enough on its own. While it is essential that the defendant should have 'received the property of another', liability is not considered to be 'triggered by the mere fact of receipt'; there must also be unconscionability. On the other hand, dishonesty is not required; the fact that the defendant must have received relevant property makes a lesser test of fault appropriate".

515. Newey LJ went on at [20] to observe that "knowledge and possession must…coincide for liability to arise" although, as he made clear at [23], "[t]here is no requirement that a defendant should still have the property in question by the time a knowing receipt claim is brought". However, as he concluded having heard full argument on the point at [79],

"…a continuing proprietary interest is required for a knowing receipt claim to be possible"; in other words, the defendant must have received trust property.

516. The experts did not expressly deal with knowing receipt in their reports, but Mr Curl submitted that the law on knowing receipt in the BVI is the same as English law. Bearing in mind the evidence of the experts on other aspects of BVI law, I accept that is very likely to be the case. Accordingly, I proceed on that basis.

517. I have already found a breach of duty, as set out above. I also accept that JJW Guernsey, sharing the Sheikh's state of mind, was aware of the relevant breach of fiduciary duty by the Sheikh together with the features of the transaction which I have found made it dishonest. The components identified in *El Ajou* are all present on the facts of this case. Furthermore, the Company retained a proprietary interest in the 891K Shares at the time of their purported transfer. I reject the contention in paragraph 34 of JJW Guernsey's Defence that at all material times it believed itself to be the beneficial owner of the 891K Shares.

518. Upon receipt of the 891K Shares (legal title being conferred by registration), there was an obligation on JJW Guernsey immediately to restore them; that is the custodial duty of the constructive trustee (see *Byers* at [47]-[51]; see also *Re Ahmed*). It failed to take that step, instead transferring them to MBI International Holdings on 23 June 2017.

519. In the premises, I find that JJW Guernsey, as recipient of the 891K Shares pursuant to the Void Transaction is liable to account as a constructive trustee (*Issue 18*). I reject the submission made on behalf of the MBI Respondents in closing that the Liquidators have "adopted" the transfer to JJW Guernsey for the purposes of their knowing receipt claim such that they cannot make out what was described as their "strict liability claim" (later clarified to mean the Liquidators' substitutive performance claim) against the MBI Respondents. I accept the submissions of the Liquidators that their claim involves falsifying the Void Disposition, seeking equitable compensation from the Sheikh and Ms Al Jaber for the loss occasioned to the Company's liquidation estate by virtue of that disbursement whilst at the same time pursuing JJW Guernsey for coextensive equitable compensation for the same disposition. I do not accept that there is anything inconsistent in such approach (see *Libertarian* per Lord Millett at [168]-[169]).

THE CLAIM OF UNLAWFUL MEANS CONSPIRACY

520. The PoC identifies the conspiracy as the "failure to deliver" the JJW Inc Shares (i.e. all of the 1,020,873 JJW Inc shares) to the "Former Liquidator" (i.e. Ms Caulfield). There is no plea of specific dishonesty or fraud. It is alleged that there was a combination of the Sheikh, Ms Al Jaber, JJW Guernsey "or any one or more of them" and that JJW UK joined the conspiracy "on or after its incorporation on 17 June 2016". Ms Caulfield ceased to be the liquidator on 8 July 2019. There is no plea that the conspiracy extended to the current Liquidators.

521. Save in respect of JJW UK, the relief sought in respect of this claim is said by the Liquidators to overlap with the relief sought elsewhere in these proceedings.

The Law

522. The expert evidence indicates that the law in relation to unlawful means conspiracy is the same in the BVI as in this jurisdiction. There does not appear to be any BVI authority directly on point, but English authority on this cause of action was referred to with evident approval in a discussion of a claim for inducing a breach of contract in *Teliasonera Finland OYJ v Alfa Telecom Turkey Limited* BVIHCV2007/0109 per Joseph-Olivetti J at [50]. It is Mr Lowe's unchallenged view, which I accept, that the BVI court would follow decisions of the English court in respect of the elements of the tort.

523. The relevant English law was common ground between the parties, and was set out by the Liquidators in their skeleton argument, largely in the following terms.

524. In *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, Buckley LJ held at 404a that to obtain a remedy for unlawful means conspiracy a claimant must establish:

> "(a) a combination of the defendants, (b) to effect an unlawful purpose, (c) resulting in damage to the plaintiff (*Crofter Hand Woven Harris Tweed Co Ltd v Veitch* per Simon LC).

525. The word "conspiracy" means no more than a "combination" or "agreement" (which need not be an agreement in a contractual sense) with a common intention to do whatever it is that is the object of the alleged conspiracy (404c). Buckley LJ went on to hold, at 404h, that as long as all the facts which made the transaction were known to the parties to the combination, ignorance of the law will not excuse them. In the same case, at 406f-j, Goff LJ identified that fraud or dishonesty is not required to establish the cause of action.

526. Conduct will constitute unlawful means where it lacks "just cause or excuse" *(JSC BTA Bank v Ablyazov (No 14)* [2020] AC 727, per Lord Sumption and Lord Lloyd-Jones at [10]), however there is no consistent definition of what is meant by unlawful means: "legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule" (*Ablyazov* at [15]). It has been held that breach of fiduciary duty by a director will satisfy the requirement for unlawful means (*Keymed (Medical & Industrial Equipment) Limited v Hillman* [2019] EWHC 485 (Ch) per Marcus Smith J at [122]).

527. There must be an intention to cause harm to the claimant, but in a case of unlawful means conspiracy that need not be the predominant purpose of the combination (*Ablyazov (No 14)* at [16]). The claimant must prove the intention, but that may be done by asking the court to infer the relevant intention from the acts themselves (see *Kuwait Oil Tanker Co SAK v Al-Bader (No 3)* [2000] 2 All ER (Comm) 271, per Nourse LJ at [120]-[121]).

528. In *Kuwait,* Nourse LJ explained that it is in the nature of such arrangements that the claimant may not have much direct evidence and gave guidance on how the court should approach this:

> "A further feature of the tort of conspiracy, which is also found in criminal conspiracies, it that, as the judge pointed out…, it is not necessary to show

> that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivery by O'Connor LJ in *R v Siracusa* (1990) Cr. App. R. 340 at 349 is of assistance in this context:
>
> > Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.
>
> Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were 'in it together'. That may be a helpful question to ask, but we agree with [counsel for the defendants] that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in the pursuance of the conspiracy.
>
> In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself. Curiously this is such a case, although it appears to us that in crucial respects it is also necessary to draw inferences as to the extent of the agreement from what happened after it."

529. Thus, a tacit combination, where there is no evidence of express agreement, is sufficient to establish an unlawful means conspiracy and this may be supported by inferences drawn from "what happened after it". Not every act needs to have been done by every conspirator – the combination must be to the effect that "at least one of" the conspirators will use unlawful means (see *Lakatamia Shipping Co v Nobu Su* [2021] EWHC 1907 (Comm) per Bryan J at 83).

530. It is enough for liability to arise that a defendant "be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of" (see *Lakatamia* at [85]). A director who passively consents to wrongdoing is equally liable as a party to the combination. As Bryan J said in *Lakatamia* at [96]:

> "What is clear from the authorities is that it is necessary to look at all the particular facts of the case to establish whether there was a combination and whether someone participated, actively or passively in the conspiracy – being aware that someone was committing a potentially unlawful act, but (simply) not taking steps to stop it, may not suffice to demonstrate a combination, but it all depends on the circumstances, and in particular the position of the individual concerned."

531. A company acts through its officers and can be a party to a conspiracy (*Belmont* at 416b-c, per Waller LJ). Such a company's state of mind and level of knowledge depends on its directing mind and will, alternatively upon the mind and will of its directors as agents. See *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 695j-696b, per Nourse LJ and at 706d-h, per Hoffmann LJ.

Discussion

532. The only unlawful means pleaded by the Liquidators is the failure to deliver up the JJW Inc Shares. The PoC pleads various "overt acts" which are alleged to have been carried out "pursuant to the conspiracy":

i) the Void Disposition, which is alleged to have involved Ms Al Jaber and JJW Guernsey;

ii) the purported transfer of the 891K Shares to MBI International Holdings on 23 June 2017, said to have been caused by the Sheikh at one point in the PoC but later said to be the actions of the Sheikh and/or JJW Guernsey and/or JJW UK;

iii) the statement in the Sheikh's List of Corrections for trial, made by "the Sheikh and [JJW UK]" that on or about 27 July 2017, the assets and liabilities of JJW Inc had been transferred to JJW UK (as opposed to the shares in JJW Inc);

iv) the inference that the Sheikh, "acting on his own behalf and/or on behalf of [JJW UK] caused the assets and liabilities of JJW Inc to be transferred to JJW UK on or about 27 July 2017", as described in the List of Corrections (again, this is elsewhere said to have been the action of the Sheikh and/or JJW Guernsey and/or JJW UK).

