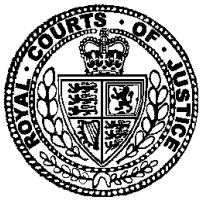

Neutral Citation Number: [2018] EWHC 2905 (Comm)

CL-2014-000863

Case No: CL-2014-000863

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2018

Before :

MRS JUSTICE COCKERILL

- -

Between :

FM CAPITAL PARTNERS LTD	**Claimant**
- and -	
(1) FR□D□RIC MARINO **(2) AUR□LIEN BESSOT** **(3) YOSHIKI OHMURA** **(3) MARIT SJØVAAG**	**Defendants**

- -
- -

Nathan Pillow QC & Anton Dudnikov (instructed by **Hogan Lovells International LLP**) for the **Claimant**
James Couser (instructed by **Richard Slade and Company**) for the **First Defendant**
Laurence Emmett & James Fox (instructed by **Cooke, Young and Keidan LLP**) for the **Third Defendant**

Hearing dates: 25 July 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE COCKERILL

Mrs Justice Cockerill :

1. On 25 July 2018 a one day consequentials hearing was scheduled in this case following on from the main judgment on liability which I delivered on 11 July 2018. A considerable portfolio of issues arose for decision and time ran short. Some further submissions were therefore required after the close of the hearing.

2. With vacation looming and the production of this judgment therefore unlikely before October, I acceded to submissions for the Claimants that I deal with the relatively uncontroversial issues first by way of decision ("the July Decision") to be encapsulated in an order, with reasons to follow. The remaining issues that were left for decision, and the reasons, appear together in this judgment.

3. Thus the issues to be covered in this judgment break down as follows:

    i) July Decision Issues:

        a) Amount of the bribery claim;

        b) Allocation: approach, costs and credit;

        c) Interest basis;

        d) Costs: incidence, basis, interim payment;

        e) Appeal issues.

    ii) Remaining issues:

        a) Proprietary claim;

        b) Account of profits and equitable compensation: Election;

        c) Account of profits: Issues regarding Mr Ohmura;

        d) Equitable compensation issues;

        e) Other issues as to the terms of the Order.

The July Decision Issues

4. The decision which I made read as follows:

> "1. Amount re bribery claim (Marino pleading point): Claimant's figures.
>
> 2. Allocation:
>
> a. Approach as per Claimant's schedules.

b. Costs:

i. Haggiagi not relevant to Mr Ohmura, but to be treated the same as the other recoveries.

ii. Generally: deduction of 30% from headline figures to allow for the effect of taxation.

c. Credit to be given for outstanding payments.

3. Interest: simple interest for this claim.

4. Costs:

a. Defendants to pay the Claimant's Costs

b. Basis: Indemnity

c. Amounts of interim payment:

i. Marino: US$1.5 million

ii. Ohmura US$ 1,000,000

5. Permission to appeal refused (both D1 and D3).

6. Time for renewing the application for permission and filing an appellant's notice at the Court of Appeal be extended to 14 [days after the handing down of this judgment]."

Amount of bribery claim

5. The first issue is the amount which is to be found to be due in relation to what has been called the bribery head, but covers not just bribery properly so called but also receipt of secret commissions.

6. It was submitted by Mr Couser for Mr Marino that the only paragraphs of the pleading where this head had been properly pleaded were the subheadings at paragraph 39CC. He argued that paragraph 39D is to be read as cross-referring to 39CC only. The significance of this is that if so it would follow that Mr Marino was not liable in relation to the GAIN Ironfly payments under this head (though they are covered by the dishonest assistance claim).

7. Having looked carefully at the pleading I am satisfied that this is a false point. The pleading is not immensely easy to follow, but it has a section headed "Secret Commissions", the last paragraph of which is paragraph 39D. Its cross-reference back to "*each of the aforesaid transfers*" is in context to be read as a reference to each of the transfers within the section, including the GAIN Ironfly payments. This is reinforced by the facts that:

i) Paragraph 39D estimates the payments to be worth US$8 million, which would make no sense if the GAIN payments were not included; and

ii) Those payments were originally the focus of this section.

Allocation issues

8. The next questions are those relating to allocation. The first question is whether the *pro rata* approach adopted by the Claimant, which results in a significant allocation to Phase 2 issues, is appropriate and fair.

9. Mr Emmett for Mr Ohmura contended it was not, and that 100%, alternatively 80%, of the other receipts should be allocated to this phase of the proceedings, and hence to Mr Ohmura's benefit. He contended that the correct approach in a case such as the present, was set out by the Court of Appeal in *Townsend v Stone Toms & Partners* (1984) 27 BLR 26.

10. He says that this case demonstrates that once there is a *prima facie* case that the plaintiff has received a sum of money which reduces the loss, it is for the plaintiff to show, if it be the case, that some part of the sum was for another cause of action. In this regard he refers me to the judgment of Waller LJ at page 56 and the words of Oliver LJ:

> "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…
>
> Where … the party who has to bring the money into account himself provides no material to show how any apportionment should be made (or, as in this case, invites the Judge to deal with it in a particular way) the Judge has to do his best with what material he has, and the only material that he had in this case was the claims themselves. What he had to ascertain was what the plaintiffs had lost, and to what extent that loss had been mitigated or satisfied by what had been received."

11. His Lordship went on to say that there was really no other reliable way of doing this except by assessing the true value of the plaintiff's claims against the third party and comparing it with the amount the plaintiff had actually received from the third party.

12. He also directed my attention to the judgment of Purchas LJ at page 53:

> "Where the previous recovery stems from the acceptance of a payment into Court made and accepted not only in respect of the claim for damages under consideration, but also in respect of other claims not relevant, 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. For my part I cannot see how this exercise can be done without an investigation of the other claims, unless it be for the Court to say that the plaintiff has 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. Particularly where there is also a counterclaim, the subjective motives of payer and receiver alike cannot be relevant. The Court must restrict its attention to the effective benefits received by the plaintiffs. For these reasons the learned Judge was perfectly correct to investigate the value of the claims between the appellants and Laings, as well as the claims between the appellants and the respondents."

13. Mr Emmett says that in the light of this I should be cautious about following the course which FMCP suggests and relying on the judgment of Eder J in *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 755 (Comm) at paragraphs [8] – [13] in particular upon the statement at paragraph [13] that *"the claimants have a choice as to how the recoveries are to be appropriated so long as it is not 'obviously unsustainable'"*.

14. Mr Emmett submits that to the extent it is taken as a statement of general principle it is contrary to the decision of the Court of Appeal in *Townsend*.

15. He says that I must have three things in mind:

    i) The Court of Appeal in *Townsend* did not hold that the plaintiff could simply "choose" how to apportion a recovery as between its various claims against the defendant and the third party. Moreover, if the Court of Appeal had allowed the plaintiff in the *Townsend* case to choose the basis for apportionment, it would have attributed the payment to each claim against D1 in the proportion which £30,000 bore to the total amount of the claims brought against D2. Rather the Court must ask what "effective benefits" were received by the plaintiff from the third party in respect of the concurrent claims.

ii) If the statement of Eder J bore the interpretation for which FMCP contends, the reference to acting *"bona fide and without collusion"* would make no sense. If the claimant can make the appropriation by reference to its own interests, it is unclear what would be involved in an appropriation made in bad faith. Moreover, "collusion" implies interaction with another person, and on FMCP's approach it is unclear which other person is pointed to. Collusion, he says, is referable to the situation when an apportionment is agreed by the original payer of the sum in question. It is suggested that there may be some context to the statement of Eder J which is not reflected in the judgment or that Eder J misunderstood the judgment of Oliver LJ in *Stone Toms*.

iii) It is obviously unfair to allow the claimant to make an apportionment retrospectively and with a view to its own interests. Moreover, if the appropriate question for the Court were merely to ask whether the proposed allocation is "obviously unsustainable", this would encourage claimants, as is the case here, to present as little evidence to the Court as possible. Such an approach prevents defendants and judges questioning the sustainability of the apportionment and of the other claims. This is not consistent with the approach of the Court of Appeal in *Townsend*, which requires the claimant to provide information to support the particular apportionment for which it contends to prevent double recovery.

