Neutral Citation Number: [2023] EWHC 651 (Ch)

Claim No: BL-2020-000294

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane
London, EC4A 1NL

20 March 2023

Before :

MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

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Between :

TRAFALGAR MULTI ASSET TRADING COMPANY LIMITED (IN LIQUIDATION)	**Claimant**
- and -	
(1) JAMES DAVID HADLEY **(2) THOMAS WILLIAM GORDON BIGGAR** **(3) STUART NEIL CHAPMAN-CLARK** **(4) ANDREW CHRISTOPHER JONES** **(5) TITAN CAPITAL PARTNERS LIMITED** **(6) CGROWTH CAPITAL BOND LIMITED** **(7) WILLIAM MACFARLAND WRIGHT III** **(8) PINNACLE BROKERS LIMITED (IN LIQUIDATION)** **(9) MARK LLOYD** **(10) VIVERE FORTI INTERNATIONAL FOUNDATION** **(11) KIRSTY LOUISE PLATT** **(12) PLATINUM PYRAMID LIMITED** **(13) BENTLEY JARRARD THWAITE**	**Defendants**

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Mr William Wright appeared on behalf of himself and the 6th Defendant as Applicants.
Mr Bentley Thwaite appeared on behalf of himself and the 12th Defendant as Applicants.
Mr Justin Higgo KC and Ms **Belinda Mcrae** (instructed by Kingsley Napley LLP) appeared on behalf of the Claimant, as Respondent to the Application.
Mr Lorrell (instructed by Valemus Law) appeared on behalf of the 9th Defendant as a party interested in the Application.
Mr James Hadley appeared on behalf of himself as a party interested in the Application.

Hearing date: 17 March 2023

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JUDGMENT on the third Adjournment Application

THE DEPUTY JUDGE:

1. BACKGROUND

1. This judgment relates to what is now the third application for a lengthy adjournment of a four week trial in relation to claims bought by Trafalgar Multi Asset Trading Company Limited ("**Trafalgar**" or "**the Claimant**").

2. Trafalgar is a Cayman Islands company that is now in liquidation. Trafalgar is a subsidiary of, and had been formed to carry out the trading activity of, Trafalgar Multi Asset Fund Segregated Portfolio ("**the Fund**"). The Fund is a segregated portfolio of the Nascent Fund SPC, a Cayman Island protected cell fund structure.

3. This time the application is made by the 6th, 7th, 12th and 13th Defendants (together "**the Applicants**"). They are applying for adjournment of the four- week trial in this matter (the "**Trial**"). The Trial is already under way and, when the application was received, had already been proceeding for over two weeks.

4. The Applicants are some of the defendants in a complex action brought by the Claimant involving an alleged conspiracy to injure the Claimant financially. The Claimant was originally pursuing several separate but linked causes of action against 13 Defendants. However, the Claimant has settled with one of the original Defendants (the Second Defendant) and has obtained judgement against two others (the 10th and 11th Defendants).

5. One of these causes of action relates to an allegation of bribery against the First, 6th, 12th and 13th Defendants. The defence of these defendants relating to this allegation was the subject of an application for summary judgment in front of Mr Ian Karat sitting as a Deputy Judge of the High Court.

6. Deputy Judge Karat dismissed this application in his judgment dated 22 March 2022. His judgment can be found at [2022] EWHC 641 (Ch). It was supplemented by a further judgment dated 11 April 2022, for which the reference is [2022] EWHC 919(Ch).

7. However, his decision was the subject of a successful appeal.

8. In its judgment of 16 December 2022 which can be found at [2022] EWCA Civ 1639, the Court of Appeal reversed Deputy Judge Karat's decision, and gave judgement on the bribery claim in favour of the Claimant and against the First, Twelfth and Thirteenth Defendants, subject only to a determination of quantum.

9. The First Defendant (whom I will generally refer to as "**Mr Hadley**") asked the Court of Appeal for leave to appeal to the Supreme Court in respect of this decision. Permission was refused on 5th January on the grounds that the case raises no issue of general importance and an appeal would not have reasonable prospects of success.

10. On 12 January 2023, Mr Hadley, lodged an application to the Supreme Court for leave to appeal the decision of the Court of Appeal. Separately on 13 January 2023 the 13th Defendant (whom I will generally refer to as "**Mr Thwaite**"), without first having applied to the Court of Appeal, for leave to appeal, lodged an application on behalf of himself and the 12th Defendant (which I will generally

refer to as "**PPL**") to the Supreme Court, also asking for leave to appeal the Court of Appeal's decision on different grounds.

11. The Claimant later served a notices of objection to both applications.

2. THE FIRST APPLICATIONS FOR ADJOURNMENT

12. Shortly prior to the Pre-Trial Review ("**PTR**") in this matter, applications for adjournment of the trial were made. Applications were made by Mr Hadley (on 23 January 2023); by Mr Thwaite for himself and PPL (also on 23 January 2023); and by 7th Defendant (whom I will refer to as "**Mr Wright**") for himself and for the 6th Defendant (which will refer to as "**CGrowth**") (on 26 January 2023). The applications were all essentially made on the grounds that it would be inappropriate and inequitable for the trial to commence until after the findings of the Supreme Court have been handed down.

