Neutral Citation Number: [2025] EWHC 1918 (Ch)

Case Nos: CR-2021-001548, CR-2022-000144, BL-2024-001058

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD) and BUSINESS LIST (ChD)**

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

Date: 25 July 2025

**Before** :

**Tom Smith KC**
**(sitting as a Deputy Judge of the High Court)**

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**Between:**

**(1) LAURENCE PAGDEN**
**(as Liquidator of Core VCT IV plc and Core VCT V plc)**
~~**(2) SIMON JAMES UNDERWOOD**~~
~~**(as Former Liquidator of Core VCT IV plc and Core VCT V plc)**~~
**(3) DAVID ROBERT BAXENDALE**
**(4) STEVEN ANTHONY SHERRY**
**(as Joint Liquidators of Core VCT plc)** **Applicants**

**- and –**

**(1) MARK ROBERT FRY**
**(2) NEIL JOHN MATHER**
**(as former Joint Liquidators of Core VCT plc, Core VCT IV plc and Core VCT V plc)** **Respondents**

**And Between:**

**(1) CORE VCT PLC (in liquidation)**
**(2) CORE VCT IV PLC (in liquidation)**
**(3) CORE VCT V PLC (in liquidation)** **Claimants**

**- and –**

**(1) SOHO SQUARE CAPITAL LLP**
**(formerly Eso Capital Advisors LLP and, before that, Core Capital Partners LLP)**
**(2) WALID KHALIL FAKHRY**
**(3) STEPHEN PETER EDWARDS**
**(4) MARK ROBERT FRY**
**(5) NEIL JOHN MATHER**
**(6) BEGBIES TRAYNOR (CENTRAL) LLP**
**(7) BTG ADVISORY LLP (formerly BTG Financial Consulting LLP)**
~~**(8) BEGBIES TRAYNOR GROUP PLC**~~
**(9) SOHO SQUARE CAPITAL I LP (formerly Core Capital I LP)**
**(10) SOHO SQUARE CAPITAL II LP (formerly Core Capital Partners II LP)**
**(11) RHONDA NICOLL**
**(12) DAVID JOHN ALEXANDER STEEL**
~~**(13) PETER MENZIES SMAILL**~~

**Defendants**

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**Catherine Addy KC, Daniel Lewis and Charles King** (instructed by **Harcus Parker Limited**) for the **Applicants and Claimants**
**David Blayney KC and Sophie Holcombe** (instructed by **Pinsent Masons LLP**) for the **First to Third, Eleventh and Twelfth Defendants**
**Adam Deacock** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondents and the Fourth to Seventh Defendants**
**Thomas Grant KC and Jonathan Allcock** (instructed by **Stephenson Harwood LLP**) for the **Ninth and Tenth Defendants**

Hearing dates: 14-17 July 2025
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# Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 25 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Tom Smith KC :**

## Introduction

1. This is the judgment following the hearing of a number of applications made in three related proceedings:

   (1) a Part 7 Claim issued on 24 August 2021, with claim number CR-2022-000144 (the "**Part 7 Claim**") making claims against the Defendants;

   (2) an Insolvency Application dated 23 August 2021, with claim number CR-2021-001548 (the "**Insolvency Application**") seeking relief against Mark Fry and Neil Mather, the previously appointed liquidators of the Claimants (the "**Former Liquidators**");

   (3) a second Part 7 Claim issued on 19 July 2024 with claim number BL-2024-001058 which has been described as the "**Protective Claim**" making claims against the Defendants and which is said to have been issued by the Claimants on a protective basis ahead of the sixth anniversary of the restoration of the Claimants to the register of companies.

2. By an Order dated 1 December 2021 the Part 7 Claim was transferred to the Insolvency and Companies List to be case managed, heard and tried with the Insolvency Application.

3. There are seven interim applications before the Court: (1) the Claimants' application for permission to amend the existing Particulars of Claim (which relate to both the Part 7 Claim and the Insolvency Application) (the "**POC**") in the form of a draft Amended Particulars of Claim (the "**Draft APOC**"); (2) the Applicants' application (in the Insolvency Application) for a direction (pursuant to Insolvency Rule ("**IR**") 12.11) for statements of case and for the Draft APOC to stand as Combined Points of Claim; and (3) five applications

made by the three different groups of Defendants for the striking out and/or summary judgment in respect of some or all of the claims which have been made against them in the Part 7 Claim and/or in the Protective Claim.

4. The Claimants were venture capital trusts ("**VCTs**"), established to raise funds primarily from retail investors for the purposes of investing in small and medium-sized enterprises ("**SMEs**"). Their shares were listed on the London Stock Exchange. Individual investors who purchased shares were thereby afforded tax benefits under the tax regime applicable to VCTs.

5. In summary, the claims in the proceedings principally relate to disposals of the assets of the Claimants alleged to have been at an undervalue and to the detriment of their investor members:

   (1) Firstly, the sale of the Claimants' interests in various portfolio companies (the "**Portfolio Companies**") to the Ninth Defendant, Soho Square Capital I LP (formerly Core Capital I LP) ("**New Core 1**") on 8 July 2011 (the "**2011 Transfer**");

   (2) Secondly, the sale of the Claimants' remaining investments (including its partnership interests in New Core 1) to the Tenth Defendant, Soho Square Capital II LP (formerly Core Capital Partners II LP) ("**New Core 2**") on 25 August 2015 (the "**2015 Transfer**").

6. Pursuant to management deeds, the Claimants were managed by Core Capital LLP (the "**Former Manager**") until 6 January 2014 and, thereafter, by the First Defendant, Soho Square Capital LLP (formerly Eso Capital Advisors LLP and, before that, Core Capital Partners LLP) (the "**Manager**").

7. The Claimants were placed into members voluntary liquidation ("**MVL**") on 16 April 2015 with the Former Liquidators appointed as liquidators. The 2015 Transfer (to New Core 2) took place after that date.

8. The other Defendants are:

(1) The Second and Third Defendants, Mr Fakhry and Mr Edwards, the founders and managing partners of the Manager and the Former Manager;

(2) The Sixth Defendant ("**Begbies**") which is the firm of which Mr Fry and Mr Mather were at the relevant times members, and the Seventh Defendant ("**BTG Advisory**"), a firm of which Begbies was a member and which provided financial advisory services;

(3) The Eleventh Defendant, Ms Nicoll, a member and finance director of the Former Manager and the Manager, and the Twelfth Defendant, Mr Steel, a member and investment partner of the Former Manager and the Manager;

(4) The Thirteenth Defendant, Mr Smaill, who was a director of the First Claimant from 7 October 2005 and a director of the Second and Third Claimants from 16 April 2015. He resigned as a director on 21 May 2019. Mr Smaill was also the Claimants' representative on the Advisory Panel of New Core 1.

9. Shortly before the present hearing, the Claimants and Mr Smaill reached agreement, and I made an order by consent dismissing the Part 7 Claim and the Protective Claim as against Mr Smaill. The claim against the Eighth Defendant had previously been dismissed by consent. As such, there are eleven remaining Defendants. They fall into three groups: (1) the Manager, Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel (together the "**Soho Defendants**"); (2) New Core 1 and New Core 2; and (3) Mr Fry, Mr Mather, Begbies Traynor (Central LLP) and BTG Advisory LLP (the "**Begbies Defendants**").

10. The proceedings have a complex procedural history. Having been placed into MVL in April 2015, the Claimants were dissolved on 18 November 2016. In

June 2018, a member issued an application to restore the Claimants to the register for the purposes of investigating previous conduct in respect of their assets. On 20 July 2018 Fancourt J made an order restoring the Claimants to the register and appointed Messrs Pagden and Underwood of Menzies LLP as new liquidators (the "**Liquidators**"). The evidence of Mr Pagden explains that the Liquidators then took steps to gather information and collect documents, including by making an application under sections 234 to 236 of the Insolvency Act 1986.

11. Subsequently, Mr Fakhry and others applied for the restoration of the Claimants and the appointment of the Liquidators to be set aside. That application was heard by the Court of Appeal in March 2020 with judgment handed down in September 2020: *Fakhry and ors v Pagden and ors* [2020] EWCA Civ 1207. The Court of Appeal did not set aside the orders but held that the views of the members in relation to restoration and the appointment of new liquidators should have been ascertained and the Court informed of these views prior to the order for restoration being made. Accordingly, the Court of Appeal directed that meetings of members should be held to vote on: (i) whether the Claimants should remain restored to the register for the purpose of investigating the conduct of the Manager and the Former Liquidators and (ii) whether the Court appointed liquidators should remain in office, with the matter then to be reviewed by an ICC Judge subsequently in light of the votes cast, including to consider whether interested parties' votes should be taken into account.

12. On 23 and 24 August 2021 the Insolvency Application and the Part 7 Claim were issued. On 24 August 2021 an *ex parte* application was made to Falk J for leave under section 212(4) of the Insolvency Act 1986 for misfeasance and breach of duty claims to be brought against the Former Liquidators. Falk J regarded it as unsatisfactory that the application had been brought on such short notice, but nevertheless made an order granting leave on an interim basis for the purpose of holding the ring.

13. Pursuant to the order of Falk J, the application for leave to bring misfeasance proceedings against the Former Liquidators came back for hearing before ICC Judge Burton on 19 November 2021. The Defendants point out that, by this time, the Court of Appeal's order had not been complied with since no steps had been taken to convene meetings of the Claimants' members and a hearing had not been requested for directions to be given in respect of those meetings. ICC Judge Burton adjourned the application for leave and gave directions for an expedited hearing of an application for directions to be given in relation to the convening of the meetings. The application for leave was heard on 21 December 2021 and for reasons explained in a subsequent judgment dated 22 March 2022 ([2022] EWHC 632 (Ch)) ICC Judge Burton granted leave.

14. On 3 December 2021 ICC Judge Burton gave directions for meetings of members to be convened to consider the resolutions and approved the form of the circular. At the meetings (which duly took place on 20 December 2021), the members of Core VCT IV and Core VCT V voted overwhelmingly in favour of both resolutions. However, in relation to Core VCT, the First to Third Defendants voted against Messrs Pagden and Underwood remaining in office as liquidators.

15. Following a further hearing on 25 March 2022, ICC Judge Burton subsequently decided that these votes should not be disallowed ([2022] EWHC 944 (Ch)). However, this was on the basis of an undertaking being given which provided for new liquidators of Core VCT to carry out a review of the Part 7 Claim, to review the litigation funding agreements and to decide whether or not to continue with the Part 7 Claim. In the meantime, the proceedings were stayed (in the case of the Part 7 Claim, by order of ICC Judge Burton of 21 April 2022 and, in the case of the Insolvency Application, by a consent order dated 13 May 2022).

16. In the meantime, on 24 December 2021 the amended Part 7 Claim Form together with the POC was served on the Defendants.

17. On 28 July 2022 Messrs Baxendale and Sherry of PricewaterhouseCoopers LLP (the "**Replacement Liquidators**") were appointed by the Court as liquidators of Core VCT (and Mr Pagden and Mr Underwood were removed as liquidators of that company). The Replacement Liquidators duly carried out their investigations and review of the claims made in the proceedings. The Replacement Liquidators confirmed the outcome of their review to the parties on 1 December 2023 (being a decision to continue the claims) and on 12 January 2024 both the Liquidators and the Replacement Liquidators issued applications to lift the stays.

18. On 4 March 2024 the Claimants provided the Draft APOC to the Defendants. On 19 July 2024 the Protective Claim was issued, being one day in advance of the sixth anniversary of the restoration of the Claimants to the register.

19. The applications to lift the stays were opposed by the Soho Defendants. However, by a judgment dated 25 September 2024 ([2024] EWHC 2657 (Ch)) Simon Gleeson (sitting as a Deputy Judge of the Chancery Division) discharged the stays. Mr Gleeson also gave procedural directions for the issuing of an application to amend in the form of the Draft APOC and for the proposed cross-applications by the Defendants. The Claimants say that the delay which has occurred as a result of the resistance to the lifting of the stays was the fault of the Defendants.

20. A direction for the trial of a preliminary issue was given on 4 December 2024, which trial took place before Thompsell J on 18 and 19 June 2025. Judgment following that hearing is presently awaited. The preliminary issue concerns whether certain terms of the Sixth Defendant's terms of business and their letters of engagement limit the liability of the Fourth to Seventh Defendants. The outcome of that preliminary issue does not bear on any of the issues which I have to decide at the present hearing.

## The Approach to the Applications

21. The position resulting from the number of applications before the Court is one of some complexity. As noted above, there are seven applications before the Court relating to the existing Part 7 Claim, the amendments now sought to be made as set out in the Draft APOC, and the Protective Claim.

22. In my judgment, it is most helpful to deal with matters in the following order:

    (1) First, the applications for strike out/summary judgment in relation to the existing Part 7 Claim;

    (2) Secondly, the application to amend the POC in the form of the Draft APOC, which then falls to be assessed in the context of the determination of (1);

    (3) Thirdly, the applications in relation to the Protective Claim.

23. One reason why this approach is, in my judgment, the most logical is because the authorities suggest that the question, posed by CPR rule 17.4(2), of whether the claim in respect of which permission to amend is sought is a new claim falls to be assessed by reference to those existing pleaded causes of action which are viable: see *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 per Millett LJ at 406f. In *Paragon Finance*, a claim of breach of fiduciary duty had been asserted on the face of the pleading but did not disclose a proper cause of action; a sufficiently pleaded cause of action for breach of fiduciary duty was sought to be introduced for the first time by way of amendment and Millett LJ held that "*this to my mind unquestionably amounts to the introduction of a new cause of action*" for the purposes of what was then RSC Order 20 rule 5(2) and (5).

## The Facts

24. Before turning to the various applications, it is necessary to set out the facts in some further detail. This section of this judgment is derived from the materials

which were before me at the hearing. Nothing I say in it is to be taken as a finding of fact on any matter.

25. As noted above, the Claimants were VCTs and raised money from investors and invested in various SMEs. Relevantly for present purposes, these investments included investments in: Allied International Holdings Ltd ("**Allied**"), Pureleaf Ltd and Momentous Moving Holdings Ltd (together, "**Pureleaf**") and various companies which are together referred to as the Portfolio Companies: Ark Home Healthcare Ltd, Better at Home Ltd, Blanc Brasseries Holdings plc, Colway Ltd, Kelway Holdings Ltd and Kelway Ltd, and SPL Services Ltd. For the most part, the Claimants' investments in the SMEs were carried out through the creation of a new holding company by the Former Manager in which the Claimants subscribed for shares and/or loan notes, into which the underlying businesses were transferred.

