Neutral Citation Number: [2021] EWHC 1273 (Comm)

Case No: CL-2017-000323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 May 2021

Before :

MR JUSTICE FOXTON

- -

Between :

(1) THE SERIOUS FRAUD OFFICE **(2) MR JOHN MILSOM AND MR DAVID STANDISH** **(as joint Enforcement Receivers in respect of the realisable property of Gerald Martin Smith)**	**Applicant**
- and -	
HOTEL PORTFOLIO II UK LIMITED (in liquidation) and others	**Respondent**

- -
- -

Daniel Saoul QC, Tim Akkouh and **Richard Hoyle** (instructed by **Harcus Parker Limited** and others) for the First and Second Applicants and the Fifth to Seventh, Tenth and Twenty-First to Twenty-Fifth Respondents ("**the Settlement Parties**")
James Pickering QC and **Samuel Hodge** (instructed by **Spring Law**) for the Twelfth to Fourteen Defendants ("**HPII**")

Hearing dates: 24, 25 and 26 March 2021
Draft Judgment circulated: 26 April 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FOXTON

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18 May 2021 at 10:00 AM.

The Honourable Mr Justice Foxton :

Table of Contents

A. INTRODUCTION

1. This judgment addresses the Settlement Parties' application for an order dismissing:

> "HPII's proprietary claim to the Relevant Property and the IUAs, as advanced in HPII's Revised Statement of Case dated 13 March 2019 (in relation to the Relevant Property) and HPII's Statement of Case dated 3 July 2020 (in relation to the IUAs)",

In the judgment which follows, I will use the phrase "the Relevant Property" to encompass all the property in issue in the Directed Trial.

2. The background to the claims is set out in my judgment in the Directed Trial at [2021] EWHC 1272 (Comm) ("the Directed Trial Judgment"), and the matters said to give rise to HPII's claim are addressed at Section M of that judgment. In this judgment, I use the terms which I have defined in the Directed Trial Judgment.

3. For the purposes of the Settlement Parties' application, it is to be assumed that:

   i) HPII has a claim against Mr Ruhan arising from his breach of the self-dealing rule, by being involved in the purchase of the Hyde Park Hotels from HPII through Mr Stevens as a secret nominee;

   ii) by reason of that breach, the profits made from the subsequent sale and development of the Hyde Park Hotels are held on constructive trust for HPII.

4. The issue to be determined in this application is whether it is arguable that HPII can trace or follow those profits into the Relevant Property.

B. THE TEST TO BE APPLIED

5. I was referred to the frequently quoted summary of the approach to be adopted in determining summary judgment applications set out by Lewison J in Easyair Limited (t/a Openair) v Opal Telecom Limited [2015] EWHC 339 (Ch), [15] and also to the decision of the Court of Appeal in AC Ward & Son Ltd v Catlin (Five) Ltd [2009] EWCA 1098, [34]. Two of the principles identified in those cases are particularly relied upon here:

   i) in deciding whether a claim or defence is arguable, the court must take account not only the evidence actually placed before it on the application for summary judgment, but also "the evidence that can reasonably be expected to be available at trial"; and

   ii) the court should hesitate before making a final decision without a trial, even if there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation of the facts would add to or alter the evidence available at the trial and so affect the outcome of the case.

6. The Settlement Parties supplemented that summary with the judgment of Asplin LJ in Elite Property Holdings Ltd v Barclays Bank [2019] EWCA Civ 204, [40-42] where she stated:

> "40. There was no dispute about the test to be applied in the circumstances of this case. The dispute was whether the Judge had applied it properly or whether he had fallen into error by conducting a mini trial. In any event, it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost.
>
> 41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction ... A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences ...
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon ..."

7. For its part, HPII referred to a number of authorities which addressed the relevance, in a summary judgment context, of the possibility of further material becoming available at trial. In ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725, [14], Moore-Bick LJ observed that "sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial", in which case it would be wrong to give summary judgment. In Lexi Holdings v Pannone and Partners [2009] EWHC 2590 (Ch), Briggs J referred to this passage, and noted that the issue is whether "there is a sufficient prospect that material will become available in time for trial so as to afford the defendants the real prospect of a successful defence" ([4]). He later stated that the question for the court is whether there was a "real prospect" of documents becoming available at trial which will make good the defendant's case, rather than a likelihood ([37]).

8. Of course, a summary judgment application may be brought at a relatively early stage in the life of an action or the wider dispute of which it forms part, before disclosure or evidence gathering is substantially underway, in which context the need for the court to have regard to "the evidence that can reasonably be expected to be available at trial"

will often be a compelling reason why it is not possible to conclude at the summary judgment stage that the claim or defence lacks a realistic prospect of success. On occasions, however, a summary judgment application is brought when the available processes for procuring evidence have already been deployed, with the prospect of anything further becoming available at trial being substantially diminished.

9. This application is being heard over three years after HPII first asserted its claim, after I have heard a two month trial which considered a number of closely related issues involving the same parties, and after completion of the production of evidence in an action commenced by HPII to advance the same claims against two other parties.

C. THE PROCEDURAL BACKGROUND

10. HPII first asserted its entitlement to trace into the Relevant Property in its statement of case served in December 2017. It did so in the most general of terms. It alleged that Mr Ruhan had profited from the Cambulo Transaction (paragraph 48(1)) and that it was "entitled to follow or trace the above transferred property or its proceeds of sale accordingly" (paragraph 52(1)). There followed:

    i) A plea that the proceeds had been paid into the Arena Settlement, the Cooper and McNally Companies or companies held by Mr Stevens as Mr Ruhan's nominee (paragraph 76).

    ii) A plea that the transferees under the IOM Settlement acquired rights subject to Mr Ruhan's proprietary claims which were in turn subject to HPII's proprietary claims (paragraph 81).

11. Given the opacity of this plea, Popplewell J made on an order on 25 April 2018 requiring HPII to answer a Part 18 Request in which Harbour had sought particulars of HPII's tracing case, that request having been made with a view to seeking to strike out HPII's claim in this action if it had no arguable tracing claim. In response to the request that HPII identify "the current whereabouts of the traceable proceeds of the sum" (Request 19(c)), HPII pleaded "see also paragraphs 48 to 63 of the HPII POC" (a reference to HPII's Particulars of Claim in the proceedings it had commenced against Mr Ruhan and Mr Stevens: "the Ruhan S/C" and "the Ruhan Proceedings"). This can only have meant that those paragraphs in the Ruhan S/C set out HPII's case as to the location of the traceable proceeds of the Hyde Park Hotel profits. The paragraphs to which reference was made appeared under the heading "The subsequent use of the Hyde Park Hotels and their proceeds of sale." So far as relevant to this application, the following matters were pleaded:

    i) Mr Ruhan's involvement in the Qatar Projects, for which funding in the sum of $143.46 million had been provided by the Investec Facility.

    ii) The fact that shares in Euro Estates had been used as collateral for the Investec Facility.

    iii) The fact that Euro Estates had used a "significant proportion of the profits and gains made" on the sale of the two Kensington Hotels (£72.41m) to discharge the Investec Facility, and had stepped into the shoes of Investec under the Investec Facility ("the First Pearl Loan").

iv) A second loan of £19.91m made by Euro Estates to BTH1 and BTH2 on 16 April 2008 ("the Second Pearl Loan").

v) HPII alleged that a "significant proportion" of the proceeds of the Qatar Projects had been applied to meet the "working capital requirements" of the Arena Settlement, including Sentrum, which had been sold for £220m in June 2012.

vi) HPII then referred to the fact that the proceeds of the sale of Sentrum, in the total of £92m, had been used to discharge the First and Second Pearl Loans, which £92m had then been applied for the purpose of various projects in which it was said that Mr Ruhan was interested.

12. In summary, the only particularised tracing claim advanced at this stage was through the First and Second Pearl Loans, the investment and sale of Sentrum, and through one or both of those routes into the £92m.

13. HPII has subsequently denied that it ever advanced a tracing claim into the £92m, suggesting that "the £92m was referred to, not in the context of tracing in these proceedings, but rather in the context of Mr A Stevens and his companies acting as Mr Ruhan's nominee or bare trustees". For example, HPII's skeleton argument for this hearing stated:

> "HPII's position is that it never *expressly* sought to trace through the £92m into the Relevant Property or the IUAs. It acknowledges that the heading for Part IV of HPII's POC in the Ruhan Proceedings, which reads 'The Subsequent Use of the Hyde Park Hotels and Their Proceeds of Sale' was probably not the most apposite heading for that section, especially seeing as other distinct matters are also discussed within that section in chronological sequence."

(emphasis added).

14. I am unable to accept this characterisation of HPII's case, not only because the clear purpose of these paragraphs in the Ruhan S/C was to identify the proceeds of the profits of the Hyde Park Hotels, but because that could have been the only reason for cross-referring to those paragraphs in the Further Information when answering Harbour's request that HPII set out its case as to which assets represented the traceable proceeds of the Hyde Park Hotel profits. Indeed when Harbour sought specific confirmation that HPII was still saying that its tracing case was as set out in the paragraphs of the Ruhan S/C cross-referred to in its Further Information, and whether HPII was alleging that it had a right to trace otherwise than through the First and Second Pearl Loans and/or the £92m, HPII at no stage responded saying that it was not seeking to trace into or through those assets. Rather, the correspondence suggested that HPII's case was clear from HPII's "statement of case … originally filed and served on 29 November 2017 and then revised on 2 May 2018 and then further revised on 13 March 2018", and in the Further Information which had already been served.

15. The reason for this apparent sensitivity on HPII's part now is that on 20 November 2020, in support of their strike-out application, the Settlement Parties served evidence which it is now accepted establishes that it is not arguable that any part of the £92m can

be traced into the Relevant Property. In response, on 12 February 2021, HPII served a 90-page witness statement and 4,400 pages of new documents, which set out a new iteration of its tracing claim. In summary, HPII now alleges that it can trace into, and through, 12 payments which are said to represent proceeds of the Qatar Projects:

i) Payments 1 to 10, made between 2007 and 2010.

ii) Payment 11 made in 2014.

iii) Payment 12 made in 2015.

16. The Settlement Parties argue that:

i) HPII's change of case reflects the fact that its case as currently pleaded is unsustainable and should be struck out;

ii) HPII's original case involved a binding election in law which precludes it from pursuing its new case.

17. I can deal with the first of those arguments at this point. HPII's tracing claim is pleaded in the widest possible terms, albeit the only detail ever provided was by reference to a tracing case which it is now recognised is no longer sustainable. It can fairly be said that HPII should have taken steps much earlier than it did to put flesh on the bare bones of this important part of its case. The events with which this aspect of HPII's case is concerned largely occurred between 2008 and 2014, and, but for the adjournment of the Directed Trial in 2019 (which HPII opposed), would already have been determined. Further, HPII was restored to the register by its liquidators in 2015 specifically for the purpose of pursuing claims arising from Mr Ruhan's involvement in the sale of the Hyde Park Hotels, and it has effectively been functioning as a litigation special purpose vehicle since then.

18. Nonetheless, if and to the extent the tracing routes HPII now relies upon are viable, it would, in my view, be appropriate in principle to permit the amendments necessary to incorporate those claims in its statement of case, rather than enter summary judgment on the case as pleaded. However, the unfortunate absence of any proposed amendment at this hearing is no reason not to submit HPII's proposed case to the appropriate degree of forensic analysis, with a view to ensuring that all of the assumptions inherent in the case have been identified and tested. That is necessary both to ensure that the pleading does indeed raise a case fit for trial, and, if and to the extent that it does, that the matters for investigation and decision at that trial have been properly identified.