16. Finally he says that the supposed test begs the question: "unsustainable" by reference to what? It seems he submits implicitly to recognise that an objective inquiry is required.

17. Mr Emmett therefore says that in circumstances where FMCP has not attempted to give the Court the material it would need to reach a decision of the kind contemplated in *Townsend*, it is not appropriate to apportion any of the settlement sums received from Mr Bessot to Phase 2.

18. Alternatively, he submits that if the Court is minded to make an apportionment on the basis of the very limited material provided, it should pay particular attention to the facts that:

i) FMCP did not sue Mr Bessot until it received a copy of the Charles Russell letter, which revealed the existence of the Phase 1 claims. Up to late 2015, it was pursuing the Phase 2 claims only against Mr Marino. If it had thought there was a good basis for bringing the Phase 2 claims against Mr Bessot it would have done so prior to receiving the Charles Russell letter;

ii) The Phase 2 claims were obviously significantly weaker than the Phase 1 claims;

iii) Fighting the Phase 1 claims (which included allegations of serious dishonesty) obviously posed greater reputational risk to Mr Bessot than fighting the Phase 2 claims would have posed;

iv) The evidence of Mr Humphrey in his Tenth Witness Statement is that even before the bifurcation the majority of FMCP's costs were devoted to the Phase 1 issues rather than the Phase 2 issues;

v) There is doubt as to whether the Phase 2 issues are to be pursued at all (which is said to be a reflection of their overall strength).

19. FMCP joined issue robustly with this argument. It contended that the approach for which Mr Ohmura argued was obviously unworkable and that the approach adopted was actually favourable to the Defendants, because the alternative indicated by Steyn J (as he then was) in *Banque Keyser Ullman v Skandia Insurance (No. 2)* [1988] 2 All E.R. 880 was less favourable. He suggested that:

> "The principle appears to be that if a plaintiff who receives payment from one tortfeasor establishes an additional separate claim against that tortfeasor, then 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."

20. FMCP says that this approach would have allowed them to allocate Mr Bessot's recovery without giving any credit to the other defendants. They chose the *Urumov* approach, they say, very much in an attempt to be even-handed.

21. Despite Mr Emmett's thoughtful and clear argument on this point I am not persuaded that either the principle he contends for, which is that the claimant needs to provide materials to enable an apportionment to be properly assessed, or the result which he seeks is correct. 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.

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.

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.

24. The question then arises of whether the *Urumov* case is of assistance in pointing to the appropriate course. It seems to me that it is.

25. The "obviously unsustainable" test at which Mr Emmett took aim, and also the use of the apparently inappropriate *"collusive or not bona fide*" wording in *Urumov* can be traced back through this case to the lengthy judgment of Evans-Lombe J in *Barings Plc (In Liquidation) v Coopers & Lybrand* [2003] P.N.L.R. 34 where, in the context of a question as to apportionment of a settlement, he considered *Banque Keyser Ullman* at pp 882 and 884 (the latter of which suggests that it may be necessary for the claimant to prove that the other claim is *"sustainable in facts and law*" or "*likely to succeed at trial*"). Having looked at these passages the judge stated this:

> "1116. These passages …. demonstrate that the Barings parties may appropriate the settlement monies received from the Coopers defendants to the post-December 31, 1994 claims, as long as those claims meet the necessary threshold. The real issue is the level of that threshold: must the court decide whether the claims would have succeeded at trial, or is some lesser scrutiny required?
>
> 1117 Mr Brindle for BFS pointed out that, in Banque Keyser Ullman , Steyn J. gave the judgment from which I have quoted above at the end of a full trial. He already had a clear and informed view on the strength of the costs claims which were in issue. He was therefore able to decide without any need for further evidence that the claim for disallowed costs referred to in the second passage would have failed at trial. Mr Brindle distinguished Townsend on the grounds that there was there only one claimant; the

> court there had been given no material at all on which to base an appropriation; and that the payment there was a payment into court, which is made under a special procedure and which it may be more difficult for a claimant unilaterally to appropriate to particular claims. By contrast, the general rule, where a creditor is owed two debts by a debtor and receives a payment which is not appropriated between them, is that the creditor may appropriate the payment between the debts as he thinks fit.
>
> 1118 Mr Brindle suggested that Steyn J. would be horrified if he were told that his ruling required me to hear the full case against the Coopers defendants, over the course of several weeks, purely in order to decide this point. I agree with him, and would be very reluctant to make such a finding unless authority compelled me to do so. I do not think either Banque Keyser Ullman or Townsend do so compel me.
>
> 1119 Banque Keyser Ullman is explicable on the grounds suggested by Mr Brindle. In Townsend the Court of Appeal stated that even a payment into court may be appropriated to particular claims, by the claimant requesting an apportionment in the notice of payment in. That would be conclusive, as long as the apportionment were not collusive or not made bona fide (per Oliver L.J. at p.41). In the case of a negotiated settlement, it seems to me that the normal rule allowing appropriation by the recipient should apply (Halsbury's Laws, 4th ed., vol.9(1) para.956), subject to the sort of low-level threshold indicated by Oliver L.J.. One of Mr Brindle's formulations of that threshold was whether the claims were obviously unsustainable. That seems to me a preferable approach to his alternative approach, by analogy to the Civil Liability (Contribution) Act 1978 , which would pay no regard at all to the chances of the claimant making out his claim at trial."

26. In the light of this authority, which explains the conclusion to which Eder J came in *Urumov*, and which shows another court grappling with somewhat similar issues to those which confront me here, I am satisfied that 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.

27. While I accept that there may be questions as to whether the Phase 2 claims were the real focus of the claims against Mr Bessot, such claims are pleaded against him, and they are on the face of it extensive and serious claims. While they have been somewhat derided on the merits, it has not been suggested that they were "obviously unsustainable", only that they are "significantly weaker" than the Phase 1 claims. Indeed I note that there has been no attempt at strike out or reverse summary judgment either by Mr Bessot – or by Mr Marino who faces the same claims. I therefore conclude that these claims surmount the "obviously unsustainable" hurdle and that the Claimant's appropriation should be accepted.

28. So far as allocation of costs incurred against those who have made payments is concerned, Mr Emmett notes that this depends on a claimant presenting evidence to the Court showing that its claim to costs *"was sustainable on the facts and in law"*: see *Stevenson v Singh* [2012] EWHC 2880 (QB) at [70]-[75], which also quotes *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1988] 2 All ER 880 at page 884. This effectively deals with the point raised by Mr Couser as to allocation of recoveries to costs in principle.

29. Two specific issues arise however. First it is argued that on this test FMCP is not entitled to bring into account any claim for costs as against Mr Haggiagi because there is no evidence that:

    i) Proceedings against Mr Haggiagi were ever commenced so as to give rise to any entitlement to recover costs;

    ii) Costs would have been recoverable in any jurisdiction in which proceedings could have been commenced as against Mr Haggiagi;

    iii) The costs allegedly incurred were reasonably incurred so as to be recoverable if proceedings had been commenced in the English courts (or even as to what these costs were).

