CL-2020-000001

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IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 22 October 2021

BEFORE:

DANIEL TOLEDANO Q.C.

(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Between:

VADIM MARATOVICH SHULMAN

Claimant

- and -

HOGAN LOVELLS INTERNATIONAL LLP

Defendant

Lord Marks Q.C. and Simon Goldstone (instructed by **Pillsbury Winthrop Shaw Pittman LLP**) for the **Claimant**

Helen Davies Q.C., Michael Bolding and Jacob Rabinowitz (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

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Hearing dates: 14 and 15 April 2021 (adjourned by consent); 6 and 7 October 2021

APPROVED JUDGMENT

Daniel Toledano Q.C.:

Introduction

1. In this judgment I will refer to the Claimant as Mr Shulman and to the Defendant as HLI. This judgment concerns HLI's application dated 23 December 2020 seeking summary judgment against Mr Shulman's claim in so far as it seeks relief as a result of (i) the alleged conflict between the interests of Mr Shulman and the interests of PJSC Commercial Bank PrivatBank ("PB"); (ii) the alleged own interest conflict relating to HLI acting simultaneously for Mr Shulman and PB; and/or (iii) any alleged breach of confidentiality relating to the fact that HLI was retained by PB (item (iii) was not pursued in view of Mr Shulman's amendments claiming general damages for breach of confidence). In the alternative, HLI seeks to strike out the corresponding parts of Mr Shulman's Particulars of Claim. In response to the summary judgment application, Mr Shulman issued an application dated 5 February 2021 to amend his Particulars of Claim. This judgment therefore also deals with the amendment application.

2. Before turning to these applications, I have set out below the significant features of the procedural background. For reasons which will become clear, it is necessary for me to set out that background in more detail than might ordinarily be required.

Procedural background

3. Mr Shulman issued his claim form on 3 January 2020 and served Particulars of Claim ("PoC") on 5 March 2020. In the PoC, Mr Shulman complains about HLI's conduct during the course of Mr Shulman's retainer of HLI between October 2016 and February 2018 (complaints are also made about the period prior to the retainer, from June to October 2016). Mr Shulman retained HLI to pursue an action on his behalf against two Ukrainian businessmen, Messrs Bogolyubov and Kolomoisky (referred to by the parties as the "Intended Defendants"). A claim form was issued in the Chancery Division on behalf of Mr Shulman against those businessmen on 12 May 2017.

4. So far as jurisdiction was concerned, the anchor defendant was alleged to be Mr Bogolyubov who was thought to be resident in England at the time. It was known that Mr Kolomoisky was then resident in Switzerland. However, on 3 July 2017 Mr Bogolyubov applied for a declaration that the court had no jurisdiction because he was no longer domiciled in England as at 12 May 2017. In a judgment dated 2 February

2018, Barling J granted Mr Bogolyubov's application: see [2018] EWHC 160 (Ch). He held that there was "*overwhelming evidence*" that by 5 April 2017 (and therefore by 12 May 2017) Mr Bogolyubov had ceased to be resident and domiciled in England and had instead become domiciled in Switzerland. The Court of Appeal refused permission to appeal on 2 July 2018.

5. In his original PoC in the present action against HLI, Mr Shulman alleges that breaches of duty by HLI caused Mr Shulman to be unable to pursue his claims against the Intended Defendants in England and thereby caused him loss and damage to "*reflect the value of the lost chance to pursue and enforce his claim against the Intended Defendants in the English High Court*" (para 99). Mr Shulman asserts that he lost a high percentage chance of recovering sums of up to US$500m and sums in respect of his costs (paras 104 and 105).

6. A central feature of Mr Shulman's complaints is the allegation that HLI acted for him in his claim against the Intended Defendants when it had "*multiple conflicts of interest*" as a result of also acting (i) for a Mr Pinchuk and (ii) for PB. Mr Shulman claims that HLI's breaches of duty constituted deliberate misconduct. Mr Shulman also complains that HLI breached its duty to protect his confidential information.

7. So far as Mr Pinchuk is concerned, HLI acted for him in proceedings against Messrs Bogolyubov and Kolomoisky dating back to 2013. These proceedings were settled early in 2016 just prior to trial. HLI continued to represent Mr Pinchuk after the settlement.

8. So far as PB is concerned, HLI acted and continues to act for PB in its claim against Messrs Bogolyubov and Kolomoisky which was issued in December 2017. In that claim, PB alleges that Messrs Bogolyubov and Kolomoisky perpetrated a large-scale fraud on the bank at a time when they were its controlling shareholders and members of its supervisory board. Mr Shulman's complaint is that HLI should not have acted for PB in circumstances where Mr Shulman and PB were "*competing for the same assets of the Intended Defendants*" (PoC para 88(14)(ii)).

9. It is clear to me from my review of the PoC prior to the proposed amendments that Mr Shulman's original complaints about HLI's relationship with PB were directed solely at the period which began when HLI first commenced acting for PB. There were no

complaints directed at any earlier period. By way of example, Mr Shulman complained (i) about not being told of the PB retainer (PoC at 88(14)(ii)), (ii) that HLI had "acted" for PB (PoC at 88(14)(ii), 89(1), 89(4) and 90(5)) and (iii) that HLI "accepted the [PB] retainer" and "accepted the instructions to act for [PB]" (PoC at 88(14)(iii) and 89(2)). At the time of the original PoC, Mr Shulman did not know the date when HLI first acted for PB. Hence, Mr Shulman pleaded that HLI was put to proof of when it first began acting for PB.

10. The significance of this point is that, if HLI only began acting for PB after Mr Bogolyubov was already domiciled in Switzerland, then the PB retainer and any conflicts that it gave rise to could not have been responsible for the alleged loss of a chance to pursue the Intended Defendants in England. Since no other loss and damage was pleaded, it would follow that the alleged PB conflict and breaches of duty by HLI could have had no causative impact.

11. These circumstances led to HLI issuing its summary judgment application. The application was supported by two witness statements, one from Mr David Reston, the partner of Herbert Smith Freehills LLP acting for HLI, and one from Mr Richard Lewis, one of the HLI partners acting for PB. In his witness statement, Mr Lewis confirmed that HLI had not been retained by PB in respect of its claims against Messrs Bogolyubov and Kolomoisky until 7 August 2017. Mr Lewis did not at that time exhibit a copy of the retainer letter but a heavily redacted version of it was subsequently exhibited by Mr Christopher Hardman, another HLI partner, who provided a witness statement dated 20 July 2021 to which I will refer further below. The PB retainer letter is indeed dated 7 August 2017.