D. HPII'S TRACING CASE IN SUMMARY

19. HPII's tracing case now proceeds as follows:

i) Stage 1: The starting point for all three strands of HPII's case is that HPII can trace into any profits Mr Ruhan made from the on-sale and development of the Hyde Park Hotels.

ii) Stage 2: It is alleged that Euro Estates held its indirect interest in the Hyde Park Hotels and received its share of the profits on bare trust for Mr Ruhan.

iii) Stage 3: It is alleged that Euro Estates used the profits derived from the sale of the Hyde Park Hotels:

a) to repay the Investec Facility, which entitles HPII to trace into the assets acquired by the BTH1 companies with the benefit of that facility ("Stage 3A"), and onto Stage 4;

b) to pay £4m which was used to purchase 51.01% in Bridgehouse Marine Limited ("Stage 3B"), and onto Stage 8; and

c) to provide funding to BTH2 ("Stage 3C") and onto Stage 6.

iv) Stage 4: It is alleged that, having traced into the assets acquired with the benefits of the Investec Facility, HPII can then trace from those funds to monies which were paid back to Mr Ruhan or his companies arising from BTH1's involvement in the Qatar Projects:

a) So far as Stage 3A is concerned into $196.864m recovered between 12 December 2007 and 24 December 2010 (Payments 1 to 10: "Stage 4A");

b) So far as Stages 3A and 3C are concerned, into $36.826m recovered on 27 January 2014 (Payment 11: "Stage 4B"); and

c) So far as Stage 3A is concerned, into $43.5m recovered on 15 June 2015 (Payment 12: "Stage 4C").

v) Stage 5: It is alleged that:

a) Payments 1 to 10 can be traced into the assets transferred under the IOM Settlement ("Stage 5A").

b) The assets transferred under the IOM Settlement can be traced into 16 of the Non-Arena Companies ("Stage 5B").

vi) Stage 6: It is alleged that Payment 11 can be traced through a $33,149,978 payment to Minardi in January 2014 into three of the IUAs: Flats 11, 21 and 23, Hamilton House.

vii) Stage 7: It is alleged that Payment 12 can be traced into two of the IUAs – Montagu Square and Flat 12, Hamilton House – and one of the Jersey Properties.

viii) Stage 8: It is alleged that the £40m realised from the sale of Bridgehouse Marine (at Stage 3B) can be traced into various IUAs and Jersey Properties.

E. THE APPLICABLE LEGAL PRINCIPLES

20. I summarised the principles which determine the entitlement to follow or trace in equity in the Directed Trial Judgment at [125]-[129]. There are features of the law of tracing which merit more specific consideration when determining this application.

The nature of tracing

21. Both parties referred me to Lord Millett's definitive analysis of the nature of tracing in Foskett v McKeown [2001] 1 AC 102, 127-128. There are a number of features of that summary which are of particular relevance in this case:

    i) Tracing is the process of "identifying a new asset as the substitute for the old".

    ii) "Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner."

    This passage is important in the present case because it recognises that a claimant who traces has a choice as to whether to pursue the original asset or a substitute (or, indeed, a substitute for a substitute). At p.131, Lord Millett stated to similar effect that "where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of this misapplied money". Lord Millett's earlier passage uses the language of "exchange" to link assets for tracing purposes, but, as I explain below, the extent to which tracing depends on "asset exchanges" has been called into question in more recent cases and commentary.

    iii) When an instruction is given to a bank to transfer money from one person's account to the credit of someone else at another bank, "no money passes from paying bank to receiving bank or through the clearing system" but there are "simply a series of debits and credits which are transactionally linked".

    As Lord Millett explains, some transactions, although colloquially treated as the transfer of money from A to B, as a matter of legal analysis involve a number of sequential steps involving intermediate parties, the chronological sequence of which may not always be consistent with the colloquial description.

    iv) While we speak "of tracing one asset into another … this … is inaccurate" because "the original asset still exists in the hands of the new owner, or it may have become untraceable". Lord Millett explains that "the claimant claims the new asset because it was acquired in whole or in part with the original asset" and "what he traces, therefore, is not the physical asset itself but the value inherent in it".

    Given some of the submissions made by HPII, I should set out my understanding of what Lord Millett is saying here. He is not saying that it is possible to trace into any additional asset which is acquired through exploiting (in however loose a sense) the value of the original asset (e.g. where someone who appears to own an expensive house is able to borrow money to buy a valuable painting because of the credit-worthiness the inherent value of the house appears to give him). Rather he was pointing to the fact that the new asset is acquired in exchange for the old (and thereby in realisation of its exchange value) albeit both assets continue to exist (c.f *specificatio*, *commixtio* etc in Roman law).

"Backwards tracing"

The conceptual debate

22. The process of identifying the proceeds or substitutes of assets is inherently forward looking (just as the process of subrogating someone who has conferred a benefit on someone else to an existing claim is inherently backward looking). Reflecting that conception of tracing, the 8th edition of *Goff and Jones: The Law of Unjust Enrichment* (2011) described the concept of tracing as "tightly focussed" on asset exchanges (para. 7-18). However, in 1995, Professor Lionel Smith argued for a different approach to tracing in an article which was heavily relied upon by HPII, "Tracing into the Payment of a Debt" (1995) CLJ 290 ("the Smith Article"). Professor Smith argues that when value is used to pay a debt, the traceable proceeds of that value are not the right immediately acquired in exchange for the payment (the discharge of the debt) but "whatever was acquired in the past when the debt was incurred" (p.292). That analysis has itself been subject to critical commentary (Professor Conaglen, "Difficulties with tracing backwards" (2011) 127 LQR 432) but two decades on, it remains very influential.

23. The "tightly focussed" asset exchange model suffered from the obvious difficulty that cause and effect do not always operate in legal disputes in a chronologically linear fashion – for example when A instructs its bank to make a payment from its account to B's account with its bank, the ultimate payee's account may be credited before trust funds are debited from the account of the original payor. In cases concerned with transfers of money, the courts have not been prepared to allow these chronological complications to stand in the way of tracing. However, particularly when the chronological complications arise because the various steps between the application of trust assets and the ultimate receipt of the asset into which the tracing claim is asserted include an overdrawn bank account, the decisions have raised fundamental questions as the proper characterisation of the tracing process, and in particular how far (if at all) it is still dependent on the concept of asset exchange.

The earlier cases

24. As with so much of the law of tracing, the analysis can begin with Agip (Africa) Ltd v Jackson [1990] Ch 265, in which the "rogue" who is a necessary feature of many complex legal problems forged a transfer instruction to pay money from Agip's account to the account of BOL. That transaction took effect through Agip's bank, BdS, instructing BOL's bank, Lloyds, to credit BOL's account, which credit was effected before BdS made the necessary transfer to Lloyds (and the resultant debit to Agip's account). Millett J held "there is no difficulty in tracing the plaintiff's property in equity" (p.290), but did not directly address the chronological issue. In an article published the following year, "Tracing the proceeds of fraud" (1991) 107 LQR 71, 74-75, he stated:

> "There is no difficulty in tracing funds in equity, even where they have been the subject of electronic transfer. There is no need for a physical asset. Equity can follow the chose in action through its transmutation as a direct result of instructions given to the two banks from a debt owed by A's bank to A into a debt owed by B's bank to B. It is not necessary to follow the money through

> the clearing system or to pretend that any chose in action has been assigned. It is not necessary to establish that the money credited to B's account is the identical money debited to A's account. It should not matter in what order the various transactions took place. Equity acts on the conscience of the recipient; and the existence of a direct causal connection between the debit and the credit should sufficiently identify the one as the source of the other to enable the money credited to B's account to be taken to represent the money debited to A's account".

25. Agip can be interpreted as a case in which A set out, in a single transaction, to use trust money to make a payment to B, in which case the precise sequence of the steps by which the trust money is debited and the payee credited did not prevent the credit in B's account being taken to represent the debit in A's account. It is possible, however, (as Professor Lionel Smith does in the Smith Article, pp.302-3), to analyse the decision as one in which BdS used credit from Lloyds to "buy" the payment to BOL, and then funds from Agip to repay the debt to Lloyds. That is the explanation the Court of Appeal adopted in Relfo Limited (in Liquidation) v Varsani [2014] EWCA Civ 360; [2015] 1 BCLC 14, [51] (adopting Professor Smith's explanation in The Law of Tracing (1997) p.251 which restated the analysis in the Smith Article). However, as I explain below, the Court of Appeal in Relfo cannot be read as endorsing any wider principle that the misuse of trust money to repay a loan always allows the beneficiary to trace into the assets acquired with the loan (or payments made to third parties using the proceeds of the loan).

26. The next case relied upon by HPII (which is also referred to at p.294 of the Smith Article) is Westdeutsche Landesbank Girozenrale v Islington LBC [1994] 4 All ER 890, a case concerned with a claim to trace a payment of £2.5m made into a bank account which had subsequently become overdrawn. Having determined that the burden lay on Islington LBC to prove that the £2.5m no longer survived in original or substituted form in its hands (p.938), Hobhouse J considered whether it was sufficient to discharge that burden for Islington to point to the fact that the account had subsequently become overdrawn. The answer was no. At p.939, he noted:

> "The Beneficiary is entitled to ask what has been done with the sums taken out of those accounts. If they have been used to acquire an asset, he is entitled to a charge upon that asset. If that asset should subsequently be sold and the proceeds of sale repaid into one of the fiduciary's bank account, the beneficiary is entitled to follow those proceeds of sale …. On occasions when the accounts only contained small credits or were in overdraft, Islington had in fact lent money out on the market on a short term basis … On this scenario what was happening was that the credits in the account (which were debts owing by the bank to Islington) were converted into debts owing to the Islington by persons dealing in the money market and on the repayment of those debts they were converted back again into debts owing by the Co-operative Bank to Islington".

27. This does not appear to endorse backwards tracing. There is nothing to suggest that Hobhouse J had in mind loans made to the money market before the £2.5m was paid to Islington from sums overdrawn from the account which were later repaid with the £2.5m. At best, the matters which led Hobhouse J to conclude that the council had not discharged its burden included (but were not confined to) the fact that the £2.5m payment had permitted subsequent borrowing by the authority from the bank (through the use of the permitted overdraft), which had itself generated further assets in the form of the debts due to local authority on the money market. In any event, as Professor Conaglen notes, Lord Browne-Wilkinson in the House of Lords in the same case reaffirmed that any entitlement to trace had ended when the account became overdrawn ([1996] AC 669, 706).

28. It is next necessary to consider Bishopsgate Investment Management Ltd v Homan [1995] Ch 211. In that case trust (pension) funds had been improperly paid into M's bank accounts, which accounts were either overdrawn at the time of the payment or became overdrawn subsequently. Vinelott J applied the rule that it is not possible to trace in equity through an overdrawn account, but reserved the position where there was a connection between a particular misappropriation of pension funds and the acquisition by M of a particular asset with borrowed funds, giving the examples of (i) an asset acquired by M with money borrowed by way of the overdraft when there was an inference that the borrowing was undertaken with the intention it be repaid by misappropriating pension funds and (ii) where pension funds were paid into the overdrawn account, so as to free up borrowing capacity in that account which could then be and was used to acquire a particular asset (although only the first of these would strictly speaking involve backwards tracing). On appeal, Leggatt LJ rejected the suggestion that "backwards" tracing could be undertaken in these circumstances and also the concept of a "composite transaction" used to justify it, which he described as "fallacious" (p.221). Dillon LJ, by contrast, thought it "at least arguable" that there could be a charge over the assets "if the connection … between the particular misappropriation … and the acquisition … of a particular asset … is sufficiently clearly proved" (p.217). Henry LJ agreed with both judgments.

29. In Shalson v Russo [2005] Ch 81, [141], in a brief passage, Rimer J expressed his preference for Dillon LJ's view, in a passage which suggests that what is required to permit backwards tracing in these circumstances is a link between the acquisition of the asset with borrowed funds (in that case a luxury yacht, the *Mosaique*) and the misappropriation of funds to repay the borrowing. It appears to be implicit in his judgment that the mere repayment of the borrowing with trust funds is insufficient to constitute such a link.