30. Secondly it is said that in relation to any claims for costs it is still necessary for FMCP to assist the Court in making an objective assessment of the terms of the various settlements, to ascertain which sums are attributable to costs and to ascertain which of the costs allegedly incurred were reasonable so as to be in principle capable of recovery. It is submitted that it would be appropriate to reduce by 50% the amounts which fall to be brought into account by way of costs to reflect the facts that: FMCP has not sought to explain what the costs that are claimed actually represent; in each case, the settlement was a

compromise pursuant to which it is to be inferred FMCP agreed not to recover the full amount of the costs it could have recovered; and on any assessment, FMCP would have recovered significantly less than 100% of its costs.

31. So far as the first point is concerned, in principle there seems to be no objection to including costs *vis a vis* Mr Haggiagi where, even if he was not in fact sued here, he plainly could have been as a necessary and proper party to this litigation (if he had not compromised the claim against him, as he did). As for the second point, again I consider that the approach for which Mr Ohmura contends requires an excessive amount from the Claimant and the Court. The amounts involved are not suggested to be particularly out of the way in the context of litigation of this sort. However the amount which would be recoverable if the costs were ones incurred in completed litigation would only be the assessed costs, not the 100% figures. I conclude that it is appropriate for the amount of costs allowed to be reduced to reflect the sums which would actually have been recoverable. An often used percentage for likely recovery on assessment is 70%, and I have ordered that this figure be used accordingly.

32. The final point on apportionment is that Mr Ohmura takes issue with FMCP in relation to sums that have been agreed to be paid, for which no credit has been given.

33. He points to *Stevenson v Singh* at [61] where it is said that it is *"also necessary to take into account the amounts which [the other defendants] have agreed to pay, but have not yet paid"*.

34. I accept that it follows from this that to the extent that there are outstanding sums, further credit should be given.

Costs

35. On costs FMCP seeks indemnity costs, pointing to the nature of the claims on which it has succeeded and my findings as to objective and subjective dishonesty on the part of both Mr Marino and Mr Ohmura.

36. The two defendants take rather different approaches to costs. For Mr Marino it was not disputed that indemnity costs followed on the claims on which FMCP succeeded and which involved dishonesty, but it was argued that the same conclusion does not hold true for the costs of the breach of fiduciary duty claims on the basis that such claims are not sufficiently out of the norm to warrant indemnity costs. In addition I was urged to bear in mind that FMCP had lost on conspiracy and knowing receipt as well as Swiss Law and that it should follow that Mr Marino should not be penalised for what were in essence erroneously brought claims.

37. I am not attracted by this argument in circumstances where the breaches of fiduciary duty were part and parcel of the dishonest behaviour of Mr

Marino. Further it was submitted that indemnity costs should be awarded in the other direction on the issues on which FMCP failed.

38. I do not find that approach either attractive or cohesive with the guidance in the authorities regarding the approach to costs. I have in mind here the famous dictum in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC). [72]:

> "(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
>
> (ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
>
> (iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
>
> (iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7) .
>
> (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
>
> (vi) In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.
>
> (vii) If (a) one party makes an order offer under Part 36 or an admissible offer within Rule 44.3(4)(c) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.
>
> (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

39. Likewise in *Kidsons v Lloyds* [2007] EWHC 2699 (Comm) [2008] 3 Costs L.R. 427 Gloster J summarised the position as follows at [11]:

> ""There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at para 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues". Likewise in Travellers' Casualty (supra), Clarke J said at para 12:
>
> "If the successful claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point."."

40. I will not therefore follow the course which Mr Couser urged.

41. Mr Ohmura accepted that FMCP was the successful party and that, as a starting point, was entitled to its costs. However he submitted that this was not a case in which indemnity costs should be awarded without restriction in relation to the costs of the case. At most he said indemnity costs should cover only those matters identified by FMCP as indicating the appropriateness of indemnity costs in its evidence and skeleton argument, namely the evidence of Mr Ohmura (i.e. the production of his witness statements). Moreover, he contended there were a substantial number of reductions to which those costs must be subjected including:

    i) The costs of claims against other defendants;

    ii) Mr Bessot's witness statement;

    iii) Mr Eltriki's witness statement;

    iv) Mr Colas' evidence;

    v) Professor Pieth's evidence;

    vi) Late provision of trial bundles;

    vii) Failure to abandon the case in relation to AMFC+.

42. Detailed submissions were addressed to each of these points by the parties in writing and at the oral hearing, which I do not seek to reproduce. Suffice it to say that each point was very much in issue.

43. Having considered these issues they do not appear to me to be of much moment. As the authorities cited above make clear, a successful party need not win on every point nor take every litigation decision optimally

to be entitled to a full costs recovery (subject to assessment). Nor do I see why indemnity costs should be confined to the specific outcroppings of the case run by Mr Ohmura which most obviously bear the hallmarks of a case where indemnity costs are appropriate. Just as departing from the "costs follow the event" principle required a substantial justification (see Zuckerman [27.65]) so logically must depriving a successful litigant of his right to indemnity costs. Here I do not see anything which would approach that hurdle.

44. Given the acceptance by the Defendants that in essence this is an indemnity costs case, one has to consider whether there should be any derogation from the award of indemnity costs. None of the things relied upon seem to me to be matters which would make it appropriate to deprive the Claimant of an award of indemnity costs which has been earnt by something sufficiently out of the normal course to attract this serious order. In particular:

    i) So far as costs of other defendants are concerned, costs have been sought only from the end of 2015 onwards, and Mr Ohmura is jointly and severally liable as regards those heads of liability established against him;

    ii) The Claimants' conduct as regards Mr Bessot, given the complicated nature of the position, does not strike me as unreasonable. Nor are these costs significant;

    iii) Mr Eltriki is another *de minimis* cost and his evidence was in fact needed to deal with the April Mandate;

    iv) The plea of market practice originated with the Defendants and it was not unreasonable for the Claimants either to seek expert evidence on this, or take the decision not to call Mr Colas in the light of the way that the case had moved;

    v) As for Professor Pieth, it can hardly be right to penalise a party when its expert evidence was not preferred on a subsidiary issue (which in the event did not have any impact on the outcome), when such evidence was necessary;

    vi) As for the trial bundles, while I see there may be some scope for criticism, it appears to have arisen out of a miscommunication and is hardly a matter which merits the loss of the indemnity costs order (and indeed it was really only Mr Ohmura's case that this was one of a number of factors which together would reach this result).

45. FMCP's total minimum recoverable costs to 11 July 2018 are some US$4.6m (the costs are billed by Hogan Lovells International LLP in US$) and they seek a payment on account of those costs.

46. CPR 44.2(8) provides that where the court orders a party to pay costs subject to detailed assessment, it *"will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so"*. There is no reason (still less a good one) to depart from the general rule in this case.

47. FMCP submits that the only question is: what is a 'reasonable sum'? There is no rule that the amount ordered to be paid on account should be the irreducible minimum of what may be awarded on detailed assessment: *Excalibur Ventures v Texas Keystone* [2015] EWHC 566 (Comm) at [22]. Rather, as Christopher Clarke LJ went on to explain:

> "23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."
>
> 24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."

48. FMCP submits that US$2.65million (56% of the total) is a reasonable sum as against Mr Marino. In the skeleton it was suggested that US$2.2m (56% of the total of the costs recoverable from him), was sought against Mr Ohmura, but that was later reduced to US$1.9 million.