12. In light of the date of the PB retainer, HLI contended that the alleged conflicts of interest relating to PB (even assuming that they occurred, which HLI denies) could not have materialised until 7 August 2017, by which time Mr Shulman had already lost the opportunity to pursue the Intended Defendants in the English High Court. Accordingly, HLI sought summary judgment or strike out so far as the PB allegations were concerned.

13. On 5 February 2021 Mr Shulman applied to amend his PoC (version 1). The amendments included, in particular:

(1) 42A: A plea that HLI was required strictly to prove the terms of its retainer by PB and the date/s on which: (a) HLI first approached PB (or PB approached HLI), (b)/(c) HLI first discussed with PB the prospect of bringing claims against the Intended Defendants and applying for freezing orders, (d) PB informed HLI that it would instruct HLI to apply for freezing orders and (e) PB formally retained HLI.

(2) 88(14)(iv): a similar fact evidence allegation to the effect that the alleged PB conflict was supportive of the prior alleged Pinchuk conflict. This allegation referred to HLI's preparedness to place itself, "*prior to and upon acceptance of instructions from [PB], in a situation where a conflict arose*". The allegation of a conflict prior to acceptance of instructions was a new allegation.

(3) 98(5): an allegation that, had a freezing order been granted even after 5 April 2017, Mr Shulman would or might have reached a settlement with the Intended Defendants prior to the judgment of Barling J and/or prior to the Court of Appeal's refusal of permission to appeal.

(4) 106A: a claim for a declaration that HLI was guilty of deliberate misconduct.

(5) Prayer: a claim for nominal damages if the court found that there had been a breach which had not caused financial loss.

14. Mr Shulman's application to amend was supported by a witness statement of Ms Ruff, a partner of Pillsbury Winthrop Shaw Pittman LLP, dated 3 February 2021. This witness statement was also served in opposition to HLI's summary judgment application. Ms Ruff stated that she believed that Mr Shulman had a real prospect of succeeding in proving that the alleged PB conflict of interest caused Mr Shulman to sustain substantial losses and also that he had a real prospect of demonstrating an entitlement to other forms of relief (i.e., nominal damages and declaratory relief) (as claimed in the proposed amendments).

15. On the damages claim, Ms Ruff said that Mr Shulman did not admit the date of the PB retainer and pointed out that the retainer itself had not been produced (as I have indicated above, a redacted version was subsequently provided). Ms Ruff went on to say that the date of the retainer was not the only relevant date. She said that she would have expected an extended period of time between PB approaching HLI (or HLI

approaching PB) and HLI agreeing to act (as Ms Ruff put it, high profile instructions rarely landed on a partner's desk). She therefore said that the suggestion that the date of the retainer was the only candidate for the conflicts of interest to have arisen was "*artificial and self-serving*". This was said to justify the proposed amendments at 42A which sought clarity concerning a range of dates.

16. Ms Ruff also relied on a translation of a document dated 18 January 2018 (the "Dubinin Request") which was a request by Mr Oleksandr Dubinin, a Member of the Ukrainian Parliament, to the General Prosecutor of Ukraine asking the prosecutor to investigate how certain entities, including HLI, had procured government work (in the case of HLI, this referred to the PB retainer, PB having been nationalised in December 2016). Ms Ruff relied, in particular, on the fact that Mr Dubinin asserted that Messrs Lewis and Hardman, the two key partners of HLI, had visited Ukraine numerous times in 2016 and 2017. In the case of Mr Hardman, Mr Dubinin set out the dates of nine visits made by Mr Hardman to Ukraine during 2017 and prior to 7 August 2017 (the date of the PB retainer). Mr Dubinin stated that there was reason to believe that these visits may have had as their intention obtaining work in breach of state procurement regulations. According to the evidence of Ms Ruff, the Dubinin Request was accepted for investigation by February 2018 although HLI point out that nothing appears to have happened in relation to this investigation since that time.

17. Ms Ruff relied on the Dubinin Request as evidence that HLI's discussions with the Ukrainian Government about the PB retainer might have been taking place for some months prior to 7 August 2017 and, indeed, prior to April 2017 at which time Mr Bogolyubov may still have been within the jurisdiction. Ms Ruff claimed that any such conflict may "*have caused or contributed to the failure by [HLI] not to issue proceedings before Mr Bogolyubov left the jurisdiction*".

18. Ms Ruff also gave evidence in support of the proposed amendments that I have described in paragraph 13 above, especially the allegation that even after 7 August 2021 HLI's alleged conduct in relation to PB had caused loss and damage in the form of depriving Mr Shulman of a freezing order which could have been used to extract a settlement from the Intended Defendants prior to Barling J's judgment.

19. In the event, HLI's summary judgment application did not proceed on the date it was listed to be heard, which was at the CMC on 9 February 2021. The 9 February 2021

hearing was vacated by a Consent Order made by Waksman J dated 8 February 2021. Directions were given for a two-day hearing at which all outstanding applications would be dealt with.

20. By a letter dated 19 February 2021 Herbert Smith Freehills identified those of the proposed amendments to the PoC that were opposed.

21. On 26 February 2021 Mr Shulman served a further draft of his proposed Amended PoC (version 2). This made a number of additional claims, in particular:

    (1) 105A: a claim for restitutionary damages for breach of contract, equating to all or part of the profits HLI made from the PB retainer during the period for which HLI was retained by both Mr Shulman and PB.

    (2) 105B: a claim for an account of profits earned by HLI under the PB retainer during the period for which HLI was retained by both Mr Shulman and PB.

    (3) 106B: a claim for reimbursement of fees paid to HLI on the basis of a total failure of consideration and/or in equity (the equitable analysis was also relied on by Mr Shulman, by way of proposed amendment to his Defence to Counterclaim, as an answer to HLI's claim for unpaid fees and disbursements).

    (4) 106C: a claim for an account of profits that HLI earned from its retainer with Mr Shulman.

    (5) 106D: a claim for equitable damages equating to the profits that HLI earned from its retainer with Mr Shulman.