13. These applications were heard at the PTR by Mr Richard Spearman KC sitting as a deputy judge of the High Court. He declined the applications.

14. He acknowledged that if leave was given, and the appeal was successful this would fundamentally alter the landscape of the Trial but nevertheless refused the application. This was principally on the grounds that the Supreme Court was highly unlikely to give leave to appeal as the Supreme Court will only entertain appeals which raise an arguable point of law of general public importance and he did not consider that any such issue had been identified. He suggested that the Defendants should ask to expedite the decision of the Supreme Court to give leave to appeal. He pointed out that, if leave were refused, there would be no reason not to carry on with the trial. If leave were granted, then an application for adjournment could be considered by the trial judge at that point.

15. Unfortunately, the learned Deputy Judge's expectations on the timing of the Supreme Court's decision proved unduly optimistic. On Friday, 24 February 2023 Mr Hadley was told by the Chief Case Manager at the Supreme Court that a decision was not expected until around Easter.

3. THE SECOND APPLICATION FOR ADJOURNMENT

16. A renewed application for adjournment, made by Mr Thwaite, PPL and Mr Hadley was put before me on the afternoon of Friday 24 February 2023. I heard this the following Monday, which technically was the first day of the Trial and had been reserved as a reading-in day for me, as the judge presiding over the Trial.

17. That application was made on similar grounds to those supporting the first application for adjournment.

18. In my *ex tempore* judgment on this point I dealt first with the point that in the absence of any new matters arising that were not before DJ Spearman at the PTR the court should not overturn the existing order made by DJ Spearman.

19. I considered that there were only two matters that potentially could be considered new matters.

    i) that Mr Hadley had provided further exposition of his case for appeal. I did not consider these matters to be material.

    ii) that at the time that Deputy Judge Spearman made his order there was considered to be a good chance that the Supreme Court's permission to appeal decision would be with the court before the Trial commenced, whereas this was no longer the case. At that point I did not have the benefit of a transcript from the PTR and so was not sure as to precisely the factual basis and assumptions behind the learned Deputy Judge's decision and in particular what his expectations were if the Supreme Court failed to give its decision on the matter of leave to appeal before the trial was due to commence.

20. I decided to give the Defendants the benefit of the doubt on the second point and proceeded on the basis that this could be considered a material change in circumstances. Having now seen the transcript of the proceedings before Deputy Judge Spearman, I may have been overgenerous on this point.

21. I went on to hear the application on its merits. The legal framework that I considered on that occasion is of equal relevance to the application currently before me.

22. I noted then, and do so again now, that a decision to adjourn the trial is a matter of case management. The court has wide powers to deal with grant or refuse the application. CPR rule 3.1(2)(b) gives the court the power to adjourn or bring forward a hearing. When exercising that power, the court must consider what is referred to as the "overriding objective" set out in CPR rule 1.1 of dealing justly and at proportionate cost (see CPR 1.2(a)).

23. I went on to consider the factors enumerated by Coulson J *Fitzroy Robinson Limited v Mentmore Towers Limited and others* [2009] EWHC 3070 (TCC).

24. In that case, Coulson J noted that the starting point when considering an application for an adjournment was the overriding objective (CPR rule 1.1) but went on to identify five factors to which the court should have specific regard when considering a late application to adjourn a trial.

25. I considered those matters and in particular those under the headings "*Specific matters affecting the trial*" and "*The consequences of an adjournment for the claimant, the defendant and the court"*. I considered those two matters together as they are really different aspects of the decision that is in front of the court which is to balance those two concerns as had been recognised by Coulson J in the later case of *Elliott Group Limited v GECC UK [2010] EWHC 409 (TCC)*.

26. In conducted that balancing exercise, I shared Deputy Judge Spearman's view that the prospects of success in getting the Supreme Court to grant leave to appeal were extremely low and, if the Supreme Court were not to give leave to appeal,

or were to hear the appeal and dismiss it then the defendants will have suffered no harm from proceeding with the trial.

27. On the other hand, if the Supreme Court were to give leave to appeal and were to find in favour of the defendants, the relevant defendants will have been prejudiced in that we will not have heard evidence on the bribery question. This in my view was highly unlikely. Furthermore, it could be managed if I were to continue with the trial but not give judgment until the Supreme Court proceedings have run their course as if necessary we could reopen the hearing to hear any further evidence.

28. Having regard to this balance of outcomes, I therefore dismissed the application.

4. THE THIRD APPLICATION FOR ADJOURNMENT

29. I am now faced with a third application for adjournment and must apply the same principles.

30. The applicants (Mr Thwaite on behalf of PPL, Mr Wright and CGrowth) are again asking for an adjournment *"due to issues surrounding disclosure and the pending decision of the Supreme Court (on applications to appeal the judgement and order of the Court of Appeal, having is not yet been handed down)"*.

