IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) BANK SARASIN-ALPEN (ME) LIMITED
(2) SHAHAB HAIDER
(in his capacity as Liquidator of Bank Sarasin-Alpen (ME) Limited)

Claimants

and

(1) MR ELIE VIVIEN SASSOON
(2) MR STEPHANE EMILE ASTRUC
(3) MR EDMOND CARTON
(4) BANK J SAFRA SARASIN LIMITED
(5) BANK J SAFRA SARASIN ASSET MANAGEMENT (MIDDLE EAST) LIMITED

Defendants

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON the Claimants' Claim No. CFI-009-2023 (the "Part 7 Claim") and the Second Claimant's Application No. CFI-005-2016/6 in Claim No. CFI-005-2016 (the "Insolvency Claim")

AND UPON the Defendants filing and serving applications to strike out the Part 7 Claim and the Insolvency Claim pursuant to Rule 4.16 of the Rules of the DIFC Courts (the "RDC") and/or for immediate judgment pursuant to RDC 24.1 (application CFI-009-2023/7 in the Part 7 Claim and application CFI-005-2016/11 in the Insolvency Claim) (the "Strike Out Application")

AND UPON the Defendants filing and serving an application seeking security for costs (the "Security for Costs Application")

AND UPON the hearing held on 26 January 2024 before Justice Sir Jeremy Cooke (the "Directions Hearing") and the directions order dated 7 February 2024, giving directions for the Strike Out Application and listing a hearing on 18 and 19 April 2024 (the "Hearing")

AND UPON the Order made by Justice Sir Jeremy Cooke dated 15 March 2024 ordering inter alia that the Second Claimant is to be removed from his office as liquidator of the First Claimant on publication of the Court's judgment on the Strike Out Application

AND UPON the Order made by Justice Sir Jeremy Cooke dated 22 March 2024 giving directions for the Security for Costs Application and listing it to be heard at the Hearing

AND UPON reading the evidence and submissions filed on the Court File

AND UPON hearing Counsel for the Claimants and Counsel for the Defendants at a hearing held on 18 April 2024 (the "Hearing")

IT IS HEREBY ORDERED THAT:

The Strike Out Application

1. The Strike out Application is dismissed.

2. The Defendants shall pay the Claimants' costs of the Strike Out Application on the standard basis, to be the subject of assessment by the Registrar if not agreed.

3. The Defendants shall make a payment on account of such costs of AED 440,000 by no later than **4pm on 3 May 2024.** </p>

The Security for Costs Application

4. The costs of the Security for Costs Application in CFI-009-2023/11 dated 23 February 2024 shall be costs in the case.

5. The Claimants shall notify the Defendants forthwith in the event of a termination by the insurers of the ATE policy, and in that event the Defendants have the liberty to apply.

IT IS HEREBY ORDERED BY CONSENT THAT:

Case Management Conference (RDC Part 26)

6. Pursuant to RDC 28.10, the parties shall provide information about the documents within their control by 4pm on 27 May 2024, as follows:

a. As to hardcopy documents, the parties shall identify relevant repositories of hardcopy documents and their proposals for searching and producing such documents; and

b. As to electronic documents, the parties shall complete and exchange Electronic Document Questionnaires in the form set out in Practice Direction 30(1)(b) of the English Civil Procedure Rules.

7. The parties shall file Case Management Information Sheets by **4pm on 27 May 2024.**

8. Defendants shall serve on the Claimants drafts of any documents necessary for the purposes of obtaining mutual legal assistance from the relevant Swiss Courts in connection with witness evidence and documentary disclosure and production by **4pm on 27 May 2024.**

9. The Claimant shall file a Case Management Bundle by **4pm on 2 June 2024.**

10. A Case Management Conference is listed to take place as a virtual hearing on **10 June 2024.**

Disclosure and production of documents (RDC Part 28)

11. Each of the parties shall disclose:

a. the documents on which he relies; and

b. the documents which (i) adversely affect his own case, (ii) adversely affect another party's case, or (iii) support another party's case, and

c. the documents he is required to produce by a relevant practice direction (being Practice Directions 31A and 31B of the English Civil Procedure Rules and any Practice Directions of the DIFC Court).

12. The date for compliance with paragraph 11 of this Order shall be determined at the Case Management Conference on **10 June 2024.**

Trial (RDC Part 35)

13. The trial of this matter shall be listed for an in-person trial commencing on **27 October 2025** with an estimated duration of two weeks.

14. In the event of no agreement on appointment of a replacement liquidator of the First Claimant, the Court will, on an application by either party, determine the identity of such a replacement.

15. The current liquidator, the Second Claimant, shall not be removed from office until appointment of a replacement.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 30 April 2024
At: 8am

SCHEDULE OF REASONS

Introduction

1. These are the reasons for the dismissal of the Defendants' Application for strike out and/or summary judgment. On 8 January 2024, the Defendants issued a Strike Out Application in which they sought to have the Claimants' claims against the Defendants struck out in whole or in part in accordance with RDC 4.16 and/or immediate judgement in their favour in accordance with RDC 24.1. RDC 4.16 permits the Court to strike out a statement of case if it appears that:

(a) The statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a Rule, Practice Direction or Court Order

Whilst RDC 24.1 provides that the Court may give immediate judgement against a party on whole or in part of a claim if:

(a) it considers that:

(i) the claimant or defendant has no real prospect of succeeding on the claim or issue; or

(ii) the defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

The grounds set out in support were multifarious, extending over four pages of the Application Notice. Some of those have been abandoned and new grounds put forward which were neither put forward in the Application Notice itself nor pleaded in the Defence and Counterclaims filed on the same day. This application is the latest interlocutory attempt by the Defendants to be rid of the claims which they regard as ill founded. The prior history of these proceedings and the previous attempts appears from the order of 15 March 2024 and earlier orders to which reference can be made.