For the purposes of (ii) and (iv), it is said that the Sheikh was acting as the controlling mind of every entity in the MBI Group including the Company and/or JJW Inc and/or JJW UK and/or JJW Guernsey and/or MBI International Holdings.

533. The PoC asserts that the overt acts were breaches of duty and/or breaches of trust that had the foreseeable result of defrauding or otherwise harming the Company "in the manner set out" in paragraph 82B. Paragraph 82B is the paragraph in the PoC which alleges the Sheikh's failure to disclose particulars of the registered title to the JJW Inc Shares, but I assume that this reference is in fact to the plea that the Void Disposition and the 2017 Transfer "had the effect of causing to be extinguished the value of the JJW Inc Shares".

534. Turning to the issues, as identified by the parties, it is difficult to see how the general plea of conspiracy "on or after 14 January 2015" (*Issue 22*) can succeed:

i) I reject the suggestion that a mere "failure to deliver" shares can amount to unlawful means. The basis for this claim appears to be premised upon the Delivery Up claim made against the Sheikh and Ms Al Jaber in paragraph 72 of the PoC, which claim suffered from the various difficulties to which I have already referred. I have rejected that claim and, in particular, I have rejected the suggestion that there was any breach of fiduciary duty on the part of the Sheikh or Ms Al Jaber in failing to deliver up the JJW Inc Shares. I have noted the varying different ways in which this claim was articulated on behalf of the Liquidators and I am bound to say that the claim in conspiracy is not improved if the alleged "failure to deliver" is primarily to be regarded as a failure to cooperate or a failure to disclose.

ii) In any event, by reason of the findings of fact that I have already made, the 891K Shares were in the "custody and control" of Ms Caulfield (and before her, Mr Kinnon) until they were transferred away on 8 March 2016. There was no obligation on the Sheikh or Ms Al Jaber to "deliver" them up.

iii) Furthermore, Mr Kinnon, Ms Caulfield (and then the current Liquidators) had "custody and control" of the 129K Shares at all times. The 129K Shares are and were registered in the Company's name. Although there is no doubt that the Sheikh provided misleading, and apparently false, information as to the 129K Shares to Ms Caulfield and subsequently to the Liquidators, that does not support the proposition that a failure "to deliver" them amounted to unlawful means.

iv) Setting aside the difficulties around the concept of "delivery" of the JJW Inc Shares, I agree with the MBI Respondents that it is impossible to see how a "failure" to deliver could, without more, amount to unlawful means (and I was shown no authorities by the Liquidators in support of such a proposition). Whilst I can see that a refusal to deliver up company property on demand might be unlawful (where lacking in just cause or excuse), a mere failure denotes no positive or conscious act. No refusal to deliver, or active infringement of property rights, is pleaded by the Liquidators as amounting to the unlawful means.

535. The plea that the Sheikh and/or Ms Al Jaber and/or JJW Guernsey caused or allowed or participated in the 2016 Void Disposition (*Issue 23*) is made out, as against the Sheikh and JJW Guernsey, for reasons I have already given. I accept that the Void Disposition was an overt act involving a breach of fiduciary duty by the Sheikh that had the foreseeable result of defrauding or otherwise harming the Company by reason of the transfer away of Company property. JJW Guernsey had an immediate obligation to "deliver" the 891K Shares by reason of its position as constructive trustee pursuant to the knowing receipt claim, such that the difficulties identified in the previous paragraph around delivery up fall away. Assuming these facts to amount to conspiracy (and I note the caution expressed by Lewin on Trusts 20th Edition at 43-070 as to the co-existence of claims of breach of trust and conspiracy), I cannot see that this adds anything to the existing claims against the Sheikh and JJW Guernsey.

536. There is no evidence whatsoever of any combination involving Ms Al Jaber and the PoC do not even allege her involvement in the transfers of 23 June 2017 and 27 July 2017. The only acts pleaded against her are her alleged involvement in the 2016 Void Disposition and her failure to deliver up the JJW Inc Shares; I have already dismissed these claims. Ms Al Jaber is not alleged to have caused or allowed any of the other "overt acts" to take place and there is no evidence whatsoever that she was involved in these

other matters. There is not even any evidence that she passively stood by and allowed the "overt acts" to happen (even if that would be sufficient). I agree with the submissions made by the MBI Respondents in closing that there is no evidence of any shared purpose between Ms Al Jaber and the other alleged conspirators – someone who is not aware of any of the acts which others are taking and who is herself taking no action cannot possibly be said to share a purpose.

537. I reject the Liquidators' case that Ms Al Jaber should not be given the benefit of the doubt in circumstances where she has not appeared at the trial. If there had been a single document implicating her in the "overt acts" alleged, then the position might be different, but absent a stroke of evidence suggesting any knowledge or involvement on her part, I do not consider that it would be fair to implicate her in any alleged breach of fiduciary duty/breach of trust or conspiracy. An allegation of conspiracy (as an allegation of serious wrongdoing) must be both properly pleaded and convincingly proved with cogent evidence (see *Lakatamia* at [42]). The Liquidators cannot begin to satisfy that requirement in relation to Ms Al Jaber.

538. As to whether JJW UK joined any conspiracy on or after 17 June 2016 (*Issue 24*): the Liquidators acknowledge that the Sheikh was not a director of JJW UK in June 2016 (and indeed he did not become a director of JJW UK until May 2021), however, they say that JJW UK was and is solely owned by MBI UK and that the Sheikh has been recorded at Companies House as a registrable person with significant control over MBI UK between its incorporation on 17 June 2016 (also the date of JJW UK's incorporation) and 29 April 2022. Furthermore, the Sheikh was a director of MBI UK between 17 June 2016 and 2 March 2017. The Liquidators contend that, in the circumstances, the Sheikh was in control of the sole shareholding of JJW UK and consequently in control of the identity of JJW UK's directors. They say that his knowledge should be attributed to JJW UK.

539. In my judgment, there is insufficient evidence for me to find that, on balance, JJW UK combined or conspired with any other entity or person, notwithstanding the assertion that the Sheikh was its controlling mind and will. Aside from the difficulties caused by the principle in *Revenue and Customs Commissioners v Holland* [2010] UKSC 51; [2010] 1 WLR 2793, there is no evidence of the Sheikh having done anything such that his acts could be attributed to JJW UK. It is said that JJW UK (together with the Sheikh and JJW Guernsey) caused or allowed or participated in the 2017 Transfer in breach of fiduciary duty and/or breach of trust, but this is not alleged to have been the unlawful means conspiracy and there is no evidence as to how JJW UK was involved, other than in accepting the transfer of assets and liabilities from JJW Inc – which could not possibly have amounted to a breach of fiduciary duty or a breach of trust.

540. There is no evidence that JJW UK had anything to do with the "failure to deliver up" the 891K Shares by JJW Guernsey and no evidence that any acts of the Sheikh as a person with significant control over MBI UK are to be attributed to JJW UK. JJW UK has not received the 891K Shares. A claim in knowing receipt originally made against JJW UK was deleted by the Liquidators.

541. Finally, on the subject of the "overt acts" in the form of the 2017 Transfer and the List of Corrections (Issue 25), there is no evidence as to the circumstances in which the purported transfer of the 891K Shares from JJW Guernsey to MBI International Holdings took place. The Liquidators invite me to infer that the transfer was done pursuant to the conspiracy and that this inference is supported by the temporal proximity of that transfer

and the asset transfer carried out a few weeks later. However, that suggestion ignores the contemporaneous evidence as to the commercial considerations which caused various inter-connected companies to re-structure their affairs at this time. The Sheikh was not a director of JJW Inc at the time of the July 2017 Resolution and there is no evidence that he was present at the Board meeting on 27 July 2017. I have already pointed out that the transfer of assets and liabilities from JJW Inc to JJW UK cannot have involved a breach of trust or fiduciary duty, and the suggestion by the Liquidators in closing that the restructuring occasioned by the July 2017 Resolution "must have involved credit and debit entries in the books of account of, at least, JJW UK, JJW Inc and MBI International Holdings", is wholly without evidential foundation.

542. The claim in conspiracy, in so far as it is said to involve Ms Al Jaber and JJW UK fails. The actions of the Sheikh and JJW Guernsey at the time of the Void Disposition amounted to a breach of duty, liability as a constructive trustee and knowing receipt on the part of JJW Guernsey - there is no need for me to determine that they also amounted to a conspiracy. However, should it be important, I find that the failure on the part of the Sheikh and JJW Guernsey to deliver the 891K Shares at the time of the Void Disposition was done with the intention of depriving the Company of those shares (*Issue 26*) and that, if the Void Disposition had not taken place, the Company would have had the 891K Shares available for realisation and distribution to its creditors (*Issue 27*). The 129K Shares were at all material times available for realisation and distribution to creditors in any event.

EQUITABLE COMPENSATION

543. The Liquidators seek equitable compensation from the Sheikh, from JJW Guernsey and from Ms Al Jaber. None of their claims against Ms Al Jaber has been successful and so I need not consider the claim for equitable compensation against her.