31. The first part of this application requested a short adjournment to deal with issues surrounding late disclosure made by Mr Hadley. This was dealt by me on 13 March 2023. I allowed a brief adjournment to allow the parties time to consider substantial new disclosure material which had been provided late by Mr Hadley.

32. I reserved the second part of this application to be heard at a remote hearing on 17 March 2023 and it is that part of the application which is now the subject of this judgment.

5. THE GROUNDS FOR THE APPLICATION

33. The grounds stated in the application for a further, longer adjournment, were stated in the application as follows:

> 2. The Claimant misrepresented the evidential position before the High Court Judge and the Court of Appeal, such that the Court of Appeal decision was obtained by way of misrepresentation. Misrepresenting or withholding information or the truth where in a position with a duty to disclose the truth; and by doing so gaining a benefit for themselves or others amounts to civil fraud. Fraud unravels everything, specifically the summary judgment finding. This Court is invited to determine that discrete point now. Directions will need to be given for that determination.

34. The Application went on to state various of the matters on which the Applicants relied before continuing:

> 3. The trial Judge (in the earlier adjournment application hearing) stated that the competing arguments as to whether or not to adjourn pending the Supreme Court decision were (in effect, at that point) an act of balance. Now these additional matters have come to light, there is a compelling case to adjourn as we submit the balance has moved to such an extent that the prejudice to D12/D13/D6/D7 and possibly others is grossly unjust.

35. These grounds were expanded in a Skeleton Argument on behalf of the applicants and in a witness statement by Mr Wright. I also had the benefit of a skeleton argument on behalf of the Claimant, although I had only a very short time to study this before the hearing commenced and no chance to consider properly the case law referred to in it.

6. THE HEARING AND PRELIMINARY MATTERS

36. The hearing of the application took place remotely on Friday, 17 March 2023. At the hearing Mr Thwaite and Mr Wright appeared as litigants in person. Mr Justin Higgo KC, supported by Ms Belinda McRae appeared for the Claimant. Mr Lorrell appeared representing the 9th Defendant, Mr Mark Lloyd. Mr Hadley was also present.

37. Before I heard argument from the Applicants, explained how I proposed dealing with the Application and explained what I referred to as the "steep hill" that the Applicants would need to climb to make their case.

38. In his skeleton argument Mr Higgo had invited me to strike out the application as being totally without merit under CPR rule 23.12. Despite my misgivings about the case advanced by the Applicants, I declined to do so as I thought I should first seek to understand better the Applicants' case, which, understandably for litigants in person, had not expressed as crisply and coherently as it might have been if they had had representation.

39. In Mr Thwaite's skeleton argument, he confirmed that the Applicants were seeking, as well an adjournment of the trial, directions for the submission of pleadings and evidence. This was wanted so as to determine whether evidence or representations put forward by the Claimant (directly or through Counsel) in the context of the Summary Judgment application and appeal, amounted to misrepresentation, passing the threshold of civil fraud and thereby compromised the Court of Appeal's decision on the issue of bribery.

40. I explained to the Applicants that this court has no jurisdiction to determine matters relevant to a decision made by the Court of Appeal as part of this case. If the Defendants wished to challenge a decision by the Court of Appeal, they had three possible means of redress.

    i) The first is to seek leave to appeal to the Supreme Court (which they have done, although perhaps not clearly on all the grounds that are now being pursued).

ii) The second is to the second is to make an application under CPR rule 52.30 to reopen the Court of Appeal proceedings. This, I explained, was possible although rare. It applies only where reopening the appeal is necessary to avoid a real injustice. The procedure is available only in exceptional circumstances and where there is no effective alternative remedy. Permission is needed from the Court of Appeal to make an application and will be granted only where no leave to appeal has been granted by the Supreme Court.

iii) The third is to bring a separate action for fraud. As was explained by Lord Sumption at [60] in the Supreme Court decision in *Takhar v Gracefield Developments Ltd* [2020] AC 450:

> "an action to set aside an earlier judgment for fraud is not a procedural application but a cause of action":

41. I therefore passed over the part of the Application that this court should hear, or give directions for hearing, the Applicants' case that the Court of Appeal's judgment has been compromised by fraudulent misrepresentation.

42. I explained that I would assume instead that the Applicants were seeking an adjournment so that they can pursue their other remedies via the Supreme Court or through an application under CPR rule 52.30 or through a separate action based on fraud. This would however require me to consider the strength of the arguments offered concerning misrepresentation and whether these matters were new since the previous adjournment hearings.

43. The parties present confirmed their agreement to this approach.

7. THE OVERARCHING CASE

44. The Applicants' overarching complaint is that matters were put in evidence were represented by the Claimant or its Counsel which were demonstrably false and where the Claimant could not have held an honest belief that the misrepresentations were true or the Claimant had been reckless as to the truthfulness of representations when they were made.