2. The principles governing strike out and immediate judgement are not in issue. In order to justify the former, it must be shown that the pleadings disclose no reasonable grounds for bringing the claim and it is accepted that, for this purpose, the fact pleaded by the Claimants must be accepted as true. It is said that the facts pleaded in the Consolidated Particulars of Claim (the "PC") are not sufficient to constitute a complete cause of action and, in particular, that the allegations of fraud are inadequately pleaded with an absence of allegation of primary facts, an absence of particulars capable of supporting the inference of fraud and insufficient conduct pleaded to found the allegation of unlawful means conspiracy. In relation to the application for immediate judgement, it is said that there are pure questions of law which can be decided now and that where questions of fact or mixed questions of fact and law are involved, the court can determine at this stage that there is no realistic prospect of success for the claims. It is accepted that the court must avoid conducting a mini trial without disclosure and oral evidence, but it is rightly submitted that the Court does not need to accept everything at face value that a party says in witness statements or in a pleading supported by a statement of truth. It is also accepted that there is a higher threshold for summary disposal of allegations of fraud, because fraud often has to be inferred from facts known to the claimant in circumstances where the allegedly fraudulent defendants have sought to hide their misconduct. Whilst cogent evidence is required to justify a finding of fraud or other discreditable conduct because of the lesser likelihood of such conduct taking place than other forms of breach of duty, the process of disclosure is often critical in ascertaining what was taking place and in any application of the nature of that brought here, the Court bears that in mind in considering whether it is appropriate to give immediate judgment.

3. It is said by the Defendants that the PC suffers from two distinct types of defects: the first is a "Claim Deficiency" inasmuch as many of the claims pleaded do not give rise to legally cognizable causes of action: the second is a "Pleading Deficiency, inasmuch as the PC fails to articulate with sufficient clarity the material facts comprising the case that the Defendants are to meet. The Claim Deficiencies comprise four species, namely: claims that do not exist under DIFC law; claims that are time-barred; claims constituted by pleaded primary facts which do not satisfy all the elements of the relevant course of action; and claims that have no realistic prospects of success having regard to primary facts capable of determination on a summary judgement application. The Pleading Deficiencies reveal an inadequate basis to plead the "Scheme" which is said to constitute an unlawful means conspiracy. It is said that the broad-brush conspiracy claims impute to the Fourth and Fifth defendants' fiduciary duties that they do not have and that unsustainable inferences are pleaded in the absence of adequate please of primary facts with broad extrapolations, which do not withstand scrutiny in the context of serious claims of fraud and dishonesty. In consequence it is said that the claim should be struck out and/or particular paragraphs and/or a particular claim should be struck out or the subject of summary judgement.

5. Whilst the claim is framed in a number of different ways, with different legal labels and breaches of different duties, the gravamen of the allegations appears in paragraphs 10 - 12 of the PC. There, it is alleged that the first three individual defendants embarked, with the Fourth Defendant, the parent company (BJSS), and the Fifth Defendant ("BJSSAM"), a newly formed subsidiary, on a fraudulent scheme by which the business of the First Claimant ("BSA") was to be transferred to BJSSAM for no consideration, leaving BSA with depleted assets which would be available to the Al Khorafis, who were likely judgement creditors. This is said to be an unlawful means conspiracy involving the exploitation of BSA's confidential information relating to its Relationship Managers ("RMs") and clients, the poaching of many of such RMs and the client base to which the RMs related, with the resultant loss of business which went with those relationships. Objection was taken by the Defendants to the terminology used (such as "transfer of clients", "transfer of business", "diversion of client relationships") as not representing misappropriated assets or property but there can be no doubt that, whether or not this is covered by the expression "goodwill", which was used in discussion in court, BSA carried on business through the RMs employed by it with the clients which it advised and whose investments it managed and that this business had value, was profitable and can properly be described as an asset of BSA. What BSA allegedly lost, as a result of what occurred, was the opportunity to continue in such business and earn further profit. By setting up a competing business in BJSSAM, and engaging RMs who had been employed by BSA the Defendants procured the transfer of clients of BSA to BJSSAM with all the advisory and management business that entailed. Whilst the Defendants maintain that each of the clients made autonomous decisions to transfer their business, that BSA was ceasing business, that there was no breach of any contract on the part of the RMs or clients, and that no wrongdoing took place, the essential fact that RM's and clients moved from BSA to BJSSAM is not in issue with the result that BJSSAM took over the advisory investment and management function that had previously been undertaken by BSA. It is said that the Individual Defendants conspired with the corporate Defendants to achieve this result.

6. The Individual Defendants are said to have acted dishonestly in breach of fiduciary duties as directors or senior employees in permitting BSA's business to be misappropriated by BJSSAM and in participating in the fraudulent scheme. Along with these allegations, claims are made for dishonest assistance in the fraudulent breaches of duty and for knowing receipt, in addition to the unlawful conspiracy where the unlawful means consists of the dishonesty and fraud perpetrated. The Liquidator also seeks relief against the Individual Defendants for fraudulent trading, transactions in fraud of creditors, misfeasance and claims against BJSSAM in respect of a transaction at an undervalue. It is only this last claim which, as alleged, does not include the plea of dishonesty or fraud.