22. On 1 March 2021 Mr Lewis served a witness statement in reply to Ms Ruff's statement. In this second witness statement, Mr Lewis stated that he had only visited Ukraine once from January 2016 to July 2017, and that trip took place in 2016 and was unrelated to PB. Mr Lewis explained that Mr Hardman had travelled to Ukraine more frequently in 2016 and 2017. Mr Lewis also stated that "*[HLI] did no substantive work in connection with [PB's] potential claim against the Intended Defendants…prior to August 2017.*"

23. Ms Ruff served a second witness statement dated 15 March 2021, in which she raised a series of questions about Mr Lewis' account in his second witness statement.

24. The two-day hearing was eventually listed to take place on 14 and 15 April 2021.

25. On 13 April 2021 Mr Shulman served further proposed amendments to his PoC (version 3). These further amendments concerned paragraphs 42A, 106B and 2C of the prayer.

26. The hearing then commenced before me on 14 April 2021 but, in the early hours of the morning of the second day of the hearing, Mr Shulman's counsel advanced a yet further amendment to paragraph 42A of the PoC, together with a new paragraph 42B (version 4). These were significant proposed amendments in that, for the first time, they went beyond merely putting HLI to proof of the date of the PB retainer and of other dates said to be relevant. The new proposed amendments asserted that it was to be inferred that, prior to 7 August 2017, and, indeed, prior to April 2017, HLI and PB (or other state entities) had commenced discussions and correspondence concerning claims against the Intended Defendants and HLI's retainer, and that these discussions and correspondence resulted in HLI acting in breach of duty to Mr Shulman. As a result of these further proposed amendments, HLI's counsel asked for the hearing to be adjourned and this was not opposed by Mr Shulman's counsel.

27. I therefore made an order dated 23 April 2021 adjourning the hearing to a later date. The directions I made required Mr Shulman to serve "*a final form*" of his proposed amendments and any further evidence. I also required HLI to identify which of those amendments it opposed and to serve any further evidence of its own. The matter was then to be re-listed for a further two-day hearing.

28. On 13 May 2021 Mr Shulman served his final form amendments (version 5). These are the amendments that I address substantively in this judgment. The proposed amendments modified and added to the previous versions.

29. On 20 May 2021 Ms Ruff provided her third witness statement which exhibited a translation of a document dated 6 February 2018 confirming that the prosecutor was investigating Mr Dubinin's concerns.

30. On 8 July 2021 Herbert Smith Freehills identified those amendments to the PoC that it opposed and those parts of the PoC that it was seeking to strike out.

31. On 21 July 2021 HLI served Mr Hardman's witness statement dated 20 July 2021. Mr Hardman was the partner of HLI responsible for securing the PB retainer. In this witness statement, Mr Hardman gives an account of the period prior to 7 August 2017 and of

the circumstances in which HLI came to be retained by PB. I will come back to the detail described by Mr Hardman later on in this judgment.

32. Finally, I should add that on 1 October 2021 Pillsbury Winthrop Shaw Pittman gave notice that Mr Shulman would rely on ongoing civil proceedings against HLI and others in Ukraine. These proceedings concerned complaints that procurement regulations had been breached. Pillsbury Winthrop Shaw Pittman provided translations of three judgments. I was informed by Ms Davies QC for HLI that HLI's stance was that these proceedings had not been properly served on HLI and that HLI had therefore not participated in them.

The issues for determination

33. HLI seeks summary judgment against Mr Shulman's claim for damages and/or equitable compensation for loss said to have been caused by alleged conflicts and resulting breaches of duty arising out of the PB retainer. The alleged conflicts and breaches of duty consist of (i) an alleged conflict between HLI's duties to Mr Shulman and to PB, (ii) an alleged own interest conflict between HLI's duties to Mr Shulman and HLI's own interests in respect of the PB opportunity and retainer and (iii) an alleged breach of duty to act in Mr Shulman's best interests by advancing the interests of PB instead. I will refer to these matters together as the **Alleged PB Breaches**.

34. Had summary judgment been granted in this form as against the original PoC, it would have disposed of the entire PB conflicts aspect of the case. However, HLI accepts (i) that the allegations of conflict and breach of duty from the point of the PB retainer are arguable and (ii) that the remedy of an account of profits earned by HLI under the PB retainer during the period for which HLI was retained by both Mr Shulman and PB is also arguable (this is the claim in paragraph 105B of the amendments). Accordingly, these matters will need to be investigated at trial.

35. The summary judgment application relating to the claim for damages and/or equitable compensation concerning the PB retainer is, as I have said above, premised on the simple proposition that the claim does not work because of a timing point: the PB retainer was dated 7 August 2017 but Mr Bogolyubov had left the jurisdiction by April 2017. Any conflicts arising out of the PB retainer could not therefore have caused Mr

Shulman to lose the chance to pursue the Intended Defendants in England. In response, Mr Shulman has advanced, through his proposed amendments, two answers:

(1) **Argument 1** (Alleged PB Breaches prior to date of retainer): Mr Shulman asserts that the Alleged PB Breaches arose at an earlier point in time than the date of the PB retainer and prior to April 2017. This assertion lies behind Mr Shulman's proposed amendments at paragraphs 42AA, 42A, 42B, 58A, 76(3), 87(6), 88(13A), 88(14B), 89(1A), 89(4) and 91(2)(A) of the PoC.

(2) **Argument 2** (freezing order and therefore settlement after date of retainer): Mr Shulman asserts that, even if these conflicts only arose from 7 August 2017, they still caused loss and damage to him on the basis that, absent the conflicts, HLI would have secured a freezing order on his behalf against the Intended Defendants (rather than advising him not to seek one) and this would or might have enabled him to extract a settlement from the Intended Defendants prior to 2 February 2018 when Barling J ruled on jurisdiction. This assertion lies behind Mr Shulman's proposed amendments at paragraphs 77, 98(1A), 98(A), 100 and 100A of the PoC.

36. HLI resists the amendments that underpin each of Argument 1 and Argument 2. In relation to Argument 1, HLI says in a nutshell that Mr Shulman does not have the necessary evidential basis to assert that the Alleged PB Breaches arose any earlier than 7 August 2017. In relation to Argument 2, HLI says that it is fanciful to suppose that Mr Shulman could have secured a settlement with the Intended Defendants at a time when they had a pending jurisdiction challenge and would have had no reason to settle prior to judgment on that challenge. I will therefore address these matters below.