45. The Applicants suggested that, at its lowest, the standard was recklessness. They based this on statements by Lord Denning MR giving judgement for the Court of Appeal in *Barclays Bank v Cole No 1* [1967] 2 Q.B. 738, where Lord Denning was considering generally the concept of fraud in a civil matter.

46. The Claimant argued in its skeleton argument that within the context of an action to set aside an earlier judgement for fraud the relevant test requires rather conscious and deliberate dishonesty in relation to evidence that was relevant to the judgement. The relevant evidence, action, statement or concealment must be material and the dishonesty must be instrumental to the judgement obtained. This guidance derives from *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ, and it is that guidance that I shall follow in this case.

47. Therefore when I use the term "fraudulent misrepresentation" in this judgement, I am referring to this standard of conscience and deliberate dishonesty.

48. As I explained to the Applicants, these are very serious accusations. If a barrister were putting forward this argument in court without any firm basis for the accusation, he should expect censure from the court and could face disciplinary proceedings.

49. I also explained, ahead of the Applicants presenting their case that, for the purposes of assessing the merits of the Application for a further adjournment, I would need to take account of two matters.

50. First, I needed to consider the principle of finality of court decisions. This was an important element of justice.

51. This issue is relevant firstly in relation to the adjournment application. The court has already heard two applications for a long adjournment. Deputy Judge Spearman ruled against such an application at the pre-trial review and I effectively confirmed his ruling when the matter came to me on the first day of his trial.

52. The principle of finality also applies to the Court of Appeal's decision. That decision cannot be reopened just because the Defendants want to re-argue a point that could have been argued before or because they have come across some new evidence may have some bearing on the decision. There are only limited, and specific grounds on which a Court of Appeal decision can be overturned.

53. Secondly, with the current application, I have to consider whether the misrepresentation accusations identified make it substantially more likely that the Applicants will succeed in the Supreme Court or through an application to the Court of Appeal under CPR rule 52.30, given the high thresholds and limited scope relevant to both types of proceedings or whether they were likely to succeed in a separate action for fraudulent misrepresentation.

54. Having regard to these principles, I set out five points that I would consider in relation to the Applicants' various accusations regarding misrepresentations having been made to the court:

    i) whether the Applicants are likely to be able to show whether there was, in fact, a misrepresentation;

    ii) if so, whether they are likely to be able to show whether the information provided to the Court was not merely incorrect but amounted to a fraudulent misrepresentation on the part of the Claimant or the Claimant's counsel;

    whether the Applicants are justified in bringing point up only now (as neither the Supreme Court or the Court of Appeal is likely to determine a matter that could have been dealt with before the matter came to the Court of Appeal); I should acknowledge however that this point needs to be considered carefully in the light of the decision Supreme Court Decision in *Takhar v Gracefield Developments* – in a case of fraud an argument that the

point should have been put earlier will not succeed merely on the grounds that the applicant could have discovered the point with reasonable due diligence: as Lord Kerr put it at [52]:

"The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice."

Nevertheless, the point will apply where the applicant knew of the fraud at the time of the relevant hearing.

iii) whether the point has been raised and dealt with before; and

iv) whether the point is likely to be relevant to a challenge to the determination that was made by the Court of Appeal, given the narrow scope for such challenges

I should note, however, on review of the *Takhar v Gracefield Developments* decision that this point, although it follows from the *Barclays Bank* decision that I have mentioned above, also needs to be dealt with extreme caution given Lord Kerr's finding at [45] that:

"in cases of fraud, unlike other instances of claimed miscarriages of justice, it is not necessary to show that the further evidence would have been a determining factor in the result."

55. I explained that based on my assessment of the above points, I would then determine the application having regard to the principles in *Tibbles v SIG Plc* and those in *Fitzroy Robinson Limited v Mentmore Towers Limited and others* as I had when I heard the previous application for a lengthy adjournment.

56. We turned to consider the various misrepresentations alleged.

8. ALLEGED MISREPRESENTATIONS CONCERNING MR HADLEY'S AUTHORITY

57. The first instances of misrepresentation alleged by the Applicants had been dealt with at paragraphs 18 to 28 of Mr Thwaite's skeleton argument. Essentially they related to the question of whether Mr Hadley was authorised to undertake the CGrowth transaction.

58. Mr Thwaite contended that statements made in the Claimant's Particulars of Claim that Mr Hadley had no actual or apparent authority to act on behalf of Trafalgar the directors of the Fund were known to be false by the Claimant's directors. He pointed to various statements made in evidence by the directors that they had believed Mr Hadley had had authority to bind the fund to be false.

