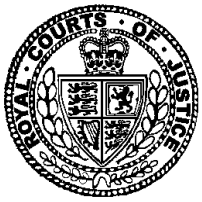

Neutral Citation Number: [2024] EWHC 818 (Comm)

Case No: CL-2021-000395

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/04/2024

Before :

SEAN O'SULLIVAN KC
(sitting as a Deputy Judge of the High Court)

- -

Between :

RIAD TAWFIQ AL SADIK	**Claimant**
- and –	
(1) CLYDE & CO LLP	
(2) MICHAEL BLACK QC	
(3) MARCUS STAFF	
(4) HARNEY WESTWOOD AND RIEGELS	**Defendants**

- -
- -

NIGEL JONES KC and **SARAH MCCANN** (instructed by **KEYSTONE LAW**) for the **CLAIMANT**
IAN CROXFORD KC and **DANIEL EDMONDS** (instructed by **REYNOLDS PORTER CHAMBERLAIN LLP**) for the **FIRST DEFENDANT**
CHARLES HOLLANDER KC and **JOANNE BOX** (instructed by **DAC BEACHCROFT**) for the **SECOND AND THIRD DEFENDANTS**
ALAIN CHOO-CHOY KC and **KYLE LAWSON** (instructed by **MISHCON DE REYA LLP**) for the **FOURTH DEFENDANT**

Hearing dates: 11-15 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 12 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sean O'Sullivan KC (sitting as a Deputy High Court Judge):

1. This is a professional negligence claim brought by Mr Al Sadik ("C") against his former legal advisers (together "the Ds") in respect of an unsuccessful claim which he pursued in the Cayman Islands, and subsequently before the Judicial Committee of the Privy Council, between December 2009 and 18 June 2018 ("the Investcorp Claim").

2. The Investcorp Claim was, by any sensible measure, a complicated and expensive dispute. Mr Jones KC (C's counsel) described it as "catastrophic". From C's perspective, that is undoubtedly an accurate description. C lost at trial, with all of his different claims being dismissed. He then lost on appeal to the Court of Appeal and on further appeal to the Privy Council. An effort to bring proceedings in Dubai was scuppered by an anti-suit injunction granted by the Caymanian Court.

3. The present claim is also complicated, although perhaps not quite to the degree of the underlying litigation from which it has spawned. It is defended at every level by all of the Ds, who say (among other things) that they were not negligent and that, even if they had been, the matters complained about would not have made any difference to the end result given that, as Mr Hollander KC (for D2 and D3) put it rather colourfully, C "*went down to the sound of trumpets on every single allegation*" in the Investcorp Claim.

4. I am concerned with what might be described as a series of threshold issues. On 21 March 2023, Nigel Cooper KC (sitting as a Deputy Judge of this Court) ordered that the limitation issues raised by some of the Ds should be heard as preliminary issues, together with applications for reverse summary judgment made by all of the Ds.

5. I heard some evidence on the limitation issues, followed by submissions on those issues and then submissions on the summary judgment applications. I must pay tribute to the skill with which all of the arguments were presented to the Court, both in writing and orally, as well as to the cooperation between the legal teams, who agreed a timetable for evidence and submissions, and then largely stuck to it, working together to keep what could have been a rather sprawling hearing under control.

6. I am going to start by introducing the facts generally and setting the scene, before turning to the two aspects, which I will address in the order in which I heard them: limitation and then summary judgment.

A Background facts

7. What follows is intended to be introductory. It utilises both the factual introduction provided in C's skeleton for the hearing and a very helpful "*Defendants' Factual Narrative*" which was provided by the Ds. In places, my summary will inevitably gloss over or simplify aspects of the story. There are probably also some parts of it which one party or another would consider controversial, but its purpose is only to assist the reader with understanding what follows. My specific factual findings (e.g. on knowledge) are contained in a later section of this judgment.

A.1 C's investment

8. C is an ultra-high net worth individual and very experienced businessman and investor, resident in Dubai. He is fluent in English. He is the owner of a successful construction

and engineering company based in the UAE. In 2007, he sold shares in his company as part of a merger with an Australian firm in exchange for US$327 million. He was looking to invest some of that money.

9. Following discussions in late 2007 and early 2008, C and Investcorp Bank B.S.C. and certain entities related to Investcorp Bank (all which I will refer to collectively as "Investcorp") agreed an investment scheme. As part of this, on about 1 March 2008, C and his wife entered into a share purchase agreement ("the SPA") with Investcorp Bank, Investcorp Nominee Holder Limited and Shallot IAM Limited ("Shallot"). Shallot was a Caymanian SPV, incorporated for the specific purpose of handling C's investment with Investcorp.

10. The SPA provided as follows:

*"**A. PURPOSE***

I/We have requested Investcorp Bank B.S.C. ('Investcorp') to establish a separately managed account (the 'Investment Account'), which will invest in certain hedge funds or segregated accounts with any hedge fund managers selected by the Investment Manager (as defined below), including, but not limited to, any Investcorp hedge fund (whether an Investcorp Fund of Hedge Funds, an Investcorp Single Manager Fund or any other Investcorp hedge fund product (any of the foregoing, an 'Investcorp Hedge Fund') or a hedge fund or a segregated account with any other hedge fund manager; provided, however that any such other hedge fund manager is at the time of investment a manager with which an Investcorp Hedge Fund is invested. The Investment Account will be established as a special purpose vehicle, Shallot IAM Limited which will be incorporated under the laws of the Cayman Islands (the 'Company'). All assets of the Company are hereafter referred to as the 'Assets Under Management' and each hedge fund or segregated account in which Assets Under Management are invested is hereafter referred to as an 'Underlying Investment'. To the extent that Assets Under Management are invested in any Investcorp Fund of Hedge Funds, such investment will be made in non-fee bearing shares.

B. SUBSCRIPTION: CURRENCY

Subject to the acceptance hereof by Investcorp and subject to the terms and conditions set forth in this Share Purchase Agreement, I/we hereby agree to purchase, and Investcorp agrees to procure the Issuance and sale, for an aggregate purchase price equal to the Investment amount indicated on the signature page hereof (the "Investment Amount"), of a number of UAE Dirham denominated Participating Non-Voting Redeemable Preference Shares of the Company, par value equal to the UAE Dirham equivalent to US$0.01 per share ("Company Shares"), equal to (i) the Investment Amount, divided by (ii) UAE Dirham 1,000.00…

C. INSTRUCTIONS FOR SUBSCRIPTION

I/We understand that this Agreement must be completed,, dated and executed by me/us, and must be received by Investcorp at least seven calendar Days prior to the applicable Subscription Date, unless such requirement is waived. At least five calendar Days prior to the applicable Subscription Date, I/we shall transfer the total Investment Amount to the account indicated on the signature page of this Agreement in UAE Dirham net of

all withholdings, cost of exchange and banking charges, and/or authorize Investcorp to debit my/our account with Investcorp for such amount. The Company Shares will be issued on the Subscription Date, and recorded in my/our name in registered, book entry format.

I/We understand that no acceptance of this investment shall be final until (a) Investcorp receives payment of the Investment Amount, (b) the conditions set forth in Section D below have been satisfied, and (c) the Subscription Date has occurred. Prior to the Subscription Date, Investcorp may determine to return all or part of the Investment Amount to me/us in the event of an Inability to deploy subscription monies or for any other reason. I/We understand that my/our subscription cannot be revoked by me/us in whole or in part at any time after my/our delivery of this Agreement to Investcorp. Any amounts held by Investcorp prior to the Subscription Date will earn interest at a market rate, and accrued interest, plus any amount not accepted for investment, will be returned to me/us within a reasonable time after the Subscription Date (or, if earlier, within a reasonable time after Investcorp determines not to proceed with this subscription).

D. ACTIONS TO BE TAKEN PRIOR TO ACCEPTANCE OF SUBSCRIPTION

In contemplation of my/our investment, and as a condition precedent to the final acceptance thereof, I/we understand and agree that the following actions shall be taken:

1. *The Company will enter into (a) an Investment Management Agreement (the "Management Agreement'), pursuant to which the Company will appoint Investcorp Investment Advisers Limited ("IIAL" or the "Investment Manager') as its sole and exclusive manager in respect of its acquisition, holding and disposition of Its corporate assets. I/we understand that I/we may receive a copy of the Management Agreement upon written request to Investcorp.*

2. *The Initial shareholder of the Company has elected the directors of the Company, who will continue to serve as directors of the Company until their successors are duly elected. I/We understand that the Incumbent directors will have the power to fill any vacancies on the Company's board of directors. I/We further understand that the Company's board of directors will authorize or otherwise cause the Company to take any actions that the board believes are necessary or desirable In order to effectuate the purposes of this Investment or otherwise manage the affairs of the Company."*

11. It should be noted that the "*I/we*" repeatedly referred to is C (and his wife). In simple terms, pursuant to the SPA, C agreed to subscribe for shares in Shallot and that Shallot would invest C's money in hedge funds.

12. On 27 February 2008, C transferred AED 500 million (approximately US$136 million) to Investcorp in advance of executing the SPA.

13. On 1 March 2008, the SPA was executed.

14. On 4 March 2008, Investcorp transferred that US$136 million-odd to Shallot, which in turn transferred the funds to a subsidiary SPV, Blossom IAM Ltd ("Blossom").

15. C's funds were invested by Blossom, with investments beginning on 4 March 2008 and continuing through until 2 September 2008.

16. The investment made by C was leveraged, with his initial investment of around US$136 million being leveraged by additional borrowing of US$214 million. One of the central issues in the Investcorp Claim concerned this leveraging, which increased, in relative terms, the risk to which C's investment was exposed. What Investcorp put in place for C was what was labelled in the Investcorp Claim as "First Layer" leverage, meaning where the SPV investment vehicle borrows money which is then invested. Another way of creating leverage would be "Second Layer" leverage, where the hedge fund in which the investment is made seeks to achieve a certain level of leverage as part of its investment strategy.

17. Unfortunately for C, his investments suffered during the global financial crisis in 2008 such that, by the time C redeemed his investment in December 2009, he had incurred an overall loss of AED 207 million (around US$56 million). The extent of his loss was magnified by the leveraging which had been put in place.

A.2 Commencing the Investcorp Claim

18. A dispute arose between C and Investcorp in relation to the investment. C alleged that Investcorp had guaranteed a return of 45% on the investment over a three-year period. Investcorp denied this.

19. As a part of this dispute, on 26 February 2009, C requested a copy of the investment management agreement ("the IMA") which is referred to in section D of the SPA (see above). Investcorp then executed the IMA on around 1 March 2009, which was stated to be "*effective as of 4 March 2008*". It sent this document to C.

20. C instructed the First Defendant ("D1") and subsequently the Second and Third Defendants, Michael Black KC ("D2") and Marcus Staff ("D3"), and the Fourth Defendant, Harney Westwood & Riegels ("D4") to advise him in relation to a potential claim against Investcorp. It is common ground that D1's retainer was governed by UAE law, D2/D3's retainer by English law, and D4's retainer by the law of the Cayman Islands.

21. C commenced the Investcorp Claim in the Grand Court of the Cayman Islands on 14 December 2009.

22. In summary, C alleged that Investcorp had guaranteed a 45% return on his investment over a three-year period; had fraudulently misrepresented its ability to generate a return on the investment; had deceitfully withheld the fact that it was applying leverage to the investment; and had acted in breach of contract and/or breach of fiduciary duty when using leverage. C sought to recover the following sums:

    22.1. damages for his loss of bargain on the contractual promise of a 45% return. That would have yielded around US$200 million.

    22.2. Alternatively, the return of his US$136 million investment plus damages for loss of use of those funds from 27 February 2008. He accepted that he would give credit for the value, if any, of his investment that had already been returned

to him.

22.3. In the further alternative, the amount by which his investment was diminished as a result of the use of leverage.

23. Investcorp served its Defence on 11 June 2010. It denied all of the claims. In particular, it denied that there was any collateral contract to guarantee the 45% return and it averred that the investments had been leveraged in accordance with the SPA.

A.3 The reamendment application

24. In October and November 2011, the parties exchanged expert reports in the field of hedge funds. Amongst other things, C's hedge fund expert, Ms Marti Murray, opined in her report that Investcorp had acted imprudently in connection with the construction and management of C's portfolio, specifically in relation to asset allocation and the use of leverage.

25. On 17 November 2011, C issued an application for permission to re-amend his Amended Statement of Claim. The proposed re-amendments, as set out in the draft Re-Amended Statement of Claim ("the ReASOC"), alleged that the IMA was a sham agreement which had been created on 26 February 2009 for the purpose of misleading C. It was alleged that the consequences of this were, amongst other things, that:

25.1. the IMA itself was void and the SPA had never come into effect because the entry into the IMA was a condition to the SPA;

25.2. any investment decisions purported to be made pursuant to the IMA or SPA were not valid because no such investment power existed; and/or

25.3. the investment had been paid over under a mistake of fact and C was entitled to have the money restored to him.

26. There were also amendments picking up Ms Murray's points about Investcorp's construction and management of C's portfolio, especially in relation to investment allocation.

27. There were new claims for relief, including:

27.1. Claim for declarations: C sought declarations that the IMA was a sham document of no legal effect, alternatively that it came into effect only on 1 March 2009; that the SPA never came into effect, alternatively that it came into effect only on 1 March 2009; and that C's investment was knowingly (and unconscionably) received by Investcorp Bank and/or Shallot on trust.

27.2. Money had and received: C alleged that, as a result of the SPA not coming into effect, or only coming into effect on 1 March 2009, the money had been paid over by C under a mistake of fact in 2008.

27.3. Further breach of trust: C alleged that Investcorp and/or Shallot and/or Blossom did not have authority to exercise the discretionary power of investment and, when they purported to do so, the power was exercised in breach of trust and in the knowledge that the exercise of the power was in breach of trust.

28. Investcorp opposed the application to amend and cross-applied to strike out various parts of Ms Murray's report, where it was making allegations about Investcorp's imprudent approach to asset allocation. Mr Justice Andrew Jones QC ("Justice Jones"), who was the allocated trial judge, heard the applications on 1 December 2011. C attended the hearing by video-link from Dubai.

29. Justice Jones refused to allow C to make the controversial reamendments. Some uncontroversial reamendments were allowed. Justice Jones explained this decision in a short ruling:

"This application is dismissed for the reasons which I will briefly summarize as follows. Firstly, it is not necessary to amend the Statement of Claim in order to do justice between the parties in the sense that the Plaintiff is not at any risk of losing his case in the absence of amendment. Secondly, I think that the intended amendments raise additional causes of action, which if they were to be pleaded at all, could and should have been raised at an earlier stage. And certainly no later than the 16th September. Thirdly, I agree that the intended amendments do tend to introduce new allegations of negligence, which the defendant cannot reasonably be expected to deal with properly in the limited time available before trial. Fourthly, I think that allowing these amendments is likely to disrupt the orderly preparation of this case for trial commenced on the 9th January, and for a variety of reasons, I'm satisfied that this case should not be adjourned. So for those reasons, I dismiss this application…"

30. Justice Jones did not grant Investcorp's application to strike out the parts of Ms Murray's report which were making allegations about Investcorp's imprudent approach to asset allocation. He allowed C to rely upon these at trial on a *de bene esse* basis, with questions of admissibility, in the absence of a pleaded case of negligence, left over for another day.

31. A few days later, on Sunday 4 December 2012, C met with Mr Hutchison (of D1), together with D2, at the Capital Club in Dubai to discuss the outcome of the hearing and preparations for trial. Mr Hutchison's attendance note of that meeting records that the first point raised by C was a complaint that his legal team had taken too long to pursue the reamendment application: "*Why were the materials in our hands not submitted back in Sept? It was too late on 1 Dec.*".

A.4 <u>The Trial and the Judgment</u>

32. The trial of the Investcorp Claim ("the Trial") took place over 29 days from 9 January to 7 March 2012 before Justice Jones.

33. Justice Jones handed down a detailed 98-page judgment on 18 May 2012 ("the Judgment"). He dismissed all of C's claims. He made the following findings in relation to the factual witnesses:

33.1. C was not a reliable witness and advanced evidence that was "*inconsistent*" and "*disingenuously contrived*". He "*unfailingly interpreted every word of* [the documentary evidence] *in whatever way best suited his case*" and "*His general demeanour in the witness box was that of an advocate, convinced of the merits of his case, but oblivious to the possibility that other witnesses might have recorded conversations and events accurately in their emails*";

33.2. Mr Zaidi, C's employee and investment adviser, "*loyally supported his employer in a way which lacked all credibility*" and was "*not a truthful witness*";

33.3. Investcorp's witnesses of fact, by contrast, were "*experienced industry professionals*" and "*honest*" such that their evidence "*is more reliable than that of Mr Al Sadik*".

34. In outline, Justice Jones made the following findings on C's claims:

34.1. There was no collateral contract concluded between C and Investcorp.

34.2. On its true construction, the SPA authorised Investcorp to leverage the investment amount, by applying leverage at the SPV level, and the use of Blossom to do so was not a breach of contract.

34.3. If, contrary to this finding, Investcorp had not been authorised to leverage the investment at the first layer, Investcorp would instead have allocated the investment to certain specific hedge funds which applied leverage. Had it done so, having regard to the actual performance of those funds, C's loss would have been **greater** than that which he actually suffered.

34.4. Investcorp's response to the discovery that no IMA had been entered into in 2008 was "*deceitful*". A standard form IMA had been prepared including an express term authorising first layer leverage and executed on 1 March 2009. The document purported to have retrospective effect, being said to be "*effective as of March 4 2008*". It was sent to C on 8 March 2009, without explaining to him that this had been executed only a few days before. Justice Jones observed that: "*Investcorp rightly places no reliance upon this document which is not binding and enforceable in accordance with its terms, but it is relevant to my assessment of the credibility of the evidence of those involved in its production*".

34.5. Investcorp's investment decisions, and more specifically its "*initial asset allocation decision and the subsequent decisions in relation to the application of leverage*", were made *bona fide* for a proper purpose in accordance with the SPA and in what was considered to be C's best interests. There was no ulterior motive of capitalising new funds and/or increasing fee income.

35. Following on from the Judgment, C was ordered to pay approximately US$15.4 million in costs. In this context, Justice Jones found that the collateral contract claim had been "*pursued relentlessly and to the bitter end*", notwithstanding that C "*knew in his own mind that he had not been given any enforceable guarantee*". He thus held that this part of the case had been conducted "*improperly and unreasonably*", and that the costs of that claim should be paid on the indemnity basis.

A.5 Appeals

36. C appealed to the Court of Appeal of the Cayman Islands.

37. The hearing of that appeal took place over four days between 20 and 23 November 2012. For reasons which are unclear, judgment was not handed down until 21 September 2016, nearly four years after the hearing.

38. Sir John Chadwick, Justice of Appeal in the Cayman Islands, prepared a detailed 150-page judgment ("the Appeal Judgment"). The Appeal Judgment made clear that there had been no breach of the SPA: Investcorp was entitled both to leverage at the SPV level and to transfer the investment funds to Blossom to do so.

39. C then appealed to the Judicial Committee of the Privy Council. The appeal was heard by a five-member board on 30 April and 1 May 2018.

40. The Privy Council Judgment was handed down on 18 June 2018, dismissing C's appeal. The two main issues by that stage had been whether (i) Shallot's transfer of funds to Blossom or (ii) Blossom's leveraging of those funds at the SPV level involved breaches of the SPA by Investcorp and Shallot. The Board found that, on its true construction, the SPA authorised leveraging of the investment at the SPV level and that the transfer of funds to Blossom was an authorised administrative step for the achievement of that purpose.

41. The Board also considered whether, in the event that there was a breach of the SPA, C had suffered actionable loss. This issue did not arise given the Board's other findings, but it expressed the view that C would have faced an "*uphill task…in the light of the judge's finding that, had Investcorp perceived that first layer leveraging through Blossom was not permissible, it would have adopted second layer leveraging of his portfolio through the feeder funds, which would have caused greater loss than in fact he suffered*".

A.6 The Dubai Proceedings and anti-suit injunction

42. In May 2018, after the hearing before the Privy Council, consideration was being given to C's other options in the event that the appeal was unsuccessful. On 21 May, D1 emailed C a summary of headline points. This email indicated that there was a jurisdictional basis for bringing a claim in Dubai.

43. C instructed D1 to proceed, and they instructed local solicitors Hilal & Associates in Dubai to act as local advocates.

44. On 22 May 2018, D1 emailed D2 and D3 as follows:

> *"…Action in Dubai - effect on Cayman / JCPC?*
>
> *Separately, as mentioned previously to Michael, we are preparing to issue a new claim against Investcorp in the Dubai Courts (we consider it is available and a more favourable prospect than going in Bahrain), for which timing at this point is primarily driven by need to protect time for various of the causes of action under UAE law. We may file at the end of this week … I have also alerted the client previously to the risk I see that upon being notified of the Dubai action (before the JCPC judgment, which is likely) Investcorp will seek to inform the JCPC or try something to anti-suit in Cayman which may damage the JCPC judgment prospects. Michael expressed the view when we discussed briefly that the risk of adverse impact was low, weighed against the risk of time bar in Dubai. And that we could justify the action to Cayman / JCPC if needed on grounds that we needed to file to protect time and the delay from CA has meant it coincides with this.*

Please can you give me your views on this issue now before we file. It seems to me more of a risk not to commence in Dubai because we're waiting for JCPC and could lose any other rights to claim in Dubai (albeit I consider the correct application of prescription gives more time, the client fairly wants to take no chances on the possible shorter period)…"

45. D2 responded to that email the same day:

…Secondly, if the choice is between the possibility of losing the right to make a claim in the UAE altogether and the hard-to-anticipate consequences of the claim being brought to the JCPC's attention, I think that common prudence dictates one follows the course of bringing the claim...

