Neutral Citation Number: [2020] EWCA Civ 245

Case No: A4/2019/0005

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
The Hon. Mrs Justice Cockerill
[2018] EWHC 1768 (Comm), [2018] EWHC 2905 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2020

Before:

LORD JUSTICE IRWIN
LADY JUSTICE SIMLER DBE
and
SIR JACK BEATSON

- -

Between:

FRÉDÉRIC MARINO	Appellant
- and –	
FM CAPITAL PARTNERS LTD	Respondent

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Thomas West (of **Richard Slade and Company**) for the **Appellant/First Defendant**

Nathan Pillow QC (instructed by **Hogan Lovells International LLP**) for the **Respondent/Claimant**

Hearing date: 28 January 2020

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Approved Judgment

Sir Jack Beatson

I. Overview

1. The appellant, Mr Frédéric Marino, was at the material times a director and Chief Executive Officer of the respondent, FM Capital Partners Ltd ("FMCP"). He appeals from the orders of Cockerill J following a trial in which she held that he and others are liable to FMCP for breach of fiduciary duty, dishonest assistance, and in respect of secret commissions and bribes. Claims by FMCP in conspiracy and knowing receipt failed. Mr Marino was ordered to pay FMCP US$ 17.35 million. One of his co-defendants, Mr Yoshiki Ohmura, whose role is described at [10] below, was ordered to pay FMCP US$15.75 million. Mr Ohmura also appealed, but his appeal, on the only grounds for which permission was granted, was made conditional upon him complying with conditions which he failed to do, and his appeal was dismissed: see [35] below.

2. Mr Aurélien Bessot, at the material time also a director of FMCP and its Chief Investment Officer, was another of Mr Marino's co-defendants, but before trial he entered into a global but confidential settlement with FMCP. Mr Bessot settled all FMCP's claims against him by a payment of some US$2.8 million, and those claims were stayed by an order dated 23 February 2016. The single issue in this appeal is whether, and if so how much, credit should be given by FMCP to Mr Marino for the sums FMCP received from Mr Bessot, "the recoveries issue". FMCP has given credit for some 17% of the recoveries from Mr Bessot. Mr Marino's case is that it should have given credit to 100% or alternatively 80% of those recoveries.

3. The factual circumstances, the nature of FMCP's claims and the judge's decisions and the remedies in respect of the claims that succeeded are set out in two judgments. The first is a careful and detailed 602 paragraph "main judgment", [2018] EWHC 1768 (Comm), handed down on 11 July 2018 after a nine day trial, hereafter "MJ". The second is a 141 paragraph judgment on consequential matters including the recoveries issue, [2018] EWHC 2905 (Comm), hereafter "CJ". It was handed down on 1 November 2018, following a hearing on 25 July and subsequent written submissions. The judge's orders that are material were made on 30 July (corrected under the slip rule on 15 August and 3 September) and 12 December (corrected under the slip rule on 17 December) 2018.

4. Mr Marino's case before this court adopted and tracked the written submissions made by Mr Emmett and Mr Fox on behalf of Mr Ohmura. It was submitted that the judge erred in accepting the proposition that a claimant has a choice as to how recoveries are to be appropriated provided that choice is not obviously unsustainable, which she held they were not in this case. This was because Court of Appeal authority[1] shows that it is for a claimant to show by evidence that a recovery is in respect of a cause of action which should not be credited so as to reduce the liability of another defendant. It was argued that, where a claimant has not put forward sufficient material to satisfy the civil burden of proof, the non-settling defendant should be credited with the full amount that the claimant received under the settlement.

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[1] *Townsend v Stone Toms & Partners* (1984) 27 BLR 26. It and the other authorities are discussed at [56] ff below.

5. FMCP's case is that, for both principled and practical reasons, the authorities relied on by Mr Marino, which pre-date the Civil Procedure Rules, do not apply to this case. First, the judgment entered was for restitution of the bribes and accounts of Mr Marino's profits rather than for compensatory damages. Secondly, in this case, see [15] – [16] below, case management directions were made for the claims to be tried in two separate trials, the second of which has yet to take place. Moreover, it is argued that the appeal is "moot" or "academic" because Mr Marino's bankruptcy means that his remaining liability will not be satisfied.

6. In sections II – V below I summarise the background to FMCP's claims; the circumstances giving rise to what I refer to as the recoveries issue, the judge's decision on the recoveries issue, and the rival submissions before this court. Section VI contains my discussion of the questions before the court and my conclusions.

II. The background

7. In view of the fullness of the judgments below and the narrowness of the sole remaining issue, the recoveries issue, it is only necessary to refer to other circumstances of the wider dispute by briefly summarising the highlights and cross-referring to the relevant passages in the earlier judgments.

8. FMCP is a UK company originally envisaged in a report prepared by Mr Marino (then at JP Morgan) in February 2009. The report recommended a restructuring of the investment portfolios of the Libya Africa Investment Portfolio ("LAP"), a Libyan sovereign wealth fund, the total assets of which were approximately US$ 5 billion. FMCP was incorporated on 3 July 2009 as a joint venture between the LAP, Mr Marino and Mr Bessot. The judge found that the plan was for Mr Marino and Mr Bessot to arrange structured product trades for part of the LAP's assets. By the beginning of 2014, FMCP was managing more than US$ 500 million of those assets. Before January 2014 when Mr Bessot left, LAP's share in FMCP was 55% and Messrs Marino and Bessot's shares were respectively 33% and 12%.

9. FMCP's claims arose as a result of breaches of duty owed to it by Messrs Marino, Bessot and others concerning its investments totalling nearly US$ 240 million in structured financial products offered by Bank Julius Baer & Co. ("Bank Baer")[2] between mid-2009 and October 2011.[3] Messrs Marino and Bessot were the first and second defendants. The other two defendants were Ms Marit Sjøvaag, who was formerly Mr Marino's wife, and Mr Ohmura.

10. Mr Ohmura was an employee of Bank Baer and founded its investment arm GAM Structured Investments Ltd ("GAM"). He stopped working for the bank on 31 July 2009 but remained under contract to it until 30 August 2009. He subsequently set up as a trader on his own. He established Conquest Capital Limited, a Cayman Islands company ("Conquest Cayman") soon after he stopped working for the bank/GAM, and he established Conquest Financial Partners AG, a Swiss company ("Conquest FP") on 21 August 2009. Those entities were at all material times owned and controlled by him. On 22 October 2009 Messrs Ohmura and Marino established

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2 The structured products in which FMCP invested were known by their acronyms. GAIN I and GAIN II were acquired in July and October 2009, and AMFC+ was acquired in May 2010. The proceeds of these were invested in two other products, TRAC in November 2010, and TRAC+ in July and October 2011.

3 LAP started to deal with Bank Baer in July 2007 with an investment of $150 million.

Vesper AG and (see MJ§262) Mr Marino remained a co-owner of Vesper and Conquest Cayman until October 2010.