59. The question of authorisation has proved a complex one in this case. The Claimant's case is that:

i) Mr Hadley had actual authority, direct from the Fund to authorise payments out of bank accounts belonging to the Fund;

ii) The fund management company, Victory Asset Management Limited ("**VAM**") had actual authority to manage the Fund and the assets held by Trafalgar;

iii) until he came a director, Mr Hadley did not have actual authority to act on behalf of VAM;

iv) the directors of the Fund, however, had been working on an assumption that VAM had given Mr Hadley actual authority to act on behalf of VAM, and only found out about his want of authority later;

v) even if Mr Hadley did have authority to act on behalf of VAM or the Fund, that authority did not allow him to act in circumstances where he had a conflict of interest because he was receiving a benefit that had not been fully disclosed to the directors of Trafalgar or was using that authority in pursuit of a conspiracy to injure the Claimant;

vi) third parties could not rely on apparent authority if their understanding relating to authority derived only from what Mr Hadley had told them and had not been confirmed by the Fund or Trafalgar;

vii) furthermore, a party that knew about the undisclosed benefit or was part of the unlawful means conspiracy alleged could not rely on actual or apparent authority.

60. Taken out of context it would be unsurprising if any of the directors of Trafalgar answered an individual question in cross examination in a manner that did not fully set out this complicated position as regards authority.

61. Even without allowing for this, I could see no conflict between the Claimant's case that the Claimant and its directors **now** understand that Mr Hadley did not have actual authority (prior to his becoming a director of VAM) (because VAM had done nothing to pass on to him the authority that had been vested in VAM) but **at the time** had wrongly assumed that there was actual authority because it had been intended that VAM would to invest Mr Hadley with its authority and they assumed that VAM had done so.

62. All of the statements that Mr Thwaite took me to in the evidence given by the directors related to their knowledge at the time that transactions were being contemplated. These had no bearing on the state of their knowledge at the time that the Particulars of Claim were drafted, and so provided no evidence whatsoever of any falsity of their belief in the statements made about Mr Hadley's authority in the Particulars of Claim.

63. I therefore fail to see that the Applicants have demonstrated any misrepresentation, let alone a fraudulent misrepresentation on the point of authority.

64. It may also be relevant that, even if any of the statements were false, they would affect the basis of the Court of Appeal's decision as regards the bribery charge which was centred firmly on the fact that there was no adequate disclosure of the conflict of interest before the CGrowth transaction was entered into and not on any want of authority on the part of Mr Hadley.

65. However, given Lord Kerr's finding in *Takhar v Gracefield Developments,* quoted above, that in cases of fraud, it may not necessary to show that the further evidence would have been a determining factor in the result, I will not, and need not, base my decision on that consideration.

66. As I do not think put the Applicants are anywhere close to establishing a misrepresentation in relation to the authority point, I do not consider that the matters complained of in paragraphs 18 to 27 of the Applicant's skeleton argument are likely to cause the Court of Appeal to reopen the case under CPR 52.30 or to form grounds for an appeal to the Supreme Court or for a separate action to establish fraudulent misrepresentation.

67. These matters, therefore, form no reason to overturn the decision not to grant an adjournment made by Deputy Judge Spearman or my confirmation of that decision.

9. CLAIMANT DISCLOSURE FAILINGS AND RELATED REMARKS

68. At paragraphs 29 to 36 of his skeleton argument, Mr Thwaite made allegations that the Claimant had failed to make full disclosure to the court and that the court had been misled as to whether the Claimant had made full disclosure by statements made by Mr Higgo on behalf of the Claimant at the Summary Judgment Hearing and before the Court of Appeal.

69. Mr Thwaite argued that the Defendants had been disadvantaged at the Court of Appeal hearing because they had not been allowed to put into evidence documents which had been disclosed to them after the striking out hearing at first instance which they considered to be relevant to the points before the Court of Appeal. Mr Thwaite submitted further that there was evidence that should have been disclosed prior to the summary judgment hearing and had not been disclosed. He argued that when the defendants applied to the Court of Appeal to introduce the evidence, the Court of Appeal refused to do so on the basis that these documents were not before the court of first instance and on the basis of assurances from Mr Higgo that there was nothing in the documents was relevant to the bribery point being considered by the Court of Appeal.

70. I asked Mr Thwaite to take me to the misrepresentations that he was relying upon.

71. The first point that he took me to was a statement made by Mr Higgo on day two of the summary judgement hearing,

72. This point was made initially by reference to a particular statement made by Mr Higgo at the summary judgment hearing when that "*we don't have documents to disclose in relation to that issue*".

73. In looking at this statement in context, it is clear that the issue referred to is the issue of whether discussions between Mr Thwaite and Mr Hadley for the sale of VAM to PPL had commenced by a certain date.

74. Mr Higgo made the point that it was obviously true that the Claimant would not have any correspondence on this point as they would not have been parties to the correspondence between Mr Thwaite and Mr Hadley. If there was any documentary evidence such as email correspondence on this point it would be held by Mr Thwaite or Mr Hadley (or by the Serious Fraud Office which at the time was holding Mr Hadley's documentation and devices). Accordingly, it was obvious that Mr Higgo was not misrepresenting the position. It was difficult to conceive what information the Claimant could have that would be relevant to this particular issue.

75. I fully accept Mr Higgo's explanation on this point and I find it inconceivable that his answer could be regarded as a misrepresentation and certainly not as having been made fraudulently.