46. On 27 May 2018, C issued proceedings against Investcorp in Dubai on 28 May 2018 ("the Dubai Proceedings").

47. On 31 August 2018, a summons for an anti-suit injunction in relation to the Dubai Proceedings was issued in the Grand Court of the Cayman Islands. On 18 October 2018, the application was heard, with C represented by D4 with new leading counsel (Mr Tom Lowe QC of Wilberforce Chambers).

48. On 13 November 2018, the Grand Court of the Cayman Islands granted an injunction against C in relation to the Dubai Proceedings.

A.7 <u>Events following the Privy Council decision</u>

49. On 17 July 2018, a meeting took place at C's offices in Dubai between C and Mr Hutchison of D1. Mr Hutchison emailed C the next day and recorded that, at their meeting, C had stated that he was dissatisfied with the services that D1 had provided in connection with the Investcorp Claim, and that he intended "*… to pursue a claim against us (and against Counsel) in relation to our handling of your claim in the Courts of the Cayman Islands and the Judicial Committee of the Privy Council …*".

50. Later on 17 July 2018, C met with Mr Jeremy Miocevic, a partner in the Dubai office of Curtis, Mallet-Prevost, Colt & Mosle LLP.

51. On 23 July 2018, D1 informed C that they were unable to continue acting for him, given his "*stated intention to raise a claim in negligence against us*".

52. On around 30 July 2018, Mr Miocevic informed C that his firm did not have the requisite expertise to handle "*the case against Clyde & Co for negligence*". He recommended that C instruct Keystone Law, who were approached in around late July/early August 2018.

53. On 2 July 2019, Keystone Law/Nigel Jones QC provided C with a written advice on potential claims against the Ds.

A.8 <u>The present claim</u>

54. As noted above, the present claim was issued on 30 June 2021.

55. C does not allege that his legal representatives were negligent in their conduct of the

Trial or the appeals. He makes two sets of claims. The first concerns the reamendment application. It is alleged that all of the Ds failed to advise him to make the reamendment application earlier, on the basis that the application would then have succeeded, and that, if this had happened, the Investcorp Claim (as re-amended) would also have succeeded, or at least would have had "*a substantial chance of succeeding*", or would have given rise to "*a reasonable prospect of achieving an acceptable settlement with Investcorp*".

56. The second concerns the anti-suit injunction. C says that D1 and D2 failed to advise him properly as to the risk of an anti-suit injunction in relation to the Dubai Proceedings (and the costs consequences of the same) and that, had they done so, he would not have issued the Dubai Proceedings, and would not have incurred his own legal costs in relation to the Dubai Proceedings or the anti-suit injunction, or any liability to pay Investcorp's costs of the anti-suit injunction. This claim is valued at about US$1.75million.

B Limitation

B.1 Introduction

57. The claims against D2/D3 and D4 are brought only in the tort of negligence. It is common ground that the primary limitation period for allegations of negligence relating to the reamendment application against D2/D3 and D4 has expired, on the basis that the cause of action accrued more than six years before the claim was issued. It should be noted that D1 has accepted that a different limitation period applies to it, as a result of its retainer being subject to UAE law. D1 was not involved in the trial of these preliminary issues.

58. The preliminary issues concern (a) the operation of the extended limitation period (i.e. in s.14A of the Limitation Act 1980) in England and Wales, and the equivalent provision in the Cayman Islands (the Cayman Limitation Law (1996 Revision) ("the CLL 1996")), and also (b) C's allegations that the Ds owed continuing duties of care to advise that they, or any other member of the legal team, had or might have acted negligently, which continuing duty was breached by D2 to D4 each day until about 23 July 2018, when C's retainer with D1 came to an end.

59. I heard evidence from C (by videolink) on the state and development of his knowledge and understanding over the relevant period. There was no live evidence called by the Ds.

B.2 The legal framework: s.14A / s.14

(a) The statutes: s.14A of the Limitation Act 1980 / s.14 of CLL 1996

60. Section 14A of the Limitation Act 1980 (added by s1. of the Latent Damage Act 1986) provides as follows:

> *"(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.*

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either—

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

61. Section 14 of the CLL 1996 is in very similar terms:

"(1) Subject to subsection (2), this section applies to any action for damages for negligence… where the starting date for reckoning the period of limitation under paragraph (b) of subsection (3) falls after the date on which the cause of action accrued.

(2) Section 4 shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of —

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (4), if that period expires later than the period mentioned in paragraph (a).

(4) For the purposes of this section, the starting date for reckoning the period of limitation under paragraph (b) of subsection (3) is the earliest date on which the plaintiff … first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action. Knowledge that any act or omission did or did not, as a matter of law, involve negligence is irrelevant for the purposes of this subsection.

(5) In subsection (4) —

"the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge of both —

(a) the material facts about the damage in respect of which damages are claimed; and

(b) the other facts relevant to the current action mentioned in subsection (7).

(6) For the purposes of paragraph (a) of subsection (5), the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(7) The other facts relevant to the current action and referred to in paragraph (b) of subsection (5) are —

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute the negligence;

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of any person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(8) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire from facts —

(a) observable or ascertainable by him; or

(b) ascertainable by him with the help of appropriate expert advice which it was reasonable for him to seek, but a person shall not be taken by virtue of this subsection to have knowledge of any fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

62. For present purposes, it was agreed that I could treat these two provisions as functionally identical, although some parts come in a different order. It was also common ground that I could treat English authorities on s.14A of the Limitation Act 1980 as, in effect, representing Caymanian law on s.14 of the CLL 1996.

(b) Required knowledge

63. The key question is when C had the "*knowledge required for bringing an action for damages in respect of the relevant damage*" which comprises:

63.1. knowledge of the material facts about the damage in respect of which damages are claimed, which is sometimes labelled "material facts knowledge";

63.2. knowledge that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

63.3. knowledge of the identity of the defendant and, if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant. There is no issue about this type of knowledge in this case and I will not address it further.

64. It might be noted that it is expressly provided that knowledge that the act or omission involves negligence is irrelevant. In Haward v Fawcetts [2006] UKHL 9, Lord Nicholls explained at [12] that:

"… Parliament has drawn a distinction between facts said to constitute negligence and the legal consequences of those facts. Knowledge of the former (the facts) is needed before time begins to run, knowledge of the latter (the legal consequence of the facts) is irrelevant … A claimant need not know he has a worthwhile cause of action".

65. This last point can cause conceptual problems in the context of solicitors' negligence cases, where the clients might need some understanding of the law in order to see that they are worse off, or that they are worse off because of a failure by the solicitor to advise (see Haward at [15]).

66. More generally, it has been said that the Court should adopt a broad common-sense approach when considering the date on which relevant knowledge was, or could have been acquired: e.g. Spencer-Ward v Humberts [1995] 1 EGLR 123 per Lord Bingham LJ at p.126 ("*It is, I think, necessary that issues on this section should be approached in a broad common-sense way, bearing in mind the object of the section and the injustice that it was intended to mitigate. There is a danger of being too clever and it would usually be possible to find some fact of which a plaintiff did not become sure until later*"). I take this as encouragement to avoid being overly technical about any of the required knowledge.

67. Nugee J set out a summary of the law on s.14A at paragraphs [15] - [16] of Cole v Scion Limited [2020] EWHC 1022 (Ch), which has been adopted as common ground in subsequent cases and was commended to me by C. It is helpful and I will set it out in full (save for observations specific to the facts of that case), although not all of the commentary is directly relevant to the issues with which I am concerned:

"It can be seen that the effect of s. 14A is as follows:

(1) It only applies to claims in negligence (and only to claims other than claims for personal injury): s. 14A(1).

(2) The purpose of the section is to correct the injustice that could be caused by the ordinary 6 year time limit for a claim in tort. A cause of action in negligence accrues as soon as the claimant suffers loss as a result of the defendant's negligence, and a claimant may suffer loss without being aware of it, particularly (although not only) in cases of economic loss. Under the law as it previously stood, a claimant who suffered such latent damage might therefore find that their action was barred before they even knew they had a claim. The effect of s. 14A(4) is to give a claimant in such a case a secondary period of 3 years from the "starting date".

(3) The starting date is usually the date when the claimant has the requisite knowledge. By s. 14A(5) the claimant must also have the right to bring an action for damages, but in most cases, including this one, this has no practical effect on the starting date. In practical terms the question is when the claimant first has the requisite knowledge.

(4) The combined effect of s. 14A(6)-(8) is that there are four things that the claimant has to know. The first (by s. 14A(6)(a) and (7)) is that he has suffered sufficiently serious damage to make it worth suing. This relates solely to matters of quantum (Haward v Fawcetts [2006] UKHL 9 ("Haward") at [107] per Lord Mance). Since the putative defendant is assumed not to dispute liability and to be able to satisfy a judgment, this is not a very high bar and only really serves to cut out the case where all the claimant knows is that he has suffered loss in some trivial amount, "so minor that no one would contemplate instituting proceedings" (Haward at [106]).

(5) The second (by s. 14A(6)(b) and (8)(a)) is that the damage was "attributable to" the act or omission alleged to constitute negligence. This requirement is the one that has given rise to most difficulty in the authorities, and I will have to look at it in more detail below. In practice in the present case it means that for

the vicarious liability claim what the Claimants needed to know is that the damage was attributable to the advice, or lack of it, given by Formation.

(6) I can take the third and fourth together. The effect of s. 14A(6)(b) and (8)(b) and (c) is that the claimant needs to know the identity of the defendant, and, in a case of vicarious liability, the identity of the person whose act or omission is in question, and the facts making the principal liable…

(8) By s. 14A(9) a claimant does not need to know that the relevant acts or omissions constituted negligence. This provision has given rise to a certain amount of difficulty in the reported cases, but it is not suggested that anything turns on it in the present case.

(9) Finally, s. 14A(10) in effect extends a claimant's knowledge from his actual knowledge to his constructive knowledge…

16. The section has now been in force in this form since 1986 and has unsurprisingly accumulated a fair amount of authority. As I have said there was little dispute as to the law, and I can summarise what I take from that cited to me in the present case as follows:

(1) The leading case on s. 14A is Haward. This was in fact a case of actual knowledge not constructive knowledge, but much of what their Lordships said is relevant to both. For a convenient summary, Mr Pooles referred me to the judgment of Tomlinson LJ in Jacobs v Sesame Ltd [2014] EWCA Civ 1410 ("Jacobs") at [26ff] where he cited the relevant passages from speeches of four of their Lordships. I do not think it necessary to set them all out, although I refer to certain points that emerge from them below.

(2) The burden of proof under s. 14A is on the claimant to establish that he brought his claim in time. It is incumbent on the defendant, as with all limitation defences, to raise the issue by pleading it, but once it has been raised, it is for the claimant to prove that he first had the requisite knowledge 3 years or less before the proceedings were brought. There was no dispute about this, and it is supported by authority at the highest level (see eg Haward at [23]-[24] per Lord Nicholls and at [128] per Lord Mance; see also Jacobs at [4] per Tomlinson LJ), although at first blush it seems a little odd. Limitation is a defence, and normally one would have thought it was for a defendant to make out a defence. I can see that there may be pragmatic reasons why it is appropriate to require the claimant to establish when he first had actual knowledge of something, as this is something which (by definition) is peculiarly within the claimant's own knowledge and about which the defendant will usually be in the dark; but is it not clear why the same should be the case where a defendant is relying not on actual knowledge but on constructive knowledge, which is an objective question (see below). One might have thought that if a defendant wished to allege that the claimant had constructive knowledge, it would be for him to establish what a reasonable person would have known. But the authorities are clearly to the contrary, and it was common ground that the burden was on the claimant, and I will therefore proceed on this basis.

(3) There is a substantial body of authority on what "knowledge" requires. It is

summarised by Lord Nicholls in Haward at [8]-[10]. It does not require knowing with certainty, but it requires more than suspicion:

"It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence".

See also at [112] per Lord Mance.

(4) *Not only does the claimant not need to know with certainty, he also does not need to know in detail. There are many statements to this effect, mostly in the context of attributability. As long ago as Wilkinson v Ancliff (B.L.T.) Ltd [1984] 1 WLR 1352, a case on the similar provisions in relation to personal injury claims in ss. 11 and 14 LA 1980 decided before the Latent Damage Act 1986 was even passed, Slade LJ said at 1365A-B that he thought that an employee who had "broad knowledge" that his injuries were due to his working conditions might well have enough knowledge of attributability to start time running:*

"even though he may not yet have the knowledge sufficient to enable him or his legal advisers to draft a fully and comprehensively particularised statement of claim."

(5) *Other statements to similar effect can be found collected in the speech of Lord Nicholls in Haward at [10], such as that a claimant needed to know "in general terms" that her complaint was capable of being attributed to an operation, or that a claimant needed to know the "essence" of the relevant act or omission, or have "in broad terms" knowledge of the facts on which the complaint is based; see also at [66] per Lord Walker referring to the "essence" or "essential thrust of the case" or facts which "distil what [the complainant] is complaining about".*

(6) *So far as the question of attributability under s. 14A(8)(a) is concerned, "attributable" means "capable of being attributed to" (rather than "caused by"): Haward at [122] per Lord Mance, approving a line of cases to this effect. What is required for a claimant to have knowledge of attributability is therefore knowledge in broad terms of: (a) the facts on which the claimant's complaint is based; (b) the defendant's acts or omissions; and (c) that there was a real possibility that those acts or omissions had been a cause of the damage.*

(7) *For the purposes of constructive knowledge, the test is an objective one, based on what a reasonable person with the general characteristics of the claimant would have done: see Gravgaard v Aldridge & Brownlee [2004] EWCA Civ 1529 at [22] per Arden LJ:*

"Section 14A(10) does not state that a person's knowledge includes knowledge "which a reasonable person might be expected to acquire" but rather that a person's knowledge includes knowledge "which he [she] might reasonably be expected to acquire" (contrast s.14A(7)). In my judgment, this choice of wording is significant. It means, in my view, that in general the court must have regard to the characteristics of a person in the position of the claimant, but not to

characteristics peculiar to the claimant and made irrelevant by the objective test imposed by subs.(10).”

It is common ground that in the present case that means that one must have regard to the fact that the Claimants are professional footballers or managers, and that in assessing their constructive knowledge, what has to be considered is what knowledge a professional footballer or manager might reasonably be expected to have acquired. One does not however have regard to the particular characteristics of each individual Claimant.

(8) In this context, a reasonable person is expected to read his correspondence: Webster v Cooper Burnett [2000] PNLR 240…at 246C per Swinton Thomas LJ…”

(c) Burden of proof

68. At paragraph [16(2)] of Cole, Nugee J suggested that the burden of proof under s.14A is on the claimant, who must establish that he brought his claim in time. He said that it is incumbent on the defendant to raise the issue by pleading it, but once it has been raised, it is for the claimant to prove that he first had the requisite knowledge 3 years or less before the proceedings were brought.

69. However, in Nash v Eli Lilly [1993] 1WLR 786, Purchas LJ had said (at subparagraph 6 on p.796):

“Finally it is important to remember where the onus of proof lies. If the writ is not issued within three years of the date when the cause of action arose (section 11(4)(a)), the onus is on the plaintiff to plead and prove a date within the three years preceding the date of the issue of the writ (section 11(4)(b)). If the defendant wishes to rely on a date prior to the three year period immediately preceding the issue of the writ, the onus is on the defendant to prove that the plaintiff had or ought to have had knowledge by that date.”

70. I found this last proposition conceptually difficult. I can understand how it might be said that the claimant is obliged to plead and prove that the date of knowledge came within 3 years of the commencement of proceedings. I also follow that one could say that, if a defendant alleges that knowledge was obtained earlier, the defendant must plead and prove that positive case. But if both of those propositions are true at the same time, it is not clear to me which ultimately governs. What if the Court were to find neither parties’ case to be proved on the balance of probabilities: would the claim be time-barred or not?

71. Fortunately, everyone agreed that this conundrum was unlikely to need to be solved in the present case. Indeed, it would be a very strange case indeed in which it ended up mattering. I do not propose to say any more about it.

(d) Material Facts Knowledge

72. In Haward, Lord Nicholls said (at [10]) that a claimant needed to have “*in broad terms*” knowledge of the facts on which the complaint is based; see also at paragraph [66], where Lord Walker refers to the “*essence*” or “*essential thrust of the case*” or facts

which "*distil what [the complaint] is complaining about*".

73. It has repeatedly been said that this is not a high hurdle: see, for example, paragraph 15(4) of Nugee J's summary in Cole (i.e. "*…not a very high bar and only really serves to cut out the case where all the claimant knows is that he has suffered loss in some trivial amount*"). I am in no doubt that this correctly states the law. In 3M United Kingdom Plc v Linklaters [2006] EWCA Civ 530, Moore-Bick LJ explained at [29]-[33] that this requirement is "*directed to a narrow question*" and "*concerned only with the claimant's knowledge of the seriousness of the damage*". He added that: "*In a commercial context damage does not have to be very substantial to satisfy those requirements*".

74. The requirement for knowledge is often formulated in simple and rather reductive terms, which is perhaps consistent with the more general encouragement to adopt a broad common-sense approach. For example:

74.1. in Broadley v Guy Clapham and Co. [1994] 4 All ER 439, Hoffmann LJ was concerned with s.14 (on which s.14A was based). He suggested (at p.448j) that the right approach was to "*look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based*"; and

74.2. in Trainer v Cramer Pelemont [2019] EWHC 2501 (QB), Walker J said (at [147]) that:

> *"Once a claimant knows that a better outcome, from the claimant's point of view, was possible and that something had gone wrong, the claimant will at that point have material facts knowledge".*

75. That simplified formulation that "*something had gone wrong*" is repeated in a number of the cases and textbooks, where it is often pointed out that knowledge that a better outcome was possible should not be confused with knowledge that there has been negligence. If that shorthand is used, it needs to be understood that it is concerned with the claimant's knowledge of his own position, not his assessment of the defendant's conduct. A homeowner whose property is affected by cracking can see that, from his point of view, something has gone wrong. He does not need (at least under this heading) to know that the reason for the cracking was a miscalculation by his architect, as opposed to (say) the unfortunate effect on the foundations of a tree in his garden.

76. As I have already said, there can be particular difficulties, especially in the context of lawyers' negligence cases, with fitting the requirement for knowledge that something has (to use that shorthand) "gone wrong" together with the stipulation (in s.14A(9)/ s.14(4)) that knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant. In Witcomb v J Keith Park Solicitors [2023] EWCA Civ 326, for example, the claimant had not been advised that it was possible to seek provisional damages and had thus settled his personal injury claim on a basis which left no scope for further recovery in the event of subsequent deterioration. He knew that he was at risk of under-settlement if his injuries turned out to be significantly worse than predicted, but, as Thirlwell LJ explained (at [27]):

> *"…He did not know that there was an alternative to that settlement. He did not know*

about provisional damages. He did not and could not know that he had not been advised about something he knew nothing about. He did not know that the settlement could have protected him against future significant deterioration".

77. If legal advice is required in order for the claimant to understand that he is in a different position from the position in which, with proper advice, he should have been, then the claimant does not have the required knowledge until he receives (or, in a case involving constructive knowledge, should have received) that legal advice.

78. Finally, the fact that the damage might be made good or avoided by some future action does not mean that a claimant does not have sufficient knowledge of it: see *Jackson & Powell* at §5-099 and 3M v Linklaters (supra). In the latter case, the claimant companies knew that the break clauses in their leases were not capable of being exercised unless a problem with assignments could be overcome, but did not know whether the point would actually be taken by their landlord. It did not follow that the claimants did not know about the damage until the landlord broke off the negotiations.

(e) Attribution Knowledge

79. In Haward, Lord Nicholls stated (at [11]):

"… The statutory provisions do not require merely knowledge of the acts or omissions alleged to constitute negligence. They require knowledge that the damage was "attributable" in whole or in part to those acts or omissions. Consistently with the underlying statutory purpose, "attributable" has been interpreted by the courts to mean a real possibility, and not a fanciful one: see Nash v Eli Lilly & Co [1993] 1 WLR 782, 797-798. Thus, paraphrasing, time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question".

80. This is not an especially difficult concept, although its application can certainly give rise to problems. It is concerned with causation, but (as with knowledge of the material facts about the damage) does not require certainty or a perfect understanding of the causal chain, but only that the damage is capable of being attributed to the defendant's acts or omissions.

81. In many cases, until a claimant is aware of the damage, it is unlikely that they will have knowledge of attributability, so it may often be necessary to deal with the two elements together (see, e.g., Etroy v. Speechly Bircham [2023] EWHC 386 (Ch) at [79]-[82]).

(f) Constructive knowledge

82. There are two types of constructive knowledge: knowledge which ought to have been available from the claimant's own observations (but was not actually known) and knowledge which requires input from others (usually experts).