7. Even if it was possible to excise certain paragraphs or claims pleaded in the PC as suitable for a strike out or summary judgment, there would be no real purpose served in doing so, since the scope of any trial would remain the same, with the same factual issues to be determined in relation to the remaining causes of action. As is often the case, the Claimants have put different legal labels on their claims which depend on essentially the same facts and inferences to be drawn from those facts. The scattergun approach of the Defendants in challenging huge areas of the PC in the hope that one or more might succeed is misconceived. In the Application there were some 50 grounds of complaint. A further 33 emerged thereafter and 29 were not pursued whilst only 2 were formally abandoned. Efforts were made in argument to deal with a number of them compositely and I do so here. Where an individual complaint is not separately addressed in this judgment, that is because it fails along with the general conclusion that factual issues arise in relation to it which cannot be determined on a summary judgment application and no plain and obvious point of law arises which is determinative in respect of it.

Limitation/Time bar

8. There was no express plea of limitation in the Defence and Counterclaim, except for "the lesser claims" where fraud was not alleged; nor was any different point made in the Application. The arguments put forward by the Defendants on previous occasions focused on the submission that the Claimants' pleas of fraud were unjustified and contrived in an effort to avoid the ordinary six-year time bar for claims. Now, however, the Defendants seek a strike out on the basis that fraud is not a necessary ingredient of the claims made and that the provisions of Article 9 (1) of the Obligations Law are inapplicable, with the result that claims which are not governed by the Insolvency Acts (whether 2009 or 2019) became time-barred, at latest by 14 April 2021. A further attempt to strike out claims under the Insolvency Act provisions, where it is accepted that the time

limit could only expire on 21 February 2023 foundered on the fact that the Claim Form and the Application Notice under the Insolvency Acts were filed on 1 February 2023.

9. As to the former, a cause of action which is framed in dishonesty or fraud is different from a cause of action which is not. It was contended by Ms Martin for the Defendants that fraud was not a necessary ingredient of a claim for breach of fiduciary duty by a director or an employee, nor for a claim for misfeasance under the Insolvency Acts. That is true but not to the point since the pleas made are all, with the exception of the claim for transaction at an undervalue, pleas of fraud or dishonesty. The Claimants relied on the decision of the English Court of Appeal in Paragon Finance plc v DB Thakerar & Co [1999]1 AER 400 where Millett LJ (as he then was) at p404 c said:

> "It is uncontrivable that an amendment to make a new allegation on intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action. Intentional wrongdoing give rise to distinct causes of action."

Thus, a plea of fraudulent or dishonest breach of duty is a plea of a cause of action in which fraud is a necessary ingredient. The very cause of action, as so expressed, contains that requirement.

10. The same is true of the claim for unlawful means conspiracy. In *Cunningham v Ellis* [2018] EWHC 3188 (Comm), Teare J held at paragraph 95 that the action which the claimant then sought to bring was for conspiracy to injure by unlawful means. Fraudulent misrepresentation was relied upon as the unlawful means. He held that the fraudulent under- invoicing and retention of monies was an essential part of the claim (being the alleged unlawful means) with the result that the fraud was an essential element of the cause of action relied on by the claimant. Whilst therefore, an unlawful means conspiracy does not necessarily involve a claim in fraud or dishonesty, where the unlawful means is alleged to be fraudulent or dishonest, the claim is not subject to the usual period of limitation.

11. Furthermore, Article 9 (1) of the Obligations Law provides that:

> "Notwithstanding Article 38 of the Court Law, where a cause of action arises as a result of fraud by the defendant, there is no time limit before which the action must be commenced."

It has been held by Sir David Steel, at paragraph 38 of *Rafed Abdel Mohsen Bader Al Khorafi v Bank Sarasin Alpen (ME) Ltd,* CFI 014-2016, that there is no material difference between this provision and the cognate provision the English Limitation Act 1939 as construed by the Court of Appeal in that jurisdiction. The wording of the English Statute in section 32(1)(a) of the Limitations Act 1939 is however different because the relevant section there refers to "an action based upon the fraud of the defendant" as opposed to "a cause of action [which] arises as a result of fraud". The English Court of Appeal held, in relation to the predecessor of the relevant section in the English Statute that the section was limited to claims where fraud was an essential ingredient. The following subsection in the English Limitation Acts relates to fraudulent concealment. In the DIFC statute, however, there is no directly equivalent provision to the later sub-section. There is only one provision, as cited above which refers to a cause of action which arises out of fraud. Whereas Sir David Steel apparently could see no material difference between the two forms of words, I beg to differ. Even if fraud is not a necessary ingredient of the cause of action, if the cause of action arises as a result of fraud in the conduct which constitutes the breach, it is covered by Article 9. It is sufficient, in order to avail oneself of Article 9, to plead a fraudulent action, whether or not it is a necessary ingredient of the particular claim.

12. Moreover, Article 62 (4) (a) of the DIFC Trust Law provides that:

> "No period of limitation shall apply to an action brought against a trustee. in respect of any fraud to which the trustee was a party or to which the trustee was privy."

In *First Subsea Limited v Baltec* [2018] Ch 25, the English Court of Appeal held that where a director acted in breach of fiduciary duty in being involved in the misappropriation of the company's assets, he was a trustee for the purposes of section 21 (1) of the English Limitation Act which provided that the six-year limitation period was inapplicable "in respect of any fraud or fraudulent breach of trust".

13. The effect is that there is no relevant period of limitation for the breaches of directors' duties or fiduciary duties in the form pleaded by the Claimants.

14. As to the Insolvency Act claims, an elaborate argument was mounted by the Defendants relating to the absence of a date for hearing in the Application Notice filed in respect of those claims. It was said that because the notice contained no hearing date in it (which would have been a nonsense given the need for a hearing to be fixed for an effective trial of the issues), the effect was somehow akin to a *ex parte* application for extension of time for the service of a Claim Form which was otherwise due to expire, where it was incumbent upon the applicant to point out the relevant date of expiry of the limitation period. It was said that, if the Court did not treat the Claimant's' application as an extension of time, the Court would, in effect, be allowing an applicant the opportunity to file an application without requesting a hearing and not to serve a respondent for a significant period of time which had the effect of extending the limitation period itself. This, to my mind, betrays a confusion of thought relating to periods for service on the one hand and the issue of proceedings on the other. There was no need for any extension of time of a period for service in the present case and not only was the Application under the Insolvency Acts issued within the limitation period, but so also was the Claim Form which saw the same relief.