544. The pleaded case against the Sheikh seeks an order that he account in his capacity as fiduciary for his breach of trust, his stewardship of the Company's assets and "any and all benefits" received by him as a consequence of those breaches. Upon the outcome of an account, the Liquidators seek delivery up of the relevant assets *in specie* or such property in his hands or under his control as represents the traceable proceeds of such sums, alternatively an order for equitable compensation "based on the value of the assets at the date of the breach and interest on such basis as the court thinks fit".

545. Further or alternatively, the Liquidators plead an entitlement to equitable compensation from the Sheikh in the sum of US$ 3,646,609,000 "or such other amount as the court thinks just", together with interest. In light of my dismissal of the Liquidators claims in respect of the pre-Liquidation period, there is no possible basis for the recovery of equitable compensation of US$ 3,646,609,000.

546. The claim for equitable compensation against JJW Guernsey seeks an order for payment of US$ 134,219,910 or such other amount as the court thinks just, together with interest. The claim for damages for unlawful means conspiracy is pleaded in the same sum and it is the Liquidators case that the measure of damage should be calculated on the same basis as the equitable compensation.

547. In opening, the Liquidators submitted that this is unlikely to be a case where specific restoration of trust property is realistic and that any valuation exercise will "probably be impossible". Essentially it is the Liquidators' case that the Sheikh has refused to provide cooperation in the lead up to this trial and that there is no reason to suppose that he would change his approach if the court were to order an account. In the circumstances, the Liquidators have called no evidence as to the valuation of the JJW Inc Shares. Mr Curl invites the court to "do the best it can with the evidence it has" and to fashion the appropriate measure of equitable compensation for the various wrongs done to the company.

The Law

548. Section 175 IA 2003 does not identify the appropriate remedy for a company that has suffered a void disposition after the commencement of liquidation. The same may be said of the equivalent provision in England (section 127 Insolvency Act 1986), as Mummery LJ observed in *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, at [22], noting that "[t]he right of recovery of the company's property which has been disposed of its determined by the general law" (see also *Re Ahmed* at [29]).

549. Unfortunately, the general law in the area of equitable compensation is not entirely straightforward. I was referred to numerous authorities as to the approach the court should adopt to a case involving the misapplication of trust funds from which I extract the following broad propositions:

i) Equitable compensation is the personal remedy (as opposed to a tracing or proprietary remedy) available against trustees, or others in a fiduciary position, whose acts or omissions amount to a breach of trust or fiduciary duty (see *Auden McKenzie v Patel* [2019] EWCA Civ 2291, per David Richards LJ at [31]).

ii) In considering the remedy it is important to analyse the nature of the duty which has been breached (see *AIB v Redler* [2014] UKSC 58 per Lord Toulson at [59]), not least because the reasoning supporting the assessment of compensation reflects an analysis of "the characteristics of the particular obligation breached" (*AIB v Redler* per Lord Reed at [138]).

iii) In broad terms, breaches of duty have been analysed as falling within one of three main categories: first, transactions involving the unauthorised payment or disposal of or damage to trust assets, causing loss to the trust; second, breaches of duties of loyalty, involving trustees in making profits at the expense of the trust or by the use of information or opportunities available to the trustee in that capacity; third breaches of duties of care and skill (see *AIB v Redler* per Lord Toulson at [60] and *Auden McKenzie* at [31].

iv) In all claims for equitable compensation, the beneficiary is entitled to have the trust properly administered, so he is entitled to have made good any loss suffered by reason of a breach of duty (*AIB v Redler* per Lord Toulson at [66]).

v) A distinction emerges from the authorities between "substitutive performance claims" and "reparative claims" – the former being claims for a money payment as a substitute for performance of a trustee's obligation to produce trust assets *in specie* upon demand (see *AIB v Redler* per Lord Toulson at [53]); the latter being

claims for a money payment to make good the damage caused by a breach of trust' (see *AIB v Redler* at [54]). As David Richards LJ said in *Interactive Technology Corporation Ltd v Ferster* [2018] EWCA Civ 1594 at [16]:

> "Equitable compensation is apt to include a payment made to restore to a claimant the value of the assets or funds removed without authority by a trustee or other fiduciary, such as a director. It may also include reparation for losses suffered by the claimant…".

(See also *Libertarian* per Lord Millett NPJ at [168] and [170] and *Davies v Ford* [2021] EWHC 2550 (Ch) per David Holland KC at [106]-[107]).

vi) The purpose of a substitutive order (referred to by Lord Toulson in *AIB v Redler* as a "restitutionary order") is to "replace a loss to the trust fund which the trustee has brought about" (*AIB v Redler* at [65]).

vii) "The basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss...If specific restitution of the trust property is not possible then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed" (*Target Holdings Ltd v Redferns* [1996] 1 AC 421, per Lord Browne-Wilkinson at 434 C-D). This approach was approved in *AIB v Redler* by Lord Toulson at [67] in the following terms: "[i]f the trustee makes an unauthorised disposal of trust property, the obvious remedy is to require him to restore the assets or their monetary value. It is likely to be the only way to put the beneficiaries in the same position as if the breach had not occurred. It is the real loss which is being made good". See also per Lord Reed at [134].

viii) Where a substitutive order is being considered, "the common law rules of remoteness of damage and causation do not apply" (*Target Holdings* at 343F; *Libertarian* per Ribeiro PJ at [90]). Foreseeability of loss will generally be irrelevant "but the loss must be caused by the breach of trust, in the sense that it must flow directly from it" (*AIB v Redler* per Lord Reed at [135]). Thus, although in a general sense common law damages and equitable compensation share the same aim of compensating for loss caused by the relevant tortious conduct, breach of contract or breach of fiduciary duty, the liability of the defendant is not generally the same (see *Auden McKenzie* at [48]).

ix) The amount of the award is measured by the objective value of the property lost normally determined at the date when the account is taken (i.e. the date of trial) and using "the benefit of hindsight" and "common sense" (*Libertarian* per Lord Millett NPJ at [168], *Target Holdings* at 439 and *AIB v Redler* per Lord Reed at [135]).

x) Although Lord Browne-Wilkinson observed in *Target Holdings* that "there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the breach" and that "the basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach", these observations were not directed at the effect that hypothetical intervening events might have had on the

claimant's "loss" (see *Auden McKenzie* at [50]-[51]). Instead, their meaning was explained by Lord Browne-Wilkinson's observation at 437 that "The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the estate back into the position it would have been in had there been no breach".

xi) Where the claimant provides evidence of loss flowing from the relevant breach of duty, the onus lies on a defaulting fiduciary to disprove the apparent causal connection between the breach of duty and the loss (or particular aspects of the loss) apparently flowing therefrom (see *Libertarian* per Ribeiro PJ at [93]).

xii) By contrast with the approach taken to a substitutive claim, where a reparative claim is made, the amount recoverable is measured by reference to the actual loss sustained by the beneficiary and "in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss" (*Libertarian* per Lord Millett NPJ at [170]). This form of equitable compensation is therefore different in kind from equitable compensation arising in connection with a substitutive claim where the primary concern is to make good a deficit in the fund (*Lewin on Trusts* 20th Edition at 41-06). In a reparative claim, the court may consider counterfactual evidence (see for example *Gwembe Valley Development Co v Koshy* [2003] EWCA Civ 1048 per Mummery LJ at [147] and *Daniel v Tee* [2016] EWHC 1538 (Ch) per Richard Spearman KC at [189]-[190]).

550. Observations made by the court in both *Target Holdings* and *AIB v Redler* were relied upon by the MBI Respondents in this case in support of the proposition that all equitable compensation is reparative in nature and that the court may accordingly have regard to counterfactual evidence of what would have happened in the event that the Void Disposition had not taken place.

551. *Target Holdings* and *AIB v Redler* were both cases involving funds being paid to, and being held by, solicitors on a temporary basis for the purpose only of giving effect to agreements for secured loans. As David Richards LJ pointed out in *Auden McKenzie* at [39], in both cases, the obligations of the solicitors were defined by their instructions, which were to release the funds to the borrowers once the required security had been granted. The solicitors in both cases released the funds without the grant of security – in *Target Holdings* the security was granted one month later, in *AIB* it was never granted.