83. In relation to the latter, the way in which s.14A(10) is formulated makes clear that it is concerned with what the particular person might be expected to do, acting reasonably, not with what a hypothetical reasonable person might do. In Gravgaard v Aldridge & Brownlee [2004] EWCA Civ 1529, Arden LJ explained how this operates (at [22]):

"Section 14A(10) does not state that a person's knowledge includes knowledge "which a reasonable person might be expected to acquire" but rather that a person's knowledge includes knowledge "which he [she] might reasonably be expected to acquire" (contrast s.14A(7)). In my judgment, this choice of wording is significant. It means, in my view, that in general the court must have regard to the characteristics of a person in the position of the claimant, but not to characteristics peculiar to the claimant and made irrelevant by the objective test imposed by subs.(10)…"

84. If the suggestion is that the claimant ought to have sought legal advice, it is relevant whether they are already receiving legal advice from the (allegedly) negligent defendant. In Witcomb, Thirlwell LJ explained (at [38]) why it is not easy for a defendant to contend that independent advice should have been sought (at least in a case where the defendants – i.e. the lawyers who are said to have been negligent – were continuing to act):

"First, the claimant had no reason to seek a second opinion (or indeed a third, given that he was being advised by both solicitors and counsel). He was being advised by apparently competent and experienced solicitors and counsel whose advice he was entitled to trust. They were not suggesting that a further opinion be obtained.

Second, to require a claimant to seek a second or third opinion in those circumstances would involve placing what Lord Woolf CJ described in Oakes v Hopcroft [2000] Lloyds Med Rep at [34] as "an excessive burden" upon a claimant to expect him to question the advice of his lawyers.

Third, to require a litigant who has received advice from competent and experienced solicitors and counsel to incur the expense, delay and disruption of a second/third opinion in case the opinions of both solicitor and counsel (which he has no reason to doubt) were flawed would seriously undermine the effective running of personal injury litigation."

85. Those are powerful points and (as discussed further below) seem to me largely to dispose of any reliance on this type of constructive knowledge in our case.

B.3 The legal framework: continuing duties

86. Mr Jones KC acknowledged that there are a number of cases where it has been clearly held that a solicitor, or other professional, does not owe a continuing duty to the client. He confirmed that he did not disagree with the summary of the cases set out in Mr Choo-Choy KC's skeleton, from which much of what follows is taken.

87. In Bell v Peter Browne & Co [1990] 2 QB 495, Nicholls LJ explained (at p.501) the difference between an ordinary duty to carry out an obligation where, if the solicitor fails to carry out the obligation, he is in default and remains in breach, and a continuing duty, such as the duty of a landlord to carry out repair to the leased property, "*which arises anew for performance day after day, so that on each successive day there is a fresh breach*".

88. In Gold v Mincoff & Gold [2001] Lloyd's Rep PN 423, Neuberger J addressed (at [98]-[99]) the problem with arguing for a continuing duty, just because there was a negligent omission:

"98. Mr Davidson rightly warns against the court being too easily persuaded by the claimant that he has a fresh cause of action against his solicitor on the basis that the solicitor failed to advise, at some point after his initial negligence, that he had been negligent. If such an argument were too readily accepted, it would have two unsatisfactory consequences. First, it would enable the provisions of the 1980 Act to be evaded in many cases in an artificial way. Secondly, it would effectively impose on a solicitor some sort of implied general retainer. Accordingly, I would accept that it would be a relatively exceptional case where the court would be prepared to hold that a solicitor's negligence claim that was otherwise Statute-barred could, albeit in a slightly different guise, be resurrected on the basis that, at a time within the limitation period and less than six years before the issue of proceedings, the solicitor failed to advise that he had been negligent. Only if the facts clearly warrant such a conclusion should the court adopt it, in my view.

99. It is clear that a solicitor "who … has acted negligently [does not come] under a continuing duty to take care to remind himself of the negligence of which, ex hypothesis, he is unaware" — per Oliver J in Midland Bank Trust Co Ltd -v- Hett Stubbs and Kemp [1979] Ch at 403C. It is also true, in my opinion, that the mere fact that, following his negligence and within the limitation period, the solicitor is instructed in the same matter by the same client, does not itself put the solicitor under a duty to discover, or advise as to, his negligence on the earlier occasion. As was said by Oliver J in Midland at 403A, the Court must be careful of imposing a duty on a solicitor which involves going beyond his specific instruction…".

89. Helpfully, the learned Judge then explained the kind of specific factual scenario in which there might be a further breach of duty arising out of the failure to identify or advise about an earlier omission (also at [99]):

"…Nonetheless, if the subsequent instruction was also negligently implemented by the solicitor, and, this later negligence concealed the earlier negligence then, subject to normal questions such as causation and remoteness, if the earlier negligence only comes to light outside the limitation period, the loss of the right to sue in respect of it can properly be the subject of a claim based on the later negligence…".

90. In that case, it was held that the defendant solicitors **had** owed a duty to advise the claimant as to their earlier negligence. However, this was an example of the kind of specific factual scenario identified in the second passage. The defendants had acted for the claimant, negligently, in relation to certain mortgages which he had entered into in 1984. In 1993, they acted for him again in relation to the restructuring of the earlier mortgages. Neuberger J held that the defendants should have identified, and advised the claimant about, their earlier negligence when dealing with the restructuring in 1993. It will immediately be seen that this is not an example of a continuing duty, but rather of a fresh instruction giving rise to a new duty. The effect, for the purposes of limitation, might be the same, but the nature of the duty is very different.

91. In Tesco v Costain Construction [2003] EWHC 1487 (TCC), Richard Seymour QC rejected the existence of an alleged continuing duty to review past work, explaining (at [270]) that:

"The notion that a professional person owes a continuing duty to review the quality of the performance of his retainer or engagement is not a straightforward one unless it is

intended simply as a transparent mechanism for delaying artificially the commencement of some period of limitation. In the ordinary conduct of human affairs a task which is considered to have been completed satisfactorily is put behind one as the next task is embraced. To expect someone in real life continuously to review what he or she is doing is to expect them to be paralysed into substantial inactivity by anxious traversing of old ground until eternity …"

92. Similarly, in Nouri v Marvi [2010] EWCA Civ 1107, the Court of Appeal held that a solicitor had not owed a continuing duty to rectify a previous error in circumstances where there were *"no special facts*" to suggest that the solicitor had assumed such a duty: see at [38].

93. In Capita (Banstead 2011) Ltd v RFIB Group Ltd [2015] EWCA Civ 1310, Longmore LJ reviewed a number of previous authorities on this issue at [14]-[23] and concluded that, even in cases where there is a continuing retainer, a breach of duty gives rise to a single cause of action accruing at the time of the original failure, not a continuing cause of action which accrues day-by-day thereafter. He described (at [19]) the difference between a case in which the file has been closed and a case in which there is a continuing retainer as:

"a factually incidental distinction rather than a distinction of principle. The obtaining and receiving of advice after a mistake has been made (even if the mistake can be easily rectified) cannot to my mind mean that an obligation to correct one's mistake or negligence continues to accrue and give a fresh cause of action every day after the mistake has been made. As Mustill LJ pointed out in Bell, it would be unusual for there to be an express term in the average retainer contract (or the average pension adviser contract) requiring the adviser to exercise continuing vigilance to discover any mistakes he may have made and then to busy himself to put them right. Moreover it cannot be right to imply what he called such "a strange obligation" into an apparently usual form of contract".

94. Henderson J agreed, holding (at [49]) that: "*… an unremedied breach of contract is just that: a breach of contract which has not been remedied. In the normal way, it is impossible to construct a continuing contractual obligation, in the sense of one which gives rise to a fresh breach on a daily basis, from the mere failure to perform the original obligation in due time*".

95. In Sciortino v Beaumont [2021] EWCA Civ 786, Coulson LJ observed (at [47]) that the argument that "*the solicitor or barrister defendant generally owes a continuing duty to review or revisit earlier advice*" was "*a contention that often arises in these cases*", and that it was a device by which "*claimants have sought to argue that, although claims based on the original breach of duty might be statute-barred, there was a later breach of the continuing duty to review which was within the six year period*". He confirmed that, although the existence of such a continuing duty will depend on the terms of the retainer in any given case, as a general proposition, the existence of such a duty had been "*comprehensively rejected*" by the majority of the Privy Council in Maharaj v. Johnson [2015] UKPC 28. He described the law as follows (at [50]):

"Where a defendant's breach of duty has caused a claimant some loss outside the limitation period, the fact that further loss is caused by that same breach within the limitation period will not save the claim from being statute-barred. What is more, that

result cannot generally be avoided by the suggestion that there was a continuing duty on the part of the lawyer to review his or her previous advice".

96. The authors of *The Law of Solicitors' Liabilities* (4th Ed.) address this topic at paragraphs 7.10 – 7.14, suggesting that the effect of the authorities is as follows:

"There is, however, one point of potential interest in relation to the limitation period in contract. This was first raised in cases which arose before s. 14A had come into force. The argument is, essentially, that, where solicitors have acted negligently, after their negligent act the solicitors are subject to a continuing duty to advise their client that they have acted negligently. This duty continues until the date when the client's claim in respect of the original negligence becomes statute-barred, and breach of this further duty is itself actionable. If this argument were correct, then a solicitor who was negligent in 2010 would have a continuing duty to warn the client of his or her own negligence. That duty would be in force until 2016, whereupon the solicitor could presumably be sued in the following six years, until 2022, for failure to warn that he or she had previously acted negligently. In this way the limitation period would effectively run for 12 rather than six years, and possibly ad infinitum. Thus, it is unlikely that arguments of the type set out in this paragraph are correct in principle…

… In light of Capita, it is suggested that, unless the matter is considered in the Supreme Court, the position is that future courts are most unlikely to hold that a solicitor has a continuing duty to revisit their earlier possible errors and put them right unless the facts compel a finding that the solicitor has expressly accepted such a duty.

To conclude, while it is possible that a solicitor's contract of retainer may contain a continuing obligation to check whether the solicitor has made errors and put them right, unless such a term of the retainer is express, the court is unlikely to hold that there is an implied term to this effect. On the other hand, if solicitors are negligent at time A, and are then later instructed at time B to do work which, if correctly done, would reveal their earlier errors at time A, then they may have a duty at time B to report the earlier negligence at time A. In those circumstances, a failure at time B to report the earlier negligence may give rise to a new cause of action at time B, which in practice will enable the claimants to recover damages in respect of the negligence at time A".

97. Mr Choo-Choy KC summarised the principles emerging from the cases as follows:

97.1. a solicitor does not generally owe a continuing duty to advise its client as to whether it has been negligent in the performance of its own retainer; and

97.2. a solicitor may owe a duty to revisit its previous advice if:

97.2.1. it expressly agrees to do so for some reason; or

97.2.2. such a duty is a necessary incident of some other duty which the solicitor has undertaken to perform (as in Gold v Mincoff, where the solicitors undertook to restructure earlier mortgages, which necessarily required them to consider whether their work on the earlier mortgages had been performed properly).

98. I agree with that summary.

B.4 The parties' submissions in outline

(a) C's position

99. C's case is that he did not have the knowledge required for s14A/s14 until 2 July 2019, in that:

99.1. the hearing on 1 December 2011 did not put C on notice that the reamendments, if successful, may have produced a different result at the trial. He relies on what he was told (and what he was not told) by his legal team at the meeting on 4 December 2011, following on from the application hearing;

99.2. that remained the position following the Judgment on 18 May 2012, in respect of which Ds advised C that there were strong grounds of appeal;

99.3. as such, C did not have knowledge of the facts about the damage he had suffered arising from the failure of the application in respect of which he brings this claim;

99.4. C also had no knowledge that any such damage (knowledge of which is denied) was attributable in whole or in part to the matters pleaded as negligence in this claim;

100. C says that, following the decision of the Privy Council in June 2018, and after the meeting with Mr Hutchison of D1 which took place on 17 July 2018, C decided to seek independent legal advice. His first discussion with independent lawyers was on 17 July 2018. The first advice on potential claims that he received was provided on 2 July 2019 which is the date C asserts is the date of knowledge for the purposes of s.14A/ s.14.

101. C's case is that it was only when he received independent legal advice on 2 July 2019 that he became aware that his inability to rely on the reamendments at trial had caused him to suffer any damage. He says that he needed to understand that, notwithstanding the factual and legal conclusions of Justice Jones in the Judgment, the reamendments could still have offered him a prospect of success against Investcorp. That is said to have required legal assistance, especially having regard to the complexity of the issues in this case.

102. Mr Jones KC acknowledged in his oral closing submissions that, while it might be said that, until C knew about the damage he had suffered, he could not know that it was attributable to the Ds, there was not really any **separate** point about attribution knowledge here. If C knew that he was worse off as a result of the failure of the reamendment application, he plainly also knew who was responsible for that. As such, Mr Jones KC agreed, this is really a case about C's knowledge of the material facts about the damage.

103. In relation to constructive knowledge, C's case was that, in circumstances where the Ds continued to act as C's lawyers, and in light of the advice C was receiving from them at the time, it was not reasonable to expect C to seek independent legal advice at any earlier stage. In the end, as I will explain, the Ds did not place any real reliance upon constructive knowledge, largely accepting the force of Mr Jones KC's submission about the reasonableness of C trusting his existing legal team.

104. On continuing duty, C says that each of the Ds owed C a continuing duty of care which extended to advising C if they or any of them had acted negligently or potentially negligently and/or if they perceived a conflict of interest between C and themselves and/or any other member of the legal team. On that basis, if any of the Ds had complied with their continuing duty properly to advise C, C would have sought independent legal advice and pursued his claim against the Ds earlier. As such, C claims damages based on the loss of the chance to do so.

105. To justify that continuing duty, Mr Jones KC referred me to the facts pleaded in C's Amended Replies, which included that "*Jones J made clear in his decision on the Re-Amendment Application that the application should have been made earlier and that was the principal cause of its dismissal*", that "*The Defendants remained retained through to July 2018*", and that "*The Defendants were the only lawyers retained by the Claimant in respect of the Claim from its preparation and issue up to 23 July 2018*".

(b) D2-D4's position

106. D4 took the lead in presenting this part of the case on behalf of D2 – D4. It was submitted that C had all of the relevant knowledge required to start time running under s.14A/ s.14 on 1 December 2011 (once Justice Jones had dismissed the reamendment application). By then:

106.1. C knew that the application had been made, and that his legal team had advised him to pursue it. He must therefore have appreciated that his legal team thought it was in his best interests to make the re-amendments.

106.2. C was present when leave to amend was refused. He was aware of the adverse outcome of the hearing immediately.

106.3. C knew that the Court had refused permission for him to pursue the various new claims set out in the ReASOC and hence that he had lost the chance to rely on those claims.

106.4. He knew that the application had been dismissed, at least in part, as a result of delay by his legal team in pursuing the application.

106.5. C knew that, irrespective of what would happen at trial, he had suffered an immediate financial loss as a result of the application being dismissed. He was ordered to pay Investcorp's costs of the application in any event.

107. Put simply, Mr Choo-Choy KC submitted, C knew that "something had gone wrong", and that a better outcome could have been achieved. He knew that he had lost the chance of achieving a better result at trial or through a settlement with Investcorp. That is the very loss that he seeks to recover in these proceedings.

108. Mr Choo-Choy KC also submitted that the fact that some of the damage that C had suffered might have been made good or avoided if he had won at trial, or on appeal, was simply irrelevant. In the further alternative, it was said that, after receiving the Judgment on 18 May 2012, any uncertainty as to whether he had suffered any damage was dispelled. As a final back-up, D4 said that C knew by 17 June 2018 that his final appeal to the Privy Council had been dismissed. D4 points out that C accepted that he

was aware that the Privy Council was the end of the line as far as the Cayman proceedings were concerned. Even if C only finally realised that he had suffered damage on 17 June 2018, that would suffice for D4's purposes, still being more than 3 years before the claim form in the present action was issued.

109. I note for completeness that this final back-up position was not available to D2/ D3, because they entered into a standstill agreement on 1 November 2019, so a date of knowledge after 1 November 2016 would mean that a claim against them was brought in time.

110. Although both D4's skeleton and that of D2 and D3 referred in passing to constructive knowledge, it was common ground in closing submissions that this was not really a case about C getting expert advice. In practice, I understood Mr Choo-Choy KC to acknowledge the difficulty for D2-D4 of arguing that C should reasonably have sought a second opinion earlier than he did, in circumstances where he was not being advised to do so by any of the Ds. The Ds' position was that no legal advice was necessary in order for C to have all the material facts about the damage.

111. In relation to continuing duty, D2-D4 submitted that C had not identified any special facts which would support the imposition of the duty alleged. On the contrary, it was said that:

111.1. once the application had been dismissed (on 1 December 2011), there was no reason for D2-D4 to revisit or reconsider any advice that they had previously provided to C;

111.2. although D2-D4 continued to be instructed in relation to the Investcorp Claim, the claims pursued in that regard were **not** the claims that had been the subject of reamendment. Advising C in relation to those claims did not require reconsideration of the application;

111.3. it is not suggested that C ever instructed D2-D4 to revisit the reamendment application, or that any of D2-D4 undertook some other task which required them to do so.

B.5 My findings of fact in relation to knowledge

112. The only live evidence about the state of C's actual knowledge came from C himself, who gave evidence by videolink.

113. As discussed above, Justice Jones in the Judgment was highly critical of C's evidence. He found C to be argumentative and hence unreliable as a witness. It is right that I bear that in mind, but I have to say that I did not form any equivalent negative impression of C in the relatively short period during which he was cross-examined before me. It is probably fair to say that C had some themes to which he would return when given the opportunity: that he placed great trust in his legal team, and that he accepted what they told him and followed their advice, rather than taking any active role himself. But I largely accept the evidence he gave about what he remembered happening.

114. I am more cautious about evidence about what he thought, or what he had specifically in mind, years ago. That was not because I had any specific reason to conclude that C

did not believe what he was telling me about that. It is simply due to the inherent unreliability of evidence of that kind, when the human mind is bound to be affected by what has happened since as it seeks to reconstitute the perspective of the past.

115. Turning to the substance of his evidence, then, C confirmed that his legal team had decided that they needed to make an application to reamend and that his understanding was that it would add value to his case:

> Q. So what was your understanding of the purpose and the benefits of making that application?
> A. I understood that they -- they thought that it would add value to -- to my case.
> Q. So your understanding, therefore, was that the re-amendment application would add value to your case and that therefore, for that reason, it was worth pursuing?
> A. That is the only reason. Why would they do it then?

116. It is clear that, in the run up to the hearing, C thought the application sufficiently important to his case to be concerned about the potential for problems with the videolink affecting D2's ability to make submissions, such that (in an email dated 27 November 2011) Mr Hutchison of D1 recorded C as proposing that D3 attend in person in the Cayman Islands "*as he was concerned that any technological problem with the video link from Dubai could screw up this important application*".

117. C made no bones about the fact that he had observed the hearing on 1 December 2011 via the videolink and had seen Justice Jones refuse the application. He also accepted that he understood at the time that three of the reasons given by Justice Jones for refusing the application related to the lateness of the application.

118. Perhaps most importantly, he agreed that that he had known at the time that he would no longer be able to pursue the new claims:

> Q. You knew and understood that you would no longer be able to pursue the claims that the judge had disallowed when dismissing the amendment application; is that fair?
> A. Yes, I knew that we lost that opportunity.

119. That description of his knowledge – in C's own words "*we lost that opportunity*" – seems to me to be very important. It is, in my view, an accurate summary of what C realised had happened, given his understanding of the purpose for the application and what had happened to it. It also fits with C's reaction in the aftermath, to which I will come in due course.

120. C acknowledged that he had known at the time that the failure to make the reamendment application earlier was the fault of his lawyers; indeed, he did not really understand the question, since that proposition was so obvious to him.

121. C was also aware that, because of Justice Jones' ruling on costs, he would have to pay Investcorp's costs of the application, and bear his own costs, even if he won at trial. He could not recall how much those costs would be although said they "*couldn't have been more than tens of thousands of pounds*" which he described as "*insignificant*".

122. In relation to the meeting at the Capital Club on 4 December 2011, where C met with

D2 and Mr Hutchison of D1, C agreed that the reason that the attendance note (taken by Mr Hutchison) recorded C asking first "*Why were the materials in our hands not submitted back in Sept? It was too late on 1 Dec*" was because that was his most pressing concern at the time of the meeting. He accepted that he was disappointed:

> Q. And that was obviously because you understood that the hearing had gone badly for you and you thought that a better result would have been if the re-amended claims had been allowed; is that fair?
> A. Until the meeting, I thought that we -- there is something that we lost.

123. As that answer made clear, he was suggesting that, while he went into the meeting thinking that something had been lost, he emerged from it satisfied that nothing had been lost. I do not accept that accurately reflects his state of mind at the time. The first point is that, however confident he understood his legal team to be, he knew that there was a risk that the claims would fail at trial. The second point is that he knew that if his existing claims were to fail, it would have been better to have the new claims as well. Hence:

> Q. Now, if your claims were to fail at trial, you must have appreciated at the time of that meeting that in that event, it would have been better to have the re-amended claims than not to have them; is that fair?
> A. Of course. Of course. Definitely.

124. It is clear to me that what C thought, or perhaps hoped, following this meeting was, not that it made no difference to his position that the application had been rejected, but rather that he would win at trial in any event. It does not seem that anyone was talking about prospects of success in percentage terms at the time, but my impression is that C believed that the reamendments would (say) make a 75% case into an 85% case. He knew that, if things got tricky, it would be better to have that additional route to victory available to him. As such, he knew that he was now in a weaker position than he would have been in if the reamendments had been allowed. But he still felt confident that he would win at trial.