30. The Court of Appeal divided on this issue again in Foskett v McKeown [1988] Ch 265, in which trust funds were used in breach of trust to pay periodic payments due under an insurance policy. One instalment of premium had been paid from the payer's bank account when the credit balance was less than the amount of the payment (with the result that the payment caused the account to go into overdraft within permitted limits), which overdraft might subsequently have been repaid by a further payment of trust moneys. Scott VC observed at pp.283-4 that if this was established, and if it was shown to be the payer's intention "throughout" to use trust monies to pay the premiums under the policy, then it was not "at all obvious that the circumstance that the payment into the account of the purchasers' money was made very shortly after the payment of the

premium, rather than before or at the same time as the payment, should be regarded as fatal to the purchasers' equitable tracing claim." He referred in this connection to the fact that "the availability of equitable remedies ought … to depend upon the substance of the transaction in question and not upon the strict order in which associated events happen", and he also referred to the Smith Article (although it should be noted that Professor Smith's analysis does not appear to depend on proof of the payer's intentions). On one view, the scenario in which Scott VC contemplated that tracing would be possible is one where the trustee intended throughout to use trust funds to meet the period payments due under the policy, but where the payments of trust funds into the trustee's account had not always matched the payments out of the premium.

31. Neither Hobhouse nor Morritt LJJ addressed the status of this particular instalment, but both firmly restated the "no backwards tracing" rule. Hobhouse LJ at p.289 stated that "the doctrine of tracing does not extend to following value into a previously acquired asset" and at p.296, Morritt LJ approved Leggatt LJ's statement in Bishopsgate that:

> "there can be no equitable remedy against an asset acquired before misappropriation of money takes place, since ex hypothesi it cannot be followed into something which existed and so had been acquired before the money was received and therefore without its aid".

The more recent authorities

32. It is now necessary to consider the two more recent authorities which, together, represent the current state of development of the law on backwards tracing.

33. The first is the Court of Appeal's decision in Relfo Limited v Varsani [2014] EWCA Civ 360; [2015] 1 BCLC 14. In that case, a sum of money was misappropriated from Relfo and paid into the account of an entity called Mirren. On the same day, a sum in the same amount was paid by an entity called Intertrade into the bank account of a Mr Varsani. It had not been possible to expose all of the intermediate steps linking these transactions by the time of the trial, but the trial judge (Sales J) was able to infer their existence on the evidence. However, it was clear that the crediting of Mr Varsani's account had taken place before funds capable of meeting that payment had left Mirren's account.

34. In view of the reliance Mr Pickering QC placed on Relfo, it is important to note the following matters which were either common ground or accepted by the Court of Appeal:

    i) First, that tracing required "something in the nature of direct substitutions" ([28]).

    ii) Second, that the requirements for a tracing claim were "in general not satisfied where some of the assets were already owned by the defendant or were paid into an overdrawn account so that no property could be identified as representing the substituted product of the claimant's property" ([30]).

    iii) Third, that the claim did not represent an attempt to trace "into pre-existing assets" ([34]).

The correctness of the thesis advanced in the Smith Article was not therefore, directly in issue.

35. However, the Court found that the required nexus between the Relfo debit and the Varsani credit was established because the latter had been made by Intertrade against an undertaking that it would be reimbursed with funds emanating from the Relfo debit. The key passages in Arden LJ's judgment appear at [61]-[63]. At paragraphs [61]-[62], Arden LJ analysed the transaction as one in which:

    i) As a result of an instruction given to Relfo's bank, a debt owed by Relfo's bank to Relfo had been replaced (using that verb to convey the passive sense of substituted), by virtue of a bank transfer, with a debt owed to Relfo by Mirren (who, presumably, was in turn owed a debt by its bank in respect of the credit received).

    ii) Mirren agreed to transfer the amount advanced to someone else in return for promises by those parties to make equivalent payments down the chain which in due course led to the Varsani credit.

    iii) Those payments were all made on the basis of Mirren's undertaking in (ii) (and similar undertakings by the unknown intermediate entities).

36. At [63], in an important passage, Arden LJ then stated:

> "Monies held on trust can be traced into other assets even if those other assets are passed on before the trust monies are paid onto the person transferring them provided that that person acted *on the basis that he would receive reimbursement for the monies he transferred out of the trust fund*. The decision in Agip demonstrates that in order to trace money into substitutes it is not necessary that the payments should occur in any particular order, let alone chronological order. *As Mr Shaw submits, a person may agree to provide a substitute for a sum of money even before he receive that sum of money*. In those circumstances, the receipt would postdate the provision of the substitute. What the court has to do is to establish whether the likelihood is that monies could have been paid at any relevant point in the chain in exchange for such a promise. I see no reason in logic or principle why this particular way of proving a substitution should be limited to payments to or by correspondent banks".

(emphasis added).

37. In summary, the Court accepted a form of anticipatory substitution, where the claimant agrees to provide the trust property in exchange for another asset, receives that asset and then proceeds to fulfil its promise.

38. The second decision is the Privy Council's judgment in Federal Republic of Brazil v Durant International Corp [2015] UKPC 35; [2016] AC 297. Trust property (bribes) had been paid into a bank account in New York ("the C account"). Payments were made

from the C account into D1's account in Jersey. The last three payments into the C account took place after the date of the last payment from the C account into the D1 account, and, at certain points in time, the total value of payments made from the C account to the D1 account were greater than the amount of trust property paid into the C account at that time. The judgment of the Board was delivered by Lord Toulson JSC. He referred to the respondent's reliance on the fact that the court is concerned with tracing the value in an asset, and their submission that the question of whether there is a sufficient transactional link between two assets is to be determined concentrating "on the substance of the transaction and not the form". He noted that "those propositions carry force, but do not resolve the disputed issues" ([32]). The Board rejected the thesis in the Smith Article that repayment of a loan with trust money gives the beneficiary a right to trace into assets acquired with the borrowing ([33]) on the basis that:

> "The courts should be very cautious before expanding equitable proprietary remedies in a way which may have an adverse effect on other innocent parties. If a trustee on the verge of bankruptcy uses trust funds to pay off an unsecured creditor to whom he is personally indebted, in the absence of special circumstances it is hard to see why the beneficiaries' claim should take precedence over those of the general body of unsecured creditors".

As Lord Toulson JSC makes clear in this example, the effect of Professor Smith's thesis is that the beneficiary, by adopting the repayment of an unsecured loan with trust assets, becomes a secured creditor.

39. However, the Board acknowledged that there may be cases where there is a "close causal and transactional link" between the incurring of the debt and the use of trust funds, referring in this regard to the decision of the Saskatchewan Court of Appeal in ACCS v Pettyjohn (1991) 79 DLR (4th) 22, in which a loan had been taken out to acquire cattle, on the basis that the lender would have a security interest in the cattle, but the borrower had anticipated the receipt of the loan by purchasing the cattle using a bridging facility which was discharged with the loan. It was held that the loan had been used to acquire the borrower's rights to the cattle, it being "commercially unreasonable to divide the transaction so minutely" when the bridging finance had been obtained "not as a separate transaction, but always with a view that it would be repaid through the moneys advanced by ACCS".

40. The Board thought the Court had been right in the Pettyjohn case "not to divide minutely the connected steps by which, on any sensible commercial view, the purchase of cattle was financed … but to look at the transaction overall" ([37]). Turning to the case at hand, the Board emphasised the importance, given the sophisticated activities of money launderers, of the court not allowing "a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect", and identified two circumstances in which it was particularly important to consider the substance of the overall transaction rather than the precise sequence of events:

    i) where the individual steps in the sequence were "a deliberate part of the choreography"; and

    ii) where the timing issues arose "because of the incidents of the banking system".

41. In conclusion, the Board held that "backwards tracing" depended on establishing "a co-ordination between the depletion of the trust fund, and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust funds" ([40]). It appears from the following paragraph that by "co-ordination" the Board had in mind "the co-ordinated outward and inward movement of assets".

42. The Board's emphasis on the importance of identifying the overall transaction, rather than dividing it minutely into the connected steps, and its emphasis in this regard on the issue of whether those separate steps were "co-ordinated", bears some similarities with the Ramsay principle of statutory construction of fiscal legislation. Lord Wilberforce in WT Ramsay Ltd v IRC [1982] AC 300, 323-324 explained that principle as follows:

> "If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded … They are not, under the Westminster doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole".

43. Both principles recognise that in some cases, what is "as a matter of substance" a single transaction intended to bring about a particular outcome may be implemented through a series of transactions, which it was always intended would operate together to produce that outcome. Beyond the existence of the intended outcome, and the co-ordination of the elements necessary to achieve it, identifying a "single composite transaction" (as it is sometimes put) can often appear an essentially conclusory exercise. However, some assistance in the application of that test in the present context can be obtained by re-visiting the conceptual basis for allowing the beneficiary to trace into substitutes for trust property. In Foskett, 130-1, Lord Millett approved Professor Williston's statement that "the cestui que trust should be allowed to regard the acts of the trustee as done for his benefit". Where the relevant breach of trust is, as matter of substance, the use of trust funds to pay a third party, then tracing will allow the beneficiary to claim the benefit of that act even if the trustee implements it through a series of co-ordinated steps. However, where a trustee takes out a loan in his or her personal capacity in order to buy a car, but then resolves to use trust funds to repay the loan, it does not seem apt to describe the decision to take out the loan and to acquire the car as breaches of trust which the beneficiary is electing to treat as acts done for their benefit. Only the repayment of the loan with trust funds merits that characterisation. The position may well be different when the trustee acquires property in the car prior to payment, and then uses trust funds to pay the seller (an example posited in the Smith Article): as a matter of substance, there is a single transaction in which the trustee has used trust funds to buy a car.

Conclusions

44. There is no doubt that the timing issues addressed and (in some instances) overcome in these cases have implications for the "tightly focussed" asset exchange model of tracing. The question is whether those implications involve no more than the recognition of a limited number of narrow and pragmatic exceptions to soften the edges of the surviving rule (cf. Lord Sumption JSC's comments on the "transferred loss" principle in Swynson Ltd v Lowick Rose llp [2017] UKSC 32; [2018] AC 313, [16]), or whether they require (at least arguably) the formulation of a new starting point. A supporter of the latter approach is Lord Burrows JSC writing extra-judicially, when he addressed what might be thought to be the easiest of the apparent exceptions to accommodate while maintaining the general rule, namely timing differentials in the credit and debit flows when money is paid through the banking system. In *The Law of Restitution* (3rd), 142, he states:

> "Indeed it would seem that 'backwards tracing' must be accepted if one is to explain tracing into and through 'in credit' bank accounts. This is because if one is tracing funds into a bank account, the account is often credited before the bank has received the relevant funds. In other words, the debt owned by the bank to the customer, which is treated as a substitute for the funds, exists in advance of the funds being received".

45. I have concluded that present state of English law is that backwards tracing into assets acquired prior to the misuse of trust assets is not permitted, save in certain narrow (but, for all that, soft-edged and overlapping) exceptions where a strict insistence on chronological sequence would fail to reflect the substance of the position. For those who might object that this involves "break[ing] down the cases into different factual categories" and thereby "deconstruct[ing] the law into a fissiparous bundle of distinct rules" (cf. Lord Sumption's observation in Belhaj v Straw [2017] UKSC 3; [2017] AC 964, [227]), it can be said that while this approach might be deprecated when identifying and formulating rules, it is in the very nature of exceptions to an otherwise general rule, and that the recognition of such exceptions should not inexorably require the re-visiting of the rule.

46. On the basis of the authorities to date, these exceptions include:

i) cases where the payment of money through the banking network for the purpose of effecting a payment from A to B involves credits occurring before debits;

ii) cases in which the debit of trust property and the credit to be traced into were effected as part of a single transaction intended to achieve that outcome through a series of co-ordinated elements, whatever the chronological ordering of those elements (indeed it might be suggested that the only difference between i) and ii) is that in the former, the chronological issues arise as a consequence of ministerial or administrative acts, whereas in the latter they may sometimes form part of what Lord Toulson JSC referred to as the "choreography");

iii) cases of anticipatory substitution as discussed by Arden LJ in Relfo, where an asset is acquired on the basis of an undertaking that the trust property will be exchanged for it (as, in due course, it is); and

iv) conventional bilateral exchange transactions where the respective transfers are not simultaneous (e.g. Professor Smith's example of the car sale where the price is payable after property in the car passes).