26. The Claimants were managed, first, by the Former Manager and then by the Manager. The Former Manager was appointed as manager of the First Claimant pursuant to a Management Deed dated 11 October 2005 (the "**2005 Management Deed**") and of the Second and Third Claimants pursuant to Management Deeds dated 7 December 2006 (the "**2006 Management Deeds**"). It is said that the terms of these three Management Deeds were all to the same effect.

27. As public limited companies, the Claimants also had directors. For the First Claimant, these were (at the time of the 2011 Transfer) John Brimacombe, David Dancaster and Mr Smaill and (at the time of the 2015 Transfer) Ray Maxwell and Mr Smaill; for the Second Claimant, (at the time of the 2011 Transfer) David Adams, Mr Maxwell and Andrew Richards and (at the time of the 2015 Transfer) Mr Maxwell and Mr Smaill; and for the Third Claimant, (at the time of the 2011 Transfer) Greg Alridge, David Harris and Mr Richards and (at the time of the 2015 Transfer) Mr Harris and Mr Smaill. In addition, at the time of the 2015 Transfer, the Former Liquidators were also in office (with the

powers of the directors circumscribed by section 91(2) of the Insolvency Act 1986).

The 2011 Transfer

28. It is said that from at least November 2010 the Former Manager was marketing the Claimants' interests in the Portfolio Companies to new investors. A transaction was proposed which involved the raising of £46.8 million of capital from new institutional investors through a new investment vehicle, New Core 1, and the transfer of various of the Claimants' interests in the Portfolio Companies to New Core 1. The new investors in New Core 1 were Access Capital Partners and 17 Capital LLP (the "**New Investors**"). In exchange for the transfer of their interests in the Portfolio Companies, the Claimants would receive £8.2 million and interests representing 29.56% of New Core 1. This transaction is the 2011 Transfer. The Part 7 Claim alleges that the 2011 Transfer was at an undervalue.

29. The 2011 Transfer was the subject of a circular sent to the members of the Claimants on 9 June 2011 and was approved at general meetings held on 7 July 2011. It was then implemented through three asset transfer agreements entered into on 8 July 2011 between each of the Claimants and New Core 1 under which the Claimants transferred their debt and equity interests in each of the Portfolio Companies to New Core 1 (the "**Transfer Agreements**").

30. New Core 1 was a limited partnership with a general partner (Core GP I LP) established pursuant to the terms of a limited partnership agreement and registered under the Limited Partnerships Act 1907. In the usual way, the limited partnership agreement provides for each partner to have a share in the profits and assets of New Core 1. Following the 2011 Transfer, the limited partners consisted of three British Virgin Islands companies (Core (BVI) Ltd, Core IV (BVI) Ltd and Core V (BVI) Limited) and two limited partnerships (Core Feeder I LP and CoreCovado LP), through which the investors including

the Claimants ultimately held their interests. The details of these arrangements are set out in paragraphs 21 to 27C of the Draft APOC.

31. The Former Manager (and subsequently the Manager) was also the manager of New Core 1, and it is pleaded by the Claimants that persons and entities associated with the Manager held beneficial interests in New Core 1.

32. Following the 2011 Transfer, the Claimants retained interests in the remaining companies including Allied and Pureleaf (the "**Residual Portfolio Companies**"). Certain of those interests were sold by the Claimants prior to their entry into MVL in April 2015 and the proceeds were distributed to investors.

The Appointment of the Manager

33. The Former Manager was replaced as manager of the Claimants by the Manager pursuant to three management deeds dated 6 January 2014 (in the case of the First Claimant as subsequently amended and restated on 4 July 2014) (the "**2014 Management Deeds**"). The Claimants rely on the terms of the 2014 Management Deeds by which they say the Manager is liable to the Claimants for any loss or damage suffered or incurred by the Claimants arising out of the negligence, default or breach of the management agreement or otherwise of the Former Manager.

The 2015 Transfer

34. By November 2014, the Manager began taking steps to place the Claimants into MVL. As part of this process, it was proposed that the investments in New Core 1, including those of the Claimants, and the remaining directly held investments of the Claimants would be sold to New Core 2 for total consideration of £48 million. On 10 March 2015 a combined Notice of General Meeting (the "**2015 Circular**") was issued to the Claimants' shareholders proposing that the companies be placed into MVL and that Mr Fry and Mr

Mather be appointed as joint liquidators. On 16 April 2015 the Claimants were placed into MVL and the Former Liquidators appointed as liquidators.

35. On 29 April 2015 Mr Fakhry informed the Former Liquidators by email of an offer "*for the portfolio as a whole which we believe should be considered*".

36. In July 2015 the Seventh Defendant then produced a valuation review (the "**BTG Valuation Review**"). This provided a range of valuations of between £52 million and £68 million for the investments of both the Claimants and New Core 1, as against the Manager's own valuation of c. £63 million as at 31 March 2015. The offer of £48 million was noted to represent a blended discount of 23.8% on the Manager's valuation of £63 million.

37. Like New Core 1, New Core 2 was a limited partnership with a general partner (Core GP II LP) established pursuant to the terms of a limited partnership agreement and registered under the Limited Partnerships Act 1907.

38. The sale of the investments of the Claimants and New Core 1 to New Core 2 completed on 25 August 2015. In relation to the investments in New Core 1, on that date the limited partners in New Core 1 (including those holding the interests of the Claimants) transferred their entire interest to Core GP II, in its capacity as general partner of New Core 2, which became sole limited partner of New Core 1. The Claimants' remaining direct investments were also transferred to New Core 2 (presumably also to Core GP II as general partner).

39. This transaction is the 2015 Transfer. The Part 7 Claim also alleges that the 2015 Transfer was at an undervalue. In this respect, the Claimants say that both the 2011 Transfer and the 2015 Transfer were carried out at significant discounts to the Former Manager's or the Manager's contemporaneous valuations of the assets being transferred.

40. The Manager was also the manager of New Core 2, and it is pleaded that persons and entities associated with the Manager held beneficial interests in

New Core 2. In this respect, there were various limited partners in New Core 2 as set out in paragraph 51 of the APOC.

41. The final general meetings of the Claimants' shareholders were held on 10 August 2016. The final accounts and returns were registered by the Registrar of Companies and the Claimants were deemed to be dissolved on 18 November 2016.

Other Claims

42. In addition to the claims in respect of the 2011 Transfer and 2015 Transfer, the Part 7 Claim also makes a claim in relation to the investments made by the Claimants in Allied (which, as noted above, was a Residual Portfolio Company). The investment in Allied was sold to New Core 2 as part of the 2015 Transfer, and it is said that this realised proceeds of £4.8 million. Essentially, the allegation in relation to Allied is that it is said that, by causing the First Claimant to make certain investments in Allied by way of secured loan notes, this had the effect of prejudicing the investments of the Second and Third Claimants which had been made by way of equity and unsecured debt.

43. The Protective Claim also sought to make a new claim in relation to Pureleaf. Pureleaf was also a Residual Portfolio Company. It is said that the Claimants' investment in Pureleaf was sold in 2014 realising approximately £2.762 million for the Claimants. It was said that a follow-on investment which was made by the Second and Third Claimants into Pureleaf in 2011 of £1.75 million was to the detriment of the First Claimant essentially because this follow-on investment was made by way of secured debt. However, the new claim against Pureleaf was abandoned by the Claimants in the course of the hearing before me, and it is therefore not necessary to consider it further.

44. Finally, there is also a claim alleging the charging of excessive fees by the Former Manager and the Manager.

**The Part 7 Claim and the Insolvency Application**

45. In relation to the existing Part 7 Claim and Insolvency Application, the relevant applications are:

    (1) An application by New Core 1 and New Core 2 dated 22 November 2024 for the striking out of and/or summary judgment on the claims made against each of them in the Part 7 Claim; and

    (2) An application by the Soho Defendants dated 22 November 2024 for the striking out of and/or summary judgment on certain claims made in the Claim Form and the POC in the Part 7 Claim.

The Relevant Principles

46. The Defendants seek summary judgment and/or strike out on the relevant claims pursuant to CPR rule 24.3 on the basis that the Claimants have no real prospect of succeeding on the claims and CPR rule 3.4(2) principally on the basis that the POC discloses no reasonable grounds for bringing the claims.

47. The relevant principles are well established. In particular, the approach to summary judgment applications was set out in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] per Lewison J and in *Daniels v Lloyds Bank plc* [2018] EWHC 660 (Comm) at [49] per Cockerill J. I was also referred to *TFL Management Services Ltd v Lloyds TSB Bank plc* [2014] 1 WLR 2006 at [26]-[27]. Although I do not lengthen this judgment by quoting all these paragraphs, I have considered them carefully.

48. It is common ground that I should proceed, for the purposes of this hearing only, on the basis that all the primary facts on which the claims are based are true.

Applications for Strike Out

49. The Claimants make the point that there is a distinction between CPR Part 24 and CPR 3.4(2)(a) in circumstances where limitation is in issue. They refer to Nicklin J in *Baroness Lawrence v Associated Newspapers Ltd* [2024] 1 WLR 3669 at [74]:

> "*Limitation operates as a defence to a civil claim. It must therefore be raised by a defendant in answer to the claim. As such, even an unanswerable limitation defence does not lead to the conclusion that an otherwise viable case does not disclose reasonable grounds for bringing the claim. For that reason, if limitation is the sole basis for an application to strike out under CPR r 3.4(2)(a), the application will be dismissed.*"

50. In the present case, however, all of the relevant applications also make applications for summary judgment in the alternative to applications for strike out under CPR rule 3.4. As such, I will approach the applications insofar as they are based on limitation grounds as being made under CPR Part 24 rather than under CPR rule 3.4. This means that the relevant principles to summary judgment applications as set out in, inter alia, *Easyair* are applicable.

Application by New Core 1/New Core 2

51. It is convenient to deal first with the application by New Core 1 and New Core 2 to strike out and/or for summary judgment in relation to the Part 7 Claim. The basis of the application made by New Core 1 and New Core 2 is that it is said that the POC contains no particulars at all of any claims against those defendants. The POC is said to be, so far as those defendants are concerned, an "*empty document*". (New Core 1 also seeks summary judgment on the claim made against it in relation to the 2011 Transfer on limitation grounds: this is dealt with separately below.)

52. The body of the existing POC does not plead any claims against either New Core 1 or New Core 2. This can be most obviously seen from paragraphs 125

to 130 (in relation to the 2011 Transfer) and paragraphs 146 to 158 (in relation to the 2015 Transfer). It is also to be noted that knowing receipt claims are specifically pleaded against Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel, but no similar claims are pleaded against either New Core 1 or New Core 2.

53. Limb (2) of the Prayer to the POC does purport to seek relief against, inter alia, New Core 1 and New Core 2. That relief relates to the alleged receipt of profits derived from breaches of duty and trust. It is not however alleged that New Core 1 or New Core 2 owed any such duties or committed any such breaches. Moreover, the body of the POC does not explain or particularise any claim for this relief claimed against either New Core 1 or New Core 2. The Prayer does not seek relief against New Core 1 and New Core 2 based on the receipt and retention of the property transferred pursuant to the 2011 and 2015 Transfers.

54. Ms Addy's principal response was to refer to the Claim Form. That included at paragraph 3 of the rider (as part of a compendious claim for relief against various Defendants) a claim against New Core 1 and New Core 2 for:

> "*receipt, knowingly or otherwise in a manner which touches on their conscience, of assets in which the Claimants have an equitable proprietary interest in their assets that were transferred into the 9th and 10th Defendants and their traceable proceeds"*

55. However, it is clear that this claim was not subsequently pleaded in the POC when they were served. The reasons for this (whether it was deliberate or by way of accidental omission) have not been explained in the evidence or submissions.

56. In this context, I was referred to the decision of Freedman J in *Akkurate Ltd v Richmond* [2023] EWHC 2392 (Ch) at paragraph 47:

> "*A claim which appears in a claim form, but which is omitted from the Particulars of Claim is not deemed to have been irrevocably abandoned.*

*The effect is that in an appropriate case, a party can seek to amend the pleading to include the claim. That is to say that it has ceased to be a part of the claim, but the Court has a discretion on application to allow it to be restored. "…There is no principle of law which says that a claim abandoned on the pleadings cannot be resurrected by amendment, or that an 'election', once made on the pleadings, cannot be revoked by a change of mind. This is a matter of procedural rather than substantive law. Whether a court permits the resurrection to take place is a pure matter of discretion. There may well be circumstances where the election or abandonment has in some way prejudiced the other party or it is otherwise too late for a change of direction. But those are matters which are weighed in the balance when the discretion is exercised." per Morison J at para. 14, (and see paras. 11 – 17) in British Credit Trust Holdings UK v UK Insurance Ltd [2003] EWHC 2404 (Comm) The consequence is that the claim no longer forms part of proceedings in those circumstances, albeit that by amendment in an appropriate case, and subject to the discretion of the Court, it might again become a part of the claim.*"

57. This demonstrates that, where a claim has been included in a claim form but is then omitted from the particulars of claim, it will not be deemed to have been irrevocably abandoned. However, unless and until permission is given to amend the particulars of claim to introduce the claim, it will have been abandoned in a procedural sense and will not form any part of the proceedings. It follows that, in the context of the present case, the inclusion of the knowing receipt claim in the Claim Form could only assist the Claimants if the Court was prepared now to give permission for the claim to be introduced into the POC. That amendment application is dealt with subsequently in this judgment. However, if such permission was not to be given, then it would follow that the inclusion of this claim in the Claim Form would not save the existing Part 7 Claim from being struck out as against New Core 1 and New Core 2.

58. Ms Addy's other response to this application was to refer to the well-known dicta of Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, 243 that "*a cause of*

*action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy from another person*". I was also referred to *Football Dataco Ltd v Sportradar GmbH* [2011] 1 WLR 3044 at paragraph 27 where Jacob LJ said that:

> "*English procedural law says that if you allege in your pleading facts which, if proved, would establish a cause of action, that is sufficient to support a claim for that cause of action: see e g Letang v Cooper [1965] 1 QB 232 and In re Vandervell's Trusts (No 2) [1974] Ch 269, 321. You do not have to spell out precisely the legal basis of the cause of action. Pleadings in England have a technical meaning. They are the documents which contain the assertions of fact which the party intends in due course to prove by evidence. They do not need to include arguments of law and seldom do*."

59. However, in my judgment, this does not assist the Claimants in the present case. This is because the consequence of not having expressly formulated any claim in knowing receipt against New Core 1 and New Core 2 in respect of the 2011 and 2015 Transfers is that essential facts necessary for that cause of action have not been pleaded. Specifically, (a) the receipt by New Core 1 and New Core 2 of property in which the Claimants had a continuing equitable proprietary interest; and (b) the alleged knowledge of New Core 1 and New Core 2 when receiving such property, including the attribution of the knowledge of other Defendants to New Core 1 and New Core 2, so as to make New Core 1's and New Core 2's retention of the property unconscionable.

