[2024 Gib LR 417]

MANSION (GIBRALTAR) LIMITED and ONISAC LIMITED v. MANASCO and KM ACCOUNTANTS LIMITED

SUPREME COURT (Dudley, C.J.): August 14th, 2024

2024/GSC/026

Civil Procedure—settlement of proceedings—"without prejudice" communications—"without prejudice" communication may be exhibited in evidence if exclusion of communication would be cloak for perjury, blackmail or other unambiguous impropriety—"without prejudice" letter from defendants' lawyer to claimants' lawyer contained unambiguously improper (i) threat to provide Chief Minister with defence if proceedings not settled; (ii) suggestion that proceedings should be settled to protect personal political interest of partner at claimants' lawyers firm; and (iii) suggestion that settling proceedings would avoid serious reputational consequences for Gibraltar

Civil Procedure—defence—amendment—defendant not permitted to amend defence to introduce insufficiently pleaded, vague allegations of illegality against claimants

The claimants brought proceedings for damages and compensation.

The first claimant ("Mansion Gibraltar") and the second claimant ("Onisac") were part of the Mansion Group of companies which operated an online gaming enterprise known as "Mansion." The first defendant ("KM") was an accountant. He had been Mansion Gibraltar's Chief Executive Officer and *de facto* Chief Financial Officer, and the sole director of Mansion Gibraltar and Onisac as well as other companies in the Group. The second defendant was a Gibraltar company of which the claimants claimed that KM was at all material times the sole director and shareholder.

At all material times until May 1st, 2021, a Mr. Mak acted as the duly authorized representative of the sole shareholder of the companies within the Mansion Group. The claimants claimed that KM reported to Mr. Mak. On May 1st, 2021, Mr. Mak was replaced by a Mr. Block, who was also appointed as a director of each of the Mansion companies. A disciplinary investigation against KM was instituted in September 2021 and KM was

suspended from employment. He resigned before the conclusion of the investigation.

The claimants issued their claim form in September 2022. They alleged various breaches of fiduciary, non-fiduciary and contractual duties. They sought damages and equitable compensation and an order that KM account for all benefits he (or his related parties) might have received directly or indirectly as a result of his position within the claimant companies. In July 2023 the claimants amended their particulars of claim and now also advanced proprietary claims in respect of some of the alleged breaches. The various alleged breaches included (i) KM procuring the payment to himself of bonuses and personal allowance payments to which he was not entitled; (ii) KM authorizing and/or approving payments to a company known as White Wizard Media Ltd. which, to the claimants' knowledge, did not provide any services to the claimants; (iii) KM failing to take reasonable (or any) steps to comply with directions given by the regulatory authority in Gibraltar for gaming, ultimately requiring Onisac to enter into a regulatory settlement of £850,000; (iv) KM procuring the payment of personal rental expenses; (v) KM causing Mansion Gibraltar to purchase high end vehicles for his own personal use; (vi) KM procuring Mansion Gibraltar to pay for luxury watches which derived no benefit to Mansion Gibraltar; (vii) KM's use of Mansion Gibraltar's corporate credit cards to pay for personal expenses and to purchase a domain name for KM's own benefit; and (viii) KM causing Mansion Gibraltar to pay for other personal expenses, such as legal fees and rent.

In September 2023, the defendants' lawyer sent the claimants' lawyer a letter marked "Private and Confidential" and "Without Prejudice" ("the WP letter"), enclosing an amended draft defence containing allegations of illegality. The WP letter stated *inter alia* that if the proceedings were not settled—

> "the jurisdiction stands to lose a great deal and could well make us the pariahs of Europe, leading to black certification resulting from being the base for Mansion defrauding many countries in Europe—and still are. As a result, I will feel obliged to provide a copy of the document to the Chief Minister because if he cannot prevent the inevitable damaging fallout, he can at least act against Mansion to put a stop to its illegal businesses and offer to assist the affected European countries to recover their losses and to prevent future fraud.
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> The public impact on the Government coming up to an election would be devastating as the Gibraltar taxpayer has been continuously defrauded on the Government's watch, and it will not help for the general populace to identify the government minister with responsibility with a law firm of which he is a member defending the illegal actions of the entity responsible . . .
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> I am aware of the relevant contacts in Spain, Italy, France, Austria, and Germany, all affected nations, and they will undoubtedly send in witnesses and observers to support the case against Mansion. Unfortunately, as European partners in the EU, the fallout from these

> revelations is likely to do serious long-term damage to our jurisdiction . . . The political and administrative actions that can be taken against Gibraltar by the EU and its respective countries, especially Spain, can be devastating. I believe it will seriously impact the current treaty negotiations because the illegality includes Spain, and the resulting scandal will not do the negotiating teams any favours whatsoever. This will not be lost on Fabian, who is Gibraltar's best hope of a meaningful outcome of the current talks, apart form being its leading statesman.
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> I can also reasonably anticipate that the mere publication of this Defence will cause a media feeding frenzy that cannot be abated, as all journalists will smell blood in the water. The Daily Telegraph . . . will turn the whole unsavoury story into a mini-series . . . I do not believe that those involved are aware of the stakes involved. They are acting in haste, which means that they will repent at leisure.
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> Let there be no mistake about it, the pursuit of these claims will be the end of Mansion in Europe and possibly Asia . . . [T]his is a path of mutual annihilation and makes no sense whatsoever."

The claimants considered that the letter was blackmail and a flagrant misuse of the "without prejudice" procedure such that it could not be protected by privilege. They applied to exhibit the WP letter into evidence ("the without prejudice application"). The alleged improper threats were said to amount to unambiguous impropriety. The claimants submitted that the threats needed to be seen in the context of KM seeking the withdrawal of the claimants' claim with no offer by KM to make any payment in settlement of the claim, and in circumstances in which there was no connection between the allegations and threats made in the letter to the defence.

The defendants opposed the without prejudice application. They submitted that the without prejudice rule was a principle of law and practice of great antiquity which was not to be sacrificed save in truly exceptional circumstances. The WP letter was no more than an attempt to settle proceedings that were likely to be long-running and expensive, and which would do no party any good or indeed the jurisdiction if permitted to run the course. The submission that the WP letter constituted blackmail was an ill-founded assertion made by parties seeking secrecy to cover up their own illegality. On a change of solicitors and the raising of a new and serious ground of defence (*ex turpi causa*) which was capable of impacting on the jurisdiction more widely, it was incumbent on the defendants' lawyers to disclose fully and frankly to the claimants' lawyers the new ground of defence and the likely consequences of the action should it continue. What was asserted in the letter was simply a statement of the obvious based upon the belief of the truth of what was stated. The allegations were capable of doing serious damage to the gaming industry in Gibraltar and the purpose of the letter was to avoid any such damage.

KM applied to amend the defence and counterclaim ("the amendment application"). Overarching the principal allegations which KM now sought to advance was an allegation that the claimants formed part of a criminal organization and that KM had been required to participate in the unlawful conduct, and that in those circumstances the court should not grant the claimants any relief. The following was the principal unlawful and/or fraudulent conduct which KM alleged against the Mansion Group: (i) tax evasion in various jurisdictions; (ii) providing misleading information to the UK Gambling Commission and UK press in respect of the absence of links between Mansion Europe and Mansion Asia; (iii) the re-tagging of commissions due to affiliates thereby decreasing the commissions lawfully due to them and consequently defrauding them of the undisclosed difference; (iv) the planning and implementation of unlawful online casinos in other countries; and (v) the theft of legitimate winnings of a player in Canada by misleading her as to her legitimate entitlement.

The defendants also applied for an order for specific disclosure or inspection of documents.

Held, judgment as follows:

(1) The without prejudice application succeeded. The policy behind the "without prejudice" rule was that parties should be encouraged so far as possible to settle their disputes without recourse to litigation and should not be discouraged by the knowledge that anything said in the course of negotiations might be used to their prejudice in the proceedings. The rule applied to exclude all negotiations genuinely aimed at settlement from being given in evidence. An exception to the rule was that a party could give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety. The critical question when determining whether to lift the veil of prejudice was whether the privileged occasion itself was abused. To lose the without prejudice veil, threats did not have to fall within any formal definition of blackmail, rather what fell to be considered was whether the remarks in the letter as to what would or could transpire if the action were not settled amounted to unambiguous impropriety. The fact that no monetary offer of settlement was made was irrelevant. There were very many cases which were compromised on the basis of parties agreeing not to pursue claims against one another. In the context of an interlocutory application and without the benefit of oral evidence and cross-examination, the court was unable to deal with submissions which called for a determination as to intent, the most obvious being that the suggestion that *The Daily Telegraph* would get to hear and publish the allegations of fraud was a veiled threat. The following were the matters raised in the letter which fell for consideration as possibly falling within the scope of the "unambiguous impropriety" umbrella: (i) the statement of intention to provide the Chief Minister with a copy of the draft defence; (ii) seeking to conflate what the defendants' lawyer presumably perceived to be the possible political interests of one of