15. Assuming, arguendo, that the accessory liability claims exist under DIFC law (as to which see below), in the present case the pleas again allege fraudulent and dishonest conduct. Dishonest assistance speaks for itself. Knowing receipt here likewise involves privity to the dishonest and fraudulent intent.

16. The end result is that there is no valid Limitation point to be taken in relation to any of the causes of action pleaded.

Non- Existent Causes of Action in the DIFC

17. It is said by the Defendants that dishonest assistance, knowing receipt and misfeasance are not claims known to DIFC law which is statutory

alone. It is no longer maintained that unlawful means conspiracy is not recognised in the DIFC law, but it is said that, if a substantive claim does not appear in a DIFC statute, it is not part of DIFC law. There is no real difference between the parties as to this essential principle, but the parties differ in relation to the effect of the Trust Law and the Insolvency Law.

18. Article 10 of the Trust Law, under the heading "Common Law and Principles of Equity", provides, at subparagraph (1) that:

> "The common law of trusts and principles of equity supplement this Law, except to the extent modified by this Law or any other DIFC law or by the Court."

Subparagraph (2) provides that:

> "The statute law of England and Wales does not, except to the extent it is replicated in this Law, apply in the DIFC".

19. In *Re DIFC Authority* [2020] DIFC CA 002 at paragraphs 139-143, the Court of Appeal had cause to determine the effect of Article 10 and at paragraph 141 stated that:

> Article 10 applies the common law of trusts and principles of equity as a supplement to the Trust Law" and that "the Court itself therefore has the authority to develop a common law of trusts and principles of equity in the same way that other common law courts might do on a case-by-case basis. It is not confined to the application of the common law of trusts and principles of equity as understood under the law of England and Wales... The common law of trusts and principles of equity of England and Wales do not apply directly to the DIFC but may be taken into account and thereby applied by the Courts."

At paragraph 143 the Court held that:

> "The common law of trusts and principles of equity referred to in Article 10 of the Trust Law is the common law of trusts and principles of equity as determined by the Courts of the DIFC from time to time drawing upon the common law of England and Wales and other common law jurisdictions as they see fit."

20. There is nothing in the Trust Law definitions which limits such development. Article 4 of the Trust Law 2018 provides that:

> "All questions arising from acts or omissions occurring prior to the commencement of this Law shall be determined in accordance with the Previous Law."

Which means the 2005 Trust Law. That law, by Article 59, set out remedies which are capable of being made against third parties, such as tracing, imposing a constructive trust on wrongfully disposed trust property and its proceeds and "any other appropriate relief". Article 35 of the Law of Damages and Remedies gives wide powers to the court to make such orders as it thinks fit where a person commits a breach of any requirement, duty or obligation imposed under any DIFC Law. Articles 13 and 15 (5) of the Law of Obligations provide for joint liability. Article 13 imposes joint and severable liability by providing that:

> (a) A claimant has the right to sue any number of persons whom he considers to be jointly or severally liable in respect of any liability to him under this Law, subject to any rules of the Court limiting this right.
>
> (b) Persons who are jointly liable, or severally liable in respect of the same loss, are liable for the whole loss.
>
> (c) Persons who are severally liable in respect of different loss are each liable only for the loss that each has caused.

In line with this, Article 15(5) also inserts that:

> (a) A person who knowingly and actively instigates another to act or omit to act in a manner which gives rise to liability under this Law, or who otherwise acts in concert with another in relation to such an act or omission, is jointly liable with the other.

These provisions, whether seen individually or cumulatively, provide a statutory framework for the development of the common law of trusts and principles of equity in accordance with the decision of the Court of Appeal referred to in the previous paragraph of this judgement.

21. The concepts of dishonest assistance and knowing receipt are now well established in many common law jurisdictions including England and Wales. Whether seen as accessory, primary or secondary liability, there is no doubt that they have become part of an established regime to remedy the effects of fraud. Whether this is regarded as a development of common law, or equitable principles is neither here nor there and it matters not whether so-called "constructive trustees" by virtue of dishonest assistance or knowing receipt are truly "trustees" in the proper sense of the word (cf *Williams v Central Bank of Nigeria* [2014]AC 119 at [9]-[11]). The application of common law and equitable principles in any common law jurisdiction, ought, in my judgement, to result in the applicability of these remedies. Whilst there are no DIFC authorities which clearly establish the existence of ancillary liability of this kind, this is not a plain and obvious case for striking out on the basis of established legal principles to the contrary.

22. So far as concerns misfeasance, Article 115 (b) of the Insolvency law 2019, which states that on application the Court may make `an order to compensate the Company in respect of any misfeasance or breach of fiduciary or other duty in relation to the Company.' This has an equivalent provision in Article 80 of the Insolvency Law 2009 that permits the court to make one or more of the following orders on application:

> (a) To pay to the Company any money or other property of the Company which he has misapplied or retained, or become accountable for;
>
> (b) To compensate the Company in respect of any misfeasance or breach of any fiduciary duty or other duty in relation to the Company;
>
> (c) To make such contributions (if any) to the Company's assets as the Court thinks proper; or

(d) To require the person to do, or not to do, any act or thing.