47. In my view, HPII's argument to the contrary fails to acknowledge the weight of authority against any wider recognition of backwards tracing: Leggatt LJ in Bishopsgate; the subsequent approval of his judgment by the majority in Foskett; the matters which were either common ground or approved in Relfo, [28], [30] and [34] and, most importantly, the decision of the Privy Council in Durant at [33] (with its salutary reminder of the need for courts to be "very cautious" in creating new equitable proprietary rights, echoing prior judicial warnings to similar effect: eg. Re BA Peters Plc [2008] EWCA Civ 1604, [21]).

48. I do not regard Agip (which dealt with the point briefly, and, on the basis of Sir Peter Millett's article, apparently on a pragmatic basis) and Westdeutsche (which does not appear to have involved backwards tracing at all) as taking the contrary argument forward. Dillon LJ in Bishopsgate only thought some limited species of backwards tracing to be arguable, and while he had the support of Rimer J in Shalson, the decision in that case proceeds on the basis that there was no general principle of backwards tracing, but at best some exceptions on particular facts. Sir Richard Scott VC's view in Foskett, as I have noted, was in the minority.

Election

49. I referred above to the fact that a party advancing a tracing claim may have a choice (or election) as to which assets to trace into. Where the law gives a party a choice between two inconsistent courses of conduct, the election as to which course to follow is final and binding once made (Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd's Rep 391, 398). The conduct sufficient to amount to an election will vary with the context. Where the claimant has inconsistent rights against the same defendant (for example a right to rescind a contract for misrepresentation or to enforce the contract, or a right to terminate a contract or seek performance under it) then commencing legal proceedings seeking a claim on one basis may be sufficient to amount to an election (Keith Handley, *Estoppel by Conduct and Election* (2nd) para. 15-002). Where a claimant has alternative and inconsistent remedies against the same defendant, it is generally sufficient to elect before judgment is entered (United Australia v Barclays Bank Limited [1941] 1 AC 1, 29-30). Further, pursuing a claim against one defendant will not necessarily amount to an election not to pursue an inconsistent claim against another defendant: Clarkson Booker v Andjel [1964] 2 QB 775, 794-96.

50. When considering the question of election between inconsistent claims against a trustee, *Lewin*, 44-0032 states:

> "Where the election is a meaningful one it should be exercised at the time of judgment or, if issues of tracing or following trust assets are dealt with by an inquiry subsequent to judgment on questions of breach of trust, at the time of judgment in the inquiry. A beneficiary will not be barred from electing to assert a proportionate share in property in the hands of a donee deriving title from a trustee which represents money misappropriated by

> the trustee from a bank account by reason only that the beneficiary has taken and compromised proceedings against the bank in respect of the misappropriation".

51. The only case I have found which addresses the issue of election in the context of the choice which a beneficiary has when tracing assets is the decision of the Royal Court of Jersey in In the matter of Esteem Settlement and the No 52 Trust [2002] 2 JLR 53. In that case, trust funds of £4.4m were transferred into an account and mixed with innocent funds, and amounts from that account were then loaned to Esteem, who used them to buy a property and to fund the cost of improvements on another property. In proceedings for breach of trust in England, the claimants (GT) advanced a tracing claim to the assets acquired with the loan. In Jersey, the claimants sought to treat the loan as valid, and to trace into its proceeds. At [119]-[120], the Royal Court held that this new claim was precluded by the claimant's earlier election:

> "In the English proceedings GT deliberately chose to trace into the assets of Esteem … On the basis of [GT's] arguments Mance LJ held in his judgment that GT could trace into Esteem's interest in 52 Cadogan Place …
>
> In our judgment, it is quite unacceptable for GT, having persuaded the English High Court that Esteem had provided no value and that therefore GT could trace into Esteem's assets, to seek now to argue quite the contrary, so that it can trace into the loan account … It cannot be right that GT is allowed in the English proceedings to trace to the underlying asset which has increased in value, but, in these proceedings, claims to trace to the loan account thereby seeking to avoid the consequences of the fact that some of the loan proceeds have been lost by Esteem. Either it can trace to the loan account or it can trace to underlying assets of Esteem … It cannot do both".

52. Tracing, as has been noted, is strictly speaking neither a right nor a remedy, but a means of identifying the claimant's property, either to found a personal claim against the recipient for its dealings with it, or to recover it in reliance on the claimant's proprietary rights (Foskett p128: "tracing is thus neither a claim nor a remedy"). Nonetheless, in the present context, tracing bears some resemblance to a remedy, in that the claimant's election is between alternative forms of relief arising from the violation of the same original right (the misappropriation of trust property), and, perhaps for that reason, there are numerous judicial references to the "equitable remedy of tracing", and similar descriptions in textbooks (e.*g. Lewin*, 1-023). Further, when the election is between recovering property currently in the hands of one person or recovering property in the hands of another, the election can be said to involve claims against two different persons. In addition, when a beneficiary faces a choice as to whether to assert rights in property through different routes into different assets, there may be a number of factors affecting the feasibility or value of the alternatives – for example whether one route is blocked (or at least encumbered) by a bona fide purchaser for value - or what the value of the asset will be by the time of recovery. These matters, in my view, militate against the suggestion that the mere assertion of a claim to one particular asset involves an election in this context, and, accordingly, I am satisfied that the law is correctly stated in the paragraph from *Lewin* set out above.

53. Having identified the applicable legal principles, I will now consider the various stages in HPII's tracing analysis.

F. STAGES 1 AND 2

54. It was not suggested by the Settlement Parties that Stages 1 and 2 of HPII's tracing analysis are not arguable. I note that the case advanced in this action, and in the Ruhan Proceedings, is as follows:

    i) Mr Ruhan's nominee Mr Stevens set up "a complex group of companies in Madeira, Guernsey and the United Kingdom which comprised of at least 10 companies" defined as "the Cambulo Group".

    ii) That the Cambulo Group and the companies within it held assets as bare trustees for Mr Ruhan.

    iii) That the profit made by the Cambulo Group from the sale of the Hyde Park Hotels was obtained "as nominee or bare trustee for Mr Ruhan".

55. Focussing on the two Kensington Park Hotels, which were the source of by far the greater part of the profits into which HPII claims it can trace, and which are the only profits which feature in HPII's tracing claim advanced in its evidence at this hearing, the position is as follows:

    i) By the time these profits were generated, each hotel was owned by a separate company: Cambulo Kensington Palace Developments Ltd (Gsy) and Cambulo Kensington Park Development Ltd (Gsy).

    ii) Those two companies were both owned by Cambulo Property Holdings Ltd.

    iii) Cambulo Property Holdings Ltd was owned as to 50% by Cambulo Madeira and 50% by CPC Group Ltd (Gsy) which represented the Candy brothers' 50% share in the project.

    iv) Cambulo Madeira was owned as to 80% by Euro Estates and 20% by Wellard.

56. It is not clear to me which of these companies are said to fall within the definition "the Cambulo Group" used by HPII, and how HPII's tracing argument caters for those companies in which the Candy brothers' company had a 50% share (into which HPII do not appear to assert a right to trace). I also note that the suggestion that the companies hold assets on bare trust for Mr Ruhan (rather than Mr Ruhan being the ultimate beneficial owner of those companies) is, at first sight, surprising. There are no doubt alternative ways in which HPII might put its case, which may have their own consequences. However, as no one sought to argue that Stages 1 and 2 of HPII's analysis were not arguable, or that there were not arguable alternatives which might support the same outcome, I will say no more about these issues.

G. STAGE 3A

The factual background

57. The background to this part of HPII's case is conveniently summarised by Cooke J in Orb Arl v Ruhan [2015] EWHC 262 (Comm), [28]-[29]:

> "On the evidence produced to the Court, which is in reality undisputed, the profit from the sales of the two Kensington hotels did not become available to Euro Estates until March 2008. By this time, Mr Ruhan, using companies outside the Arena Settlement, namely Bridge Towers Holdings 1 Ltd, Bridge Towers Holdings 2 Ltd and six subsidiary Bridge Towers companies, was involved in property development in Qatar in two separate projects. In pursuing this, Bridge Tower Holdings 1 obtained a loan of $143 million from Investec, secured on the Qatar assets themselves, and on the Sentrum assets also (rather than vice-versa). Investec was however looking for additional security and Mr Stevens' evidence is that, for a fee and a small profit participation, he was prepared to assist Mr Ruhan in this respect. On 21 December 2007, although the Kensington Hotels had not yet been sold, profits were expected when they did sell and Mr Stevens allowed Euro Estates 80% shareholding in Cambulo Madeira to be used as collateral in respect of the Investec loan to Bridge Tower Holdings 1, it being a term required by Investec that, if there was a relevant sale of the Kensington Hotels which preceded the realisation of the proceeds of the Qatar development or other refinancing, the proceeds from such disposal would be used to repay the outstanding Investec loan facility.
>
> When the Kensington Hotels were sold in March 2008, the proceeds were then used to discharge the Investec loan with Euro Estates concluding a direct facility agreement with Bridge Tower Holdings 1 on virtually identical terms as the facility agreement previously in place with Investec".

58. By way of further background, and with some necessary simplification, Mr Ruhan was involved in two development projects in Qatar:

    i) The first was "the Pearl", a major island development divided into precincts with luxury residential accommodation. The holding company for the "Pearl" project was BTH1 which in turn owned six companies (BT1 to BT6 and collectively the "BTH1Subs"), each of which was to own one of the towers once built.

    ii) The second was "Brooq Tower", land on which it was proposed to undertake a further luxury property development. The holding company for the "Brooq" development was BTH2 which in turn owned a number of subsidiaries, BT7 to BT12 (collectively the "BTH2Subs"). BTH2 and the BTH2Subs were also involved in the "Pearl" development, but in relation to different towers from BTH1 and the BTH1Subs.

59. On 9 December 2007, each of the BTH1Subs entered into a "term completion sale agreement" (the "BTH1 TCSAs") with Al Arrab and the Land Investment & Real Estate Development Company ("the Land"), under which the relevant BTH1Sub agreed to acquire a tower to be constructed by Al Arrab on a plot to be provided by the Land. I was provided with one of the TCSAs – that entered into by BT1. In short, it committed

Al Arrab and the Land to transfer the completed tower to BT1 no later than the Scheduled Completion Date (31 October 2009). In return, BT1 agreed to pay $140m, $30m by way of a cash deposit to be paid at an early stage ("the Cash Deposit Amount"), and the balance to be paid at or around hand-over. The Cash Deposit Amount was to be protected by refund guarantees to be provided by "A" rated international banks, intended to ensure the repayment of the deposits if certain trigger events occurred.

60. On 21 December 2007, BTH1 entered into the Investec Facility, for just over $141m, which was to be applied in funding $22.5m of the Cash Deposits for each of the six BTH1Sub towers, and $1m per tower for costs (the remaining 25% of the Cash Deposit Amounts being sourced from elsewhere). The security provided for the Investec Facility comprised:

    i) Debentures over BTH1 and the BTH1Subs.

    ii) A charge over the shares of BTH1 and the BTH1Subs.

    iii) A charge over the shares of Euro Estates.

    iv) Variations to deeds affecting certain Sentrum properties to provide for cross-collateralisation of certain properties.

61. Clause 2.5(a)(iii) provided that the Facility was to be pre-paid "in an amount equal to 100% of the aggregate amount of any dividends, liquidation or disposal proceeds or other receipts or distributions from time to time received by" Euro Estates, and clause 2.5(a)(iv) (in conjunction with Schedule 14) provided that the entire outstanding amount of the Investec Facility would become repayable in the event of any change of control in the ownership structure of the Hyde Park Hotels.

62. It is clearly strongly arguable that, when the Investec Facility was taken out, the contemplation of both Investec and the Ruhan-side entities was that the Investec Facility would be repaid from the proceeds of the Hyde Park Hotels development project. Not only is that strongly supported by the terms of clause 2.5(a)(iii) of the Investec Facility, but it receives strong support from various contemporaneous documents which Mr Pickering QC for HPII referred me to:

    i) A "Business Plan" appended to the Investec Facility referred to Mr Ruhan owning the Hyde Park Hotels which were "now worth £425m", which the Emir of Qatar was said to be interested in purchasing.

    ii) An Investec credit executive summary of 18 September 2007 described the full package of security, and stated that "Investec will take a charge over the Thistle Hotels in Kensington as secondary security to support the transaction", (the two hotels being identified as having a combined net worth of £365m) in addition to "the security of the original transaction".

    iii) An internal Investec memorandum of 17 October 2007 referred to the charge Investec would have over Euro Estates, stating "Fried Frank [Investec's lawyers] have reviewed the structure and are satisfied that Investec can execute the charge and that Investec will receive the proceeds". The memo explained

> that "there is a strong likelihood that the client will either sell down or refinance the hotels within the next 12 months", and that "if the hotels are sold, our loan will be repaid in its entirety".

iv) I was referred to memos to similar effect dated 12 and 21 November 2007, and other Investec documents along essentially the same lines.