60. I disagree with the Claimants that these facts are already pleaded in the paragraphs of the POC to which reference was made in oral submissions[1]. Paragraphs 20 and 50 of the POC plead, in general terms, the transfers of assets to New Core 1 and New Core 2 as part of the 2011 and 2015 Transfers, but there is no plea that the Claimants had an equitable proprietary interest in those

[1] POC paragraphs 13, 20, 50, 63, 66, 68(6), 76(6), 124, 127 and 143.

assets which were received by New Core 1 and New Core 2. There is also no plea that New Core 1 or New Core 2 received or retained the property with knowledge that it was trust property that had been transferred in breach of trust. In many ways, it is implicit in the Claimants' amendment application which seeks to introduce the new paragraphs 130C to 130F and 158B to 158D into the Draft APOC in order to plead such facts that these facts have not been pleaded hitherto.

61. In addition, the relief sought against New Core 1 and New Core 2 in relation to the knowing receipt claim in respect of the 2011 and 2015 Transfers has also not been pleaded in the POC. In this respect, it is instructive to compare the relief sought against New Core 1 and New Core 2 which the Claimants wish to be added to the Prayer in the Draft APOC by way of amendment, with the existing relief sought in the existing Prayer to the POC.

62. Ms Addy sought to deal with this by pointing out that CPR 16.2(5) empowers the court to grant a remedy, even if that remedy is not specified in the claim form, and CPR 16.4 does not require the particulars of claim to specify the remedies claimed (aside from interest and certain types of damages). However, CPR 16.2(1) does require the claim form to specify the remedy which the claimant seeks. Although if a matter was to proceed to trial, CPR 16.2(5) might empower the court to grant a remedy which had not been specified in the claim form, it does not mean that in advance of trial a defendant is not entitled to seek the striking out of a claim on the basis that no relevant relief has been claimed against it in either the claim form or the particulars of claim.

63. In the course of argument, I suggested to Ms Addy that one way of testing the position would be to ask what would be the position if the present Part 7 Claim continued in its unamended form through to trial: would the Claimants at trial be able to advance a claim of knowing receipt against New Core 1 and New Core 2 and seek a remedy derived from their receipt of the property transferred under the 2011 and 2015 Transfers and would the court be able to grant the remedy? Ms Addy argued that the Claimants would be entitled to advance such

a claim at trial and that the court would be entitled to grant to such a remedy. However, I disagree; I consider that, unless the relevant defendants raised no objection, the court would be bound to conclude that no such claim had been pleaded and therefore could not properly be advanced at trial.

64. For these reasons, subject to the question of amendment, New Core 1 and New Core 2 are entitled to an order striking out the Part 7 Claim against them under CPR 3.4(2)(a) (it not being necessary in the circumstances to consider whether CPR 3.4(2)(b) and/or (c) might also be applicable).

Application by the Soho Defendants

65. The Soho Defendants make a number of applications for summary judgment and/or strike out in relation to the existing Part 7 Claim.

*Knowing Receipt Claims*

66. The Soho Defendants apply for the strike out or summary judgment of the knowing receipt claims against Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel in respect of the 2011 and 2015 Transfers on the grounds that the Claimants have failed to plead any receipt by those individuals of property transferred in breach of trust or fiduciary duty in which the Claimants had a continuing equitable proprietary interest (see *Byers v Saudi National Bank* [2024] AC 1191).

67. There was no dispute between the parties as to the applicable legal requirements for a claim in knowing receipt. Rather, the focus was as to whether the existing pleaded case satisfied these requirements. In this respect, paragraph 129 of the POC pleads in relation to the 2011 Transfer that Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel "*are liable for knowing receipt, having received interests in New Core 1 (or their traceable proceeds) in which the Claimants have an equitable proprietary interest and which it is*

*unconscionable for them to retain*". A similarly formulated allegation is pleaded in paragraph 150 of the POC in relation to the 2015 Transfer.

68. The Soho Defendants said that the "*interests*" in New Core 1 and New Core 2 that were received by the Soho Defendants were never the property of the Claimants. Rather, the partnership shares in New Core 1 and New Core 2 were the rights conferred by the relevant limited partnership agreement on limited partners to share in the profits and capital of the limited partnership, subject to the terms of those agreements. As such, there was no allegation in the POC that Mr Fakhry, Mr Edwards, Ms Nicoll or Mr Steel received property in which the Claimants had an equitable proprietary interest.

69. The property which was the subject of the 2011 Transfer and 2015 Transfer was (in relation to the 2011 Transfer) the debt and equity interests in the Portfolio Companies, and (in relation to the 2015 Transfer) primarily the interests held in New Core 1. Legal title to this property was transferred to New Core 1 (in relation to the 2011 Transfer) and to New Core 2 (in relation to the 2015 Transfer), which were limited partnerships managed by their general partners, and not to any of Mr Fakhry, Mr Edwards, Ms Nicoll or Mr Steel. This property is in any case different from the property which is the subject of the existing pleaded allegations which refers to the "*interests*", i.e. the partnership shares, acquired and held (directly or indirectly) by the relevant individuals in New Core 1 and New Core 2.

70. In her oral submissions, Ms Addy KC contended that the relevant property for the purposes of the knowing receipt claims was in fact the debt and equity interests in the relevant companies, and the interests in New Core 1, which were transferred to New Core 1 and New Core 2 pursuant to the 2011 and 2015 Transfers respectively. She contended that such property, when received by the relevant general partners of New Core 1 and New Core 2, was at that point held on trust for the limited partners of New Core 1 and New Core 2 which included Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel (albeit that Ms Addy accepted that, in the case of New Core 1, these individuals were not directly limited

partners). As such, it is said that these individuals received beneficial interests in that property.

71. There was limited explanation at the hearing of the nature of any such trusts, including by reference to the provisions of the Limited Partnerships Act and the terms of the relevant limited partnership agreements, and the authorities such as *IRC v Gray* [1994] STC 360. Ms Addy's essential argument was that on the receipt of the property the general partner held it on trust for the limited partnership and, therefore, each partner within the limited partnership had a beneficial interest in that property. In any case, the argument sought to be advanced by Ms Addy by way of her oral submissions was not in the same terms as the case which had been pleaded. As noted above, the existing pleaded case focussed on the shares in the limited partnership conferred on the limited partners under the terms of the limited partnership agreements, rather than on the debt, equity and other interests transferred to the general partners of New Core 1 and New Core 2 under the 2011 and 2015 Transfers.

72. During the course of the hearing, the possibility was therefore canvassed of a further proposed amendment being put forward by the Claimants to deal with this issue so as to bring the pleading into line with the submissions. However, it was not possible for such a draft amendment to be produced to the Soho Defendants and the Court prior to the conclusion of the hearing. I therefore indicated that I would consider the strike out application on the materials as they stood. If I concluded that the claims as currently formulated should be struck out, it would then be a matter for the Claimants as to whether they wished to make any further application to amend at the consequentials hearing prior to the Court's order being sealed. Any such application would obviously fall to be considered at that time on its merits.

73. In the circumstances, I consider that the knowing receipt claims against Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel in relation to the 2011 and 2015 Transfers fall to be struck out. In my judgment, the POC does not plead an arguable claim of knowing receipt against these individuals since it does not

properly plead any receipt by them of trust property in which the Claimants had an equitable proprietary interest. The pleaded case is based on the interests held by the individuals in the relevant limited partnership, but those interests were not themselves property transferred in breach of trust or fiduciary duty in which the Claimants had any continuing equitable proprietary interest. Moreover, the case which had been pleaded differed from that which was pursued in oral submissions. I therefore propose to make an order striking out these claims, subject to consideration of any further application to amend which is made by the Claimants.

*Inducing Breach of Contract Claims*

74. In relation to the inducing breach of contract claims in respect of the 2011 and 2015 Transfers, the Soho Defendants say that there are no particulars of the contractual provisions which the Claimants say the relevant defendants caused to be breached; there are no particulars of the allegation that the relevant defendants acted intentionally; and there are no particulars of the actions that each of the individuals took to direct the actions of the Former Manager.

75. However, I agree with the Claimants that these matters are adequately pleaded in paragraphs 69, 77, 127, 128, 130, 148, 149 and 151 of the POC. To the extent that further particulars are required then these can be subject of a Part 18 request. It follows that I would not strike out or grant summary judgment on the inducing breach of contract claims on this ground. The question of whether the inducing breach of contract claim in relation to the 2011 Transfer is in any event time barred is dealt with as part of the discussion on limitation below.

*Conspiracy Claim*

76. Although the Claim Form contains reference to a conspiracy claim against Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel, it has been confirmed by the

Claimants that this claim is not being pursued. It should therefore be struck from the Claim Form.

*Limitation Arguments*

77. I turn then to the applications made in relation to the Part 7 Claim on limitation grounds.

78. There was agreement as to the applicable limitation periods:

    (1) six years for claims for breach of fiduciary duty and/or trust (section 21(3) of the Limitation Act 1980 ("**LA 1980**")), breach of a tortious duty of care (section 2 of the LA 1980), and knowing receipt and dishonest assistance (section 21(3) of the LA 1980 and see *Williams v Central Bank of Nigeria* [2014] AC 1189 at [119]);

    (2) 12 years in respect of breach of contract claims arising under a deed – hence including all claims for breach of the Management Agreements (section 8 of the LA 1980).

79. It was also common ground that, in respect of claims for breach of fiduciary duty, breach of trust, and breach of contract pursuant to section 5 or 8 of the LA 1980, time runs from the date of breach. In respect of tortious claims, generally time runs from the date all constituent elements of the tort are present, typically occurring when more than minimal damage is suffered, even if the damage subsequently increases (see *Kelly Elliott v Hattens* [2021] EWCA Civ 720 at [11]).

80. The effect of the above is that a number of claims made in the POC against the Soho Defendants were not time barred when the Claim Form for the Part 7 Claim was issued on 24 August 2021. As such, the limitation arguments apply to:

(1) the claim against the Manager for breach of fiduciary duty and trust and tortious duties of care in relation to the mismanagement of the Claimants' investments in Allied (the "**Allied Mismanagement Claim**"), on the grounds the claims are statute-barred under sections 2 and 21(3) LA 1980;

(2) the claim against the Manager in respect of all fees incurred more than 12 years before issue for breach of fiduciary duty, trust and contract and for breach of its tortious duty of care by charging excessive fees to the Claimants (the "**Excessive Fees Claim**"), on the grounds the claims are statute-barred under sections 2, 8 and 21(3) LA 1980;

(3) the claim against the Manager for breach of fiduciary duty and trust and for breach of its tortious duty of care arising from the 2011 Transfer (the "**2011 Transfer Claim**"), on the grounds that the claims are statute-barred under sections 2 and 21(3) LA 1980;

(4) the claim against Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel for dishonest assistance, knowing receipt and inducing breach of contract in respect of the 2011 Transfer (the "**2011 Transfer Accessory Claims**"), on the grounds the claims are statute-barred under sections 2 and 21(3) LA 1980.

81. In addition to the relevant claims against the Soho Defendants, New Core 1 and New Core 2 also seek summary judgment on any claim made against them in the Part 7 Claim in relation to the 2011 Transfer on limitation grounds. (This is in the alternative to their primary position that no such claim is in fact pleaded.)

*Section 21(1)(b) of the LA 1980*

82. In relation to the Excessive Fees Claim and the 2011 Transfer Claim, the Claimants rely on section 21(1)(b) of the LA 1980. The Soho Defendants

accept that the Court is not in a position to determine the section 21(1)(b) argument on a summary basis. This means that it is accepted that the existing claims against the Manager for breach of trust and fiduciary duty in respect of the Excessive Fees Claim and the 2011 Transfer Claim should not be summarily dismissed on limitation grounds.

83. The Soho Defendants maintain that, insofar as claims are made for breach of contract, breach of tortious duty or for an account of profits in respect of the Excessive Fees Claim and the 2011 Transfer Claim, then these are not saved by section 21(1)(b) and should be dismissed as time-barred. The Claimants, on the other hand, say that there would be no real utility to making such an order since the other claims in respect of the Excessive Fees Claim and the 2011 Transfer Claim will proceed to trial in any event. Applying the language of CPR 24.3, they say that is a "*compelling reason*" why the claims should be disposed of at a trial.

84. However, as Mr Blayney pointed out, there would be a tangible benefit in disposing of the contractual, tortious and account of profits claims now since otherwise it would be necessary to deal with the section 32 arguments (which are relied on in relation to these claims) at trial. Equally, it is necessary to consider the arguments in relation to section 32 in any event as part of the present applications in relation to other claims. Moreover, if I conclude that those arguments have no real prospect of success, then it would necessarily follow that there ought to be summary judgment dismissing the claims which are made for breach of contract, breach of tortious duty or for an account of profits in respect of the Excessive Fees Claim and the 2011 Transfer Claim.

85. I also agree with Mr Blayney that the decision in *Executive Authority for Air Cargo and Special Flights v Prime Education Ltd* [2021] EWHC 206 (QB) does not assist the Claimants on this point. As Mr Blayney pointed out, that decision was concerned with a different question of whether, where the court has rejected an application for summary judgment, it should nevertheless make a declaration in relation to any findings of fact or law which the court has made.

It was in that context that the statement of Saini J at paragraph 115 of the judgment was made.

86. Reliance by the Claimants on section 21(1)(b) as against New Core 1 and New Core 2 was not pursued at the hearing: see below.

*Section 32 of the LA 1980*

87. In response to the limitation arguments, the Claimants primarily rely on section 32 of the LA 1980. Section 32(1) and (2) of the LA 1980 provides as follows:

> "*Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*
>
> *(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.*"

88. These provisions were the subject of authoritative treatment by the Supreme Court in *Potter v Canada Square Operations Ltd* [2024] AC 679. Relevantly, the Supreme Court held that the concept of "*concealment*" in section 32(1)(b) includes both the taking of active steps to hide a fact and a failure to disclose it and it is not necessary that either step was in breach of duty. The fact that was concealed had to be relevant to the right of action asserted by the claimant in the proceedings before the court, in that it was a fact without which the claimant's cause of action was incomplete. However, a fact was only "*deliberately*" concealed if the defendant intended the result of the concealment, with recklessness as to the possibility of the fact being concealed being insufficient. Lord Reed explained (at paragraph 109):

> "*What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question.*"

89. The last element means that the defendant must have considered whether to inform the claimant of the relevant fact and decided not to do so (see paragraph 108 per Lord Reed).

90. In addition, in order to establish concealment of a relevant fact, a claimant must show that it did not have knowledge of that fact at any time in the period between the accrual of the cause of action and the alleged concealment (see *Ezekiel v Lehrer* [2002] EWCA Civ 16 at [43]-[45] referring to *Sheldon v Outhwaite* [1996] 1 AC 102, 144A per Lord Browne-Wilkinson). This is a significant point in relation to the facts of the present case given that the directors and the Former Liquidators were in office for much of the relevant period.