the partners of Isolas with the settling of the action; and (iii) seeking to conflate what the defendants' lawyer presumably perceived to be the broader interests of the jurisdiction with the settling of the action. Lawyers were required to act in a way that upheld the rule of law and public trust in the profession, and with integrity in the best interests of each client. There was nothing improper in a lawyer (subject to legal professional privilege and confidentiality considerations) bringing any alleged wrongdoing to the attention of the relevant authorities. What was fundamentally wrong with the WP letter was that the defendants' lawyer made the notification of the contents of the defence to the Chief Minister conditional upon the claim not being settled. Whether as a matter of law it was capable of amounting to blackmail was wholly irrelevant, in the context of purported without prejudice communications it was an unprincipled statement and one which was unambiguously improper. Seeking to conflate the personal political interests of a partner at Isolas and the settling of the action also amounted to unambiguous impropriety. In effect the defendants' lawyer was suggesting to Mansion's lawyers that, so as to protect the personal political interest of one its partners, they should persuade Mansion to settle the claim. He was identifying a possible conflict of interests and encouraging this as a factor which should militate towards a settlement. As regarded the suggestion by the defendants' lawyer that settling the action would avoid serious reputational consequences for the jurisdiction, the short answer was that such an approach ran counter to a lawyer's duty to uphold the rule of law. This also was unambiguously improper. It followed that the without prejudice application succeeded. However, as regarded the amendment application it was of no material value to the claimants. The application was made on the basis that the letter showed that KM's proposed amendments were without merit and had arisen only in a last-ditch attempt to blackmail or coerce the claimants into dropping the claim. In the absence of oral evidence the court was unable to make any determination as regarded the motives behind the filing of the application to amend the defence or the sending of the letter. Moreover, the motivation of a party when seeking to amend a pleading did not assist when considering whether objectively it disclosed reasonable grounds upon which to bring or defend a claim. That said, given the determination that no privilege attached to the communication, subject to relevance, it could be relied upon in these proceedings (paras. 19–20; paras. 25–32).

(2) The amendment application would be refused. First, in respect of each allegation of illegality or immorality advanced by KM there was insufficient detail to enable the claimants to respond to the allegations. The purpose of pleadings was to define the issues to be tried but the proposed amendments were drafted in such broad terms that whilst they were not incoherent, they were so unreasonably vague so as to make it impossible to identify the issues with sufficient precision. KM had failed to provide the necessary detailed factual information or particulars in support of each allegation of illegality. Allegations of fraud or dishonesty must be sufficiently particularized. Secondly, although it was averred in the draft

amended defence and counterclaim that the Mansion Group was essentially a criminal organization, no attempt was made to particularize the corporate links between the multiple companies through which it was alleged much of the illegality was conducted and the claimant companies, and how that conduct was to be attributed to the claimants. Thirdly, other than the allegation of evasion of Gibraltar tax (and possibly the re-tagging of commissions due to affiliates and the alleged theft of the jackpot winnings in respect of which matters the governing law of those contractual relationships were not pleaded) the allegations of illegality were predicated upon breaches of foreign law. It was a long-established principle that foreign law was a matter of fact that must be pleaded but the draft amended defence and counterclaim failed to plead any precise provisions of foreign law which it was said had been breached. Fourthly, when it was necessary for the proper understanding of a statement of case for substantial parts of a lengthy document to be included, the passages should be set out in a schedule but evidence should not be included in statements of case. However, the schedule to the draft amended defence and counterclaim did precisely that in a particularly egregious way. The documentation provided was voluminous and disparate, no attempt was made in the draft amended defence and counterclaim to link any particular allegation to any specific document. Fifthly, the extant defence that KM as sole director of the claimants could take decisions to the exclusion of all others, and which was maintained in the draft amended defence and counterclaim, appeared to contradict the case which KM now sought to advance that he participated in immoral or illegal activities on behalf of the claimants under duress. Sixthly, the evidence relied upon was in effect limited to bare assertions by KM which were not supported by contemporaneous documents. The defendants failed to establish a proper factual basis which met the threshold merits test. The application to amend in so far as it related to the allegations underpinning the *ex turpi causa* defence would be dismissed (paras. 79–86).

(3) Even if KM's defence of illegality were sufficiently pleaded and supported by evidence, it would not as a matter of law have afforded a defence to the claim. The basis of the defence was that a claimant should not be entitled to their normal remedies because they had been involved in illegal conduct which was linked to the claim. However the claims brought against KM were not based on immoral or illegal acts but on simple breaches of fiduciary and common law duties. Even if the cause of action was founded on illegal or immoral acts, the draft defence would not have a realistic prospect of success. The essential rationale of the illegality doctrine was that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. The court would consider (a) the underlying purpose of the prohibition which had been transgressed and whether that purpose would be enhanced by denial of the claim; (b) any other relevant public policy on which the denial of the claim might have an impact; and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that

punishment was a matter for the criminal courts. In the present case (had the court been satisfied that the allegations of illegality in the draft amended defence and counterclaim were sufficiently particularized and the merits threshold test met) in respect of (a) it was undoubtedly an important policy consideration that trading companies operating from Gibraltar strictly complied with their tax and regulatory obligations both within and outside Gibraltar, but if any such organization were minded to maximize their profits by acting in an unlawful or immoral way, the risk that they might not be able to recover from a CEO or director who had improperly benefitted from breaches of fiduciary and common law duties would very unlikely feature as a consideration when the company through its officers was contemplating any illegal or immoral activities or operations to maximize profit. In respect of (b) there was a strong public policy that directors or senior employees of companies should not profit from breaches of fiduciary and common law duties and escape liability, particularly in circumstances in which on KM's own case he actively participated in much of that illegality. Proportionality therefore would not have fallen to be considered (paras. 88–94).

(4) The defendants' application to amend the counterclaim would be refused. The proposed amendments which were predicated on the allegations of illegality and immorality did not meet the threshold test for permission to amend. They were in any event of themselves wholly inadequately particularized (paras. 95–97).

(5) The defendants' application for specific disclosure would be dismissed (paras. 109–111).

Cases cited:

(1) *AC Ward & Son* v. *Catlin (Five) Ltd.*, [2009] EWCA Civ 1098, referred to.

(2) *Amersi* v. *Leslie*, [2023] EWHC 1368 (KB), followed.

(3) *Cutts* v. *Head*, [1984] Ch. 290; [1984] 2 W.L.R. 349; [1984] 1 All E.R. 597, considered.

(4) *Easyair Ltd. (t/a Openair)* v. *Opal Telecom Ltd*., [2009] EWHC 339 (Ch), followed.

(5) *Ferster* v. *Ferster*, [2016] EWCA Civ 717; [2016] C.P. Rep. 42, followed.

(6) *Holman* v. *Johnson (alias Newland)* (1775), 1 Cowp. 341; 98 E.R. 1120, considered.

(7) *Oceanbulk Shipping & Trading SA* v. *TMT Asia Ltd.*, [2010] UKSC 44; [2011] 1 A.C. 662; [2010] 3 W.L.R. 1424; [2010] 4 All E.R. 1011; [2011] 1 Lloyd's Rep. 96, referred to.

(8) *Patel* v. *Mirza*, [2016] UKSC 42; [2017] A.C. 467; [2016] 3 W.L.R. 399; [2017] 1 All E.R. 191, applied.

(9) *Rush & Tompkins Ltd.* v. *Greater London Council*, [1989] A.C. 1280; [1988] 3 W.L.R. 939; [1988] 3 All E.R. 737, referred to.

(10) *Savings & Investment Bank Ltd.* v. *Fincken*, [2003] EWCA Civ 1630; [2004] 1 W.L.R. 667; [2004] 1 All E.R. 1125, considered.
(11) *Stoffel & Co.* v. *Grondona*, [2020] UKSC 42; [2021] A.C. 540; [2020] 3 W.L.R. 1156; [2021] 2 All E.R. 239; [2021] PNLR 6, considered.
(12) *Su-Ling* v. *Goldman Sachs Intl.*, [2015] EWHC 759 (Comm), followed.
(13) *Three Rivers District Council* v. *Bank of England*, [2001] UKHL 16; [2003] 2 A.C. 1; [2001] 2 All E.R. 513, considered.
(14) *Unilever plc* v. *Proctor & Gamble Co*., [1999] EWCA Civ 3027; [2000] 1 W.L.R. 2436; [2001] 1 All E.R. 783; [2000] FSR 344, considered.
(15) *Vedanta Resources plc* v. *Lungowe*, [2019] UKSC 20; [2020] A.C. 1045; [2019] 2 W.L.R. 1051; [2019] 3 All E.R. 1013; [2019] Env. L.R. 32; [2019] 1 CLC 619; [2019] 2 Lloyd's Rep. 399; [2019] BCC 520; [2019] BLR 327, considered.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.31.12: The relevant terms of this rule are set out at para. 106.

H. Malek, *K.C.* with *J. Montando* and *J. Castle* (instructed by Isolas LLP) for the claimants;
C. Finch (instructed by Verralls) for the defendants.

1 **DUDLEY, C.J.:** This is the judgment on three applications which although evidently distinct have the potential to impact upon each other. These are:

(i) An application by the first defendant ("KM") to amend the defence and counterclaim ("the amendment application");

(ii) An application by the claimants to exhibit into evidence correspondence exchanged between Verralls and Isolas, those sent by Verralls having been marked "without prejudice" ("the without prejudice application"); and

(iii) An application by the defendants for an order for specific disclosure or inspection of documents in a list attached to the application notice ("the disclosure application").

2 By the same application notice by which the claimants sought to introduce the without prejudice correspondence, they also sought an order that the amendment application and the without prejudice application be heard in private and that no person other than the parties to these proceedings be permitted to inspect and/or take a copy of the draft amended defence and counterclaim ("the DAD&C") until such time as the claimants' without prejudice application and the amendment application was determined.