125. The emails from the time show that he continued to raise with his legal team the fact that there were arguments he could not advance at trial, which would not make sense if he had really thought that this made no difference to him. An example is the email dated 12 March 2012 in which D2 recorded C observing to him on a call that "…*we cannot now raise the IMA*".

126. C confirmed that when he received the Judgment (at that stage in draft) on 26 April 2012, he was aware that all of his claims had been dismissed. When asked whether this caused him to realise that his inability to pursue the reamended claims had lost him something at the trial, he indicated that he was told by his legal team that they would reverse the decision on appeal. He accepted, however, that he had been aware that there was an obvious risk of failure in the Court of Appeal.

127. When he received the Privy Council judgment (in draft form) on 17 June 2018, C was aware that his claims had been definitively dismissed and there was no chance of further appeal:

> Q. But by the time the Privy Council judgment came out, at

> the very latest, on 18 June 2018, you knew that all of the expressions of confidence from your legal team as to the prospects of success of your claims, all of those expressions of confidence had been ill-founded? You knew that, didn't you?
> A. Yeah, I knew that something went wrong.

128. C's evidence was that Mr Hutchison told him that it would be possible to obtain redress against Investcorp via proceedings in Dubai.

129. By the time C met with Mr Hutchison on 17 July 2018, however, it was clear that C's mind was turning to other options. His evidence was that he was really disappointed, angry and sad, and that this was why he told Mr Hutchison that he intended to pursue a claim against the Ds.

130. Mr Hutchison's email to C following the meeting records C telling him that he already had something along the lines of a detailed complaint under preparation in that regard. C accepted that he had said that to Mr Hutchison, but suggested that it was an exaggeration. When asked about this in cross-examination, C insisted that he needed to talk to a lawyer and had not yet done so. He actually met Mr Miocevic of Curtis Mallet later that same day. He said that his "exaggeration" (my word) about the extent to which he had already had advice and the status of that potential claim was because Mr Hutchison was pressing for payment of fees.

131. I accept C's evidence about the timing of his first meeting with Mr Miocevic. But what seems to me more important is that, even before that meeting, C was able to tell Mr Hutchison that he intended to make a negligence claim, and (given Mr Hutchison's description of what was said when writing to D4 a day or so later) was even able to identify the failure to make the reamendment application earlier, and the "*sham IMA amendment*" as one of the items on a list about which he would be complaining:

> Q. So is the answer to my question yes, you had told him that you had decided to sue the entire legal team, you had told him that one of the grounds was the precondition on the SPA, which is the sham IMA amendment, and you had not at that stage taken any legal advice at all; do you agree with that?
> A. That's correct..

132. As such, while C insisted (no doubt truthfully) that he had wanted legal advice before commencing this claim, it is clear to me that C already had in his mind that loss of the opportunity to advance further claims as a result of the rejection of the reamendments **as something which he had lost**. The same emerges from the information which Mr Miocevic passed on to Keystone law about C's instructions in his email of 6 August 2018, as C acknowledged, although he wanted to make clear that it was just one issue of many which he had raised with Mr Miocevic:

> Q. And from your perspective, the consequence of that was that that failure meant that you lost the chance to argue the re-amended claims at trial; correct?
> A. Yes, that -- that -- when I explained this to Mr Miocevic, we were of the -- there might be a possibility that we lost the chance.
> Q. So, again, it was you who had identified that potential

area of claim even before you had spoken to any new lawyers; correct?

A. No, no. No, not correct. I -- that was one of the many items I -- after the JCPC, I had -- on reviewing what happened, that was one of the items. When I met Mr Miocevic, I took him through what happened and gave him the various issues that I thought may be -- may be relevant.

B.6 Discussion: Knowledge

(a) Knowledge of loss of chance

133. I start with C's pleaded case as to his loss. Paragraph 52.2 of the Particulars of Claim says:

> *"As against the Second, Third and Fourth Defendants the Claimant is entitled to be compensated for the loss of the chance of that success* [i.e. succeeding on the claim as reamended] *and/or of achieving an acceptable settlement with Investcorp".*

134. Everyone agreed that I was concerned with that loss as claimed, and so it made no difference in this context that the Ds' position is that, on a proper analysis, nothing valuable was lost as a result of the refusal of the application to reamend. The question of whether anything was actually lost is relevant when it comes to the summary judgment applications, but irrelevant here.

135. In the course of closing submissions for the preliminary issues, I suggested that perhaps the pivotal difference between the parties was whether C's state of mind following the 4 December 2011 meeting was that the loss of the new claims made no difference at all, or only that it would be better if they had those new claims but he would probably be OK. Mr Jones KC concurred with that characterisation. He invited me to find that C was told that the loss of the new claims made no difference to him at all.

136. As I hope is clear from the foregoing section, that is not the view I take of C's evidence about his state of knowledge. On the contrary, it was clear to me that C knew on 1 December 2011 that something had indeed been lost as a result of the lateness of the reamendment application. Specifically, he knew that he had lost the chance to advance the new claims contained in the ReASOC. That is the very loss about which he now complains. If I ask myself whether he knew that he was worse off, the answer is "yes". If I seek to identify the essence of his complaint in the present action, it seems to me that it is that he was prevented (by the Ds' negligence) from pursuing those new claims.

137. I accept that, having regard to the advice he was given at the meeting on 4 December 2011, C believed that his action would still ultimately be successful, and hence it should not matter that he could not advance the new claims. Mr Choo-Choy KC submitted, however, that this belief was irrelevant. This was for two reasons.

138. The first was that, on a strict reading of section 14A(4)(a) (and especially the words "*the earliest date*"), once the requisite knowledge was obtained by the claimant, it did not matter if that knowledge was subsequently lost. Once the time period starts to run, it cannot be interrupted. I suspect that there would be force in this point if one were concerned with a case where it is said that the knowledge was **forgotten** after being

obtained. But I would be cautious of being overly technical about the timing of acquisition of knowledge. If a claimant was told one thing at the beginning of a meeting, but something different at the end, it seems to me that one would need to examine what he took away from the meeting as a whole in order to decide on the extent of his actual knowledge. To give an extreme example: imagine that, in a meeting with his financial advisor, a client is first told (correctly) that his investment is down US$1m, but, a little while later, is told (wrongly) that the calculation was in error, and he was actually up US$1m. It seems to me that it would be artificial to say that the client "knew" that his investment was out of the money so that the clock starts.

139. Mr Choo-Choy KC submitted that, in the present case, the gap between 1 December and 4 December 2011 means that I should be focused on C's state of knowledge on 1 December 2011 and not on what happened 3 days later. I understand the point, and accept that the extent of the temporal gap is relevant, but my sense is still that, on the particular facts with which I am concerned, one has to see the hearing, and the debriefing which followed it, as part of the same process by which C acquired relevant knowledge. In any event, I am content to give C the benefit of the doubt in that regard.

140. Mr Choo-Choy KC's second point, however, seemed to me to hit the nail on the head. He submitted that C was not told on 4 December 2011 that it made **no difference** to his case that the reamendment application had been unsuccessful, but rather that it would (or perhaps the correct word is "should") be OK in the end. As I have made clear, I agree with that characterisation of C's evidence. To revert to the analogy of the client meeting the financial adviser, that is more akin to the client being told that the investment was down by US$1m, but that the expectation was that the portfolio valuation would in due course move back up to its original level. In that case, the client knows that his investment has fallen substantially in value. That knowledge is not overwritten by the hope that everything will work out for the best.

141. I agree that there is an analogy here with cases such as 3M v Linklaters, because such cases make clear that the claimant cannot focus only on the final outcome. The required knowledge concerns the pleaded damage, not the final quantification of that damage. So, to use the facts of that case, the clients who know that the break clauses in the leases cannot be exercised know that they are worse off because they are vulnerable to the landlord taking that point. The clients do not need to know that the landlord has taken or will take the point, and hence the precise extent of their loss, to have knowledge of the material facts about the damage. In the same way, C knows that he is worse off because he cannot advance the new claims. He does not need to know that the other claims will ultimately fail, let alone need to be able to make an assessment of the precise extent to which his prospects of success would have been better (if at all) with the new claims included, to have knowledge of the material facts.

142. It also seems to me that this analysis is consistent with the statutory scheme, which sets a relatively low bar for this "quantum" knowledge. I will revert to this topic when I consider the Ds' alternative case, premised upon knowledge of the costs order which was made against C following the failure of the reamendment application. But it does seem to me important to bear in mind that the statutes provide for assumptions which make clear that identification of a relatively limited loss will suffice: i.e. that the defendant "*did not dispute liability and was able to satisfy a judgment*".

143. Once the claimant knows that he is worse off, he can make a decision about whether to

investigate the potential claim. That is the limited carve out from the ordinary rule on limitation which s.14A / s.14 is intended to provide. The claimant might choose not to do so, or at least not to do so immediately, for good reasons. For example, he might take the view that the problem can be solved a different way. He might hope that it will all turn out for the best. That does not change the fact that he had the knowledge required to make that choice.

144. Mr Jones KC pointed out that a claim of the present type is concerned with a comparison: comparing C's hypothetical position if the reamendment application had succeeded with his actual position as a result of its rejection. He submitted that C did not know in December 2011 that he was **comparatively** worse off. On the contrary, Mr Jones KC said, C thought he would win at trial and thus that he was in (comparatively) the same position. This is a clever submission, but it seems to me to be flawed. It treats this type of loss of a chance claim as coming into being, and hence becoming visible to the claimant, only when the ultimate outcome is known. But that is not correct. Even before the Trial, it would have been open to C to sue the Ds on the basis that his inability to advance the new claims which had been the subject of the reamendment had given rise to a loss. That loss might not be easy to value, but if the new claims added anything at all to his prospects of success, then it must follow that the refusal of the application caused him an immediate loss. That is why it is common ground that the cause of action in tort accrued at the time of the reamendment application being refused, not when the Privy Council refused the final appeal. Indeed, if one took that submission (i.e. that what C needed to know was that he was comparatively worse off, in terms of ultimate outcome, by virtue of the refusal of that application) to its natural conclusion, it might be said that C does not have **that** knowledge even today. As I will explain in the context of the summary judgment applications, there is considerable disagreement between the parties as to whether C would have succeeded at the Trial, if the reamendment had been allowed.

145. It seems to me that, while C's understanding of the potential extent of his loss might be said to have improved as it became apparent that his existing claims were doomed, he knew in December 2011 that a loss had been suffered. I do not accept that he thought in December 2011 that there was no risk of his existing claims failing, which (in my judgment) would be the degree of certainty which would be required in order for him to be able to say that the loss of the new claims genuinely did not make any difference to his position. He accepted that he knew there was no guarantee in that regard.

146. Further, if, contrary to the view I have just expressed, C can say that he did not know, in December 2011, that there was any risk that he might lose on the existing claims, that position becomes impossible to maintain once C had received the Judgment. Mr Jones KC submits that C believed he would turn that result around on appeal. Again, I am content to accept that C did have an optimistic view of his prospects of succeeding on appeal. But that is far from being the same thing as saying that he believed that the inability to advance the new claims as a result of the rejection of the reamendment application had made **no difference**.

147. The problem with C's position in this regard might be said to become more pronounced at each disastrous stage of the Investcorp Claim: the Judgment, the decision of the Court of Appeal, and finally the decision of the Privy Council. If I was in any doubt about whether he had the requisite knowledge in December 2011, that doubt would be

removed by the time of the Judgment in May 2012 when C could see that he had not in fact won on the other claims. It may be that the decisions of the Court of Appeal and the Privy Council only add underlining to a conclusion which is already perfectly clear.

148. I reject C's case that he needed to obtain legal advice before he knew that he had suffered a loss. This is not a scenario in which C had not realised something had "gone wrong" until further advice was received, as with the patient who believes that the operation had been required to remove a tumour until an expert tells him it was actually a healthy organ that was extracted. C could see for himself that the reamendment had been refused and that the new claims could not be pursued. He did not need a lawyer to tell him that this amounted to a disadvantage. Only time would tell him for sure the full **extent** of that disadvantage, but that is a different matter.

149. I can see that C might want some legal advice before commencing proceedings: advice about negligence, time limits, jurisdictional considerations, etc. But it is perfectly clear that he did not need that advice in order to identify that the refusal of the amendment had caused an opportunity to be lost, nor (if this is seriously being suggested) to identify that the loss of that opportunity (i.e. the refusal of the reamendment) was potentially attributable to the Ds. Even before obtaining that advice, C was already able to advance the essence of that complaint in his meeting with Mr Hutchison on 17 July 2018, and to raise it again thereafter (as part of a list of items) with Mr Miocevic. It is important to remember that obtaining the required knowledge starts a three-year time period which can be used for seeking legal advice and carrying out further investigations. It is not necessary for the potential claimant to be ready immediately to commence proceedings.

(b) Knowledge: legal costs

150. C acknowledged that he understood, at the hearing on 1 December 2011, that he was being ordered to pay Investcorp's costs of the reamendment application in any event. C's evidence was that he did not recall how much those costs were but it could not have been more than tens of thousands of pounds. In the absence of any other evidence about the quantum of those costs, I accept that evidence.

151. D2-D4s' alternative case on knowledge was that this costs order, even on its own, was sufficient to meet the test for knowledge of loss in s.14A/ s.14. As I have made clear, when C was asked about these costs, he was relatively dismissive. In the context of a case of this kind, he suggested, this sum was "*insignificant*".

152. Mr Jones KC submitted that the meaning of the phrase "*such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages*" was affected by the context, such that the quantum of damage which would be "*sufficiently serious*" in the context of litigation worth many millions, and suffered by a "*person*" who is a multi-millionaire, needs to be more than a few tens of thousands in legal costs.

153. For his part, Mr Choo-Choy KC argued that this part of the statutory test was (a) purely objective (hence "*a reasonable person*", as compared with the formulation in the context of constructive knowledge: "*expert advice which it was reasonable for him to seek*") and (b) involved assumptions which present only a low bar (i.e. "*against a defendant who did not dispute liability*").

154. Although I would not go so far as to say that context could not play any role at all, it seems to me that Mr Choo-Choy KC's approach here is much closer to what the statutes intend. I would suggest that it is necessary to strip away any considerations which are inconsistent with the assumptions which the statutes require the Court to make. To my mind, C was not really suggesting that he was so rich that, if faced with a solvent defendant who did not contest liability, he would not trouble himself to collect a sum of tens of thousands of dollars. Rather, he was saying that he would not want to derail his main claim against Investcorp by getting into a fight with his own legal team over a costs bill in that amount. I fully understand that, but it seems to me to be irrelevant to the statutory test, which assumes a solvent defendant who did not contest liability. As I have said, it is clear that these statutes are intended to operate as a limited carve out from the limitation regime, so as to ensure that a potential claim does not become time-barred before the claimant knows that he might have such a claim. They are not intended to preserve time while the claimant makes the often-difficult decision as to whether actually to commence proceedings. The claimant is given three years in which to make that decision.

155. Mr Jones KC also submitted, however, that this costs order was not really "*the damage in respect of which damages are claimed*". On the face of it, that is correct. The essence of C's complaint is about the loss of the chance of succeeding with his claim, not about being required to pay these specific costs in any event. For example, C does not contend, in the context of the application for summary judgment that, whatever else, the D's negligence resulted in an obligation to pay those costs of the application. However, my understanding is that C's quantum does in fact include (albeit only as part of his claim that he has had to pay Investcorp's costs more generally) Investcorp's costs of the reamendment application.

156. It is also clear that there are examples in the authorities of what look at first sight like different "types" of loss, being treated as an early manifestation of "*the damage in respect of which damages are claimed*", on the basis that there is a single cause of action for negligence. In Hamlin v Edwin Evans (A Firm) [1996] P.N.L.R. 398, the complaint was about the pre-purchase survey carried out by the defendant. Shortly after completion, it was discovered that there was dry rot, which the defendant should have observed. That was subject to a claim, which was settled. But some years later, it became apparent that the house also suffered from unconnected structural defects. The Court of Appeal (Waite LJ) held that there was a single cause of action arising out of one negligent act (the making of the survey report) and the reference in s.14A to damage was to that damage, great or small.

157. In Clinton Eagle v Redlime Ltd [2001] EWHC 838 (QB), the claimant had knowledge by October 2006 of the material facts about damage, because he knew that there had been subsidence, causing cracking. He did not know about the full extent of the damage, which went far beyond the cracking, but it was confirmed that "*knowledge of such damage will be sufficient to satisfy this element even if other more serious damage may exist and only be discovered at a later date*" (at [31] per Eder J).

158. This principle is summarised by the editors of *Jackson & Powell on Professional Liability* (9th Ed.) as follows (at §5-099): "*Where there is other, more serious, separate damage which a claimant only discovers at a later date, but which falls within the same cause of action as that for the other damage, time will run from when the claimant*

learnt of the earlier damage".

159. Accordingly, if it mattered, and despite having some reservations about this, I would feel obliged to hold that C's knowledge in December 2011 about the position in relation to legal costs (i.e. that, because the reamendment application had failed, he was obliged to pay Investcorp's costs of that application in any event) was itself sufficient to fulfil the statutory knowledge condition and start the three-year period running. As in those cases, there is only a single negligent act here, which (we are assuming) resulted in the rejection of the application to reamend and hence this order for costs.

160. However, I prefer to focus on C's knowledge of the loss which is really at the heart of the present claim: the loss of the opportunity to rely upon the new claims in his proceedings against Investcorp. As I have already explained, I am satisfied that he had knowledge of that loss in December 2011.

B.7 Discussion: Continuing duty

161. It seems to me that the case on continuing duty was a commendable effort by Mr Jones KC to offer an alternative way to escape from the time bar if his submissions on s.14A/ s.14 were not accepted. But, in truth, Mr Jones KC's approach would mean that, in very many cases in which there was a continuing retainer, there would be a continuing duty to advise about past negligence, and hence a greatly extended limitation period. It does not seem to me that that is the law. Nor do I accept that it should be the law, given that there is legislation (in both England and the Cayman Islands) which already protects a client who does not have actual or constructive knowledge of the damage.

162. Mr Jones KC accepted that the cases discussed in section B.3 above make clear that the fact of a retainer between a lawyer and his client does not automatically give rise to a continuing duty requiring the lawyer to advise that he had been negligent in the past.

163. Mr Choo-Choy KC went further and submitted that there was not usually any duty of that kind at all, whether continuing or otherwise: that a lawyer is not obliged to "mark his own homework" in that way. That seems to me a difficult issue, albeit one which would very rarely make any practical difference. Mr Choo-Choy KC drew attention to the comments of Ward LJ in Ezekiel v Lehrer [2002] EWCA Civ 16 (at [25]), to the effect that requiring a solicitor always to advise that he might have been negligent (even when the solicitor believes the advice which has been given is good advice) and therefore that the client had better seek a second opinion, would lead to absurdity as the same warning would have to be given by each new lawyer. I take that point, although I am not sure it is a complete answer in a scenario where the lawyer's advice is negligent (and hence, by definition, a reasonably competent lawyer would realise that).

164. Perhaps fortunately, the issue does not arise for decision here, for two reasons. First, in the present case, C's complaint is not limited to saying that, for example, D4 should have advised that it had been negligent in relation to the reamendment application. It is also alleged that (for example) D4 should have advised C about the negligence of D2 and D3 (and vice versa). Mr Choo-Choy KC acknowledged that it would be difficult for him to argue that, in a team of solicitors/ attorneys/ barristers of this kind, there could not be an implied duty to use reasonable skill and care to detect and advise about the negligence of other members of the team. The highest he put it was that it would depend on the scope of the particular retainer. I agree with that, but it seems to me that

it might well form an implied part of the defendant's duty of care in a situation like the present.

165. The second reason is that it makes no practical difference in the present case whether or not there is an "ordinary" duty to advise. This argument only assists C if there is a continuing duty: a duty which arises and is breached afresh each day. That would provide C with a claim which would not be statute-barred. By contrast, it is of no value to C to show that, among other time-barred claims, he would have had a claim which was parasitic on the original negligence. No doubt that is why there are no authorities addressing whether there is a (non-continuing) duty requiring professionals to detect and advise about their own negligence. If the client can prove that his lawyer has been negligent (e.g. by missing a time limit), then it adds nothing to be able to show that the lawyer also failed to advise that the time limit had been missed. If that secondary negligence resulted in any loss at all, it would probably be a lesser loss (loss of a chance of pursuing a claim against the lawyer?) than that caused by the primary negligence.

166. I am going to assume that there might have been duties on D2, D3 and D4 to take reasonable care to identify and advise about their own negligence and that of other members of the team. The real question here is whether there is a **continuing** duty of that kind.

167. It is important to recognise that a continuing duty is different in nature from an ordinary duty. At one point in his oral submissions, Mr Jones KC suggested that, if there is a duty, it must last for some period of time and hence we are only arguing about how long it would last. With respect, that misunderstands the distinction. With an ordinary duty to use reasonable care when investigating an issue and advising the client, if there is a breach, that is that. It might be that the lawyer is given a reasonable time in which to give the advice before there is any breach. But if that period before breach lasts several days, it does not follow that there is a "continuing duty" lasting for days. A continuing duty means that, after the initial breach, the duty arises again, and is breached again, day after day after day. That is why it has the effect of extending time: because the client can sue for the loss caused by the last breach. That is also why the concept is somewhat artificial, at least in the context of a simple omission, because, if a lawyer is (expressly or impliedly) instructed to give certain advice and fails to do so, it is artificial to treat the lawyer as if he was again instructed to give that advice the next day, and failed again to do so.