91. Similarly, in relation to section 32(2), the Supreme Court held that there would only be a "*deliberate*" commission of breach of duty if the defendant intended

to commit, or knew that he was committing, a breach of duty, with recklessness as to the possibility of a breach being committed being insufficient. Lord Reed said (at paragraph 153):

> "*For all these reasons, the reasoning of the Court of Appeal in relation to section 32(2) cannot be accepted. "Deliberate", in section 32(2), does not include "reckless". Nor does it include awareness that the defendant is exposed to a claim. As Lord Scott said in Cave at para 58, the words "deliberate commission of a breach of duty" are clear words of English. They mean, as he added at para 61, that the defendant "knows he is committing a breach of duty"*."

92. The Defendants also point out that if there is more than one defendant then deliberate concealment by one will not extend time against the others, even if the effect of the concealment was to prevent the claimant from discovering he had a claim against the others: *Lewin on Trusts*, 20th ed., 50-161.

93. In relation to the test for when the concealment could have been discovered with reasonable diligence, Millett LJ explained the position as follows in *Paragon Finance* at 418b-d:

> "*The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree*."

94. As subsequently explained by the Court of Appeal in *OT Computers Ltd v Infineon Technologies AG* [2021] QB 1183 the application of this test requires the court to take into account the characteristics of the claimant, which may include the fact that it is in administration or liquidation (see paragraphs 59 and 61 of the judgment).

95. With these principles in mind, it is necessary to turn to the Claimants' case on the application of section 32(1) and (2). Starting with the evidence, Morrissey 4 paragraph 10 stated as follows:

> "*I address the Applicants' /Claimants' factual position on limitation in section F of this witness statement below. This sets out the factual matters the Applicants/Claimants will say are relevant to the application of section 32(1) of the Limitation Act 1980 (the "LA80"). The essential point is that, as a matter of fact, the alleged "wrongdoers" in the claims brought in these proceedings - the former investment managers - were effectively in control of the Core VCTs from the time they were incorporated until they were originally dissolved in November 2016.*"

96. Paragraph 78 of Morrissey 4 then introduced "*the factual matters relevant to its application, and in particular, the evidence in support of the Former Manager's/Manager's control of the Claimants*". As indicated there, this evidence focuses on the alleged control by the Former Manager and Manager of the Claimants, including after the appointment of the Former Liquidators. The evidence in Section F of Morrissey 4 does not however identify any facts relevant to the Claimants' claims which are said to have been deliberately concealed, or which were the subject of deliberately committed breaches of duty. It also does not advance any case as to the earliest date when the Claimants discovered any such facts or when they could with reasonable diligence have done so, or why the circumstances of any deliberate breaches of duty were such that that they were unlikely to be discovered for some time. In this respect, the evidence does not deal with the question of the knowledge of

the directors and the Former Liquidators, or what they might with reasonable diligence have discovered.

97. The reply evidence filed by the relevant Defendants addressed the evidence as put in Morrissey 4, their primary position being that the issue of control was irrelevant to the application of section 32.

98. In the meantime, on 30 April 2025 Pinsent Masons wrote to Harcus Parker offering the Claimants a further opportunity to file evidence to deal with the position in relation to section 32. Harcus Parker responded to that letter on 7 May 2025 confirming that they would not be filing any further evidence. On 14 May 2025 Pinsent Masons served a Part 18 request for further information on Harcus Parker, which request was also made by Stephenson Harwood on behalf of New Core 1 and New Core 2 and by RPC on behalf of the Begbies Defendants.

99. The Claimants' response to the request for further information was dated 4 June 2025 (the "**RFI Response**"). This indicated the claims in relation to the Manager where section 21(1)(b) was being relied on and the claims where section 32(1)(a) or (b) were being relied on. It was also said that the Claimants intended to rely on section 32(2), but not section 32(1)(c). Response 3.4 stated:

> "*It is not accepted that, for the purposes of the Applications, the Claimants are required to identify individual facts relevant to the causes of action which were concealed by the Defendants (see, further, the response to request 3.6 below).*"

Response 3.6.2 stated:

> "*In circumstances where (as addressed in detail in Morrissey-4 and Pagden-6):*

*(a) the Claimants had been under the control of the Former Manager and the Defendants; and*

*(b) the Former Liquidators are also defendants to these claims for their participation in the New Core 2 transaction, acted in accordance with the directions of the Defendants and failed to perform any independent investigation;*

*no knowledge is attributable to the Claimants in respect of the claims against the Defendants and the Claimants could not with reasonable diligence have discovered facts essential to the claims any earlier than is summarised in response 3.6.1 above*"

This argument has been referred to, by way of shorthand, as the "Wrongdoer Control Argument".

100. By a letter dated 4 June 2025 to Stephenson Harwood, Harcus Parker indicated that the Claimants reserved the right to rely on section 21(1)(b) in relation to the knowing receipt claims against New Core 1 and New Core 2 and that section 32(1)(b) applied to all claims against those defendants. The reliance on section 21(1)(b) was not however pursued by the Claimants in their oral submissions[2], and I take it that reliance on this provision as against New Core 1 and New Core 2 has been abandoned. In any case, it is clear as a matter of authority that section 21(1)(b) does not apply to knowing receipt claims: see *Byers v Saudi National Bank* [2024] AC 1191 at [134]-[138] discussing *Williams v Central Bank of Nigeria* [2014] AC 1189 (see [36] and [100] in particular).

101. The Defendants argue that, where the expiry of primary limitation is raised by a defendant in a summary judgment application and a claimant's answer to this is reliance on section 32, then it is incumbent on the claimant to put forward

[2] It was referenced in the Claimants' skeleton argument at paragraph 139(2)(d).

evidence to satisfy the court that the section 32 case is one with a reasonable prospect of success. In this respect, they referred to *Goldtrail Travel Limited v Grumbridqe* [2021] EWHC 1713 at [39]-[43], [72], [100]-[102] and *Axa Sun Life plc v HMRC* [2024] EWCA Civ 1430 at [91]-[93]. In *Goldtrail*, the Chief Master had commented as follows (in a conclusion upheld by Adam Johnson J on appeal and subsequently cited with apparent approval by the Court of Appeal in *Axa Sun Life*):

> "*No positive case about section 32(1)(b) has been put forward by the claimant. The claimant has not set out the facts it possessed and explained which essential facts it was missing. In a claim of this type, it is not just the facts that have to be considered but also what inferences may reasonably be drawn from them. The claimant has not explained why Mr Grumbridge, as a director of and indirect shareholder in BPI, was not made a party to the First Claim. It is not for the court to speculate why that decision was taken and whether there were objectively justifiable grounds for it. The absence of such a case makes it impossible to assess what essential facts the claimant did not possess that might trigger reliance on section 32(1)(b) of the 1980 Act. In my judgment, the absence of any positive case about limitation is fatal to the claimant because the real prospect of success test is being applied to an issue in relation to which the burden of proof rest[s] on the claimant. The burden is of course on the defendant to establish the grounds of the application, but where the claimant declines to explain its case on section 32(1)(b), the court is entitled to conclude that the usual limitation period applies. This suffices to determine the application in favour of Mr Grumbridge*."

102. This is consistent with what Moore-Bick LJ stated in *KNIC v Allianz Global* [2007] 2 CLC at paragraph 14 about the approach to summary judgment applications in general: "*It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial*." Moore-Bick LJ also pointed out that, if a party wishes to rely on the possibility that further

evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court.

103. The Claimants argue that *Goldtrail* was an extreme or unusual case because no explanation had been given for the failure to include Mr Grumbridge in the first set of proceedings in that case. However, I do not agree that makes *Goldtrail* extreme or unusual; the facts of all cases differ to a greater or lesser extent, and I do not see the fact that in *Goldtrail* there had been an earlier set of proceedings not involving Mr Grumbridge affects the statement of general approach made by the Chief Master, which was cited with apparent approval by the Court of Appeal in *Axa Sun Life* and is consistent with what was said by Moore-Bick LJ in *KNIC v Allianz Global*.

104. The Claimants' principal argument was, given the procedural stage of the present proceedings where no defences or replies had yet been served, they were not obliged to have pleaded out a case on limitation. I would accept that argument in that it may well be acceptable for a claimant to only plead its position on limitation in its reply once the defendant had pleaded its reliance on limitation in its defence. However, I think this is besides the point so far as the present applications are concerned for two reasons: first, the Claimants are facing an application for summary judgment on limitation grounds to which, in my judgment, it was incumbent on them to set out in evidence their position in response so as at least to identify what issues of fact arose and why it was said that they had a real prospect of success on those issues so that the matter should proceed to trial; and, secondly, the Claimants have in any event pleaded their position on limitation in the RFI Response, namely, their reliance on the Wrongdoer Control Argument.

105. As such, I approach the reliance on section 32 on the basis that the Claimants' case in this respect is as stated in Morrissey 4 and in the RFI Response, namely, the Wrongdoer Control Argument.

*The Wrongdoer Control Argument*

106. I turn to the Wrongdoer Control Argument. As noted above, this is the Claimants' argument that time did not begin running for limitation purposes because the Claimants were under the control of wrongdoers whose knowledge is not to be attributed to the Claimants for these purposes.

107. In *Burnden Holdings (UK) Ltd v Fielding* [2017] 1 WLR 39 at paragraph 49, David Richards LJ (as he then was) stated as follows in relation to the application of section 32:

> "*The first issue is to identify the individuals who, on behalf of the claimant company, might discover the wrongdoing so as to start time running. It is, in my view, clear that it cannot be the alleged wrongdoers themselves: see Bilta (UK) Ltd v Nazir (No 2) [2016] AC 1. It follows in the present case that knowledge by Mr and Mrs Fielding would not constitute knowledge by the company. There were three other directors of the company and it is not alleged that any of them were wrongdoers. It follows that discovery by one or more of them would constitute knowledge by the claimant company.*"

108. Relatedly, in *Julien v Evolving Technologies* [2018] BCC 376 Lord Briggs stated as follows (at paragraph 61):

> "*Finally, there remains the large policy objection noted by the trial judge, namely that there is no obvious reason why time should run in favour of the directors of a company who have committed a deliberate breach of duty, or deliberately concealed a breach of duty, for as long as they choose to retain control of the company as its Board. There is much to be said for adhering to the simple rule, based upon the separate personality of the company from even a sole shareholder, that shareholder knowledge of a breach of duty owed to the company by its directors, or the ability to discover the facts, is simply not to be attributed to the company at all, at least for as long as the allegedly delinquent directors retain control of it.*"

109. It is important to place these statements in context. In *Burnden Holdings*, David Richards LJ was addressing the position, on the assumption that there had been a deliberately committed breach of duty, whether the breach had been committed "*in circumstances in which it is unlikely to be discovered for some time*" for the purposes of section 32(2). This is clear from the submission which was being made to the court which is summarised at paragraph 48 of the judgment. It was for these purposes that David Richards LJ held that the knowledge of Mr and Mrs Fielding would not constitute knowledge by the company. However, what David Richards LJ was clearly not saying was that this principle of attribution of knowledge obviated the need to identify first of all a deliberately committed breach of duty in order to engage the application of section 32(2). To the contrary, his statements at paragraph 49 of the judgment proceed on the footing that there had been such a breach and it was on that basis that it was then necessary to proceed to consider the second part of the test in section 32(2).

110. In *Julien* the claim was one by the company against its former directors. The directors sought to argue that the claim was time-barred, but the company in turn sought to rely on section 14 of the Trinidadian Limitation of Certain Actions Act 1997, which was in materially the same terms as section 32(1) and (2). Specifically, the company relied on section 14(2) and argued that the directors' breach of duty had been deliberate, in circumstances in which it was unlikely to be discovered for some time (see paragraph 5 of the judgment). Thus, as in *Burnden*, the question of the attribution of knowledge was then relevant to the further question of whether the circumstances of the breach were such that it was "*unlikely to be discovered for some time*". For the purposes of the trial of the preliminary issue on this point, it was assumed that the breach itself had been deliberate (see paragraph 6 of the judgment). So, as in *Burnden*, the analysis proceeded on the assumption that there had been a deliberate breach of duty, and the question of attribution of knowledge then fell to be considered in relation to the "*unlikely to be discovered for some time*"

requirement (as reflected in the two questions considered by the Board as summarised in paragraphs 8 and 9 of the judgment).

111. The key point, therefore, is that neither *Burnden* nor *Julien* stand as authority for any proposition that that the existence of "*wrongdoer control*" obviates the need to demonstrate either deliberate concealment of facts or deliberate commission of a breach of duty in order to engage section 32(1)(b) and (2). All they demonstrate is where such a deliberate concealment or deliberate breach has been established then the usual rules of attribution of knowledge to a company will apply for the purposes of the remaining parts of the tests in section 32(1) and (2), namely, the questions of whether the claimant discovered the fraud or could with reasonable diligence have discovered it, or whether the circumstances of the breach of duty were such that it was unlikely to be discovered for some time. Indeed, it is difficult to see how the existence of "*wrongdoer control*" could obviate the need to demonstrate either deliberate concealment of facts or deliberate commission of a breach of duty in order to engage section 32(1)(b) and (2) since these matters are express requirements of the statute.

112. There are also some further points arising out of the nature and scope of the relevant rule of attribution of knowledge. As David Richards LJ noted in the passage from *Burnden*, this rule was considered by the Supreme Court in *Bilta v Nazir* [2016] AC 1. In that case, Lord Neuberger summarised the rule in the following way (at paragraph 7):

> "*Where a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing, even where the directors were the only directors and shareholders of the company, and even though the*

*wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings.*"

113. Lord Sumption described the same rule as follows (at paragraph 71): "*in an action for breach of duty against the directors there cannot be attributed to the company a fraud which is being practised against it by its agent, even if it is being practised by a person whose acts and state of mind would be attributable to it in other contexts*". As Lord Sumption noted, in the context of the illegality defence, this rule of attribution is commonly referred to as the *Hampshire Land* principle after *In re Hampshire Land Co* [1896] 2 Ch 743. Lords Toulson and Hodge stated similarly (at paragraph 181):

"*In most circumstances the acts and state of mind of its directors and agents can be attributed to a company by applying the rules of the law of agency. It has become common to speak of "the Hampshire Land principle" or the "fraud exception" as the exception to an otherwise general rule that attribution occurs. It is our view that "the fraud exception" is not confined to fraud but is simply an instance of a wider principle that whether an act or a state of mind is to be attributed to a company depends on the context in which the question arises. "The fraud exception", applied to prevent an agent from pleading his own breach of duty in order to bar his principal's claim against him, is the classic example of non-attribution.*"

114. There are, however, two relevant features of this rule of attribution which are apparent from the judgments of the Supreme Court in *Bilta*, and the earlier authorities which are there referred to. First, the rule will not prevent the attribution of the knowledge of non-wrongdoer directors to the company. This was also the point which David Richards LJ made in paragraph 49 of *Burnden*; it simply follows from the fact, that under usual rules of attribution, the knowledge of directors will be attributed to the company and, if the director is not a wrongdoer, then there is no reason not to apply that usual rule. Secondly, the rule typically applies in the context of claims brought by the company against the wrongdoers, rather than against third parties.

