Neutral Citation Number: [2013] EWHC 1993 (Ch)

Case No: 2013 Folio 686

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 11/07/2013

Before :

MR JUSTICE MORGAN

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Between :

(1) PAVEL SUKHORUCHKIN **(2) HURLEY INVESTMENT HOLDINGS LIMITED** **(3) PAVEL NOVOSELOV** **(4) VICKGRAM HOLDINGS LIMITED**	**Claimants**
- and –	
(1) MARC GIEBELS VAN BEKESTEIN **(2) SANJIT TALUKDAR** **(3) AMETISTA PATRIMONIAL (MAURITIUS) LIMITED** **(4) PNT CAPITAL ADVISORS** **(5) BLUE PEARL ADVISORS LIMITED** **(6) TELNIC LIMITED** **(7) AMETISTA PATRIMONIAL SA**	**Defendants**

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Mr Robert Miles QC, Ms Louise Hutton and **Mr James Sheehan** (instructed by **Herbert Smith Freehills LLP**) for the **Claimants**
Mr Jeffrey Gruder QC, Mr Daniel Lightman, Mr Paul Adams and **Mr Thomas Elias** (instructed by **Mishcon de Reya LLP**) for the **First to Fifth and Seventh Defendants**

Hearing dates: 3rd, 4th, 5th and 8th July 2013

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Judgment

Mr Justice Morgan:

Introduction

1. This is an application by the Claimants for an order continuing, until judgment or further order, an injunction first granted by Mr Justice Christopher Clarke on 15th May 2013.

2. The order of 15th May 2013 was made on an ex parte application by four Claimants against five Defendants. The first Claimant was Mr Pavel Sukhoruchkin, who was referred to by both sides as Pavel S. The Second Claimant was a company beneficially owned by Pavel S. The Third Claimant was Mr Pavel Novoselov who was referred to by both sides as Pavel N. The Fourth Claimant was a company beneficially owned by Pavel N.

3. The First Defendant was Mr Marc Giebels van Bekestein who was referred to by both sides as Marc. The Second Defendant was Mr Sanjit Talukdar who was referred to by both sides as Sanjit. The Third Defendant was a company beneficially owned by Marc and the Fourth Defendant was a company beneficially owned by Sanjit. The Fifth Defendant was Blue Pearl Advisors Ltd ("Blue Pearl"), which was beneficially owned by the Third and Fourth Defendants. I will refer to the four personal parties by their first names as the parties themselves have done. There is a Sixth Defendant to the Claim, Telnic Limited ("Telnic"), but this Defendant is not a Respondent to the application which is before me. The Claimants have also applied to add a Seventh Defendant, Ametista Patrimonial SA who is also to be a Respondent to the application for proprietary and freezing injunctions. There was no opposition to joining Ametista Patrimonial SA as a further Defendant and I will make an order to that effect. In this judgment I will refer to the First to Fifth and Seventh Defendants as "the Defendants" and this phrase will not include Telnic which is not a Respondent to the application which I am considering.

4. The order of 15th May 2013 took the form of a proprietary injunction and a worldwide freezing injunction. The proprietary injunction restrained dealings with what were referred to as Trust Assets. This phrase was defined so as to refer, essentially, to sums received by Blue Pearl from two agreements which Blue Pearl had entered into, one in relation to a fund called the Hadar Fund and the other in relation to a fund called the Rio Capital Fund, and any monies derived from such sums. The definition of Trust Assets used in the order of 15th May 2013 did not extend to a further sum which has been the subject of this dispute, namely, a sum received by Blue Pearl from Telnic, in which the Hadar Fund invested. The freezing injunction was a worldwide injunction restraining dealings with assets up to a value of £13 million. The freezing injunction also included an asset disclosure order and extensive disclosure has been provided by the Defendants pursuant to this order.

5. The order I am asked to make is essentially to continue the order made on 15th May 2013 until judgment or further order in the meantime. The draft of the order which has been placed before me has some changes from the earlier order. I am asked to extend the definition of Trust Assets which are to be the subject of the proprietary injunction so that the definition now includes any sum received directly or indirectly by Blue Pearl from Telnic. Further, I am asked to increase the value of the assets frozen from £13 million to £14.5 million.

The requirements for a freezing injunction

6. There is no real dispute as to the matters in respect of which the court must be satisfied before it will grant a freezing injunction. The Claimants must show that they have a good arguable case. They must have a good arguable case in relation to the legal propositions on which they rely and as to the facts which they allege will entitle them to judgment at the trial. They must show that there are relevant assets to be made the subject of the order. They must show that there are substantial grounds for concluding that there is a real risk of the Defendants' assets being disposed of, so that a judgment in favour of the Claimants would go unsatisfied. It must be just and convenient for such an order to be made.

The requirements for a proprietary injunction

7. The established view is that the requirements for a proprietary injunction are not identical to those for a freezing injunction. The principles to be applied are the normal American Cyanamid principles. These are that the Claimants must show that there is a serious issue to be tried, that damages would not be an adequate remedy for the Claimants and that the balance of convenience or balance of justice favours the grant of an injunction. This formulation of the relevant principles refers to a claimant showing a serious issue to be tried rather than showing a good arguable case. It is generally understood that a requirement to show a good arguable case is more onerous than showing only a serious issue to be tried. Nonetheless, it has been said in relation to the American Cyanamid principles that where the scales are evenly balanced in relation to the balance of convenience, one can take into account the relative strengths of the parties' cases. For a statement to that effect in a relevant context, see Polly Peck International plc v Nadir (No 2) [1992] 4 All ER 769 at 784 g-h per Scott LJ.

8. The above statement of the principles, in relation to a claim for a proprietary injunction, does not expressly include a requirement that the Claimants must show that there are substantial grounds for concluding that there is a real risk of the relevant assets being disposed of, so that a judgment in favour of the claimants would go unsatisfied. In this context, the court is considering something which the claimant may establish at the trial is its asset or an asset in which it has an interest and not just the defendant's asset. Nonetheless, the reality of any threat to interfere with the property in which the claimant says that it has a proprietary interest must be relevant to the court's decision whether to intervene by granting an injunction.

9. Mr Gruder QC on behalf of the Defendants has questioned whether the above approach in relation to a claim to a proprietary injunction is correct. Alternatively, he submitted that the approach ought to be changed. He was minded to accept the established approach in a case where a claimant asserted that it had a pre-existing interest in property before the alleged wrongdoing by the defendant took place and where he was seeking an injunction to prevent an interference with that interest. However, he questioned whether this approach was appropriate where the proprietary interest only came into existence by reason of the defendant's alleged wrongdoing. An example of that happening would be where the alleged wrongdoing involved a fiduciary acquiring an asset from a third party in circumstances which involved a breach of his fiduciary duty. The person to whom the duty was owed could advance a claim to an account of profits, which is a personal claim, or he could claim that he had a proprietary interest in the asset so acquired. Decisions such as Bhullar v Bhullar [2003] 2 BCLC 241 and FHR European Ventures LLP v Mankarious [2013] 3 All ER 29 show the width of the circumstances in which a breach of a fiduciary duty can give

rise to a proprietary claim against the fiduciary. Mr Gruder therefore submitted that when the claimant brought proceedings for relief arising out of the alleged wrongdoing, the court should adopt the same approach, whether the claim was for a freezing injunction or a proprietary injunction, as to the strength of the case needed before the court would intervene. In either case, it was submitted, the court should require a claimant to show that it had a good arguable case.

10. I do not feel able to accept Mr Gruder's submission on this point. It seems to me to be contrary to authority which is binding on me. The rationale which so far has been found acceptable is that an asset freezing injunction involves imposing a restraint on the defendant dealing with his own assets (in which the claimant does not have any interest) whereas a proprietary injunction imposes a restraint on the defendant dealing with the claimant's assets or with assets in which the claimant has an existing proprietary interest. Further, it has hitherto been considered to be irrelevant whether the claimant had a proprietary interest in the asset before the wrongdoing took place or only as a result of the wrongdoing; in either case, the claimant's case will be that it has a proprietary interest in the asset before the claim is made and before the injunction is sought.