3 Originally KM indicated that he would not object to the privacy application but thereafter there was a change of position. Mr. Malek advanced the application on the basis that the privacy regime sought was very circumscribed and one which would only engage until the handing down of this judgment. The privacy application was in large measure predicated upon what the claimants describe as a veiled threat in the key letter in the without prejudice application "that the mere publication of this defence will cause a media feeding frenzy that cannot be abated." The submission advanced was to the effect that the purpose of the privacy regime was to protect the reputation of Christian Block ("Mr. Block") who is a director of both claimants and of other individuals named in the draft pleading, from unfounded allegations of fraud and illegality, until such time as for the purposes of the amendment application those matters had been considered and ruled upon. For reasons I gave at the time, I granted the limited relief sought.

Background

4 In setting out the claim I draw from my judgment of February 21st, 2023 (2023/GSC/009) in respect of the grant of injunctive relief against KM.

5 The first claimant ("Mansion Gibraltar") and the second claimant ("Onisac") are part of a wider group of companies ("the Mansion Group") which together comprise and operate an online gaming enterprise known as "Mansion." KM was at all material times (for the purposes of the claim) employed by Mansion Gibraltar as its Chief Executive Officer and *de facto* Chief Financial Officer. He was also the sole director of both Mansion Gibraltar and Onisac as well as of other companies within the Mansion Group.

6 The second defendant ("KM Accountants") is a company incorporated in Gibraltar in 2008. It was struck off the Register of Companies on April 20th, 2016 and restored to the Register on April 4th, 2019. It is the claimants' case that KM was, at all material times, the sole director and shareholder of KM Accountants.

7 KM is a qualified accountant and Fellow of the Association of Certified Chartered Accountants. He commenced his employment with (or for) Mansion Gibraltar on or around October 2010, progressing to Chief Financial Officer in August 2012. On May 31st, 2016, KM was appointed as a director of the claimants and other Mansion companies. Thereafter on December 1st, 2016 he became the sole director of these companies after the then Chief Executive Officer resigned. KM was appointed Chief Executive Officer ("CEO") of Mansion Gibraltar on January 13th, 2017 and continued as *de facto* Chief Financial Officer. I introduce "(or for)"

because an issue is raised in the DAD&C which relates to KM's employment status during certain periods.

8 At all material times until May 1st, 2021, Mr. Mak Ping On ("Mr. Mak") acted as the duly authorized representative of the sole shareholder of the companies within the Mansion Group. The claimants' case is that in relation to the discharge of his duties, KM "reported to" Mr. Mak.

9 On or around April 1st, 2021, KM was informed Mr. Block would be replacing Mr. Mak as the authorized representative of the shareholder and that Mr. Block would be moving to Gibraltar and would be appointed a director of each of the Mansion companies so that KM would no longer be sole director. On May 1st, 2021, Mr. Mak was replaced by Mr. Block.

10 It is Mr. Block's evidence that arising from certain transactions involving Mansion Iberico Espana SL (a company within the Mansion Group) an investigation against KM was instituted on September 22nd, 2021 and KM was suspended from employment pending the completion of the disciplinary investigation which was led by Mr. Block. Prior to the conclusion of the disciplinary investigation, by letter dated December 1st, 2021 KM resigned from his employment as CEO and from his directorships.

11 The claimants issued their claim form on September 7th, 2022. It is their case that KM committed various breaches of fiduciary, non-fiduciary, and contractual duties during his time as CEO and sole director of the claimants. The claimants seek damages/equitable compensation in the total sums of £2,339,464.18 and €2,977,003.64 from KM as well as an order that KM account for all benefits that he (or his related parties) may have received directly or indirectly as a result of his position within the claimant companies. By order dated July 3rd, 2023 the claimants amended their particulars of claim and now also advance proprietary claims in respect of some of the alleged breaches.

12 The various alleged breaches are summarized in Mr. Block's first affidavit at para. 27 as set out below:

> "27.1. KM procuring the sums of *€327,033.28* and *£427,500* in bonus payments to be paid to himself for the financial years 2019 and 2020, as well as the sum of *£66,236.67* in alleged personal allowance payments to which he was not entitled—the *Bonus Payments & Allowance Claims*;
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> 27.2. KM authorising and/or approving the sums of *€2,508,035.36* and *£127,073.28* to be paid to a company known as White Wizard Media Limited ("*WWML*"), a suspicious company incorporated in the Marshall Islands which, to the Claimants' knowledge, did not provide any services to the Claimants—the *WWML Claim*;

27.3. KM failing to take reasonable steps (or any steps) to comply with directions given by the regulatory authority for gaming in Gibraltar, ultimately requiring Onisac to enter into a regulatory settlement for the sum of *£850,000*—the *Regulatory Settlement Claim*;

27.4. KM procuring the sum of *£162,000* to be paid to one Angela May Miller for, on his own admission during the Investigatory Meeting, personal rental expenses—the *Angela Miller Claim*;

27.5. KM causing Mansion Gibraltar to purchase 4 high value vehicles for his own personal use causing loss and damage to Mansion Gibraltar amounting to *£192,139.97*—the *Vehicles Claim*;

27.6. KM procuring Mansion Gibraltar to make payment of *£27,876* and *€91,935* for luxury watches which were of no benefit to Mansion Gibraltar, and for which KM has failed to account for—the *Watches Claim*;

27.7. KM procuring the sum of *€50,000* to be paid by Mansion Gibraltar to a chain of Spanish jewellers and retailers of luxury watches known as 'Chocron 1948 SL' which derived no benefit to Mansion Gibraltar—the *Chocron Claim*;

27.8. KM's utilisation of Mansion Gibraltar's corporate credit cards to make payments for personal expenses in the sum of *£249,951.31*— the *Credit Cards Claim*;

27.9. KM utilising Mansion Gibraltar's corporate credit card to make payment of the sum of *£14,755.74* to purchase a domain name which the Claimants say was KM's own personal expenditure and/or for KM's own benefit—the *GoDaddy Claim*;

27.10. KM causing Mansion Gibraltar to make payment of the sum of *£71,931.21* for other personal expenses such as legal fees and rent—the *Personal Expenses Claims*; and

27.11. KM obtaining a (secret) personal profit by receiving a Ferrari which he valued for insurance purposes at £150,000 as inducement for KM to act favourably towards a competitor—*the Ferrari Claim*." [Emphasis in original.]

13 The competing positions between the parties in respect of those heads of claim are summarized and in the context of the application then before me considered in my judgment of February 21st, 2023. I remit myself to that judgment in that regard. However, by their amended particulars of claim the claimants no longer advance the Ferrari claim on the basis that they have been compensated in full by a third party. And by order dated September 20th, 2023 the claimants obtained summary judgment in respect of (i) the personal allowance overpayments in the sum of £66,236.67 plus

interest, and (ii) the "GoDaddy claim" in the sum of £14,755.74 plus interest.

14 It is useful to highlight briefly the WWML claim and developments in that regard given that it has featured prominently in this litigation and has underpinned a number of disclosure applications. By this head of claim the claimants seek as against KM damages in the sums of €2,508,035.36 and £127,073.28. Those sums represent payments made to WWML in satisfaction of 14 invoices issued by WWML to Mansion Gibraltar from August 10th, 2018 to June 13th, 2019. There is also the related claim against KM Accountants in the sum of €112,000. KM Accountants invoiced Aventador Media Ltd. ("Aventador") in the sum of €112,000 in respect of consultancy services. Aventador and WWML both shared the same registered office in the Marshall Islands and both were dissolved on the same day. The core allegation is in effect that WWML provided no services and that the agreement between it and Mansion was a sham which allowed Mansion moneys to be channelled to a company in an offshore jurisdiction from which KM benefitted. The evidential basis supporting the WWML claim has been materially strengthened since the freezing order was made and the claimants obtained non-party disclosure orders and there is now very cogent evidence that through Aventador, KM received into his personal bank account £94,000 which can be traced to moneys paid by Mansion Gibraltar to WWML.

15 The defence advanced in respect of the various heads of claim is summarized in my aforesaid judgment but important also to highlight a defence which has throughout been advanced by KM, namely that whilst he frequently liaised and consulted Mr. Mak, he did not "report" to him or the ultimate beneficial shareholder. That in the context of corporate governance of the claimants and/or the exercise by KM of his powers as sole director thereto, the consent and/or approval of Mr. Mak, *qua* representative of the beneficial shareholder, was neither required nor sought. As put in KM's extant defence and counterclaim dated October 19th, 2022 (settled by Sir Peter Caruana, K.C.M.G., K.C. and Chris Allan, instructed by KM's former solicitors, Messrs. Peter Caruana & Co.) in a section entitled "KM's Duties and Obligations," sub-headed "Corporate Governance—applicable legal principles" the following is pleaded (at paras. 22 and 28):

> "22. Many of the claims in the Particulars of Claim are pleaded on a basis that disregards and is inimical to basic, applicable principles of company law relating to corporate governance and directors' functions and powers, and in full disregard and distain for the Companies Articles of Association."
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> "28. Accordingly, under the law and the Claimants' Articles of Association, the right, power and obligation to conduct the affairs of

a company is vested, subject to any lawful provision to the contrary in the company's Articles of Association (which is not the case of either claimant company) in its Directors, that is to say, KM as their sole director, to the exclusion of all others, including the ultimate beneficial shareholder."