115. In the present case, there were however directors of the Claimants in office who are not said to have been wrongdoers. The Claimants point out that the directors were non-executive rather than executive and that their functions were limited because management of the Claimants was carried on by the Former Manager and the Manager. They say that the non-executive directors had, by design, very limited powers to intervene in the Former Manager's/Manager's management of the Claimants' affairs. In this respect, they refer to the terms of the Management Deeds setting out the extensive functions of the Former Manager and the Manager. I was also referred to a director appointment letter (for Mr Smaill) which expressly referred to his appointment as a "*non-executive*" director, and to an email dated 28 August 2006 from Mr Fakhry to SJ Berwin which, in relation to arrangements being put in place for the operation of the Second and Third Claimants, made reference to "*ensuring the board can only interfere in extreme circumstances*".

116. For present purposes, I assume that all these points are right. However, they do not themselves mean that whatever knowledge those directors did have does not fall to be attributed to the Claimants. It would be a question of identifying what that knowledge was.

117. Similarly, at the time of the 2015 Transfer, the Former Liquidators were in office. Whist the Claimants have criticised the decision-making of the Former Liquidators, no real material has been placed before the Court to support an allegation that they were wrongdoers for the purposes of the rule as to the attribution of knowledge. Accordingly, as matters stand, it is difficult to see why the knowledge of the Former Liquidators would not also be attributed to the Claimants.

118. For these reasons also, it was, in my judgment, necessary for the Claimants to put forward an arguable case on deliberate concealment of facts relevant to the claims and/or deliberate commission of breaches of duty involving the relevant facts in response to the application for summary judgment made against them.

119. The Claimants referred to various authorities which suggest that a dispute as to the application of section 32 is inapposite to be determined on a summary judgment application (see e.g. *Lawrence v Associated Newspapers* at [82] and [189]-[190] and *DLA Piper UK v Henshaws Farming LLP* [2025] EWHC 542 (Ch) at [60]-[61]). However, those cases are referring to the situation where the application of section 32 gives rise to a disputed issue of fact. That is not the position in the present case. Rather, the Claimants have chosen not to put forward a case on deliberate concealment and/or deliberate breach on the facts but have rather sought to rely on a legal argument (the Wrongdoer Control Argument). In order to determine that argument, it is not necessary to determine any disputed issue of fact. Indeed, New Core 1 and New Core 2 expressly stated that, for the purposes of the present hearing, they were content to proceed on the basis that all of the primary facts on which the claims are based and which are relied on in Morrissey 4 and Pagden 6 are true. Equally, I am not persuaded by the submission that the volume of evidence contained in the hearing bundle itself demonstrates the impropriety of ordering summary judgment.

*Non-Disclosure Arguments*

120. In the course of her submissions, Ms Addy also advanced an alternative argument to the Wrongdoer Control Argument to the effect that there had been breaches by the Defendants of duties of disclosure so as to engage section 32(2) and section 32(1)(b). These submissions were made by reference to existing allegations of non-disclosure contained within the POC and the Draft APOC.

121. The Defendants contended that this alternative case had not been contained in Morrissey 4, or within the RFI Response and that the Claimants' conduct was "*blatantly tactical*" in that they had taken the approach of deliberately not putting forward a case on deliberate breach or deliberate concealment so as not to subject that case to scrutiny (instead seeking to rely on the Wrongdoer Control Argument). However, in submissions, the Claimants had then sought

to change course in order to advance such an argument, essentially by reference to existing allegations contained within the Draft APOC which were now sought to be re-purposed in order to support a section 32 argument.

122. I agree with these submissions. In my judgment, the Claimants elected to take a particular course in relation to the summary judgment applications based on the limitation arguments. That course was deliberately not to put forward a factual case on deliberate concealment or deliberate breach but instead to rely on the Wrongdoer Control Argument. That is not itself a criticism of the Claimants, as they were entitled to take that course. However, having done so, it is not now open to the Claimants to seek to reverse course and seek to engineer such a case which had not been set out in either the evidence or in the RFI Response (being the pleaded case on this issue) and to which the Defendants had been given no proper opportunity to respond.

123. I therefore agree with the Defendants that it is too late for the Claimants to seek to raise the arguments based on alleged breaches of duties to disclose through their submissions in circumstances where no such case had been trailed in the evidence or in the RFI Response. For this reason alone, I would reject these arguments. However, even if is this is wrong, I consider that the arguments in any event have no real prospect of success.

124. As to this, the relevant allegations of non-disclosure were set out at paragraphs 167 to 170 of the Claimants' skeleton argument for this hearing, and the principal allegations are to be found at paragraphs 67(8), 75(8), 118, 127, 139-140, 143(4), 148, 149(2)-(3) and 155(4) of the POC. Certain additional allegations are also sought to be added by way of amendments contained in the Draft APOC. These pleaded allegations are not part of a pleaded case in relation to limitation, but rather are pleaded breaches of duty and other non-disclosures which are now sought to be relied on for the purposes of the limitation arguments.

125. In my judgment, there are a number of difficulties with the Claimants' attempts to now seek to rely on these allegations for the purposes of section 32.

126. First, although the duties to disclose are pleaded as duties owed to the Claimants, the alleged failures to disclose are said to be failures to disclose to the Claimants' shareholders, rather than to the Claimants themselves. This is clearly true of paragraphs 127, 139-140, 143(4), 148, 149(2)-(3) and 155(4) of the POC. In my judgment, it is also true of paragraph 118, albeit that paragraph unhelpfully does not make expressly clear to whom it is said that the relevant matter was not disclosed. Similarly, the cited paragraphs in the Draft APOC (paragraphs 54, 54D, 118A, 128(A1)(e) and 149(5) and (6)) also appear to be directed at allegations of a failure to make disclosure to the shareholders[3]. Indeed, the Claimants' own skeleton argument (at paragraph 174) expressly referred to these matters as "*matters which the Defendants failed to disclose* ***to the Claimants' shareholders***" (emphasis added). For present purposes, the relevant issue is however the question of disclosure to the Claimants, not to their shareholders. For this reason alone, I do not see that these allegations of non-disclosure assist the Claimants for present purposes.

127. Second, in relation to New Core 1 and New Core 2, there is no allegation or evidence of deliberate concealment or deliberate commission of breach by the Former Manager or Manager acting as agent of New Core 1 or New Core 2. For these purposes, "*agent*" bears its ordinary legal meaning: *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2024] AC 727. On the face of the pleaded case, the pleaded non-disclosures have nothing to do with either New Core 1 or New Core 2. The Claimants pointed out that the Manager acted as agent of New Core 2 in relation to the entry into the agreements by which the 2015 Transfer was effected. However, in my judgment, this is besides the point, since the relevant question is whether there is any material to suggest that the Former Manager or Manager acted as agents of New Core 1 or New Core 2 in

[3] The exception appears to be paragraphs 149(5) and (6) relating to the alleged non-disclosure of deferred consideration. However, this would only appear to be of any relevance to a claim against Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel relating to such deferred consideration. It is difficult to see how it can affect the position in relation to other claims or other Defendants.

relation to the instances of non-disclosure asserted in the POC. There is no evidence or even allegation that they did.

128. Thirdly, and even more fundamentally, in the case of all of the Defendants, there is no evidence or allegation that there has been any "*deliberate*" concealment or "*deliberate*" breach in the sense explained by the Supreme Court in *Canada Square*. No such allegation is pleaded in the POC or in the Draft APOC, nor in the evidence or the RFI Response. Nor was any such allegation contained in the Claimants' skeleton argument for this hearing.

129. Fourthly, the Claimants' argument does not explain (insofar as section 32(1)(b) is relied on) what facts relevant to the claims were in fact concealed or (insofar as section 32(2) is relied on) what facts relevant to the claims were involved in the relevant breaches of duty. Nor does it explain when the Claimants discovered the concealment, or with reasonable diligence could have done so.

130. The Claimants referred to a number of cases: *Haysport Properties v Ackerman* [2016] BCC 676 at [116], *Re Pantiles Investments Ltd* [2019] BCC 1003 at [67], *Re Daystreet15 Ltd* [2020] EWHC 1140 (Ch) and *Brown (Liquidator of Shahi Tandoori Restaurant Ltd) v Bashir* [2021] EWHC 337. These are all instances where the court found on the facts that there had been deliberate concealment or deliberate breaches. However, that does not mean that there was such concealment or were such breaches in the present case. In any event, these cases pre-date the decision of the Supreme Court in *Canada Square* and it is not clear to me that they applied what is now understood to be the correct test as to the meaning of "*deliberate*" as explained by the Supreme Court. For this reason also, I think that they are of limited assistance for present purposes.

131. Ms Addy also referred to various material relating to the position after the Liquidators had been appointed in July 2018, where she said that there had been various instances of a failure to properly co-operate with, and provide information to, the Liquidators. However, as Mr Allcock pointed out, any deliberate concealment or deliberate breach which occurred after July 2018

once the Liquidators were in office would not be sufficient if the Claimants already knew the relevant facts prior to the appointment of the Liquidators (see *Ezekiel v Lehrer*). Equally, it would be sufficient for the Claimants' purposes if the limitation period had not started running until July 2018, since this was less than six years before the Part 7 Claim had been issued.

*Section 32(1)(a) of the LA 1980*

132. The Claimants also rely on section 32(1)(a) in relation to the dishonest assistance claim made against certain of the Soho Defendants in relation to the 2011 Transfer.

133. As to this, the Soho Defendants do not dispute that section 32(1)(a) is capable of applying to dishonest assistance claims. However, they contend that the onus is on the claimant to put forward a case as to when the fraud was, or could have been discovered: see *Axa Sun Life* at [91] approving the statement in *Goldtrail*; and *Paragon Finance v Thakarar* at 418b-d: "*The question is not whether the claimants should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take*."

134. I therefore accept Mr Blayney's submission that, on a summary judgment application, where the claimant seeks to rely on section 32(1)(a) it is therefore required to put forward an arguable case that the fraud was not and could not have been discovered until a later date. For the reasons explained above, the Claimants have not done so. Rather, they have sought to rely on the Wrongdoer Control Argument. For these reasons, I consider that this is a case, similar to *Goldtrail*, where because the claimant has declined to explain its case on section 32(1)(a), then the court is entitled to conclude that the normal limitation period applies, with the result that the relevant dishonest assistance claims have no real prospect of success at trial.

*Clause 7.12 of the 2014 Management Deeds*

135. Finally, in relation to the claims against the Manager, the Claimants sought to rely on Clause 7.12 of the 2014 Management Deeds. This provides as follows:

> "*From the Commencement Date, the Manager agrees and acknowledges that it shall be liable to the Company for any loss or damage suffered or incurred by the Company recoverable at law arising out of any negligence, default or breach by Core Capital LLP (the "Old Manager") under the management agreement between the Company and the Old Manager dated [date of 2005-06 Management Deed, as applicable] (the "Old Management Agreement") or otherwise arising in respect of the provision by the Old Manager of its services in relation to or otherwise in connection with the Company (including, without limitation, in respect of the Company in connection with acting as operator and manager of the Company and, acting as adviser to the Company in respect of the Company's Unquoted Portfolio) however and whenever the same may arise or have arisen.*"

136. The Claimants contended that, in the case of the Manager, the application of section 8 of the LA 1980 to clause 7.12 is to render the Manager liable for any and all liabilities of the Former Manager irrespective of when they arose and whether they would be time-barred as against the Former Manager and to make those claims subject to a primary limitation period of 12 years from the date of execution of such Management Deeds (which was less than 12 years ago). This was said to be on the basis that by clause 7.12 the Manager contracted that it was liable for the breaches of the Former Manager "*whenever the same may arise or have arisen*".

137. The Soho Defendants contended that this was wrong because under the terms of clause 7.12 the Manager only agreed to be liable to the relevant Claimant for any loss or damage suffered or incurred by the Company as a result of the actions of the Former Manager which was *"recoverable at law"*. As such, if a

claim was time-barred against the Former Manager when it was brought, then there would be no corresponding claim against the Manager under clause 7.12 because the loss or damage would not be recoverable at law against the Former Manager. It was also said that the Claimants' construction of clause 7.12 was commercially absurd because the effect would be that the Manager was agreeing to be liable for claims which were time-barred against the Former Manager and there was no commercial reason why it would have agreed to this.

138. Ms Addy submitted that the intention of clause 7.12 was to ensure that the Claimants would be placed in no worse position by reason of the Manager being substituted for the Former Manager. As she said, "*the idea being that the manager effectively holds the claimants harmless in respect of anything that the former manager would otherwise have been liable for*". I accept that as a statement of the purpose of clause 7.12 (and I did not understand Mr Blayney to dissent from this). However, that purpose is achieved by the Manager only agreeing to be liable to the Claimants for any claims which are not time-barred as against the Former Manager when they are brought. That leaves the Claimants no worse off from the change in manager. But, if the Manager was to agree to be liable to the Claimants for claims against the Former Manager which would have been time-barred when brought, then that would put the Claimants in a much better position, rather than merely leaving them no worse off. The Claimants did not advance any reason as to why the parties would have intended such a result.

139. Reverting to the language of clause 7.12, the Claimants' argument in effect requires the phrase "*recoverable at law*" to be subject to a gloss as meaning "*recoverable at law when this deed was executed*". However, in my judgment, there is no basis for any such gloss to be read into clause 7.12. Similarly, I do not consider that the language at the end of clause 7.12, "*however and whenever the same may arise or have arisen"*, assists the Claimants for these purposes. This language emphasises the breadth of the claims which are capable of falling within the scope of clause 7.12, but it does not qualify the "*recoverable at law*" requirement which appears earlier in the clause.

140. I accept that, applying the guidance given in *Easyair*, I should only proceed to deal with this point in the context of an application for summary judgment if I am satisfied that there was before the court all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument. In the present case, I am so satisfied. In my judgment, the language of clause 7.12 is not ambiguous but, in any event, I was not taken to any factual matrix material which might be relevant to the construction exercise and support a different interpretation. Nor was there evidence to suggest that such material is likely to exist and would be available at trial.