Disputes of fact

11. Mr Gruder made detailed submissions on the facts alleged by the Claimants. He submitted that the Claimants' case on the facts is improbable in a number of different ways. Further, he pointed out that the Claimants contend that they did not know a number of matters and that this lack of knowledge is critical to the way in which the Claimants put their case in a number of respects. He pointed out that the Claimants are only able to contend that they did not know certain material facts because they say in their evidence that they did not read documents which were sent to them (for example, they did not read all the emails in a chain of emails or they did not open an attachment to an email) or that if they did read something they did not understand what they read or they did not realise its significance.

12. The above formulations of the principles refer to matters such as a good arguable case or a serious issue to be tried. In the present case, the parties fundamentally disagree about the relevant facts. This is not a case where the facts reliably appear from the contemporaneous documents, as those documents do not appear to show a comprehensive picture of all of the relevant events. It seems to be accepted by both sides that when the matter comes to trial it will be inevitable that the court will reject some of the evidence of some of the witnesses on the ground that it is not only incorrect, but that it is knowingly untrue. The differences between the witnesses cannot, it seems, be put down to honest differences in recollection. Somebody is telling lies. It may even be that both sides are not being straightforward and honest in their statements to the court. Each of the four individual litigants in this case, if they all give evidence at the trial, could expect to be constructively cross-examined for a period to be measured in days not hours. Of course, the court on this present application cannot know what a trial judge will make of the oral evidence which is to be given at the trial.

13. I can accept that it is entirely possible that the Claimants will not be believed at the trial of this action. Further, on the material I have seen, I regard some of the Claimants' factual assertions as being less than probable. However, I think it would

be dangerous for me to attempt to go further than that and to conclude for the purposes of the present application that I should reject parts of the Claimants' evidence. In particular, it will be a matter for the trial judge, and not for me, to determine whether the Claimants knew a particular fact when their evidence on this application is that they did not know that fact.

14. Accordingly, I will not attempt to form any view as to which side has the more plausible case. In these circumstances, I consider that in this particular case it would be more dangerous than helpful to try to form provisional views in relation to the disputed facts and then to allow those provisional views of the facts to influence to any significant extent the outcome of this application.

15. The above approach is in accordance with authority. The attitude to be adopted by a court as to the matters in dispute on an application such as the present was well described by Parker LJ in Derby & Co v Weldon [1990] Ch 48 at 57 where he said:

> "That the hearing of an application for interlocutory relief should take 26 days is, in my view, entirely unwarranted, as is also the fact that the documents for an appeal from the judge should comprise several thousand pages of affidavits and exhibits.
>
> There are in essence only three issues; (i) has the plaintiff a good arguable case; (ii) has the plaintiff satisfied the court that there are assets within and, where an extraterritorial order is sought, without the jurisdiction; and (iii) is there a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory. Such matters should be decided on comparatively brief evidence. In American Cyanamid Co v Ethicon Ltd [1975] AC 396, 407-408, Lord Diplock, dealing in that case with an application for an interlocutory injunction, said:
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> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing': Wakefield v. Duke of Buccleugh (1865) 12 L.T. 628 , 629."
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> In my view the difference between an application for an ordinary injunction and a *Mareva* lies only in this, that in the former case the plaintiff need only establish that there is a serious question to be tried, whereas in the latter the test is said to be whether the plaintiff shows a good arguable case. This

> difference, which is incapable of definition, does not however affect the applicability of Lord Diplock's observations to *Mareva* cases."

16. At page 58, Parker LJ added:

> "[Counsel] for the defendants has however sought to go yet again into large parts of the evidence in order to persuade us that the judge's finding that there is a high risk of dissipation of assets both here and overseas should be reversed in respect of overseas assets. In essence he sought to persuade us to attempt to resolve conflicts of fact going to the merits of the claim but which were also important on the question of risk of dissipation. This is no part of this court's function any more than it is the function of the court at first instance. He also sought to show that the plaintiffs in the present case have no proprietary claim. His submissions in this behalf depended on the resolution both of disputed, detailed and complex fact and of difficult questions of law requiring mature consideration. The function of this court is again misappreciated."

17. As Parker LJ stated in the passage just quoted, the court's attitude to disputes of fact on an application for an interlocutory injunction may also extend to certain disputed matters of law. One of the difficult questions of law in that case concerned the possible application of the decision of the Court of Appeal in Lister & Co v Stubbs (1890) 45 Ch D 1. As to the arguments on that point, Nicholls LJ added at 63:

> "In my view these rival contentions raise a seriously arguable point, of some general importance, which it is undesirable for the court to pursue and decide on this interlocutory application. The underlying facts are far from clear. There is a dispute on the evidence on the way in which the impugned foreign exchange transactions were conducted. This is not a satisfactory basis for the court to decide a point of law which, as presented to us, may turn on fine questions of fact, presently obscure, concerning what sums of money actually passed from whom and to whom and when and in respect of what."

The legal structure in this case

18. It is agreed that the structure of companies, shareholdings and trusts which was created in this case was the result of discussions which took place between the four individual litigants. It could be said that the structure created in this case was complex. It would be more accurate to say that the structure was elongated. Each of the individual components in the structure was not itself complex. It was just that there were rather a lot of components.

19. Without attempting a comprehensive description of the structure which was created, it might be helpful to describe how Pavel S and Pavel N were going to benefit personally pursuant to the operation of such a structure. The position of each of them is broadly similar and it will suffice to refer to Pavel S alone. I was given more than

one description of the detailed components in the structure. For example, the description in the skeleton argument for the Defendants is not identical to that in a structure chart which was provided to me. I consider that the following description of the structure will suffice to deal with the issues arising on this application.

20. The assets under management were to be vested in Hadar Fund Ltd.

21. Hadar Fund Limited would pay a fee to Hadar Investment Advisers Ltd ("HIA"). HIA would hold shares, referred to as management shares, in Hadar Fund Ltd but no dividend would be payable to HIA as the holder of those shares.

22. When HIA received fees from Hadar Fund Ltd, HIA would be in a position to declare a dividend. Accordingly, it would declare such a dividend which would be paid to its sole shareholder, Haysom Ltd.

23. Haysom Ltd would then declare a dividend which would be paid to its sole shareholder, Veltro Ltd.

24. Veltro Ltd held its shares in Haysom Ltd on trust for four companies in equal shares. Each one of these companies was connected with one of the four individual litigants. Veltro Ltd as trustee would then pay 25% of the dividend to each one of these companies as a beneficiary. In relation to Pavel S, the relevant company was Hurley Investment Holdings Ltd.

25. Hurley Investment Holdings Ltd would then declare a dividend in favour of its sole shareholder, which was again Veltro Ltd.

26. Veltro Ltd would hold all of this dividend on trust for Pavel S and would remit the dividend to Pavel S pursuant to that trust.

The alleged wrongdoing

27. The Claimants' allegations as to wrongdoing by the Defendants can be conveniently divided into three parts. The following description of the allegations is taken from the detailed Particulars of Claim which has been served by the Claimants. At this point in the judgment, I will focus on the factual allegations rather than the legal analysis advanced by the Claimants.

28. Part I concerns alleged wrongdoing in relation to an agreement made between Hadar Fund Ltd, HIA and Blue Pearl. The Claimants' claim in relation to this alleged wrongdoing is for one half of a receipt by Blue Pearl of about $41.3 million.

29. Part II concerns alleged wrongdoing in relation to an agreement or a series of agreements concerning the Rio Capital Fund. The Claimants' claim in relation to this alleged wrongdoing is for one half of a receipt by Blue Pearl of about $1.9 million.

30. Part III concerns alleged wrongdoing in relation to a payment by a third party, Telnic, to Blue Pearl. The Claimants' claim in relation to this alleged wrongdoing is for one half of a receipt by Blue Pearl of about $4.4 million.