The question arises as to whether or not those provisions provide for a freestanding form of relief for misfeasance to be given to the liquidator in an application to the Court "in relation to a person to whom this Article. applies" or whether these provisions are limited to the relief set out in the preceding eight Articles which specifically refer to persons to whom Article 115(b) and Article 80 (as the case may be) apply. As a matter of construction of the statute, I was inclined to think that the Defendants were right in saying that the relief to be given under those two provisions relates to the misfeasance referred to in the preceding sections, but the Claimants pointed out that Article 80 (b) covers claims for misfeasance or breach of any fiduciary duty or other duties in relation to companies, where none of the previous Articles provide for breach of fiduciary duty at all. The persons to whom Article 80(b) would apply would obviously be the fiduciaries in question. When comparison is made with section 212 of the English Insolvency Act, it would seem that only the language of section 212(3), which allows the court to order repayment, restatement or accountment for the money or property or, otherwise, `to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary duty or other duty as the court thinks just,' has been enshrined in the DIFC legislation, without reference to section 212 (1) and (2), which precede it and make the freestanding nature of the clam for fiduciary duty actionable at the instance of the Liquidator. The point of law here is again not so plain and obvious that reliance upon those provisions should be struck out of the PC and the facts supporting the claim for misfeasance under this provision are those which support the claims for breach of fiduciary duty and participation in the alleged conspiracy. At the end of the day, it probably makes little difference to a claim for damages unless a wider form of compensation is available under those provisions than is provided elsewhere. In the overall context of this action, it would not be right, prior to full investigation of the facts, for the Court to taken definitive view on the applicability or otherwise of this provision, given the claims made in relation to misdoing both under the preceding articles and as otherwise pleaded.

Retrospectivity of legislation

23. This appears to me to be a non-point. The Defendants referred to the PC which includes numerous claims alleging breaches of the Insolvency Law 2019 and the Companies Law of 2018, with alternative reliance placed upon provisions of the earlier Insolvency Law 2009 and the Companies Law 2009. The point is made that the provisions of the later legislation are not identical to those in the earlier legislation but the differences, in my view are of such limited significance as to have no real impact upon the breaches of duty alleged. Moreover, it is said that the Law of Obligations covers much the same ground and is pleaded as doing so at paragraph 103 of the PC.

24. The duties may be marginally different, but the overall effect is much the same. Both directors and employees owe fiduciary duties to the company of which they are directors or employees, whether the ambit of those duties is expressed in legislation in identical manner or not. The duties at common law are well established. The duty to act honestly must apply regardless. Duties of loyalty, acting in the best interests of the company and avoiding conflicts of interest are inherent to the position of a fiduciary. While such duties can be modified by contract, that is not suggested here. Whether or not a director or employee is also a director or employee of a parent company is neither here nor there. Conflicts of interest may become difficult to handle where the individual has a dual capacity, but the law is clear that a person who owes fiduciary duties to more than one principal must act in the best interests of each and cannot prefer the interests of one over the other (see *Bristol & West Building Society v Mothew* [1998] Ch 1, per Millett LJ at 18H19). If the individual's position as director or employee of both companies becomes irreconcilable because of a conflict of interest (which is likely to be rare), the individual in question has no option but to resign from one or the other or both positions, but on resignation cannot take with him the information obtained prior to resignation and use it elsewhere. There is clear law to the effect that a director or employee cannot, by resignation from his position, thereby enable him to set up in competition with the benefit of property owned by the company, maturing business opportunities or information obtained prior thereto (See *Quarter Master UK v Pyke* [2004] EWHC 2825 (Ch) at paragraphs 57, 71 -72 and 75 where such persons were held to be liable to account not only for the personal profits made by them but also the profits made by the company set up to compete). Where Mr Sassoon is alleged to have knowingly dealt with BSA's property after resigning from his position as director, he would in any event, in addition to any liability for breach of duties as a director, be liable as a constructive trustee. He would, if the allegations are established, be a participant in the unlawful conspiracy and party to the dishonest nature of it. The authorities referred to here are also directly relevant to the submission made by the Individual Defendants that there was no breach of duty in effecting the Scheme and no property transferred in executing it (see below).

25. Whether or not the Claimants are entitled to rely on Article 1(3) of the Companies Law of 2018 which provides that "anything done or omitted to be done pursuant to or for the purposes of the Previous Law or the Operating Law" as a substantive and not merely a procedural provision allowing for claims under the earlier legislation to be pursued under the later law, which appears to be covered by Article 1(4), matters not. In the context of this action, the notion that a claim made for a breach of duty as alleged under the later legislation would not also be a breach of duty under the earlier legislation is fanciful. The authorities cited above show the ambit of the applicable fiduciary duties in the context of an alleged conspiracy to divert/ transfer/ misappropriate the business of BSA to the detriment of BSA and its creditors.

26. Once again, this is not a plain and obvious case for striking out an individual claim made under a specific statute when the facts relied on are the same for claims put in different ways under statute or common law.

Pleading Deficiencies - lack of particularization of fraud and adequate pleas of facts from which inferences could be drawn

27. I can deal with these points shortly because I have already said that the essence of the claim in fraud is clearly pleaded. The Defendants rely on well-established dicta that fraud must be distinctly alleged and clearly proved. The claim of the Claimants is that there was an unlawful conspiracy between the Defendants dishonestly to misappropriate the business of BAS and thereby to deplete the assets of BA to the detriment of its creditors and, in particular, the Al Khorafis. The complaint is made that the PC lacks particulars of who did what, when and how to achieve this result but it is common ground that the majority of RMs previously engaged by BSA were taken on by BJSSAM and that they took most of BSA's clients for whom they acted as BSA's RMs with them to BJSSAM.