37. There are also a number of other proposed amendments that are objected to by HLI which I will also address. These are as follows:

(1) Mr Shulman's interest in obtaining a freezing order (PoC para 46(5)).

(2) Reliance on the Alleged PB Breaches as similar fact evidence (PoC paras 88(14)(iv) and 90(6)).

(3) A point in relation to the alleged Pinchuk conflict (PoC para 89(3B)).

(4) The allegation that HLI's alleged breach of various provisions of the Code amounted to deliberate misconduct (PoC paras 90(A), 90(7), 91A and 106A).

(5) The claim for reimbursement of fees paid by Mr Shulman to HLI (PoC para 106B(b)).

(6) The claim for nominal damages (para 1A Prayer).

38. Other objections to proposed amendments originally taken by HLI ultimately fell away or had been addressed by Lord Marks Q.C. on behalf of Mr Shulman and I do not need to deal with them (this applies, in particular, to para 88(15) of the proposed amendments which Lord Marks accepted during the hearing would need to be modified (i) so that it asserted that the confidential information was material to PB, (ii) so as to delete the reference to Mr Pinchuk and (iii) so as to delete items (b) and (c)).

39. In addition, there was a dispute between the parties as to whether the court should on this occasion determine the true construction of the limitation of liability clause in the HLI terms of engagement relied on by HLI. The limitation of liability clause provides as follows: "*To the extent permitted by law, our liability…to you in respect of this matter, whether in contract or tort (including negligence) or on any other basis, is limited to £5 million. Any exclusion or limitation of liability does not apply if we commit fraud or deliberate misconduct.*" The disputed point of construction is whether the fraud or deliberate misconduct must be such as to cause the loss in question (HLI's construction) or whether any fraud or deliberate misconduct in connection with the retainer may be relied upon (Mr Shulman's construction).

40. This point was not included in the summary judgment application itself. It was, however, included in the Herbert Smith Freehills letter of 8 July 2021 which identified the parts of the proposed amendments which were in issue and also identified the parts of the PoC that HLI sought to strike out (the letter in fact referred to the wrong paragraph of the PoC so far as the limitation provision was concerned, albeit that the text referred to the point of construction).

41. Ms Davies asked the court to rule on the point of construction whereas Lord Marks contended that the court should not do so and that he had not fully developed his construction arguments in the circumstances. Lord Marks said that Mr Shulman's submissions had focused on the limitation clause and the construction arguments in the

context of whether there was another compelling reason for trial within the meaning of CPR Pt 24.2(b) but not for the purpose of the court reaching a final view as to the points of construction that arose.

42. Having considered the submissions made, I have decided not to deal with the construction argument on the limitation provision but rather to leave it for trial. It seems to me that there was some confusion between the parties as to whether this point was live or not at this hearing and it would not be fair to Mr Shulman to resolve it finally in these circumstances. I am also conscious of the fact that at trial, the judge will need to consider other aspects of the engagement letter and that it would be better if all aspects in dispute were dealt with together in light of all of the admissible evidence at trial.

Relevant legal principles

43. In order to obtain summary judgment, the burden is on HLI as applicant to demonstrate that the claim for damages and/or equitable compensation for loss said to have been caused by the Alleged PB Breaches has no real prospect of success. I have had regard to the correct approach to this question as summarised by Lewison J in the well-known passage from **Easyair Limited v Opal Telecom Limited** [2009] EWHC 339 (Ch) at para 15. In particular, that the claim must have a realistic as opposed to a fanciful prospect of success and that, for it to be realistic, it must carry some degree of conviction.

44. The same test is also applied by the court in relation to applications to amend a statement of case, in that the court will refuse permission to amend to raise a case which does not have a real prospect of success: see, e.g. **Kawasaki Kisen Kaisha Ltd v James Kemball Limited** [2021] EWCA Civ 33, Popplewell LJ at para 17. Since it is Mr Shulman who wishes to amend his PoC, he bears the burden of establishing that the proposed amendments meet this test.

45. The court can take into account not only the evidence actually placed before it on the application, but also the evidence that can reasonably be expected to be available at trial. This principle is itself subject to the caveat that it is not enough simply to argue that the case should go to trial because something may turn up (such arguments being likened to the approach of Wilkins Micawber from Charles Dickens' novel David

Copperfield: see, e.g. Cockerill J in **King v Stiefel** [2021] EWHC 1045 (Comm) at para 22).

46. One issue that arises in the present case is the evidential burden that rests on the party seeking to establish, for example, that its proposed amendments have a real prospect of success. In **Elite Property Holdings Ltd v Barclays Bank plc** [2019] EWCA Civ 204 Asplin LJ stated (at 41): "*A claim does not have [a real prospect of success] where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences…*"

47. This was endorsed in the **Kawasaki** case I have referred to above as follows (at para 18(3)): "*The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41.*"

48. In **Kawasaki** itself, the Court of Appeal set aside an order granting permission to serve a claim on the second defendant out of the jurisdiction on the basis that the claim (whether as pleaded or in the form of proposed amendments) did not have a real prospect of success. In reaching this conclusion, the Court of Appeal relied on uncontradicted evidence served on behalf of the second defendant which it considered there was no reason to doubt.

49. Mr Shulman placed some reliance on the case of **Shah v HSBC Private Bank (UK) Ltd** [2010] 3 AER 477. In that case, the claimants had a strong prima facie case that the defendant bank had not executed their instructions. The Court of Appeal concluded that it was wrong in principle for the claims to be dismissed summarily based on a witness statement from the bank's solicitor which indicated that the bank's defence rested on its suspicions about money laundering. The Court of Appeal considered that such a defence needed to be proved in the ordinary way at trial, there being a danger of injustice in deciding cases without appropriate disclosure and cross-examination. I do not consider that I can derive much assistance from this authority as regards the matters

that I have to decide in the present case. In **Shah**, the claimants had a strong prima facie case that their instructions had not been followed and the question was whether the defendant could defeat this summarily by reliance on a witness statement identifying its suspicions. A key issue in the present case is whether Mr Shulman has a sufficient evidential basis for the proposed amendments. HLI is not relying on Mr Hardman's witness statement to counter a strong prima facie case but rather to respond to one aspect of the proposed amendments.