552. In *Auden McKenzie,* in the context of considering a decision on a summary judgment application as to whether equitable compensation in a substitutive scenario could be reduced or eliminated by reference to a hypothetical counterfactual, David Richards LJ identified (at [38]) what he described as the "qualifications" that *Target Holdings* and *AIB v Redler* introduced "to the previously strict application of the obligation of a trustee to restore to the trust fund the value of any assets transferred, or the amount of any payments made, without authority", observing that it was necessary to be clear as to those qualifications. He went on to consider key extracts from the speeches of Lord Browne-Wilkinson in *Target Holdings* and Lords Toulson and Reed in *AIB v Redler,* making, in particular, the following observations:

i) (at [44]), that there is nothing in Lord Browne-Wilkinson's speech in *Target Holdings* to suggest that in ascertaining the loss suffered where a claim is made to make good loss by way of equitable compensation (i.e. a substitutive claim),

"account was to be taken of hypothetical events, as opposed to actual events which go to establish the quantum of the loss to the trust or its beneficiaries". It was the fact that Target:

> "had actually obtained [the] security which was taken into account in concluding that no loss flowed from the breach of trust in the premature release of the loan monies. This was the context of the question posed by Lord Browne-Wilkinson at the start of his speech: 'Is the trustee liable to compensate the beneficiary not only for losses caused by the breach but also for losses which the beneficiary would, in any event, have suffered even if there had been no breach?'. As Lord Toulson said in AIB at [67], 'the finance company was seeking to be put in a better position on the facts…than if the solicitors had done as they ought to have done'".

ii) (at [45]-[48]), the impact of hypothetical events did arise in *AIB v Redler* (there was always a risk of the borrower defaulting but the absence of a legal charge increased the Bank's exposure). In that case, the court rejected the claim for compensation equal to the loan monies released by the solicitors and awarded compensation by reference to the value of the legal charge for which the Bank had bargained but never received. Lord Toulson said at [62]:

> "…it would not in my opinion be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties".

Accordingly, in the context of the trust established to give effect to the particular transaction, the trustee's obligation to "make good" the unauthorised application of the trust funds was "limited by the loss which the beneficiary would have suffered if the trustee had fully performed its duties". David Richards LJ described this as the *ratio* of Lord Toulson's judgment, noting also that Lord Reed's conclusion was the same.

553. Against that background, David Richards LJ observed at [49] that "*Target Holdings* and *AIB* establish that equitable compensation in respect of unauthorised payments is not *invariably* for the sum equal to the payments", explaining, however, that those cases:

> "are restricted to circumstances where the beneficiary obtained the full benefit for which it bargained or where, if the trustee had fully performed its obligations, the loss would have been less than the amount of the unauthorised payment made by the trustee. In each case, the reduced figure is the loss that flowed directly from the breach of trust".

554. He noted that there was "no analogy" with the facts of the case before him and pointed out at [58] that "[w]here a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments". However, in circumstances where he was dealing with a summary judgment application he was not prepared to say that the argument before him based on the counterfactual was unsustainable. He noted (at [60]) that both *Target Holdings* and *AIB v Redler*:

> "demonstrate a willingness on the part of the courts to develop equitable remedies for breach of trust and breach of fiduciary duty and, where required to do what is practically just, to entertain some departure from the strict obligation of trustees and fiduciaries to restore the fund under their control…".

555. In my judgment, I must accordingly determine in this case whether, on the facts, it would be appropriate for the court to permit a departure from that "*strict obligation*". However, before going any further, I make two additional points:

i) First, it appeared to be common ground that the authorities to which I have referred above would be applied in the BVI. I was referred to a decision of Wallbank J sitting in Antigua and Bermuda in the Eastern Caribbean Supreme Court (the court of which the BVI court is a member) in *Stanford International Bank Ltd (in liquidation) v Vingerhoedt* ANUHCV2012/0319 in the cases of *Libertarian*, *Target Holdings* and *AIB v Redler* were identified (at [10]) as setting out "[t]he principles on which compensation for breach of trust is awarded".

ii) Second, I accept the MBI Respondents' submissions that a finding of dishonesty does not affect the approach to be taken to equitable compensation (see *Lewin* at 41-014).

Discussion

556. Having regard to the authorities to which I have referred above, the Liquidators make a substitutive claim in respect of the Void Disposition of the 891K Shares. Notwithstanding their pleaded case, they invite the court to make an immediate award of equitable compensation drawing my attention to *Libertarian* at [172] where Lord Millett NPJ observed that a claimant "may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word".

557. As to the value of the JJW Inc Shares, the Liquidators identify three pieces of evidence on which they rely as disclosing the value of those shares at different times:

i) The Statement of Affairs signed by the Sheikh on 31 December 2014, identifying the 11% shareholding in JJW Inc as worth US$ 134,219,910 (a proportionate per share value of US$ 131.47 (i.e. US$ 134,219,910 divided by the total number of JJW Inc shares held by the Company, namely, 1,020,873). This produces a value for the 891K Shares of US$ 117,244,821.45.

ii) The 2016 JJW Inc Accounts (disclosed by the MBI Respondents) show "Total owner's equity" of €681,876,000 (a proportionate per share value of €75.27 (i.e. €681,876,000 divided by the total number of shares in JJW Inc 9,058,993). This produces a value of €67,123,403.36 for the 891K Shares on 31 December 2016. The Liquidators point out that this date is only a few months after the Void Disposition (i.e. the shares retained their value following their misappropriation) and a few months before the restructuring in 2017 pursuant to which the assets and liabilities of JJW Inc were transferred to JJW UK. I did not understand the MBI Respondents to quibble over the calculation used by the Liquidators to obtain the value per share pursuant to these Accounts.

iii) The 27 July 2017 Resolution pursuant to which all of JJW Inc's assets were transferred to JJW UK such that, as at the time of transfer, the JJW Inc Shares must have been worthless.

558. The Liquidators submit that, although the valuation of the JJW Inc Shares in the Statement of Affairs is not accepted by the MBI Respondents (and indeed does appear to have based on an error, as I have identified in dealing with the chronological background to this claim), the valuations in 2016 and 2017 identified above are taken from their own evidence and so cannot be challenged by them. In circumstances where they consider there to be no real prospect of obtaining any further relevant valuation evidence, the Liquidators are content to accept this evidence and invite the court to do the same. They say that it establishes that restitution of the 891K Shares (or their worth) at the date of judgment will not satisfy the Company's loss because the value of the 891K Shares has been wholly dissipated. By contrast, they submit that it is clear that shares in JJW Inc had significant value both at the commencement of the Liquidation and on 31 December 2016 and they invite the court to order equitable compensation of US$ 117,244,821.45, alternatively, as a minimum, €67,123,403.36.

559. The MBI Respondents contend that the correct approach to equitable compensation is reparative and that the compensatory focus requires an analysis of what loss has actually been caused, as otherwise the Liquidators will obtain a windfall which "will not correspond to any profit made by the trustee, nor any loss suffered by the beneficiary" such that it would be "penal" (see *AIB* per Lord Toulson at [64]). Accordingly, they invite the court to consider causation by reference to various counterfactuals and an alleged intervening act:

i) First, they argue that JJW Guernsey was at all times legally entitled to call to be registered as a shareholder by reason of its pre-existing beneficial interest, or as equitable mortgagee or under a lien, and that had it taken those steps itself they would not have been void. This counterfactual argument cannot survive the findings I have made as to the Void Disposition and I need consider it no further.

ii) Second, they contend that Mr Kinnon and Ms Caulfield never made any decision to realise the JJW Inc Shares and that there is no evidence that they tried, or wanted, to do so – the implication being that they would never have done so. They invite me to draw inferences from the absence of Ms Caulfield and Mr Kinnon as witnesses for the Liquidators.

iii) Third, in the Defence, they plead that the Liquidators never had a genuine interest in investigating legal title to the JJW Inc Shares and that "[t]heir objective has at all material times been to obtain evidence against Sheikh Mohamed in order to make a monetary claim against him and any solvent entities with which he has any connection". I reject this allegation, which does not appear to me to be borne out by the evidence.

iv) Fourth, they contend that the Liquidator's loss was caused by Ms Caulfield's own failure to "take control" of the JJW Inc Shares, a failure which breaks the chain of causation. In her oral closing submissions (but not in her written closing) Miss Stanley placed considerable emphasis on the analysis of Gloster LJ in *Re Ahmed* in this context.

560. Turning first to the approach to be taken to the award of equitable compensation, I agree with the Liquidators that the award in the circumstances of this case, which plainly involves the unauthorised misappropriation of assets, must be substitutive.

561. The core message of the judgments in *AIB v Redler* was that a trustee is required to restore the trust fund to the position it would have been in "if the trustee had performed his obligations". In this case, as I have found, the only relevant obligation on the Sheikh was his fiduciary obligation of stewardship not to deal adversely with Company property. Had he not engaged in the Void Disposition, the Liquidators would, at all material times, have retained the JJW Inc Shares effectively in their possession – the 891K Shares would not have been registered in the name of JJW Guernsey.

562. I reject the contention that *Target Holdings* and *AIB v Redler* require the counterfactuals advanced on behalf of the MBI Respondents premised upon hypothetical intervening events to be taken into account. Adopting the words of the Deputy Judge in *Davies v Ford*, where the aim of the equitable compensation is to restore to the trust that which has wrongfully been paid away "it is not open to the trustee or fiduciary who has been in breach to argue the counterfactual, that is that the trust property would have been lost or paid away even if he or she had not been in breach" ([106]). By analogy, in this case it is not open to the MBI Respondents to argue that the JJW Inc Shares would never have been realised.