The without prejudice application

16 By letter dated September 3rd, 2023 marked "Private and Confidential" and "Without Prejudice" ("the WP letter") Mr. Finch wrote to Mr. Peter Isola, the Senior Partner at Isolas, on the following terms:

"Pursuant to our meeting, when I indicated to you that I would be sending an amended draft defence establishing the true relationship and conduct of the gaming operations that were extant between our respective clients, I now enclose a clean draft of the same. There exists a track changed version to comply with court amendment rules but for ease of reading and reference, I am sending the clean draft.

You will see that there are wholesale changes to Sir Peter Caruana's Defence and counterclaim, but this is because Sir Peter tried to avoid the suggestions of illegality, possibly to negotiate a settlement in due course, which would benefit from avoiding seriously contentious issues. Regrettably, the actions of your junior litigators and the initiation of criminal proceedings in Spain has frustrated that option into oblivion. Unbridled enthusiasm to win ought not to exceed reasonable bounds. However, we are where we are.

This is a lengthy document and will require time to read and digest, but the assertions made are backed up by evidence of an incontrovertible nature, being documentation that my client either had before his suspension or secured at that time.

I contacted you, old school protocol, because if something impacts upon a colleague, as this case does, I will always make my approach clear beforehand to try and resolve the issues without publicity or litigation, particularly litigation that does neither party any good. I acknowledge that the modern generation believe that procedural attacks are the way forward, but I feel that the old ways in Gibraltar still have a beneficial role to play.

Any reading of this amended defence will leave you in no doubt that there are serious undisclosed issues affecting your clients. Naturally, I instinctively exclude your firm from knowledge of the nature and extent of your clients' unlawful conduct, but it is there and cannot be avoided.

I am sending this document to you in the first instance because I am hoping that it will enable you to put a solution to your clients that will

result in the cessation of proceedings in Gibraltar and Spain. I honestly believe it will be in their best interests to do so. It goes without saying that there will be a similar benefit for my client, but that is settlement.

If your clients do not accept a non-litigious solution and deign to continue the current proceedings, then it will ignite further action. I have two principal concerns, my client and the jurisdiction. My client has nothing to lose by fighting to the end using all the ammunition at his disposal. But the jurisdiction stands to lose a great deal and could well make us the pariahs of Europe, leading to black certification resulting from being the base for Mansion defrauding many countries in Europe—and still are. As a result, I will feel obliged to provide a copy of the document to the Chief Minister because if he cannot prevent the inevitable damaging fallout, he can at least act against Mansion to put a stop to its illegal businesses and offer to assist the affected European countries to recover their losses and to prevent future fraud.

The public impact on the Government coming up to an election would be devastating as the Gibraltar taxpayer has been continuously defrauded on the Government's watch, and it will not help for the general populace to identify the government minister with responsibility with a law firm of which he is a member defending the illegal actions of the entity responsible. I would not do so but I am aware of the personal nature of the opposition attacks against this Government, and I am convinced that they would have a field day to generate a scandal full of disgust and recriminations. I do not believe that this would be good for Gibraltar, because I do not believe that the opposition would be good for Gibraltar. Nor do I believe that having generated such adverse publicity and making an international debacle of the case, that they would be able to undo the damage which they have created for all the wrong self-serving reasons. And to this you can add hostile reaction from Israel, who were oblivious of the fraud perpetrated by Chris Block, your clients' star witness, by syphoning off Israeli personnel by sending one to Spain and the rest to be deployed behind a UK employment consultancy firm, to avoid the employee tax due. This is particularly relevant because this is the fraud that the UBOs demanded, and my client refused to adopt, which led to his ultimate suspension and Mr. Block's elevation.

I am aware of the relevant contacts in Spain, Italy, France, Austria, and Germany, all affected nations, and they will undoubtedly send in witnesses and observers to support the case against Mansion. Unfortunately, as European partners in the EU, the fallout from these revelations is likely to do serious long-term damage to our jurisdiction. And remember that there will be no solace to be had from attempting to rebut claims on the procedural basis of non-enforcement

of foreign tax. The political and administrative actions that can be taken against Gibraltar by the EU and its respective countries, especially Spain, can be devastating. I believe that it will seriously impact the current treaty negotiations because the illegality includes Spain, and the resulting scandal will not do the negotiating teams any favours whatsoever. This will not be lost on Fabian, who is Gibraltar's best hope of a meaningful outcome of the current talks, apart from being its leading statesman.

I can also reasonably anticipate that the mere publication of this Defence will cause a media feeding frenzy that cannot be abated, as all journalists will smell blood in the water. The Daily Telegraph will lead with the headlines, 'We told you so' and berate the official from Mansion who blatantly lied when he denied that [*redacted*] and wife were the UBOs of the Mansion group. They are the owners, and this goes for Mansion Asia as well as Mansion Gibraltar. No doubt they will turn the whole unsavoury story into a mini-series. There is no longer any time for this situation to drag on, as the Spanish Court will progress the case in its jurisdiction and your juniors are champing at the bit to do the same in Gibraltar. However, I do not believe that those involved are aware of the stakes involved. They are acting in haste, which means that they will repent at leisure.

Let there be no mistake about it, the pursuit of these claims will be the end of Mansion in Europe and possibly Asia, once the Philippine Regulator considers the unholy mess that will be Mansion Gibraltar. The Chief Minister, to protect the jurisdiction, may have no option but to cancel the Mansion licences and cause an inquiry to be launched into the historical malfeasances of the Mansion group. And the filing of the Defence will be sufficient to bring this about, no matter what is argued in reply. And they can also expect severe consequences to follow from the Canadian Regulator and Playtech once the scam against the Canadian player who won the jackpot is laid bare. As I indicated in discussion, this is a path of mutual annihilation and makes no sense whatsoever.

It is my case that the proceedings both in Gibraltar and Spain should be discontinued with an effective Tomlin order in place, leading to contempt of court and damages should it ever be breached. My client will never breach the order because it will never benefit him to do so. Your clients will not for the same reason. However, if Gibraltar tax is owed, it must be paid, and Mansion Gibraltar can no longer be the hub of grey area/unlawful business in Europe. If the group cannot make sufficient revenues lawfully then it should close its operations and move elsewhere. Otherwise, they constitute a ticking time bomb for our jurisdiction.

> Let me know your response please by Friday the 8th of September next, as we are running out of time, courtesy your litigation department. I sincerely hope that you take this missive in the right spirit as it is genuinely meant as a solution to avoid irreparable damage to our respective clients and, no less importantly, the jurisdiction of Gibraltar."

17 Mr. Peter Isola replied by letter dated September 8th, 2023 setting out his recollection of their conversation at lunch; stating that all the steps taken in the litigation by Isolas had been on their clients' express instruction; expressing certain views about the draft amendments and particularly relevant in the context of the present application:

> "Our clients consider that the various threats and allegations made in your letter and the enclosed defence, not least those in which you refer to our clients as 'criminal organisations' are baseless and are wholly denied by our clients. As an experienced litigator you will be aware of your various legal and ethical obligations, particularly in circumstances where threats are made against clients and their legal representatives, and we would take this opportunity to remind you of the same.
>
> You should note that the contents of your letter are such that we consider that it would be improper to continue corresponding on a 'without prejudice' basis, such that this letter has been sent in open correspondence. Indeed, the contents of your letter which as previously mentioned is nothing short of blackmail is a flagrant misuse of 'without prejudice' such that your letter cannot be protected by privilege."

Mr. Finch replied on September 12th, 2023 by letter marked "Without Prejudice" essentially reiterating the assertions made in his earlier letter and dealing with the criticism levied by Mr. Peter Isola, stating:

> "I made a genuine attempt on behalf of my client, and with the jurisdiction in mind, to try and resolve matters without resorting to further litigation of the most damaging kind. I gave you a heads up of what may come. Many lawyers today would not have done so. To denigrate this as 'muck slinging' instead of fair warning and dispute resolution, as we are obliged to do, is neither professional or responsible."

18 Simply for the purposes of completing the background, in the event, some time before November 22nd, 2023, Verralls wrote to the Minister with responsibility for gambling (presumably *qua* "Licensing Authority" pursuant to s.5 of the Gambling Act 2005) raising KM's concerns. An email from the Gaming Commissioner to Mr. Finch dated November 22nd, 2023, reflects that the complaint had been passed onto him and that he had concluded:

> "For the avoidance of doubt, the bare assertions made in your email (presumably driven by your client's perceptions) are insufficient to immediately trigger an investigation, or reconsideration of the licensing status [of Mansion]. I would need further and better particulars."

The law

19 The policy behind the "without prejudice" rule was described by Oliver, L.J. in *Cutts* v. *Head* (3) ([1984] 1 All E.R. at 605–606) cited with approval by Lord Griffiths in *Rush & Tompkins Ltd.* v. *Greater London Council* (9) ([1988] 3 All E.R. at 739):

> "That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151 at 156, be encouraged freely and frankly to put their cards on the table . . . The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

Lord Griffiths then went on to state (*ibid.*, at 740):

> "The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."

And later also explaining how the rule is not without exception (*ibid.*):

> "These cases show that the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement . . . The court will not permit the phrase to be used to exclude an act of bankruptcy . . . or to suppress a threat if an offer is not accepted (see *Kitcat v. Sharp* (1882) 48 L.T. 64)."