168. I struggled to see what assistance was offered by consideration of the regulatory regime in this context. There is no doubt, for example, that an English solicitor who became aware that he or she has been negligent was obliged to inform his or her client: see for example Outcome 1.16 of the SRA Code of Conduct (2011) (which was the version in force at the relevant time). I expect that, if the lawyer did not comply with such obligations, in addition to risking regulatory sanction, they would be in breach of a duty owed to their client (although it might be a fiduciary duty, rather than a duty to use reasonable skill and care). But I am not sure that tells me anything useful about the nature or extent of any duty in circumstances where the lawyer was **not** aware of the negligence.

169. That point perhaps overlaps with the first of Mr Jones KC's justifications for a continuing duty in this case, namely that it was, he suggested, especially obvious that there had been negligence in relation to the reamendment application. He observed that

some of the cases in which the English Court had set its face against any continuing duties concerned situations where the professional would have to go back and review their own work carefully to find the error. By contrast, in our case, he submitted that it should have been "*blindingly obvious*" to the Ds, given the circumstances, that they had been negligent.

170. Although attractively presented, it does not seem to me that there is any force in this point. I agree that there is an important distinction to be drawn between a scenario in which the professional actually knows that he has been negligent, but chooses to say nothing, and a scenario in which the professional is not aware of the negligence. In the former case, as I have said, I would expect there to be additional (fiduciary?) duties being breached as a result of this deliberate silence. I would also expect there to be other escape routes in relation to limitation in a case where the primary time limit expires while the professional **deliberately** keeps relevant information from the client.

171. By contrast, I do not see any equivalent distinction between scenarios in which it is supposedly more or less obvious that there has been negligence. I do not agree that the extent of the negligence could cause a continuing duty to come into being. There is no case in which it is suggested that, where the professional is especially negligent, there will be a continuing duty.

172. My sense was that what C really wanted to allege was that the Ds must actually have been aware of their (alleged) error in relation to the reamendment application, but chose to say nothing. But when pressed on that, Mr Jones KC was quick to acknowledge that that was not a case he was in a position to advance. C was not suggesting, for example, that it should be inferred that the Ds actually knew they had been negligent. A serious allegation of that kind cannot be advanced by way of nod and wink at the trial of a preliminary issue. It would need to be pleaded and it has not been.

173. In my judgment, it does not advance the argument for a continuing duty to say that the professional should have been aware of the primary breach of duty. In one sense, of course they should: that is why the omission was negligent. But, as I say, there is no authority which suggests, and no obvious logic for concluding, that a continuing duty might arise because the professional happened to be especially negligent.

174. Mr Jones KC's next justification for a continuing duty was that the retainer or relationship lasted for a long period. More specifically, he submitted that the Ds remained his legal team from 2011 through until after the decision of the Privy Council in 2018 "*and yet they remained silent*". But it is clear that a continuing retainer is not sufficient on its own. In several of the cases in which the English Court has held that there is no continuing duty, there was an ongoing relationship. For example, the existence in Capita v. RFIB of an ongoing retainer, rather than a file which had been closed, was described as just a "*factually incidental distinction*" by Longmore LJ. See also PSGS Trust v. AON [2022] EWHC 2058 (Ch), where Miles J held at [136]-[153] that Capita v. RFIB had to be followed in a case where the claimant was trying to rely upon the fact of a continuing retainer to justify the existence of a continuing duty.

175. I certainly do not accept that the fact that the relationship ends up lasting for a long time, so as to mean that the primary limitation expires before the client has any reason to approach another lawyer or obtain independent advice, can create a continuing duty. A continuing duty cannot come into being retrospectively. For completeness, I should

also draw attention to the difficulty with this argument in the context of barristers, who do not have a simple continuing retainer in the manner of solicitors, but are traditionally instructed or briefed to perform defined tasks.

176. Mr Jones KC's remaining points added very little to the argument. He suggested that the underlying litigation was very complicated, and that C placed a high degree of trust and confidence in his lawyers. That must be true in a great many cases. If it were enough to give rise to a continuing duty, the law books would be filled with examples of such duties arising and being used to evade time limits.

177. Mr Jones KC ended his oral submissions with a plea for justice to the effect that it could not be right that a client was denied the chance to discover that he could sue by the fact that he was continuing to retain the negligent defendant, and hence not getting independent advice from another lawyer: "*Why on earth would [that] be right?*" he asked. But that question seems to me misguided. The solution to that potential problem, where it genuinely arises, is found in s.14A/ s.14, as discussed in the previous section. There is no justification for analysing the duties which arise out of the retainer of a professional in an artificial way in order to escape from the statutory regime.

178. What Mr Jones KC was not able to do, as he very properly accepted, was to point to any specific later instructions, or specific requirement for review, which might, if performed with reasonable skill and care, have caused the earlier negligence to come to light. It was not suggested, for example, that, following the Court of Appeal decision, or the Privy Council decision, any of the Ds had been asked to look back and consider what had gone wrong.

179. In those circumstances, I hold that there was no continuing duty and the time limit for bringing a tortious claim against D2, D3 or D4 in relation to the lateness of the reamendment application had indeed expired.

B.8 Conclusion on preliminary issues

180. For the reasons I have given, I find that the claims against D2, D3 and D4 in relation to the lateness of the reamendment application are all time-barred. C had the knowledge required for bringing an action for damages in December 2011. None of D2, D3 or D4 owed any **continuing** duty of care in relation to advising C if they or any of them had acted negligently or potentially negligently and/or if they perceived a conflict of interest between C and themselves and/or any other member of the legal team.

181. That disposes of all the claims against D3 and D4, and also of all the claims, save that concerning the anti-suit injunction, against D2.

C Summary judgment

C.1 Introduction

182. I turn, then, to the Ds' applications for reverse summary judgment. For completeness, I should say that D1 also makes an application to strike out, but this is advanced only on the basis that the statement of case discloses no reasonable grounds for bringing the claim and hence it adds nothing to the applications for summary judgement.

183. These summary judgment applications are directed at all of C's claims, but it is convenient to break the arguments and discussion into three distinct parts. The first two parts concern the claims arising out of the failed application to reamend. As I have already touched on, this failure to obtain permission to amend is said to have deprived C of the chance of succeeding on (alternatively, compromising) two additional "types" of claim against Investcorp, namely (1) claims arising out of the allegation that the IMA was (to use the label adopted in the Investcorp Claim) a "sham" (which I will call "the Sham IMA claims") and (2) claims arising out of the allegations that the way in which C's investments were allocated was not prudent (which I will call "the Imprudent Allocation claims"[1]). Finally, there are C's claims in relation to the anti-suit injunction against D1 and D2.

C.2 Approach

(a) Summary judgment

184. It was common ground that the starting point is the list[2] of propositions in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] per Lewison J as follows:

> *"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

[1] The parties referred to these as the "Negligence" claims, but that label has the potential to be confusing in the present context.
[2] Approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098 at [24].

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

(b) Loss of a chance: generally

185. An unusual feature of these summary judgment applications, at least when dealing with the claims in relation to the failed application to reamend, was that they were focused on issues of causation/ quantum. The Ds were not inviting me to conclude that C had no prospect of succeeding on the allegation that there was a breach of duty in making the application to reamend late in the day. That would be controversial at trial, but is not an issue susceptible of summary judgment. Nor do they argue that the reamendments would never have been allowed. Rather, they say that, even if the reamendments had been permitted, it would have made no difference to C's ultimate position: that C would still have lost at trial, on appeal, etc.

186. It was common ground that these issues of causation/ quantum fall to be analysed as involving a "loss of a chance"; for C's loss of opportunity to run the reamendments at the Trial. As such, the Court would assess his prospects of succeeding by reference to the "loss of a chance" approach, the relevant question being whether any lost argument had a real and substantial prospect of success rather than a negligible or speculative one. See generally Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 4 All ER 907 and, more recently, Perry v Raleys Solicitors [2019] UKSC 5.

187. It was also agreed that, as a result, the Court is concerned with the prospects of the underlying claim in a general sense, and is not required to conduct a "*trial within a trial*": Dixon v Clement Jones Solicitors [2004] EWCA Civ 1005 *per* Rix LJ at [27].

188. The Ds accepted that this presented a challenge in the context of a summary judgment application, because it meant that I would need to conclude that there was **no real prospect** of C proving that he would have had a **real and substantial chance** of succeeding on one of the disallowed claims, or of settling the case if those claims had not been disallowed. On any view, that combination sets a low bar for C to clear. Even if I arrived at the firm view that the disallowed claims were unlikely to have succeeded, that might not be enough, unless I could say that they had no real **chance** of doing so.

189. Having said that, it cannot be right to say that reverse summary judgment can **never** be given in a loss of a chance case and Mr Jones KC did not put the argument that high.

Indeed, there are examples of cases in which summary judgment has been granted in the context of claims for a loss of a chance, such as Rachel Coote v Augustus Ullstein QC & Another [2022] EWHC 607. In that case, HHJ Gosnell was concerned with a claim brought against a barrister and a solicitor who had acted for the claimant on a claim alleging a link between the MMR vaccine and epilepsy. The claim became time-barred, and the claimant sued the legal team. On an application for reverse summary judgment, HHJ Gosnell considered the medical evidence on which the claimant's case was founded carefully and concluded that the chances of that evidence being accepted were "*nil or virtually nil*" (see [101]).

190. Mr Croxford KC submitted further that the (apparent) complexity of the case and the number of pages included in the hearing bundles cannot, in and of themselves, prevent summary judgment being granted in an appropriate case. That must be right. If a case involves complex factual or expert disputes, then plainly it cannot be resolved summarily. But the fact that one might have to pick one's way around some lengthy draft pleadings in order to understand the issues, or hunt for the key passages in a long judgment to see the answers to them, is not a reason for refusing summary judgment.

191. There was some discussion of what is meant by a real and substantial chance of success. Some authorities on loss of a chance have suggested that a way of expressing the boundary in percentage terms would be to use a figure of 10%. See, for example, Simpson on *Professional Negligence and Liability* (2023) at §9.229, Thomas v Allbutt [2015] EWHC 2187 (Ch) (e.g. at [461]) and PCP v Barclays [2021] EWHC 307 (at [559]). As ever when one uses percentages for prospects of success, I suspect this should be understood to be art, rather than science. Unlike in Chaplin v. Hicks [1911] 2 KB 786, where (putting to one side all subjective assessments of beauty) Ms Chaplin might have been said to have had a 24% chance of winning the beauty contest because she was one of fifty competitors for 12 prizes, prospects of succeeding on a legal claim cannot be arrived at mathematically.

192. Despite that, the references to 10% as the boundary for a real and substantial chance of success are still helpful to me, in exactly the same way as some clients find it helpful to be provided with percentage figures by their lawyers: because a percentage figure provides a better sense of where we are than subjective words of description like "real and substantial". The percentage helps me to see that it is not enough to be able to say that there is some identifiable chance of success, no matter how tiny (1%?), and also that C is not required to show that the claim is sufficiently strong to mean that, with a fair wind, it might succeed (30%?). All of that said, the ultimate question for me is whether the claims had real and substantial chance of success, which is a question which cannot be answered using a calculator.

193. A topic which I found difficult was how to fit the encouragement, in the context of summary judgment applications, to the effect that, where there is a short and decisive point of law, the Court should "*grasp the nettle and decide it*", with the focus on prospects of success (as opposed to binary questions as to whether the case would win or lose) in the context of the loss of a chance to pursue litigation. In the end, I agree with the approach which was suggested by Mr Croxford KC: if I am able to form a clear view of the right answer to a question of construction or the like, I am entitled to decide that the contrary argument did not have a real and substantial chance of succeeding, even if C's position might be said to be properly arguable. By contrast, if a

determinative legal issue seems to me more evenly balanced – a difficult, as opposed to a straightforward, question to answer – that might be a proper basis for saying that the claim had a real and substantial chance of success.

194. That approach seems to me consistent with the comments made by Neuberger J in Harrison v Bloom Camillin [2001] PNLR 7 (at [101]) to the effect that, while in principle the right approach (at trial) is still to make an award according to the chance that a point of law would have been decided in a way favourable to the claimant, the Court should be more ready to decide that the claimant would have failed or succeeded on a point of law:

"In my judgment, the proper approach [of] the court to an issue of law which would have arisen in the action, which the claimant has been deprived of the opportunity to bring, is the same as in relation to an issue of fact or opinion which the claimant would have established in the action. However, at least in general, the court should in my judgment be far more ready to determine that the claimant would have failed or succeeded on a point of law than to determine that the claimant would have failed or succeeded on a point of fact or, even, opinion…"

(c) Loss of a chance: multiple contingencies

195. I was also assisted by Mr Croxford KC's submissions as to the correct approach to be adopted where success turns on, not just one, but multiple, contingencies, namely that I must remember that (at least where those contingencies are independent or discrete) the mathematical approach is to identify the probability of each required ingredient being present and then multiply them. See Bryan J's helpful and detailed discussion of this complex topic in Assetco plc v Grant Thornton UK LLP [2019] EWHC 150 (Comm) at [418] – [449].

196. Strictly speaking, therefore, if (to give an example) C needed to win on both his argument about the existence of a precondition, and his argument that there was a knowing breach of trust, and if the prospect of succeeding on each argument individually was 30%, it might follow that his prospect of succeeding overall was only 9% (0.3 x 0.3 = 0.09). Taken to that extreme, at least if I were then measuring that result against the 10% threshold referred to above, I would be concerned that the analysis risks forgetting that these percentages are not really probabilities in any mathematical sense, but only a way of expressing in a different way one's perception or assessment of the prospects. In the context of litigation, contingencies of this kind – limbs on the decision tree – are never completely independent and discrete, not least because the same judge in the Cayman Islands would have been deciding all of them. But it does seem to me to be very important to remember that, where success requires a series of hurdles to be cleared by the claimant, the fact that there are multiple contingencies can have a significant impact on the assessment of the chance.

(d) Loss of a chance: post-breach events

197. In the present case, the main reason that the Ds are able to argue that C had in fact no chance of succeeding on new claims which they were at the time recommending he amend his Statement of Case to include is because of the Judgment (together with the result of C's subsequent appeals).

198. It was common ground that I am entitled to have regard to events and matters that come to light after the alleged negligent act. This is established by a series of cases, including Dudarec v Andrews [2006] EWCA Civ 256 (where the Court took into account subsequent medical evidence when assessing damages for loss of an opportunity to try a personal injuries claim), Whitehead v Searle [2008] EWCA Civ 285 (where the Court took into account the fact of a subsequent death in quantifying damages), and perhaps especially Amalgamated Metal Corp Plc v Wragge & Co (A Firm) [2011] EWHC 887 (Comm) (where the Court took into account how HMRC had approached the settlement of a related claim in quantifying loss, recording the submission, which Steel J accepted, as follows: "*In short the court knows what would have happened and does not, it is submitted, have to speculate as to what would have happened*" - at [120]).

199. That perhaps offers at least a partial answer to Mr Jones KC's superficially attractive submission to the effect that the Ds' submissions should be approached with caution when they amounted to saying that claims which the Ds themselves had been advising C to include, had no prospects of success.[3] The Ds are not saying that the proposed reamendments **never** served any useful purpose. By way of example, there was clearly perceived to be an advantage to getting evidence about the imprudence in relation to asset allocation and the use of leverage before the Court, because it was hoped that would assist on the allegations of bad faith. The Ds are saying that, given the view Justice Jones subsequently took of the issues which did arise for decision, it is **now** possible to see that the new claims would have added nothing. The benefit of hindsight enables one to see that what at the time appeared a potentially useful alternative route was in fact just another blind alley.

200. Realistically, if a judge makes a finding of fact in the context of one issue, they are not going to reach a different conclusion on the same factual issue, on the basis of the same evidence, just because the issue arises in a slightly different context. Or, to use an example, to which I will return below, if the judge forms the view that a particular expert lacks the requisite independence and expertise properly to opine on asset allocation, in the context of a limited disagreement about the inferences to be drawn from the way in which Investcorp structured the investments, it is futile to hope that he might have formed a different view of the same expert's independence and expertise if that part of her evidence had also been relevant to another issue.

201. Indeed, it seems to me possible to go slightly further than that. When considering the prospects of succeeding on a difficult legal argument, lawyers will sometimes refer to the possibility that the argument might succeed "on a good day", or "with a fair wind" (or other formulations to the same effect). Among other things, this reflects the fact that judges are human beings, not computers, and can be influenced by factors which go beyond the competing submissions on one specific legal argument. With that in mind, it seems to me relevant that we now know that C was not going to have a good day in front of Justice Jones. We know what weather was coming and there was no prospect of C benefiting from a favourable wind. On the contrary, he was walking into a hurricane.

[3] A variation on the argument considered in Mount v. Barker Austin [1998] PNLR 493, where Simon Brown LJ referred to the Court being resistant to a plea from the solicitors who had charged for conducting the litigation, and never gave negative advice about its prospects, to the effect that the plaintiff had been bound to lose: see p.509. However, that was ultimately the conclusion which the Court of Appeal reached in that case.

202. It would be dangerous to take this too far. It must be assumed that Justice Jones would have acted entirely judicially and that he would have decided each and every live issue on its merits. But where we can see that a point is legally dubious, it seems to me that we can rule out the possibility that Justice Jones would have been bending over backwards to find in C's favour.

203. Having said all of that, I bear in mind that, where a point was not addressed at the Trial, and the reason for that was (on the assumptions I am making for the purposes of this application) that the Ds were negligent, C is entitled to the benefit of any genuine doubt. If the reason for the doubt is the Ds' negligence, that is only fair, especially in the context of a reamendment which the Ds were recommending to C.

(e) Loss of a chance: prospects of settlement

204. C's case is that he lost a chance of successful settlement, as an alternative to success at trial, had the reamendments been allowed.

205. Again, I did not detect any difference between the parties as to the legal analysis in this regard. Mr Jones KC accepted that it is not correct to say that any claim, no matter how weak, has a settlement value. This was made clear in Kitchen v RAF Association [1958] 1 WLR 563, where Lord Evershed MR said *(*at p.575):

"I would add, as was conceded by Mr Neil Lawson, that in such a case it is not enough for the plaintiff to say: 'Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side and they would have had to pay something to me in order to persuade me to go away.'"

206. This was cited with apparent approval by Lord Briggs JSC in Perry v. Raleys (supra) at [26].

207. See also Harrison v Bloom Camillin (supra), where Neuberger J described the relevance of settlement value as follows (at [85] and [87]):

"…it seems to me that the exercise the court would carry out, in deciding the likely settlement figure (if it concludes that the action is likely to have settled), is very similar to the exercise of assessing the likely measure of damages which would have been awarded by the court if the claimant had been successful in the action, and then reducing it by an appropriate fraction. After all, while I accept there could be special circumstances in some cases which would render the analogy inexact, there is a close similarity between the figure the parties to an action would have arrived at for the purpose of settling that action and the figure which the court arrives at when applying an appropriate fraction to reflect the uncertainties to the likely measure of damages if the claimant had won…

…particularly where there is a very large potential claim indeed, there may be some claimants who might think that a virtually hopeless case may nonetheless have nuisance value, which would result in the claimants being bought off with a payment, not insignificant in itself, albeit very small compared to the amount potentially at stake. Nonetheless, it may well not be right to ascribe any value to the loss of the chance to bring such an action".

208. With that in mind, it seems to me that the proper course is to look at the prospects, or merits, of the new claims first. If the new claims had a real and substantial chance of success at trial, this application for summary judgment will fail and there is no need to go on to consider how the inclusion of the new claims might have affected the prospects of settlement. At the other end of the spectrum, it is clear that, in most scenarios, if the claim which is lost as a result of the negligence was hopeless, it will follow that it had no substantial settlement value. But I do accept that there might be unusual cases: e.g. where a claim carries risks for the opposing party over and above the risk of being found to be liable at trial.

C.3 The Sham IMA claims

209. I will take the two types of claim included in the ReASOC in turn, starting with the Sham IMA claims.

210. It is important to repeat that, in this regard, the application for reverse summary judgment was focused exclusively on whether a substantial chance of a better outcome was lost when the reamendment application was rejected. As C submitted, for the purpose of considering that issue, it is necessary for me to **assume** that:

210.1. the Ds were negligent in relation to the timing of that application; and

210.2. if the application had been made timeously, it would have been successful.

211. Against that background, I come to the arguments about whether it would have made any meaningful difference to C if the application had succeeded, and the Investcorp Claim had included the new claims as set out in the ReASOC.

(a) The arguments in outline

212. The Ds pointed out that the rejection of the reamendments did not prevent the matters concerning the making of the IMA from being ventilated and tested at trial. They explained that the declarations which had been sought by way of reamendment ultimately served no useful purpose (e.g. because C did not need a declaration that the IMA was void – Investcorp did not argue otherwise, and Justice Jones therefore held that the IMA was "*not binding and enforceable in accordance with its terms*" - see paragraph 5.19 of the Judgment).

213. In relation to the new money claims premised upon the fact that there was no IMA, the Ds contended that, to the extent that the creation of the IMA was a genuine condition precedent in Clause D of the SPA, it was a condition precedent only to the final acceptance by Investcorp of the investment and, if necessary, it was for Investcorp's sole benefit and was waived.

214. The Ds also argued that, notwithstanding the absence of an executed IMA until March 2009, the parties to the SPA had dealt with each other on the basis of a shared common assumption that the SPA was in force and that Investcorp was authorised to arrange investments on behalf of C. Investcorp proceeded to implement the investments in reliance upon that common assumption. In those circumstances, C would have been estopped by convention from denying that investments had been authorised.