49. As to payment on account there are two points in issue.

50. Mr Marino says that FMCP is obliged, if it wishes the Court to make an order for a payment on account, to provide reasonable information about the total claimed in costs against each Defendant and that it has wholly failed to do this. He says that the provision of a simple total is inadequate and that FMCP would have to break out the costs incurred solely in pursuing the other Defendants. He gives as one example of such costs all costs associated with the claims in relation to Swiss law, which was a matter only ever live as between FMCP and Mr Ohmura.

51. Mr Ohmura does not resist the making of an order for payment on account in principle but says that the amount claimed by FMCP must be subject to a very substantial reduction to reflect the fact that assessment is likely to lead to (i) the costs judge apportioning costs as between defendants in a manner different from that proposed by FMCP; and (ii) a reduction in the costs actually recoverable by reference to reasonableness.

52. I do not consider that the absence of detail should stand in the way of the making of an order for payment on account at this stage. However it does impact on the amount which I can be confident will be recoverable on assessment, particularly when the figures put forward change at the last moment as has happened here. I will therefore make an order which results in recovery at this stage of somewhat less than 50% of the very large costs in the case, split as set out above: Mr Marino: US$1.5 million, Mr Ohmura US$ 1,000,000.

Appeal Issues

53. Both Mr Marino and Mr Ohmura sought permission to appeal, which I refused. As written reasons have been given in the permission to appeal forms I will simply record for completeness, and because there is a crossover with one of the issues below, as follows.

54. Mr Marino sought permission to appeal on two substantive points: the conclusion as to the April Mandate and on my finding at [201] of the judgment that Mr Marino would have been under an obligation to declare any rights under any such agreement. I considered that as to the first it has no reasonable prospects of success as a challenge to an issue where I carefully weighed and balanced the evidence as to the existence of the alleged April Mandate and its scope if any such agreement existed. As to the latter the issue is not one which affects the outcome as it is a subsidiary finding and is academic on the basis of the primary finding.

55. Mr Marino also sought permission on two other points. The first (on which it is fair to say that the bulk of the emphasis was placed) relates to a change I made to the judgment at the corrections stage and which it was submitted by Mr Couser amounted to removing a finding in Mr Marino's favour as regards the proprietary claim. I do not regard this point as arguable; the alteration related to a subsidiary paragraph in the

section on knowing receipt and it was always plain that the proprietary claim remained live. There was therefore (i) no change to a finding in Mr Marino's favour, and (ii) the change did not result in a finding against Mr Marino which could be appealed. In any event Mr Marino has been offered ample opportunity at the consequentials hearing – and in the month which I gave thereafter for written submissions on this point – to raise any submissions on the point.

56. The second further point related to findings in relation to Mr Bessot; as I have recorded in the decision I gave on this, the basis for the argument is unclear and no finding against Mr Marino was identified as being rendered erroneous by any such references.

57. Mr Ohmura has sought permission to appeal on my conclusions on dishonest assistance, bribery and choice of law. On each of these I concluded, for the reasons I have given in writing, that the issues did not have a real prospect of success or meet the "some other compelling reason" hurdle which was posited in respect of one of them.

The Remaining Issues

Bribery: the Proprietary claim

58. FMCP pursues what has been described as "the proprietary claim" in this context. That description is perhaps somewhat inapt, since the claim is made not against an individual person, but against an asset. FMCP's case is that benefits secretly received by a fiduciary in breach of duty to their principal are in equity the property of the principal: *FHR European Ventures LLP v Mankarious* [2015] AC 250 (SC). This is *inter alia* because equity considers that the fiduciary has obtained the relevant benefit on behalf of the principal rather than themselves.

59. Although the claim was originally pleaded as against both Mr Marino and Mr Ohmura it is ultimately live only against Mr Marino, although there are crossovers to other questions which do concern Mr Ohmura, and he consequently made submissions on it.

60. As regards Mr Marino, FMCP submits that he procured and received the benefit of the bribe moneys in breach of his fiduciary duty to FMCP. It points to my findings within the main judgment that the bribes paid by JB/GAM and later Conquest FP were indeed received by or for the benefit of Mr Marino personally, despite having been routed (at his direction) through the Ironfly or Leopard bank accounts.

61. It submits that it follows that the bribe moneys were impressed with a constructive trust in favour of FMCP immediately upon their receipt into the accounts of Ironfly or Leopard (as appropriate). FMCP has or had an equitable proprietary claim to the moneys so received; and, to the extent that they have been moved or exchanged, it can follow them and/or trace the value of them in equity unless and until they lawfully come into the hands of a *bona fide* purchaser for value without notice. It is

therefore legally irrelevant that the moneys were directed into the Ironfly/Leopard bank accounts.

62. It submits that this analysis is supported not only by *Prest v Petrodel* [2013] 2 AC 415 but also by other authorities such as *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, and *Shell International Trading and Shipping Co v Tikhonov* [2010] EWHC 1399 (QB) which deal with the question of a bribee's personal liability to account for bribe moneys directed to and received into a corporate vehicle's bank account.

63. In this regard there was not a significant amount of debate as to the law. Mr Couser's own skeleton for Mr Marino for this consequentials hearing appeared on occasion to proceed as if it were accepted that such a claim existed. So in paragraph 9 of his skeleton he noted that *".. to the extent that the claims against [the] third parties were proprietary claims (which it is highly likely they were) the monies received by FMCP in settlement were received in specie, .."*. Given that the third parties are said to have received the funds claimed from Mr Marino that analysis does presuppose the existence of a proprietary claim against him. In his oral submissions he focussed on the importance of minimising bribery claims essentially for this reason. Mr Marino's team chose not to address the point in any more detail at the hearing or in the period given for written submissions after the hearing.

64. The biggest issue here was perhaps my determination in the main judgment that the claim in knowing receipt failed. In that context I determined that the *Prest v Petrodel* analysis was not applicable. FMCP do not hesitate to say that they consider that that answer was wrong; but submit that for present purposes it matters not, because the issue is (or is capable of being) different when one is considering a proprietary claim.

65. I have been persuaded on hearing argument on this point that (regardless of the view one takes on the knowing receipt point) the proprietary claim against Mr Marino is good. Although the law has plainly been controversial, recent high authority justifies the conclusion for which FMCP contends.

66. I also take the view that those authorities are indeed focussed on this kind of claim and that there genuinely is a distinction to be drawn between the position as regards knowing receipt, where the wrong effectively occurs in the receipt and the question of knowledge focusses on the recipient; and the position where the wrong under consideration was, as here, the bribery of a director who has acted in breach of his fiduciary duties and the claim represents essentially a remedy for the wrong of the individual, which is impressed on the monies *ab initio*. The English Courts have traditionally been slow to derogate from the corporate personality principle, but to do so in the latter situation represents a more obviously justified derogation than the former.

67. Neither Ironfly nor Leopard can be presented in the guise of *bona fide* purchaser; and so the trust imposed at the point of time when the monies were diverted from FMCP is not defeated. One point arises as regards Ironfly, which was whether the fact that this was co-owned could make a difference. I had indicated in the main judgment, the point not having made it beyond passing reference in written submissions, that it seemed to me that it might. Having now heard argument on the point I conclude that since the claim is one for which the only other co-owner of Ironfly, Mr Bessot, would have been jointly and severally liable, this cannot impede the claim; though in any event the sums which went into the wholly owned Marino vehicle, Leopard, would be traceable.