31. In relation to the alleged wrongdoing in Part I, the Particulars of Claim refers to the arrangements between Hadar Fund Ltd and HIA under which HIA was to receive a

fee for acting or purportedly acting as an investment manager for the Fund. On 24th February 2011, Hadar Fund Ltd, HIA and Blue Pearl entered into a written agreement, which was then dated 21st December 2010. Under this written agreement, HIA was to pay to Blue Pearl 2/3 of the fees which it received from Hadar Fund Ltd in relation to a substantial part of the Hadar Fund. It was envisaged when the agreement was entered into that a third party would imminently thereafter invest some $1 billion in the Hadar Fund. This investment was made in around early May 2011. In accordance with the agreement, after May 2011, HIA duly paid to Blue Pearl 2/3 of the fees it received from Hadar Fund Ltd in relation to a substantial part of the Hadar Fund. The amount of money paid to Blue Pearl in this way is said to be $41.3 million.

32. The Claimants say that the agreement dated 21st December 2010 was entered into by HIA in particular as a result of a fraud practised on HIA by Sanjit and Marc. In fact, the pleading concentrates on the position of Sanjit rather than Marc but neither the Claimants nor the Defendants submitted to me that I should draw any distinction between Marc and Sanjit in relation to this, or indeed any other, allegation in this case. The particular fraud alleged to have been practised on HIA was that HIA was told that Blue Pearl was ultimately beneficially owned by Pavel S and Pavel N and Marc and Sanjit and so there was no real difference between the relevant 2/3 of the fees from Hadar Fund Ltd being retained by HIA on the one hand and being paid over by HIA to Blue Pearl on the other.

33. The Defendants deny that there was any fraud of the kind alleged by the Claimants in relation to the agreement entered into and dated 21st December 2010. They say that Mr Graham, the director of HIA and of Hadar Fund Ltd, who executed the agreement on behalf of those companies, knew that Blue Pearl was ultimately beneficially owned by Marc and Sanjit. The Defendants point to documents which they say would have shown Mr Graham that that was the position. The documents which are referred to are dated prior to 24th February 2011 but they continue after that date and include documents in existence before the payments were made by HIA to Blue Pearl, but yet HIA did not question the fact that it was paying 2/3 of the fees, in relation to a substantial part of the Hadar Fund, to a company which was owned by Marc and Sanjit alone and in which Pavel S and Pavel N did not have an interest. The Defendants also offer a detailed explanation as to why the agreement dated 21st December 2010 was entered into in circumstances where Pavel S and Pavel N were fully aware of what was intended to be achieved by that agreement.

34. It is relevant to refer at this point to the effect on Pavel S and Pavel N of 2/3 of the fees from Hadar Fund Ltd being paid by HIA to Blue Pearl. The effect was simply that HIA retained only 1/3 of the fees from Hadar Fund Ltd, in relation to the relevant part of the Hadar Fund. When HIA declared a dividend payable to its shareholders, the amount of the dividend (to the extent that it was derived from the investment into the Hadar Fund to which the agreement with Blue Pearl related) was only 1/3 of what it would have been if it had retained the full amount of the fees paid to it by Hadar Fund Ltd. Ultimately, as the funds passed from company to shareholder and from trustee to beneficiary in the structure which I have earlier described, the amount received by Pavel S and by Pavel N was 1/3 of what it would otherwise have been (to the extent that it was derived from the investment into the Hadar Fund to which the agreement with Blue Pearl related). It is said that the result is that Marc and Sanjit through Blue Pearl received $41.3 million whereas they should only have received

one half of that sum. The other half should have gone to Pavel S and Pavel N. Accordingly, the Claimants between them claim the sum of $20.65 million from the Defendants.

35. Part II of the allegations of wrongdoing is not so well particularised in the Particulars of Claim. In some ways, the allegation is similar to the allegation in relation to the alleged wrongdoing involved in Part I of the allegations. This time the wrongdoing concerned fees payable to HIA in relation to the Rio Capital Fund, rather than the Hadar Fund. In summary, HIA was entitled to fees for acting as an investment manager to the Rio Capital Fund. HIA gave up its right to those fees in favour of Blue Pearl. As before, it is alleged that HIA was persuaded to do this because Marc and Sanjit fraudulently represented to HIA that Blue Pearl was ultimately beneficially owned by Pavel S and Pavel N as well as by Marc and Sanjit.

36. The effect of these arrangements on Pavel S and Pavel N was that the sums received by HIA were reduced by some $1.9 million, all of which went to Blue Pearl. The sums ultimately received by Pavel S and Pavel N were reduced because the sums paid from company to shareholder and from trustee to beneficiary under the structure I have earlier described were reduced. Marc and Sanjit received between them all of the $1.9 million instead of only half of it. Accordingly, the Claimants between them claim the sum of $0.95 million from the Defendants.

37. The allegation of wrongdoing in Part III of the allegations is rather different from those in Parts I and II. The allegation in Part III is that Telnic wanted to find an investor and that it agreed to pay $4.4 million to Marc and/or Sanjit and/or Blue Pearl if they could persuade Hadar Fund Ltd to be that investor. Hadar Fund Ltd advanced $22 million to Telnic in return for shares in Telnic. Telnic paid $4.4 million, as a so called “finder’s fee”, to Blue Pearl. The remaining $17.6 million was then available to Telnic as working capital. The Claimants allege that Marc and Sanjit deceived the Claimants as to where the $22 million was coming from; in particular, it is suggested that Pavel S and Pavel N were led to believe that the $22 million was money being invested by a third party in the Hadar Fund for the purpose of then being invested in Telnic and so that the risk of the investment was the risk of the third party and not the risk of the Hadar Fund. It is also said that Mr Graham of Hadar Fund Ltd was deceived because he was told, wrongly, that Pavel S and Pavel N wanted Hadar Fund Ltd to invest $22 million of its own funds in Telnic. Hadar Fund Ltd was further misled because it was led to believe that it was providing $22 million of working capital to Telnic whereas it was only providing $17.6 million of working capital.

38. The effect on Pavel S and Pavel N of Blue Pearl receiving $4.4 million which Marc and Sanjit and Blue Pearl did not share with Pavel S and Pavel N is different from the effect of the alleged wrongdoing considered in Part I and Part II above. It is not said that if Hadar Fund Ltd had retained this $4.4 million that this would have benefited Pavel S and Pavel N. HIA was a shareholder in Hadar Fund Ltd but those shares did not carry any right to a dividend. Thus, Pavel S and Pavel N did not have a right, directly or indirectly, to any dividend to be paid by Hadar Fund Ltd, the amount of which could have been influenced by the fact that Hadar Fund Ltd had invested less than $22 million in Telnic.

39. Instead, what Pavel S and Pavel N say is that Marc and Sanjit are obliged to share the gain of $4.4 million with them. Even if the $4.4 million were the fruits of a fraud

practised by Marc and Sanjit on Hadar Fund Ltd, Pavel S and Pavel N contend that they are entitled to one half of it as against Marc and Sanjit and that the court should assist Pavel S and Pavel N to advance this claim by granting the injunctions which they seek.

The alleged fiduciary duty owed to Pavel S and Pavel N

40. Having described the basic allegations of fact which are made by Pavel S and Pavel N, I next need to describe the Claimants' contentions as to the alleged obligations on the part of Marc and Sanjit.

41. Stripped to its essentials, the claim put forward by the Claimants is that alongside the rights and obligations which were created by the legal structure which I have earlier described, there were fiduciary obligations owed by Marc and Sanjit to Pavel S and Pavel N. These fiduciary obligations were described by Mr Miles QC on behalf of the Claimants as horizontal fiduciary obligations. This phrase was meant to convey that the fiduciary obligations were not brought into existence as the direct result of the status of each of Pavel S, Pavel N, Marc and Sanjit in the structure. Instead, the fiduciary obligations arose out of the arrangements made between these four individuals before the structure was set up and as a result of the way in which the structure was intended to be operated by Marc and Sanjit. In particular, the structure would be operated in a way which was not wholly in accordance with the legal rights and obligations conferred by the structure.