215. The Ds submitted that the claim for money had and received was hopeless because there was no mistake on the part of C when the money was transferred and, in any event, Investcorp would have had a defence of change of position. In relation to the claim for breach of trust, the Ds pointed out that C had been seeking to prove that Investcorp had known that it was acting in breach of trust, which case (the Ds said) was rejected at the Trial.

216. In relation to the condition precedent, C's pleaded case was that "*…the SPA never came into effect – (i) that entry into the IMA was a condition precedent to the SPA…*".

217. In his oral submissions, Mr Jones KC refined C's argument in this regard to argue that the IMA was not a condition precedent to the validity of the SPA as a whole, but rather to final acceptance by Investcorp, which he said was itself a condition precedent to the power in Section A of the SPA to invest the money using Shallot. He said that I could assume that this refinement to C's case would have been made at the Trial if the reamendments had been permitted. I am doubtful as to whether that is a legitimate way to proceed, at least without a pleaded case (in the present action) to that effect, especially given the limitation issues which arise here. But, for present purposes, I will give Mr Jones KC the benefit of the doubt on that procedural question.

218. C said that, at the Trial, Justice Jones did not have to consider in terms whether the IMA was a condition precedent or grapple with the relief that was claimed from the deceitful creation of the IMA. In fact, Mr Jones KC contended, the Judge had no alternative but to consider the SPA as a stand-alone document; with no pleaded case before him either that it was anything other than a stand-alone document, or that it was of no effect because of a failure to comply with the condition precedent.

219. C argued that it was not open to Investcorp to waive the condition precedent because it was for the protection of both parties and that Investcorp did not in fact waive it. He also denies that there was any estoppel, because C proceeded in ignorance of the non-existence of the IMA and there was no shared assumption about that.

220. In relation to the defence of change of position, it was said that C would have been able to respond to any change of position defence with the argument that it was the consequence of Investcorp's own failure to comply with the condition precedent, and thus the defence would give Investcorp the benefit of relying on its own wrong in circumstances where C knew nothing about it.

(b) Stage 1: Evidence about the IMA was in play

221. The ReASOC included claims for declaratory relief. Obviously, the loss of a declaratory claim cannot give rise to any claim for damages unless the absence of a declaration has a financial consequence.

222. It seems clear to me that the Ds are right to say that, at the trial, C was able to rely upon the allegations made about the creation of the IMA. Justice Jones **did** consider the creation of the IMA at trial, confirming that "*it is relevant to my assessment of the credibility of the evidence of those involved in its production*". Indeed, he was critical of Investcorp's conduct in relation to the IMA in the Judgment, describing Investcorp's response to the discovery that no IMA had been entered into in 2008 as "*deceitful*".

223. As such, C's complaint is not, and could not be, that he was prevented from referring to the IMA, or to its invalidity, during the Trial. His complaint was that he was not able to premise further claims on its invalidity, by arguing that its existence was a condition precedent to Investcorp investing his money pursuant to the SPA.

(c) Stage 2: Was the IMA a "sham" document?

224. D1 complained about the labelling of the IMA as a "sham". C said that label was accurate, because the IMA was created in circumstances where it was backdated by Investcorp to deceive C. D1 said that a "sham" means a document which is not intended to create the legal rights and obligations which it gives the appearance of creating (see Snook v London and West Riding Investments Ltd [1967] 2 QB 786) and that the Investcorp entities that entered into the IMA did intend to give effect to the legal rights and obligations as expressed in the IMA.

225. I cannot see why this issue is of any substantive relevance and I am not going to decide it. It was common ground at the trial before Justice Jones that the IMA was of no binding effect as between C and Investcorp. It was common ground that it was only created in March 2009.

(d) Stage 3: Was entry into the IMA a condition precedent to anything (and if so to what)?

226. The first issue of real substance in this context is a question of construction of the SPA. It was common ground that the Court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. In doing so the court must consider the language used and ascertain what a reasonable person – who has all the background that would reasonably have been available to the parties in the situation in which they were at the time of the contract – would have understood the parties to have meant. See, for example, the helpful short summary provided by Popplewell J in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pts) Ltd [2018] 1 CLC 94 at [88].

227. The relevant text from the SPA is set out at paragraph 10 above. I am most directly concerned with the following words in section D:

> *"In contemplation of my/our investment, and as a condition precedent to the final acceptance thereof, I/we understand and agree that the following actions shall be taken:*
>
> *1. The Company will enter into (a) an Investment Management Agreement (the "Management Agreement')…"*

228. Mr Choo-Choy KC submitted that there are two possible ways of reading the opening words of this section: the phrase "*condition precedent*" might refer (a) to the understanding and agreement by C and his wife, or (b) to the carrying out of the various actions in the subparagraphs to section D, including entering into the IMA.

229. I agree with that submission. I also agree that, on balance, the more satisfactory way of construing this provision is to read the condition precedent as concerned with the understanding and agreement by C and his wife. I say that for four reasons:

229.1. first, as a matter of syntax, that is the most natural reading of the words: "*as a condition precedent to the final acceptance thereof, I/we understand and agree that the following actions shall be taken*". The verbs in the main clause are "*understand and agree*". The reference to taking the "*following actions*" is in a subclause; that is what is being understood and agreed. Indeed, if the intention were to make the carrying out of the various actions in the subparagraphs into a precondition, the words "*I/we understand and agree that*" would appear to end up serving little or no useful purpose;

229.2. second, it would make limited sense to have a condition precedent to final acceptance **by Investcorp** that **Investcorp** (or entities under its control) will take various actions. It would make more sense for agreement by C to operate as a condition precedent to a step which Investcorp is then to take/ organise. That also fits with the wider scheme of the SPA, which is structured as a series of things to which C (or "*I/we*") is agreeing as part of a request to Investcorp to establish a "*separately managed account*" to invest in hedge funds;

229.3. third, some of the activities in the subparagraphs to section D are ongoing and simply could not function as pre-conditions to final acceptance of the investment. Most obviously, the directors on the board continuing to serve until their successors are duly elected does not work as a condition precedent to something which must happen at the very outset. But C's **understanding and agreement** that the initial shareholder has elected the directors, and that those directors will continue to serve, could be – and indeed was – obtained at the very outset;

229.4. fourth, if the aim of the drafting is to make it crystal clear that C and his wife **must** accept that these actions will be taken, and must authorise them, before the investment can be accepted, the wording referring to a condition precedent might be thought a satisfactory way of doing that, even if (in practical terms) it ends up adding nothing to that agreement.

230. Put shortly, that reading seems to me to fit with the words and to make more commercial sense than the alternative relied upon by C.

231. However, I recognise that there are arguments the other way. In section C, there is a reference to "*the conditions set forth in Section D below*", and the use of the plural "*conditions*" does not fit very well with reading that "*condition precedent*" as a single understanding/ agreement by C and his wife. Moreover, the heading of section D refers to "*ACTIONS TO BE TAKEN PRIOR TO ACCEPTANCE OF SUBSCRIPTION*" and the text then makes clear that the "actions" to be taken are those described in the subparagraphs. That might suggest that the preconditions to "*final acceptance*" must be those actions, not merely C's understanding/ agreement.

232. I end up taking the view that the drafting is, on any view, imperfect and that this is not a question of construction which, in the context of a loss of a chance claim, I should be rushing to answer.

233. Of course, if I am right in my suspicion that the "condition precedent" to "final acceptance" is just the agreement by C and his wife to the various actions which Investcorp was proposing to take, then that agreement was given, the precondition was

fulfilled, and that would be the end of the Sham IMA claims.

234. However, even if the conditions precedent to "final acceptance" are the actions set out in the two subparagraphs (or at least some of them), it does not seem to me that this gets C where he wants to go. It would simply follow that there was no final acceptance by Investcorp, meaning that it remained open to Investcorp to return the investment to C. The last part of section C of the SPA makes provision for Investcorp's right to return some or all the "Investment Amount" (in terms of timing for repayment and the payment of interest) in the event of "*an inability to deploy subscription monies or for any other reason*", as compared with C's acceptance that the subscription cannot be revoked in whole or in part after delivery of the SPA by C to Investcorp.

235. Mr Jones KC wanted to equate "final acceptance" precisely with the "Subscription Date". While I can see that the two stages might often be simultaneous, they cannot simply be the same event, since section C provides that "*no acceptance of this investment shall be final until (a) Investcorp receives payment of the Investment Amount, (b) the conditions set forth in Section D below have been satisfied, and (c) the Subscription Date has occurred*". In other words, final acceptance comes when or after "*the Subscription Date has occurred*". They are not one and the same.

236. It follows that there is a gap in the logic when Mr Jones KC contends that the absence of the IMA means that there can be no "final acceptance" and the absence of final acceptance means that there can be no subscription and hence no investment. There can be, and indeed will always be, subscription before "final acceptance". Moreover, Mr Jones KC ultimately needs entry into an IMA by Shallot to be a condition precedent to the investment which is provided for in section A of the SPA. C needs to say that the request which is made in section A, and hence the power which Justice Jones (and the Cayman Court of Appeal and the Privy Council) found there to (among other things) use first layer leverage, is all conditional upon prior completion of the actions in section D. But that is to turn the scheme of the SPA on its head: section A contains the request which C was making that Investcorp make those investments, and section D only provides for a condition precedent to final acceptance by Investcorp. Nothing is said about anything in section D being a condition precedent to the power conferred by section A.

237. Putting all of this together, it seems to me that the overwhelming likelihood is that the Sham IMA claims would have been knocked out at the first stage: on the basis that the legal argument which underlay them, even as refined by Mr Jones KC at the present hearing, did not work.

(e) Stage 4: Waiver

238. In any event, if the execution of the IMA is a precondition to final acceptance by Investcorp, and that somehow means a precondition to making any investment, then it seems to me obvious that Investcorp was entitled to waive that precondition. If the issue had been live, Investcorp would have been held by Justice Jones to have waived that precondition when it in fact accepted the money, arranged for subscription for the shares in Shallot, and then put in place the investments.

239. The essential principle here is well-known. Mr Croxford KC cited *Chitty on Contracts* (35th Ed.) at §26-049:

"…Where the terms of a contract include a provision which has been inserted solely for the benefit of one party, he may, without the assent of the other party, waive compliance with that provision and enforce the contract as if the provision had been omitted. He will not be permitted to do so where the provision has been inserted for the benefit of both parties…"

240. C argued that, given the investment manager to be appointed under the IMA was the person who was going to have the sole discretionary right to invest the monies, and the SPA permitted C to call for a copy of the IMA at any stage, the existence of a valid IMA in place was in C's interests as well as those of Investcorp. On this basis, it was said that this was not a provision for Investcorp's sole protection.

241. I disagree. On any view, it was a precondition only to final acceptance **by Investcorp**. Only Investcorp's rights changed on final acceptance; after that, it was no longer permitted simply to return the money and became committed to making the investment. To the extent that it is also relevant to consider the purpose for the IMA itself, rather than the purpose for (on the current assumption) making that into a precondition, the IMA was intended to be, in effect, an internal agreement between Shallot and its investment manager. The existence of the IMA offered no protection at all to C, who was not going to be a party to it and was not even going to receive a copy unless he specifically requested one. As discussed above, section D made clear that C's role was simply to "*understand and agree*" that all of these actions would be taken. It follows that, if there was a relevant condition precedent, it could be waived by Investcorp.

242. C argued next that there was no decision by Investcorp to waive the condition precedent, on the basis that the absence of the IMA was overlooked until 2009 and then Investcorp created the IMA when it was asked for a copy. That seems to me to miss the point, which is that Investcorp conducted itself in the relevant time period as if there had been final acceptance of the investment, by proceeding to invest the money and telling C it had done so.

243. C's own pleaded case (in the Investcorp claim) was that Investcorp wrote to him on 2 March 2008 and confirmed the investment, that he met with Investcorp on 4 March 2008, when he was told that Shallot had been established and his money had been transferred to it, and that he was told on 8 April 2008 that the investment had fallen in value by about US$4m (but there was no need to worry). It seems clear to me that these communications from Investcorp are more than sufficient to give rise to a waiver.

244. It is easy to test this. Imagine that, within a month or so of the subscription in Shallot, the investments had actually shot up in value. Then Investcorp discovers that it has not yet arranged for the IMA, and it opportunistically seeks to rely upon this, arguing that it can return C's investment money, plus interest at market rate, and keep all the proceeds from the actual investment for itself. It is easy to see that Investcorp would be told that it could not do that: it could not rely upon the absence of the IMA to contend that there had been no final acceptance and no investment, because it had already chosen to accept the money and invest it, thereby waiving any condition precedent in that regard. I cannot see how Investcorp could have answered a plea of waiver. It is obvious that it is correct.

245. I take the view that the overwhelming likelihood is that this, albeit in reverse, would have been the conclusion of Justice Jones (if the point had arisen at the Trial). I accept

that there is a theoretical possibility that a different view on this combination of legal and factual issues could be reached, but it seems to me that the combination of factors to which I have just referred makes that very unlikely. It represents another knock-out punch for the Sham IMA claims and one which, again, I would expect to land.

(f) Stage 5: Estoppel by convention

246. If, again contrary to the view I have just expressed, execution of the IMA was a condition precedent to Investcorp's entitlement to invest C's money and that precondition was not for Investcorp's sole protection, it seems to me that both parties would still be estopped from denying that the money had been invested pursuant to the SPA.

247. There was no disagreement about the test for estoppel by convention. Mr Croxford KC referred to the following short summary in Spencer Bower: Reliance-Based Estoppel (5th ed., 2017) at §8.2:

"An estoppel by convention is an estoppel from denying a proposition established not by representation or promise by B to A, but by mutual, express or implicit assent. The estoppel is not founded on A believing a representation by B, but on a common assumption of facts or law as a basis of their relationship, to which B has so assented as to make B responsible for A's reliance on it. Where the parties have so acted in their relationship upon that shared assumption that it would be unfair on A for B to resile from it, than A will be entitled to relief against B."

248. He also summarised the ingredients for an estoppel which were recently outlined by the Supreme Court in Tinkler v Commissioners for Her Majesty's Revenue and Customs [2021] UKSC 39, which summary I agree with and adopt:

248.1. The common assumption upon which the estoppel is based must be expressly shared between them, with something having "crossed the line" and with that crossing of the line between the parties consisting either of words or conduct from which the necessary sharing can properly be inferred.

248.2. The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

248.3. The person alleging the estoppel must in fact have relied upon the common assumption to a sufficient extent, rather than merely upon his own independent view of the matter.

248.4. That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

248.5. Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

249. Mr Croxford KC also pointed out that there is the concept of "concurrence" or "acquiescence" in the context of trust relationships. This concept is summarised in *Lewin on Trusts* (20th Ed.) as follows (at §41-107):

> "*If a beneficiary … concurs in a breach of trust, he is forever estopped from proceeding against the trustee for the consequences of that act, whether or not he knew that the act constituted a breach of trust, and whether or not he derived benefit from that breach.*"

250. I doubt that this adds very much to estoppel by convention, but it perhaps reinforces that it is legitimate to consider how the beneficiary – here C – conducts himself in relation to the activity which is later alleged to amount to a breach of trust.

251. There is no doubt that both parties understood that the money had been invested by Investcorp and believed that this was being done pursuant to the SPA. It is important to remember that C's case in the Investcorp Claim (pursued all the way to the Privy Council) was that the **SPA** did not permit the use of "first layer" leverage. C always treated the SPA as the operative agreement.

252. In terms of conduct crossing the line, Mr Jones KC accepted that C knew the money was being invested, and was completely content about that, including having multiple meetings with representatives of Investcorp where the performance of the investments was discussed. Mr Jones KC had no choice but to do so: C's own witness evidence for the Trial described in detail C's interactions with Investcorp in relation to the investments between March and June 2008: the series of meetings in March and April 2008 and the emails exchanged between Investcorp and C / his assistant Mr Zaidi about the performance of investments and the funds into which his investment had been allocated.

253. If it adds anything, Justice Jones also touched on the chronology following the investment in the Judgment (e.g. at paragraph 3.19):

> *"During the following six months Messrs. Al Khatib and Kironde communicated with Mr. Al Sadik on a number of occasions and the call notes reflect that he expressed disappointment with the poor results and said nothing about having a guarantee. There was a meeting with Mr. Al Khatib on 8th September. He did not make a contemporaneous call note as such, but he did describe what happened at the meeting in a subsequent e-mail transmitted to Messrs. Gharghour and Kironde on 15th September. It records that Mr. Al Sadik was "extremely unhappy or angry rather" with Investcorp's performance which was compared unfavourably with that of Citigroup and HSBC, but he refused to meet with the hedge fund specialists or any more senior representatives of Investcorp. Importantly, the e-mail records that "He wants to see results otherwise he probably will redeem by year end".*"

254. Faced with all of this, Mr Jones KC argued that there was no shared assumption between the parties **as to the IMA**: C believed or assumed that this agreement had been created, whereas Investcorp should have known that it had not been. But this seems to me to miss the point: the conventional understanding between the parties was about the **making of the investment** pursuant to the SPA, not about the status of the IMA. Two parties can share a conventional understanding as to the current position between them without also agreeing in every particular as to how that position has come about.

255. It is obvious that, having arranged and managed the investment with the involvement of C for a period of time, Investcorp would suffer a detriment if C was permitted to resile from that conventional understanding about the investment in the event that there was a fall in the markets.

256. Again, putting all of this together, it seems to me that C had no real wriggle room in this regard. For the reasons I have explained, I doubt that it was necessary for Justice Jones to find that C was subject to any estoppel. If anything was needed, it seems to me it was simply a waiver (see above). But I am also confident that, if the issue had been live, he would have found that there was an estoppel. Put very simply, C's case in this regard amounted to saying that it should be entitled to rely upon an "administrative" error – an error internal to Investcorp and irrelevant to the performance of C's investment – in order to unravel that investment after the markets turned sour, despite C having very much wanted that investment to be made and having been involved in meetings etc. about it. C wanted to have his cake back, even after he had eaten it. If his position was otherwise sustainable, it seems to me that it would be the paradigm case for an estoppel.

(g) Stage 6a: Trust claim

257. If this stage in the argument were reached, it would follow that C had succeeded on its argument that the IMA was a condition precedent to the making of a valid investment pursuant to the SPA and had avoided a finding that the condition precedent had been waived, or that he was estopped from denying that the investment had been made pursuant to the SPA. On this basis, C argues that the making of that investment by Investcorp, which I understood potentially to include even the subscription to shares in Shallot, amounted to a breach of trust.

258. The pleaded claim in this regard was as follows (see Part C paragraph 26E.4-5 of the ReASOC):

> *"If and in the event that the SPA did not come into force and effect until 1st March, 2009 or at all then Investcorp Bank and/or Investcorp Advisers and/or Shallot and/or Blossom did not have authority to exercise the discretionary power of investment and to the extent they purported to do so the power was exercised in breach of trust and in the knowledge that the exercise was in breach of trust."*

259. I emphasise those final words: "*and in the knowledge that the exercise was in breach of trust*". That goes much further than saying that Investcorp was (because of the absence of the IMA) not authorised to invest the money. It is an allegation that Investcorp **knew** that it was not authorised to invest the money. In the course of oral submissions, Mr Croxford KC suggested that this claim was expressed in this way because it would always be a necessary ingredient of a personal (as opposed to proprietary) remedy against a trustee that he had knowledge that he was acting in breach of trust and was acting unconscionably. Mr Croxford KC submitted that, once the investment money had been paid away, the only way in which Investcorp might remain liable as trustee would be if its conscience was affected by knowledge of the facts; in other words, if it was liable as constructive trustee or the equivalent.

260. I am not sure about that. My understanding is that a trustee who pays away trust property otherwise than in accordance with the terms of the trust would be obliged to

reconstitute the trust property, without the beneficiary having to prove that the trustee knew the transaction in question was unauthorised. See generally *Lewin on Trusts* (20th Ed) paragraphs 41-001 to 41-006.

261. Mr Croxford KC accepted that possibility in principle, but submitted that it did not apply to a situation like that with which we are here concerned. At this stage, the argument becomes rather complicated. Mr Croxford KC pointed to the way in which the development of the relationship had been described by Sir John Chadwick in the CoA Judgment (at [155]):

"It is not in dispute that, in the period between the receipt of the Investment Amount and the execution of the SPA, Investcorp Bank held the Investment Amount upon trust "for Mr. Al Sadik for the purpose of investing it on the terms of an agreement in writing to be negotiated". For convenience, I will refer to that trust as "the pre-SPA trust". Given the terms of the pre-SPA trust, it necessarily came to an end when Investcorp Bank and Mr. Al Sadik (with other parties) entered into the SPA on 1 March 2008. From that date until 4 March 2008 (when Investcorp Bank converted the Investment Amount into US Dollars and credited the proceeds to the account of Shallot), the Investment Amount was held by Investcorp Bank upon the trust of the SPA ("the post-SPA trust")…"

262. Mr Croxford KC submitted that what was being labelled as "the post-SPA Trust" was not in fact a trust at all, properly so called, but rather a species of fiduciary relationship. I would have thought the more natural reading of that part of the CoA Judgment (and the more obvious conclusion) was that there was an express trust on the terms of the SPA, at least until the "investment" in Shallot was made by subscribing for its shares. In any event, Sir John Chadwick's analysis is premised upon the existence of a fully effective SPA, because the issue about the effect of the "condition precedent" was not before the Cayman Court of Appeal.