20 In *Unilever* v. *Procter & Gamble* (14), cited with approval by the United Kingdom Supreme Court in *Oceanbulk Shipping & Trading SA* v. *TMT Asia Ltd.* (7) ([2010] UKSC 44, at para. 22), Walker, L.J. identified eight exceptions to the "without prejudice" rule. In the context of the present case, it is only the fourth exception which is potentially engaged ([2000] 1 W.L.R. at 2444):

> "[O]ne party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' (the expression used by Hoffmann LJ in *Foster v Friedland*, 10 November 1992, CAT 1052) . . . But this court has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin*, [1993 CAT 205], warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

As explained by Floyd, L.J. in *Ferster* v. *Ferster* (5), the critical question when determining whether to lift the veil of privilege is whether the privileged occasion itself is abused and as he put it ([2016] EWCA Civ 717, at para. 11):

> "[I]t may be easier to show that there is unambiguous impropriety where there is an improper threat than where there is simply an unambiguous admission of the truth."

And as to what amounts to a threat for these purposes (*ibid.*, at para. 24):

> "It is not necessary for the threats to fall within any formal definition of blackmail for them to be regarded as unambiguously improper."

The submissions

21 The claimants' stated purpose for seeking to lift the veil of privilege from the WP letter is to show that KM's proposed amendments are without merit and have arisen only as a last-ditch attempt to blackmail or to coerce the claimants into dropping their claim. The alleged improper threats said to amount to unambiguous impropriety, are summarized in their skeleton argument as follows:

> "(i) The threat made to deliver copies of the Defence which at the time had not been filed and/or determined was wholly unreasonable. This included a threat that Verralls would provide a copy of the document to the Chief Minister so he could put a stop to the Claimants' business;
>
> (ii) The threats and attempts to exert pressure on Isolas LLP immediately prior to the General Election in an attempt to put personal interests ahead those of the Claimants. The sole

purpose was to seek to persuade the Claimants to drop its claim against KM;

(iii) The threat that the publication of the Defence would have on the Treaty Negotiations with Spain. As with the threat of the General Election, the sole purpose of this threat was to ensure that the Claimants were coerced into dropping its claim against KM;

(iv) The serious unfounded allegations of fraud made against Mr. Block as Group Chairman and CEO to preserve his own interests over those of the Claimants;

(v) The veiled threat to 'tip off' the press and the threat that the publication of the Defence would lead to a mini-series published by the Daily Telegraph; and

(vi) The fact that the pursuit of litigation would lead to a path of mutual annihilation."

22 The submission advanced for the claimants is that those threats need to be seen in the context of KM seeking the withdrawal of the claimants' claim with no offer by KM to make any payment in settlement of the claim, and in circumstances in which there is no connection between the allegations and threats made in the letter to the defence. It is also submitted that the WP letter must be seen in its temporal context, namely prior to the general election. That in all those circumstances the WP letter far exceeds what is proper and permissible in litigation and clearly abused the without prejudice rule to cloak what amounts to clear unambiguous impropriety.

23 In contrast to Mr. Malek's detailed analysis of the evidence and the law, Mr. Finch adopted a broad approach to his submissions which are possibly best understood by reference to his written submissions. Mr. Finch submits that the application for the lifting of the veil constitutes a departure without justification of the basic rules of evidence that apply in Gibraltar. That the purpose of the without prejudice rule is to encourage settlement discussions without parties weakening their position in the formal dispute. That the rule allows for parties to speak and write openly without fear that what they are saying may be used against them in court. That it is a principle of law and practice of great antiquity which is not to be sacrificed save in truly exceptional circumstances. In support of that latter proposition, he relies upon the English Court of Appeal decision in *Savings & Investment Bank Ltd.* v. *Fincken* (10). The principle is summarized in the headnote as follows ([2004] 1 All E.R. at 1125):

"An admission in without prejudice negotiations was not to be treated as tantamount to an impropriety, unless the privilege afforded to such discussions was itself abused. The public interest in the without

prejudice role was very great, and not to be sacrificed save in truly exceptional and needy circumstances."

24 As regards the WP letter itself, Mr. Finch submits that any fair reading of it must lead to the conclusion that this was no more than an attempt to settle proceedings that were likely to be long-running and expensive, and which in truth would do no party any good or indeed the jurisdiction if permitted to run the course. That in a previous hearing counsel for the claimants had indicated that the disclosure application was based upon blackmail. Mr. Finch accepts that if it constituted blackmail it would fall within the exception to the rule but rather that this is an ill-founded assertion made by parties seeking secrecy to cover up their own illegality by attacking the legal representative of the defendants and that the suggestion fails to recognize or understand the definition of blackmail. He further submits, that on a change of solicitors and the raising of a new and serious ground of defence going to the heart of the case and capable of impacting upon the jurisdiction more widely, it is incumbent upon the new legal representative to disclose fully and frankly to the solicitors for the claimants the new ground of defence disclosed and the likely consequences of the action should it continue. That what was asserted in the WP letter was simply a statement of the obvious based upon the belief of the truth of what is stated. That the allegations are capable of doing serious damage to the gaming industry in Gibraltar and that it is absolutely clear that the purpose of the WP letter was to avoid any such damage and he makes no apology for trying to defend the jurisdiction whilst also trying to defend his clients.

Discussion

25 It is evident from *Ferster* v. *Ferster* (5) that, to lose the without prejudice veil, threats do not have to fall within any formal definition of blackmail, rather what falls to be considered is whether the remarks in the WP letter as to what would or could transpire if the action were not settled amount to "unambiguous impropriety."

26 I do not consider the submission advanced by Mr. Malek that the fact that no monetary offer of settlement was made is relevant. There are very many cases which are compromised on the basis of parties agreeing not to pursue claims against each other. Also, and in the context of an interlocutory application and without the benefit of oral evidence and cross-examination, I find myself unable to deal with submissions which call for my making a determination involving any intent, the most obvious being that the suggestion that *The Daily Telegraph* would get to hear and publish the allegations of fraud was a veiled threat.

27 In my judgment the following are the matters raised in the WP letter which fall for consideration as possibly falling within the scope of the "unambiguous impropriety" umbrella:

(i) the statement of intention to provide the Chief Minister with a copy of the draft defence;

(ii) seeking to conflate what Mr. Finch presumably perceived to be the possible political interests of one of the partners of Isolas with the settling of the action; and

(iii) seeking to conflate what Mr. Finch presumably perceived to be the broader interests of the jurisdiction with the settling of the action.

28 In making any such determination, there can be no better touchstone than the English SRA principles which are incorporated into the Code of Conduct governing our legal profession by virtue of the code prescribed by me pursuant to s.16 of the Legal Services Act 2017. In the context of lawyers acting *qua* solicitors, the principles *inter alia* require that they act in a way that upholds the rule of law in a way that upholds public trust in the profession and that they act with integrity in the best interests of each client. I deal with each of the three matters I have identified in turn.

29 It must be self-evident that there is absolutely nothing improper in a lawyer (subject to legal professional privilege and confidentiality considerations) bringing any alleged wrong doing to the attention of the relevant authorities, as indeed was done some time before November 22nd, 2023. What was fundamentally wrong with the WP letter is that Mr. Finch made the notification of the contents of the defence to the Chief Minister (leaving to one side the fact that he may not for these purposes have been the appropriate authority) conditional upon the claim not being settled. Put another way, it was a stated intention to inform the authorities of alleged illegality if the claim was not settled. Whether as a matter of law it is capable of amounting to blackmail is wholly irrelevant, in my judgment in the context of purported without prejudice communications it was an unprincipled statement and one which was unambiguously improper.

30 Seeking to conflate the personal political interests of a partner at Isolas and the settling of the action, in my judgment, also amounts to unambiguous impropriety. In effect Mr. Finch was suggesting to Mansion's lawyers that, so as to protect the personal political interest of one of its partners, they should persuade Mansion to settle the claim. He was identifying a possible conflict of interests and encouraging this as a factor which should militate towards a settlement.

31 As regards the suggestion by Mr. Finch that settling the action would avoid serious reputational consequences for the jurisdiction, the short answer is that such an approach runs counter to a lawyer's duty to uphold the rule of law. The rule of law is the core value of any democratic society

and, at its most basic, it is the ideal that all citizens and institutions should be subject to and entitled to benefit from the same laws—it is about the equality of all citizens before the law. The suggestion by Mr. Finch that the claim should be settled and consequently serious allegations of illegality by Mansion ignored, because otherwise this would have a detrimental impact upon Gibraltar, is to ignore the rule of law, and coming from a lawyer it is surprising. This also was unambiguously improper.

32 It follows that the application succeeds. However, as regards the amendment application it is of no material value to the claimants. The application was made on the basis that the WP letter shows that KM's proposed amendments are without merit and have arisen only in a last-ditch attempt to blackmail or to coerce the claimants into dropping its claim. In the absence of oral evidence, I am unable to make any determination as regards the motives behind the filing of the application to amend the defence or the sending of the WP letter. Moreover, in my judgment, the motivation of a party when seeking to amend a pleading does not assist when considering whether objectively it discloses reasonable grounds upon which to bring or defend a claim. That said, given my determination that no privilege attaches to the communication, subject to relevance, it may of course be relied upon in these proceedings.

The amendment application

Chronology of the application

33 To view the timing of the application in context, on June 5th, 2023, I made an order for directions requiring the parties to give each other standard disclosure of documents by 4 p.m. on August 31st, 2023 and with a trial window fixed for the first available 21-day period as from May 1st, 2024.