563. The facts of this case are worlds away from the facts in *AIB v Redler* and *Target Holdings* and (even having regard to the flexibility of equity) I can see no justification for a departure from the strict obligation of trustees and fiduciaries to restore the fund under their control, always assuming that the breach (i.e. the acts giving effect to the Void Disposition) can be seen with hindsight and common sense to have caused the loss. In my view it can. The loss to the Company is the value of the 891K Shares that were (purportedly) transferred away to JJW Guernsey and subsequently dissipated. If an account in common form were ordered to be taken, the payment away of the 891K Shares would be disallowed (or falsified) as a legitimate transaction and the Sheikh and JJW Guernsey would be ordered to make good the loss. That cannot be done in this case by return of the 891K Shares. Further, I reject the suggestion, on the facts, that counterfactual arguments about whether or not the JJW Inc Shares would ever have been sold, and if so, at what value, are relevant to the ascertainment of that loss.

564. In *Re Ahmed*, a case involving the transfer away of title to shares in a bankrupt's estate, the Court of Appeal held that *Target Holdings* and *AIB v Redler* required the wrongdoers to make good the loss in fact suffered and caused by the breach of trust. Gloster LJ referred to this as the "causation loss" point, and she identified that the question for the court was what loss had actually been caused to the estate as a result of the breach of trust. She determined that, contrary to the decision of the Judge below, the breach of trust had occurred upon the failure on the part of the first appellant to restore the shares upon the appointment of the trustee in bankruptcy. However, she went on to point out that, consistent with *Target Holdings*, the date of the breach is not necessarily the date of the loss and she noted that on the date of the bankruptcy order, the trustee in bankruptcy had not yet been appointed.

565. Accordingly, she said at [56], "he could not realise the value in the shares and loss could not have flown from this point" and she went on to accept at [57]-[58] that "the loss occurred, or flowed from, the date at which the trustee in bankruptcy would have actually

sold the shares", noting that, given *Target Holdings*, "the court cannot ignore the reality of what would have actually happened in the particular circumstances of this case". Evidence had been given at the trial which indicated that the initial trustee in bankruptcy had not evinced any intention of realising the shares and that he would not have got round to selling the shares during his time in that role. Accordingly, on the available evidence, Gloster LJ held that a sale of the shares (if they had been returned) would have taken place within 3-6 months of new trustees in bankruptcy being appointed and she took as a valuation date for the loss a date which fell within that window.

566. *Re Ahmed* does not appear to have been cited to the court in *Auden McKenzie* and so was not considered by David Richards LJ in the context of his analysis of the law on substitutive claims, which appears to me substantially to cut across that of Gloster LJ in *Re Ahmed*. Although David Richards LJ made no final determination on the facts before him, he did make clear the extent to which he considered *Target Holdings* and *AIB v Redler* needed to be qualified with reference to their specific facts, together with the limited reach of the speeches in those cases in respect of causation: "They are not directed at the effect that hypothetical intervening events might have had on the claimant's loss" ([51]). I respectfully agree. The court in *Re Ahmed* does not appear to have been addressed on this point during argument.

567. Even if I am wrong and *Re Ahmed* is to be seen as establishing a different rule in the case of share transfers in a bankruptcy/insolvency situation, *Re Ahmed* was of course decided on its own facts – in other words on the basis of the findings of fact made by the Judge as to what would have happened in the circumstances of that case. In so far as the MBI Respondents seek to advance a case based on the counterfactual and/or an intervening act breaking the chain of causation, the onus lies on them to satisfy the court on balance that their case is correct. Having considered the evidence with care, I am not so satisfied. The Liquidators and their predecessors were under a duty to realise the JJW Inc Shares (see section 185(1)(a) IA 2003) and there is no proper evidential basis to conclude that they would not have discharged that duty if it had been open to them to do so.

568. In particular, on the evidence available at trial, I find that:

i) Mr Kinnon, Ms Caulfield and the Liquidators all came to this Liquidation as strangers to the affairs of the Company, but were faced with a campaign of stonewalling and misinformation from the Sheikh.

ii) The chronological evidence to which I have referred in detail shows both Mr Kinnon and Ms Caulfield regularly seeking information from the Sheikh, various of the companies within his business and agents of those companies about the assets and liabilities of the Company, including the JJW Inc Shares. These requests for information were, for the most part, met with no, or unhelpful, responses, particularly in the period following the failure of the appeal in the Termination Application.

iii) The evidence also shows that the Liquidation suffered from funding issues. I accept Mr Krys' evidence (which struck me as entirely plausible) that when dealing with offshore liquidations where there is inadequate funding, liquidators can only do what is "reasonable and practical in the circumstances". I note that there is evidence in a letter from Ms Caulfield to the Sheikh of 16 September 2015 to the effect that, absent payment from the Sheikh to settle the existing funding issues

(which the Sheikh did nothing to alleviate), she intended to take "immediate steps to realise the Company's investments".

iv) Mr Krys' evidence based on his extensive experience that the pursuit of information under the BVI statutory regime by way of applications to the court are rarely of any real assistance and do not satisfy a cost/benefit analysis, is likely to be correct. I also accept Mr Krys' evidence that the Liquidators (including Ms Caulfield) considered seeking a disclosure order in the BVI but, bearing in mind that there was no money in the estate and having regard to the advice of their lawyers, the view was taken that the best available option was to seek recognition in the English court. Mr Krys was pressed hard on this point in cross examination, in particular on the issue of why no application had been made against Maples, to which he responded:

> "…the directors are always the parties who are best to have the information. The information that Maples would provide, in our view, was limited, and…most of the law firms and parties will…protest and object, so its not a cheap and easy exercise, and it may not have got us much useful information. The Sheikh, in our view, was the best placed person, or some of the staff that he had working with him, which is why we did Mr Yussouf and Mr Salfiti as well, were the best placed to be able to give us information regarding the company."

I accept this evidence, which struck me as both rational and pragmatic. It was not put to Mr Krys in cross examination that his decision-making was perverse or irrational.

v) In all the circumstances, Ms Caulfield (who was being supervised by Mr Krys, and who plainly took part in the decision-making process that Mr Krys described in his evidence) took appropriate and reasonable steps to try to discover the asset position of the Company.

vi) Any difficulties that Ms Caulfield encountered in this endeavour were the consequence of the Sheikh's campaign of misinformation and stonewalling. I note in particular that from about February 2015 and contrary to his position prior to that date, the Sheikh and his representatives began to suggest to Ms Caulfield that the JJW Inc shares were subject to "security", a claim that (i) was never backed up by the production of any evidence until long after the Void Disposition; and (ii) I have now dismissed.

vii) In light of the contemporaneous chronological evidence, I accept the evidence given to the court by Ms Caulfield in her affidavit of 20 September 2016:

> "The Sheikh has provided scant information regarding the assets and liabilities of the Company.
>
> The Liquidator has issued countless letters and emails to the Sheikh with no response. Examination of the Sheikh in the BVI is not practical as he is not a resident of the BVI it is unlikely he would attend any examination in the BVI. No further investigation is possible without additional information".

569. In all the circumstances, I decline to draw the inference that I was invited to draw by the MBI Respondents in relation to the absence of Ms Caulfield, namely that she would have been unable to say (truthfully) that she had in fact tried or wanted to realise the JJW Inc Shares. Whilst it may well be the case, on the available evidence, that Mr Kinnon would have regarded realisation of the JJW Inc shares to be premature, not least because he was involved in the Sheikh's application to terminate the Liquidation, I do not consider that the contemporaneous evidence supports the inference I am invited to draw in relation to Ms Caulfield. It seems to me on the evidence that she was doing what she could to progress the Liquidation in the face of stonewalling from the Sheikh, that the steps she took to progress the Liquidation were reasonable and, in so far as it is necessary for me to do so, I find that had she been provided with accurate information she would have taken appropriate steps "to take control" of the 891K Shares and to realise them for the benefit of the creditors.

570. Turning then to the question of an account, I agree with the Liquidators that an order for an account is most unlikely to shed further light on the matter, essentially because (i) it is now clear that the 891K Shares were purportedly transferred away in March 2016 and that, since that time, JJW Inc's assets and liabilities have been transferred to JJW UK; (ii) at all material times, the Sheikh has chosen not to co-operate with the Liquidators, providing misinformation about title to the JJW Inc Shares and providing relevant information (if at all) only at the last possible minute. Thus:

i) It took several years for the Sheikh to provide a Statement of Affairs, which on his current case he says was, in any event, misleading and erroneous.

ii) The Sheikh consistently misled the Liquidators as to the title to the JJW Inc Shares, including the 129K Shares. He did this in the Petsche Email, in the oral evidence he gave at his s.236 Examinations on 26 April and 1 November 2018 and in his first, third and fourth witness statements.

iii) I have found that the Sheikh lied about the Void Disposition and gave false evidence about the date on which the Share Transfer Forms were signed. This can only have been with the intention of avoiding the outcome he now faces in these proceedings.

iv) It became clear at the trial, that the Sheikh and his employees, including Mr Deen, had ready access to documents relating to the Sheikh's group of companies which the Liquidators had been seeking for many years, including the JJW Inc Register. This was obtained from Maples without difficulty at the outset of the trial (as was confirmed by Mr Deen when giving evidence and was also confirmed by the Sheikh in his fifth statement). As Mr Deen appeared to confirm in his evidence, the Baker & McKenzie letter to Maples of June 2020 was written on the pretext that the MBI Respondents did not have access to that share register, when in fact, that was not the case. I find that the Sheikh could have provided this information within a very short period of time but that he chose not to do so in advance of the trial.