76. I asked Mr Thwaite to take me to his next instance of alleged misrepresentation.

77. He explained again his allegation that there were material items in relation to various elements of the bribery point that the Claimant had withheld.

78. In this context, he took me to an exchange during the Court of Appeal hearing between Lord Justice Stuart-Smith and Mr Higgo were the judge asked Mr Higgo whether he was aware of "*any document in disclosure, in general disclosure, that demonstrates that full disclosure in the technical sense was made"*. I think that he meant here, and was taken to mean, that technical disclosure had not been made. Mr Higgo answered that he was not and that

> "I am aware of the documents to which reference has been made and if they affected the way I put this appeal, I have them before the court myself".

79. Mr Thwaite argued that this was a misleading answer because there were documents which were relevant to the bribery claim and which had not been disclosed. I asked him to take me to those documents.

80. He took me to two documents.

81. The first was an internal email that was said to show that the management of Custom House, was operating "*a freeze of communication with James until further notice*". This, in Mr Thwaite's submission was relevant, first in demonstrating that Mr Hadley generally conducted his communication with Trafalgar informally by discussing matters with Mr Butler on the telephone and secondly that the board of Trafalgar was said to have instituted a "communication freeze".

82. Mr Higgo explained that this communication was obviously immaterial since if Mr Hadley had wanted to claim that he had told Mr Butler or another director of Trafalgar about his conflict of interest he had been perfectly at liberty to give

evidence about this point. Mr Hadley had not raised any such defence. He might have added that Mr Hadley had also not made any suggestion that he had understood that he had been prevented from discussing the conflict-of-interest by any alleged communication freeze.

83. As regards Mr Thwaite's contention that evidence was needed front of the Court of Appeal that Mr Hadley generally conducted his communication with Trafalgar informally on the telephone with Mr Butler, I agree that that was not a point at issue. Mr Hadley had made not made any pleading that he had made a full disclosure by telephone or otherwise. If he had claimed that he had made a full disclosure by telephone, and it had been denied by the Claimant that he ever communicated by telephone then it is conceivable that the point of whether he generally dealt with the Claimant informally by telephone might have been useful background. But given that there was no pleadings or evidence before the court that he had made such a disclosure, evidence of how he normally communicated with Trafalgar was of no relevance to the proceedings.

84. In my view the communication freeze issue is completely a red herring, as it is clear within its context that by "communication freeze" it was meant that the directors of Trafalgar and Custom House were limiting information they were providing to Mr Hadley. There is no suggestion that they were refusing to accept communications from Mr Hadley. Also if they had been, Mr Hadley would have been aware of that and able to put the matter before the court himself.

85. I therefore accept Mr Higgo's explanation that he and the Claimant's wider legal team would not have considered this email to be relevant to the matters before the Court of Appeal and therefore he was not misleading the court when he indicated that full disclosure in the technical sense had been made. This email was not relevant to the questions being considered by the Court of Appeal – principally whether Mr Hadley had given full information about his conflict of interest before the CGrowth transaction had been entered into.

86. As a result the Claimant's failure to put this email in front of the court cannot support a finding of fraudulent misrepresentation or even of recklessness with truth.

87. The second document which Mr Thwaite referred to as evidence that the that the Claimant had been withholding relevant evidence was an email from one of the administrator's staff to Mr Hadley on 18 March 2016 asking Mr Hadley (who at that stage still the authorised signatory on the bank accounts) to authorise a payment out of the Fund's bank account for what later turned out to be the CGrowth bond issue. This, Mr Thwaite argued, was relevant as it poured doubt on the Claimant's case that the first point at which the board of Trafalgar were aware of CGrowth transactions was on 29 March.

88. Mr Higgo confirmed that it had been, and remained, the Claimant's case that the board of Trafalgar was unaware of the CGrowth transactions until 29th March. He took the court to the correspondence following queries made by the board that had been set in train when the board became aware of the 18 March 2016 request for payment. He argued, and I agree, that this correspondence demonstrated the

board's surprise had that a new transaction had been entered into at a time when the Fund had suspended redemptions and subscriptions in its shares.

89. The fact, therefore, that the Fund administrators knew that payments were being on behalf of the Fund, was not determinative of the question of the date on which the board of the Fund knew of the CGrowth transactions. They only became aware that there was a transaction with CGrowth after they started asking questions about it. The email that Mr Thwaite referred us to, therefore, was not evidence that the board knew of the CGrowth transaction at a date earlier than 29th of March.

90. Given these points, whilst it is possible that another firm conducting disclosure might have taken a broader view of the relevance of the email of 18 March to the knowledge issue, I cannot say that the Claimant's legal team was unreasonable in taking that view. Certainly they were not fraudulent, or even reckless or negligent in taking this view.

91. As for the comments made by Mr Higgo to the effect that full disclosure had been made, there is no evidence that he was not genuine in his belief that effect. Neither was his belief reckless or negligent.