11. FMCP's claims for conspiracy, dishonest assistance, bribery, breach of fiduciary duty, and knowing receipt arose from introductory commissions paid by Bank Baer and the banking counterparties to the first three defendants or for their benefit through entities they controlled. The total sum claimed by FMCP was some $83 million.

12. In broad terms, between August 2009 and 2011 Bank Baer/GAM paid introductory commissions of some $6.05 million to Ironfly International Ltd ("Ironfly"), a Seychelles company incorporated on 9 April 2009 owned by Mr Marino and Mr Bessot, and $2.4 million to Conquest FP, the Swiss company owned by Mr Ohmura. In turn, on 16 October 2009 Ironfly paid $625,000 to Conquest Cayman, the Cayman Islands company owned by Mr Ohmura. In that period FMCP entered into some 14 short term trades with banking counterparties. The banks which were counterparties to the trades in the structured products also paid introductory commissions totalling some $7.5 million to Conquest FP. In turn, out of the payments to it by Bank Baer/GAM and the counterparty banks, Conquest FP paid $4.8 million commission to Leopard Technology Ltd. ("Leopard"), a Seychelles company owned by Mr Marino and $3.39 million to Ironfly: MJ §§45-47. The judge found that the bribes paid by JB/GAM and later Conquest FP were received by or for the benefit of Mr Marino personally, despite having been routed (at his direction) through the Ironfly or Leopard bank accounts: CJ §60, referring to her findings in the main judgment.

13. In 2010 Mr Marino paid a total of $856,271 indirectly to Mr Ramadan Haggiagi, at the material times a non-executive director of FMCP, and from the spring of 2009 LAP's Head of Investment: MJ §§49, 267-274. Mr Haggiagi knew of the introducer's fee Mr Marino had received and about Mr Marino's payments to Ironfly. He approached Mr Marino and sought a payment for his own benefit, and Mr Marino paid him because he wanted to keep him "onside": see MJ §§267, 272-274. It appears (see CJ §29) that proceedings were never issued against Mr Haggiagi.

14. LAP had been concerned about the management of its assets by FMCP since late 2011: see MJ §§51 -53. Matters came to a head towards the end of August 2014. LAP complained to FMCP, stated that it had lost all confidence in Mr Marino, and asked FMCP to investigate its concerns: see MJ §54. By the beginning of September 2014, Mr Marino had been suspended and forensic accountants had been engaged. The circumstances leading to Mr Marino's dismissal on 3 November 2014 are summarised by the judge at MJ §§55 - 60. These proceedings were issued on 23 December 2014 and served on 19 February 2015.

15. I have stated that the trial before Cockerill J did not deal with all FMCP's claims. At a case management conference on 20 December 2016, Andrew Baker J accepted FMCP's application that the overall trial of the substantive claims be split and directed that there be two separate trials. The first "Phase 1" trial which came before Cockerill J was to include all the claims against Mr Ohmura. "Phase 2" was to be a trial of FMCP's claim that Mr Marino and Mr Bessot's conduct caused it to incur losses of two types. First, that on one of its investments through Bank Baer, notes known by their acronym, GAIN, it had forfeited capital protection and lost some $46 million. Secondly, it claimed that it suffered loss in respect of fees charged without

LAP's consent, which fees benefitted entities owned or controlled by Mr Marino and Mr Bessot.

16. At the hearing before Andrew Baker J, Mr Ohmura agreed that the two phases should be separated. Mr Marino, who at that hearing was assisted by Mr West then acting as a McKenzie Friend, did not agree, but made no specific submissions objecting apart from stating that the overall cost of two trials would be greater than the cost of one. Andrew Baker J stated that the case management considerations meant that there was "a very clear and strong case for splitting the overall trial of the substantive claims". One of those was that, unless it was discovered that Mr Marino had significant undisclosed assets, the sums involved meant that in this case a second trial was "the least likely outcome". He was also satisfied that careful consideration had been given to the degree to which the practicalities of trying the issues allowed "for a clean enough split to make it workable". The "Phase 2" trial has not occurred, and at the hearing before us the court was told that no procedural steps have been taken for it since the pleadings.

17. The judge's analysis and conclusions on the principal claims she dealt with are at MJ §§96 – 479. Her summary of her conclusions is at MJ §582. Her Ladyship held that Mr Marino and Mr Ohmura were liable to FMCP for breach of fiduciary duty, dishonest assistance and in respect of secret commissions or bribes paid to them and Mr Bessot or for their benefit through entities they controlled. In an order dated 30 July 2018 and sealed on 3 September 2018, after being corrected under the slip rule on 15 August and 3 September, judgments in respect of the principal sum, and taking account of pre-judgment simple interest and "relevant recoveries", were entered for the sum of $12.47 million against Mr Marino and the sum of $9.91 million against Mr Ohmura.

18. The judge identified the issues relating to remedies at MJ §§583 – 602. She stated that the remedy FMCP sought on the claims on which it succeeded was an account of profits and/or equitable compensation for the breaches of fiduciary duty and dishonest assistance: see MJ §§584 and 587. In respect of the bribery, she accepted FMCP's submission that it was entitled to recover the amount of the bribes as money had and received and to damages for fraud/deceit for any actual loss suffered, and to a proprietary remedy: MJ §§592-595. She found that FMCP suffered some loss as a result of the various payments made to Messrs Marino and Bessot and Mr Ohmura; but that loss was less than the full amount of those payments: MJ §§422, 425. In her judgment on consequential matters, she stated that FMCP was seeking an account of profits in the amount of the bribes against Mr Marino which was "probably academic in view of the restitutionary claims and does not appear to be in issue": CJ §112.

19. It was common ground that, as against each defendant, FMCP could not claim both account and compensation but was required to elect between liability to account and damages for actual loss prior to final judgment: see MJ §597 and CJ §73. Moreover, FMCP accepted that there could be no double recovery and "made clear that recoveries from one defendant by way of profit would go in fact to reduce loss against the other": CJ §79 But the judge rejected the defendants' submission that FMCP had to exercise any right of election between remedies consistently as against all defendants: CJ §90.

20. FMCP set out its approach to giving credit for the recoveries from Mr Bessot and two others[4] against Mr Marino's liability and the quantum of its various claims before the hearing on the consequential matters on 25 July 2018 and before it made its final election between an account of profits and compensatory damages. It had foreshadowed its approach shortly before the trial. A letter dated 27 February 2018 from its solicitors, Hogan Lovells International LLP set out the payments it had received and how it had apportioned those payments to the various claims (including costs and interest). But it did not make its election between an account and damages until the end of the hearing on 25 July 2018. It then elected for restitution and an account of profits for the claims against Mr Marino and some of the claims against Mr Ohmura but compensation for other claims against Mr Ohmura. Because of the settlement with Mr Bessot in 2016, it was not necessary for FMCP to make an election in his case.