141. In these circumstances, I am able to conclude that the Claimants have no real prospect of establishing that the effect of clause 7.12 of the 2014 Management Deeds is to render the Manager liable for claims against the Former Manager which became time-barred prior to the issue of the Part 7 Claim.

**The Application to Amend in the form of the Draft APOC**

142. I turn to the application to amend the existing POC in the form of the Draft APOC.

143. There are a large number of proposed amendments, although it has transpired that a number of them are now uncontroversial as between the Claimants, the Soho Defendants and the Begbies Defendants. I was provided with a helpful table which summarised the position in relation to each proposed amendment. New Core 1 and New Core 2 had not engaged with this exercise, as their position is that the Part 7 Claim should be struck out or dismissed against them in its entirety, and that the proposed amendments seeking to advance knowing receipt claims against them should not be permitted. I give permission for the amendments which are not opposed between the Claimants, the Soho Defendants and the Begbies Defendants, and which do not relate to the amendments sought to be introduced in relation to New Core 1 and New Core

2. I address below the points which were the subject of opposition and argument.

144. CPR 17.1(2)(b) provides that a party may amend a statement of case which has been served with the permission of the court. CPR 17.4 applies where an application for such permission is made and a period of limitation has expired. CPR 17.4(2) provides that:

> "*The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings*."

145. This rule reflects the terms of section 35 of the LA 1980.

146. It was common ground between the parties that the approach to be taken to CPR 17.4(2) was that set out by the Court of Appeal in *Geo-Minerals GT Limited v Downing* [2023] EWCA Civ 648 at paragraph 25 per Males LJ:

(1) Stage 1: is it reasonably arguable that the opposed amendments are outside the applicable limitation period?

(2) Stage 2: did the proposed amendments seek to add or substitute a new cause of action?

(3) Stage 3: does the new cause of action arise out of the same or substantially the same facts as are already an issue in the existing claim?

(4) Stage 4: should the Court exercise its discretion to allow the amendment?

147. As to the second stage, the Court of Appeal in *Geo-Minerals* cited with approval the judgment of Stephen Morris QC in *Diamandis v Wills* [2015] EWHC 312 (Ch):

> "*(1) The 'cause of action' is that combination of facts which gives rise to a legal right; (it is the 'factual situation' rather than a form of action used as a convenient description of a particular category of factual situation …*
>
> *(2) Where a claim is based on a breach of duty, whether arising in contract or tort, the question whether an amendment pleads a new cause of action requires comparison of the unamended and amended pleading to determine (a) whether a different duty is pleaded (b) whether the breaches pleaded differ substantially and (c) where appropriate the nature and extent of the damage of which complaint is made … (Where it is the same duty and same breach, new or different loss will not be new cause of action. But where it is a different duty or a different breach, then it is likely to be a new cause of action).*
>
> *(3) The cause of action is every fact which is material to be proved to entitle the claimant to succeed. Only those facts which are material to be proved are to be taken into account; the pleading of unnecessary allegations or the addition of further instances does not amount to a distinct cause of action. At this stage, the selection of the material facts to define the cause of action must be made at the highest level of abstraction. …*
>
> *(4) In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading …*
>
> *(5) The addition or substitution of a new loss is by no means necessarily the addition of a new cause of action … Nor is the addition of a new remedy, particularly where the amendment does not add to the 'factual situation' already pleaded …*"

148. In relation to element (3) of this summary, I was also referred to what Tomlinson LJ had said in *Co-operative Group Ltd v Birse Developments Ltd* [2013] BLR 383 at paragraph 20:

> "*In the quest for what constitutes a "new" cause of action, ie a cause of action different from that already asserted, it is the essential factual allegations upon which the original and the proposed new or different claims are reliant which must be compared. Thus "the pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action" – see Paragon Finance plc v D B Thakerar and Co (a fi rm) (CA) [1999] 1 All ER 400 at 405 per Millett LJ. "So in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading" – see per Robert Walker LJ in Smith v Henniker-Major and Co (a fi rm) [2003] Ch 182 at 210.*"

149. I was also referred to *D&G Cars Limited v Essex Police Authority* [2013] EWCA Civ 514 where Briggs LJ pointed out that a new allegation of intentional misconduct will involve the introduction of a new claim: see paragraphs 58 to 64.

150. Similarly, as to the third stage, the Court of Appeal also cited with approval the statements made by Mr Morris QC in paragraph 49 of *Diamandis v Wills*:

> *"As regards Stage 3, ('arising out of the same or substantially the same facts') a number of points emerge, particularly from Ballinger at [34] to [38]:*
>
> *(1) "Same or substantially the same" is not synonymous with "similar".*

*(2) Whilst in borderline cases, the answer to this question is or may be substantially a 'matter of impression', in others, it must be a question of analysis …*

*(3) The purpose of the requirement at Stage 3 is to avoid placing the defendant in a position where he will be obliged, after the expiration of the limitation period, to investigate facts and obtain evidence of matters completely outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.*

*(4) It is thus necessary to consider the extent to which the defendants would be required to embark upon an investigation of facts which they would not previously have been concerned to investigate … At Stage 3 the court is concerned at a much less abstract level than at Stage 2; it is a matter of considering the whole range of facts which are likely to be adduced at trial …*

*(5) Finally, in considering what the relevant facts are in the original pleading a material consideration are the factual matters raised in the defence …"*

151. It follows that one of the key questions is whether the amendment if allowed would require the defendant to investigate facts and obtain evidence of matters outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.

152. I was also referred to the Court of Appeal decision in *Mulalley v Martlet Homes Ltd* [2022] EWCA Civ 32 where Coulson LJ also emphasised that, for these purposes, "*substantially the same*" is not synonymous with "*similar*" (paragraph 50), but also said that ultimately the observations made in the cases

could not be a substitute for applying the words of section 35 LA 1980 and CPR 17.4(2).

153. The authorities also indicate that amendments which make new allegations about a defendant's state of mind may well mean that the new claim does not arise from the same or substantially the same facts as are already in issue: see in particular *Paragon Finance* at 418g-h per Millett LJ and 420d-g per Pill LJ.

154. Finally, as to stage four, the court's discretion is not to be lightly or routinely exercised: see *Fattal v Walbrook Trustees* [2010] EWHC 2767 (Ch) at paragraph 41 per Lewison J.

The Correct Approach

155. There are in addition some further points which require to be addressed at the outset which arise out of the inter-relationship between the applications to strike out and/or for summary judgment in relation to the Part 7 Claim, and the application to amend made in reliance on CPR 17.4.

156. First, the question of whether CPR rule 17.4(2) is capable of being engaged in circumstances where the existing claims have been struck out or dismissed against the relevant defendants. In this respect, it is clear from the decision of the Court of Appeal in *Libyan Investment Authority v King* [2021] 1 WLR 2659 that CPR 17.4(2) only permits a new cause of action to be pleaded where it arises out of the same or substantially the same facts "*as are already in issue on any claim previously made in the original action*" (see [36]-[39] per Nugee LJ referring to *Goode v Martin* [2002] 1 WLR 1828, and section 35(5)(a) LA 1980). In the *Libyan Investment Authority* case that caused a difficulty because the Judge at first instance had already made an order striking out the particulars of claim prior to the amendment application being made. However, no similar difficulty arises in the present case. This is because, although I have reached the conclusion, for the reasons set out above, that claims in the Part 7 Claim should be struck out or dismissed, those conclusions were subject to the

possibility of an application to amend being made by the Claimants. Further, no order striking out or dismissing any part of the Part 7 Claim has yet been made prior to my consideration of the amendment application.

157. Second, the question, raised by CPR rule 17.4(2), of whether the claim in respect of which permission to amend is a new claim falls to be assessed by reference to those existing pleaded causes of action which are viable: see *Paragon Finance* per Millett LJ at 406f referred to above. As such, if an existing claim is to be struck out or dismissed as not being viable, then a further formulation of the claim sought to be introduced by way of amendment will be a "*new claim*" for CPR 17.4(2) purposes. I did not understand Ms Addy to dispute this point.

158. Third, related to this, when assessing whether an amendment introduces a "*new claim*" it is necessary to assess the position by reference to the existing particulars of claim, rather than the claim form. This is clear from the decision of the Court of Appeal in *Chandra v Brooke North* [2013] EWCA Civ 1559 at paragraph 92:

> "*On the other hand once the claimant serves particulars of claim on a defendant, he pins his colours to the mast as against that defendant. Particulars of claim are normally narrower in their scope than the original claim form. Those particulars then constitute the ongoing claim against that defendant. If the claimant applies to amend as against that defendant, what the court has to do is to compare the original particulars of claim with the proposed amendments. If the claimant is seeking to add a new claim after expiry of the limitation period, he cannot escape from the tentacles of s 35(3) to (5) of the 1980 Act by relying upon the broad wording contained in his original claim form*."

159. Ms Addy sought to argue that this reasoning only applied where the wording in the original claim form was "*wide*", whereas she said that the terms of the Claim Form in the Part 7 Claim in the present case were "*narrow*". I would

not accept that as a characterisation of the Claim Form in the present case; it seems to me that, as is not infrequently the case, it was broadly drafted to cover a large number of claims against various defendants. But, in any event, I do not agree that this is a valid gloss on Jackson LJ's statement. It appears to me that Jackson LJ was making a general point that, once a claimant has served a particulars of claim, then he has pinned his colours to that particular mast so that it is the particulars of claim which is then relevant for assessing whether a subsequent amendment seeks to introduce a "*new claim*" for CPR 17.4(2) purposes.

160. Ms Addy also pointed out that in the *Libyan Investment Authority* case Nugee LJ had said that the comparison exercise required by CPR 17.4(2) could be done with the claim form alone (paragraph 62 of the judgment). However, in those comments, Nugee LJ was clearly contemplating a situation where the claim form was all that was available. As such, I do not consider that this detracts from Jackson LJ's statement as to the correct approach to be taken where a particulars of claim has in fact been served. Mr Grant also pointed out that the approach explained by Jackson LJ in *Chandra* has been subsequently applied in a number of other cases: *Re One Blackfriars Ltd* [2019] EWHC 1516 at [36]; *Tulip Trading Ltd v Bitcoin Association for BSV* [2022] EWHC 667 (Ch) at [117]; *URS Corporation Ltd v BDW Trading Limited* [2023] EWCA Civ 772 at [3] and footnote 2; *CCP Graduate School Ltd v Natwest Bank* [2024] EWHC 581 (KB) at [43].

161. Accordingly, I conclude that, for the purposes of assessing whether the amendments seek to introduce "*new claims*" for CPR 17.4(2) purposes the comparison exercise is to be carried out with the POC in the existing Part 7 Claim.

162. Fourth, there is then a question as to how the question of whether any new claim arises out of the same facts or substantially the same facts as are already in issue is to be approached in circumstances where there are other defendants to the existing proceedings. Ms Addy submitted that the wording of CPR

17.4(2) did not limit this assessment to facts already in issue between the claimants and the relevant defendants who were the subject of the application to amend, but could extend to facts already in issue in the existing proceedings between the claimants and other defendants. This submission is also supported by the language of section 35(5)(a) which refers to the "*facts as are already in issue on any claim previously made in the original action*". It also supported by obiter dicta of Warren J in *Tetra Pak Ltd v Biddle & Co (a firm)* [2010] 1 WLR 1466 at paragraph 77:

> "*However, it is, I think, correct that account can be taken in the present case of what is pleaded in the original particulars of claim against the fourth and fifth defendants in determining whether the claim (on this hypothesis, a new claim) against Biddle & Co made in the proposed amended particulars of claim arises out of substantially the same facts and matters as the claim against the fourth and fifth defendants*."

163. Mr Grant sought to argue that the dicta of Warren J were only obiter, that the reasoning had been doubted by Jackson LJ in *Chandra*, and that the case cited in support of the relevant submission in *Tetra Pak* (*Charles Church Developments Ltd v Stent Foundations Ltd* [2007] 1 WLR 1203) was not on point. I accept the first point, but it does not mean that the dicta were wrong. As to the second point, it does not seem to me that in *Chandra* Jackson LJ was addressing this part of the reasoning in *Tetra Pak*, but rather he was expressing reservations about Warren J's analysis on a different point, namely, his treatment of the decision in *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* 33 BLR 77 (see paragraph 90 of *Chandra*). As to the third point, it seems to me that *Charles Church Developments* was relevant and supportive of Warren J's dicta since in that case Jackson J (as he then was) held that where a claimant had brought a claim against two defendants, then it was open to the claimant to rely on the facts put in issue by the defence of the first defendant for the purposes of contending that an amendment against the second defendant should be permitted under CPR 17.4(2) as arising out of the

same or substantially the same facts as already in issue (see paragraph 41 of *Charles Church*).

164. Moreover, Mr Grant's submissions did not address the relevant language in CPR 17.4(2) or section 35(5)(a) which is not limited to the facts in issue between the claimants and the defendant in relation to whom the amendment is sought to be made. However, there is a question as to how the approach advocated by Ms Addy is to be reconciled with the Court of Appeal's approval in *Geo-Minerals* of part of the test as being whether the amendment, if allowed, would require the defendant to investigate facts and obtain evidence of matters outside the ambit of and unrelated to the facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim. This is because it may well be reasonable for a defendant to existing proceedings not to have investigated facts which were not in issue between itself and the claimant, but which were in issue between the claimant and other defendants.

165. I did not receive any submissions on this issue. It seems to me that there is a degree of tension on this point in the existing authorities. In the circumstances, I consider that the best course for present purposes is to allow the benefit of doubt to the Claimants and to approach the matter on the basis that the assessment of whether any new claim arises out of the same or substantially the same facts as already in issue is to be carried out by reference to all the facts in issue in the existing proceedings between the Claimants and all of the Defendants.

166. Fifthly, for these purposes, I will also treat as part of the original claim those amendments (set out below) which I have decided to allow and which are not dependent on CPR 17.4(2) (see *Secretary of State for Transport v Pell Frischmann Consultants Ltd (No 2)* [2006] EWHC 2909 (TCC) at [38(v)]). (As noted above, this does not include any amendments which affect the position of New Core 1 and New Core 2.)

167. Finally, there is the question of limitation. It was accepted by Ms Addy that, if I was to conclude that an existing claim made in the Part 7 Claim was time-barred, then it would not be possible to introduce a differently formulated version of the same claim by way of amendment under CPR 17.4(2). This is because, even if the new claim was deemed to have commenced on the same date as the original action by reason of section 35(1)(b) of the LA 1980, it would still be time-barred and thus be liable to be dismissed. In these circumstances, the court would be bound to refuse the amendment as having no real prospect of success.