50. There is one further factor concerning the evidential basis for the claims made by Mr Shulman which is that they are advanced as claims of deliberate misconduct. This is an allegation of a very serious nature. Whilst it is not a claim in fraud or deceit as such, the need to have a solid evidential foundation for the allegations is undoubtedly reinforced in a case where deliberate misconduct is alleged against professionals. In the case of fraud and deceit, Snowden J recently stated that the authorities established that parties should not plead a case without a "*solid foundation*" in the evidence, as opposed to a case based on "*speculation and inference*": **Federal Deposit Insurance Corp v Barclays Bank Plc** [2020] 5 CMLR 23, at para 39.

51. Although HLI's application also sought a strike out under CPR 3.4(2)(a) in respect of the disputed parts of the claim, Ms Davies focused her submissions on summary judgment which seems to me to be the more appropriate power in the circumstances.

Date of retainer

52. The starting point as regards both the applications is the date of the PB retainer. This was not formally admitted by Mr Shulman, but it was not seriously disputed by him either (indeed, his skeleton argument at para 20.13 stated: "*It seems that HL's retainer with [PB]…was dated 7 August 2017*"). Not only is the date of 7 August 2017 confirmed in Mr Lewis' first witness statement, the letter of engagement itself dated 7 August 2017 was exhibited by Mr Hardman as I have said above. I do not consider there to be any evidence before the court that casts any doubt on this date and I therefore accept it as the date of the retainer.

Argument 1 (Alleged PB Breaches prior to date of retainer)

53. Lord Marks contended that a number of matters demonstrated that Mr Shulman had a real prospect of establishing one or more of the Alleged PB Breaches prior to the date

of the retainer. Lord Marks says that HLI were taking steps in the first few months of 2017 to secure the PB retainer in the course of which HLI might have come under a duty towards PB or put itself in a position of an own interest conflict or breached its duty to Mr Shulman to act in his best interests. Lord Marks relied in particular on the content of the Dubinin Request, on Mr Hardman's statement and on the various civil and criminal actions in Ukraine.

54. The Dubinin Request indicates that Mr Hardman went to Ukraine nine times prior to 7 August 2017 and asks the prosecutor to investigate the purpose of these trips, especially whether they involved attempts to secure the PB retainer in breach of state procurement regulations. Taken on its own, the Dubinin Request is not evidence in support of Mr Shulman's case because it does not go far enough. It raises questions that Mr Dubinin considers fit for investigation. There is no evidence before the court that anything has been turned up by the investigation in the more than three and a half years since the request.

55. So far as Mr Hardman's witness statement is concerned, this contains an account of his visits to Ukraine in the first half of 2017. Significantly, in the critical period prior to May 2017 (this is the critical period because Mr Bogolyubov had left the jurisdiction by early April) Mr Hardman could only recall one conversation in which the possibility of HLI acting for PB was raised. This was a discussion in January 2017 with a partner at a Ukrainian law firm who wanted to discuss a joint pitch to PB in respect of possible claims against the Intended Defendants. Mr Hardman says that he was not given any information on PB or its possible claims and that he did not have any discussions at this time with PB or any state entities about the joint pitch idea/any possible PB retainer. He says that nothing at all came of this discussion.

56. All of the other matters in Mr Hardman's witness statement relate to the period after May 2017 culminating in the 7 August 2017 retainer. Of particular note was a meeting on 5 July 2017 at the offices of the Ukrainian Ministry of Finance in Kiev attended by Mr Hardman and representatives of PB. According to Mr Hardman, representatives of two large law firms other than HLI delivered presentations at this meeting, in addition to Mr Hardman himself.

57. Overall, Mr Hardman confirms Mr Lewis' evidence that HLI did no substantive work in connection with PB's potential claims against the Intended Defendants prior to 7

August 2017. Mr Hardman also says that (i) he did not receive any confidential information from PB or state entities in relation to potential claims against the Intended Defendants or (ii) give anything approximating to advice to PB or any state entity in relation to such claims, in each case at any point prior to 5 July 2017.

58. The difficulty for Mr Shulman is that Mr Hardman's January 2017 discussion was not even with a representative of PB or a state entity but rather with a partner at another law firm. There is no other evidence before the court of anything material happening prior to early April 2017. I entirely accept that the authorities establish that the court is not required to take everything stated in a witness statement on a summary judgment or amendment application at face value and is entitled instead to subject it to a degree of scrutiny in light of other material before the court (see, e.g., **ED&F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472, Potter LJ at para 10). However, in the present case there is nothing before the court to cast doubt on what Mr Hardman says about the events prior to early April 2017. The Dubinin Request does not do so because it raises questions but does not provide answers and Ms Ruff's evidence about her expectation of a long lead time for major instructions to materialise is too generic and high level to assist in establishing that something more must have taken place prior to early April.

59. I keep in mind that the Alleged PB Breaches consist of three somewhat different arguments, namely, a conflict between duties owed to two clients or potential clients, an own interest conflict and a breach of duty to act in Mr Shulman's best interests. HLI cannot, in my judgment, have owed a duty to PB prior to being retained, or perhaps from the moment that it commenced advising PB if it did so at a time prior to the formal retainer. Whilst, on the material before the court, this might have extended the date of a duty arising to 5 July 2017, there is no credible basis for saying that HLI could have owed a duty to PB prior to early April 2017. It seems to me that a similar analysis must also apply to the other Alleged PB Breaches. In my view, Mr Shulman has not raised a credible basis for saying that, at any time prior to early April 2017 and by reason of HLI's activities relating to PB (such as they were), HLI placed itself in a position where its own interests conflicted with those of Mr Shulman or acted in such a way as to breach its duty to act in Mr Shulman's best interests. There is simply no material which establishes a sufficiently arguable case that such allegations are or might be correct.

60. So far as the alleged own interest conflict is concerned, Ms Davies also submitted that mere courting of a potential client alone is not in itself sufficient to amount to an own interest conflict. She relied in this regard on the judgment of Vos J in **Dennard v PwC** [2010] EWHC 812 (Ch). In that case, the claimants, who were existing clients of PwC, alleged that PwC had an own interest conflict when valuing a portfolio in that it was in the claimants' interests for PwC to value it at a high price but in PwC's interests to value it at a low price in order to obtain future refinancing work from a prospective client (Barclays).