68. I was referred (albeit in the context of a later point) to Lewin on Trusts at §20-085:

> "But the trustee cannot avoid the rules concerning accountability for profits by arranging for the profit to be taken by his company (or a company in which he has a substantial interest) which is a mere cloak for the trustee, or which is formed by the trustee for the purpose of taking the profit, or which could have been taken by the trustee but which is arranged by him to be taken by a company. We do not consider that this principle is affected by Petrodel Resources Ltd v Prest, which tightened up and restated the law on piercing the corporate veil. No piercing of the corporate veil is involved. Rather the principle is that in the circumstances stated above the trustee continues to have a liability of his own which is not eliminated by the interposition of the company. In such a case the trustee will be personally accountable for the full amount of the profit, not merely a part proportionate to his interest in the company. The company will be personally accountable for the full amount of the profit obtained by it and will hold the profit on constructive trust for the beneficiaries. But in a case where a third party has a real and independent interest in the company, the profit to be accounted for will be limited to that attributable to the trustee's breach of duty…"

69. That passage would seem to encapsulate the authorities. Here Mr Marino sought to take payments which I have found he was not entitled to via a company which was his creature. If I were to permit him to succeed in this argument the result would be to enable him to evade his liability to account for the profit which he in substance made. The authorities do not require me to reach that conclusion and I accordingly find that, subject to the question of whose is the claim (LAP or FMCP), the proprietary claim against Mr Marino succeeds. That issue I have

dealt with below, since it was principally argued by Mr Emmett in the context of Mr Ohmura's arguments relating to account of profits.

Account of profits and equitable compensation: Election

70. Mr Ohmura took two separate points under this head. The first was that election has to be made between account of profits and equitable compensation. He says that FMCP cannot have both. The second is a less familiar point: he contends that the election has to be exercised consistently against all Defendants. So if FMCP seek equitable compensation against Mr Marino they cannot seek an account of profits against Mr Ohmura (and vice versa).

Election between remedies

71. Mr Emmett for Mr Ohmura argues that the remedies of an account of profits and damages for loss are inconsistent because they rest on incompatible premises. The former rests on the premise that the principal has affirmed the steps taken by the defaulting fiduciary, and requires the fiduciary to act in accordance with that affirmation by surrendering to the principal the benefits which should have been obtained for the trust fund. But the latter rests on the rejection of the actions of the fiduciary and requires the fiduciary to compensate the principal for losses suffered as a result of the default.

72. The claimant beneficiary is not entitled, as is often said, to *"approbate and reprobate"*. Furthermore it is said that logically this principle should extend not just to each claim, but also to other concurrent causes of action arising from the same facts.

73. On this issue there was no contest as to the primary point. FMCP accepted that as against each individual it could not claim both account and compensation.

Election against all defendants?

74. In relation to this issue it was submitted for Mr Ohmura that where a claimant has claims against more than one defendant arising out of the same facts (and in particular, where the claimants are jointly liable), the claimant must exercise any right of election between remedies consistently as against all defendants.

75. It was submitted that the same reasons that prevent a claimant from obtaining inconsistent remedies against the same defendant in respect of a single wrong should equally prevent the claimant from obtaining inconsistent remedies against different defendants in respect of the same wrong. "Approbation and reprobation" against joint wrongdoers is said to be equally inconsistent and therefore impermissible.

76. It was also suggested that there is a practical side to this argument in that allowing a claimant to obtain inconsistent remedies against

different defendants would lead to double recovery in the case of claims for which it is not necessary to prove loss. It cannot be right to allow a claimant to elect to recover damages from one defendant so as to place the claimant in the position in which it would have been if there had been no wrong; and then elect to obtain from another defendant an account of profits (which does not require proof of loss).

77. Mr Emmett was not able to identify any case directly on point, but directed my attention to *Twinsectra Ltd v Lloyds Bank plc* [2018] EWHC 672 (Ch) where Jeremy Cousins QC sitting as a Deputy Judge of the High Court considered the question of election between inconsistent rights as against all potential defendants. At [72] he said as follows:

> "(i) Where an election has been made between rights, it cannot be retracted. Thus, where a contract has been affirmed by the innocent party, following repudiatory breach by the other party, the innocent party cannot later go back upon his affirmation. His decision stands, and so does the contract. For this purpose, election, whether intended or not, by an unequivocal act communicated to the other party, is conclusive; Scarf v Jardine , pages 359-361, per Lord Blackburn. It is, therefore, possible for the making of a claim against one party, even though it does not proceed to judgment, to represent an unequivocal manifestation of an election between inconsistent rights which might affect a claim against another party; see Scarf v Jardine, per Lord Blackburn at page 362.
>
> (ii) The entry of a judgment, at least a final one, against one person in an action against two persons in a case of alternative liability, will constitute such a conclusive step; Morel v Earl of Westmorland, pages 76-77 in the Court of Appeal, per Collins MR, later affirmed in the House of Lords."

78. Mr Emmett submits that there is no reason why inconsistent remedies should be treated any differently, and submits that this approach is supported by the decision of the House of Lords in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) and *Mahesan v Malaysia Government Officers' Co-Operative Housing Society Ltd* [1979] A.C. 374.

79. FMCP took issue with this approach. While accepting that logically there might be some risk of double recovery, it accepted that this could not be allowed to happen and made clear that recoveries from one defendant by way of profit would go in fact to reduce loss against the other.

80. As a matter of principle it submitted that there was no authority which said that such an election was impermissible. The authorities to which Mr Emmett referred me were said not really to approach the point, and therefore not to be of assistance. In terms of pure analysis it was said that the rationale for the rule (rejecting or accepting the acts of the fiduciary) need not drive the same response to two dishonest assisters, one of whom is not a fiduciary. There, it was submitted, the basis for giving the option of an account of profits is a different one; the policy of the law turning its face against people benefitting from dishonest wrongdoing and meddling dishonestly in a trust relationship.

81. In this connection Mr Pillow QC pointed me to Handley on Estoppel by Conduct and Election at 14-045-7 where it is said: *"Recovery in restitution from one converter does not preclude recovery of damages from another provided there is no overcompensation."*

82. This was an interesting point and put very persuasively by Mr Emmett for Mr Ohmura. In the end, despite his efforts, I am not persuaded that it would be right to find that election must be exercised consistently as between defendants – at least defendants in a position such as this.

83. My starting point is the authorities. Mr Emmett placed considerable weight on passages from *Aerostar* and *Mahesan*.

84. I did not consider that these authorities did provide the support which was asserted. Mr Emmett very properly conceded that it was not quite clear from paragraphs 206 and 208 of *Aerostar* that Morgan J required the wrongdoer and the dishonest assistant to exercise their election in the same way. I agree that it is not clear; it seems that no question of different remedies being taken against different defendants arose. I do not consider that I can take much, if any, support from that decision.

85. Similarly as regards *Mahesan*, Mr Emmett conceded that when Lord Diplock there talked about the claimant not being able to recover both in money had and received and in damages for fraud it was not clear that he intended that the claimant should exercise its election the same way with both defendants, but suggested that this was on balance the better reading. Again, having revisited the authority, I do not see this passage as offering support for this reading. It occurs in the context of the consideration of a single defendant; there is no express reference to this issue, or even a real hint that it is in the mind of the court.

86. In relation to the *Barclays* case, one may be able to read some question mark about the position as regards joint tortfeasors into the passage to which I was directed at p 50. However that is a purely hypothetical section; having found that there was no election on the facts, the court was proceeding to consider the position as regards separate tortfeasors if that answer were wrong, the case being one about separate torts. It is a considerable reach to spell out of that any principle even of persuasive authority.