168. Having dealt with those points of principle, it is necessary to turn to the particular amendments.

Amendments opposed by the Begbies Defendants

169. It is convenient to group the opposed amendments together by reference to those which were opposed by the particular groups of Defendants. So far as the Begbies Defendants are concerned, their opposition focused on some specific amendments sought to be made by the Claimants. For these purposes, the Claimants accepted that Stage 1 of the *Geo-Minerals* analysis was met i.e. it was reasonably arguable that the opposed amendments were outside the applicable limitation period.

*Paragraphs 19E(4)-(5) and 85D*

170. The proposed amendments in paragraphs 19E(4) and (5) relate to advice provided by an entity called Matrix Corporate Capital LLP ("**Matrix CC**") and the role undertaken by another entity, Matrix Securities Limited ("**Matrix Securities**"). The specific amendments objected to are proposed pleas that Matrix CC entered into creditors' voluntary liquidation in January 2013 with Mr Mather and Kirsty Provan of Begbies appointed as liquidators and that in July 2023 Matrix Securities entered into liquidation with Mr Mather and Ms Provan as liquidators.

171. These amendments appear to be linked to a later proposed amendment in paragraph 85D. This pleads the close relationship between Begbies and the Manager said to have been built up through multiple appointments and the anticipation of future appointments. It is said that this relationship caused the Former Liquidators to fail to apply a proper degree of scrutiny to the transfers of the Claimants' assets. The relevant part of paragraph 85D reads as follows:

> "*The Claimants' aver that Begbies' close relationship with the Manager, built up through multiple appointments before the Claimants' liquidations and in anticipation of further appointments after the Claimants' liquidations, caused them to fail to apply a proper degree of scrutiny to the transfer of the Claimants' assets to Manager-connected entity in the MVL.*"

172. In my judgment, the proposed amendment in paragraph 85D does seek to introduce a new claim. In particular, it seeks to allege for the first time that the Former Liquidators failed to discharge their duties properly because of the alleged close relationship which they had with the Manager. It is thus a serious allegation of intentional or reckless breach of duty rather than of mere negligence. No such allegation is contained in the existing POC.

173. Moreover, the proposed new claim does not arise out of the same or substantially the same facts as already pleaded. To the contrary, it is a new allegation of intentional or reckless wrongdoing, whereas the existing allegations against the Former Liquidators are not of this nature. It therefore raises new questions as to the knowledge and state of mind of the Former Liquidators. In addition, it is also apparent that it is intended to be based on a survey of all other appointments which the Former Liquidators and their firm took where there was a connection with the Manager. This is clearly a new area of inquiry.

174. In this respect, although Ms Addy pointed out that Mr Fry had previously been directed to provide a witness statement in response to an application under

sections 235 and 236 of the Insolvency Act 1986 setting out details of the previous appointments taken by Begbies where the Manager had been involved, this does not mean these facts are already in issue in the claim for the purposes of CPR 17.4(2).

175. I therefore consider that the proposed amendment in paragraph 85D does not fall within CPR 17.4(2).

176. I also consider that the amendment in paragraph 85D is objectionable for two further reasons. The first is that the allegation made in paragraph 85D is not followed through in relation to the allegations of breach made in paragraphs 155 of the Draft APOC. As such, on the proposed draft pleading, this is a further reason to reject the amendment, although noting that, if this was the only objection, it might have been capable of being cured by a revision to the draft amended pleading. The second is that Ms Addy accepted in the course of her submissions that there was no allegation being made of a conflict of interest such that the Former Liquidators should not have accepted the appointment. In my judgment, that acceptance is inconsistent with the allegation sought to be advanced by way of paragraph 85D.

177. Once the amendment in paragraph 85D is refused, the proposed amendments in paragraph 19E(4) and (5) appear to have no purpose or relevance and so fall to be refused for that reason.

178. For these reasons, I refuse permission for the proposed amendments in paragraphs 19E(4) and (5) and 85D of the Draft APOC.

*Paragraphs 48A and 48B, 155(2)(g)-(j)*

179. Paragraph 48A purports to plead what are said to be significant disparities in a discount applied by BTG as part of its valuation of the investments held by the Claimants and by New Core 1 (the "**BTG Valuation Review**"). It is said that a lower discount was applied to the investments held by New Core 1 when

compared with those held directly by the Claimants. Paragraph 48B pleads a point as to the true discount recorded in respect of the Claimants' investment in Allied.

180. In the course of argument, I pointed out to Ms Addy that the formulated pleading in respect of paragraph 48A did not make sense. This is because the opening words of the plea suggested that a point was being made as to a level of discount applied by BTG as part of a valuation which it had produced. In fact, the analysis contained within the plea was directed at a different point, namely, the levels of discount inherent in the offer of £48 million when compared to the Manager's valuations of the relevant assets. This analysis does not concern any type of discount "*applied*" by BTG in producing any valuation of its own. In light of these observations, Ms Addy confirmed that the proposed amendment in paragraph 48A was not being pursued by the Claimants.

181. So far as paragraph 48B is concerned, I agree with the Claimants that this amendment does not introduce a new claim. It is already pleaded that the sale of the Claimants' assets to New Core 2 was at an undervalue and that the BTG Valuation Review was not an adequate or reliable valuation (see paragraph 155(2) of the POC). The new matters sought to be relied on are further particulars of that existing pleaded breach, as can be seen from the new sub-paragraph (g) which is sought to be added as an additional particular of the existing breach pleaded in paragraph 155(2). Even if the amendment did introduce a new claim, then that claim would in any event arise out of the same or substantially the same facts as already pleaded since the BTG Valuation Review is already in issue as is the question of whether the sale to New Core 2 was at an undervalue. I therefore consider that the amendment in paragraph 48B would in any event fall within CPR 17.4(2).

*Paragraphs 50A and 50B*

182. These paragraphs introduce further particulars around the structuring of the sale to New Core 2. As explained by Ms Addy, they are intended to pre-empt any

arguments that the Claimants had no control over the sale process or that other parties agreed to or acquiesced in the discount applied to the relevant investments. Ms Addy said that these points could in fact possibly be left to a reply. I agree that these amendments do not introduce any new claim; they are defensive in nature designed to counter possible arguments raised by the Defendants. Even if they did raise a new claim, they would arise out of the same or substantially the same facts as already pleaded. I therefore consider that these amendments would also fall within CPR 17.4(2).

*Paragraphs 55 to 55H, 60*

183. These paragraphs introduce new details about correspondence which took place between shareholders and the Manager and Former Liquidators. I agree with the Claimants that these paragraph 55A and 55B are further particulars of the existing pleading in paragraph 55 that concerns were expressed by shareholders about the conduct of the Former Manager and Manager and the way in which the Claimants' investments were sold to New Core 2. They do not introduce a new claim.

184. The position is however different in relation to the amendments in paragraphs 55C to 55H and 60 since the matters pleaded in these paragraphs post-date the 2015 Transfer. A similar point arises in relation to the language "*after the transfer*" contained at the end of the new proposed paragraph 155(5B). Ms Addy accepted that these matters would likely only be relevant for limitation purposes, and that they could therefore be pleaded by way of reply. In my judgment, the appropriate course is to refuse permission for these amendments, on the basis that it will be open to the Claimants to plead these matters by way of reply to any defences served by the Defendants insofar as those defences raise limitation arguments to which these matters are relevant.

*Paragraph 81*

185. It was agreed by the Claimants and the Begbies Defendants that permission to amend was not being sought in respect of sub-paragraph 81(5) and that the question of permission to amend in relation to the other proposed amendments to paragraph 81 should be deferred pending judgment on the preliminary issue.

*Paragraphs 108C and 108D, 154A*

186. Proposed new paragraphs 108C and 108D relate to the position of Allied. They plead that Allied International was placed into creditors' voluntary liquidation in January 2015, with Ms Provan and Gary Shankland of Begbies appointed as liquidators. Paragraph 108D also pleads a transaction which took place by which Allied International sold its interest in its US subsidiary to Allied. It is said that this matter supports an inference that the Former Liquidators knew of the Manager's propensity to enter into connected party and preferential transactions at the time of their appointment as liquidators of the Claimants in April 2015, and therefore should have applied a higher degree of scrutiny to the Manager's proposed transaction. It is also said that the Former Liquidators knew or ought to have known that the US subsidiary of Allied International alone was valued at £7.271 million at the time of its acquisition by Allied in November 2014, undermining the Manager's valuation of the Allied investment (of approximately £6.4 million as at the 31 January 2015) in the 2015 Transfer.

187. Proposed new paragraph 154A in effect repeats the allegation that the Former Liquidators knew or ought to have known from their involvement in the Allied liquidation about what is said to have been the Former Manager's propensity to enter into connected party transactions. In its original form, it also alleged that this should also have been apparent from Begbies' role in the liquidation of Pureleaf. However, Ms Addy confirmed in the course of argument that the reference to Pureleaf in this proposed amendment should be excised.

188. In my judgment, these proposed amendments do not introduce a new claim. The Claimants expressly disavow asserting any freestanding claim against

Begbies in relation to its role in the liquidation of Allied International. The matters are pleaded as being relevant to the knowledge of the Former Liquidators and the approach that they should have taken to the valuation of the Allied investment for the most part in the context of claims which are already pleaded. Even if these amendments did raise a new claim, then it seems to me that they would arise out of the same or substantially the same facts as already pleaded so as to fall within CPR 17.4(2). I deal separately below with the proposed new paragraph 155(5C).

*Paragraph 155(5A)-(5C)*

189. These sub-paragraphs seek to introduce new allegations of breach of duty by the Former Liquidators as to:

(1) their reliance on the views of the New Investors as to the value of the assets in New Core 1;

(2) their alleged failure to take into account or give appropriate weight to the numerous concerns about conflicts of interest and the possibility of a related party transaction raised by shareholders, both before and after the transfer;

(3) their failure to apply a heightened level of scrutiny to the transaction, given their knowledge of the Manager's conduct arising from the prior liquidations and administrations of the investee assets in which they were involved.

190. As a matter of the structure of paragraph 155 of the Draft APOC, these sub-paragraphs introduce new allegations of breach of duty, although no new duties or loss are alleged. The authorities suggest that a new allegation of breach is likely to amount to a new cause of action. However, this is not necessarily the case since it is always a question of fact and degree: see *Diamandis v Will*s [2015] EWHC 312 (Ch) per Stephen Morris QC at [48(2)] ("*where it is … a*

*different breach, then it is likely to be a new cause of action*"); and *Secretary of State for Transport v Pell Frischmann Consultants Limited (No 2)* [2006] EWHC 2909 (TCC) per Jackson J at [38(ii)] ("*If the claimant alleges a different breach of some previously pleaded duty, it will be a question of fact and degree whether that constitutes a new claim*").

191. As to the question of fact and degree, in the present case, the proposed new allegations of breach arise in the context of other existing alleged breaches which relate to the sale of the Claimants' assets to New Core 2 at, it is alleged, an undervalue. On balance, I think that the better view is that paragraphs 155(5A) and (5B) (subject in the latter case to the excision of the words "*after the transfer*" as mentioned above) are sufficiently related to the existing alleged breaches regarding the sale at an alleged undervalue, and the reliance on the BTG Valuation Review that they do not constitute new claims. Even if they did, they would arise out of the same or substantially the same facts as already in issue so as to fall within CPR 17.4(2). As to this, the investment made by the New Investors in New Core 1 is already pleaded, and the question of the views of the New Investors as to the value of that investment and the Former Liquidators' reliance on such views is only a very modest additional area of inquiry.

192. The position in relation to paragraph 155(5C) is more difficult. On its face, it is very broadly drafted. As such, in its current form I consider that it does not fall within CPR 17.4(2) as it raises a new claim which does not arise out of the same or substantially the same facts as already pleaded. However, the underlying particulars in the Draft APOC are limited to the liquidation of Allied (see paragraphs 108C and 108D, 154A). If paragraph 155(5C) was expressly restricted to these matters, then I consider that in this amended and more limited form it would either not introduce a new claim or would fall within CPR 17.4(2).

<u>Amendments opposed by the Soho Defendants</u>

193. I turn to the amendments opposed by the Soho Defendants. For these purposes, the Claimants again accept that Stage 1 of the *Geo-Minerals* analysis is met i.e. it was reasonably arguable that the opposed amendments were outside the applicable limitation period.

*Paragraphs 63(4A), 109-110B and Appendix C*

194. These amendments relate to the topic of the alleged charging of excessive fees. Paragraph 63(4A) seeks to plead a new provision, clause 3.14, of the Management Deed dated 11 October 2005. Paragraphs 109 to 110B and Appendix C then plead the claims in relation to what is said to have been the charging of excessive fees. In the course of argument, Ms Addy confirmed that the Claimants were not pursuing permission to amend in relation to sub-paragraphs 109(5)-(10) of the Draft APOC.

195. As a starting point, it is clear that the new, proposed claim differs from that which has been pleaded to date. The existing pleaded claim in relation to the charging of excessive fees focussed on the receipt by the Former Manager and Manager of fees from the companies and funds in which the Claimants were invested. However, through the amendments, that claim is now proposed to be abandoned, and replaced with new claims that: (a) the annual operating costs charged to the Claimants by the Former Manager and the Manager were in excess of a cap, set out in the prospectuses, of 1.5% of the funds raised by the Claimants, such excess said to be £1,889,546, and (b) the fees charged to the Claimants by the Former Manager in relation to the costs of the share issuances were in excess of a cap of 5.5% of the gross proceeds of the offer imposed by clause 3.4 of the 2005 and 2006 Management Deeds, such excess said to be £994,190. This latter claim therefore also depends on the introduction of the new plea of clause 3.4 of the 2005 Management Deed sought to be introduced in the new paragraph 63(4A).

196. In my judgment, these are clearly new claims. They are based on different provisions of the prospectuses and the Management Deeds, claim different

amounts, relate to different time periods and have a different legal basis to the existing pleaded claims. Overall, there has been a change from a claim based on the remuneration said to have been earned by the Manager and the Former Manager from the investments made by the Claimants to a challenge based on the charging of operating costs to the Claimants themselves, and the charging of costs relating to the share issuances.

197. Moreover, I consider that these claims do not arise out of the same or substantially the same facts as already pleaded. Although the issue of excessive charging has in general terms already been put in issue, the new claims raise new and material fields of inquiry as to the operating costs charged and the effect of the relevant provisions of the prospectuses, and the issue costs charged, and the effect of Clause 3.4 of the 2005 and 2006 Management Deeds. Amongst other things, the new claims now go back to 2005 rather than 2009. The amendments would raise material new areas of factual inquiry for the Soho Defendants. I therefore consider that these amendments fall outside CPR 17.4(2).

198. For completeness, I should record that I would not have rejected these amendments for the other reason advanced by the Soho Defendants, namely, that they were not properly particularised.