571. The ultimate discretion as to whether to order an account lies with the court. Unsurprisingly, Mr Curl made clear in closing that if the court was concerned as to a lack of evidence in support of the Liquidators' substitutive claim, then the Liquidators would rather have an order for an account than a decision dismissing the claim. However, his

primary position remained that an account would be "a waste of time" because "the Sheikh is just going to stonewall us again".

572. As I have said, I agree with that and where the MBI Respondents have themselves provided evidence as to the value of the 891K Shares between the date of the Void Disposition and the July 2017 Resolution (i.e. as at 31 December 2016), I accept that evidence as representing the best available evidence of the value of the loss to the Company. Unlike the Statement of Affairs (which was signed by the Sheikh who is self-evidently not an expert valuer), the JJW Inc Accounts were prepared by Ernst & Young and it is to be inferred that they represent an accurate snapshot of the financial position of JJW Inc as at 31 December 2016. In all the circumstances of this case I consider this evidence to be sufficient to satisfy the burden that rests with the Liquidators to establish their loss.

573. Importantly, although the MBI Respondents apparently do not accept that the JJW Inc Accounts represent the realizable value of the 891K Shares, they have produced no evidence to suggest that the 2016 JJW Inc Accounts are inaccurate, or to shed doubt over the value they ascribe to the JJW Inc Shares as at 31 December 2016. On the contrary, they have sought to rely upon the 2016 JJW Inc Accounts. They have also adduced no evidence in support of the proposition that there would have been no market for the 891K Shares (or that they would have had no value, or a reduced value) had the Liquidators sought to realise them at or around that date or that the directors of JJW Inc would have refused or delayed the registration of the transfer pursuant to the terms of the Articles of JJW Inc (a point raised in argument but not anywhere pleaded). If the MBI Respondents wished to seek to make out these defensive points at trial, the onus was on them to produce the necessary evidence. They have not done so.

574. I bear in mind that the July 2017 Transfer appears (on the MBI Respondents' own evidence) to have had the effect of denuding the 891K Shares of all value and I note that the MBI Respondents have not sought to adduce any evidence to contradict that state of affairs, whether as at the date of the transfer or the date of judgment (which for these purposes is the relevant date).

575. Importantly, I did not understand the MBI Respondents to suggest that the court should order an account, or that there was any additional evidence that they would wish to rely upon if the court were to make such an order.

576. Assessing the available evidence as at the date of this judgment and having regard to hindsight and the application of common sense, I consider that making an award of €67,123,403.36 (or the equivalent in pounds sterling) would provide appropriate equitable compensation for the misappropriation of the 891K Shares. Accordingly, I make that award against both the Sheikh and JJW Guernsey (*Issue 28*).

577. In light of my findings, it is not strictly necessary to deal with the value of the claim for damages in conspiracy. However, where I have dismissed the MBI Respondents' arguments based on causation, I see no reason why the damages to be awarded against the Sheikh and JJW Guernsey for conspiracy would be any different from the equitable compensation that I have awarded (*Issue 29*). Whilst the MBI Respondents correctly made the point that the PoC sought damages in respect of the conspiracy "equating to the value of the Company's Holding BVI Shares as at the date of the Statement of Affairs, i.e. US$ 134,219,910", it has been clear throughout the trial that the damages sought for

conspiracy by the Liquidators are the same as the value of the equitable compensation (the Liquidators' primary case being that equitable compensation of US$ 134,219,910 was appropriate).

DEFENCES AND COUNTERCLAIMS

Reflective Loss

578. In the Defence, the MBI Respondents pleaded that "[i]f, which is denied, the Liquidators seek to claim any diminution in the value of the [JJW Inc Shares], or other amount which reflects the same or similar loss to that of [JJW Inc], the same is barred by the rule against reflective loss". I do not consider that the claims on which the Liquidators have succeeded give rise to this problem – they are not concerned with the diminution in value of JJW Inc's shares (there is no allegation that the Sheikh sought to asset strip JJW Inc), but with a separate and distinct loss suffered by the Company caused by reason of the misappropriation of the 891K Shares. There is no basis on which such a claim can possibly be said to be reflective of loss suffered by JJW Inc and indeed it is not suggested that JJW Inc has suffered any actionable loss. Accordingly, I need not consider the issue of reflective loss any further (*Issue 31*).

Contributory Negligence

579. Furthermore, I do not consider there to be any need for me to consider the issue of contributory negligence. It is accepted by the MBI Respondents that their plea of contributory negligence can apply only to the extent that the Liquidators' claim is made in negligence. I have dismissed the possibility of statutory directors' duties continuing after Liquidation (which include a duty to act with care, diligence and skill) and, in the premises, there can be no claim in negligence against the Sheikh and thus no claim in contributory negligence against the Liquidators (*Issue 30*).

Limitation

580. Given that I have dismissed the Alleged 2009 Disposition Claim, the Delivery Up Claim and the Failure to Disclose Claim, there is also no need for me to consider the MBI Respondents' limitation defence, which does not bite in respect of the Void Disposition, the claim in knowing receipt or the claim in conspiracy (*Issue 32*).

Indemnity

581. The question of the entitlement to an indemnity from the Company (a defence raised by the MBI Respondents in light of the terms of Article 19 of the Company's Articles of Association) can be dealt with swiftly given the findings I have already made.

582. Article 19 of the Company's Articles provides that section 57 of the IBCA 1984 applies in its entirety such that "the Company shall indemnify every person referred to in section 57(1)…against any and all expenses and liabilities incurred by them in the circumstances referred to in that section".

583. Section 57(1) IBCA 1984 provides that "subject to…any limitations in its memorandum or articles" a company may indemnify directors and other defined parties "against all expenses, including legal fees, and against all judgments, fines, and amounts paid in

settlement and reasonably incurred in connection with legal, administrative or investigative proceedings…". However, section 57(2) provides that 57(1) will only apply "if the person acted honestly and in good faith with a view to the best interests of the company".

584. Section 57 IBCA 1984 is the predecessor to section 132 BCA 2004. Sections 132(1) and 132(2) are in very similar terms to 157(1) and 157(2). Mr Lowe states that he is unaware of BVI case law on section 57 of the IBCA 1984 or section 132 of the BCA 2004. Mr Fay points out in the Joint Report that section 57 IBCA 1984 was repealed in 2007 and that he is unaware of any BVI case law relating to reliance (post repeal) on an indemnity arising and/or governed by the IBCA 1984. He observes that the question of whether a person can still rely on an indemnity granted pursuant to section 57 IBCA 1984, and whether such reliance is now governed by section 132 of the BCA 2004 has not, to the best of his knowledge, been determined, but is a matter of statutory interpretation in respect of which the relevant principles under BVI law are the same as under English law.

585. Fortunately, I need not delve further into this topic. In light of my findings as to the Sheikh's conduct in connection with the Void Disposition, there can be no doubt that he falls outside the scope of the indemnity provision in Article 19, whatever the statutory position and whatever the position as to the incorporation of the indemnity into the Sheikh's contract with the Company (cf. *Globalink Telecommunications Ltd v Wilmbury Ltd* [2003] 1 BCLC 145 at [30]-[31] per Stanley Burnton J). The Sheikh did not act honestly, in good faith or in what he believed to be the best interests of the Company. There is no circuity of action and this Counterclaim must fail (*Issue 33*). For obvious reasons, I need not consider its application to Ms Al Jaber.

Ex Parte James

586. Finally, in their Defence, the MBI Respondents assert by way of counterclaim that if they are found liable to the Company, they are entitled to be given credit for (and any liability should be reduced by) the sums of €56,755,600 and €32,420,500 (i.e. a total of €89,176,100) "which became due and payable by the Company to JJW Guernsey and JJA Austria (respectively) following the Demand Letters and which remain outstanding". By reference to the rule in *ex parte James*, the MBI Respondents say that it would be "unfair (alternatively unconscionable) for the Liquidators to seek to take advantage of the instruments pursuant to which the Company acquired the Shares, without giving credit for the sums the Company should have paid to acquire them" (*Issue 34*).