263. Mr Croxford KC cited Westdeutsche Landesbank v. Islington BC [1996] AC 669, in which Lord Browne-Wilkinson made clear (at p.705-6) that equity operates on the conscience of the owner of the legal interest, such that he cannot be a trustee if he is unaware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or unaware of the factors which cause him to be trustee in the case of a resulting or constructive trust. So far, so uncontroversial. But that case involved a payment which had been understood at the time to be contractual, but in fact was not (because the contract was entered into *ultra vires*). The local authority did not know that the contract was invalid. The local authority always thought the money was its own to spend. That is not quite the same as a case where there is already a trust (i.e. the pre-SPA trust) and the question is whether what replaces it is another trust (on the terms of the SPA), or something else.

264. All of that said, I agree with Mr Croxford KC that it is difficult for C to identify exactly how a claim for "innocent" breach of trust arises, even if one assumes that the prior stages in the argument have been fulfilled: i.e. that the failure to prepare an IMA means that Investcorp was not permitted (as opposed to not obliged) to make the investment, and that there was no waiver or estoppel in this regard.

265. Perhaps more to the point, the claim as pleaded in the ReASOC did not seek to thread its way through the obstacles. Instead, consistently with the way in which the case

against Investcorp was being presented more generally, it contended that Investcorp had been aware of the breach of trust. On the face of the Judgment, that allegation would have failed. Justice Jones held that the parties had "*completely overlooked*" the need for an IMA (see paragraph 5.19) and further that "[Investcorp's] *initial asset allocation decision and the subsequent decisions in relation to the application of leverage were made bona fide for a proper purpose in accordance with the SPA*" (see paragraph 7.5).

266. Mr Jones KC argued vigorously that the Ds' reliance upon any of this as a finding of fact about Investcorp's knowledge that it was in breach of trust by Justice Jones overstated the position. He pointed to paragraph 4.4 of the Judgment and Justice Jones' explanation of the limits of his investigation:

"Clause D.1 provides that Shallot will enter into an Investment Management Agreement (referred to as the "IMA") with an Investcorp group company called Investcorp Investment Advisers Limited. This was not done and the reasons for this omission were not explored by the parties in evidence. Both parties appear to have completely overlooked this provision"

267. Mr Jones KC's submission was that, when, in this paragraph and at paragraph 5.19 of the Judgment, Justice Jones said that the parties "*overlooked*" the provision about the IMA, all he was really saying was that he **assumed** that the IMA had been "*overlooked*", because that issue had not been explored in the evidence at the Trial (as a result of the refusal of the reamendments).

268. I cannot accept that submission. In my judgment, Justice Jones was holding, and would always have held, that Investcorp was not aware of the failure to arrange for the IMA and hence Investcorp did not know that it was (on Mr Jones KC's analysis) not authorised to invest C's money and hence was in breach of trust. I say that for two main reasons. First, it is clear that, while there may not have been any investigation at the Trial of the initial failure to generate the IMA, there was a great deal of focus on Investcorp's actions on discovering that there was no IMA in place. By way of example, this was canvassed in the parties' closing submissions. To suggest that disclosure and cross-examination for that purpose did not reveal that individuals within Investcorp had actually known, pretty much from the outset, that there was no IMA, but that this supposed knowledge would have emerged if the ReASOC had been permitted, is fanciful.

269. Second, it makes no sense to suggest that Investcorp might, at the point of making the investments, have been aware that there was no IMA and aware that it was therefore not entitled to make those investments, but nevertheless have pressed on with doing so without taking the obvious step of putting in place an IMA. On any view, putting in place an IMA was an administrative step, entirely within the power of Investcorp. I asked Mr Jones KC whether he could identify any possible reason for Investcorp to have acted in that way. He pointed to Investcorp's deceitful actions when asked for a copy of the IMA in 2009, but seemed to forget that those actions **did** include creating an IMA. If the problem had been identified by Investcorp at an early stage, before any investments had been made, of course, no backdating would ever have been needed.

270. Mr Jones KC suggested initially in his oral submissions that there was scope for an argument, along the lines which I had canvassed with Mr Croxford KC, to the effect that an "innocent" breach of trust – an investment by Investcorp which was not in fact

authorised – might suffice for C's purposes. But that is, again, to advance a different case from that in respect of which I am being asked to give summary judgment. As with Mr Jones KC's reformulation during his oral presentation of C's case as to the effect of non-compliance with the alleged precondition, that amounts to a contention, not that the new case which the C was seeking to advance in the ReASOC might have succeeded, but that a yet further (re-reamended) version of that case might have done so. That case was not pleaded and no application to amend has been made. It was not explored in the evidence for this application.

271. Even putting that procedural objection to one side, however, it seems to me that this potential new case ends up being hopelessly speculative. Stepping back, underlying all of this is a bold proposition: a minor administrative error by Investcorp, which has no effect at all on the performance of C's investment, nevertheless results in Investcorp being in breach of trust, such that it is required to reconstitute C's whole investment, when Investcorp had invested the money exactly as C had envisaged.

272. To suggest that an argument to that effect might have been pushed to the forefront of C's case at Trial risks confusing the use of hindsight by the Court (because I am not required to pretend that I do not know how events in fact unfolded) with the use of hindsight in impermissible ways. C was advancing its claim against Investcorp on the basis that Investcorp had deceived him and acted in bad faith, using his money for its own purposes. Until the trial and the Judgment, he and his legal team had no reason to think those allegations were going to fail. They had no reason to be formulating, and they were not in fact formulating, alternative cases premised upon a mere administrative oversight by Investcorp. Perhaps if the Ds had been able to visit the future and read the Judgment, they would, on returning to 2011, have made some dramatic changes to the case to be advanced against Investcorp at trial. But just because we can see what was coming does not mean that we should analyse C's prospects as if he had had that same knowledge.

273. No doubt with those various problems in mind, Mr Jones KC's ultimate position was that, for the purposes of this summary judgment application, he needed to persuade the Court that C could have succeeded on the pleaded case as to breach of trust (i.e. what Mr Jones KC called "unconscionability"). I think he was right to make that concession.

274. However, having made that concession, I take the view that Mr Jones KC was in difficulties on this ingredient of the Sham IMA claims as well. For the reasons I have explained, it seems clear to me that Justice Jones would always have rejected C's case that Investcorp knew that it was in breach of trust and was acting unconscionably when it arranged the investments for C. In the light of Mr Jones KC's acceptance that, at least for the purposes of the summary judgment application, he is stuck with that formulation of the claim for breach of trust, that represents a further significant obstacle to a successful claim.

(h) Stage 6b: Money had and received

275. In his oral submissions, Mr Jones KC indicated that he and his team had reflected on the points about this particular claim made by the Ds and did not propose to make any submissions on it.

276. It seems to me that this was a realistic position for C to take. The fundamental problem

with the claim for money had and received was that it required C to be operating under a mistake of fact or law (i.e. about the IMA or the status of the SPA) when he transferred the money to Investcorp. But the money was transferred on 28 February 2008, which was before the SPA was executed and hence before C could have thought the IMA would have existed. At that stage, even if section D of the SPA had been operated as intended, the IMA would not yet have been executed.

277. At best, there was a "misprediction" by C, not a mistake, as at the date of his transfer, to the effect that the SPA would be entered into and would become fully effective. As explained in Goff & Jones *The Law of Unjust Enrichment* (10th Ed) at paragraph 9-07:

"It is well established that a "misprediction", consisting of a present belief or assumption about a future state of affairs which is subsequently falsified, is not an operative mistake for the purposes of the law of unjust enrichment, even when it causes one person to confer a benefit on another; nor does a misprediction constitute a ground for restitution in its own right".

278. Like Mr Jones KC, I cannot see how C could have succeeded on the claim for money had and received in those circumstances. It was simply hopeless.

279. There were a series of other problems. For example, it seemed likely that Investcorp would have had a defence of "change of position" (as in Lipkin Gorman v. Karpnale Limited [1991] 2 AC 548), given that Investcorp was found by Justice Jones to have invested the money in question in good faith. But the coffin lid is already nailed shut and no further nails are required.

(i) Conclusion on the Sham IMA claims

280. Drawing these threads together, I am satisfied that the Sham IMA claims would inevitably have failed. The construction of the SPA on which the whole argument depends departs fundamentally from the way it was actually put in the ReASOC and, even as reformulated, is barely arguable. Even if the Cayman Court had accepted that the effect of a failure by Investcorp to put in place an IMA was to prevent the discretionary power to invest from coming into being, both parties had been operating on the assumption that Investcorp had that power to invest and had utilised or was utilising that power as envisaged by the SPA. Even if that was not fatal, C would have had to persuade Justice Jones that, contrary to the impression Justice Jones actually formed at the Trial, Investcorp had in fact **known** at the time of investing the money in 2008, that there was no IMA in place, but for some peculiar reason chose to do nothing about it until 2009.

281. In my judgment, there does not need to be a trial (or I should perhaps say a further trial) in order to establish that the Sham IMA claims are hopeless. It is not a question of what view a judge might form of the evidence at trial, nor is there any genuine hope of further evidence shedding a different light on these issues. To the extent that there are factual issues bound up in these conclusions, they have been decided in the Judgment, or the answers are obvious, or are common ground.

282. It is right to say that the analysis requires some care, needing to be worked through in a series of stages, but the end result of that analysis is clear beyond argument. If one were to multiply out the "probabilities" mathematically, in order to arrive at an overall

figure, it seems to me one would end up with a fraction of a percentage point.

C.4 The Imprudent Allocation claims

283. I turn next to the other category of claims which C says that he was prevented from pursuing as a result of the refusal of the reamendment application. I will describe what was pleaded in this regard in more detail below, because there is a dispute between the parties as to whether there was any further or different claim in this regard. For now, however, I will use the label of "Imprudent Allocation" to refer to the further allegations which were made in the ReASOC about asset allocation by Investcorp (which I understood to be mostly focused on the use of "first layer" leverage).

284. Mr Jones KC was entirely candid about the difficulties for C with this category of claims. In his oral submissions, he said that whatever notional chance one might arrive at for the Sham IMA claims, the percentage for the Imprudent Allocation claims would be lower. Given the view I have expressed above about the prospects of the Sham IMA claims, that might be thought an unpromising start.

(a) The parties' submissions

285. The Ds said, in outline, that:

285.1. this was not a freestanding claim in negligence. Rather the proposed re-amendments were putting forward particulars of negligence to support the existing allegations of misconduct on the part of Investcorp. As he had wanted, C was permitted to rely upon the evidence from Ms Murray about supposed negligence for that same purpose at the Trial. Despite that, those allegations of misconduct were ultimately rejected by Justice Jones. That outcome would not have been any different if the reamendments had been allowed;

285.2. the Imprudent Allocation arguments were based on the expert evidence of C's expert witness, Ms Murray. That evidence was rejected on the grounds that (i) Ms Murray fell short of the standards expected of an expert witness; and (ii) was not qualified to express an opinion on the relevant matters. Accordingly, had the amendment been permitted, C would not have had any expert evidence to support his allegations that Investcorp had acted without reasonable care and skill in making the investment decisions that it did. In those circumstances, there was no real and substantial chance of that claim succeeding;

285.3. even if C had been able to establish a freestanding breach of duty, he would not have been able to establish any loss. He advanced no separate claim for loss in this regard, but rather relied on the same loss pleaded in respect of the other claims which were determined at the trial. But Justice Jones held that if "first layer" leverage had not been used, C would have suffered even greater loss when Investcorp set up second layer leverage (see the Judgment at paragraph 4.11).

286. C submitted that:

286.1. there were important distinctions between the new claims and the 5th and 11th claims which were determined against C at trial. In essence, it was said that the

Imprudent Allocation claims made wider allegations than were made in the already pleaded claims;

286.2. it was possible that Justice Jones would have formed a different view of the expert evidence, if it had been relevant to more than the case that Investcorp's decisions were made dishonestly to serve its own business interests; and

286.3. in relation to the quantification of C's loss, if a wider range of matters had been attacked, they may have given rise to different counterfactuals.

(b) Stage 1: Is there a freestanding claim?

287. It might be thought a little surprising that there is an issue between the parties as to whether the reamendment application actually sought to add a new claim in this regard. It might be thought that one would simply look at the draft pleading and the answer would be obvious. Ultimately, it seems to me that that is what I must do: look at the ReASOC and decide what new claims, if any, were being added. However, it is interesting to see that this disagreement is not new.

288. At the reamendment application itself, there was a very similar disagreement in this regard. D2, presenting the application on behalf of C, asserted (for example) that "*We're not raising negligence, at all. We're particularising the case on a breach of fiduciary duty*" (see p.18 of the transcript from the hearing). Lord Falconer, for Investcorp, argued that C was seeking to add what he called negligence claims. Justice Jones sided with Lord Falconer, ruling that "*Thirdly, I agree that the intended amendments do tend to introduce new allegations of negligence, which the defendant cannot reasonably be expected to deal with properly in the limited time available before trial*" (p.139-40 of that same transcript).

289. It was agreed that none of this bound me. In the end, I need to look at the proposed reamendments and decide what is new. In that regard, the key passages are:

289.1. paragraph 50A of Part B (which was not new):

"It is a term to be implied into the SPA that Shallot and Investcorp Bank each owed a duty to exercise the discretionary power of investment in good faith and with a degree of prudence, diligence, care and skill which a prudent person rendering services as an investment manager would exercise".

289.2. paragraph 120 of Part B (which was new):

"The asset allocation decisions to invest in Blossom and to arrange First Layer Leverage and engage in First Layer Leverage (that is to say, each and every decision taken to make an investment using First Layer Leverage) throughout the currency of the SPA were taken in breach of the fiduciary duties owed to Mr. Al Sadik under the trust that arose on 28th February, 2008 and the terms of the SPA in relation to the discretionary power and in particular the implied term set out in this Part B at paragraph 50A, that is to say that the decisions were taken in bad faith and without the degree of prudence, diligence, care and skill which a prudent person rendering services as an investment manager would exercise. The decisions were taken recklessly, that it to say, without any

or any proper regard to the best interests of Mr. Al Sadik and predominantly for the benefit of Investcorp Bank".

289.3. paragraph 26E of Part C, of which subparagraph (2A) was new:

"(k) Eleventh Claim: Breach of Contract (Duty to Act Fairly)

26E (1) It is a term to be implied in the SPA that Shallot and Investcorp Bank each owed a duty to Mr Al Sadik to exercise the discretionary power of investment in good faith ("the Duty of Good Faith") and prudently. The duty is pleaded more specifically in Part B at paragraphs 50A to 50C.

(2) Upon entering into the IMA Investcorp Advisers and Blossom each became subject to the Duty of Good Faith which was also included in the IMA (Clause 5). Investcorp Bank and/or Investcorp Advisers and/or Blossom breached the duty by using and continuing to use leverage when they knew it was much more likely than not that the shares in the hedge funds in which Blossom invested would decline and had no prospects of rising, and this was a continuing breach until there was no more leverage.

(2A) Further and in any event, having regard in particular to the facts and matters pleaded in Part B at paragraphs 119 to 125, each and every asset allocation decision taken by Investcorp Bank including the decision to arrange First Layer Leverage (on the terms of the MNPAs) and to use First Layer Leverage was taken in the Interests of Investcorp Bank and recklessly and without proper regard to the interests of Mr. Al Sadik and in breach of the implied term identified in Part B at paragraph 50A and in breach of the fiduciary duties of loyalty more specifically pleaded in this Part C at paragraph 23.

(3) Investcorp Bank and/or Shallot and/or Investcorp Advisors and/or Blossom breached the Duty of Good Faith and the Trust Duties by acting in the best interests of Investcorp Bank reckless as to the interests of Mr Al Sadik and/or Shallot. The motives of these Investcorp parties are more particularly described in Part A and paragraph 13C and in Part B at paragraphs 50A to C and 119 to 125."

290. Mr Croxford KC argued that subparagraph (2) to paragraph 26E, which predated the reamendment, already advanced an allegation that the power to invest had been used imprudently, because it alleged breach of "*the duty*". He said that meant the duty as pleaded "*in Part B at paragraphs 50A to 50C*", and hence included the duty to invest "*prudently*", not just the part of that duty in paragraph 50A which had been given the label "*the Duty of Good Faith*". I am not sure about that, since it seems to me that the more natural reading is to link "*the duty*" to the duty referred to in the preceding sentence. Moreover, to invest when you **know** that "*it was much more likely than not that the shares in the hedge funds in which Blossom invested would decline and had no prospects of rising*", sounds to me like an allegation of bad faith, not mere imprudence.

291. Be that as it may, the key is probably the new subparagraph (2A) to paragraph 26E, and

whether the inclusion of the phrase "*and in breach of the implied term identified in Part B at paragraph 50A*" was to be understood as a freestanding allegation of a failure to use the requisite prudence, diligence, care and skill, or just part of the existing case that these decisions were being taken in Investcorp's own interests. In that regard, it is noteworthy that the reference to the implied term (a) is sandwiched between two allegations which go well beyond mere imprudence, (b) is linked to them by "*and…and…*" (not even "and/or"), and (c) is not separately particularised in any way. The particulars are said to be "*pleaded in Part B at paragraphs 119 to 125*", of which only paragraph 120 mentions prudence. But, in a similar way, even that says "*the decisions were taken in bad faith **and** without the degree of prudence, diligence, care and skill…*" (my emphasis). If this was an attempt to advance a separate case, to the effect that, even if Investcorp was acting in good faith, it was not using the requisite skill and care, that was being done in a very low-key fashion.

292. My strong impression is that these proposed reamendments were not really adding anything new, or at least were not intended to advance a new claim to the effect that there might have been "innocent" imprudence on the part of Investcorp. It seems to me that what was really going on was that C's legal team wanted to deploy Ms Murray's expert evidence about the supposed imprudence of the decisions made about asset allocation, as part of the case that Investcorp was acting in bad faith. They wanted to say: "No prudent bank would do this; Investcorp must have been up to no good".

293. If that is right, it is important to understand that C's legal team got what they wanted at the Trial, even if it ultimately profited C nothing. As well as opposing the application to re-amend, Investcorp had sought an order on 1-2 December 2011 requiring Ms Murray's report to be re-served with all the evidence about lack of prudence excised. Justice Jones did not grant that order, but instead decided to allow her report in on a *de bene esse* basis. In the Judgment, Justice Jones dealt in some detail with her evidence, as I will describe below.

294. Having said all of that, it seems to me that, in the context of a loss of a chance claim, it is properly arguable that success on the reamendment application would have enabled C to advance a claim at Trial to the effect that Investcorp's decisions about asset allocation were imprudent, even if not involving bad faith. I must therefore consider next whether **that** claim had any real prospects of succeeding.

(c) Stage 2: Expert evidence on "negligence"

295. C's whole basis for the allegation of imprudent allocation was the expert report of Ms Murray. It is obvious that an allegation of that kind requires expert evidence; a judge would be unlikely to be able to form a view about the advantages and disadvantages of different approaches to asset allocation without the assistance of experts.

296. The problem for C is that Justice Jones formed a very negative view of the evidence of Ms Murray. In particular, he held that:

296.1. she fell short of the standards to be expected of an independent expert (see paragraph 2.10 of the Judgment), in that her reports were adversarial, both in tone and content (paragraph 2.11) and that she (also paragraph 2.11):

"…had clearly come to the firm conclusion (with the benefit of hindsight) that

Investcorp had acted imprudently by making an increasingly leveraged investment in the market conditions that existed between Q2 and Q3 of 2008. Her terms of reference encouraged her to take a judgmental approach and, having done so, she argued her case in cross-examination to an extent which leads me to approach her evidence with a high degree of caution."

296.2. she had "*no actual experience of working as an asset allocator*" (paragraph 2.10) and that "*her limited experience does not qualify her to express an opinion about the quality of the work undertaken by Mr Franklin* ". Mr Franklin was Investcorp's head of asset allocation who had responsibility for constructing C's investment portfolio.

297. By contrast, Investcorp's expert, Professor Stowell, was found to have relevant experience ("*20 years experience in the investment banking and hedge fund industries including at O'Connor Partners, a large hedge fund based in Chicago*": see paragraph 2.4 of the Judgment). His evidence on investment structure and asset allocation was accepted by Justice Jones. For example (at paragraph 6.20 of the Judgment):

"…Both Prof. Stowell and Mr. Opp said that, in their experience, the investment restrictions and other terms of White Ibis III intended to protect the lender's interest, were consistent with what they would normally expect to see in credit facilities of this sort. There is nothing about these terms which leads me to the conclusion that Investcorp was disregarding Mr. Al Sadik's best interests by entering into this credit facility".

298. These conclusions on Ms Murray's evidence are, to my mind, all but fatal to C's prospects of succeeding on the Imprudent Allocation claim. It is not possible to get a claim of that kind off the ground if the expert on whose evidence the claim is based does not have the required expertise in the relevant area. That is especially true if the other side's expert does have the required expertise and expresses the view that Investcorp's use of leverage was "*reasonable*".

299. Mr Jones KC acknowledged that he could not suggest that C would have deployed evidence from any other expert. This new case was founded on the evidence from Ms Murray. To my mind, there is no sensible basis for concluding that Justice Jones would have formed a different view of the very same evidence just because it also happened to be relied upon for a slightly different purpose.