*Paragraphs 85B to 85D*

199. Paragraphs 85B and 85C plead certain contentions as to the control which it is said that the Former Manager and Manager exercised over the Claimants' investments. In addition, paragraph 85D, which I have already dealt with, pleads the involvement of Begbies in other appointments.

200. As to paragraphs 85B and 85C, Ms Addy explained that these were intended to be a summary of existing claims, rather than the introduction of anything new. However, that begs the question of why the summary is required if it is not adding anything additional. Moreover, paragraph 85C appears to make

substantive allegations against the Former Manager and Manager of misuse of control and of enrichment which are cast in very general terms. In the circumstances, I refuse permission for these amendments as a matter of discretion. In my judgment, such a summary is likely to hinder rather than assist, and the Claimants should rely on the other paragraphs of the Draft APOC which advance the specific allegations made against the Former Manager and Manager.

*Paragraph 108B*

201. Paragraph 108B introduces a new claim for an account of the profits said to have been derived by the Former Manager and Manager from their breaches of fiduciary duty and breach of trust. The objection by the Soho Defendants relates to the reference to the Former Manager, since they say that the effect of clause 7.12 of the 2014 Management Deeds was not to render the Manager liable for any remedy of account of profits which would lie against the Former Manager. A similar point also arises in relation to paragraph 110B (which has already been dealt with in the context of the proposed amendments relating to excessive fees discussed above).

202. The terms of clause 7.12 have been set out above. Under that clause, the Manager agreed to be liable to the Company "*for any loss or damage suffered or incurred by the Company recoverable at law arising out of any negligence, default or breach by [the Former Manager] …*". In my judgment, this language is clearly inapt to capture a remedy of account of profits since this remedy is not based on any loss or damage which was suffered by any of the Claimants but rather on profits said to have been earned by the relevant Defendant. It is therefore not subject to the same requirements as a claim for damages or equitable compensation for loss or damage which has been suffered (see *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10).

203. Ms Addy pointed out that the profits and losses may be two sides of the same coin in the sense that profits earned by a defendant may have been at the

expense of a corresponding loss caused to the claimant. That may well be the case, but it does not alter the fact that the remedies of accounts of profits and damages and equitable compensation are different and that, fundamentally, the remedy of account of profits is not based on loss or damage suffered by any of the Claimants. In my judgment, the Soho Defendants are therefore correct to say that by clause 7.12 of the 2014 Management Deeds the Manager was not agreeing to be liable for any remedy of account of profits which is or might have been available against the Former Manager. I therefore refuse permission for the proposed amendment in paragraph 108B insofar as it relates to the Former Manager, but give permission for the remainder of paragraph 108B. I would also have refused permission for the account of profits claim in relation to the Former Manager in paragraph 110B. As noted above, I have in any event concluded that the amendments of which paragraph 110B forms part do not satisfy the requirements of CPR 17.4(2).

Amendments opposed by New Core 1 and New Core 2

204. I turn to the specific amendments opposed by New Core 1 and New Core 2. For these purposes, the Claimants again accept that Stage 1 of the *Geo-Minerals* analysis is met i.e. it is reasonably arguable that the opposed amendments are outside the applicable limitation period.

205. The relevant paragraphs of the Draft APOC are paragraphs 130C to 130F and then paragraphs 158B to 158D. These plead claims in knowing receipt against New Core 1 and New Core 2 in relation to the 2011 and 2015 Transfers.

206. As set out above, I have already concluded the existing Part 7 Claim falls to be struck out against New Core 1 and New Core 2 because the relief which is pleaded against those defendants in the prayer to the POC is not supported by the pleading, and there is no claim of knowing receipt in relation to the 2011 or 2015 Transfers which is pleaded. As noted above, it was not contended that this meant that CPR rule 17.4(2) was inapplicable in relation to the proposed amendments at paragraphs 130C to 130F and paragraphs 158B to 158D of the

Draft APOC since it was accepted that the amendments could still be said to have the effect of "*adding*" or "*substituting*" a new claim, notwithstanding my earlier conclusions on the strike out of the Part 7 Claim since the Court's order to that effect has not yet been made and thus New Core 1 and New Core 2 remain parties to the existing Part 7 Claim. However, Mr Grant contended that my decision on the strike out of the Part 7 Claim is highly relevant when it comes to the application of CPR 17.4(2), both in relation to the question of whether the amendments introduce a new claim and whether they arise out of the same or substantially the same facts as are already in issue.

207. So far as the former is concerned, it is clear to me that the proposed amendments do introduce a new claim. On the basis of my conclusions above, the existing Part 7 Claim does not plead any knowing receipt claim, and certainly no viable knowing receipt claim, against New Core 1 and New Core 2 in relation to the 2011 and 2015 Transfers. Moreover, for these purposes, it is clear that it is necessary to examine what is pleaded in the particulars of claim rather than in the claim form itself: see *Chandra v Brooke North (a firm)* at paragraph 92.

208. As such the wording in the Claim Form for the Part 7 Claim (which I do not think in any event assists the Claimants for the reasons set out above) cannot in any event assist them in this context since it is necessary to focus on what is pleaded in the POC in the Part 7 Claim. It follows that the amendments, which now seek to introduce such a claim, involve the introduction of a new claim for the purposes of CPR 17.4(2).

209. The question then is whether the new claims arise out of the same or substantially the same facts as already in issue. As explained above, I approach this on the footing that the facts already in issue extend to the facts already in issue in relation to other Defendants, as well as New Core 1 and New Core 2.

210. As noted above, the existing POC does not contain two key allegations which are essential to the new claims of knowing receipt in relation to the 2011 and

2015 Transfers: (a) the receipt by New Core 1 and New Core 2 of property in which the Claimants had a continuing equitable proprietary interest; and (b) the alleged knowledge of New Core 1 and New Core 2 when receiving such property, including the attribution of the knowledge of other Defendants to New Core 1 and New Core 2, so as to make New Core 1's and New Core 2's retention of the property unconscionable.

211. So far as the first is concerned, paragraphs 20 and 50 of the POC do plead, in general terms, the transfers of assets to New Core 1 and New Core 2 as part of the 2011 and 2015 Transfers. It may be said that the plea that the Claimants had an equitable proprietary interest in those assets which were received by New Core 1 and New Core 2 is a relatively modest development of this. This is particularly so given that the POC appears to contain an existing plea that the 2011 Transfer and the 2015 Transfer were effected by the Former Manager and the Manager in breach of fiduciary duty: see paragraphs 124 and 143 of the POC.

212. However, in relation to the alleged knowledge of New Core 1 and New Core 2, there is no existing plea that they knew that the property was property which had been transferred in breach of trust or fiduciary duty. Moreover, the proposed amendment does not simply involve amending the pleading so that an existing plea of such knowledge held by other individuals is to be attributed to New Core 1 and New Core 2. The amendment pleads in this respect that the knowledge of Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel as set out in paragraphs 128 and 149 of the Draft APOC is to be attributed to New Core 1/New Core 2 (see paragraphs 130E and 158C). However, paragraphs 128 and 149 do not at present even plead any knowledge of breach of fiduciary duty on the part of those individuals; these allegations of such knowledge on the part of those individuals are *also* sought to be added by way of amendment through the new paragraphs 128(A1) and 149(A1)[4].

[4] It was made clear that New Core 1 and New Core 2 had not consented to the other amendments proposed to be made to the POC.

213. It follows, in my judgment, that the new knowing receipt claims against New Core 1 and New Core 2 do not arise out of the same or substantially the same facts as already in issue in at least two respects: first, they involve a new allegation that the knowledge of Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel is to be attributed to New Core 1/New Core 2; and, secondly, they involve new allegations that Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel knew that the 2011 and 2015 Transfers were effected by the Former Manager and the Manager in breach of fiduciary duty. Whilst the former might be said to be in large part a matter of law, the latter clearly involves a significant new field of factual and evidential inquiry. I also bear in mind the guidance from the Court in *Paragon* that new allegations of intentional wrongdoing are likely to give rise to new factual issues (see paragraph 153 above).

214. For these reasons, I conclude that the amendments proposed to be made in paragraphs 130C to 130F and paragraphs 158B to 158D of the Draft APOC do not satisfy the requirements of CPR 17.4(2).

215. Finally, in relation to the claim made in respect of the 2011 Transfer, I have concluded that the claim made in the existing Part 7 Claim is time-barred and should be dismissed. For this reason also, it would be inappropriate to give permission to amend in respect of this claim since, even taking into account the relation back allowed by section 35(1) of the LA 1980, the claim in relation to the 2011 Transfer would still be time-barred and have no real prospect of success.

The Pureleaf Claim

216. In relation to the Pureleaf claim (paragraphs 108E to 108W and Schedule 3B of the Draft APOC), the Claimants accepted that permission to amend would not be given by the Court. Accordingly, I refuse permission for these amendments. The Claimants originally sought to maintain the Pureleaf claim in the Protective Claim, which claim was the subject of an application to strike out/for summary judgment by the Soho Defendants. However, in the course of

her submissions, Ms Addy confirmed that the Claimants were no longer seeking to maintain the Pureleaf claim in the Protective Claim.

Discretion

217. As noted above, even where the amendments satisfy the requirements of CPR rule 17.4(2) the Court has a discretion as to whether or not to allow the amendments, which is not to be exercised lightly or as a matter of routine. As to this, the Claimants say that the amendments are not "*late*", the passage of time is attributable to the unusual procedural history, no defences have yet been served by any of the Defendants, there is no legitimate prejudice to the Defendants, no one is being "*mucked around*", and there is no prejudice to any trial date. In general, I accept these points. Accordingly, where I have concluded that the amendment does not raise a new claim or satisfies the requirements of CPR 17.4(2), then I am satisfied that I should exercise my discretion to permit the amendment.

218. The exceptions to this are the proposed amendments in paragraphs 130C to 130F and paragraphs 158B to 158D of the Draft APOC. I have already concluded that these amendments do not satisfy the requirements of CPR 17.4(2). However, even if I had concluded that they did satisfy the requirements of CPR 17.4(2), then I would not have allowed these amendments as a matter of discretion.

219. No explanation was provided by the Claimants as to why these claims were not included in the POC. There was no suggestion that any new facts had been discovered between the dates of the POC and the Draft APOC which meant that it was now possible to plead these claims when it had not been possible to do so before. Knowing receipt claims in relation to both the 2011 and 2015 Transfer were included in the POC as against Mr Fakhry, Mr Edwards, Ms Nicoll and Mr Steel, thereby demonstrating that it was possible to plead such claims at the time of the POC.

220. It also seems improbable that knowing receipt claims against New Core 1 and New Core 2 were omitted from the POC by accident. It seems more likely that a deliberate decision was made not to include them. It would follow that the attempt now made to introduce the claims against New Core 1 and New Core 2 by way of amendment represents a change of mind on the part of the Claimants. If this is right, then it might well be a powerful reason against exercising the discretion to permit the amendment: if a claimant simply changes its mind about advancing a claim, then it might well be said that it should not be permitted to benefit from the relation back allowed by section 35(1) of the LA 1980 and should simply have to issue a new claim and have to take the limitation position as it stands at the time of issue of that claim.

221. In any event, in the absence of a clear explanation of the reasons for the change in the Claimants' position, I would not have been minded to exercise my discretion to permit these amendments under CPR 17.4.

The Length of the Draft APOC

222. Finally, various of the Defendants contend that the Draft APOC is excessively long at 124 pages (including appendices) and is in contravention of the Chancery Guide which provides (at paragraph 4.4) that a statement of case should be no longer than necessary, should not generally exceed 25 pages and, save in exceptional circumstances should not exceed 40 pages.

223. In my judgment, this would not be a reason to refuse permission to amend. At the time that the POC were served, the Chancery Guide did not contain any page limit. The Claimants say that it would have been disproportionate to have started again with a new, shorter APOC. They also say that, in the circumstances of the present case, a particulars of claim in excess of 40 pages is justified given the number of different defendants, the number of claims being advanced on different factual bases and the serious nature of allegations, which are required to be properly particularised. The Claimants also point out

that the Defendants have had the Draft APOC since March 2024 and have been engaging with its substance. I agree with these submissions.

**The Protective Claim**

224. I then turn to the Protective Claim which was issued on 19 July 2024. This is subject to applications for strike out/summary judgment by New Core 1/New Core 2, the Soho Defendants and the Begbies Defendants.

The Begbies Defendants' Application

225. There was before the Court an application by the Begbies Defendants dated 13 February 2025 for the striking out of and/or summary judgment on the Protective Claim. However, in the course of her oral submissions, Ms Addy confirmed that the Claimants were not now seeking to rely on the Protective Claim as against the Begbies Defendants. As such, it is common ground that the Protective Claim should be struck out against the Begbies Defendants. For this reason, it is not necessary to consider the application made by the Begbies Defendants any further.

Application by New Core 1/New Core 2

226. For the reasons already explained in relation to the existing Part 7 Claim (in relation to the claims in respect of the 2011 Transfer), the claims in the Protective Claim against New Core 1 and New Core 2 in respect of both the 2011 Transfer and the 2015 Transfer are time-barred and therefore fall to be summarily dismissed.

Application by the Soho Defendants

227. In relation to the Protective Claim in relation to the Soho Defendants, the allegations which I have already determined in relation to the Part 7 Claim are

to be struck out or dismissed likewise fall to be struck out or dismissed from the Protective Claim.

228. As such, in practice, the Protective Claim is only relevant to any allegation against the Soho Defendants which was sought to be introduced by the Claimants to the existing Part 7 Claim but which I determined did not fall within CPR 17.2(4). The principal such claim is the amended excessive fees claim pleaded in paragraphs 63(4A), 109-110B and Appendix C of the Draft APOC. However, the claim against the Manager is time-barred in relation to any such fees which were incurred more than 12 years prior to 19 July 2024 when the Protective Claim was issued. Based on Appendix C to the Draft APOC, it therefore appears that only a very small amount of such fees may be at issue. I will hear further submissions from Counsel as to the correct order to make in this respect, in the event that the Claimants still seek to pursue the Protective Claim.

229. As noted above, the Claimants originally sought to maintain the Pureleaf claim in the Protective Claim. However, in the course of the hearing, the Claimants confirmed that they were abandoning this claim. As such, this claim would fall to be struck from the Protective Claim in any event.

**Conclusion**

230. I will make orders striking out or granting summary judgment on the Part 7 Claim and the Protective Claim, and for permission to amend the POC, as set out above. I invite counsel to prepare a draft form of order reflecting these conclusions. I will hear further submissions on any consequential issues and the question of what directions are appropriate to be made for the future conduct of these proceedings.

231. In relation to the Applicants' application (in the Insolvency Application) for a direction IR 12.11 for statements of case and for the Draft APOC to stand as Combined Points of Claim, I will make an order that the POC, as amended in

accordance with the terms of this judgment, should stand as the Combined Points of Claim.