61. Vos J concluded (at para 214) that this allegation was based on a *non sequitur*. He considered that a professional firm like PwC would be likely to attract business by "*impressing [a] prospective client with their professionalism and competence, not by showing that they are willing to act against the interests of their own client.*" Vos J considered that the pleaded allegations "*inappropriately assumes corruption on the part of PwC and also possibly Barclays.*" However, Vos J did not consider that this disposed of the conflict allegation because the essential question remained whether PwC could be said to have had a "*perverse incentive*" (at 218). He went on to hold that there was no evidential basis for this allegation. By way of explanation of what he meant by "*perverse incentive*" Vos J said this (at 218):

> "*…if the facts give rise only to the indication that the professionals will do a particularly good job for their client in order to impress them and obtain future work, no question of conflict will arise. A corrupt and contra-intuitive motive will not be inferred without a factual premise for that inference. But if there are some facts that give rise to the inference that the professionals actually have a perverse incentive to achieve a result that may be at odds with the interests of their client, a conflict may be held to exist.*"

62. Ms Davies submitted that not only had no corrupt and contra-intuitive motive been pleaded by Mr Shulman against HLI in relation to the alleged PB own interest conflict, there were also no facts that gave rise to the inference that HLI had a perverse incentive to achieve a result that was at odds with the interests of Mr Shulman.

63. In my judgment, there is force in Ms Davies' submission as regards the period prior to the PB retainer which is the period with which I am concerned. There is nothing pleaded and no evidence before the court that would indicate that doing a bad job for Mr Shulman would be likely to secure a retainer from PB, which appears to be what

the own interest conflict allegation amounts to, and indeed what the allegation of breach of duty to act in Mr Shulman's best interests in this period also appears to involve.

64. Lord Marks urged the court to take into account that more material would likely be available by the time of trial which would shed light on the early 2017 period. He referred in particular to the criminal investigation in Ukraine and also to the Ukrainian civil proceedings that I have referred to above. It is difficult for me to judge what, if any, material will come out of these proceedings by the time of trial and I do not think I should place much weight on this point. In any event, it does not seem to me that this point goes anywhere in circumstances where there is no evidence before the court to support the allegations made. In such circumstances, the submission collapses into one that something more may turn up, which is not good enough.

65. Taking into account all of the matters I have referred to above in the round, I have concluded that Argument 1 advanced by Mr Shulman, namely that the Alleged PB Breaches arose prior to early April 2017 (or at any time prior to 5 July 2017) does not have a real prospect of success. It follows that I do not give permission to amend in relation to any of the proposed amendments to the PoC premised on this argument (and I propose to strike out the words in parenthesis in para 88(1) of the PoC which state "…and [PB] if that professional relationship or retainer had already begun").

Argument 2 (freezing order and therefore settlement after date of retainer)

66. HLI contends that it is fanciful to suppose that a freezing order obtained on behalf of Mr Shulman after 7 August 2017 might have led to a valuable settlement with the Intended Defendants. The matters relied on by HLI are:

    (1) HLI denies that Mr Shulman would have obtained a freezing order;

    (2) Even if he had done so, the Intended Defendants would have known that any freezing order would have been discharged at the point that Mr Bogolyubov's jurisdiction challenge was determined, assuming that he had succeeded on that application;

    (3) The Intended Defendants would have known of the strength of the factual matters relating to the change in Mr Bogolyubov's residence and domicile (e.g., that by 5 April 2017 he was no longer living at his former Belgrave Square

house and was instead living in Geneva) such that they would have been confident of success on the jurisdiction challenge;

(4) There was no evidence before the court of any settlement discussions in fact taking place between August 2017 and February 2018;

(5) The Intended Defendants had not settled with other parties (Tatneft and PB) even though such parties had obtained freezing orders; and

(6) The suggestion that a freezing order would have made all the difference was pure speculation.

67. Mr Shulman contends that his argument has a real as opposed to a fanciful prospect of success. He points to a number of factors in support:

(1) Two other parties (Tatneft and PB) had obtained a freezing order against the Intended Defendants which, so it is said, suggests that Mr Shulman could also have done so;

(2) Mr Pinchuk had secured a settlement with the Intended Defendants thereby demonstrating that they were not averse to settlement;

(3) Even if the Intended Defendants were confident of success on the jurisdiction challenge, they would not have known for certain how that would be resolved until judgment on that application, leaving a window of opportunity for settlement prior to judgment;

(4) HLI was advising Mr Shulman in the period prior to the jurisdiction challenge that the challenge would not succeed;

(5) According to Ms Ruff's evidence, Mr Shulman knew the Intended Defendants well and had a good understanding of how they might have responded to a freezing order; and

(6) The Intended Defendants may have been concerned about the disclosure of assets that they would have been required to make as part of any freezing order obtained against them by Mr Shulman. Lord Marks pointed in particular to the fact that, at a hearing concerning the PB freezing order before Nugee J on 19 January 2018, counsel appearing for Mr Kolomoisky had asked the Judge to

exclude any HLI solicitors who were working on the Pinchuk or Shulman matters from the confidentiality club relating to the PB freezing order. Lord Marks said that this application would not have been made had the Intended Defendants not been concerned about the possible dissemination of their confidential asset disclosure to Messrs Pinchuk and/or Shulman.

68. As regards the prospects of the jurisdiction challenge, Mr Shulman has pleaded in the PoC (para 62) that on 8 and 9 August 2017 Mr Sciannaca, a partner of HLI with conduct of Mr Shulman's case, gave positive advice to Mr Shulman's representatives in respect of the likely outcome of the jurisdiction challenge. This is admitted in the Defence (at para 50) with certain qualifications.

69. It is also relevant to note that from November 2016 the amount of the Tatneft freezing order had been reduced from US$380m (the original order of Teare J dated March 2016) to US$200m (revised order of Picken J) and the PB freezing order was not obtained until December 2017 in the amount of US$2.6b. Since Mr Shulman values his claim at US$500m (albeit this is disputed by HLI), had he obtained a freezing order after 7 August 2017 but before December 2017, it might have been expected to freeze an additional amount of approximately US$300m of the assets of the Intended Defendants. This could be said to have given it added "bite" in that period, albeit that HLI say that little weight can be placed on this in circumstances where PB subsequently obtained a freezing order of a much greater amount but the claim has not settled and is instead proceeding to trial.