34 On June 14th, 2023, the claimants issued an application to file an amended particulars of claim. The amendments were agreed by KM on July 3rd, 2023 and recorded in an order of the same date. The order permitted KM to make consequential amendments to his defence within 14 days. On August 9th, 2023, Verralls notified Isolas of KM's intention to file an amended defence. On September 5th, 2023, it was provided with the without prejudice letter. On September 15th, 2023, KM filed and served an application seeking an extension of time. It was evidently the wrong relief in that the proposed amendment went well beyond the consequential amendments allowed for by the order of July 3rd, 2023 and on October 2nd, 2023 during a hearing, KM's application was withdrawn. Thereafter, on October 10th, 2023, the present application seeking the correct relief was filed and listed for hearing on November 7th, 2023. On October 31st, 2023, the claimants successfully applied to adjourn the hearing. The adjournment was granted because Mr. Malek was not available and

because the application for the interim privacy order was to be contested, and the time allocated for the hearing was potentially insufficient.

35 The hearing was then listed for February 5th, 2024 but that hearing had to be vacated as a criminal trial that I was dealing with overran. The matter was then re-listed for hearing on April 2nd, 2024 but as Mr. Finch was indisposed the matter was again adjourned. Together with a number of other applications not dealt with in this judgment, it finally came for hearing on the weeks of May 6th and 13th, 2024.

The legal principles

36 Permission to amend a statement of case can be granted by the court pursuant to CPR, 17.3. By reference to earlier authorities the key applicable principles were recently summarized in the High Court of England & Wales by Nicklin, J. in *Amersi* v. *Leslie* (2) ([2023] EWHC 1368 (KB), at para. 140):

> "(1) The threshold test for permission to amend is the same as that applied in summary judgment applications: *Elite Property Holdings Ltd -v- Barclays Bank plc* [2019] EWCA Civ 204 [40]–[42] *per* Asplin LJ ('the merits test').
>
> (2) Amendments sought to be made to a statement of case must contain sufficient detail to enable the other party and the Court to understand the case that is being advanced, and they must disclose reasonable grounds upon which to bring or defend the claim: *Habibsons Bank Ltd -v- Standard Chartered Bank (HK) Ltd* [2011] QB 943 [12] *per* Moore-Bick LJ.
>
> (3) The court is entitled to reject a version of the facts which is implausible, self-contradictory, or not supported by the contemporaneous documents. 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 or defence relied upon: *Elite Property Holdings Ltd* [42] *per* Asplin LJ.
>
> (4) In addition to being coherent and properly particularised, the pleading must be supported by evidence which establishes a proper factual basis which meets the merits test: *Zu Sayn-Wittgenstein -v- Borbón y Borbón* [2023] 1 WLR 1162 [65] *per* Simler LJ.
>
> (5) In an area of law which is developing, and where its boundaries are drawn incrementally based on decided cases, it is not normally appropriate summarily to dispose of the claim or defence. In such areas, development of the law should proceed on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed to be true on an application to strike out: *Farah -v- British Airways plc* [1999] EWCA Civ 3052 [42]–[43] *per* Chadwick LJ."

37 The merits test for granting amendments is the same as that for summary judgment, with the principles governing summary judgment summarized by Lewison, J. in *Easyair Ltd. (t/a Openair)* v. *Opal Telecom Ltd.* (4) (and approved by the Court of Appeal in *AC Ward & Sons Ltd.* v. *Catlin (Five) Ltd.* (1)). Lewison, J. summarized the correct approach as follows ([2009] EWHC 339 (Ch), at para. 15):

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into 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: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it . . ."

38 In relation to the question of evidence which could reasonably be expected to be available at trial, which in the context of the present application KM would say are documents internal to the claimants, currently unavailable to him, but in due course disclosable, Lord Briggs in *Vedanta Resources plc* v. *Lungowe* (15) put it as follows ([2019] UKSC 20, at para. 45):

> "45. This poses a familiar dilemma for judges dealing with applications for summary judgment. On the one hand, the claimant cannot simply say, like Mr. Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue: see *Tesco Stores Ltd v Mastercard Inc* [2015] EWHC 1145, per Asplin J at para 73."

39 It will be apparent from my having set out the chronology to the making of the application that an issue which arises is whether this was a late or very late application and if so whether a more exacting test falls to be applied. The relevant principles for late amendments were summarized by Carr, J. in *Su-Ling* v. *Goldman Sachs Intl.* (12) ([2015] EWHC 759 (Comm), at para. 38):

> "a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

The proposed amendments—an overview

40 The proposed amendments are significant. References to paragraphs are to these as renumbered in the DAD&C.

41 I shall not deal with each individual amendment but rather with the principal allegations which KM now seeks to advance. Overarching these is an allegation that the claimants formed part of a criminal organization and that KM was required to participate in the unlawful conduct. This is pleaded at paras. 8 and 9 as follows:

"[8] In order to follow and fully understand this Defence, it must be appreciated from the outset that it is averred that the Mansion group of Companies is essentially a criminal organisation operating on two levels, namely a public level where its operations can be regulated and controlled and constitutes the public image or persona of the companies, (referred to as the public persona) and an unlawful level where illegal gaming is established in various countries throughout Europe and elsewhere through unauthorised online gaming, known and referred to as the 'grey area,' notionally to avoid the use of the term 'illegal' The UBOs of the Mansion group of Companies, although owners of Mansion Asia and Mansion Europe, a link they were at pains to deny in their quest for an appearance of separation,

> insist on the grey area being nurtured and supported by the employees of the public persona entities, as this trade constitutes the true undisclosed profits and value of the Mansion group. Essentially, these profits are made by illegally trading and defrauding the countries in which grey area gaming is extant. At the time KM joined the First Complainant, [*sic*] this was the actual operational position and had been for some time.
>
> [9] KM was first employed by the First Complainant in October 2010 as a financial controller, due to his extensive qualifications and experience in accountancy and related matters. During his on-the-job training, he was instructed by the Claimants' personnel in areas of the gaming industry and, in particular, the 'grey areas' of gaming, the soubriquet for the unlawful and fraudulent practices which were prevalent in the gaming industry. It was made clear to him by his superiors at that time that he was obliged to learn and adopt these practices as part of his Employment."

And at para. 10 that:

> "All Mansion group employees were to a greater or lesser extent involved in these practices, as their jobs involved toeing the line."

42 Those overarching allegations of illegality form the basis for the proposed defence, that in those circumstances the court should not grant the claimants any relief. It is put at para. 64viii on the following terms:

> "The Claimants are part of a criminal organisation and have failed when particularising their claim to disclose essential facts regarding corporate and gaming illegal practices and demands being made of employees regarding the same, and it is a matter of law that a court will not stultify itself or give relief to a party that has breached the law relating to its conduct in the claim or is actively pursuing the courts assistance to do so. It is a long-standing principle of English law that a court will not grant relief to a party whose claim is based on immoral or illegal conduct relating to the claim, in the maxim Ex turpi causa non oritur actio, which is a close cousin to the equitable doctrine that a man who seeks equity must do equity and that he must come to equity with clean hands."

43 At paras. 7 and 10 of the DAD&C, albeit with overlap, specific allegations of illegality are identified. In respect of some of these the case which KM now seeks to advance is that he exercised his powers as "directed" by the ultimate beneficial owners of the claimants. The following are the principal unlawful and/or fraudulent conduct which KM alleges was undertaken by the Mansion group:

(i) handling of and reconfiguring the tax liability issues in Germany, Austria and Israel, as well as other European countries, predominantly involving false declarations leading to tax evasion in those jurisdictions;

(ii) providing misleading information to the UK Gambling Commission and UK press about whether links existed between the Mansion Europe group, and the alleged separate Mansion Asia group;

(iii) providing misleading tax and undeclared gaming duty to the Government of Gibraltar;

(iv) the re-tagging of commissions due to affiliates thereby decreasing the commissions lawfully due to them and consequently defrauding them of the undisclosed difference;

(v) the planning and implementation of unlawful online casinos in other countries, including Europe, one of which under the brand name Casino Midas;

(vi) the illegal provision of online gaming in the following countries, namely France, Austria, Germany, Netherlands, Belgium, Denmark, South Africa, Italy, Spain, and other jurisdictions in the rest of the world; and

(vii) the theft of legitimate winnings of a player in Canada, by misleading her as to her legitimate entitlement.

44 There is a schedule to the DAD&C, to which, as far as I can tell, specific reference in the draft pleading is made in only two paragraphs, namely para. 17 which reads:

> "Further particulars of this parallel arrangement will be provided in evidence in due course, but the schedule attached to this defence sets out the corporate structures and how they worked, as well as the concept of separation and rules of engagement."

And at para. 185C where in the counterclaim certain breaches of the contract of employment by the claimants are alleged and the following is said:

> "Being compelled to lie to and mislead gaming regulators about the true status of the Mansion group, including the dominant link between Mansion Asia and Mansion Europe and the true reason for creating the infrastructure regarding such companies as Apollo and others in the schedule, which was to counter increased regulation which would endanger the Mansion group's place in the grey areas."

The schedule has an index in which 21 items are identified. Thereafter it contains unpaginated documents within eight plastic sleeves, each with a cover sheet with a somewhat generic description of the contents.

45 For the purposes of the hearing of the application, as I understand it, some (or all) of the material in the schedule is exhibited to KM's witness statement of April 26th, 2024. The exhibit which is paginated in manuscript runs to some 456 pages under cover of some 30 tabs and sub-tabs. Other than as regards specific documents to which I was referred during the course of the hearing, it is impossible to dovetail it with the DAD&C and consequently to understand the relevance of the bulk of this material.