(d) Stage 3: Loss

300. C's pleaded claim for loss arising out of this so-called "*Eleventh*" claim referred back to that for the Fourth, Fifth, Nine and Tenth claims. That involved using a counterfactual in which the investment did not use "first layer" leverage, as follows:

"30. … Mr Al Sadik suffered loss as follows –

30.1 Unauthorised leveraging conducted by Blossom commenced in about April 2008 and ended in about August 2009 ("the Leverage Period");

30.2 The use of leverage by Blossom during the Leverage Period reduced the Aggregate NAV by more than it would have been reduced if unauthorised

leveraging had not been used ("the Leverage Loss");

30.3 Mr. Al Sadik will be adducing expert evidence as to the quantum of the Leverage Loss and its effect on the Aggregate NAV after the Leverage Period had ended until the date of the date of payment of the Redemption Amount (if any);…"

301. The Eleventh claim was not live at the Trial, but the Fourth and Ninth claims were and were premised in exactly the same way on a counterfactual in which no "first layer" leverage was used.

302. However, Justice Jones held that no loss had been caused by the use of "first layer" leverage (see paragraph 4.11 of the Judgment):

"… The measure of damages for the purposes of the Fourth and Ninth pleaded breach of contract claims is the sum required to put the plaintiff in the position he would have been in had the contract been performed in accordance with its terms. The asset allocation contained in the Investment Proposal was not implemented because the proposed investment in opportunistic/theme funds was ruled out by the liquidity provisions subsequently incorporated in the SPA, which in turn [led] to the decision to make a 3x leveraged investment in the single funds rather than an investment in SMF Co. The burden of proof rests on the plaintiff, but Mr. Black did not cross-examine Messrs. Franklin or Gurnani about how they would have constructed the portfolio, if the use of First Layer Leverage had not been open to them. Nor did he attempt to ascertain how they could have applied leverage incrementally, if the use of First Layer Leverage was not open to them. In my judgment the most reasonable inference to draw from the evidence is that they would have allocated 50% to LDSF (x3) and 50% to SMF Co in March 2008. Had they done so, Mr. Opp's evidence leads to the conclusion that Mr. Al Sadik's loss would have been greater than that which he actually suffered. In conclusion, if Mr. Al Sadik had established that Investcorp was in breach of contract, as alleged in the Fourth and Ninth Claims, he would have failed to prove that the breaches caused any loss and damage."

303. I can see no escape from this factual finding for C. If the complaint is that it was imprudent for Investcorp to employ "first layer" leverage, then the counterfactual must be constructed on the basis that "first layer" leverage is not used by Blossom. Justice Jones considered exactly that counterfactual scenario and concluded that, in that case, C's loss would have been "*greater than that which he actually suffered*". It is unrealistic to imagine that he would have reached a different conclusion in the context of alleged imprudent (rather than bad faith) allocation.

304. Mr Jones KC valiantly contended that, if a wider range of matters had been attacked, Justice Jones might have arrived at a different counterfactual. But when I pointed out to him that this amounted to saying that, if there had been a finding of mere negligence, the counterfactual in relation to the "correct" asset allocation would have been more generous to his client than the counterfactual in relation to the "correct" asset allocation in the context of a finding of bad faith, he agreed that was "*a stretch*". He very properly confirmed that he was not in a position to challenge what the Judgment said about C's loss.

305. To call it a "*stretch*" understates C's difficulty. The reality is that it is not realistic to

imagine that Justice Jones would have reached any different conclusion on the counterfactual and C's loss in the unlikely event that there had been a finding in C's favour on the Imprudent Allocation claim.

306. For that reason also, that claim can be seen, in the light of the Judgment, to have been devoid of any merit.

(e) Conclusions on the Imprudent Allocation claim

307. Putting those two points together, I have no hesitation about concluding that, in the light of the Judgment, the prospect of the Imprudent Allocation claim succeeding was effectively zero. I cannot see how C could have escaped from the findings made about his expert evidence and/or about his supposed loss.

308. For completeness, I should add that the Ds had identified some yet further potential problems with this claim: such as the effect of indemnities given to Blossom and its investment manager, and the practical difficulty for C with complaining about investment allocation decisions which were ultimately made by Shallot, which was an SPV without any assets (after C's investment had been recouped). However, these seemed to me less important than the obstacles presented by the findings in the Judgment, in relation to both liability and quantum.

C.5 Settlement value

309. I have already discussed the cases which make clear that a claim which is hopeless cannot (without more) be said to have value as a lost chance because it might have had some nuisance value. In the light of my findings on the merits of these new claims, I am bound to conclude that they offered no additional settlement value, unless there is some basis for saying that there might be an enhanced settlement opportunity even for these hopeless claims.

310. It does not seem to me to matter for this purpose that it might be said that the settlement value might fall to be arrived at prospectively, without the Ds being able to rely in quite the same way on the content of the Judgment. To the extent that Investcorp's notional decision-making about settlement would involve assessments of how the evidence might turn out, it is obviously relevant how their witnesses in fact performed. We can see that Investcorp's factual and expert witnesses performed well at the Trial. With that in mind, it would be pure speculation to suggest that Investcorp might internally have been predicting otherwise. In any event, there is no reason to imagine that C obtaining permission to reamend would have **changed** Investcorp's assessment of the risks in this regard, which is ultimately the issue with which I am concerned.

311. C had a point on timing. It was said that, on 31 October 2011, C had given his consent to suggesting mediation to Investcorp, but Investcorp rejected that suggestion because it came at a late stage in the proceedings. It was suggested that, if Investcorp had been faced with the reamendments, there was a chance that the Trial would have been delayed, and then there would have been time for settlement efforts to be made.

312. All of this seems entirely speculative to me. To the extent that it depends on different decisions which **C** would supposedly have made, I would expect the facts to be pleaded, and evidence adduced, about what was going on in this regard. There is nothing of that

kind. Further, I emphasise that C is not saying that, at trial, he expects to be able to call evidence from Investcorp about its approach, or the constraints of timing, or anything of that kind.

313. The evidence actually put before me in this regard was limited, but in some ways very striking. It consisted of an email dated 7 November 2011 (i.e. a few weeks before the hearing of the reamendment application) from Deepak Nambisan, junior counsel to Investcorp, to D3 (junior counsel to C). It referred to a telephone conversation on 1 November 2011 in which D3 had apparently asked whether Mr Nambisan's clients were interested in a formal mediation process. The answer was flatly negative: "*My clients consider that any form of mediation at this late stage of the proceedings will serve only as a distraction from preparing for trial in January. The proposal of a mediation is therefore rejected*".

314. As I have said, Mr Jones KC focused on the reference to this being at a "*late stage of the proceedings*". But that seems to me to see only the one tree and miss the rest of the wood. This was an open settlement overture, and it was firmly rejected. Investcorp was not willing to mediate. It was not even willing to discuss mediating. There is no basis for imagining that, if the Trial had been put back, Investcorp would suddenly have shown an interest in settlement which had previously been notable only by its absence.

315. It might be noted that the timing for the approach on behalf of C is not said to have been the result of any external factor. To the extent that Mr Jones KC is saying that, if the reamendments had been made earlier and had pushed back the Trial (itself a bold assumption, given that C's clear position at the reamendment application, as stated on his behalf by D2, was that he did not want any delay to the trial), there would have been more time for settlement efforts, the short answer is that the shortage of time was a product of the timing of that approach from C, which was presumably dictated by the imminence of the Trial. Put another way, absent another explanation for the timing of that approach from C, I would assume that if the reamendments had been raised earlier and had delayed the Trial, that change to the timetable would simply have delayed C's proposal for mediation.

316. But I doubt that any of this really matters. The short point is that, if Investcorp was interested in settling the claim, whether as a result of the proposed reamendments, or at all, it would not have rejected the proposal to mediate on the basis that mediation would be a distraction. It must have taken that view because it saw no real prospect of a mediation resulting in a settlement, such that the process would just be a distraction.

317. Mr Hollander KC and Mr Croxford KC suggested that it was easy to understand Investcorp's lack of interest in settlement, given the nature of the allegations made against it by C. But it does not seem to me that I need to get into any of that, which might also be said to be speculation in the absence of any evidence from Investcorp. The real point is that there were never any settlement discussions. It does not matter why. There is no proper basis for imagining that having a little more time after this initial approach would have made all the difference, any more than it might be hoped that adding in some further (hopeless) claims would change Investcorp's approach.

318. For his part, Mr Jones KC asserted that Lord Falconer had been quick to disown the IMA on behalf of Investcorp "*for other reasons we don't know about*". I asked Mr Jones KC whether he was suggesting that there might have been some sensitivity in that

regard which might have had an impact on the prospects of settlement if the reamendment was allowed. He responded that he was, but also accepted that there was no basis for that in the evidence. That seemed to me to be pure speculation; an attractive fantasy for C, but not anything more substantial than that. After all, as Mr Choo-Choy KC pointed out, the embarrassing story of the creation of the IMA **was** explored at the Trial, with no sign of any special sensitivity on the part of Investcorp about that.

319. I therefore conclude that C has no real prospect of showing that there was a real chance of achieving a settlement if the reamendments had been allowed. If Investcorp was not interested in settling the existing claims, the new claims were not going to make any material difference to its position.

C.6 Anti-Suit Injunction: claim against D2

320. I now come to the other claims against D1 and D2. These have nothing to do with the reamendment application. This complaint concerns the advice given in 2018 about the risk of Investcorp obtaining an anti-suit injunction in the Cayman Islands if C commenced proceedings in Dubai.

321. As against D2, this is a very short point. It is alleged that D2 failed to advise C as to the risk of an anti-suit injunction in relation to the Dubai Proceedings and the associated adverse costs risk. The question for me is whether that allegation has any real prospects of success.

(a) The parties' submissions

322. D2 submits that the allegation that he was negligent in this regard is unsustainable: he was not instructed to advise about the risk of an anti-suit injunction, but instead was asked a specific question about the potential impact of the Dubai Proceedings on the mindset of the Privy Council, assuming it was raised with the Board before they made their decision on C's appeal. D2 answered that question. Far from being asked to advise about the risk of an anti-suit injunction, he was told that this aspect had already been covered.

323. C says that D2 was being asked by D1 to provide advice in relation to the potential adverse consequences of the Dubai Proceedings being issued, one of which was the risk of an anti-suit injunction, but he failed to give any advice about that.

(b) The relevant evidence

324. It seems to be common ground that this issue turns on the content of an email exchange on 22 May 2018. It is perhaps worth setting out again the key parts of that exchange for ease of reference.

325. Mr Hutchison of Clyde & Co emailed D2 and D3 as follows:

> *"**Action in Dubai - effect on Cayman / JCPC?***
>
> *Separately, as mentioned previously to Michael, we are preparing to issue a new claim against Investcorp in the Dubai Courts (we consider it is available and a more favourable prospect than going in Bahrain), for which timing at this point is primarily*

driven by need to protect time for various of the causes of action under UAE law. We may file at the end of this week … I have also alerted the client previously to the risk I see that upon being notified of the Dubai action (before the JCPC judgment, which is likely) Investcorp will seek to inform the JCPC or try something to anti-suit in Cayman which may damage the JCPC judgment prospects. Michael expressed the view when we discussed briefly that the risk of adverse impact was low, weighed against the risk of time bar in Dubai. And that we could justify the action to Cayman / JCPC if needed on grounds that we needed to file to protect time and the delay from CA has meant it coincides with this.

Please can you give me your views on this issue now before we file. It seems to me more of a risk not to commence in Dubai because we're waiting for JCPC and could lose any other rights to claim in Dubai (albeit I consider the correct application of prescription gives more time, the client fairly wants to take no chances on the possible shorter period)…"

326. D2 responded to that email the same day, stating (in relation to the question he had been asked by Mr Hutchison):

"…Secondly, if the choice is between the possibility of losing the right to make a claim in the UAE altogether and the hard-to-anticipate consequences of the claim being brought to the JCPC's attention, I think that common prudence dictates one follows the course of bringing the claim".

327. That is really the long and the short of it. D2 was not instructed as counsel in relation to either the Dubai Proceedings, or the anti-suit injunction proceedings in the Cayman Islands. Mr Jones KC agreed that there would be no further evidence at trial about the content of these communications. The trial judge would read these messages in their context and form a view of what D2 was being asked to do.

328. In terms of context, Mr Jones KC indicated that he relied upon the evidence of Mr Ranu (current solicitor for C) about the context for this exchange. Mr Ranu (in his second witness statement) makes some submissions (e.g. about whether barristers have a duty to advise on issues beyond those discrete points in respect of which their advice is specifically sought), but also makes a number of factual assertions, such as that D2 was "*heavily involved at all stages of the proceedings (including both appeals)*" and that he was "*deeply involved in both the detail of the case and its resourcing and was constantly offering thoughts and comments on various matters without awaiting or requiring formal instructions to do so on each and every occasion*".

329. Mr Jones KC argued, in my view correctly, that if any of the factual content of this evidence made a difference to whether this claim against D2 had real prospects of success, I should allow the claim to proceed to trial. It was only if I took the view that, even if what Mr Ranu says about the relationship between C and D2 was true, the claim was still bound to fail, that I could grant reverse summary judgment.

(c) Discussion

330. That is the view that I take.

331. I accept Mr Hollander KC's submission that it is clear beyond argument that D2's

advice was being sought on the premise that C had already been advised about the risk of an anti-suit injunction. Absent that special ingredient, I see that it might be arguable that, even when D2 was specifically asked about the potential impact of the Dubai Proceedings on the thinking of the Privy Council, D2 should have checked whether consideration had also been given to the risk of an anti-suit injunction, given the extent to which D2 was "embedded" in this litigation. However, once one factors in that D2 is being told that the client has already been alerted to the risk that Investcorp might "*try something to anti-suit in Cayman*", that argument becomes hopeless. It amounts to suggesting that the only correct response to being told by his instructing solicitor that he was already aware of the risk of an application for an anti-suit injunction in the Cayman Islands, was to check whether his instructing solicitor was aware of that risk. I find it hard to believe that anyone would consider that necessary or appropriate, let alone accept that it would be **negligent** for a barrister to do otherwise.

332. Mr Jones KC argued that the strength of the case for an anti-suit injunction was such that D2 should have told Mr Hutchison that an anti-suit was a "*racing certainty*" (Mr Jones KC's words). That seems to me to start in the wrong place. The question is whether the trial judge could properly conclude that every competent barrister, informed that the client had already been advised about the risk of an anti-suit, and then asked to advise about a different issue, would have given any thought to the risk of an anti-suit injunction. As to that, in my judgment, it cannot sensibly be said that every competent barrister would take the view that an anti-suit would inevitably be granted, or that, if it was granted, that would necessarily represent a complete barrier to proceeding in Dubai for this client. After all, C was not resident in the Cayman Islands, and he had already invested very considerable sums in legal costs in chasing Investcorp.

333. As I say, I am willing to accept that, if there was no sign that the risk had been considered, it might be said to have been necessary for D2 to identify the risk, even if not asked about it. But in circumstances where the risk had already been identified, and D2 was being asked about a different risk, I do not see how it can be said that it was for D2 to tell D1 that, whatever different view D1 and C might have reached, his own opinion was that the risk of an anti-suit injunction should be treated as a showstopper.

334. It does not seem to me to add anything to say that D2 was heavily involved in the Cayman trial and appeals, or that he had been for many years. I am content to assume that Mr Ranu's factual evidence about this is correct. The reality remains that D2 was being asked about the proceedings in which he was instructed, and especially the appeal before the Privy Council which he had presented, not about potential anti-suit proceedings.

(d) Conclusion

335. In my judgment, the claim against D2 in relation to the anti-suit injunction is hopeless and there is no reason why it should go to trial. I grant reverse summary judgment on this claim too.

C.7 Anti-suit injunction: claim against D1

336. The issues in relation to the equivalent claim against D1 are slightly different. C does not accept that appropriate advice was in fact given to him about the risks of an anti-

suit injunction and D1 does[4] not contend that **that** issue (i.e. about the appropriateness of the advice given) is susceptible of summary judgment.

(a) The parties' submissions

337. D1 instead argues that there is no proper basis on which it could be concluded that D1's actions amount to an "effective cause" of the loss suffered. It acknowledges that the failure to give advice might be said to amount to a "but for" cause of the costs of the anti-suit injunction, on the basis that, if different advice had been given, C might have chosen not to commence the Dubai Proceedings at all. But D1 says that there is an insufficient nexus between the costs incurred by C in fighting an anti-suit injunction and D1's actions, given that the chronology is as follows:

337.1. on about 27 May 2018, a claim was issued in Dubai, facilitated by D1 and other local counsel (Hilal & Associates);

337.2. on 23 July 2018, D1 ceased to act for C following the complaints made by him;

337.3. on 31 August 2018, a summons was issued in the Cayman Islands by Investcorp, seeking an anti-suit injunction;

337.4. on 14 October 2018, C filed an amended claim in the Dubai Proceedings, undertaking not to relitigate in Dubai the issues which had been determined in the Investcorp Claim; and

337.5. on 18 October 2018, the application was heard, and C lost.

338. Put simply, it is said that C opted to continue to fight the application, presumably having been advised by his Caymanian legal team (against whom no claim is brought) who by that stage included: (i) D4; (ii) new counsel (Tom Lowe KC); and (iii) Al-Hilal, C's new solicitors in Dubai. That decision by C to fight on is said to amount to a break in the chain of causation.

339. C responds that there is currently no evidence before the Court as to what advice was given by C's Caymanian legal team and that the question of whether any such advice broke the chain of causation is highly fact sensitive. Mr Jones KC pointed out that D1 had not advanced its evidence in support of the summary judgment application on the basis that the Court should draw inferences about the content or timing of advice given by C's Caymanian legal team. He submitted that it would be unfair for the Court to criticise his client for not adducing evidence at this stage about that advice. In any event, C submitted, Investcorp would have been incurring costs between the date of the issue of the claim form in Dubai and the date of its summons in the Cayman Islands, such that, even if C had been advised, and agreed, to throw in his hand on receiving the summons, or perhaps even before that, there would still have been a bill for costs resulting from the initiation of the Dubai Proceedings.

(b) Discussion

340. Tempting though it may be to tie a neat bow around this action, it does not seem to me

[4] A slightly more aggressive line was taken in this regard in D1's evidence in support of the application, but that was not pursued by Mr Croxford KC in his skeleton or at the hearing.

that this issue is suitable for summary judgment.

341. On the assumptions (for present purposes) that (a) D1 did not give C sufficient advice about the risks of an anti-suit injunction and (b) if it had done so, C would not have commenced the Dubai Proceedings, then it must follow that C had already suffered some loss (i.e. the costs of commencing the Dubai Proceedings, and perhaps also some of the costs which would have to be paid to Investcorp in respect of preparing its application for an anti-suit injunction) before others supposedly became involved in advising C.

342. In oral submissions, there was much discussion of whether, having realised that he was in a hole, C (and his new legal team) should have stopped digging, instead of fighting on to a hearing of Investcorp's application. Even if that is right, it would appear to follow that (on the assumptions indicated above) D1's advice had resulted in C finding himself in a hole. Even if C's decision to continue digging amounted to a break in the chain of causation, it would follow that C had suffered some of the losses currently claimed, as a result of D1's failure to give the right advice at the outset about the risk of an anti-suit injunction being granted.

343. In those circumstances, I am wary about wading in at the summary judgment stage and seeking to reach any final conclusion about whether there must have been a break in the chain of causation, or (if there was) about which parts of the claim for Investcorp's costs cannot be recovered from D1. I accept Mr Jones KC's submission that that is likely to be a highly fact sensitive issue, or series of issues, which will perhaps depend on what advice C received from others and when. It is properly a matter for trial.

344. I do take the view, however, that C needs to plead out properly its case on causation. It is perhaps understandable why this has been done only in broad strokes so far; C has had bigger fish to fry. But if this aspect of the case is going forward to trial, it needs to be made clear whether, for example, C is alleging that he was **never** given any advice by anyone about the merits of his position, or whether (for example) he says that further costs were in effect being incurred after other lawyers took over from D1 by way of mitigation (i.e. in an attempt to extract himself). The costs which are claimed need to be broken down, so that one can see (for example) how much of Investcorp's costs were for the initial preparation of the application for anti-suit relief, which costs C might have had to pay even if he had given up on the Dubai Proceedings immediately upon being served with that application, and how much of the total was for later exchanges of evidence and the hearing itself.

345. It also seems to me questionable, if this part of the claim against D1 is the only aspect of the case which survives, whether this action should be continuing in the Commercial Court, or whether the greatly reduced value means that it should now be transferred to the Circuit Commercial Court.

346. If agreement cannot be reached following handing down of this judgment, I will hear C and D1 on those points in the usual way.

(c) Conclusion

347. C does have a real prospect of succeeding on his claim against D1 in relation to the advice given (or not given) about the risk of an anti-suit injunction. The issue as to

whether there was a break in the chain of causation at or after the point at which D1 ceased to act for C is not suitable for summary disposal. That claim must go to trial.

D Overall conclusion

348. I have found that the claims against D2 - D4 in relation to the reamendment application are time-barred. I have also concluded that those claims (against all of the Ds) have no real prospect of success and all of the Ds are entitled to reverse summary judgment thereon. The same is true for the claim against D2 in relation to advice given about the risk of an anti-suit injunction; that claim is also hopeless and D2 is entitled to reverse summary judgment.

349. That leaves only the claim against D1 in that latter regard, where I refuse the application for reverse summary judgment and hold that the same must go to trial.

350. I will hear the parties on questions of costs and other consequential matters.