21. The schedule to the order dated 30 July 2018 and sealed on 3 September 2018 identified the causes of action as "bribery" and the remedy as "restitution". That order stated that FMCP was not precluded from seeking judgment in respect of any matter not decided in the main judgment and any consequential matter (the "deferred matters"). In an order made on 12 December 2018 and sealed on 19 December 2018, judgment was entered against Mr Marino for the additional sum (reflecting the principal, together with pre-judgment simple interest and "relevant recoveries") of $4,880,360.76. This derived from sums received by Ironfly in relation to the GAIN transactions listed in MJ §186. The causes of action and remedies are stated to be bribery, with a remedy of restitution, and breach of fiduciary duty and dishonest assistance, each with a remedy of account of profits. That order also entered judgment against Mr Ohmura in respect of his liability for GAIN which, in an order made on 28 March 2019, was quantified as US$5.840,193.74.

22. Permission to appeal was sought by Messrs Marino and Ohmura on 31 grounds. In orders dated 5 February, 18 March, 8 July and 25 September 2019, Longmore LJ refused permission to appeal on all but the two grounds which concerned the recoveries issue[5] and made other directions.

III. The recoveries issue:

23. I stated at [19] – [20] that FMCP accepted before the Phase 1 trial that "where appropriate" it had to give credit to its claims against Messrs Marino and Ohmura for sums received from third parties including the other defendants and how it had apportioned those payments. After the main judgment, the position was updated before the hearing on consequential matters on 25 July 2018 in the 9th and 10th statements of Mr Humphrey dated 18 and 24 July, and subsequently in an updated quantum schedule dated 31 July.

24. FMCP is understood to have recovered a total of $6,346,036.50 from Mr Bessot, Ms Sjøvaag, and Mr Haggiagi: see the table at paragraph 15 of Mr Humphrey's 9th Statement and the updated schedule. The judge dealt with the allocation of these recoveries in her November judgment on the consequential matters. This appeal only concerns the effect of FMCP's recovery of the some $2,800,000 from Mr Bessot

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4 See [24] and [28] below.

5 These are set out at [35] below.

under the global settlement to which I referred at [2] above. FMCP's claims against Mr Bessot in part overlapped with its Phase 1 claims against Mr Marino and Mr Ohmura, and in part overlapped with its Phase 2 claims against Mr Marino. The dispute is how to apportion the recoveries between Phase 1 and Phase 2 claims.

25. The settlement between FMCP and Mr Bessot remains confidential. In late 2017 Leggatt J rejected an application for its disclosure on the ground that there was nothing relevant in it. It would thus appear that the settlement was of all the claims against Mr Bessot and not of all the causes of action in FMCP's pleaded case. Mr Humphrey's evidence is that it and the other settlements contained no specific agreement as to apportionment of the sums recovered: 9th Statement, paragraph 10.

26. Mr Humphrey's evidence about the method FMCP adopted to allocate recoveries (including the letter dated 27 February 2018) was before the judge at the hearing on the consequential matters on 25 July, and she heard submissions on this. In her judgment, she described FMCP's method as a *pro rata* approach. Mr Humphrey's evidence is that first, the individual recoveries were apportioned against the costs FMCP incurred in bringing and settling the claim. Secondly, they were apportioned against pre-settlement interest on the principal sums claimed. Thirdly, they were apportioned against the amount of the pleaded claim: 9th Statement, paragraph 11. In the case of the recoveries from Mr Bessot whose settlement covered all FMCP's claims against him, some of which were to be dealt with in Phase 2, this also involved apportioning the recoveries as between Phase 1 and Phase 2. FMCP also did this by *pro rating* the sums recovered according to the total pleaded claim in each phase.

27. The result, using the figures in the post-hearing updated Quantum Schedule dated 31 July 2018, is that FMCP apportioned the some $2.8 million recovered from Mr Bessot as follows:

    i) $221,799.82 to the costs it incurred in bringing and settling the claim against him;

    ii) $435,101.03 to the Phase 1 claims (except the one in respect of AMFC+), and

    iii) $2,143,099.15 to the Phase 2 claims.

    On these figures, FMCP thus apportioned the approximately 17% of the recoveries from Mr Bessot referred to at [2] above to the Phase 1 claims and some 83% to the Phase 2 claims.

28. The effect of the recoveries of some US$2.7 million including interest and a sum in respect of FMCP's costs[6] from Ms Sjøvaag and some $839,000 from Mr Haggiagi[7] does not arise in this appeal. This is partly because FMCP has given credit for those recoveries against Mr Marino's liability, see paragraph 12 of the 9th Statement of Mr Humphrey and partly because Mr Ohmura's appeal has not proceeded. Had Mr Ohmura's appeal proceeded, those recoveries might have been in issue *vis a vis* him because his skeleton argument states that the judge's orders only gave credit for them

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6 Hogan Lovells letter dated 27 February 2018 states that FMCP received a total of US$1,685,735.72 and $773,781.44 from Ms Sjøvaag.

7 The table at paragraph 15 of Mr Humphrey's 9th statement records three payments to FMCP from Mr Haggiagi (erroneously described as "payee").

to the claim against Mr Marino. It should, however, be noted that Mr Humphrey's evidence is that recoveries from Ms Sjøvaag were credited against Messrs Marino and Ohmura's liability in respect of the GAIN I commission which is the subject of an account.

IV. The judge's decision on the recoveries issue:

29. The judge held that she was entitled to accept FMCP's appropriation of part of the payments received from Mr Bessot to its non-overlapping and separate Phase 2 claims against him so long as those claims were not "obviously unsustainable": CJ §26. She rejected the submission on behalf of Messrs Marino and Ohmura, relying in particular on the decision of this court in *Townsend v Stone Toms & Partners* (1984) 27 BLR 26 (referred to by her as "*Stone Toms*"), that the court must decide this, that it is for the claimant, here FMCP, to show that part of the sum received was for another separate and non-overlapping, and that if it does not, it is not appropriate to apportion any of the payment to the Phase 2 claims: CJ §21.

30. The judge stated:

> "22. On my reading of the authorities (including *Stone Toms*) what is really being said is that the judge must do the best that he or she can, with the materials available to him or her. In *Stone Toms* it so happened that it was possible for the judge to make quite a detailed assessment because of the stage at which apportionment arose. The question arose at the end of a trial in relation to which one defendant had made a payment before trial. The judge had heard 67 days of evidence and delivered two judgments. He was therefore admirably placed to conduct a fairly detailed apportionment exercise.
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> 23. But this is not like for like with the current case. Firstly it concerned an apportionment of a payment in, and therefore there was more obviously a role for the Court to play. Secondly it concerned a claim which was at an end. Indeed none of the cases to which I have been directed concerns a situation such as the present one where an apportionment is between a completed and an incomplete phase of the litigation. Here what I face is an information imbalance, in that I know a good deal about the Phase 1 issues but next to nothing about the Phase 2 issues. It seems to me that there are two possibilities open to me: to accept the Claimant's apportionment of the monies it has already received (subject to any necessary oversight) or to make a broad brush assessment of my own."