87. The position is, therefore, that there is no authority which deals with this question in a way which provides any real support for the proposition. I note that were this point to be good I would find that quite surprising; though I accept that the facts of this case are unusual it would be odd if a similar situation had not previously arisen. The absence of authority would not however trouble me much could I see a clear line of principle through the argument. However I cannot.

88. The authorities on election between remedies are based on there being a real inconsistency in pursuing both remedies. That will plainly be there *vis a vis* a single defendant. I can actually see that there may be circumstances where if there are joint tortfeasors, both of whom breached essentially the same fiduciary duty, there would be a similar inconsistency in electing for different remedies as between them. But the argument becomes strained when one advances, as here, into the territory of joint and several liability and still more so when the basis of the liability between the two defendants is essentially different (breach of fiduciary duty versus dishonest assistance).

89. This seems to be consistent with the passage from the judgment of Arden LJ (as she then was) in *Ramzan v Brookwide* [2011] EWCA Civ 985, [2012] 1 All ER 903 at paragraph [63], speaking of *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 (and albeit that it is directed to the single defendant scenario):

> "Lord Nicholls's judgment demonstrates that the matter is not as complex as it might seem. The principle is that damages must be awarded on a consistent basis. Once the claimant has elected to receive compensatory damages for a particular wrong, he may not also claim an account of profits or vice versa. If, however, there are, for instance, separate wrongs, the claimant may be able to make a different election for each wrong."

90. Thus Mr Pillow QC may have put it a little high when he submitted that the principle is based on a fundamental inconsistency; but it is clear that a genuine inconsistency which makes it inappropriate for both remedies to be granted must be discernible. On the facts of the present case, and in particular given the different underpinning of the relationship which gives rise to the election, as well as the essentially different nature of the key liability of each defendant I do not consider that recovery of one remedy against one defendant and a different one against the other offends against principle.

91. I reach that conclusion although there is certainly on its face an oddity about different elections *vis a vis* different defendants. Mr Pillow QC sought to take the wind out of Mr Emmett's sails by saying that

recoveries from Mr Marino's profits would lessen the losses recoverable from Mr Ohmura. Yet he accepted that in the converse position, losses recovered from Mr Ohmura would not affect the claim against Mr Marino. The temptation is to conclude that if inconsistent election *vis a vis* joint tortfeasors is permissible it becomes something of a cherrypickers' charter. Yet having considered the matter I conclude that this argument is a red herring. As was noted in the Claimant's submissions, these sorts of oddities are inherent in the position of a defendant in a claim featuring multiple defendants and overlapping rights. A successful claimant will often choose not to seek recovery of losses in a way which is equitably spread over the defendants, but go for one more attractive target first. And, too, recovery of profits made dishonestly may be seen as prioritised for policy reasons.

92. I therefore find that while an election between remedies must be made, that election need not be consistent as between the defendants.

Account of profits: Issues regarding Mr Ohmura

93. Two points are taken by Mr Ohmura:

    i) It is said that FMCP, as opposed to LAP, has no entitlement to an account of profits as against Mr Ohmura;

    ii) Mr Ohmura should be required to account only for his own profits and not those of Conquest.

94. As a subsidiary point it was argued that if FMCP were to elect to seek an account of profits against Mr Ohmura in respect of the post-GAIN payments there would be an additional point that would arise and that is that such an account would need to include an equitable allowance in respect of Mr Ohmura's skill and expertise in earning the profits. No such claim is made (pending any appeal on the point) in relation to the GAIN payments because of my finding that there was no work done by Mr Ohmura in this regard.

Whose is the right to an account of Mr Ohmura's profits/ the proprietary claim?

95. This issue relates to the payment of US$625,000 made by Ironfly to Conquest Cayman in respect of the GAIN transaction. Mr Ohmura contends that FMCP (as opposed to LAP) is not entitled, in principle, to recover an account of profits in respect of this payment.

96. Reliance is placed on *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11 and *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 at paragraphs [121]-[124].

97. The former was a case where a principal (P) engaged an agent (A) to arrange a loan. A in turn arranged for that to be done by a sub-agent (SA). SA took a secret commission from a third party (TP). The main

question was whether P was entitled to recover the secret commission from SA. The Court of Appeal concluded that he was with Collins MR (with whom Mathew LJ agreed) saying that SA stood in a fiduciary relation as regards P and that *"he would be a debtor as for money received for the use of the persons to whom he stood in that fiduciary relation"*.

98. Stirling LJ gave the most detailed consideration of the question of who were the real principals and for whom the commission should be considered to have been earned, saying:

> "It seems to me that [P], and not the plaintiffs [A], are the persons who ought to be considered as so entitled. [SA] was dealing with [A] in their capacity as agents. They could not, without authority from [P], their principals, have authorized him to accept a commission from [TP]. In my judgment, if he had, on the strength of an authority conferred on him by [A], accepted such a commission, it would have been at his own risk; and, if it turned out that [P] had not in fact conferred such an authority on [A], he would have been accountable to [P] for the Commission he received … In these circumstances I think that [P] have a right to call on [SA] to account for the sum which he has received from [TP], as being money improperly accepted by him in the course of his employment without their sanction, and which he is under an obligation to pay over to them, and not to [A], who had no authority from [P] to release him from that obligation, or to deal with it in any way …"

99. In relation to the latter I was directed to [124] of the judgment and specifically the passage where Longmore LJ says:

> "First, we find the substance of Stirling LJ's point persuasive and consider that the real claimant was the shipowning company in question. To put the point another way Mr Nikitin's profits were not profits "which ought to have been made" for NOUK: see the decision in Murad [2005] WTLR 1573, para 85. Second, even if that is wrong, on the facts as we know them the inclusion of profits attributable to the Kuzbass and the Kaspiy would amount to an unjust enrichment of NOUK because it would leave them with an unauthorised profit in circumstances where there is no practical possibility that that profit would be passed on to the person "really entitled to receive it"."

100. On that basis it is said that where a principal (in this case LAP) employs an agent (in this case, FMCP) and the agent employs a sub-agent (in this case Mr Marino) and the sub-agent takes a secret commission, it is the person who is dealing as a principal and not the agent who is entitled to recover the commission from the sub-agent. As the Court of Appeal stated in *Novoship*, the same point could be put another way (in reliance upon *Murad v Al-Saraj* [2005] EWCA Civ 959; [2005] WTLR 1573 at paragraph [85]) by saying that the defendant is to be required to account only for those profits that should have been made for the claimant. In the present case, if the profits should have been made for any party, they should have been made for LAP.

101. It is submitted that my statement at [439] of the judgment in the present case, that I saw force in the submission that there is no satisfactory explanation as to why FMCP rather than LAP should have a proprietary interest in sums received by various companies, rests on essentially the same reasoning as that in *Novoship* and was correct.

102. For FMCP it was contended that the argument was at fault in that in *Novoship* there was a sub-agency and it was alleged and found that the sub-agent owed direct fiduciary duties to the principal (who stood in the place which LAP occupies in this litigation). Here, it was said, no one has alleged that Mr Marino owed direct duties to LAP, and indeed I determined at [448] that Mr Marino was not LAP's agent. Further it was submitted that FMCP were here acting as the asset manager of LAPs assets and did not delegate the job of asset management to Mr Marino as a sub-agent with the consequence that Mr Marino was not dealing with the funds as agent or fiduciary.