42. Although the Particulars of Claim pleads in some detail the facts on which the Claimants rely in support of their allegation of a horizontal fiduciary obligation, I consider that the central allegation in this respect is that contained in paragraph 23(5) of the Particulars of Claim which is in these terms:

> " Thereafter, Messrs Talukdar and van Bekestein would in practice operate and manage the Fund on behalf of the Principals in that, whilst professional nominee directors would be appointed in respect of the various companies within the Fund structure, such directors would seek directions and instructions from the Principals in relation to the business and affairs of the Fund structure; and the Principals agreed that Messrs Talukdar and van Bekestein would be responsible for giving (and authorised to give) such directions and instructions on behalf of all the Principals (Messrs Sukhoruchkin and Novoselov had initially wanted Messrs Talukdar and van Bekestein to be appointed as directors, which would have reflected their agreed responsibilities in respect of the operation of the Joint Venture, but they each declined, citing concerns over tax status and potential conflicts of interests) … "

43. This sub-paragraph in the pleading refers to "the Principals" who are defined elsewhere in the pleading to be Pavel S, Pavel N, Marc and Sanjit. The pleading also refers to "the Joint Venture" as an arrangement between these four which involved the setting up and operation of the structure in the way described in paragraph 23(5). The Claimants then allege that Marc and Sanjit owed fiduciary obligations to Pavel S and

Pavel N in relation to Marc and Sanjit's operation of the structure in the way described in paragraph 23(5).

44. Based on the contention that Marc and Sanjit owed these fiduciary obligations, the Claimants then contend:

(1) as regards the alleged wrongdoing in Part I, that Marc and Sanjit are liable to account for one half share of the receipt of $41.3 million and that the Claimants can assert a proprietary interest in relation to that half share;

(2) as regards the alleged wrongdoing in Part II, that Marc and Sanjit are liable to account for one half share of the receipt of $1.9 million and that the Claimants can assert a proprietary interest in relation to that half share;

(3) as regards the alleged wrongdoing in Part III, that Marc and Sanjit are liable to account for one half share of the receipt of $4.4 million and that the Claimants can assert a proprietary interest in relation to that half share; for some reason, the claim to one half of the $4.4 million was to be the subject of the proprietary injunction only and no freezing injunction was sought in relation to this sum.

45. The Claimants have pleaded other causes of action against the Defendants apart from breach of fiduciary duty. The Claimants assert that the actions of Marc and Sanjit amounted to a breach of contract. It is said that the initial arrangements made by Marc and Sanjit amounted to a contract regulating how Marc and Sanjit were to behave. I do not think that the allegation of a contract adds much if anything to this case. If I were persuaded that the Claimants could not show a sufficiently arguable case as to a breach of fiduciary duty, I think it improbable that I would have been persuaded that the Claimants would have fared any better with their allegation of breach of contact. As regards Blue Pearl, it is alleged that it dishonestly assisted Marc and Sanjit's breach of fiduciary duty and/or that it was guilty of knowing receipt of monies paid to it in breach of fiduciary duty. It is further pleaded that all of the Defendants were parties to an unlawful means conspiracy, the unlawful means alleged being the breaches of contract and fiduciary duty. Accordingly, the Claimants' case really depends upon them showing that Marc and Sanjit owed fiduciary duties to Pavel S and Pavel N as alleged.

Do the Claimants have a sufficiently arguable case that Marc and Sanjit owed fiduciary duties to Pavel S and Pavel N?

46. The allegation of fiduciary duty is opposed root and branch by the Defendants. They disagree with the allegations of fact as to the basis of the alleged duty and they contend that, even on the Claimants' own version of the facts, Marc and Sanjit did not owe fiduciary duties to Pavel S and to Pavel N.

47. I will first deal with the contentious matters of fact which are relevant to the allegation as to fiduciary duties. The Claimants will seek to establish at the trial the basic facts which are pleaded in paragraph 23(5) of the Particulars of Claim. I have been shown detailed evidence which appears to support the factual allegation that Marc and Sanjit gave instructions and directions to the directors of HIA and of Hadar Fund Ltd in the way alleged. Further, Marc and Sanjit gave or purported to give those instructions and directions on behalf of themselves and on behalf of Pavel S and Pavel

N. I consider that the Claimants' evidence shows that they have a good arguable case in relation to the factual basis alleged in paragraph 23(5) of the Particulars of Claim.

48. What then of the legal basis for the allegation as to the existence of fiduciary duties? Both sides cited a substantial number of authorities in relation to the legal test as to when the court should be prepared to find the existence of a fiduciary duty. This judgment on an interlocutory application is not an appropriate time to summarise the many authorities nor to attempt a comprehensive statement of the legal principles. Detailed statements of the relevant principles can be found in Murad v Al Saraj [2004] EWHC 1235 (Ch) at paragraphs 325 – 341 and in Ross River Ltd v Waveley Commercial Ltd [2012] EWHC 81 (Ch) at paragraphs 235 – 255. Those cases show that the court adopts a flexible approach which is acutely sensitive to the detailed facts of the individual case. In both these cases, the courts found that a defendant owed fiduciary obligations to a claimant. By way of contrast with these cases, I have also found helpful the recent decision in McKillen v Misland (Cyprus) Investment Ltd [2012] EWHC 521 (Ch) at paragraphs 88 – 105 dealing with, and rejecting as unarguable, a contention that the shareholders in that case owed each other fiduciary duties.

49. In the present case, the essential case which is pleaded is that Hadar Fund Ltd and HIA would not be operated and managed through their constitutional organs but would be operated and managed informally by Pavel S, Pavel N, Marc and Sanjit and, of these four, Marc and Sanjit would effectively act as agents, or something akin to agents, for Pavel S and Pavel N. A relationship of principal and agent is a classic relationship in which fiduciary obligations are owed. I consider that the Claimants have done enough to show that they have a good arguable case on the facts and on the law that Marc and Sanjit owed Pavel S and Pavel N fiduciary duties in exercising their de facto power of management and control of Hadar Fund Ltd and HIA.

Was the arrangement unlawful?

50. The Defendants submit that the arrangement pleaded by the Claimants, as to the management and control of Hadar Fund Ltd and HIA, was unlawful so that the court should not enforce it. The Defendants say that the duty of the directors of Hadar Fund Ltd and HIA was to act in the best interests of the company of which they were directors. The fact that the directors might have been regarded as nominee directors does not alter their duties. Those directors would be acting in breach of duty if they were simply to follow the directions and instructions of Pavel S, Pavel N, Marc and Sanjit, without forming their own independent judgment as to what was in the best interests of the company of which they were directors.

51. There was no dispute as to the general principles which define the duties of a director, including a nominee director. However, the Claimants contend that the arrangement on which they rely did not involve the directors in any breach of their duties. It was submitted that it was open to the directors to agree that they should act on the directions of the persons who were the ultimate beneficial owners of the relevant company. Further, it was open to the ultimate beneficial owners and the directors to agree that these directions could be communicated to the directors by Marc and Sanjit on behalf of all of the ultimate beneficial owners.

52. I can see that the Claimants' argument may well be right in relation to HIA. However, I am less clear that it applies to Hadar Fund Ltd because Pavel S, Pavel N, Marc and Sanjit were not, as I understand it, the ultimate beneficial owners of Hadar Fund Ltd. This possible distinction between HIA and Hadar Fund Ltd was not explored at the hearing. As regards Part I and Part II of the alleged wrongdoing, the relevant company is HIA. As regards Part III of the alleged wrongdoing, the relevant company is Hadar Fund Ltd. However, I consider that it is not necessary to explore this point further in relation to Hadar Fund Ltd as it is reasonably clear, for reasons which I will later explain, that the Claimants have a good arguable case that Marc and Sanjit acted unlawfully in relation to Hadar Fund Ltd.

53. The Claimants also submit that this question should be answered in accordance with Cayman company law and not English law. That would seem to be correct but I do not think that I would thereby be disabled from considering the point. The court may in some cases act on the presumption that the relevant foreign law is the same as English law unless that presumption is contradicted by evidence of foreign law. There are cases involving statute law, in particular relating to company law, where it is not safe to presume that the foreign statutory company law is the same as English statutory company law. An example is provided by Shaker v Al-Bedrawi [2003] Ch 350, to which I was referred in a different context. In the present case, at any rate for the purposes of this interlocutory application, I would have been prepared to proceed on the basis that Cayman company law is the same as English law in relation to the issues arising in relation to the point I am at present considering.