70. Although both parties prayed in aid what had taken place in other claims against the Intended Defendants brought by Mr Pinchuk, Tatneft and PB, at this summary judgment stage it is difficult for the court to assess the significance of these points since the progress of each of these other claims no doubt turned on its own peculiar facts and circumstances.

71. It is obvious that, in the end, whether a settlement could have been achieved will depend on the attitude of Mr Shulman and of the Intended Defendants especially as regards the all important question of the quantum of any settlement.

72. So far as the impact of freezing orders, this will of course turn on the facts of the particular case. In general terms, the authors of Gee on Injunctions (7th Ed, 2020, at 3-001) state:

> "*It is no purpose of the court granting Mareva relief to put pressure on the defendant to grant security for the claim, or to facilitate the claimant in obtaining a favourable settlement, or to create commercial pressure, but it may be that a result of the injunction will be that the defendant choose to provide security so as to get the injunction discharged, or even to settle the case.*"

73. The question for the court is whether Mr Shulman has a "real prospect" of showing that a freezing order would have resulted in a "real or substantial chance" (which is the test for a claim based on loss of a chance) of procuring a settlement with the Intended Defendants.

74. As the various matters I have outlined above demonstrate, there are factors pointing in different directions. Since the argument is concerned with a hypothetical (what would have happened had a freezing order been obtained) it is inevitable that some element of speculation is involved. Whilst there is no doubt that the window of opportunity for settlement was short and that the attitude of the Intended Defendants would likely have been impacted by the existence of the outstanding jurisdiction challenge, I do not consider on the material before the court at this stage that Mr Shulman's argument is fanciful. It seems to me that it has a real prospect of success and that it should be allowed to go to trial and be assessed in light of all the evidence then available. I therefore give permission to amend the PoC to include the proposed amendments which are premised on this argument.

75. The proposed amendments at PoC paras 88(11)(b), 89(6) and 100 will have to be modified before being finalised because as presently formulated they go beyond the date of Barling J's judgment and extend to the "*determination of the Claimant's application for permission to appeal*" against Barling J's judgment. This extension does not work on the facts because HLI's retainer by Mr Shulman came to an end on 8 February 2018, six days after Barling J's judgment. Lord Marks conceded during the course of the hearing that he was not relying on the additional six days and that therefore the correct cut-off point for the argument was the date of Barling J's judgment.

Other compelling reason

76. Mr Shulman contended that there were other compelling reasons to allow the damages and equitable compensation claims in respect of the Alleged PB Breaches to go to trial. In view of my conclusion on Argument 2, this point does not arise. Had I determined Argument 2 in favour of HLI, I would have granted summary judgment. I do not consider that any of the matters relied on by Mr Shulman would have provided a compelling reason to allow the disputed matters to go to trial if there was no real prospect of success on the arguments raised. All of Mr Shulman's submissions on this aspect of the argument seemed to proceed on the footing that, absent allowing the claims for damages and equitable compensation in respect of the Alleged PB Breaches to go to trial, the Alleged PB Breaches would not be considered at trial at all (such that he could not rely on them as deliberate misconduct for the purposes of disapplying the limitation of liability clause or for the purpose of showing a pattern of conduct or to give effect to the public interest in the ventilation of such serious claims against solicitors). However, the premise of these submissions was misconceived in that the court will already have to consider the Alleged PB Breaches at trial in the context of the claim for an account of profits.

Conclusion on summary judgment application

77. In light of my conclusions above, HLI's application for summary judgment against Mr Shulman's claim in so far as it seeks damages and/or equitable compensation as a result of the Alleged PB Breaches is dismissed. As is clear from the matters that I have already addressed above, the summary judgment application would have succeeded were it not for Argument 2 and the proposed amendments concerning the chance of settlement prior to the date of Barling J's judgment.

Other proposed Amendments

<u>Mr Shulman's interest in obtaining a freezing order (PoC para 46(5))</u>

78. Mr Shulman wishes to amend the PoC (at para 46(5)) to allege that it was in his interests to obtain a WFO (worldwide freezing order) before PB did.

79. HLI objects to this proposed amendment on the basis that it can have made no difference to Mr Shulman whether he obtained a freezing order before or after PB. It seems to me that there is force in this point. A freezing order does not provide security

for a claim, it ensures only that the relevant assets are not dissipated pending trial. I do not consider that it makes sense to consider there to have been a race to secure a freezing order before another party obtained a freezing order. That said, I do not intend to suggest that timing was irrelevant. The time at which a freezing order would or might have been obtained would, for example, be relevant to Argument 2 that I have given permission for above. Nevertheless, I accept HLI's objection to the way that the proposed amendment to para 46(5) is formulated and I do not give permission for it.

Reliance on the Alleged PB Breaches as similar fact evidence (PoC paras 88(14)(iv) and 90(6))

80. Mr Shulman wishes to amend to plead that the Alleged PB Breaches are "*potentially probative*" of the alleged Pinchuk conflict. It appears to me that these proposed amendments were designed to create a reason as to why the Alleged PB Breaches ought to be considered at trial even if they gave rise to no arguable relief in their own right. This purpose is no longer required because it is accepted that the amendment relating to an account of profits is arguable and, in any event, I have also given permission above to allow Mr Shulman to introduce Argument 2. It follows that a "similar fact" argument is not needed. I do not therefore propose to give permission to Mr Shulman to make this amendment. I do not intend thereby to prevent Mr Shulman from arguing at trial that there was a pattern of conduct on the part of HLI involving the various allegations pleaded as regards Mr Pinchuk and PB. However, there is no need to resort to a "similar fact" argument to introduce additional material for that purpose.

A point in relation to the alleged Pinchuk conflict (PoC para 89(3B))

81. In this proposed amendment, Mr Shulman seeks to contend that HLI failed to obtain or even seek Mr Shulman's informed consent to the alleged Pinchuk conflict. HLI does not object to this aspect of PoC para 89(3B). However, the proposed amendment goes on to state that HLI "*…acted for the Claimant in circumstances where [HLI] had failed to obtain Mr Pinchuk's agreement to disclose to the Claimant the nature of his retainer with [HLI] and the existence of the conflict of interest that existed as a result.*" HLI objects to this part.