31. She considered (CJ §24) that the statement of Eder J in *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 755 (Comm) at [13], deriving from the judgment of Evans-Lombe J in *Barings Plc (In Liquidation) v Coopers & Lybrand* [2003] P.N.L.R. 34 at [1116] – [1119] was of assistance in pointing to the

appropriate course. Eder J stated that "the claimants have a choice as to how the recoveries are to be appropriated so long as it is not 'obviously unsustainable'".

32. In the light of the authorities, she concluded:

> "26. I am not required to attempt what must necessarily be a very approximate and unreliable process of assessment myself, but am entitled to accept the Claimant's appropriation of part of the monies to a separate claim on a *pro rata* basis so long as that claim is not "obviously unsustainable". That does not beg the question as to what "obviously unsustainable" has to have reference. The Court can perfectly sensibly and without much information form a view on this question, particularly where, as here, the parties to that second claim are the same as the parties to the first claim and well placed to explain any obvious unsustainability."

33. Earlier in her judgment, she had stated:

> "21. … I cannot accept that what is being suggested is that in a situation such as the present I should effectively be putting this question off pending an assessment of the merits of the as yet rather undeveloped Phase 2 issues. This would be not only to encourage satellite litigation, but also satellite litigation which by its very nature would risk different conclusions to the final trial. Nor can I accept that absent full materials being tendered by the Claimant the correct approach is simply to refuse apportionment of a payment which on its face is referable to concurrent claims."

34. She accepted (CJ §27) that there may be questions as to whether the Phase 2 claims were the real focus of the claims against Mr Bessot, but stated that those claims are "pleaded against him, and they are on the face of it extensive and serious claims". She stated that Messrs Marino and Ohmura had not submitted that those claims were "obviously unsustainable", only that they were "significantly weaker" than the Phase 1 claims, and there had been no attempt to strike them out or to obtain a reverse summary judgment by Mr Bessot or Mr Marino who faces the same claims. She therefore concluded that the Phase 2 claims surmounted the "obviously unsustainable" hurdle and accepted FMCP's appropriation.

35. The two grounds on which Longmore LJ gave Messrs Marino and Ohmura permission to appeal were:

> "20. The Judge erred in law in refusing to order disclosure by FMCP of the relevant details of its recoveries from, inter alios, Mr Bessot, Ms Sjøvaag, and Mr Haggiagi, and for holding that it was for FMCP to choose how to allocate recoveries from the other defendants subject only to the threshold of the allocation not being 'obviously unsustainable'" (CJ §§8-26),

> "21. The Judge erred in law in deciding that the allocation contended for by FMCP was not 'obviously unsustainable'".[8] (CJ §276)

Mr Ohmura's appeal was, as I have stated, dismissed for non-compliance with conditions imposed by Flaux LJ in an order dated 8 July 2019 requiring him to make payments in respect of outstanding costs orders in the Commercial Court and to provide security for FMCP's costs of the appeal. For the reason I have given, the recoveries issue does not arise *vis a vis* Mr Marino in respect of FMCP's recoveries from Ms Sjøvaag, and Mr Haggiagi. Accordingly, the sole issue before this court concerns the effect on FMCP's claims against Mr Marino of the recoveries by FMCP from Mr Bessot.

V. The rival submissions:

36. There were two limbs to the submissions on behalf of Mr Marino. The first was directed at Mr Pillow QC's argument that *Townsend v Stone Toms* and the other authorities relied on by Mr Marino concern compensatory damages and do not apply to a case such as this where the judgment entered in the July order was for restitution of the bribe moneys and the one entered in the December order was for an account of profits. Mr West submitted that it was not open to FMCP to advance this point. It had not been made before the judge and there is no Respondent's Notice. As to substance, he argued that where a bribe is paid jointly to two people they are both liable to return it and where there has been a disgorgement by a defendant who has settled the claimant must take account of that in its claim against a defendant who has not settled. He also maintained that FMCP's submission is inconsistent with the fact that its allocations for its recoveries gave credit to Mr Marino's Phase 1 liability for recoveries it had made from third parties where the remedy was restitution rather than compensation. Mr West submitted that Mr Humphrey's evidence (see [28] above) showed this to be the case for the recoveries from Mr Haggiagi in respect of the bribes Mr Marino paid him and the recoveries from Ms Sjøvaag in respect of FMCP's claims for the part of the GAIN I commission he had transferred to her. The judgments entered on 30 July ordering restitution of the bribes and on 12 December 2018 ordering restitution and an account of profits were for sums that took into account "relevant recoveries", that is sums that reflected the allocations made by FMCP.

37. The second limb of his submissions is that the judge erred in relying on the *dicta* in the judgments of Evans-Lombe J in *Barings Plc (In Liquidation) v Coopers & Lybrand* [2003] P.N.L.R. 34 and Eder J in *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 755 (Comm) and not following the approach taken by this Court in *Townsend v Stone Toms & Partners* (1984) 27 BLR 26 and by Steyn J in *Banque Keyser Ullman v Skandia Insurance (No. 2)* [1988] 2 All E.R. 880 at 882b. He submitted that, while those cases, which the judge considered, and the approach of this Court in *Oak Tree Leisure Ltd v R.A. Fisk & Associates and*

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[8] The order granting Mr Marino permission "for the reasons in Mr Ohmura's application …", dated 4 February 2019 and sealed on 5 February 2019, has two references, A4/2019/0005 and A4/2018/3113. The first relates to the July order and the second to the December order but Longmore LJ stated that grounds 20 and 21 arose only relation to A4/2019/0005 so no permission was granted in respect of the December order. But since the December order entered judgment for a sum reflecting "relevant recoveries", the conclusion as to what recoveries are relevant may affect the way that order is executed. Mr Ohmura was also given permission to appeal against the July order on the apportionment ground: Order reference A4/2018/3109, dated 5 February 2019 and amended on 18 March 2019.

W. Fearnley & Sons (Salford) Ltd., unreported 26 November 1996, which had not been put before her, concerned claims for damages they support the proposition that a claimant who has received a payment from another defendant must show that the recovery relates to claims which are not concurrent and that it is for the judge to determine this, if necessary by some investigation of the other claims. The court should not accept a retrospective allocation by the claimant with a view to its own interests.

38. Mr Pillow QC submitted that Mr Marino's appeal should be dismissed for several overlapping reasons. He argued that the cases relied on by Mr Marino are not relevant because they concerned claims for damages to compensate the claimants' loss in those cases. In such cases, a claimant should not recover more in damages than it has in fact suffered, and the existence and extent of the liability of a defendant depends on whether recoveries from other defendants and third parties reduce or extinguish the claimant's loss. But where a defendant has been unjustly enriched, for example by the receipt of a payment which he is obliged to pay the claimant, he does not cease to be unjustly enriched merely because another person has wholly or partly paid the claimant.