The scope of the arrangement

54. The Defendants put forward an additional point about the scope of the alleged arrangement which the Claimants say has given rise to fiduciary obligations on the part of Marc and Sanjit. This additional point is put forward in relation to Parts II and III of the alleged wrongdoing only.

55. As to Part II of the alleged wrongdoing, concerning the diversion of fees from HIA to Blue Pearl in relation to the Rio Capital Fund, the Defendants say that the fees in relation to the Rio Capital Fund were not within the contemplation of the alleged arrangement, which they say was confined to the Hadar Fund. Whilst this point may need to be further examined at the trial, I do not regard this point on its own as preventing the Claimants showing that they have a good arguable case in relation to Part II of the alleged wrongdoing. I consider that the Claimants have a good arguable case along these lines: (1) the arrangement which imposed fiduciary obligations on Marc and Sanjit concerned the Hadar Fund and the fees payable to HIA as investment manager of that fund; (2) after the arrangement was entered into, the original Hadar Fund was effectively split into the continuing Hadar Fund and the Rio Capital Fund (to which certain assets were transferred by the original Hadar Fund); (3) after the split of the funds, HIA continued to be entitled to fees for managing or advising both the Hadar Fund and the Rio Capital Fund; and (4) the original arrangement applied in the same way to the two funds as it had originally applied to the single fund.

56. The position in relation to Part III of the alleged wrongdoing, concerning the payment by Telnic to Blue Pearl of a fee of $4.4 million, is not so straightforward. The Defendants submit that the arrangement asserted by the Claimants related to fees from managing and advising Hadar Fund Ltd. The Defendants say that payment by Telnic

was not a payment by Hadar Fund Ltd, nor a payment which HIA was entitled to receive. Instead, they contend, it was a payment by a third party, Telnic, for services rendered by Marc and Sanjit and Blue Pearl. I am not persuaded that this way of describing the matter allows the Defendants to escape from the real case advanced by the Claimants. The Claimants say that Marc and Sanjit owed fiduciary obligations to Pavel S and Pavel N in relation to Marc and Sanjit's de facto ability to give instructions to Hadar Fund Ltd. It is said that Marc and Sanjit used that ability to make a profit for themselves and that in equity they should not be allowed to retain the entirety of that profit but must share it with Pavel S and Pavel N. The idea of Pavel S and Pavel N claiming to share in a profit which has been improperly obtained at the expense of Hadar Fund Ltd is a matter I will need to refer to again later in this judgment but at this stage I conclude that the argument as to the scope of the arrangement does not on its own prevent the Claimants having a good arguable claim in relation to Part III of the alleged wrongdoing.

No recovery for reflective loss

57. The Defendants submitted that the Claimants have no seriously arguable case for the recovery of the loss which they allege they suffered because of the principle which precludes the recovery of reflective loss.

58. The no reflective loss principle has been considered in a large number of cases and the parties quite properly cited many of these cases to me. In particular, I was taken to Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 at 222-223, Johnson v Gore Wood & Co [2002] AC 1, Day v Cook [2002] 1 BCLC 1, Ellis v Property Leeds (UK) Ltd [2002] 2 BCLC 175, Barings plc v Coopers & Lybrand (No 1) [2002] 2 BCLC 364, Giles v Rhind [2003] Ch 618, Shaker v Al-Bedrawi [2003] Ch 350, Perry v Day [2005] BCC 375 and Gardner v Parker [2004] 2 BCLC 554. The arguments as to the application of the no reflective loss principle in the end took up a considerable part of the hearing of this application.

59. I can take the principle from the judgment of Neuberger LJ in Gardner v Parker at [33] where he said:

> "I think that the effect of the speeches in Johnson's case can be taken as accurately summarised by Blackburne J at first instance in Giles v Rhind [2001] 2 BCLC 582 at [27], subject to the qualifications expressed in the judgment of Chadwick LJ in the Court of Appeal (see [2003] 1 BCLC 1 at [61] and [62], [2003] Ch 618 at [61] and [62]). As amended by those two qualifications, it seems to me that Blackburne J's formulation was approved by this court (Keene LJ having agreed with Chadwick LJ) in the following terms, so far as relevant:
>
> '(1) a loss claimed by a shareholder which is merely reflective of a loss suffered by the company – ie a loss which would be made good if the company had enforced in full its rights against the defendant wrongdoer – is not recoverable by the shareholder [*save in a case where, by reason of the wrong done to it, the company is unable to pursue its claim against the wrongdoer*];

> (2) where there is no reasonable doubt that that is the case, the court can properly act, in advance of trial, to strike out the offending heads of claim;
>
> (3) the irrecoverable loss (being merely reflective of the company's loss) is not confined to the individual claimant's loss of dividends on his shares or diminution in the value of his shareholding in the company but extends … to "all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds" and also … "to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder" [*save that this does not apply to the loss of future benefits to which the claimant had an expectation but no contractual entitlement*];
>
> (4) the principle is not rooted simply in the avoidance of double recovery in fact; it extends to heads of loss which the company could have claimed but has chosen not to and therefore includes the case where the company has settled for less than it might …;
>
> (5) provided the loss claimed by the shareholder is merely reflective of the company's loss and provided the defendant wrongdoer owed duties both to the company and to the shareholder, it is irrelevant that the duties so owed may be different in content.' (Emphasis added.)
>
> (The italicised text is taken from the judgment of Chadwick LJ ([2003] 1 BCLC 1 at [61] and [62], [2003] Ch 618 at [61] and [62].)"

60. This summary of the principle was also adopted in Webster v Sandersons [2009] 2 BCLC 542 at [37] in the judgment of the Court of Appeal given by Lord Clarke of Stone-cum-Ebony MR.

61. Although the Defendants' skeleton argument put forward the no reflective loss principle as a complete answer to all of the Claimants' claims, it became clear in the course of argument that this submission did not apply to the claim in relation to the $4.4 million paid by Telnic to Blue Pearl, which raises different considerations. Conversely, by the end of the argument, it came to be accepted by the Claimants that the no reflective loss principle was engaged in this case in relation to the two agreements entered into by HIA (i.e Parts I and II of the alleged wrongdoing) subject only to the question as to whether HIA had a cause of action to recover the alleged losses from Marc and/or Sanjit and/or Blue Pearl. It had initially been argued by the Claimants that the no reflective loss principle did not apply where the shareholder was claiming a proprietary remedy in relation to the alleged loss but, after citation of Shaker v Al-Bedrawi [2003] Ch 350 and Gardner v Parker [2004] 2 BCLC 554, this submission was rightly not pursued. Further, it was not suggested that the no reflective loss principle did not apply to a claim by a beneficial owner of shares rather

than the registered shareholder, as to which see Ellis v Property Leeds (UK) Ltd [2002] 2 BCLC 175 and Shaker v Al-Bedrawi.

62. As the above cases show, the no reflective loss principle has been considered by the courts in a number of different procedural contexts. Sometimes the court is asked to strike out a claim on this ground. Sometimes the court is asked to decide a preliminary issue as to this defence. Sometimes the point is decided at the trial of the action. It is clear that the onus of proving the necessary facts is on the defendant who asserts that this principle is an answer to the claim against it. I am asked to consider and apply this principle in a different context, in relation to an application for injunctions, in which I have to decide whether the Claimants have a good arguable claim in relation to the various claims put forward or whether there is a serious issue to be tried in relation to those claims. Thus, I have to consider how the matter might look at the trial of this action where the Defendants set out to establish a defence based on this principle (the onus of establishing the necessary facts being on them).