28. The Defendants did not seek further information of any allegation made in the PC and pleaded to it in detail. They had no difficulty in understanding what was being said against them. The structure of the PC is clear following the summary at paragraphs 10 - 13. The background to the claim is set out in paragraphs 14 - 31 whilst the formulation of the Scheme is set out in paragraph 32 onwards, with its execution described at paragraphs 54 -84. The basis of BSA's prospective insolvency is explained at paragraphs 93 - 94, leading to the winding up and the Al Khorafi

judgements at paragraphs 95 -100. From paragraphs 101 onwards, through to paragraph 173, the different causes of action relied on in respect of each defendant are set out in relation to the facts already pleaded and the inferences which it is said should be drawn from them.

29. The Defendants took issue with the allegation that there had been a conspiracy to "transfer BSA's business" to BJSSAM which centred on the submissions that, on the pleas made in the PC, no property belonging to BSA had been transferred to BJSSAM, that clients were autonomous and had entered into contracts with BJSSAM of their own volition and that no fiduciary duties were owed by the Individual Defendants, particularly following the cessation of their directorships or employment by BSA. It was said that, in the light of these matters, the pleas of unlawful means conspiracy, breach of fiduciary duty, fraud and dishonesty were unsustainable. As set out at paragraph 24 above however, the authorities there cited, make good, as a matter of law the causes of action pleaded, if the facts are established. Whether or not those facts can be established is disputed but cannot be determined at this stage of the proceedings. The case is however sustainable as a matter of law. In addition to the authorities already referred to, reference can be made to the judgement of Haddon- Cave J (as he then was) in *QBE Management Services (UK) Limited v Dymoke and others* [2012] EWHC 80 (QB) at paragraphs 169 -170 and 175 and the judgment of Hart j in *British Midland Tool v Midland International Tooling Limited* [2003] EWHC 466 (Ch) at paragraph 89 which establish the propositions that employees owe fiduciary duties in the same way as directors do, that the business of a company is an asset, including its goodwill and client relationships, that directors and employees cannot lawfully set up in a competing business, poach employees or make use of information obtained as a director or employee, even if the company would not have been able to exploit the business opportunity of which they took advantage, whether by reason of insolvency or otherwise. For this purpose, it is not critical that the information used was confidential.

30. The causes of action against each of the Defendants are set out in the PC from paragraph 101 onwards. The duties of each of the Individual Defendants are specifically pleaded and their involvement in the planning and execution of the Scheme and their dishonest and fraudulent intent are set forth over some 24 pages. The execution of the alleged fraudulent scheme is set out in thirty earlier paragraphs (54 - 84) but the complaint is made that it is not said exactly what actions each of them took in participating in the conspiracy. It is almost inevitable that the Liquidator would not have information as to exactly how this was done and that knowledge of the means lies within the sphere of knowledge of the Defendants, none of whom have yet provided a witness statement dealing with the allegations. Prior to disclosure, the Claimants are limited to drawing inferences from the facts, whether or not those be the most likely inferences that could be drawn from what is known.

31. As I have already intimated, the Defendants' case is that the RMs and clients made autonomous decisions to align themselves with BJSSAM and that prior to that, the shareholders had agreed to the winding up of BSA and its cessation of business which was unconnected to any intention to deprive the Al Khorafis of the fruits of any judgment that they might obtain. None of that would necessarily excuse them from liability, as the authorities show. None of the Individual Defendants have chosen to produce a witness statement, choosing, contrary to the Practice Direction, to rely on a solicitor's evidence of fact, including what unnamed defendants have said to him. Limited documents have been produced which show the shareholders agreeing to the liquidation of the company, but which also appear to show the desire of both shareholders to reap the benefits of the contacts that BSA had with wealthy NRIs and to take over the clients with whom BSA's RMs had contact. The Defendants' Relaunch Plan Email of 20 September 2013, as it is referred to, from Mr Carton to Mr Sassoon, is relied on by the Claimants as showing what the Defendants had in mind, together with what is said to be confidential information which the Individual Defendants had and passed on to BJSS and BBJSAM which utilised it to target the best performing RMs and through them the clients of BSA, who were supplied with standard form documentation terminating their relationship with BSA and authorizing BJSSAM to act in their stead. It is accepted that some clients terminated their relationship whilst for others were terminated by BSA, by then under BJSS management and control.

32. Whilst the underlying intentions of BJSS as shareholder are disputed, the fact that the business of BSA largely came the way of BJSSAM is not. There is a clear dispute of fact whether or not confidential information supplied to BJSS' nominated directors on the board of BSA was used by BJSS and BJSSAM to make contact with and procure the engagement of the clients by BJSSAM. There is also a dispute as to whether BJSS had in mind the potential judgment that might be entered against BSA on the Al Khorafi claims and intended to deplete assets with the effect of preventing the Al Khorafis enforcing any judgment against BSA. The assets of BSA at the end of 2013 appear to have been about USD 9 million which would not have been anywhere near sufficient to pay either the compensatory or additional damages ultimately awarded.

The Directors' Duty to Creditors

33. It is in this context that the Defendants argued that the Claimants' case could not succeed because at the time of the alleged diversion of business, appropriation of goodwill, poaching of RMs/ clients and client relationships in 2013-2014 and the EGM Resolution to wind up BSA on 13 August 2014, the liability judgement in favour of the Al Khorafis had not yet been handed down. BSA was not therefore insolvent and there could be no depletion of assets which fell foul of any insolvency legislation. The liability judgment was given on 21 August 2014, when BSA was found liable under Article 94 of the Regulatory Law for intentional breaches of the DFSA Rulebook. BSA appealed against that liability judgement. By 28 August, as pleaded by the Claimants, BSA had only four employees Carton, Mr Philip, Mr George and Mr Kay Gomes. By that stage the assets under management had dropped from a peak of USD 5 billion approximately (as alleged by the Claimants) to USD 592 million approximately. Plans for liquidation were postponed but BSA ceased all financial services on 30 September, having notified the DFSA of its intention to have its regulatory licence withdrawn, which the DFSA did on 5 January 2015. Shortly after, Mr Sassoon and Mr Carton publicly joined BJSSAM and were appointed directors.