63. It is also clear from those documents that the security and recovery prospect offered by Euro Estates' apparent interest in the Hyde Park Hotels was an important (and, for the purposes of this application, I shall assume determinative) factor in Investec's decision to lend.

64. The amounts drawn down under the Investec Facility were applied to meet 75% of the Cash Deposit Amounts under the six BTH1Sub TCSAs.

65. On 25 March 2008, the Hyde Park Hotels were sold to De Vere Estates Ltd for £320m. On 27 March 2008, £91.75m from Euro Estate's share of the profits realised (at least £94.5m) was transferred to Investec who applied £71,949,630.08 to repay the Investec Facility. Confirmation of the repayment was provided to BTH1 on 2 April 2008.

66. "As of" 2 April 2008, Euro Estates acquired loan rights against BTH1 and the BTH1Subs on essentially the same terms as the Investec Facility (subject to amendments to allow for the sale of the Hyde Park Hotels), in the sum of $143m (about £71.9m), using the loan document previously prepared by Investec's lawyers, Fried Frank ("the Euro Estates Facility"). The security provided under the Euro Estates Facility was the same as that which BTH1 and the BTH1Subs had provided to Investec, save that it did not include a charge over the shares of Euro Estates or security in relation to the Sentrum assets. This appears to have been effected by the BTH1 and BTH1Subs' securities being released by Investec, and re-granted to Euro Estates, rather than assigned or novated. However, the substance of the arrangement is clear, and is aptly summarised in HPII's statement of case in the Ruhan Proceedings as follows:

> "On or about 2 April 2008 (and, accordingly, very shortly following the on-sales of the [Hyde Park Hotels] Euro Estates used a significant proportion of the profits and gains to repay the loan facility from Investec … *and thereby assumed Investec's role of lender to BTH1 in relation to the Pearl Qatar Project in its place* with security in the form of charges over the shares in BTH1 and in each of its subsidiary companies"

(emphasis added).

67. This characterisation reflects the position as a matter of substance, because there was no suggestion that Euro Estates had effected a further advance to BTH1. The subject-matter of the Euro Estates Facility was the amount Euro Estates had paid to Investec. Although HPII accepts, and relies on, the validity of the Euro Estates Facility in the Ruhan S/C, which it incorporated into its statement of claim in this action, there was a brief attempt in the documents prepared for this hearing to reserve this question, by describing it as a "purported" loan, or using the word loan in inverted commas. However, I was presented with no material which disclosed an arguable case that the Euro Estates Facility was a sham. Whoever was the true ultimate beneficial owner of

the entities involved, there is no reason to suppose the Euro Estates Facility was not intended to be what it purported to be. At the hearing, Mr Pickering QC confirmed that HPII was not seeking to suggest otherwise.

68. In circumstances which are hotly contested, in November 2012 Euro Estates entered into a Termination and Settlement Agreement ("TSA") under which it received a payment of just under £92m in settlement (inter alia) of the outstanding amount under the Euro Estates Facility. It is not in dispute before me that (as Cooke J found at [23]-[24]) the source of that £92m payment was profits made from the sale of the Sentrum business which could not (even arguably) be traced to the profits made from the sale of the Hyde Park Hotels.

The election argument

69. Assuming HPII's case is otherwise viable (which the Settlement Parties contend it is not), the Settlement Parties contend that when the proceeds of the sale of the Hyde Park Hotels were used to repay the Investec Facility (as is arguably the case), HPII had to choose between:

    i) tracing into the loan rights acquired by reason of that payment, in the form of the Euro Estates Facility, and through the repayment of that facility into the £92m or its proceeds ("route 1"); or

    ii) tracing into the assets acquired with the Investec Facility ("route 2").

70. Mr Pickering QC for HPII accepted that these were inconsistent courses which would require an election at some point, but he submitted that no election had yet been made, and the time had not yet come to make one. I agree with him.

71. As to whether there has been an election, it is important to understand how HPII's claims fit into this complex litigation. HPII's was forced to assert its claims in this action because of the Court's requirement that anyone asserting a proprietary interest in the Relevant Property set out its entitlement to do so. HPII's entitlement to bring such a claim was dependent on establishing its "upstream" tracing entitlement into assets which were the subject of the IOM Settlement as against Mr Ruhan or entities associated with him. The result has been that this particular aspect of HPII's claim has featured in these proceedings (principally to determine if, assuming it exists, any tracing entitlement is defeated by the defence of bona fide purchaser for value), while HPII has advanced the entirety of its claim against Mr Ruhan in the Ruhan Proceedings. In the Ruhan S/C, HPII's tracing claim is advanced in the widest terms, and while it certainly includes route 1 tracing, and does so in more detail than any other form of tracing claim, I do not think it can be said to be confined to it. There are paragraphs which are clearly wide enough to encompass "route 2" tracing (in particular paragraph 52). Further, the Ruhan S/C is expressly stated not to constitute an election (paragraph 102). Finally, HPII's statement of case in these proceedings, while incorporating HPII's "route 1" paragraphs from the Ruhan S/C, also incorporates paragraph 52, and includes paragraphs wide enough to encompass "route 2" tracing by asserting an entitlement to trace into all the assets transferred under the IOM Settlement (paragraphs 76 to 77).

72. No election having yet been made, for the reasons I have explained above, I am satisfied that the election which arises in this case is one which does not require to be exercised

any earlier than when judgment is entered on one or other basis (although I am not, in this judgment, going to decide whether there are circumstances in which the right of election might endure even after that point).

HPII's argument

73. That brings me to the premise of the key part of HPII's tracing argument. It is important to note that at the oral hearing, HPII puts this stage of its argument solely on the basis of "backwards tracing". By way of example, paragraph 3(2) of HPII's skeleton explained that "HPII contends this use of trust property's proceeds [viz to repay the Investec Facility] entitles it to trace … into the value in the Qatar interests acquired ... This is a backwards tracing step through payment of debts, and the law on this is discussed below". To similar effect, at paragraph 32, HPII stated that "HPII claims to be able to trace through [the Investec Facility] given that the [Hyde Park Hotel] proceeds were used to repay the [Investec] Facility".

74. I apprehend that the reason why no argument is advanced on the basis that trust property was used to provide security for the Investec Facility, and that this provides a basis for tracing into the use made of the Investec Facility, is that the only relevant security provided was the shares in Euro Estates. Those shares were not property acquired through any use of the trust property: Euro Estates was established by Mr Stevens on 21 March 2003, and its shares have at all times thereafter been held by him (whether for himself or as Mr Ruhan's nominee remains to be determined). Initially, Mr Stevens was the holder of a bearer share, and from 18 February 2005 (as is clear from a certificate of incumbency of that date) he was its sole registered shareholder. The contract for the sale of the Hyde Park Hotels was concluded between HPII and the Cambulo Group on 1 March 2005. At best, it can be said (as it clearly very strongly can) that it was Euro Estates' apparent ownership of an indirect interest in the Hyde Park Hotels which made its shares attractive security. However, the suggestion that someone can trace through the assets owned by a company into transactions involving shares in the company is not, in my view, arguable (a rule of "no reflective tracing" as it were), and this argument was not pushed by Mr Pickering QC at the hearing. Indeed, for my part, I am not persuaded that these facts would give rise to a personal claim for unjust enrichment, still less provided the basis for a proprietary claim. It is also to be noted that on the premise of HPII's tracing case as currently formulated, the shares in Euro Estates did not in fact offer Investec the security they appeared to offer because, it is said Euro Estates held their indirect interest in the Hyde Park Hotels or any profit therefrom on trust for Mr Ruhan and/or HPII itself.

75. HPII's backward tracing argument is put on two alternative bases:

    i) The broad ground, effectively adopting Professor Smith's analysis, that where trust moneys are wrongfully used to repay a loan, the beneficiary can trace into the assets acquired with the funds borrowed.

    ii) The narrow ground, on the basis that there is a sufficient nexus between the Investec Facility and the wrongful use of trust funds to make it appropriate to identify the assets acquired with the Investec Facility as the traceable proceeds of the Hyde Park Hotel profits.

76. For the reasons I have set out at [44]-[48] above, I do not believe that the broad ground for the backwards tracing claim is open as a matter of English law (and, as I have noted, the broad ground was specifically rejected by the Privy Council in Durant).

77. The narrow ground raises more difficult issues. HPII's case does not, in my view, fall within any of the established exceptions to what remains the general rule under English law that trust property cannot be traced into assets acquired before the relevant misappropriation.

    i) This is not a case in which, in the course of A making a payment to B, administrative or ministerial acts in the international banking chain have reversed the natural order of debit and credit.

    ii) I also find it difficult to characterise the borrowing under the Investec Facility, the application of the funds borrowed and the misappropriation of the Hyde Park Hotel profits as a single transaction, in which co-ordinated steps were undertaken to achieve the intended outcome of that single transaction (although I accept for the purposes of this application that it was regarded by all involved as very likely that the Investec Facility would be repaid from the proceeds of the sale of the Hyde Park Hotels, as and when this occurred). Applying my "sense test" in [43] of identifying the breach of trust which the beneficiary is seeking to adopt, the relevant act is the use of trust funds to repay the loan, not the taking out of the loan with a view to funding the "Pearl" project and the application of the loan proceeds.

    iii) This is not a case in which the loan was granted in exchange for the trust assets (so as to make this a case of anticipatory substitution).

78. However, on this ground alone, I do not believe it would be appropriate – certainly at first instance – to hold that this aspect of HPII's case is not arguable. The case might be said to present stronger facts than many of the failed "backwards tracing" claims, and if the facts alleged are established, the case would bear some resemblance with the "carve-outs" included in Vinelott J's order in Bishopsgate and which received some support from Dillon LJ on appeal. If this aspect of HPII's case succeeded, it would, as I suggested to Mr Pickering QC in argument, represent the furthest reach of backwards tracing to date, but on this issue alone, the court will be in a much better position to determine whether or not it is a case of "too far" at trial.

79. Nor would I have held this part of HPII's case to be unarguable merely because the TCSAs, or at least some of them, may have been entered into 12 days before the Investec Facility was concluded. The Cash Deposit Amounts was payable within 14 days of the conditions in clause 10.3.1 of the TCSAs being satisfied. I have no evidence as to when that was, and in any event, failure to pay the Cash Deposit Amounts would give the other parties to the TCSAs a right of termination (clause 14.2). In these circumstances, it appears to me that there is a sufficient similarity between the use of the Investec Facility proceeds to pay the Cash Deposit Amount, and the use of trust funds to keep the insurance contract alive in Foskett, to provide an arguable basis for overcoming this difficulty.

80. However, it is necessary to consider a further difficulty with this part of HPII's case. The authorities which HPII relied upon to establish a "backwards tracing" claim all

place heavy emphasis on the importance of having regard to the substance, rather than the form, of the transactions, and on avoiding too "minute" an analysis of the different steps in a composite transaction. In my view, HPII's case involves doing just that, because it relies on the fact that the Investec Facility was paid off by Euro Estates using trust monies, while paying no regard to the fact that the substance of the transaction under which this took place was that Euro Estates replaced Investec as BTH1's and the BTH1Subs' lender. HPII points to the fact that the charges from BTH1 and the BTH1Subs were surrendered and re-granted, rather than novated, and suggests that "the Investec facility came to a complete end … and Euro Estates is effectively providing the money", even if BTH1 and the BTH1Subs almost immediately and as part of the same transaction came under a debt in the same amount to Euro Estates. However, that involves exactly the "minute" parsing of the transaction which Lord Toulson JSC deprecated in Durant. Adopting Professor Smith's metaphor at p.292 of the Smith Article, the £71,949,630.08 repaid to Investec cannot be said to represent "delayed payment" for the rights acquired by the borrowers under the TCSAs, because those rights had yet to be paid for. In addition, it is noteworthy that one reason Professor Smith gave for recognising backwards tracing when a loan is repaid is that otherwise the trustee would have no tracing claim (p.298: "looking just at the payment of debt, we can see that there is no asset acquired by that payment alone, and so nothing into which we could trace"). Whether that is a sufficient basis for recognising a tracing claim or not, it is not one which applies here.