63. It is clear from the judgment of Lord Bingham in Johnson v Gore Wood & Co [2002] AC 1 at 36 C-D that in connection with an application to strike out a claim, the court closely scrutinises the relevant pleadings. In the present case, there is a detailed Particulars of Claim. That identifies the alleged wrongdoing but it does not, of course, seek to identify any cause of action vested in HIA as a result of the alleged wrongdoing. Nor is there a pleaded Defence which seeks to identify the causes of action which HIA might have in relation to the alleged wrongdoing. Indeed, it is the Defendants' case that there was no relevant wrongdoing so that neither the Claimants nor HIA have any cause of action. Nonetheless, for the purposes of considering the present point, I have to proceed on the basis that the Claimants will establish their case at trial and ask myself: in such a case, would HIA have a cause of action for the alleged loss so that the losses claimed by the Claimants are reflective of HIA's loss? There was discussion in the course of argument as to whether I should confine myself to the precise facts pleaded by the Claimants or whether I should admit the possibility that the Claimants might succeed on some of those facts but fail on others in a way which would leave the Claimants with a viable claim against the Defendants. What if HIA would have a cause of action against some or all of the Defendants if the Claimants proved all of the facts pleaded but HIA would not have a cause of action against the Defendants (but the Claimants would still have a cause of action against the Defendants) if the Claimants proved only some of the facts pleaded? I consider that I should not close my mind to the possibility that the Claimants might only prove some of the facts pleaded but still have a claim against the Defendants. However, I will wish to approach this question in a realistic way remembering that what I have to decide on this application is whether the Claimants have a good arguable claim or whether there is a serious issue to be tried in relation to their claims. I also consider that the Claimants cannot have it both ways. They strongly emphasise the serious nature of their allegations of dishonesty for the purpose of persuading me that there is a serious risk that these allegedly dishonest Defendants will dissipate their assets unless restrained by order of the court; it seems to me it would be inappropriate to accept that submission and at the same time proceed on the basis that the Claimants will not establish the alleged dishonesty but will establish some milder allegation which would allow the Claimants to say they do, but that HIA does not, have a cause of action arising out of that milder allegation. I turn then to consider the Claimants' allegations as they appear from the Particulars of Claim.

64. In relation to Part I of the alleged wrongdoing, it is specifically alleged that Marc and Sanjit deceived Mr Graham of HIA as to the appropriateness of HIA entering into the agreement which diverted 2/3 of HIA's fees from Hadar Fund Ltd to Blue Pearl. I have already drawn attention to the fact that the pleading refers principally to Sanjit but neither the Claimants nor the Defendants suggested that I should distinguish between Marc and Sanjit for any purpose. The facts there alleged clearly give HIA a cause of action against Marc and Sanjit in the tort of deceit. The pleading also alleges that Blue Pearl conspired with Marc and Sanjit. The particular allegation is that Blue Pearl conspired with Marc and Sanjit to commit a breach of their fiduciary duty to Pavel S and Pavel N. However, the basic facts alleged as to the conspiracy would also establish a conspiracy to deceive HIA.

65. It is possible to go further in identifying, from the pleaded facts, causes of action which HIA would have against Marc and/or Sanjit and/or Blue Pearl. There seems to me to be a strong case for saying on the pleaded case and on the Claimants' evidence in support of the pleaded case that Marc and Sanjit owed fiduciary duties to HIA. The Claimants' case strongly supports the conclusion that they were shadow directors of HIA. Not every shadow director owes fiduciary duties to the relevant company. That question was considered in detail by Lewison J in Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch) at [1278] – [1291] and he stated at [1289] that the indirect influence exerted by a paradigm shadow director who did not directly deal with or claim the right to deal directly with the company's assets would not usually be enough to impose fiduciary duties upon him. Conversely, he recognised that on the facts of a particular case the activities of a shadow director might go beyond the mere exertion of indirect influence. In the present case, it is central to the Claimants' case that Marc and Sanjit effectively controlled the decisions made by, and the actions of, HIA. I consider that there is a strong case on the pleadings and on the evidence in support for saying that Marc and Sanjit owed fiduciary duties to HIA. If so, and if the Claimants' allegations of fact are upheld at trial, then Marc and Sanjit broke those duties and Blue Pearl conspired with them to do so. Further, as pleaded, Blue Pearl knowingly received monies paid to them as a result of the breach of fiduciary duties and dishonestly assisted such breach.

66. For some reason, when addressing the question of HIA's possible causes of action, Mr Miles on behalf of the Claimants preferred to focus almost exclusively on a different possible cause of action from those I have mentioned. He suggested that HIA might at one time have had a right to rescind the agreement which diverted 2/3 of the fees to Blue Pearl. If HIA had paid sums to Blue Pearl pursuant to the agreement before rescinding it, then on rescission HIA would be able to claim restitution of those sums from Blue Pearl. Mr Miles then suggested that HIA no longer had such a cause of action because it had affirmed the agreement with Blue Pearl, with knowledge of the misrepresentation. Further, he submitted that the payments to Blue Pearl were not caused by the misrepresentation because Mr Graham of HIA became aware of the earlier misrepresentation before it paid over the relevant sums to Blue Pearl. Although these submissions were developed in relation to a suggested cause of action for rescission and restitution, I can see that the causation argument could in principle be applied to HIA's claim for damages for deceit and conspiracy and equitable compensation for breach of fiduciary duty although not to HIA's claim to proprietary relief.

67. The first thing to note about Mr Miles' submission as to why HIA would have lost its pre-existing cause of action for rescission is that the submission is contrary to the Claimants' pleaded case. Paragraph 66(2) of the Particulars of Claim specifically pleads that Marc and Sanjit were continuing to deceive HIA in "April/May 2011". In addition, I consider that the suggestion that HIA once had a cause of action for rescission but that it might have lost it by affirmation faces very difficult obstacles on the facts. It would involve the court at trial finding that there was a fraud practised on HIA as late as 24th February 2011 when it signed the relevant agreement with Blue Pearl but yet HIA became aware of the misrepresentation in April 2011 and then affirmed the agreement and thereafter honoured that agreement by paying 2/3 of its fees to Blue Pearl but it did not complain or even tell anyone that it had been misled. I consider that to be an extraordinary scenario. Although Mr Miles referred to a document dated 7th April 2011 in support of his contention that HIA knew the true position in April 2011 (contrary to the Claimants' pleaded case), that document is somewhat similar to an earlier document dated 8th December 2010, which Mr Miles has to say did not reveal the true facts to HIA. Accordingly, I think it is completely unrealistic for the Claimants to say that they have an arguable case that they will succeed in their factual allegations against the Defendants and in addition be able to show that HIA lost its cause of action for rescission and restitution because it knew of its right to rescind in around April 2011.

68. Further, I consider that Mr Miles' submission fails on the law as well as on the facts. Mr Miles says that the alleged affirmation by HIA produced the result that HIA did not have a cause of action against Blue Pearl for the purpose of the no reflective loss principles. I disagree. The right analysis in such a case would be that HIA had a cause of action which it then gave up. The authorities to which I was referred discuss whether the existence of a "defence" to the company's claim means that the company has no cause of action for the purpose of the no reflective loss principle. The cases seem to me to distinguish between the relevant company not having a cause of action because an essential ingredient of the cause of action is missing on the one hand and the company's cause of action being subject to a defence such as the defence of settlement, or limitation, or a cross claim which can be asserted as a set off against the company's claim on the other hand: see Day v Cook [2002] 1 BCLC 1 at [38] per Arden LJ and Barings plc v Coopers & Lybrand (No 1) [2002] 2 BCLC 364. In Perry v Day [2005] BCC 375, Rimer J considered that the company in that case did not have a relevant cause of action when the suggested cause of action was a claim to rectification in relation to the ownership of a parcel of land and such relief was not available because of the intervention of a bona fide purchaser for value in the shape of a chargee of that land. I do not regard that decision as in any way inconsistent with a finding that a defence of affirmation based on the conduct of the company in full knowledge of the wrongdoing should be equated with the result which applies where a company has a cause of action and then chooses to give it up or not pursue it.

69. I acknowledge that Mr Miles' point about causation, if it were reasonably available to the Claimants on the facts (which I do not think it was), would need to be separately analysed. If that point were reasonably available to the Claimants on the facts, then they could argue that HIA did not have a claim for damages for loss. However, I do not see that the submission as to no causation of loss would have prevented HIA bringing a proprietary claim against Blue Pearl for the fees diverted from HIA to Blue

Pearl as a result of Marc and Sanjit's breach of fiduciary duty in causing HIA to sign the agreement in favour of Blue Pearl.