39. He also submitted that the cases relied on by Mr Marino involved different factual scenarios; in particular they did not involve split trials or an "information imbalance" of the sort the judge in this case said (CJ §23 set out at [30] above) she faced. Moreover, they were, he argued, the products of a different era of civil litigation, predating the active and strong case management ethos introduced by the Civil Procedure Rules in 1999. It was therefore open to the court to decide on the position for circumstances such as those in this case by the application of first principles.

40. Mr Pillow submitted that the policy considerations underpinning the encouragement of compromise and the duty to do so by active case management strongly pointed against the position taken on behalf of Mr Marino. It would, he maintained, be remarkable to require a claimant who settles with one defendant in order to avoid the cost of a trial to be required to prove the merits of its case as part of the trial of its claim against another defendant before it can allocate any of the sum paid under the settlement to its free-standing claims against the defendant who settled rather than to concurrent claims against that defendant and the defendant who has not settled. Moreover, the appellant's position would produce an almost inconsistent dissonance between the position where a settlement apportions recoveries between the different claims and where, as in this case, it does not. This is because it is accepted (see Oliver LJ in *Townsend's* case at 41) such an apportionment is conclusive unless it is collusive or not made *bona fide*, and that beyond that there is no need to investigate the merits of the settled claims. The appellant, however, maintains where there is no apportionment such an investigation is necessary. Mr Pillow's final submission was that, if the judge was required to apply the approach in *Townsend's* case and *Oak Tree Leisure*, she did so correctly.

VI. Discussion

41. I make two preliminary observations. The first concerns the first limb of ground 20; that the judge erred in refusing to order disclosure of the relevant details of its recoveries. It is the second limb of ground 20, that the judge erred in deciding that FMCP was entitled to choose how to allocate recoveries from the other defendants

subject only to the threshold of the allocation not being "obviously unsustainable" that raises the fundamental issue in this appeal, and it is difficult to see the first limb as separate and freestanding.

42. Secondly, where a person brings claims against a number of defendants in a single set of proceedings and one of the defendants settles the claim against him or her or a third party makes a payment that is related to the proceedings, the way the trial judge approaches the determination of what effect, if any, the payment has on the claims against the defendants who have not settled is highly fact sensitive, albeit within a framework of principle. In the words of Purchas LJ in *Townsend v Stone Toms & Partners* (1984) 27 BLR 26 at 52, it "must depend very much upon the context and the conduct of each individual case. It would, therefore, be in my judgment unwise for this court to lay down general rules". Although that was said in the context of a claim for compensatory damages, I consider that there is also fact sensitivity where the question arises, as it does in this case, in respect of claims for restitution or for a mixture of restitution and compensation.

(i) FMCP's restitution point

43. Although it would have been desirable for FMCP to have served a Respondent's Notice, I have concluded that it is entitled to take the restitution point. It is a point of law, and thus open to this court. Secondly, the point could not have come as a surprise to Mr Marino since it was raised in FMCP's skeleton argument dated 25 March 2019, 10 months before the hearing. It was not suggested by or on behalf of Mr Marino before the hearing before this court that FMCP was not entitled to take the point or that a Respondent's Notice was needed, and, at the hearing Mr West dealt with it, making full submissions on its substance.

44. Moreover, while Mr Marino did not have details of the settlement, he knew about it and knew shortly before the Phase 1 trial that FMCP had apportioned the entire sum received from Mr Bessot to its costs and to interest on its various claims against him in the way set out in Hogan Lovells' letter dated 27 February 2018. There was no suggestion by or on Mr Marino's behalf at the Phase 1 trial that Mr Bessot paid FMCP more under the settlement than the proceeds of the bribes which Mr Bessot had received through Ironfly. Nor was there any suggestion on his behalf at the hearing as to the nature of a possible defence to liability by Mr Marino on the basis of these recoveries. It is difficult to see how a defence of change of position could have been raised by Mr Marino. He has not been "disenriched", the conduct relied on was not by him but by Mr Bessot's payments and Mr Bessot was not acting on behalf of Mr Marino. Moreover, in the case of restitution for wrongs (as to which see [48] – [49] below) the defence may well be denied to the wrongdoer: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580 and the decisions on the wrongful exaction of tax in the two stages of the *Test Claimants in the FII Group Litigation*: *FII No. 1* [2008] EWHC 2893 (Ch.) *per* Henderson J at [32], [335] – [342] discussed in Burrows, *The Law of Restitution* 3rd Ed., 543, 624, 697-700; and *FII No. 2* [2014] EWHC 4302 (Ch) *per* Henderson J at [314] - [315], [337], and [2016] EWCA Civ 1180 at [278], [285], [336].

45. I add that FMCP made its allocation of the recoveries before its final election of remedy and has not suggested that it is now entitled to resile from those allocations so

that there is no question of Mr Marino being deprived of the credits made to him in those allocations.

46. I turn to the substance of the restitution point. FMCP's skeleton argument relied on *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 and in particular the statement of Saville LJ in at 394:

> "… whether the payer is out of pocket or has recouped his outlay from other sources is entirely irrelevant. The payee has been unjustly enriched by receiving and retaining money he has received from the payer to which he has no right. He does not cease to be unjustly enriched because the claimant is not out of pocket. His obligation to return the money is not based on any loss the payer may have sustained …".

The *Kleinwort Benson* case concerned money directly paid by the bank to the defendant under a void swaps agreement. The issue was whether the bank's recoupment from the proceeds of a hedging contract it had made did not enable the council to rely on a defence of "passing on". It was held that the council could not rely on that defence.

47. Saville LJ's statement gives broad guidance because it concerns the effect of "recoupment" or "recoveries" on a restitutionary claim. But the claimant's recoupment in that case was not from another defendant and Saville LJ's statement was made in the context of a different type of obligation to make restitution to that which arises in this case in respect of the bribes. Absent any defence based on "recoupment" by "passing on" the risk by entering into a hedging contract, the council's enrichment in the *Kleinwort Benson* case was "at the expense" of the bank in the sense that it was "by subtraction" from the bank which had made the payments to the council. The concern of the law in such a case is with the reversal of transfers of value between claimants and defendants, and the cause of action is unjust enrichment: see Burrows, *The Law of Restitution* 3rd ed., 2011, 63 ff (hereafter "Burrows") and Goff and Jones *The Law of Unjust Enrichment* 8th ed., 2011, §1-15 (hereafter "Goff and Jones").