587. The rule was explained by Lord Neuberger in *In re Nortel GmbH (in administration)* [2014] AC 209 at [122] in the following terms:

> "As to the common law, there are a number of cases, starting with *Ex p James; In re Condon* (1874) LR 9 Ch App 609, in which a principle has been developed and applied to the effect that 'where it would be unfair' for a trustee in bankruptcy 'to take full advantage of his legal rights as such, the court will order him not to do so', to quote Walton J in *In re Clark (a bankrupt), Ex p The Trustee v Texaco Ltd* [1975] 1 WLR 559, 563. The same point was made by Slade LJ in *In re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, 287, quoting Salter J in *In re Wigzell, Ex p Hart* [1921] 2KB 835, 845: 'where a bankrupt's estate is being administered . . . under the

> supervision of a court, that court has a discretionary jurisdiction to disregard legal right', which 'should be exercised wherever the enforcement of legal right would . . . be contrary to natural justice'. The principle obviously applies to administrators and liquidators: see *In re Lune Metal Products Ltd* [2007] Bus LR 589, para 34".

588. The rule is accordingly firmly rooted in fairness (see also *McPherson and Keay: The Law of Company Liquidation,* fifth edition at 9-087 and 9-088).

589. In short, the MBI Respondents submit that it would not be fair for the Company to receive compensation or damages for the JJW Inc Shares without paying for those shares. Payment has never been made pursuant to the March 2009 Transfers and the claim seeks to hold the MBI Respondents guilty for the Company's failure to pay. Accordingly, the MBI Respondents say that it is not fair for the Liquidators to insist on the Company's full legal rights to pursue them for the entirety of the sum said to be due as that would provide the Company with a substantial windfall.

590. The Liquidators reject this argument, pointing out that the rule in *ex parte James* does not apply to a foreign office holder, that the proposition that it is unfair for an officeholder to realise assets that an insolvent entity has acquired on unsecured credit would involve a "profound interference with settled principles of title, credit and security", that there is no mutuality between any claim that JJW Guernsey or JJAB might have as creditors of the Company and the liabilities of the MBI Respondents towards the Company and, finally, that (ignoring the lack of identity between the parties), set off is not available between (a) a liability to an estate arising from misfeasance towards that estate and (b) a claim by the same party *qua* creditor of that estate.

591. I agree with the Liquidators that there is no scope for the exercise of the discretionary jurisdiction to disregard legal rights on the facts of this case, essentially for the reasons they provide, and I decline to do so.

592. That the rule applies only to officers of this court and not to foreign office holders was addressed (with detailed citation of authority) in *Glasgow v ELS Law Ltd* [2018] 1 WLR 1564, per Robin Dicker KC at [81]-[86]. I note, in particular that the Deputy Judge held that a bankruptcy trustee appointed by the High Court in St Vincent and the Grenadines was not an officer of this court such that the principle in *ex parte James* did not apply to him, notwithstanding that he had applied for and obtained an order recognising the proceedings as foreign main proceedings under the CIBR. Just as in that case (where there was no evidence of the position in St Vincent and the Grenadines) there is here no evidence from the experts as to whether the rule in *ex parte James* is a feature of insolvency law in the BVI. Even if it is, I agree with the views expressed by the Deputy Judge that, a person wishing to invoke the rule would have to do so in the BVI. As he said "Absent authorisation by the foreign court, this court cannot exercise the supervisory jurisdiction of that court over its own officers". Although Miss Stanley referred me in closing to *McPherson and Keay* on this point, at 9-089, page 628, the learned authors do no more than record, by reference to *Glasgow*, that foreign office holders are not subject to the rule.

593. I also did not understand Miss Stanley seriously to challenge the proposition that, in circumstances where the Liquidators have succeeded in their claim in respect of the Void Disposition, the JJW Inc Shares were transferred to the Company pursuant to the March

2009 Transfers on unsecured credit. I agree with Mr Curl that in an insolvency scenario, it is entirely conventional for unsecured creditors not to be paid; the assets of the insolvent company must be distributed *pari passu* to all the creditors. This is neither unfair, nor contrary to natural justice. I cannot see that the conscience of the Liquidators should be in any way affected or that recovery of the Company's loss would be tantamount to unjust enrichment of the estate. I also agree that, at least in so far as the claim against JJW Guernsey is concerned, a set off could not possibly be available by reason of the principle in *Manson v Smith* [1997] 2 BCLC 161, per Millett LJ at 163i-164a: "…there is no set off available between a debt due to a misfeasant and his liability to repay the moneys which he has been ordered to pay in misfeasance proceedings". Miss Stanley's closing submissions on *ex parte James* focused only on the claim against the Sheikh and Ms Al Jaber, presumably because of the difficulties created by this authority in connection with the position of JJW Guernsey.

594. These arguments are plainly sufficient to determine the point. The Counterclaim based on the principle in *ex parte James* must fail.

CONCLUSION

595. For all the reasons set out in this judgment, the claim succeeds in part. I shall hear the parties on any consequential matters that may arise.

Appendix A to Judgment

IN THE HIGH COURT OF JUSTICE Nos: CR-2017-003513
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006 AND IN THE MATTER OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION)

B E T W E E N:

(1) GREIG WILLIAM ALEXANDER MITCHELL
(2) KENNETH MELVIN KRYS
(JOINT LIQUIDATORS OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION))

Applicants

- and -

(1) SHEIKH MOHAMED BIN ISSA AL JABER
(2) MASHAEL MOHAMED AL JABER
(3) AMJAD SALFITI
(4) JJW HOTELS & RESORTS UK HOLDINGS LIMITED
(5) JJW LIMITED (REGISTERED IN GUERNSEY) (IN LIQUIDATION)

Respondents

APPENDIX A: AGREED GLOSSARY OF DEFINED TERMS

Definition	Defined term
Immoconsult Ares Leasinggessellschaft mbH *A creditor whose claim in the Company's liquidation was ordered to be admitted by the Eastern Caribbean Supreme Court on 15 February 2016* *Defined as **"Immoconsult"** in the RAPOC*	**Immoconsult**
JJA Beteiligungsverwaltungs GmbH *An Austrian entity* *Defined as **"JJAB GmbH"** in the RAPOC* *Defined as **"JJA Austria"** in the Amended Defence*	**JJAB**

Definition	Defined term
JJW Hotels & Resorts Holding Inc *A BVI-registered company* *1,020,873 (approximately 11.2%) of the shares in this company are in issue in these proceedings* *Defined as **"Holding BVI"** in the RAPOC* *Defined as **"JJW Inc BVI"** in the Amended Defence*	**JJW Inc**
JJW Hotels & Resorts UK Holdings Limited *The Fourth Respondent* *A UK-registered company* *Defined as **"Holdings UK"** in the RAPOC* *Defined as **"JJW UK"** in the Amended Defence*	**JJW UK**
JJW Limited (in liquidation) *The Fifth Respondent* *A Guernsey-registered company in insolvent liquidation since 31 July 2020* *Defined as **"JJW Guernsey"** in both the RAPOC and the Amended Defence*	**JJW Guernsey**
MBI International & Partners Inc (in liquidation) *A* *BVI company in liquidation since 11 October 2011* *Defined as the **"Company"** in both the RAPOC and the Amended Defence*	**Company**
MBI International Group UK Holdings Limited *A UK-registered company that wholly owns JJW UK* *Defined as the **"MBI UK"** in the Amended Defence*	**MBI UK**
MBI International Holding Group Inc *Sole director of JJW Inc since 6 February 2018*	**MBI International Holding Group**
MBI International Holdings Inc *Registered title holder to 8,038,120 shares in JJW Inc since 23 December 2011, and a further 891,761 shares in JJW Inc since 23 June 2017* *Sole director of JJW Inc between 23 December 2016 and 6 February 2018*	**MBI International Holdings**

Definition	Defined term
MBI & Partners U.K. Limited *Employer of Mr Salfiti between 1 April 2014 and 23 August 2018*	**MBI & Partners UK**
Uni-credit Bank Austria AG *The creditor that applied in BVI for the appointment of a liquidator of the Company*	**Unicredit**

Appendix B to Judgment

IN THE HIGH COURT OF JUSTICE Nos: CR-2017-003513
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006 AND IN THE MATTER OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION)

B E T W E E N:

(1) GREIG WILLIAM ALEXANDER MITCHELL
(2) KENNETH MELVIN KRYS
(JOINT LIQUIDATORS OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION))

Applicants

- and -

(1) SHEIKH MOHAMED BIN ISSA AL JABER
(2) MASHAEL MOHAMED AL JABER
(3) AMJAD SALFITI
(4) JJW HOTELS & RESORTS UK HOLDINGS LIMITED
(5) JJW LIMITED (REGISTERED IN GUERNSEY) (IN LIQUIDATION)

Respondents

APPENDIX B: LIST OF ISSUES

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1. Until at least 31 December 2008 were all the following wholly owned subsidiaries of the Company:

    a. Jadawel as defined in RRAPOC §2(a) (**"Jadawel"**);

    b. AJWA as defined in RRAPOC §2(b) (**"AJWA"**); and

    c. JJW Guernsey,

    as alleged at RRAPOC §2-§3, §26-§27?