70. Mr Miles further contended that the question whether HIA had a cause of action for the relevant loss turned on Cayman company law and the court should not presume that Cayman company law was the same as English company law. He relied on the decision in Shaker v Al-Bedrawi [2003] Ch 350 where the Court of Appeal gave its reasons for not assuming that the law in Pennsylvania as to a company's ability to distribute profits was the same as English law, pursuant to specific English statutory provisions which were enacted in part to give effect to a European Directive. I do not consider that I am doing anything contrary to the approach in Shaker. In my analysis of the causes of action available to HIA, I have applied general principles of the English law of tort and of equity. I have not applied some specific statutory provision dealing with company law which might or might not be replicated in Cayman.

71. I am most concerned on this interlocutory application not to attempt to decide any questions of law which are either too difficult to be decided on an interlocutory application or which depend upon detailed facts which can only be established at a trial. Conversely, it is clear that in an appropriate case a court should be prepared to decide the question of reflective loss at an interlocutory stage. Further, what I undoubtedly do have to decide before I am able to grant the injunctions which are sought is whether the Claimants have a good arguable claim and/or whether there is a serious issue to be tried in relation to their claims.

72. My conclusion is that the Claimants do not have a good arguable claim in relation to the losses they claim in respect of Part I of the alleged wrongdoing. Their claim is clearly barred by the no reflective loss principle. As to whether there is a serious issue to be tried in relation to the claim in respect of Part I of the alleged wrongdoing, it might be said that the arguments which I have considered on this application raised serious issues and although I have dealt with them in this judgment, the Defendants have not applied to strike out the allegations so that there is no reason why they should not be investigated again at a trial. I doubt if that is the right reasoning to adopt but even if it were, I consider that the Claimants' case that there is a serious issue to be tried is no more than borderline and I ought to take the weakness of the Claimants' claim into account when I consider whether to grant a proprietary injunction against the Defendants.

73. I will next consider the reflective loss arguments in relation to Part II of the alleged wrongdoing, relating to the diversion of fees from HIA to Blue Pearl in relation to the Rio Capital Fund. Again the issue is whether, on the Claimants' case, HIA has a cause of action against Marc and/or Sanjit and/or Blue Pearl in relation to the relevant loss.

74. It was not suggested in argument that the reflective loss principle raised any issues in relation to the Rio Capital Fund fees which were different from the issues raised in relation to the Hadar Fund fees. In those circumstances, I reach the same conclusion in relation to Part II of the alleged wrongdoing as I did in relation to Part I of the alleged wrongdoing. The Claimants' claim is clearly barred by the no reflective loss principle.

The Telnic payment

75. I have already described the way in which the Claimants put their case to share in the $4.4 million paid by Telnic to Blue Pearl. However, I consider that I now need to address the position of Hadar Fund Ltd in relation to this payment.

76. The facts as pleaded by the Claimants are that Marc and Sanjit deceived Hadar Fund Ltd into investing $22 million in Telnic. Further, the Claimants say that Marc and Sanjit received a secret commission from Telnic without disclosing that fact to Hadar Fund Ltd and certainly without obtaining the fully informed consent from Hadar Fund Ltd to that payment being received by them.

77. I have already addressed the question whether Marc and Sanjit owed fiduciary duties to HIA. A similar question arises in relation to Hadar Fund Ltd. For essentially the same reasons as I gave earlier, I consider that Hadar Fund Ltd has a good arguable case that Marc and Sanjit owed it fiduciary duties with the result that the acceptance by them of a payment from Telnic in connection with the investment by Hadar Fund Ltd in Telnic was a breach of fiduciary duty and so that Hadar Fund Ltd is entitled to claim a proprietary interest in the sum of $4.4 million received by Blue Pearl on the direction of Marc and Sanjit. As earlier explained, Blue Pearl is ultimately beneficially owned by Marc and Sanjit.

78. Prior to the hearing before me, Hadar Fund Ltd had issued an application to intervene in the present action. Mr Anderson QC and Mr Brian Kennelly attended the hearing on its behalf. At the conclusion of the hearing, Mr Anderson told me that Hadar Fund Ltd intended to apply for a proprietary injunction and a freezing injunction against the Defendants and that the claim which Hadar Fund Ltd would put forward in support of that relief would include, but would not be restricted to, a claim to a proprietary interest in the $4.4 million. Mr Anderson indicated that Hadar Fund Ltd would not make submissions in support of that application at the hearing of the Claimants' application but would await my decision on that application and then would make its own application, if that were still appropriate, in the light of that decision.

79. As I understand it, the Claimants do not seek to assert a proprietary interest in the $4.4 million as trustees for Hadar Fund Ltd. Instead, they assert a proprietary interest for their own benefit in one half of that sum or its traceable proceeds. (From now on in this judgment, for the sake of convenience, when I refer to the sum of $4.4 million, I mean to refer to that sum or its traceable proceeds but I will not on every occasion repeat the reference to its traceable proceeds.) Thus, the court will soon have to consider a claim by Hadar Fund Ltd to a proprietary interest in all of the $4.4 million in addition to the claim by the Claimants as described above. If Hadar Fund Ltd were to succeed in its claim, then the $4.4 million would not belong to the Defendants but would belong to Hadar Fund Ltd. That sum would not be an asset beneficially owned by the Defendants but would be held on a constructive trust for Hadar Fund Ltd. If Hadar Fund Ltd can assert a proprietary claim to all of the $4.4 million, then the Claimants cannot assert that one half of the $4.4 million belongs to them.

80. If for some reason, I declined to grant to Hadar Fund Ltd a proprietary injunction in relation to the $4.4 million, then I would need to deal with the Claimants' claim to a proprietary interest in one half of that sum. Further, if Hadar Fund Ltd at some later point conceded that it had no claim in relation to the $4.4 million, then again it might be necessary to consider the Claimants' claim to a proprietary interest in one half of that sum.

81. The course I intend to follow is as follows:

(1) Whatever else I do about the continuation of the order of 15th May 2013, I will make an order, both as a proprietary injunction and as a freezing injunction, in relation to the sum of $2.2 million until I have heard and determined the application by Hadar Fund Ltd for injunctions in relation to the sum of $4.4 million (and other relief);

(2) When I have determined the application by Hadar Fund Ltd referred to in (1) above, I will decide what to do about the injunctions in favour of the Claimants referred to in (1) above;

(3) My provisional view is that if I grant Hadar Fund Ltd injunctions in relation to the sum of $4.4 million, then I will not continue the Claimants' injunctions in relation to the sum of $2.2 million; I am open to persuasion whether to provide that the injunctions in favour of Hadar Fund Ltd are not to be discharged without Hadar Fund Ltd giving to the Claimants 14 days notice of such discharge to allow the Claimants to consider their position in that event;

(4) If I decline to grant injunctions to Hadar Fund Ltd in relation to the sum of $4.4 million, then I still wish to be satisfied as to whether I should continue until judgment or further order the injunctions in favour of the Claimants in relation to the sum of $2.2 million, notwithstanding that the Claimants' claim as it is at present framed is a claim to share in the proceeds of a fraud on Hadar Fund Ltd.

Taking stock

82. The remainder of this judgment is directed to the injunctions claimed in relation to Parts I and II of the alleged wrongdoing, as I have now separately dealt with the position in relation to Part III of the alleged wrongdoing (the Telnic payment).

83. I have already held in relation to the claims in relation to Parts I and II of the alleged wrongdoing, that the Claimants do not have a good arguable case and, at the highest, have a borderline only case that there is a serious issue to be tried. I could at this point come to my conclusion as to whether to continue the injunctions granted on 15th May 2013 in relation to those claims. However, for the sake of completeness, I will first deal with a number of other issues which have been argued.

The existence of assets

84. There is no issue as to the existence of relevant assets which could be the subject of proprietary and freezing injunctions.

Risk of dissipation – freezing injunction

85. There is no dispute about the test to be applied: the court must be satisfied that there are substantial grounds for concluding that there is a real risk of the Defendants' assets being disposed of, so that a judgment in favour of the claimants would go unsatisfied.