48. In the present case there was no direct transfer from FMCP and no such subtraction from it. Here the bribes were (see [12] above and CJ §60) paid by Bank Baer/GAM and the counterparty banks to Ironfly, in the case of the counterparty banks through Conquest FP. While, over the years there have been a number of ways of conceptualising the obligation of persons to make restitution of bribes,[9] today it is generally regarded as an example of restitution for wrongs where the cause of action is the wrong and not unjust enrichment. In such a case the claimant seeks a restitutionary remedy for a tort or equitable wrong although, on particular facts (see [51] below), that claim may overlap with a claim for restitution by subtraction. Where it does not overlap, as Burrows states, the enrichment of the defendant is not an element in establishing the cause of action but is of relevance to the question whether instead of claiming compensation for the wrong, the claimant "is entitled to restitution

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[9] They include "waiver of tort" and an autonomous cause of action based on unjust enrichment by "interceptive subtraction": see Birks *An Introduction to the Law of Restitution* revised ed 1989, 133-139 and 142-146.

for that civil wrong to strip away all, or some, of the wrongdoer's wrongful gain": Burrows, p 621 and see pp 684-685 on restitution of bribes.

49. The categorisation of a case as one where the cause of action is unjust enrichment or one where the cause of action is a civil wrong, whether a tort or an equitable wrong, may have practical consequences. For example, where the cause of action is unjust enrichment, there is a ceiling to the enrichment because as a general rule only direct transfers of value from the claimant's assets or labour to the defendant qualify. Where the cause of action is a civil wrong, there is no such limit. For example, in cases of bribery, the defendant's wrongful gains will often (but not always, see [50] - [51] below) have been conferred by one or several third parties and not by the claimant. Here the gains were conferred in the payments by Bank Baer/GAM and the counterparty banks. Secondly, in autonomous unjust enrichment the defence of change of position will be available, but, as noted above, it will not be where the civil wrong is the cause of action and restitution the remedy to strip away the wrongful gain. Where a defendant has committed a civil wrong from which he or she has made a gain, in this case by receiving a bribe, a restitutionary remedy, whether repayment of a bribe or an account of profits, would ordinarily lie against that defendant only in respect of sums he or she received. So, in this case it would lie against Mr Bessot only in respect of sums he received and not in respect of sums Mr Marino received, and vice versa.

50. No authority was cited to us as to the position where there are multiple defendants to a claim for restitution for wrongs, although in the context of bribery, in *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [54] considered by the judge (MJ §592), Lawrence Collins J (as he then was) stated that "The agent and the third party are jointly and severally liable to account for the bribe". That accords with the view of Goff and Jones. The editors state at §4-54 that where a benefit is received by more than one defendant, for example where a payment is made into a joint bank account, "the law generally holds that all the defendants are jointly and severally enriched, with a result that a claim for the whole amount of the enrichment may lie against any or all of them". In their chapter on contribution and recoupment (at §27-69) they state that in cases where the defendants are jointly and severally enriched, "the principle against double recovery prevents the claimant from recovering against every defendant in full".

51. Neither *Daraydan Holdings Ltd* nor Goff and Jones address the position that arises in this case where one defendant is entitled to credits in respect of sums received from another defendant who settled the claim, let alone state that the claimant must give the non-settling defendant credit for the amount received from the settling defendant. Goff and Jones, moreover, deal only with unjust enrichment "by subtraction" from the claimant and not with restitution for wrongs. On its facts, *Daraydan Holdings Ltd* was also a case of unjust enrichment by subtraction because the judge found that the price of the services the Solland defendants and their companies charged the claimant was actually increased by the amount of the bribe to the intermediary, Mr Khalid: see [87] and [89] – [90]. Lawrence Collins J stated at [87] that the bribe derived directly from the claimant: it "was paid out of the money paid by the claimants for what they thought was the price". He also stated that "these factors make the claim one for the restitution of money extracted from the claimants" and provided "a proprietary basis for the claim".

52. The approach of Burrows, who does consider the position in the case of restitution for wrongs, is illuminating. He states (at 630) that in the case of a wrong by several defendants, who gain by different amounts "in terms of principle, several liability ought to be applied" so that each defendant is liable to pay restitution for the amount that that particular defendant has gained by the wrong. Accordingly, in his example of a case in which three defendants assault the claimant in a single attack or defame him or her in a single publication, where the first was paid £10,000, the second £2,000, and the third was not paid, he states that the first two ought to be liable for respectively £10,000 and £2,000, and the third ought not to be liable in restitution at all. He does not expressly deal with the position where the first defendant settles the claim against him by repaying the £10,000 but it follows from his analysis that the second defendant is not entitled to any credit as a result of that payment.

53. This approach accords with principle. Mr West's submission that where a bribe is paid to two people a claimant must take account of a payment by a defendant who settles its claim against a defendant who does not, would mean that the non-settling defendant's enrichment would either not be stripped away at all or would only be stripped away in part. Taking an example of bribes totalling £1,000 paid to D_1 and D_2, each receiving £500, where D_2 settles and pays the claimant £500, if the claimant has to give credit for that in its claim against D_1 none of D_1's actual enrichment is stripped away. The position is similar where D_2 settles and pays the claimant £750. If the claimant has to give credit for £750 in its claim against D_1, again none of D_1's actual enrichment is stripped away. If the claimant has to give credit for the £250 which exceeds D_2's actual enrichment, only £250 of D_1's enrichment will be stripped away.

54. In neither case would the claimant recover the total sum by which the two defendants were enriched and thus the total sum for which they were liable. Since the liability of the defendant who has not settled is for his wrongful gain to be stripped away, it would be contrary to principle to credit him with the surplus paid by the settling defendant even where the settling defendant paid more than the amount he actually received. As Lawrence Collins J stated in *Daraydan Holdings Ltd* (at [86]) "there are powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty."

55. For these reasons I accept Mr Pillow's submission that because claims against a particular defendant for restitution of bribe moneys are not concerned with loss to the claimant, the claimant's recoveries from third parties do not affect the particular defendant's liability to make restitution of the bribes received by that defendant or to account for any profits made. That conclusion suffices to distinguish the authorities relied on to support Mr Marino's appeal, but since much of the argument revolved around them, I will deal with the submissions based on them.

(ii) The cases on recoveries where the claims are for compensatory damages

56. It is convenient to summarise the circumstances of *Townsend's* case, *Oak Tree Leisure* and *Banque Keyser Ullman v Skandia Insurance (No. 2)* before considering the passages from the judgments in them upon which Mr West relied. The first two were construction disputes in which persons respectively renovating a farmhouse and converting a building so it could be used as a restaurant sued their architects and construction firm. They claimed damages for breach of contract and, in *Townsend's* case, the return of moneys overpaid to the building firm as a result of wrongful

certification by the architects. In both cases payments in by one of the defendants without apportioning the sum paid among the causes of action in respect of which it was paid were accepted by the plaintiffs, and the question was whether that reduced the amount the plaintiffs could recover from the other defendant.