2. If the answer to Issue 1 is "Yes", did the Company dispose of the entirety of its interests in Jadawel, AJWA and JJW Guernsey on a date after 31 December 2008 and prior to 18 March 2009 as alleged at RRAPOC §28 and §40 to §42?

3. If the answer to Issue 2 is "Yes", was the Company thereby rendered insolvent as alleged at RRAPOC §58?

4. How did the Company acquire 891,761 shares in JJW BVI? Was this:

    a. through the 2009 Share Transfers dated 18 March 2009 between the Company and i) JJAB and ii) JJW Guernsey as alleged at RAPOD §14-17; or

    b. through other means?

5. If the answer to Issue 4 is that the Company acquired the 891,761 shares as a result of the 2009 Share Transfers, then on their true construction, did the 2009 Share Transfers:

    a. transfer unconditional ownership of the shares to the Company as alleged at RRAPOC §37; or

    b. transfer bare legal title in the shares to the Company but vest beneficial ownership in JJAB and JJW Guernsey as alleged at RAPOD §15?

6. Were the share transfer forms signed:

    a. in 2010 prior to the commencement of the liquidation as alleged at RAPOD §21; or

    b. at a time after the commencement of the liquidation as alleged at RRAPOC §53?

7. Was the registration of JJW Guernsey as the owner of 891,761 shares in JJW Inc on 8 March 2016 void as alleged at RRAPOC §74?

8. Was the effect of the 2009 Disposition together with the 2009 Share Transfers to render the Company insolvent as alleged at RRAPOC §59?

9. If the Demand Letters and/or the June 2010 Letter are authentic, was the Company insolvent by 22 December 2009 or 30 June 2010 at the latest as alleged at RRAPOC §60?

10. Was the Sheikh the controlling mind of every entity in the MBI Group including the Company and/or JJW Inc and/or JJW UK and/or JJW Guernsey and/or MBI

International Holdings at all material times as alleged at RRAPOC §2, §4, §5, §6, §7, §13, §55M, §55P and §88?

11. Did the Sheikh and Ms Al Jaber owe duties to the Company prior to the commencement of the liquidation as alleged at RRAPOC §61 to §65?

12. Did the Sheikh and Ms Al Jaber commit the breaches of duty as alleged at RRAPOC §77 and §78?

13. Did the Sheikh and Ms Al Jaber commit breaches of trust as alleged at RRAPOC §79?

14. At the commencement of the liquidation on 10 October 2011:

    a. did the Company own absolutely 1,020,873 shares in JJW Inc as alleged at RRAPOC §32 and §38; or

    b. did JJW Guernsey have security over or beneficially own 891,761 of those shares as alleged at RAPOD §15-16, §22, §24, §70, 76, §85(2)?

15. Following the commencement of the liquidation of the Company on 10 October 2011:

    a. did the Sheikh owe duties to the Company acting by its Liquidators as alleged at RRAPOC §55B and §55C;

    b. did the Sheikh and Ms Al Jaber owe duties to the Company as alleged at RRAPOC §61 to §65, §66 to §68 and §72(b)?

16. Did the Sheikh and/or Ms Al Jaber commit breaches of duty in relation to the transfer of 891,761 shares in JJW Inc as alleged at RRAPOC §81?

17. Did the Sheikh and Ms Al Jaber commit breaches of trust in relation to the transfer of 891,761 shares in Holding BVI as alleged at RRAPOC §82?

18. Is JJW Guernsey liable to account as a constructive trustee for the knowing receipt of 891,761 shares in JJW Inc on 8 March 2016 as alleged at RRAPOC §87 to §89?

19. Did the Sheikh and/or Ms Al Jaber commit breaches of duty and/or trust in failing to deliver up and/or surrender custody and control of 1,020,873 shares in JJW Inc at the commencement of the liquidation on 10 October 2011 as alleged at RRAPOC §80?

20. Did the Sheikh assert that pursuant to a purported resolution of JJW Inc dated 27 July 2017, 100 per cent of the shares in JJW Inc (i.e. necessarily including the 1,020,873 shares in JJW Inc that were registered in the name of the Company at the commencement of the liquidation, including the 129,112 shares in JJW Inc that remained registered in the name of the Company as at 23 June 2017) had been transferred or purportedly transferred to JJW UK as alleged at RRAPOC §55?

21. Did the Sheikh commit breaches of duty and/or breaches of trust in failing to disclose correct particulars of the registered title to the 1,020,873 shares in JJW Inc until 9 February 2021 as alleged at RRAPOC §82B?

22. Did the Sheikh and/or Ms Al Jaber and/or JJW Guernsey on or after 14 January 2015 combine together with intent to defraud and injure the Company by unlawful means by failing to deliver 1,020,873 shares in JJW Inc into the custody and control of the Former Liquidator as alleged at RRAPOC §93?

23. Did the Sheikh and/or Ms Al Jaber and/or JJW Guernsey cause or allow or participate in the 2016 Void Disposition, and if so was this an overt act involving *inter alia* breaches of fiduciary duty and/or breaches of trust that had the foreseeable result of defrauding or otherwise harming the Company as alleged at RRAPOC §94?

24. Did JJW UK join the conspiracy on or after its incorporation on 17 June 2016 as alleged at RRAPOC §95?

25. Did the Sheikh and/or JJW Guernsey and/or JJW UK allow or participate in the matters set out at RRAPOC 55M, 55O and 55P, and if so were these overt acts involving *inter alia* breaches of fiduciary duty and/or breaches of trust that had the foreseeable result of defrauding or otherwise harming the Company as alleged at RRAPOC §96?

26. Was the failure by the Sheikh, Ms Al Jaber, JJW Guernsey and/or JJW UK to deliver the 1,020,873 shares in JJW Inc into the custody and control of the Former Liquidator done pursuant to the conspiracy as alleged at RRAPOC §97?

27. Would the Company have had 1,020,873 shares in JJW Inc available for realisation and distribution to its creditors had the acts or omissions referred to in Issues 25 and 26 not been carried out as alleged at RRAPOC §98?

28. Are the Liquidators entitled to equitable compensation from the Sheikh and/or Ms Al Jaber and/or JJW Guernsey as alleged at RRAPOC §99 and (3)-(6) and (15) of the prayer?

29. Are the Liquidators entitled to damages from the Sheikh and/or Ms Al Jaber and/or JJW Guernsey and/or JJW UK as alleged at RRAPOC §99 and (16) of the prayer?

30. Are any such damages subject to a reduction by reason of contributory negligence on the part of the Liquidators as alleged at RAPOD §132AA ?

31. Are any of the claims barred by the principle against claims to reflective loss?

32. Are any of the claims subject to a limitation defence?

33. Are the Sheikh and/or Ms Al Jaber entitled to an indemnity from the Company should they be found liable as alleged at RAPOD §132C or:

    a. did the Sheikh and/or Ms Al Jaber fail to act in good faith and/or for what they believed to be the best interests of the Company in relation to each of their acts and/or omissions set out in the RRAPOC as alleged at RRAPOC §99A to §99B and RAR §91C?

    b. did Ms Al Jaber abrogate her decision-making function to the Sheikh and/or fail to exercise independent judgment in relation to each of her acts and/or omissions set out in the RRAPOC as alleged at §99B of the RRAPOC?

34. Are the Liquidators required to give credit for the sums due under the 2009 Share Transfers to JJAB and JJW Guernsey pursuant to the rule in *ex parte James* as alleged at RAPOD §132D?

35. Are the documents relied on by the Liquidators as being copies of the Company's accounts for the years ended 31 December 2006, 2007 and 2008 authentic?[1]

36. Are the 2009 Share Transfers authentic documents?[2]

37. Are the Demand Letters authentic documents?[3]

38. Is the June 2010 Letter an authentic document?[4]

39. Are the following documents authentic:[5]

    a. email exchanges between Abreu Advogados, White & Case (Paris) and Maples & Calder **{KMK2/64-79}**?

    b. organigram of the MBI Group **{KMK2/7-8}**?

    c. document titled *"Dispute Sheikh Mohamed Bin Issa Al Jaber / Austrian Aislines – MBI counterclaim"* **{KMK2/48-63}**?

    d. written resolution of JJW Inc **{KMK4/1-2}**?

    e. email from Daniel Perkins to Martina Jovovic **{KMK4/3}**?

    f. email from Amjad Salfiti to Martina Jovovic **{KMK1/471}**?

    g. list of MBI companies **{KMK2/9-47} {A1243}**?

[1] Challenged by the MBI Respondents.
[2] Challenged by the Liquidators.
[3] Challenged by the Liquidators.
[4] Challenged by the Liquidators.
[5] Challenged by the MBI Respondent