34. The quantum judgement was published on 7 October 2015 finding BJSS and BSA jointly liable in the sum of USD 24,583,425 and BSA liable for additional damages under Article 40(2) of the Law of Damages and Remedies, where the Court used its discretion to award damages to the aggrieved party in the sum of USD 35,028,474. BSA and BJSS had appealed against the liability judgment and then appealed against the judgment on quantum. An application for a stay of execution failed and on BSA's failure to pay the judgment debt, on 7 February 2016, the Al Khorafis presented a winding up petition. On 3 March 2016, the Court of Appeal dismissed BSA's appeal against the liability judgement and on to May 2016, by an order of this Court, BSA was put into liquidation and Mr Haider appointed as liquidator. On 29 January 2017, BSA's appeal against the quantum judgement was dismissed, with BSA unable to attend because of lack of funds. BJSS' appeal also failed.

35. It is the Claimant' case that, at the conclusion of the liability trial in the Al Khorafi proceedings, on 10 July 2013, alternatively by June 2014 at the latest when the execution of the fraudulent scheme had commenced and clients were being transferred to BJSSAM, BSA was either insolvent, bordering on insolvency or its insolvent liquidation was probable on the basis of the contingent liability arising out of the Al Khorafi claims (PC

paragraph 93). Furthermore, from July 2013 or at latest by April 2014, BSA's management, including the Individual Defendants were aware that BSA was insolvent or likely to be insolvent (PC para 94). A number of facts are pleaded as giving rise to that inference, including documents showing discussion about sale of BSA's business, or of one shareholder buying the other out and/or of leaving BSA as a shell company until the conclusion of the Al Khorafi proceedings. Reference was made to the need to protect the interests of all creditors, in the face of Mr Walia's suggestion of payment of the dividend. Al Khorafi proceedings. Reference was made to the need to protect the interests of all creditors, in the face of Mr Walia's suggestion of payment of the dividend.

36. The Claimants allege that at the conclusion of the trial, it must have been evident to BSA, BJSSS and the Individual Defendants that there was a significant risk of judgement being given in favour of the Al Khorafis by reason of the poor performance of Mr Walia in the witness box and the trial Judge's adverse comments about him during the course of the trial, in which he indicated disbelief of his evidence. In a Preliminary Post Trial Risk Assessment advice, over which privilege was waived by BJSS, it was said that BJSS' faced "a real and substantial risk that the court will find against BSA on the advisory claims and award damages" which could realistically amount to USD 32 million (USD 50 million if interest and costs were included). The Defendants were advised to settle, and Mr Sassoon told Mr Walia that the assessment received from lawyers was that there was exposure for BSA. The Defendants rely on various qualifications to this advice and upon other advice given later in the context of the appeals where the prospects of success were given as slightly higher than 50%. In the absence of a successful appeal, it seems obvious that BSA would be insolvent, given its net assets at the time.

37. It is in this context that the Defendants rely upon the decision of the Supreme court of England and Wales in BTI v Sequana [2024] AC 221, in which there was a discussion of the circumstance in which directors' duties to creditors arise in the context of management of a company which is not insolvent on the basis of assets versus liabilities or inability to pay its debts as they fall due. In that case, a decision was made to pay a dividend to a parent company which had the effect of repaying a loan in circumstances where the subsidiary had long-term pollution-related contingent liabilities of an uncertain amount. As summarised by the Defendants, the Supreme Court held that the duty to creditors was an aspect of the directors' obligations to act in the best interests of the company and where the company was insolvent or bordering on insolvency, the substantial economic interests of its creditors in any insolvent liquidation meant that the company's interests could no longer be identified solely by reference to those of its shareholders. The Supreme Court Justices in different forms of words essentially held, that the directors' fiduciary duty to the company to act in its interests was modified to include a duty to act in the interest of the creditors as a whole when the company was insolvent, bordering on insolvency or it was probable that the company would enter into an insolvent liquidation or administration. In those circumstances, appropriate weight would then have to be given to the interests of the creditors, balanced against those of the shareholders. If an insolvent liquidation or administration became inevitable, the creditors interest became paramount. Two of the Justices considered that the duty was only modified when the directors knew or ought to have known that insolvency was imminent or it was probable that the company would enter into an insolvent liquidation or administration whilst the other three appear to have taken the view that the duty was modified when that was objectively the position, whilst expressing agnosticism as to whether the actual or constructive knowledge of the directors was required. It will be seen from the above that paragraphs 93 and 94 of the PC reflect the terms of the wording used in the judgments. All the comments of the Justices, whilst carrying weight are however technically obiter.

38. In the more recent decision of Zacaroli J at first instance in England in Hunt v Singh [2023] EWHC 1784 (Ch), the judge referred to the ratio of the Supreme Court as limited to the conclusion that the creditor duty did not arise whenever there was merely a real and not remote risk of insolvency.

(a) He referred to their obiter consideration of the point in time at which the creditor duty arose and the nuanced approach shown in respect of the effect of such a duty. He referred to the different formulations of "imminent insolvency (i.e. an insolvency which directors know ought to know is just around the corner and going to happen)" or the "probability of an insolvent liquidation about which the directors know or ought to know"; "insolvent or bordering on insolvency"; and "the probability of an insolvent liquidation or administration".

(b) He pointed out that in *Sequana* there was no question of actual insolvency at the time of the payment of the dividend and only a real risk, although not a probability of insolvency at an uncertain but not imminent date in the future.