86. The Claimants say that they have demonstrated the real risk which must be shown. They rely upon the seriousness of the dishonesty and wrongdoing which they allege. They rely on the fact, as alleged, that the Defendants concealed what they were doing at the time of their dishonest actions. They rely on the discussion by Flaux J in Madoff Securities v Raven [2012] 2 All ER (Comm) 634 at [160] – [167] approved by the Court of Appeal in VTB Capital v Nutritek International [2012] EWCA Civ 808 at [172] – [178] as to the relevance of the specific allegations of dishonesty when a court considers whether a claimant has shown a sufficient risk of dissipation for the purposes of persuading the court to grant a freezing injunction. I accept that those are factors which point towards there being a relevant risk of dissipation.

87. The Claimants also submitted that the Defendants' conduct from late 2012 onwards amounted to threats and intimidation and this should be weighed in the balance against the Defendants on the present issue. I am less persuaded by this submission. The Defendants have consulted solicitors and counsel and put forward very detailed and well formulated allegations of wrongdoing by the Claimants. The substance of those allegations has not been investigated in the kind of detail which would be necessary to form any provisional view about the strength of those allegations. However, I do not regard the way in which the Defendants have put forward those claims as showing any propensity on their part to behave badly in defending the present claims against them.

88. The Claimants also say, correctly, that the nature of many of the Defendants' assets is such that they could be transferred away without any difficulty and it may not be straightforward to discover where they had gone; even if the whereabouts of the transferred assets could be discovered the process of tracking them down could be slow and expensive.

89. The Claimants also say that the Defendants have an exceptionally lavish and expensive life style and have parted with large sums by way of unexplained gifts. The Defendants counter this allegation by saying that they are entitled to live in the way which they please. Their expensive life style is their choice and even if that life style will result in relevant assets being consumed, the court ought not to impose restraints on their choice of life style. I am not persuaded that the Defendants are right about this but as this is not the only point on risk of dissipation, I will not take further time in considering this point.

90. Finally, the Claimants point to the elaborate and sophisticated structure created in this case and the use of off shore companies, nominee shareholdings and trusts. In many cases, such facts might alert the court to a defendant's propensity to dissipate or hide assets. In the present case, it is a less powerful point on behalf of the Claimants who themselves participated throughout in the arrangements in question.

91. Before coming to a final view on the suggested risk of dissipation of assets, I will consider the submissions made to me on the topic of delay as that topic is relevant to the issue of risk of dissipation. Further, it is more convenient to consider the Defendants' submissions on risk of dissipation in the context of a discussion as to the effect of delay.

Delay – freezing injunction

92. In the context of an application for a freezing injunction, delay may be relevant in a number of ways. The fact that a claimant has delayed in applying for a freezing injunction may suggest that the claimant was not in truth concerned about the risk that a defendant would dissipate his assets. Alternatively, the delay may have allowed the defendant to dissipate his assets so that the court is persuaded that there is no longer any point in granting a freezing injunction. As against that, it might be said that unless the court knows that all the assets have been dissipated, the fact of previous dissipation suggests a propensity to dissipate and shows a substantial risk of dissipation in in relation to any remaining assets. Further there might be an attempt to hide more effectively assets which have already been transferred away. In addition, it might be appropriate to make an asset disclosure order.

93. It may also be relevant to consider whether the passage of time was excusable or even necessary. In particular, it should be remembered that a claimant may need time to investigate the alleged wrongdoing, further time to take advice and prepare for litigation and time to ensure that he is able to comply with his obligation of full and frank disclosure when making an ex parte application for a freezing injunction.

94. The Defendants submit that there is no substantial risk of dissipation in the present case and that I am assisted to reach that conclusion by the Claimants' delay before seeking a freezing injunction on 15th May 2013. It is submitted that the Claimants knew of the matters of which they now complain by December 2012 (always assuming that the Claimants did not know of the matters at the time they occurred). The Claimants' then solicitors wrote to the Defendants on 13th December 2012 making the allegations which they now put forward in this action. Since December 2012, it has not been suggested that the Defendants have made any attempt to dissipate their assets although they have continued to enjoy their former life style. The Defendants had always been open about their assets as is shown by the fact that the Claimants' evidence was largely accurate as to what they were. In addition, the Defendants have substantial property assets, including property assets within the jurisdiction.

95. The Defendants also submit that the Claimants' claim and their application for injunctions were tactical. On 19th April 2013, the Defendants' solicitors wrote a very detailed letter to the Claimants and others cataloguing the Claimants' (and others') serious wrongdoing in relation to Hadar Fund Ltd and HIA. The Claimants' action was said to be an attempt to deflect the claim against them and, so far, a successful attempt. The Defendants have been fully engaged in giving disclosure of their assets and in preparing their evidence to resist the Claimants' application to continue the injunctions against them. It is said that this has meant that the Defendants have not yet been able to bring forward their own claims against the Claimants and others.

96. I can now express my conclusion in relation to the risk of dissipation and in relation to delay. If I had been persuaded that the Claimants had a good arguable claim against the Defendants in relation to Parts I and II of the alleged wrongdoing, then I would have been prepared to grant a freezing injunction against the Defendants. I would have given particular weight to the fact that the allegations which I would have held to be well arguable involved serious allegations of dishonesty and concealment. So far as I can tell, the Defendants did not between December 2012, when the claims were intimated to them, and 15th May 2013, when their assets were frozen, attempt to dissipate or hide their assets. However, in this respect the past is not a certain guide to

the future. In the past, the Defendants may have thought that they had nothing to fear from the Claimants' claims. In the future, the Defendants may take a different view. As the case gets nearer to a trial and there is disclosure and exchange of witness statements, the Defendants may come to appreciate that they have more to fear from a case which ex hypothesi the court has held to be a good arguable claim. If there is no freezing injunction in place, then the Defendants would remain free to dissipate their assets with a view to defeating a later attempt by the Claimants to enforce any judgment which they might later obtain.

Non-disclosure

97. The Defendants argued that the Claimants were in breach of their duty to make full and frank disclosure to the court at the ex parte hearing and, as a result, the court should now decline to continue the injunctions even if the court were otherwise persuaded that all the requirements for such injunctions had been established.

98. In the end, the Defendants relied on two matters which it is said were not properly disclosed to the court at the ex parte hearing. The first related to certain matters of fact contended for by the Defendants. However, the alleged facts are contentious and I do not consider that the Claimants ought to have known or predicted what the Defendants would say on those matters so as to come under an obligation to inform the court of what the Defendants' case would be in those respects.

99. The second matter relied upon by the Defendants as non-disclosure was that the Claimants did not explain to the judge that there was a legal difficulty in the Claimants' way in that its claims arguably might be barred by the no reflective loss principle. It is a little difficult to deal with this point now that I have examined the no reflective loss principle at this hearing and I have held that the Claimants' claims in relation to Parts I and II of the alleged wrongdoing are barred on this ground. That means that I am not going to continue the injunctions for that substantive reason irrespective of the non-disclosure. Conversely, if non disclosure became relevant to the outcome of this application it would necessarily follow that I had held that the arguments as to the no reflective loss principle did not disentitle the Claimants to the injunctions which they seek. Nonetheless, in case it is material, I will express my conclusion which is that if I had held after examining the arguments as to no reflective loss that it would otherwise be appropriate to continue the injunctions, I would not have declined to do so because the no reflective loss principle was not raised at the ex parte hearing.

Conclusions

100. Having dealt with the many points raised on this application, I can now express my overall conclusions. I have already dealt with the position in relation to the Telnic payment and I will not repeat what I then said. As regards the claims in relation to Parts I and II of the alleged wrongdoing, I consider that the Claimants do not have a good arguable case in relation to those claims and I would not grant freezing injunctions in relation to the sums claimed. Further, as regards the claims to proprietary injunctions, the Claimants have at most a borderline case that there is a serious issue to be tried and I intend to reflect the weakness of the Claimants' claims in the balancing exercise to be carried out in relation to the justice and convenience of granting or conversely refusing proprietary injunctions. The proprietary injunctions

claimed are very invasive and I do not consider that it is justified for the court to intervene in the way requested on the basis of such weak claims.