82. Lord Marks submitted that if, as alleged, HLI did not ask Mr Shulman for his consent, it fell to be inferred that HLI had not asked Mr Pinchuk for his consent either. Lord Marks suggested that this was relevant to outcome 3.6(b) of the Code which provides,

in so far as material, that where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, the firm should only act if "*all the clients have given informed consent in writing to [the firm] acting.*"

83. Ms Davies submitted that, assuming there to be have been a client conflict (which HLI denies), the relevant matter in a claim by Mr Shulman against HLI was whether Mr Shulman had provided his informed consent. She contended that it was irrelevant whether or not Mr Pinchuk had been asked about it and whether he had consented.

84. In my judgment, Ms Davies' submission is correct. I do not consider that Mr Shulman's claim would be advanced by an inquiry into whether or not HLI had obtained Mr Pinchuk's agreement to disclose to Mr Shulman the nature of his retainer with HLI and the existence of the alleged conflict of interest. What matters so far as Mr Shulman's claim is concerned is whether HLI sought and obtained Mr Shulman's informed consent. Accordingly, I do not give permission for this aspect of the proposed amendments.

<u>The allegation that HLI's alleged breach of various provisions of the Code amounted to deliberate misconduct (PoC paras 90(A), 90(7), 91A and 106A)</u>

85. HLI objects to the proposed amendments in so far as they allege that breaches of the Code constituted deliberate misconduct. HLI contends that the pleading is missing an important averment, namely, that the relevant individuals at HLI knew that their conduct constituted a breach of the Code in the relevant respects. HLI complains that, as currently formulated, the pleading only goes so far as to plead that (i) the relevant individuals must be taken to know the content of the Code and (ii) the conduct itself was done deliberately.

86. HLI relies, in particular, on the judgment of Henshaw J in **Toucan Energy Holdings Limited and another v Wirsol Energy Limited and others** [2021] EWHC 895 (Comm), where (at paras 289-291) the learned judge referred to, and followed, the key authorities on the meaning of "deliberate default". These authorities concluded, in essence, that the conduct needed to be intentional i.e., conduct which the party knew at the time the party committed the relevant act to be a breach or default.

87. An important plank of Mr Shulman's response to this point was to point to the way that allegations of deliberate misconduct had already been dealt with in the statements of case prior to the proposed amendments.

88. Prior to the amendments:

(1) PoC para 89(5) had pleaded as follows: "*Given HL's knowledge of the rules in relation to client and own interest conflicts (as apparent from the terms of their own retainer), the decisions to act where there were clear client conflicts and a clear own interest conflict were deliberate*".

(2) PoC para 90 had set out the various matters relied on in support of the deliberate misconduct allegation.

(3) HLI had served an RFI dated 26 June 2020 in which, in Request 9, it asked a series of questions about PoC para 90, although not about PoC para 89(5). HLI asked Mr Shulman to identify the individuals who were alleged to have deliberately breached duties, the basis on which it was alleged that such individuals had intended deliberately to breach those duties and the basis on which the state of mind of each individual was attributable to HLI.

(4) In his Response to RFI dated 30 July 2020, Mr Shulman asserted that his case was already properly and adequately pleaded, but that further: (a) Mr Shulman was not in a position to know which individuals took each decision in question, (b) on the information then available, the decisions were taken by one or both of Mr Hardman and Mr Sciannaca, (c) Mr Shulman's case was that there was no credible explanation for HLI's alleged failures other than deliberate misconduct and (d) all of the individuals were partners or employees of HLI acting in their capacity as partner or in the course of their employment.

(5) There were no follow up questions by HLI at the time.

89. It seems to me in these circumstances that it would make little sense to disallow the amendments relating to deliberate misconduct and the Code when similar pleas are already made and requests about individuals with the relevant knowledge have already been made and answered. If I were to make permission for the amendments conditional on Mr Shulman providing further particulars of its case to HLI, I fear that Mr Shulman

would be likely to give the same answers as he has already given in response to Request 9.

90. I will therefore give permission for the amendments to be made. However, I am concerned that the information so far given by Mr Shulman is not as detailed as it ought to be. I will therefore direct that Mr Shulman should give further responses to Request 9, including as regards the new paragraph 90(A) concerning the Code, at an appropriate point following disclosure in this action. This will enable HLI to know more clearly what case it has to meet as regards deliberate misconduct.

The claim for reimbursement of fees paid by Mr Shulman to HLI (PoC para 106B(b))

91. In this proposed amendment, Mr Shulman claims reimbursement of fees paid to HLI and asserts that his entitlement to such reimbursement arises (a) from an alleged total failure of consideration and also (b) in equity. In relation to equity, Mr Shulman proposes to plead that HLI's entitlement to fees was forfeited as a result of HLI's wrongful acceptance of Mr Shulman's instructions in circumstances where "*it was (owing to conflicts with its own interests, and/or those of Mr Pinchuk, and/or those of [PB]) unable to comply with its fiduciary duties to him.*" HLI objects to the PB aspect of this proposed amendment.

92. The proposed amendment concerns an allegation of wrongful acceptance of Mr Shulman's instructions, which Mr Shulman says took place in October 2016. Since the PB retainer was dated 7 August 2017, the alleged PB conflicts cannot have had an impact on events that are alleged to have already occurred some months earlier in October 2016. It seems to me therefore that the PB aspect of this proposed amendment does not have a real prospect of success and I do not therefore give permission for it.

The claim for nominal damages (para 1A Prayer)

93. HLI objects to the inclusion of this claim on the basis that it serves no purpose because HLI would not elect to claim nominal damages when other remedies including the remedy of an account of profits are relied on by them. I do not consider that this fact alone renders the amendment improper. It may be an unlikely outcome but it is not an outcome that I consider I should rule out at this stage. I will therefore give permission to amend to include this claim.

Conclusion

94. For the reasons set out in detail above, I dismiss HLI's application for summary judgment on the limited basis I have described above concerning Argument 2. I will give permission to amend on the points that I have accepted above, but otherwise dismiss the application to amend. A new formulation of the PoC will be required so as to give effect to the various matters addressed in this judgment. The parties should also agree a direction to be included in the court's Order requiring further particularisation of Mr Shulman's case on deliberate misconduct, including in respect of the breaches of the Code, following the provision of disclosure.