81. For these reasons, I have concluded that HPII's case is not arguable at Stage 3A. It is now necessary to consider the alternative tracing routes at Stages 3B and 3C.

H. STAGE 3B

The factual background

82. I referred above to the fact that Euro Estates transferred £91.75m from Euro Estate's share of the profits of the Hyde Park Hotels to Investec who applied £71,949,630.08 of that amount to repay the Investec Facility. The other £19,852,151.11 remained in BTH1's account with Investec. From there, it was transferred to Bridge House Partners' main client account in two tranches. The second tranche – £9m – appears to have been moved into one of Unicorn's account by way of loan on 28 April 2008. Unicorn in turn lent £4,016,241 to a company called Specialty, who used it to acquire 51% of a company called Bridgehouse Marine.

Election

83. Once again, the Settlement Parties say that HPII has elected to treat the £19.852m as a loan made by Euro Estates to BTH1 and/or BTH2, which was repaid by the £92m paid under the TSA in November 2012, and that this precludes a claim to trace into the use made of the £19.852m by the recipients. However, for the reasons I have given above, I am satisfied that no election has yet been made, and that the time for making an election has yet to arrive.

Can HPII trace through a repaid loan?

84. The Settlement Parties' second objection is put as follows:

> "BTH1 is said to have used the money paid to it under the Second Pearl Qatar Loan by making a loan to Unicorn; and Unicorn then made a loan to Specialty to fund the purchase of the shares in Bridgehouse Marine. So the traceable proceeds of the Hyde Park Profits are the loan rights and not the shares".

(emphasis in original).

85. However, I am satisfied that it is strongly arguable that this is only true if the relevant borrowers (Unicorn and then Specialty) were bona fide purchasers for value of the amount received under the loan. *Lewin*, 44-047 states:

> "In an ordinary case where a donee receives trust money and lends it to another, the claimant can trace into the loan itself and so recover the amount of the loan from the borrower, if good for repayment, irrespective of what the borrower does with the money lent to it; or alternatively, if the borrower is not a purchaser without notice, trace through the loan into property acquired by the borrower with the money lent".

86. The authority cited for this proposition is Mance J in Grupo Torras SA v Al Sabah [1999] CLC 1469, 1674, where he describes this as a "possible argument". In my view, it is an argument which has considerable force, because a borrower who is on notice that the trustee is lending trust funds in breach of trust can be treated as a constructive trustee of those funds, rather than someone who acquires good title to the funds transferred but comes under a personal obligation to repay the debt.

Conclusion

87. For these reasons, I am satisfied that HPII has shown an arguable case at Stage 3B of its tracing case.

I. STAGE 3C

88. This stage depends on HPII's argument that sums paid under contracts entered into on the BTH2-side of the Qatar Projects were derived from the profits made from the sale of the Hyde Park Hotels. In support of that contention, HPII points to evidence Mr Ruhan gave in an arbitration between the BTH2Subs and a Mr Al-Jufairi, and it relies on that evidence and certain other documents to advance the following case:

    i) The BTH2Subs entered into four TSCSAs on 13 November 2007 and two TCSAs on 9 December 2007.

    ii) On 31 January 2008, the BTH2Subs paid $5m under the first four TCSAs (a total of $20m), which payments were made by Unicorn "as the Bridge entities had taken out an intragroup loan from Unicorn to fund these payments and payment by Unicorn directly was administratively more simple".

    iii) A document called "the Recoveries Spreadsheet" prepared in 2016 at the instigation of Messrs Cooper and McNally identifies various recoveries made from the Qatar Projects more generally, and shows $20m from that source being

paid by a company called LMC to Unicorn on 24 January 2008 which is then shown as being transferred for the benefit of BTH2.

iv) It is to be inferred, therefore, that amounts recovered from the Qatar Projects were the source of the $20m payment used to pay $5m under the first four BTH2Subs TCSAs.

v) On 16 April 2008, Bridgehouse Partners paid US$21 million under the BTH2Subs TCSAs "from monies held for the Bridgehouse entities".

vi) On the same date, Investec transferred £10.9m (just over US$21m) from the £19,852,152.11 paid to it (which it is agreed arguably came from the profits made on the Hyde Park Hotels) to the BHP Main Client account, which it is to be inferred was the source of the payments made under the BTH2Subs TCSAs on that date.

89. In relation to these payments, the Settlement Parties submitted that HPII could derive little support from Mr Ruhan's evidence when, on HPII's own case, Mr Ruhan was a liar and a fraudster. However, those are issues which are hotly disputed and for future determination. In any event, the fact that the evidence of a witness is found to be untruthful in one aspect does not automatically entail the wholesale rejection of the witness's evidence (still less evidence given in an unconnected arbitration), as the terms of the standard Lucas direction given to juries makes clear (R v Lucas [1981] QB 720).

90. The Settlement Parties also mounted an attack on the reliability of the "Recoveries Schedule". I should explain a little more about what is known, and not known, about the provenance of this document:

i) The document appears to record the outcome of the investigative work done by or on behalf of the Orb Claimants, and it was sent by Mr McNally to Dr Smith on 29 February 2016. It records 10 payments between 2007 and 2010 said to represent recoveries from the Qatar Projects.

ii) The metadata suggests that the document was prepared by a company associated with Messrs Cooper and McNally. However, nothing is known about the basis on which the schedule was put together, or what the sources of the various entries were.

iii) A document called "Index 30", which was exhibited by Ms Stickler in an affidavit filed on 24 March 2014 in the Isle of Man proceedings, records payments 3 to 7 and 8 to 10 of those shown on the Recoveries Spreadsheet as having been made. Ms Stickler described the Index 30 schedule in the following terms:

> "A schedule obtained from the [October 2013 Norwich Pharmacal Order] that describes a series of payments transferred from Qatar to [Unicorn] in partial settlement of a series of contract claims that total $157,364,148 from 13 May 1999 [sic] until 1 March 2011".

iv) A table in substantially similar form to Index 30 is exhibited by Mr Ruhan in his witness statement served in the Ruhan Proceedings, referring to 9 of the 10 payments which the Recoveries Spreadsheet suggests were made between 2007 and 2010 (payment 8 does not appear), but it is somewhat confusingly referred to by Mr Ruhan as supporting his evidence that "from 2010 to 2012 the Qataris started drip feeding the deposit back to us" (rather than 2009 to 2011).

v) HPII's own investigations, as summarised in paragraphs 126(5) to (12) of Mr Russell's third witness statement, provides some independent confirmation for the source of payments 2 to 8 and 10.

91. Against that background, I am satisfied that the Recoveries Schedule is sufficiently reliable at this stage to provide an arguable basis that these payments were received by Mr Ruhan or companies connected with him from the Qatar Projects.

92. Standing back, therefore, I am satisfied that it is arguable that:

i) That $20m paid under the BTH2Subs TCSAs on 24 January 2008 came from recoveries made from the Qatar Projects. I have already held that HPII's claim to trace from the Hyde Park Hotels into the payments made into the BTH1Subs TCSAs is not arguable (because it depends on the ability to "backwards trace" into the proceeds of the money borrowed under the Investec Facility). I address a separate argument raised by the Settlement Parties – whether and to what extent it is possible to trace the rights acquired under the BTH1Subs' TCSAs into Payments 1 to 10 – below. While I accept that the Recoveries Schedule appears to contain inconsistent dates relating to this payment (24 January and 30 January 2008), that is not an issue which can be resolved at a summary judgment hearing.

ii) I am satisfied that it is arguable that the proceeds of the £19.9m, which it is accepted arguably represent traceable proceeds of the Hyde Park Hotel profits, can be traced into $21m paid under the BTH2Subs' TCSAs on 16 April 2008. It follows that in relation to the rights acquired by the BTH2Subs under their TCSAs, HPII has shown an arguable tracing claim. The issue of whether there is an arguable claim to trace on from those rights remains to be considered.

J. STAGE 4

93. Stage 4 of HPII's tracing claim seeks to trace assets from the Qatar Projects back to Mr Ruhan (as a necessary link in a tracing chain intended to link the Hyde Park Hotel profits with the assets transferred (or the assets of the companies transferred) under the IOM Settlement). HPII relies on three separate sets of payments:

i) Payments 1 to 10 made between 2007 and 2010.

ii) Payment 11, a payment of $36,814,816.69 made on 7 January 2014.

iii) Payment 12 a payment of $43.5m made to Ocean for the BTH1 entities and others on 11 June 2015.

94. I am satisfied that it is arguable that each of these payments were made. However, the question is what do they (arguably) represent.

Stage 4A: Payments 1 to 10

95. The Settlement Parties criticised HPII, with some justification in my view, for the absence of any real attempt to link these 10 payments with the rights under the BTH1Sub and BTH2Sub TCSAs into which they assert an entitlement to trace the Hyde Park Hotel profits. However, this issue was explored in the course of oral submissions.

96. I have referred to the terms of the BTH1Subs TCSAs above. They involve agreements under which the BTH1Subs acquired a package of rights in return for a promise to pay $140m per tower, of which 75% of the deposit of $30m per tower was sourced from the Investec Facility. In the event, none of the towers was built, and no further payments were made.

97. Any tracing claim based on the payment of 75% of the Cash Deposit Amount needs to address:

    i) what proportion of the rights acquired under the TCSAs would a claim based on tracing into $22.5m of the $30m deposit paid (out of $140m total price) give; and

    ii) how those rights could be traced into Payments 1 to 10 (or some of them).

98. HPII has no information as to what Payment 1 relates to – whether it is linked to the BTH1 or BTH2 side of the Qatar Projects or whether it was paid by or for the benefit of any party to the TCSAs. On the information available, there is no arguable basis for tracing from the TCSAs into that payment.

99. So far as the other nine payments are concerned:

    i) There are a series of payments made by Al Arrab (who was a party to the TCSAs) to entities on the BTH1 side: $36m paid on 24 January 2008; $12.282m paid on 13 May 2009; $6.182m paid on 2 June 2009; and $5.775m paid on 6 July 2009 (Payments 2 to 5). It is difficult to know what these payments represent. However, the identity of the payer and payee provides an arguable basis for contending that they are traceable to the TCSAs. It is not possible to determine whether those payments are exclusively referable to the deposits paid, or whether they relate to the entire package of obligations assumed under the TCSAs. I am willing to assume on the basis of the arguments advanced at this hearing that it is arguable that HPII can trace into 75% of these payments, or some $45m.

    ii) Payment 6 ($48.75m) was paid by Al Arrab under an agreement for the early termination of two of the towers, those to be acquired by BT3 and BT6, as the price of the "early termination" of those TCSAs. I find it more challenging to treat the entirety of this sum as referable to the deposits only, but once again I am willing to accept on the basis of the arguments advanced at this hearing that it is arguable that HPII can trace into 75% of these payments, or $36,562,500.

    iii) Payment 7 ($22m) was paid by Al Arrab pursuant to a share sale agreement with BTH1 for the sale of the shares in BT1 and BT2, being part of the total consideration of $50m. Payments 8 ($500,000) and 10 ($6m) were paid under

the same agreement. I can see no basis on which HPII can trace into these payments, which were referable to the agreement to sell shares in BT1 and BT2, rather than rights derived by those companies under their respective TCSAs. Mr Pickering QC suggested that the value of the shares in those companies would reflect the contractual rights they enjoyed, and I accept that this very likely to be the case. However, I cannot accept that the doctrine of tracing allows for tracing through the value of assets acquired by a company into the reflective increase in the value of the company's shares.

iv) Payment 9 ($56m) was paid in August 2010. On the evidence, it is arguable that this figure represented the refund of the deposits paid under the BT4 and BT5 TCSAs. On that basis, it is arguable that HPII can trace into 75% of this amount, namely $42m.