The evidence—an overview

46 When the amendment application was first filed, the position taken by Mr. Finch by his written submissions of September 18th, 2023 was that:

> "The Amended Defence filed herein is supported by a statement of truth and a statement by the first Defendant, as traditionally required in such cases. It is enough that the issues of illegality and immorality are pleaded sufficiently to raise the points; actual proof thereof is a matter for the trial judge."

It is a submission which does not sit comfortably with the authorities discussed above.

47 By his witness statement, also of September 18th, 2023, KM did not condescend into any of the detail found in the DAD&C and at paras. 3 and 4 stated:

> "3. I have always maintained with my previous legal representatives that I was caught up in serious illegality and immorality whilst working for the Claimants, and my job entailed going along with that which was demanded of me, or lose my job, as others have done before me.
>
> 4. The substance of the illegality and immorality in the Claimants and their associates and representatives was not advanced on my behalf at an earlier stage because my legal team were working on a formula that they hoped would lead to a settlement and avoid the issues of illegality."

And thereafter at paras. 7 and 9:

> "7. I can confirm that the Amended Defence contains accurate and truthful details of the various unlawful and immoral acts committed under the aegis of the Claimants, who ultimately stood to benefit, and did benefit."
>
> "9. I would ask the court to read and digest the Amended Defence as presented in its final clean form, as it correctly represents the circumstances that obtained during my period of employment. It paints a very different picture to that which was presented to the court during the injunction proceedings, when the full facts were suppressed."

48 A second witness statement by KM dated October 28th, 2023 entitled "Re: Amendment" also does not deal with the substance of the matters raised in the DAD&C with the only paragraph which is of some oblique relevance stating:

> "[4] Again, I urge the court to take notice that the Mansion beneficial owners have ordered the effective shut down of their operations in England, Canada, Spain, Bulgaria and Gibraltar, all jurisdictions touched by the group's illegal operations. I reiterate that this is a strategy which the Mansion owners have carried out in the past in 2015 with the illegal structure of the B2B business being shut down, as referred to in my amended defence."

49 By his fifth witness statement Mr. Block provided a very detailed response to the allegations advanced in the DAD&C notwithstanding the caveat at para. 31 that despite making serious allegations KM had not filed or provided any evidence supporting the averments thereby making the preparation of the witness statement particularly difficult. Subsequently two further responsive witness statements were served by KM, namely one dated January 27th, 2024 and the other on April 26th, 2024 (five business days before the date fixed for the hearing of the application), the final witness statement being the one providing the greatest level of detail.

The amendments and the evidence in support in detail

50 Before turning to the more specific allegations of illegality and the evidence advanced in respect of each, there is a broader preliminary point which bears identifying. By paras. 5, 6 and 7 of the particulars of claim, the claimants set out that the claimants are part of a wider group of companies which together comprise and operate the online gaming entity known as "Mansion." And the corporate entities relevant for the purposes of the claim are identified. By paras. 11 and 12 of the DAD&C, KM admits that the claimants are part of a wider group of companies but, as best encapsulated at para. 12, avers:

> "Paragraph 6 is admitted insofar as it goes, but does not include Mansion Iberico, Mansion Malta, Madvertsing (previously Convertonet), or Mansion Technology Operations Centre Bulgaria, or the illegal entities that Mansion operates as Casino Midas. KM will say that unless the whole of the group's activities is disclosed and considered, the claim cannot be seen in its true context."

I shall return to Casino Midas in greater detail but from a pleading perspective the broader point is that beyond the assertion that they form part of the same group, no details or particulars whatsoever are provided as to the corporate nexus, if any, between these entities and the two claimants, either in the DAD&C or the evidence.

"B2B" and the grey areas

51 I am unable for the purposes of this judgment to distil the case advanced in the DAD&C and to best understand the nature of the claim which KM now seeks to advance it is necessary to set out the principal paragraphs in full.

52 Under the heading "KM's Employment History and Obligatory Involvement in Grey Areas," at paras. 16–18 the following case is pleaded:

> "16. KM will aver that the UBOs approved the implementation of an illegal scheme called B2B, as part of its grey area activity, which nominally split the Mansion group, including the Claimants, into two levels. There were preliminary meetings, leading to a Headquarters meeting in Singapore on the 22nd November 2012 under the pseudonym 'Project Next'. The scheme required regulators and the outside world to view Mansion Gibraltar as a separate entity to the vehicles designated to conduct covertly the illegal business that B2B was designed to conduct. The whole scheme was a scam. The true purpose of the project was to evade the increased regulation of gaming by European countries, principally triggered by France outlawing gaming entirely. The claim that KM continued as a Mansion employee is also entirely misleading. Immediately after the HQ meeting approval of the B2B scheme, KM and several of his colleagues in 2012 were instructed to resign from Mansion Gibraltar and be engaged by Apollo Online Services Limited, (Apollo), where he was employed until 1 August 2015. This is the time, three years later, that things got too hot for the illegal business, because as a result of the changes to the French law outlawing all gaming whatsoever, an inquiry was commissioned and published by way of a letter, and the nominees fronting for the Mansion group in Curacao indicated that they would not carry the can for the UBOs and would disclose the true connection.
>
> 17. Additionally, KM was required, at the insistence of the UBO, when joining Apollo, to enter into a consultancy agreement with a company called Violet Star Group Limited, which was part of the parallel B2B business which had been set up by the UBOs ostensibly outside of the Mansion Gibraltar persona itself. Further particulars of this parallel arrangement will be provided in evidence in due course, but the schedule attached to this defence sets out the corporate structures and how they worked, as well as the concept of separation and rules of engagement. This device of resignation and employment ostensibly elsewhere was to give Mansion plausible deniability regarding the unlawful B2B business, The Regulator in Gibraltar, and Hassans, who were inveigled to get approval for the necessary restructuring, were deliberately misled to keep up the pretence of

> reorganisation by internal separation, a pretence that could not be achieved if Violet Star and the other entities involved had had their true role revealed. The restructuring was neither necessary nor beneficial to the Mansion Gibraltar persona unless it was to provide infrastructure to operate the B2B grey areas, When [AA Sagi Lahay] was appointed as CEO of Mansion Gibraltar, KM was instructed by the UBOs of Mansion to resign from Apollo and Violet Star, which he did, and thereafter to take up his new appointment back with Mansion Gibraltar. This shows the continuing dominant position of the principals over all the entities, both the public persona or legal side of the Claimants and the covert illegal side, the grey areas. Significant evidence of this is that Casino Midas began operating in France after the French had declared gaming illegal, but as it represented some 15% of the Mansion group revenues, it was seen as indispensable. This was designed and executed as a deliberate illegal act against the French authorities, so there can be no doubt that B2B was there to embrace illegality.
>
> 18. The grey area known as B2B ran for 3 years from 2012 to 2015, but the decision of the French authorities to commence an inquiry caused panic in the ranks of the higher echelons of the Mansion group and a decision was made to shut everything down until the storm blew over. There is evidence that Casino Midas continued working subsequently . . ."

Subsequently a description of "B2B" is provided at para. 31(ii) as follows:

> "[T]he Mansion group had first established and then abandoned a 'business to business' ('B2B') business model under which the companies provided gambling services and facilities to other online gambling companies (who then provided the services to retail clients)."

53 Possibly given the absence of any precision in the DAD&C as to the meaning of "grey areas" or "B2B" in his fifth witness statement, Mr. Block provides a very detailed explanation to counter the allegation that a B2B (business to business) enterprise is illegal. According to Mr. Block, "B2B" operations or operators is a term used to describe gambling operators which provide "white-label" services by which an operator may provide basic gaming services to Business to Client ("B2C") operators as well as other services such as customer services, or payment processing to B2C operators. That the Mansion Group had at all material times operated a B2C licence and business and had in place "white-label" agreements with other B2B operators based in Gibraltar which provided "white-label" services to it, so that it could offer the same to its clients. That the claimants had no interest in entering into the B2B market because it did not fall within their business plan. That it never owned or operated a B2B licence nor did it provide any services to third parties such as Midas Entertainment or Midas

Casino. It is also his evidence that had the claimants provided B2B services, this would not have been illegal and would have constituted a legitimate business practice because a Gibraltar B2C licence allows for B2B operations.

54 As regards the repeated reference in the DAD&C to "grey areas," possibly not unfairly Mr. Block understood that to be a reference to an allegation of illegal provision of gaming services into "grey markets." In his witness statement Mr. Block explains in some detail the difference between "white markets" "grey markets" and "black markets." Essentially the position as regards each of these markets as described by Mr. Block is this. The white market consists of activity in countries which allow and regulate online gambling. Where the laws of such a market are clear and offer an open/non-discriminatory licensing regime, any operator licensed in Gibraltar wishing to enter such market would be expected to seek a licence in that market in order to do so. In turn Mr. Block explains that the term black markets is used to define those jurisdictions in which online gaming is illegal and in which gambling is prohibited and he asserts that the claimants have not provided any such services to customers knowingly residing in these countries. Moreover, he states that the licence conditions prohibit the Mansion companies from operating in any such territories.