103. To this the reply for Mr Ohmura was that it was wrong to suggest that Mr Marino was not in a fiduciary relationship *vis a vis* LAP; the fiduciary relationship did not depend on the existence of a direct contractual relationship (see *Powell & Thomas*).

104. In relation to this argument, although it was notably well argued by Mr Emmett for Mr Ohmura, I am in the event not convinced that the analogy with *Powell & Thomas* is really there. *Powell & Thomas* was a case where one could discern a genuine chain of authority such that it made perfect sense to say, as the Court of Appeal did, that the sub-agent stood in a fiduciary relationship to the principal.

105. As it was put in the judgment's recital of facts: *"[the defendants] applied for assistance in the matter to [A], who subsequently put them into communication with [SA]; and an arrangement was made that [SA] should act in the matter, on the footing that he and [A] and the plaintiffs should divide any commission which might become payable by the defendants."* One might also note the willingness of the Court to find a contractual link, and their express reliance on the direct contact

between P and SA. In *Powell & Thomas* also SA was essentially an independent operator; he was not, as Mr Marino was, a director and employee of the party standing in the position of A.

106. That case is, on its face, a very different situation to the present and it does not appear to me that the principle applies across. This is the more so in the light of the fact that Mr Marino as director/employee of FMCP was FMCP's agent and the finding which I made that Mr Marino was not LAP's agent.

107. I do not see anything in *Novoship*, in which the principle was being applied in the context (again) of complicated facts very different to the present case, which affects this approach. I accordingly conclude that FMCP is entitled to an account of Mr Ohmura's profits.

Mr Ohmura should be required to account only for his own profits

108. The next point taken by Mr Ohmura is that FMCP is only entitled to an account of profits in respect of moneys actually received by Mr Ohmura and not in respect of the US$625,000 received by Conquest Cayman. He relies in this regard on the basis upon which I rejected FMCP's claim in knowing receipt at [431]-[439], which he says holds good equally in relation to an account of profits.

109. Alternatively he points to the judgment of the Court of Appeal in *Novoship* at paragraphs [94]-[115], as establishing that when ordering an account of profits against a person who has been found liable in dishonest assistance, the Court must order an account only in respect of those profits which were actually caused by the wrongdoing. He submits that FMCP has made no attempt to do so.

110. FMCP did not grapple with this issue, which goes only to the sum of US$625,000, in detail. Furthermore in the context of dealing with the proprietary claim FMCP accepted that one might well say that the position as regards Mr Ohmura and Conquest Cayman in terms of identification is different to the position as regards Mr Marino and Ironfly/Leopard.

111. I accept Mr Emmett's submission that similar issues are engaged as those with which I have dealt in relation to knowing receipt and the proprietary claim. This might be said to be the argument pitched half way between the two in that the wrong from which the argument arises is more cohesive with those in play in the proprietary claim. Further (i) as with the knowing receipt claim, Mr Ohmura is not, unlike Mr Marino in the context of the proprietary claim, a fiduciary and (ii) the position as regards identification of Conquest Cayman with Mr Ohmura is less strong than the Marino/Ironfly/Leopard one. I have come to the conclusion that the former factors outweigh the latter, and that the same approach should be taken to this as was taken in relation to knowing receipt.

Marino account of profits

112. FMCP seeks against Mr Marino an account of profits in the amount of the bribes. This is probably academic in view of the restitutionary claims and does not appear to be in issue.

Quantum of equitable compensation

113. An issue arises as to the amount of compensation which FMCP can claim at this stage. FMCP contends that it can quantify its claim to equitable compensation in respect of dishonest assistance in the full amount of the commissions paid to Ironfly and Leopard, on the basis that (it is said) FMCP is liable to LAP in the full amount of such payments.

114. Mr Ohmura objects to this on three bases:

    i) It is contrary to the way the claim was pleaded and argued;

    ii) The judgment did not include any finding that FMCP was liable to LAP in the full amount of the payments made to the Defendants; and

    iii) It is wrong in principle for the court to make an order for a money payment in respect of a liability to a third party that is not quantified or ascertained and in circumstances where it is not at all clear that it has caused or will cause actual loss to FMCP.

115. As for the first objection, it is said that FMCP's pleaded case does not identify the basis upon which its claim for equitable compensation is to be quantified. In its skeleton argument for trial, FMCP advanced its case in accordance with its pleading. It did not raise the liability to LAP in any context other than conspiracy. Those paragraphs made clear that FMCP's case was that it had suffered loss by reason of the alleged conspiracy put "*on two alternative bases*". The primary basis was that the fees should have been paid to FMCP. It was then said that the claim in respect of a liability to LAP was put "*in the alternative*". That part of the skeleton argument which addressed dishonest assistance made no reference to FMCP's liability to LAP.

116. Further in the context of argument about choice of law, FMCP expressly disavowed any claim to equitable compensation in respect of its liability to LAP*: "the relationship between FMCP and LAP is relevant to the issue of damage only on FMCP's alternative loss claim in relation to just one cause of action (conspiracy)."*

117. This was reflected in my finding at [499] that the case was *"(primarily at least) about commissions which should have been paid to FMCP and profits which fall to be accounted for"*.

118. It is contended for Mr Ohmura that it is not just for FMCP to change its case in this way after judgment. It should therefore be held to the case that was advanced at trial and not permitted to change that case now.

119. As for the findings on loss Mr Ohmura contends that the Court's conclusions in relation to the extent of the loss suffered by FMCP were made clear at [422]-[430] of the judgment. On FMCP's primary case I found that on the balance of probabilities, FMCP did suffer some loss but that the loss was less than the full amount of the commissions.

120. As regards the liability to LAP it is said that the relevant paragraphs do not include any finding that the quantum of FMCP's liability was the same as the amounts of the payments to the Defendants. Mr Ohmura contends that FMCP would not be liable to LAP in the full amount of those payments. For example, if the amounts of such commissions had been left within LAP's funds, there would have been an increase in the management and performance fees payable by LAP to FMCP, for which LAP would need to give credit in any claim against FMCP.

121. As for the third objection he contends that [430] of the judgment left open the Court's response to the argument made on behalf of Mr Ohmura that it is not correct for the Court to make an order for payment of a quantified sum in circumstances where it remains unclear whether and if so to what extent FMCP's liability to LAP will result in any actual loss for FMCP. Mr Ohmura reiterates his arguments that while an unpaid liability to a third party is, in principle, a recoverable head of damage, the claimant may not make a substantial recovery in respect of such a head of damage without establishing substantial actual loss. In the present case, it is not clear how the liability to LAP has caused or will cause FMCP to incur substantial loss or what that loss will be.

122. On this FMCP submitted that the pleading arguments were over-particular. The issues of loss were debated at trial and considered carefully in the judgment, which concludes that loss was suffered. It follows that FMCP has expressly claimed, and is entitled to, an equitable account in respect of that loss.

123. FMCP submits that it is not necessary for directions to be given for the taking of such an account to ascertain the quantum of the direct loss FMCP has been found on the balance of probabilities to have suffered because [427]-[430] of the judgment amount to a decision that FMCP suffered loss in the amount of its liability to LAP, for which damages are in principle recoverable. It is submitted that this liability was always claimed by FMCP in the amount by which LAP's assets were depleted by the secret commissions; and at trial no-one disputed (seriously or at all) that they had a dollar-for-dollar impact on LAP's assets. The quantum of such a claim is thus clear.