100. In summary, while HPII's case will need to address certain conceptual and evidential challenges in due course, if HPII had been able to show an arguable tracing claim into the rights acquired with the benefits of the Investec Facility, I would have held that HPII had shown an arguable tracing case into 75% of Payments 2 to 6 and 9.

Stage 4B: Payment 11

101. The evidence before me arguably establishes the following:

i) BT7, BT11 and BT12 were parties to TCSAs with Del Mar Real Estate ("Del Mar") under which the relevant BTH2Sub agreed to purchase a tower from Del Mar.

ii) On the basis of Mr Ruhan's evidence in the arbitration to which I referred at [88] above, by 7 January 2014 payments had been made in the sum of $7.5m per tower (amounting to total payments of $45m for all six towers). The payments in respect of towers VB19 to VB22 were made in instalments of $1m (on 26 November 2007), $5m (on 24 January 2008) and $1.5m (on 18 April 2008), and those in respect of VB6 and VB7 by a single payment of $7.5m per tower on 18 April 2008.

iii) On 7 January 2014, the three BTH2Subs (BT7 in respect of VB19; BT11 in respect of VB6 and BT12 in respect of VB7) agreed to release Del Mar from its obligations under the TCSAs, and the relevant BTH2Sub and Del Mar agreed to sell their interest to Mr Asmakh, who agreed to pay each BTH2Sub US$12.271m per tower.

102. As to the $36,814,816.89 paid by Mr Asmakh for the right to towers VB19, VB6 and VB7:

i) HPII has shown an arguable tracing claim into $21m paid on 16 April 2008 (Stage 3C).

ii) That amount comprised $1.5m for towers VB19 to VB22 and $7.5m each for towers VB6 and VB7.

iii) Payment 11 is only referable to towers VB19 ($1.5m), 6 ($7.5m) and 7 ($7.5m).

iv) On the premise under consideration, HPII therefore has an arguable tracing claim into $16.5m of the $22.5m which had been paid under the contracts for the three towers sold to Mr Asmakh (or 73.33% of the amounts paid).

v) If HPII had been able to make its claim good in relation to the $20m payment on 24 January 2008, those figures would have increased to $21.5m of $22.5m or 95% (as it would involve bringing into account a tracing claim into $5m paid for VB19 on 24 January 2008).

Stage 4C: Payment 12

103. On 11 June 2015, the Qatar Settlement Agreement was entered into between Al Arrab, the Land and persons purporting to represent BT1, BT2, BT4 and BT5 in order to settle claims arising under the four TCSAs and associated leases, under the agreement between BTH1 and Al Arrab for the sale of the shares in BT1 and BT2, and various associated agreements which involved other parties.

104. The settlement sum paid under the Qatar Settlement Agreement was $43.5m. HPII did not try and identify which parts of that amount were said to be referrable to the TCSAs (still less how far they were referable to that part of the deposits funded with the proceeds of the Investec Facility). However, there was no argument on this issue at the hearing, and I am therefore willing to assume in HPII's favour that 75% of the Cash Deposit Amounts funded with the benefits of the Investec Facility are traceable into this amount (in proportions which would depend on any other tracing claims established).

105. On that basis, had I accepted HPII's claim that it had an arguable claim to trace into the rights acquired using the funds borrowed under the Investec Facility, I would have held that HPII had an arguable claim to trace those proceeds into some part of the payment of $43.5m.

K. STAGE 5

Introduction

106. HPII claims it can trace from Payments 1 to 10 into assets transferred under the IOM Settlement, and it can then trace the assets transferred under the IOM Settlement (or the assets of the companies transferred under the IOM Settlement) into the IUAs and the Non-Arena Companies. On this part of its case, therefore, HPII must show an arguable case that:

i) Payments 1 to 10 can be traced into the assets transferred under the IOM Settlement (or the assets of the companies transferred under the IOM Settlement) (Stage 5A).

ii) The assets transferred under the IOM Settlement (or the assets of the companies transferred under the IOM Settlement) (or at least those into which HPII can arguably trace) can be traced into the Relevant Property (Stage 5B).

107. HPII now accepts that it is unable to trace into the shares in the Arena Holdcos, and it maintains no tracing claim to the shares in the other companies transferred under the

IOM Settlement. HPII maintains its tracing claim into the Non-Arena Companies and the IUAs. In these circumstances, I propose to consider Stage 5B first.

Stage 5B: Can HPII trace from the assets transferred under the IOM Settlement into the Non-Arena Companies and the IUAs?

The shares in the Non-Arena Companies

108. I can deal with the first part of this issue briefly because it is common ground that claims to trace from the assets transferred under the IOM Settlement into the Non-Arena Companies formed part of the Directed Trial and were to be decided on a final basis at that trial.

109. At the Directed Trial, only the Settlement Parties argued that the Non-Arena Companies were derived from assets transferred under the IOM Settlement, and then only in the alternative to their primary argument that the Non-Arena Companies were owned by Dr Smith or Dr Cochrane. That alternative argument featured in a single paragraph in the Settlement Parties' closing and the issue was not addressed at all in HPII's closing.

110. In [362] of the Directed Trial Judgment, a paragraph largely written before hearing the strike out application, I held:

> "While the Settlement Parties advanced a fall-back case that the Non-Arena Companies were held on the terms of the Harbour Trust, no one developed that argument before me. The Non-Arena Companies were not transferred under the IOM Settlement, nor were they recovered from the "Ruhan-side" of the 2012 Proceedings. There was no material at the Directed Trial which suggested that the shares in the Non-Arena Companies were themselves the traceable proceeds of the Transferred Assets. In these circumstances, and unassisted by any contrary argument, I see no basis for concluding that the Non-Arena Companies represented "Proceeds" for the purposes of the Harbour IA, so as to be held on the terms of the Harbour Trust. Accordingly, I will consider Phoenix's claim on the alternative basis (that Dr Cochrane held the Non-Arena Companies on bare trust for Dr Smith and entered into the Loan Note and the LICSA as trustee of that trusts)".

111. That finding precludes HPII's attempt to trace from the assets transferred under the IOM Settlement into the shares of any of the Non-Arena Companies. It is clearly not open to HPII to adduce further evidence and advance further argument on this issue after the end of closing submissions in the Directed Trial, as HPII accepted. In any event, I would note that the only matters relied upon now to support this argument are that Dr Smith either incorporated or acquired 16 of the Non-Arena Companies after assets had been transferred under the IOM Settlement, which is said to support the inference that the incorporation or acquisition costs of those Non-Arena Companies were met from unidentified assets transferred under the IOM Settlement. Had this argument been advanced in time, it would have been manifestly insufficient to make good HPII's tracing claim at the Directed Trial on the balance of probabilities. These were issues which were the subject of disclosure in the Directed Trial, and Mr Taylor

(who was involved with at least one of these companies) gave evidence at the Directed Trial. It was for HPII to make out this element of its proprietary claim at that stage and it was unable to do so.

112. The only Non-Arena Company which was the subject of specific submissions by HPII at the Directed Trial was Bodega. HPII's pleaded case, and its own tracing analysis as exhibited to the witness statement of Ms Aird-Brown, was that it could trace into Bodega from the £10m paid under the IOM Settlement (it being assumed that it would in due course be able to make good an upstream tracing claim into the £10m). That downstream analysis was not disputed by the Settlement Parties or any other party, and it was common ground at the closing of the Directed Trial. In its evidence for this application, HPII sought to identify alternative potential routes by which it might trace into Bodega, but tracing from the IOM Settlement to Bodega was a matter which formed part of the Directed Trial. In these circumstances, I am not willing to allow HPII to raise a different case now on that issue from that which it successfully advanced at the Directed Trial.

113. The result is that to trace into Bodega, HPII must establish an arguable claim by which the Hyde Park Hotel profits can be traced into the £10m. Not only does this suffer from same difficulties of the "missing middle" (which I address below), but it suffers from the further difficulty that the Settlement Parties (in an analysis which HPII did not challenge at the hearing) have established that £7,549,254 of the £10m is attributable to profits from the Digital Stout/Sentrum sale, and not from Payments 1 to 10. However, additional cash was transferred by reason of the IOM Settlement - £583,321.80 and £2.5m. There was no evidence as to the source of these amounts. I shall refer to the three cash payments - £10m, £583,321.80 and £2.5m – collectively as the IOM Settlement Cash.

The IOM Settlement Cash

114. I have held in Section M of the Directed Trial Judgment that, as against HPII's claim, the Orb Claimants were bona fide purchasers for value of the IOM Settlement Cash. That finding precludes any attempt by HPII now to trace into the proceeds of the IOM Settlement Cash.

115. If that conclusion is wrong, then the evidence at the Directed Trial established that the IOM Settlement Cash can be traced into the following IUAs:

    i) Flat 24 Hamilton House (the sole source of which was the £10m). It follows that even if HPII's claim to trace into the IOM Settlement assets was otherwise arguable, and the bona fide purchaser valuer defence had failed, HPII's interest in Flat 24 could not have exceeded 25%.

    ii) Flats 1, 10, 11, 14, 21 and 23 Hamilton House and the Hamilton House headleases, acquired from assets traceable to the £10m, the £2.5m and the "Wrongful Payments" which are the subject of the JLs' claims in the Directed Trial.

    iii) Flat 2 Hamilton House, acquired from the £10m and the Wrongful Payments.

iv) Flat 17 Hamilton House, acquired from assets traceable to the £10m, the £2.5m and the Wrongful Payments.

v) Flat 22 Hamilton House, acquired from assets traceable to the £10m, the £583,321.80 and the Wrongful Payments .

The IUAs

116. Save for £7.5m of the £10m which can be shown to have come from the Sentrum proceeds, there was no evidence which suggested a link, or established the absence of a link, between Payments 1 to 10 and the IUAs.

Stage 5A

Introduction

117. If HPII had been able to trace into Payments 1 to 10, it would still be necessary in order to establish its tracing claim to trace from those payments into the Relevant Property (which, on the basis of my findings summarised when addressing Stage 5B, could not have extended beyond the IOM Settlement Cash - with the exception of £7.5m of the £10m - and the IUAs).

118. HPII accepts that, even though armed with knowledge of the necessary starting point and the desired destination, it remains unable to demonstrate any link between Payments 1 to 10 and any of the Relevant Property. With some understatement, HPII explained its position as follows:

> "HPII acknowledges that it is currently unable to prove unequivocally how the funds were applied after the above initial transactions. However, HPII says that pending further investigations and analysis, given that very significant funds were applied to companies and projects within the Arena Settlement and/or connected with Mr Cooper and Mr McNally, it can and ought to be inferred that the traceable (or substitute) proceeds of those funds remained within companies and projects within the Arena Settlement structure and/or connected with Mr Cooper and Mr McNally and very significantly contributed to maintaining and/or generating the vast wealth within Mr Ruhan's ownership structure".

119. This gap in HPII's case was referred to by the Settlement Parties as "the missing middle". In determining whether that "missing middle" has the effect that HPII cannot now show a realistic prospect of success, it is helpful to consider:

i) The sources of information already available to HPII.

ii) The further sources of information which it is said might realistically be available by the time of trial.

iii) What HPII is presently able to point to by way of supportive inferences.

The sources of information already available to HPII

120. HPII has had a copy of the Recoveries Spreadsheet since May 2018, and has, therefore, been in a position to follow up the payments identified in that schedule since that time. On 25 April 2018, HPII was ordered to provide a substantive response to a Part 18 Request intended to elicit the details of its tracing claim, and it has clearly been aware of the importance of gathering evidence on this part of its case since at least that date.

121. I accept that HPII has undertaken extensive efforts to obtain evidence which would enable it to plead this part of this case in more detail. These include:

    i) Nine sets of interviews using the investigation powers which HPII's liquidator has under the Insolvency Act 1986.

    ii) 13 sets of orders made to obtain third party documents under s.236 of the 1986 Act.

    iii) The voluntary production of documents by two further parties.