92. I indicated my views on this point at the hearing. Having heard my response in relation to the two documents that Mr Thwaite had taken me to, he did not endeavour to take me to any further documents which he says demonstrated that the Claimant was holding back information.

93. As well as finding no substance whatsoever in the allegations of misrepresentation made in relation to the evidence I note also that the allegations made here are all allegations that had already been included within the grounds of appeal to the Supreme Court. These allegations, therefore, do not materially change the position as it was when Deputy Judge Spearman heard the first application for adjournment and when I heard the second application for adjournment. The accusations, therefore, provide no new ground for asking for an adjournment. Whilst the Court has power to vary or revoke interim orders: see CPR r. 3.1(7), this should only be exercised when new matters arise see *Tibbles v SIG Plc*.

10. NO NET BENEFIT

94. Mr Thwaite's next point was that the Court of Appeal was induced by misleading statements on behalf of the Claimant to ignore an important element of the defendants' case – that the consideration received by Mr Hadley for the sale of VAM conferred no net benefit on him, and therefore could not be viewed as a bribe.

95. Essentially the argument was that the payments that Mr Hadley received upfront for the purchase of the VAM were less than amounts that VAM (of which Mr Hadley was the sole owner) expected to receive in relation to outstanding management charges or commissions.

96. I find the no net benefit defence to be extremely weak for two reasons.

97. The first is that if one assesses the benefit to be received by Mr Hadley from selling VAM, this was not confined to the early payments.

98. The second is that it must be presumed that Mr Hadley thought that was getting a benefit from the sale or he would have undertaken the sale. In any bargain, both sides of the bargain consider that they are getting benefit from the bargain and it would constitute an unwarranted reduction in the scope of bribery proceedings if, in cases where the bribery is founded on the benefit of a contract, rather than a straight payment, that there is no bribery unless the contract, objectively, favoured the side said to be bribed. The relevant question in this regard is whether there is a real possibility of a conflict of interest, not whether there was net benefit.

99. Nevertheless, if the no net benefit point had been considered by the Defendants as an important plank of their case, that should have been considered by Court of Appeal, and the Court of Appeal had been fraudulently misled by the Claimant as to whether it was available to them at the Court of Appeal, then that might be relevant.

100. The statements which the Applicants say were misleading statements were a statement at the summary judgment hearing that the no net benefit point had been dropped, and a similar statement made at the Court of Appeal. Mr Thwaite argued that the point had not been dropped, and therefore the statement was misleading.

101. Mr Thwaite advanced the argument that it was still an important part of the relevant defendants' case as the point had been advanced in his witness statement. This point was not persuasive for two reasons: first, a distinction needs to be made between the contents of the witness statement and a defendant's presentation of its case; secondly, because his witness statement had been produced before the clear exposition of the no net benefit argument had been deleted from the defence.

102. We turned to the amended defence which for all material purposes was the version before the court both at the summary judgement hearing and at the Court of Appeal hearing.

103. The section in an earlier version of that defence which clearly argued the no net benefit case had clearly been struck out was at paragraph 9.3.3(i) where it had originally been stated that:

> "the payments did not confer any net benefit on Mr Hadley. The payment of £500,000 was based on the commission fees owed by the fund to VAM".

104. Furthermore, it was common ground that Mr Scorey KC, who represented the relevant defendants at the summary judgement hearing did not seek to argue the point at that hearing.

105. Mr Thwaite argued that, nevertheless, the no net benefit point had remained part of the defendants case and was still included as it had been, as he put it, reworded and put in elsewhere.

106. As part of my reading in for the hearing, I had considered carefully the amended defence and had searched for where the no net benefit argument remained within the defence. I was unable to find such a reference, so I asked Mr Thwaite to take me to one.

107. He referred me to paragraph 9.3.3(ii)(g) where it is stated:

> "it was agreed that should the commission payments some held by the Fund for VAM be delivered to VAM they would not be paid to Mr Hadley, as he had already received the deposit sum payments"

108. In my view, Mr Thwaite is wrong in suggesting that this section would have been taken as reinstating the no net benefit point by any court, or more importantly in the current context, by Mr Higgo. It was not a new insertion following the deletion of the clear exposition of the no net benefit defence at paragraph 9.3.3(i). The section had been included as part of the Defendants' argument in relation to the timing point. There was no suggestion that the figures set out explained a defence that there was no net benefit, and therefore no conflict of interest.

109. The closest thing to the no net benefit point that I could see remained within the defence was at paragraph 9.3.3(j), which had been inserted at the same time as the deletion of the clear exposition of the no net benefit defence at paragraph 9.3.3(i) where it was said:

> "In the premises, the 21 March 2016 and 6 June 2016 payments and/or promise of the same:
> (i) did not give rise to a real possibility of conflict of interest between Mr Hadley's personal interests and his duties to Trafalgar".