57. In *Banque Keyser Ullman*, the defendants, Skandia, an insurance company, and Ernest Notcutt & Co. Ltd., a firm of Lloyd's brokers, were sued by the bank for loss suffered because insurance policies were issued on the basis of false cover notes. Notcutt settled on the first day of the trial. The dispute concerned whether the costs incurred in bringing the claim against Notcutt represented an additional and separate claim which could be deducted from the amount received, for which it was accepted that Skandia was entitled to credit. Mr West relied on Steyn J's statement at 882b that:

> "The principle appears to be that if a plaintiff who receives payment from one tortfeasor establishes an additional separate claim against that tortfeasor, the payment is allocated first to that claim, and credit must be given in favour of the second tortfeasor only for the excess necessarily referable to the overlapping claim" (emphasis added).

58. The main focus of Mr West's submissions, however, were passages from the three judgments in *Townsend's* case. He submitted that they show that while the initial burden lies on a defendant to show that a part of the claim against him has already been satisfied, and to demonstrate the extent to which the plaintiff has already recovered, that burden is "discharged when the defendant shows acceptance of a payment in, in respect of causes of action where there are concurrent claims against him": Oliver LJ at 41. Purchas LJ stated (at 51) that acceptance of such a payment raises "a *prima facie* presumption that where those claims overlap claims made against another defendant, that the latter claims have also been satisfied". Waller LJ stated (at 56) that once there is a *prima facie* case that the plaintiff "has received a sum of money which reduces the loss he has suffered … "it is for him to show, if it be the case, that some part of that sum was for another, unrelated, cause of action". Purchas LJ also stated (at 56) that "the Court must decide, and it is for the plaintiff to establish, by how much that part of the payment attributable to the instant claim falls short of the total value of the claim itself" and that he could not see how this exercise could be done without an investigation of the other claims.

59. Mr West placed particular weight on Oliver LJ's statements at 41-42 that "if it is to be said that the payment in relates to some claims which are not concurrent, or which could not succeed against the defendant, the only person capable of providing that guidance is the plaintiff himself, who has accepted the payment" and that where the plaintiff "provides no material to show how any apportionment should be made… or … invites the judge to deal with it in a particular way… the judge has to do the best with what material he has". He also relied on Purchas LJ's conclusion (at 53) that where the plaintiff has provided no material to show how to apportion the payments "the plaintiff would have failed to establish that there is any excess of damage suffered in respect of which he, the plaintiff, is entitled to continue his action for damages against the remaining defendant".

60. Oliver LJ recognised that apportionment by the judge was not always "altogether straightforward" but stated that that did "not absolve the judge from attempting the

task". Any difficulty would, he considered, ordinarily be solved where the notice of payment apportioned the sum paid among the causes of action in respect of which it was paid, although he reserved his position where there may be grounds for asserting that the apportionment was collusive or not made *bona fide*.

61. As to *Oak Tree Leisure,* Mr West primarily relied on passages of the judgment of Peter Gibson LJ at pp. 8-10 of the transcript. His Lordship stated that in *Townsend's* case Oliver LJ "clearly was contemplating that there should be a proper assessment of the true value of the plaintiff's claim in the case before him" and "was looking for a reliable way of doing so". Peter Gibson LJ asked how the judge "acting judicially" could "reach a proper conclusion unless he has some evidence enabling him to make an apportionment for which reasons can be given and therefore justified", stated that the court "must have some material properly before it from which it can reach its conclusion", and that "the mere fact that a plaintiff makes a claim to which he ascribes a value seems to me to have no evidential force whatever unless the plaintiff justifies the claim and the value with evidence".

62. It was submitted that the judge's decision that a claimant has a choice as to how to allocate recoveries from another so long as it was not "obviously unsustainable", a test derived from statements in the judgment of Evans-Lombe J in *Barings v Coopers & Lybrand* was erroneous. That test is based on an erroneous interpretation of *Townsend's* case and *Banque Keyser Ullman.* In particular, it was argued that Evans-Lombe J was wrong at [1119] to regard Oliver LJ as indicating in *Townsend's* case that the threshold before allowing the claimant to allocate a receipt to a non-overlapping claim is low, and Eder J followed Evans-Lombe J without further analysis. It was submitted that the view of Nugee J in *Glenn v Watson* [2018] EWHC 2016 (Ch) is to be preferred.

63. In *Glenn v Watson* Nugee J observed at [579] that there is "great difficulty in seeing how Evans-Lombe J's analysis is reconcilable with what the Court of Appeal said in *Townsend* about the burden on the plaintiff of establishing what is left of his claim against [the non-settling defendant], or with what Steyn J actually did in *Banque Keyser Ullman*". He also stated at [580] that he said "nothing about what a Court should do where it is not in a good position to form a view of the separate claims against" the defendant who settled. But, in a passage which is not altogether easy to understand, he then stated that where as a result of hearing the claims against [the defendant who did not settle] the Court is able to form a view of the claims against [the defendant who settled] despite the fact that they have been settled", it seemed to him that:

> "the claimant can only allocate the monies received under the settlement with [that defendant] to the extent that the Court is satisfied that such claims are (in the words of Steyn J) *"sustainable on the facts and in law"* and *"would have been likely to succeed at a trial against [the defendant who settled]"*.

64. Did the judge fall into error despite her careful consideration of the judgment in *Townsend's* case and her references to the submissions based on what Steyn J said in *Banque Keyser Ullman*? In answering this question, account has to be taken of the

context of what was said in those cases and in *Oak Tree Leisure*, and to bear in mind Purchas LJ's observations about the fact-sensitivity of these matters. Here the important factual and contextual matter is undoubtedly that all the cases relied on behalf of Mr Marino are ones in which the trial judge was able to assess the strength of the settled claims because he had heard and decided all the claims which had not settled.

65. In *Townsend's* case the trial lasted for over two months and the trial judge had the material before him to determine the validity of the claims against the defendant who settled. Moreover, in that case a pro-rating approach based on the claims made would not have worked because (see 39) there was also a counterclaim. Additionally, despite what Purchas LJ said about investigating the claims which gave rise to the settlement and the recoveries, he left open (see 53) the possibility that pro-rating might be acceptable in the absence of any proof of gross inflation of the claims. In *Oak Tree Leisure* the claim against the first defendant settled shortly before the trial and after the claimant had prepared its evidence against the settling party. Although the judge was told three days into the trial that it would be necessary to value the freestanding claims against the settling party in order to determine how to apportion the recoveries from the settlement, the claimant chose not to serve the evidence it had prepared on the point. In such circumstances, it is understandable that Peter Gibson LJ made the comments set out at [61] above.

66. In *Banque Keyser Ullman,* Steyn J's statement about the need for the bank to establish an additional separate claim against the broker who has settled, was also made after the end of a full trial. Steyn J had (see Evans-Lombe J in *Barings* at [1117]) a "clear and informed view" as to the strength of the claims in issue, in that case costs claims. He "was able to decide without the need for further evidence" (see 882a-b) that the claim against the brokers which settled was an additional and separate claim to that against the brokers which did not settle and that the brokers which settled would have been held liable in full if the claim against them had proceeded to trial.