122. In addition, HPII has had the benefit of Phase 1 disclosure from the parties in these proceedings (although such disclosure was directed to the issues in the Directed Trial) and disclosure from Mr Ruhan and Mr Stevens in the Ruhan proceedings (which are to be tried in November, and in which witness statements have already been exchanged). HPII has also obtained access to some materials from the Ruhan divorce proceedings.

The further sources of information which it is said will be available by the time of trial

123. HPII have pointed to a number of sources of further evidence which it is suggested have a realistic prospect of enabling it to fill the "missing middle".

124. The first source is further s.236 orders. The only entities against whom it is suggested that further orders might be sought (either under s.236 itself or through court applications in other jurisdictions) are bank statements from Allied Irish Bank and RBSI in the Isle of Man. The Settlement Parties complain that there is no explanation for why such applications have not been pursued before, although it is legitimate for HPII, in this context, to place some reliance on limits on its litigation bandwidth against the background of its active involvement in Phase 1 of the Directed Trial and the Ruhan Proceedings. I accept that there may be some scope for a more targeted attempt to seek bank statements under s.236 or similar procedures in relation to particular payments emanating from the Qatar Projects.

125. The second potential source is witness evidence and cross-examination. It is not entirely clear to me which witnesses HPII has in mind when identifying this as a realistic source of further supportive information. If it is witnesses in Phase 2 of the Directed Trial, it is clear from Phase 1 that it is wholly unrealistic to suggest that witnesses with first-hand knowledge of how assets were dealt with on the Ruhan-side will give evidence at the Phase 2 trial. The only witness alleged to have such knowledge who gave evidence at the Phase 1 trial was Mr Stevens (and he strongly denies HPII's characterisation of his role). HPII has Mr Ruhan and Mr Stevens' witness statements for the Ruhan trial, and HPII does not suggest that those statements enable it to plug the gap in its case. I find the suggestion that cross-examination of Mr Ruhan or Mr Stevens might elicit

detailed evidence to fill the gap between the Recoveries Spreadsheet and assets transferred under the IOM Companies when it has not been possible to identify any supportive material in their disclosure unrealistic, but I accept that it may be possible to obtain answers which could support the case at a more general level (eg. as to how far money entered or left the companies managed by Messrs Cooper and McNally between 2010 and 2014).

126. The third potential source to which HPII points is disclosure from the other parties in Phase 2 of this litigation. I accept that disclosure to date has been directed to the issues in the Directed Trial. HPII says that it is realistic to suppose that parties to the Directed Trial may have further documents which are relevant to the tracing issues:

i) First, it is said that the SFO might realistically have relevant documents to disclose. However, I accept the evidence of Mr Cockburn that it is "overwhelmingly likely" that the SFO's existing disclosure will have captured any relevant documents, and that the nature of the SFO's enquiries (into Dr Smith and his affairs rather than Mr Ruhan) make the SFO an improbable source for documents relevant to this issue. Further, on the evidence before me, the SFO and the ERs have carried out searches for those bank statements which HPII suggested would assist in the tracing exercise, and those searches have not identified any such documents.

ii) Second, it is said that the JLs have access to the books and records of the companies over whom they have been appointed (Unicorn, Glen Moar, Ballaugh, Sulby, BPAC, Specialty and Bridge Properties). The JLs have provided excel spreadsheets which identify all transactions passing through Unicorn's USD, GBP and EUR accounts between c.2003 and 2014. Similar spreadsheets have also been provided for Ballaugh, Glen Moar, Bridgehouse (Bradford IOM) and Skypark, and full disclosure has been given of the documents relating to Glen Moar's RBSI accounts. That suggests that the prospects of helpful documents being disclosed are slim, but I do not feel able to discount them altogether.

iii) Third, it was suggested that Minardi might hold relevant documents. Minardi was a company which was controlled by Mr Phillip Barton until August 2014, when it was transferred into the ownership of Dr Cochrane/GACH and Mr Rankin, and then transferred again on 29 April 2016 to Phoenix. Only a limited explanation was offered as to why Minardi might realistically be expected to hold documents relevant to the tracing issue (namely the receipt of $33,149,978 which is the subject of an arguable tracing claim), although I accept it had some involvement in the Qatar Projects.

127. There is a further difficulty for HPII. The Recoveries Spreadsheet represented the fruits of the attempt by those acting for or assisting the Orb Claimants to establish their own tracing claim from the Hyde Park Hotel profits into the Arena Settlement. That exercise was undertaken when persons acting for the Orb Claimants had acquired *de facto* control of the Arena and Cooper and McNally Companies (following the IOM Settlement), and had the assistance of Messrs Cooper and McNally (as Cooke J noted in Orb Arl v Ruhan [2015] EWHC 262 (Comm), [23]). However, it would appear that they were never able to move matters beyond the Recoveries Schedule.

128. In short, the grounds for believing further relevant information will be forthcoming are thin. However, I accept that obtaining visibility as to the movement of funds once they entered Mr Ruhan's structure (referred to by one of those involved contemporaneously as "Andy's world") is an inherently challenging task. I also accept that analysing the detailed information already available – in particular the lists of Unicorn's transactions – is a time-consuming task, which HPII admits it has yet to complete.

What can HPII point by way of supportive inferences now?

129. HPII argues that it can be inferred that Payments 1 to 10 remained within the assets transferred under the IOM Settlement because evidence before the court establishes that no significant assets left the pool of assets managed by Messrs Cooper and McNally on behalf of Mr Ruhan between 2010 and 2013-14:

    i) HPII points to an undated document entitled "Principal Assets of SJ McNally, SNH Cooper and AJ Ruhan" which shows total net assets of £394m. The document is identified in the trial bundle as having been produced on 11 December 2009. It also shows net assets of Sentrum Holdings of £197,896,214, of BTH1 of £81.6m and BTH2 of £27.6m.

    ii) A schedule of a similar kind, this time dated 31 March 2012, shows total net assets of £571m.

130. I do not feel able to place any real reliance on this schedule. The increase of £177m is more than accounted for by the increase in the value of Sentrum Holdings of £204m (into which no viable tracing claim has been advanced). Further, the assets of BTH1 fell in value to £18.4m, and those of BTH2 increased only to £28.4m. Those figures themselves may mask greater falls in dollar values against sterling over that period.

131. The Settlement Parties have sought to identify what happened to the $196m of Payments 1 to 10, and (in an analysis which HPII did not seek to challenge), showed that $137.47m of the $196m had either left the companies transferred under the IOM Settlement or been consumed in the Qatar Projects, including in repaying other sources of finance. It is helpful to consider Payments 1 to 10 in turn, with the benefit of the Settlement Parties' analysis, which provides a more reliable means of assessing the viability of the tracing claim than HPII's generalised assertions about the entire pool of assets.

132. As I have stated, HPII has no information as to what Payment 1 relates to – whether it is linked to the BTH1 or BTH2 side of the Qatar Projects or whether it was paid by or for the benefit of a party to the TCSAs. On the material before me, I have concluded that there is no arguable basis for tracing from the TCSAs into that payment.

133. I have determined that some part of Payments 2 to 6 and 9, which total approximately $165.36m, are arguably traceable proceeds of the TCSAs. Of these, the Settlement Parties' analysis shows that:

    i) $6m of Payment 2 was used to pay the Saad brothers.

    ii) All of Payments 3, 4, and 5 went to pay Tatich Financing or to meet interest and fees.

iii) All bar $4.69m of Payment 9 went to repay another Investec Facility.

134. Mr Pickering QC suggested that "there are bases for suggesting that trust monies, hotel profits, were also used to pay off the Tatich Financing" loan, but HPII's evidence identified no evidential basis for that assertion, which was essentially speculative.

135. That leaves HPII, at this stage of its analysis, with an arguable tracing claim in relation to a 75% share of $30m of Payment 2 (which was paid to BTH1 on 24 January 2008, and into Unicorn's RBSI account on 30 January 2008); a 75% share of Payment 6 ($48.75m paid to BTH1 on 18 March 2008) and a 75% share of $4.7m of Payment 9 (paid to LMC on 27 August to 2010 and onto GDML). There may well be an overlap between Payment 2, and HPII's reliance on the same payments to trace into Payment 11, which I do not need to address at this stage.

136. I see considerable force in the Settlement Parties' submission that HPII has had ample time to make good this part of its claim, and that it has proved unable to do so. I also accept that the scope for further relevant evidence to emerge is limited, but it is not, in my opinion, wholly fanciful (in particular as regards Unicorn's RBSI account and the accounts of GDML). Had I held HPII's backwards tracing claim to be arguable, I would have been willing to permit the claim to be advanced by reference to the payments identified in the preceding paragraph, but not Payments 1, 3 to 5, 7, 8 and 10.

137. That would not have been on the basis that HPII could definitely run the case to trial. HPII's tracing claim has for too long been proceeding at an unacceptable level of generality. Having focussed HPII's tracing claim on the viable payments, it would be clear where HPII's investigative energies should be directed, and where the Settlement Parties should concentrate their response. Against that background, if a claim based on Payments 2, 6 and 9 otherwise proceeded, I would not have regarded a further summary judgment application as inappropriate if, after the end of the Ruhan trial, HPII was either no further forward in supporting what is currently a thin case, or if the Settlement Parties were able to push HPII further back.

L. STAGE 6

138. The Settlement Parties accept that it is arguable that Payment 11 can be traced through a $33,149,978 payment to Minardi in January 2014, into payments made to Bluestone, GM Systems and Dr Cochrane and on to Flats 11, 21 and 23 Hamilton House.

M. STAGE 7

139. The Settlement Parties accept that it is arguable that Payment 12 can be traced into two of the IUAs – Montagu House and Flat 12, Hamilton House – and one of the Jersey Properties (Antoinette Gardens).

N. STAGE 8

140. The Settlement Parties accept that the £40m realised from the sale of Bridgehouse Marine (at Stage 3B) can be traced into various IUAs and into the Jersey Properties. I accept that a number of complex issues then arise in relation to HPII's claims, which would not have arisen if the only tracing parties were Settlement Parties (who had resolved the position inter se such that the Court would not have been required to

resolve the respective contributions of different payment flows). However, the fact that such difficulties might arise was inherent in the fact that HPII's upstream tracing claims to the IUAs did not form part of the Directed Trial (it not being possible, in practice, to answer those questions until the end-point of the upstream part of HPII's tracing claim had been identified).

O. CONCLUSION

141. For the reasons set out above:

i) HPII does not pursue any tracing claim to the shares in the Arena Companies and has no tracing claim into the shares of the Non-Arena Companies.

ii) So far as the IUAs are concerned, HPII has arguable tracing claims in respect of:

a) The proceeds of the £4,016,241 advanced to Specialty, to the extent (and in such proportions) as that can subsequently be traced into the IUAs.

b) 73.33% of the $33,149,978 paid to Minardi, through equivalent shares of the subsequent payments to Bluestone ($27m), GM Systems (£15m) and Dr Cochrane (£15m), to the extent (and in such proportions) as the £15m payment to Dr Cochrane can subsequently traced into the IUAs. But for my determination at [72]-[76], the percentage would be 95%: [96(iv)].

iii) But for my determination at [72]-[76] above, HPII would have an arguable tracing claim to the IUAs, to the extent the IUAs constituted the traceable proceeds of 75% of:

a) $30m paid into Unicorn's RBSI account from Payment 2;

b) $48.75m paid to BTH1 on 18 March 2008 (Payment 6);

c) $4.7m paid to GDML from Payment 9; and

d) $43.5m paid under Qatar Settlement (Payment 12);

but not otherwise, and subject to such further information as might emerge in relation to the use made of these payments, and in relation to any other property rights in the same payments.

iv) However, to the extent it involves tracing through the IOM Settlement Cash, that tracing claim is defeated by the Settlement Parties' bona fide purchaser for value defence.

v) I make no findings in this judgment as to how far any claims can be run cumulatively or only in the alternative.

vi) For the reasons set out in Section P of the Directed Trial Judgment, HPII cannot trace into any of the Jersey Properties.

142. HPII will be required to produce a draft amendment in respect of the tracing claim I have held to be open to it.