110. Against this background, I need to consider Mr Thwaite's allegation that Mr Higgo misled the Court of Appeal.

111. The exchanges of which Mr Thwaite complains are as follows:

> "MR. HIGGO: My Lord, sorry to interrupt, but if you go back to 509, we had understood this allegation about net benefit had gone, because if you look from the bottom of the page up you will see the struck-out text, which are Mr. Scorey's amendments. This passage about conferring a net benefit was deleted from the pleading. It may be Mr. Thwaite is making a point that has been deleted by the amendments. That seems to refer to the net benefit point.
>
> LADY JUSTICE FALK: Yes.
>
> LORD JUSTICE COULSON: So on 509, the net benefit to Mr. Hadley is deleted, in green, which comes after the red.
> MR. HIGGO: Exactly."
>
> And later

> "LADY JUSTICE FALK: Just, again, to clarify the benefit of Mr. Thwaite. There is a lot of discussion of the no net benefit point. My understanding, which I just wanted to clarify, was that we saw it had been deleted from the pleadings, so it was not addressed; it just was not addressed.
>
> MR. HIGGO: It was not addressed at all by Mr. Scorey, absolutely not. He provided those deletions before the hearing.
>
> MR. HIGGO: Yes. It was in draft, but then permission was sought to make that amendment in April when the order was made. But no, I did not understand that point to be being advanced, and it was not advanced below. It is the wrong benefit. The benefit is what is Mr. Hadley getting out of this, and does that create a conflict.
>
> LADY JUSTICE FALK: Well, I think, to be fair, I understood it to be made that way, that Mr. Hadley was not getting a benefit.
>
> MR. HIGGO: The issue was conflict, not benefit."

112. I am at a loss to see how Mr Higgo can be said to have misrepresented the position here. He says that the no net benefit point had been deleted from the proceedings. It had been. He acknowledges that there is an existing issue as to whether the benefit that Mr Hadley received created a conflict, which fairly reflects paragraph 9.3.3(j) which, as far as I can see, is the only paragraph in the amended defence that bears any relation to a defence of no net benefit.

113. I therefore reject utterly any suggestion that Mr Higgo was misrepresenting the position in any way.

11. FALSE REPRESENTATIONS REGARDING THE NOVEMBER CONSULTANCY AGREEMENTS

114. The Applicants' next complaint related to what they said to be incorrect information that CGrowth had paid a 30% or 29% commission to PPL. There had been an agreement between CGrowth and PPL providing for such a level of commission. Nevertheless Mr Thwaite argued that the allegation of a 30% commission was incorrect in two ways.

115. Firstly that the commission was not paid by CGrowth, but by three companies that then received the funding from CGrowth under an agreement between CGrowth and those companies. This point seems to me to be of limited importance as the issue was PPL's benefit from Trafalgar's investment rather than the precise source of that benefit.

116. Secondly, there were financial schedules that demonstrated the amounts of cash received by PPL were less than 30% of the value of the CGrowth bonds, although it seems that these amounts were approximately equal to 30% of cash that have been paid to CGrowth in respect of the CGrowth bonds. This point also seems to me to be of limited importance as it does not negate the fact that PPL benefitted substantially (and in the amounts suggested by the Claimant) from Trafalgar's investment.

117. Mr Thwaite was unable to point me to any particular statement by the Claimant regarding an alleged 30% commission made prior to the Court of Appeal decision which could be said to be misleading, or which had been proved untrue by later evidence.

118. In the absence of being taken to a misleading statement there was no point on which I could find for the Applicants in relation to this complaint.

12. CONCLUSION AND DECISION

119. The Applicants made this application for a long adjournment of the Trial on the basis that they said that they could show that the Claimant misrepresented the evidential position at the summary judgement hearing and that the Court of Appeal such that the Court of Appeal decision was obtained by way of misrepresentation.

120. I have listened, with great patience, and in detail, to the instances of alleged fraudulent misrepresentation that the Applicants have put before me and I have not found a single statement which the Applicants can show to be a misrepresentation. Certainly they have shown me nothing that would get close to persuading the court that there has been a fraudulent misrepresentation, or any statement that might be the product of any conscious or deliberate dishonesty.

121. I therefore have no hesitation in dismissing the Application as being utterly without merit and denying a further adjournment.

122. Allegations made against the Claimant and its legal team have proved to be utterly baseless. If these allegations had been made by a barrister or a solicitor, that person would facing disciplinary proceedings.

123. The Applicants are not subject to any such disciplinary sanction but I will nevertheless express the court's extreme displeasure that they have chosen to bring an action based on baseless accusations of wrongdoing on the behalf of the Claimant and its legal team impugning the professional integrity of the professionals involved.

124. I request that this judgment but put in front of the Supreme Court, if it is still considering the application made to it for leave to appeal.

125. This conduct, to my mind, amounts to behaviour that is regarded as being out of the norm and therefore I consider it appropriate to order costs against the Applicants on an indemnity basis in favour of the Claimant and of the 9th Defendant, which has also been put to cost and inconvenienced by this meritless application.

126. I will hear from the parties as to the assessment of costs and whether any interim payment of costs is appropriate.