(c) In the case before Zacaroli J, there was an actual tax liability, as ultimately found, albeit one which was disputed. The judge said that a disputed liability was not a contingent liability.

(d) It was conceded for the purpose of argument, that the creditors' duty did not arise simply because the company was in fact insolvent but that some form of knowledge on the part of the directors was required (an issue which had been left open by a number of the Justices of the Supreme Court in their obiter views).

(e) Although the defendant in Hunt (ibid) did not appear and was not represented, the judge accepted that the contentions advanced by Counsel for the claimant (with the concession made for the purpose of argument) were essentially correct. He said:

> "in my judgement, assuming some element of knowledge is required, where the company is faced with a claim to a current liability of such a size that insolvency is dependent on successfully challenging that claim, then the creditor duty arises if the directors know ought to know that there is at least a real prospect of the challenge failing."

(f) In so saying he recognised that the language of "real risk" of insolvency was specifically rejected by the Supreme Court but said that was in the different context of the possibility that a company which was undoubtedly solvent at the relevant time, might become insolvent and some point in the future. He saw an important difference between the two contexts, particularly in the light of the rationale for the creditor duty, namely the shift in economic interest which occurs when the company becomes insolvent, whether or not the directors realise that is the case.

(g) Thus, he said, that if at the relevant time the directors are wrong in their appreciation of the risk of the company actually being insolvent, then their actions and decisions in fact impact on the creditors at that time, either together with or to the exclusion of the shareholders.

(h) Knowledge of a real risk that the company's challenge to the claim may fail, therefore, equates to knowledge that it is the creditors that are potentially currently being affected by the directors' actions and decisions.

(i) He went on to emphasise that the fact that the creditor duty was triggered was only the starting point and that the consequences would vary enormously depending on the facts. The factors to take into account in determining the content of the duty and whether it was breached would include "the brightness of the light at the end of the tunnel" "the strength of the company's resistance to the claim" and "who has the most skin in the game" as far as the directors' proposed actions are concerned.

39. This makes the whole exercise intensely fact sensitive. There is, thus, once again, no plain or obvious point of law upon which the Claimants claim must founder and there is therefore no basis either for striking out or summary judgement against them on this basis.

The Insolvency Act Claims

40. The Defendants submitted that the PC failed to plead the basic statutory elements for fraudulent trading all because there was no allegation that the Defendants caused BSA to continue to trade whilst BSA was actually insolvent, thereby intentionally or recklessly exposing its creditors to harm. That submission ignores the terms of paragraph 153 which alleges both the knowing carrying on of the business with intent to defraud creditors and its continuation for a fraudulent purpose which is then set out as the enablement of the expropriation of its assets in furtherance of the Scheme. The fraudulent intent of the Defendants is then spelt out at paragraphs 156 - 158. It was also suggested that the only intent pleaded was to defraud a particular creditor, not the body of creditors but that is not the case, although the creditor specifically in mind was said to be the Al Khorafis (see PC paragraph 158).

41. The Defendants also submitted that the plea that Mr Sassoon was involved in a transaction in fraud of the creditors was deficient because he was not an officer of BSA at the time of winding up. That is a misunderstanding since the words "being at the time an Officer of the Company" refers to the time of the wrongful act, not the time of the winding up. This is obvious since otherwise, resignation immediately prior to the winding up would have the effect of exculpating the director concerned.

42. It is further said that no transaction has been identified as a transaction at an undervalue but this again is unfounded as the PC, at paragraphs 164-165, set out the transfer of BSA's business for no consideration as the relevant transaction. It is also submitted that the Claimants seek the return of company property whilst failing to identify any property in the hands of any of the Defendants against which BSA could assert a proprietary interest. The property in question is, once again, BSA's business and the plea for relief sets out the different forms of relief available under Article 115 of the 2019 Insolvency Law or Article 80 of the 2009 Insolvency law, in circumstances where, as stated by Counsel for the Claimant in argument, the Claimants were looking for an account of the profits made as a result of misappropriation of the business.

Miscellaneous

43. There were two other allegations which were specifically challenged in the Defendants' written submissions: namely first, the alleged failure by the directors to attempt to sell BSA's business or take action other than pursue a winding up; and secondly a contention that Mr Sassoon and Mr Astruc breached their obligations to BSA by acting on behalf BJSS in negotiations with ACCL regarding the termination of the joint venture. Conflict of interest issues arise for the reasons set out earlier in this judgement because, as directors of BSA, they would be obliged to obtain the maximum price, whereas BJSS would want to pay as little as possible. The fact that nothing emerged from such negotiations means that little turns on this, save for illustrating the directors' inability to act appropriately in a different context from those which give rise to causes of action. As to the first, whilst only the shareholders could effect the sale of the shares in BSA, and it appears that BSA's business could not have been sold without the shareholders' involvement, as directors of BSA, their duty was to act in its best interests and maximise the assets of the company, which might involve exploring the possibility of marketing and sale of the business, whether or not they also owed duties to the shareholders by reason of holding office or employment with them.

Conclusion

44. In my judgement, the Application made by the Defendants was misconceived and the scattergun approach adopted suggests once again their desire to stymie or stall the litigation without due regard for the principles which govern the grant of orders for striking out or immediate judgement. The pleading points argued were meretricious and contrived and there was no substance to the argument that insufficient facts had been pleaded, whether to constitute a particular cause of action or from which inferences of fraud and dishonesty could be drawn. There were no plain and obvious points of law which could properly be decided in order to dismiss any claim made by the Claimants and, even if that had been the case there would have been no purpose served in excising the occasional paragraph or claim when each of the causes of action depended on essentially the same allegations of fact to which the Defendants were, as their Defence showed, capable of pleading and which fall to be explored at trial.

45. The Application must therefore be dismissed, and costs follow the event.