67. The statements in these cases that the claimant "establishes" the additional separate claim, "shows" that some part of the settlement payments was for an unrelated cause of action, and referring to an "investigation" of the other claims must be seen in that context. These statements provide very limited (if any) guidance about what should happen where the trial judge is not well placed to form a view about the claims against the settling party. In *Glen v Watson* Nugee J accepted (at [580]) that:

> "in a case where a trial judge has sat through a trial and therefore is well placed to form a view as to whether or not particular claims would or would not have succeeded, then the judge ought to proceed on the basis of the view which he or she had of the claims".

He stated that was consistent with the Court of Appeal decisions and what Steyn J had done in *Keyser Ullman*.

68. As Oliver LJ recognised in *Townsend's* case, there may be cases where it is difficult for the judge to form a view on the material before him or her. But Evans-Lombe J, who, see [66] above, was well aware that Steyn J made his statement after the end of a full trial, was correct to state that it cannot be right for the judge to have to hear full argument as to the case against a defendant who has settled and will not be before the

court. Hutchison LJ had recognised that seven years earlier in *Oak Tree Leisure*. He stated (at 13) that "the judge cannot, in the absence of one of the parties, embark on what is in effect a full trial of issues which have been disposed of". This also follows from the fact, see e.g. *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm) at [1551], that the settlement may encompass potential claims that have not been made as well as claims that have been made.

69. Accordingly, the question is what, less than a full trial, will suffice. In considering this, it is important, as Mr Pillow submitted, to remember the inconsistency between the position for which Mr Marino argues and the position where an apportionment is made in the settlement agreement. As Oliver LJ stated in *Townsend's* case, where the settlement agreement contains an apportionment, absent grounds for asserting that the settlement was "collusive or not made *bona fide*", the settlement terms would conclusively determine the question. Andrew Smith J's formulation in the *Fiona Trust* case at [1547], after referring to *Townsend, Banque Keyser Ullman,* and *Barings,* suggests that this is also the case even where the apportionment is not made in the settlement agreement. A qualification that there should not be grounds for asserting that the settlement was "collusive or not made *bona fide*" is consistent with the "not obviously unsustainable" threshold identified by Evans-Lombe J and applied by Eder J. Nugee J in *Glenn v Watson*, who did not refer to this aspect of Andrew Smith J's judgment in the *Fiona Trust* case, was inclined (see [63] above) to favour a threshold of a sustainable claim which would have been "likely to succeed at a trial" which is higher than the not "obviously unsustainable" threshold. But this appears to introduce a test developed in contexts where the judge is able to assess the strength of the settled claims after a full trial into cases in which he cannot.

70. It is also important to remember the policy considerations favouring the encouragement of compromise even where the claim is unfounded and worthless: see *Callisher v Bischoffsheim* (1870) 5 QB 449, 452. Those policy considerations would be undermined if a claimant who makes a settlement with one of the defendants, in part to save the cost of proving the case against that defendant, has to give credit to the other defendant for the sum paid under the settlement, unless he or she is able to prove the nature of the case against the defendant who settled. I accept Mr Pillow's submission that that would be a significant disincentive to settlement, and also that it would also be inconsistent with the way settlements are dealt with in relation to contributions between co-defendants by section 1(4) of the Civil Liability (Contribution) Act 1978.

71. It may be right to draw an adverse inference in cases such as the *Oak Tree Leisure* case where the judge concludes that it would be relatively easy for the claimant to provide the required material, but he or she has not done so in the way that the claimant in that case did not do so. But otherwise, deferring a decision until after an assessment of the merits of the Phase 2 issues in a case such as this would, as the judge stated at CJ §21 set out at [33] above, encourage satellite litigation, and would moreover risk different conclusions in the final trial.

72. The factors discussed above that point away from requiring what is in effect a full trial or a more extensive investigation in factual circumstances such as those in this case, are vigorously reinforced where, as here, there is a direction that there be two separate trials. I accept Mr Pillow's submission that the ethos of active and strong case management introduced by the Civil Procedure Rules in 1999 would be

undermined, were a court-sanctioned phased approach such as that directed by Andrew Baker J in this case to be evaded by requiring the claimant to address and deal with the nature and merits of the Phase 2 claims as part of the Phase 1 proceedings. The effect of that order was to exclude the Phase 2 issues, and thus the evidence concerning them, from the Phase 1 trial. Unlike the position in *Oak Tree Leisure,* the evidence in relation to those issues has not been disclosed let alone prepared for trial. There was no suggestion during the Phase 1 proceedings that the issues relevant to those proceedings could not be resolved without consideration of the Phase 2 issues.

73. For these reasons, I do not consider that the judge fell into error in deciding that it was for FMCP to choose how to allocate recoveries from the other defendants, subject only to the threshold of the allocation not being "obviously unsustainable".

74. I also do not consider that the judge erred in deciding that FMCP's allocation in this case was not "obviously unsustainable". This point was not developed in Mr West's oral submissions. The written submissions advance the proposition on the ground that, even on the limited information put forward by FMCP, it was possible to see that the Phase 2 claims against Mr Bessot were not nearly as strong as the Phase 1 claims, and that an apportionment based on the value of the pleaded claims was therefore "obviously unsustainable".

75. In the nine-day trial, the judge heard evidence about the general *modus operandi* of Messrs Marino and Bessot in relation to the operation of LAP's portfolios by FMCP including the GAIN notes, and as to the agreements made. As she stated (CJ §26), the parties before her were well placed to explain any "obvious unsustainability" of the Phase 2 claims. They did not do so. At the hearing on consequential matters the submissions on behalf of Messrs Marino and Ohmura were that, on the approach in the cases they relied on, it was for FMCP to show that some part of the payments under the settlements was for another cause of action. They argued that 100% or alternatively 80%, of the other receipts should be allocated to the Phase 1 proceedings, and hence to their benefit.

76. The judge stated at CJ §26 that, whatever the criticisms of the merits of the Phase 2 claims, the pleaded claims were on the face of it "serious and extensive". Neither Mr Marino nor Mr Bessot had attempted to strike them out. Peter Gibson LJ observed in *Oak Tree Leisure* (see [61] above) that the mere fact that a plaintiff makes a claim to which he ascribes a value has no evidential force unless the plaintiff justifies the claim and the value with evidence. That observation was, however, made in a case in which the claimant had evidence but chose not to serve it or to rely on it. That is not this case. The statement from *Oak Tree Leisure* that is of more relevance to this case is that by Hutchison LJ where he said (at 13-14) that the claimant is required "to place before the court evidence which would have enabled the judge to form a general view as to its validity and quantum" and "upon which the judge could conclude that the … claim was a valid and viable claim" (emphasis added). In my judgment, there was material before the judge which enabled her to do this.

Conclusion

77. For the reasons set out above, if my Lord and my Lady agree, this appeal will be dismissed.

Lady Justice Simler DBE:

78. I agree.

Lord Justice Irwin:

79. I also agree.