124. FMCP submits that there is no requirement for LAP to give credit to FMCP for a notional increase in the fees that would have been payable to FMCP

on the putatively higher fund balances because on this hypothesis FMCP was caused by Mr Marino to have (dishonestly) breached its duties to LAP, such that FMCP would not be entitled to any fees or commissions: see *Imageview v Jack* [2009] 1 Lloyd's LR 436 (CA) at [16]-[24] and [47]-[51]. But even if that were not so, the Court, having found a loss in principle, must seek to ascertain it the best it can; and it is very straightforward to calculate the fees that FMCP would have earned if LAP's assets had not been depleted by the secret commissions.

125. As to Mr Ohmura's third objection FMCP contends that it is already decided at judgment [430] that the existence of a liability in a specific amount, even if not paid, is the actual loss.

126. On this issue I accept that there is no bar to FMCP seeking this relief on the pleadings. The point was squarely in issue and debated at trial – albeit necessarily briefly given the array of other issues in play. However it seems to me that the better course is to order an account. It may be that FMCP's loss does equate to the full amount of the secret commissions in that this was the depletion caused to LAP's assets. However I do not find this being debated in terms and [427]-[430] of the judgment do not find this. They establish only that I was satisfied that a route to liability for this claim was not lacking [427], that it arose at least from the dates of the IMAs and TPMAA [428] and actually extended back to GAIN. There was no conclusion as to the amount. This is not surprising given that this was (at the time) certainly FMCP's secondary/alternative case on loss.

127. As I have said it may well be that on reflection, all parties are satisfied that an account would be a waste of time and money, in which case a consent order in an appropriate amount can be put forward, given my conclusion at [430]. However given the low place on the batting order of this issue both at trial and even in the consequentials hearing, I conclude the parties should have the opportunity to address issues which may arise as to the quantum of FMCP's loss *vis a vis* LAP.

Other issues as to the terms of the Order

The FMCP shares

128. The order sought by FMCP includes provision for transfer of the FMCP Shares (as defined in one of the schedules to the draft Order) to be transferred to and vested in FMCP absolutely and for Mr Marino to do all things reasonably necessary to achieve that end.

129. The FMCP Shares are shares which it alleged were bought with US$270,000 of the moneys which Mr Marino received and which have apparently generated some millions of dollars of profits since. FMCP submits that it is entitled by way of proprietary claims to recover both the bribe moneys and the fruits of them, even if that were (in theory) to result in a net recovery greater than the amount of the bribes

themselves. In this regard it directs my attention to *Foskett v McKeown* [2001] 1 AC 102, 110F-H per Lord Browne-Wilkinson.

130. The issue here, says FMCP, relates to Mr Marino's bankruptcy. It says that it cannot be right, if the shares were indeed purchased with funds which were bribes, that FMCP should not own the shares themselves in equity, and hence all the dividends which those shares have generated. Otherwise, it says the fruits of the shares go to Mr Marino's creditors and he and the other creditors get a windfall at FMCP's expense.

131. It relies on the Fund Flow Charts which were presented to the Court on Day 1 of the trial. These refer to relevant bank statements in the trial bundles.

132. Mr Couser for Mr Marino resisted this order. His submission was that there was no evidence other than Mr Bessot's statement to support the conclusion that the shares had been purchased with money for which Mr Marino was essentially the trustee and that that statement actually indicated that Mr Marino had told Mr Bessot that the funds were from employment at JP Morgan or Merrill Lynch. He pointed out that I had never been taken to the bank statements.

133. He also submitted that divesting Mr Marino of his shareholding in FMCP would represent a massive and undeserved windfall in circumstances where Mr Marino's shares are now worth far in excess of the US$270,000 that he paid for them (without even considering the fact that FMCP have not paid Mr Marino any dividends since the date he was dismissed by it).

134. Thirdly, he submitted that even if the Court were to order Mr Marino to deliver his shares up to FMCP, it would still be the case that he worked very hard to make FMCP the success it is now, and disgorgement in those circumstances should only be ordered where the party in Mr Marino's position is compensated liberally for their skill and work: see *Boardman v Phipps* [1967] 2 AC 46 at 104E-G, 112D. This means, he contended, that there ought to be a *quid pro quo*, because it cannot be the case that Mr Marino would be expected to work simply for his salary over that period.

135. It was also noted that Mr Marino would in any event be unable to comply with any order requiring delivery up of his shares in FMCP as they are an asset within his bankruptcy and he is not permitted to deal with them.

136. On this point the first question becomes whether the reference in the Fund Flow Charts is sufficient. Although it is perhaps surprising to see the point put forward only via this means, I do consider that the case has been sufficiently made for FMCP to be entitled to rely on this point.

137. Paragraphs J8.6 and 8.7 of the Commercial Court Guide state:

> "J8.6… the fact that documents in the trial bundle are admissible in evidence does not mean that all such documents have been adduced in evidence so as to form part of the evidence in the trial. For this to happen either the parties must agree that the document in question is to be treated as put in evidence by one or other of them and the Judge so informed or they must actively adduce the document in evidence by some other means. This might be done by the advocate inviting the Judge to read the document relied upon before the calling of oral evidence. This should be done in the written opening statement or in the oral opening statement if the document is then available. The appropriate procedure will be a matter requiring the exercise of judgment by the advocates in each case.
>
> J8.7 Ultimately it is the trial advocate's responsibility to indicate clearly to the Court before closing her or his case the written evidence which forms part of that case. Whichever course is adopted, it will not normally be appropriate for reliance to be placed in final speeches on any document, not already specifically adduced in evidence by one of the means described."

138. The Fund Flow Charts were put in and drawn to my attention specifically in opening. Agreement to them was sought, but never ultimately resulted, although it was indicated to me that portions of them were not controversial. However I cannot find that I was ever provided with anything which indicated disagreement to the specific portions of the Fund Flow Charts which are now relied on. In those circumstances it must be right that the documents referred to in the Fund Flow Charts are in evidence, as documents upon which FMCP relied, in the same way as are the documents in the list provided to me by Mr Emmett prior to the close of Mr Ohmura's factual case as documents upon which Mr Ohmura relied.

139. As for the *quid pro quo* I do not consider that it is unreasonable to order full disgorgement, when these are not shares gifted to Mr Marino as part of an incentive programme, but were purchased by him with monies to which he had no right. Further Mr Marino was very well remunerated by FMCP. It is perhaps worthy of note in this context that while contending for this result, no case was put forward for Mr Marino as to what the *quid pro quo* should be, and why.

140. Nor do I see any reason why Mr Marino should not be required to do all such things as are reasonably required to give effect to the vesting order (in default of which, a Master of the QBD shall be empowered to execute any required documents at the request of FMCP). It may be that Mr Marino can do nothing of much assistance, given his financial situation;

but to the extent that he can provide relevant assistance, he should be required to do so.

Post script as to Declaratory relief

141. At the hearing before me FMCP tendered a draft Order claiming a number of declarations. There was no detailed argument about these, however one point was raised which should perhaps be dealt with. This relates to declarations cast in terms of bribes from third parties. While I have found that sums which Mr Marino received were bribes it does not necessarily follow that a third party paying those sums would be aware that they were being received in breach of a fiduciary duty. I am unwilling to make such a declaration where it has not been pleaded (which it appeared to me it had not). It may be that a more acceptable form of declaration could be arrived at which was not contentious. But certainly any declarations *vis a vis* payment made by any company who was not before the court (either personally, or as was the case with Mr Marino's companies, through a party) should be drafted so as to ensure that no negative imputation arises *vis a vis* that entity.