55 As regards grey market jurisdictions, the explanation given by Mr. Block is that these are those which do not fall within either white markets or black markets, in that there are no licensing regulations which prohibit online gaming but also do not have any regulations or licensing regimes. According to him, this constituted the vast majority of European jurisdictions in the early days of online gaming in the early 2000s, whilst today's grey markets include most of Asia, Africa, South America and the Middle East. It is Mr. Block's evidence that the provision of online gaming (whether in a B2C or B2B capacity) to these jurisdictions is not illegal, albeit operators are required to adopt and apply the standards and regulations which apply in the jurisdiction in which they are licensed. In support of his evidence in respect of the different markets, Mr. Block exhibits a letter addressed to him dated October 30th, 2023 from H.M. Government of Gibraltar's Gambling Commissioner, the relevant paragraphs of which read:

> "Where domestic law is clear and a jurisdiction offers an open market and non-discriminatory licensing regime, we expect Gibraltar operators to take local licences.
>
> For other jurisdictions (excluding FATF 'blacklisted' jurisdictions), we expect operators to carry out their own legal analysis of domestic gambling legislation for the jurisdiction in question and to be able to justify, offering gambling on a point of supply basis into that jurisdiction.

> Where an operator offers gambling without a domestic licence into another jurisdiction, we consider that Gibraltar legislation applies in terms of consumer protection and anti-money laundering.
>
> Territories into which gambling has been permitted now and in the past are: Asia, the Middle East, parts of Africa and South America."

Flowing from that exposition, Mr. Block questions the basis upon which KM considers that Mansion has in any way operated illegally or how its operations into grey markets either on a B2C or B2B basis (which he says the Mansion Companies have never done) makes the Mansion Group a criminal enterprise.

56 There is no material challenge to Mr. Block's exposition in KM's responsive witness statement of January 27th, 2024. However, by his witness statement of April 26th, 2024, KM provides some further detail in respect of his contentions on various issues. As regards B2B, KM accepts that in principle this is a legitimate business practice. However, he goes on to assert that Mansion established a false B2B set up, using their own employees, including him, rather than the staff of a distinct legitimate licensed gaming company operating at arm's length and that consequently Mansion was running an illegal gaming operation, and that this was a fraudulent structure which was set up to avoid regulation. There is, at para. 36 of KM's witness statement, an assertion that his "exhibit 22" proves this beyond any serious doubt. The exhibit contains some 175 pages of multiple documents including Mansion board meeting agendas and supporting documentation. There is to be found in the material reference to "Midas Entertainment BV" which I understand to be a Curaçao company and also reference to France (as at 2011) being a target market. I shall return to Midas later, but for present purposes the short point is that the assertion made by KM that the exhibit supports his allegation is not immediately apparent and not something which was explained or developed by Mr. Finch in the course of his oral submissions.

57 By his April 26th, 2024 witness statement, also in relation to the alleged setting up of illegal structures, KM seeks to rely upon his "exhibit 23" which he says includes all the documents prepared and utilized for a meeting held in Singapore on November 22nd, 2012—as he puts it at para. 46:

> "[A]t this point the structure had already been setup, process and procedures in place, license, approvals, technology etc. and the meeting was a final reconnaissance meeting to ensure HQ was happy with the implementation and for final green light prior to moving all employees from Mansion to the fabricated consultancy companies . . ."

Thereafter going on to describe the following as "revealing and compelling documents":

"(1) The Mansion B2B (illegal business) ownership separation structure and consultancy participation with employees;

(2) B2B (illegal business) financial structure and revenue flows;

(3) Invoicing flows between internal entities;

(4) Separation concept (demonstrating this was a wider Mansion illegal structure which necessitated a 'separation concept' to avoid any connection, repercussion and contamination);

(5) Nominal termination agreement 2012 from Mansion to B2B consultancy together with waiver and release agreements for GG termination;

(6) Hassans proposed B2B restructuring letter to regulator together with regulator's approval to Hassan's proposal—it is evident how Hassans was not given the full picture of what was the motive and intent of the reorganization and extended structural arrangements nor was the Regulator at the time, Phil Brear. They gave approval and consent on a very different story and understanding—Mansion lied to Hassans, the then Regulator and tax authorities in order to achieve their objective;

(7) Mansion restructuring arrangements and HEPSS approval;

(8) Table of shareholders and directors;

(9) Gaming consultancy participation;

(10) Mansion Europe Holdings Limited & Apollo online consultancy agreement;

(11) Banking Grid;

(12) HQ meeting agenda and appendix 2012;

(13) Sales agreement with Extell Worldwide Limited."

And concluding by stating that the project was given the green light by "HQ."

58 As regards "grey markets"/"grey areas," by his witness statement KM acknowledges that the term "grey markets" exists to describe legitimate gaming company operations. However, the case advanced by him in his witness statement is that Mansion Gibraltar did not use the term in this sense but rather used the term "grey areas" to describe the illegal or immoral activities used by Mansion to make greater profits. The alleged activities set out at para. 43 above are provided as examples and also

provide the basis for the following more generic assertion at para. 48(f) of the witness statement:

> "The immoral compelling of employees to carry out unlawful or improper gaming practices for the benefit of the Mansion Group as part of their duties, in contravention of the lawful express and implied terms and conditions in their contracts of employment, contrary to their legal rights and reasonable expectations as employees."

Put another way, "grey areas" is an umbrella term for the alleged illegality in which KM says the claimants were involved. What is absent in his witness statement is a substantive explanation as to why he chose to participate in this alleged unlawful and/or immoral conduct for what on his own account would have been a long period or why he failed to report any of these matters to the relevant authorities until now.

The specific allegations

Tax evasion in various jurisdictions

59 Aside the generic assertion at para. 7 of the DAD&C which is outlined above, the pleaded case as regards tax evasion is lacking in particularization. At para. 26 the case advanced is that a former CEO of Mansion was removed because he refused to prepare false tax returns for Austria and Germany. And that KM was likewise removed from Mansion because having been "told to evade legitimate tax in Israel, which he declined to do . . . he had to go." Thereafter at para. 27 the case as regards the alleged Israeli tax evasion is developed only to the extent that it is said that:

> "KM knew that the Israelis were already aware of the true tax and employee position so KM disagreed with trying to cheat the Israeli side of the business because it would adversely affect the Mansion group."

60 As regards the alleged German and Austrian tax evasion, the case as pleaded in the DAD&C is that upon his appointment as CEO of Mansion Gibraltar he inherited very significant historical tax issues with Germany and Austria and that these were resolved in accordance with the directions of the representative of the ultimate beneficial owner "from improved cashflow and business generation and the submission of false accounts."

61 As regards alleged tax evasion in Gibraltar, the case is advanced in a number of ways. At para. 21.2(x) it is said that the repayment of a loan by the ultimate beneficial owner at the rate of $500,000 per month was not a formal corporate loan but rather a way of recovering historical losses suffered by the ultimate beneficial owner and were not at the time tax deductible; was not a lawful payment because it did not have board or director approval; and "may possibly have reduced the profits that were

accountable to the Gibraltar Treasury." At para. 70 it is simply asserted that:

> "The true profits of the Claimants were manipulated or suppressed by the [ultimate beneficial owners] and their respective representatives, deliberately impacting upon staff bonuses and possible Gibraltar Government taxation."

62 In relation to the alleged Israeli tax fraud, some albeit not much more detail is to be found in KM's witness statement of April 26th, 2024. His evidence at para. 30 is as follows:

> "[T]he Israelis were about to change and greatly increase the tax payable by gaming companies. The original deal with the Israelis was for Mansion to pay a tax of 10% on an estimated profit of $300,000 per month, which was nominally retained by Mansion on behalf of the Israeli tax authorities. Over time this sum grew to some $6 million, which was meant to be in our accounts. The Israeli company could not be voluntarily liquidated whilst showing a debt to the Government. But Mansion wanted to continue to use the staff from Israel elsewhere, which the Israelis considered to be assets of the company. The Israelis agreed to accept $1.5 million to allow the company to be liquidated and the staff to leave for use by Mansion, but [a representative of the ultimate beneficial owners] lost his temper and insisted that I not pay the Israeli tax and to find a way around our known tax liability. I declined and argued against. The debt was known, and it was unwise to mislead the Israeli tax authorities. Mansion received confirmation of this advice from two respected law firms in Israel that the transfer of the employees would be regarded as a syphoning of assets. But [the representative of the ultimate beneficial owners] was intent on not paying any tax . . ."

Reliance is placed upon material which is to be found at exhibits 18 and 19. These run to some 90 pages and absent specific references in the DAD&C, the witness statement or the submissions by Mr. Finch to the relevance of these documents, I fail to understand how it is said that they support the allegations of illegality. There is one document to which I was referred during the course of oral submissions which would support the contrary. An incomplete message to KM (in which the date does not appear) from the person identified by him as the representative of the ultimate beneficial owners reads:

> "1. I trust that you and all at Mansion are safe and well.
>
> 2. As discussed back in March in London please find attached a written opinion from a law firm that we use regularly.

3. Please note that there will be no further liability to the Shareholders if the advice in paragraphs 8 and 9 are carried out in the course of winding down Israeli operations.

4. Your personal liability as a director will also be extinguished or minimized if the winding down process is managed in compliance with the advice attached. So as discussed, you cannot hire any employees from Convertonnet in any Mansion entity. If you do, then you open yourself up to liability as a director and Mansion as it can be argued as a transfer of assets.

5. You will note at paragraph 11, failure to pay tax is generally not regarded as a crime.

6. In respect of . . .”

63 As regards the alleged evasion of Gibraltar, Austrian and German tax, the short point is that the allegation is not materially developed or supported by evidence in KM’s witness statement. Again, reference is made to exhibited documents with no effort made to explain their relevance.

Providing misleading information to the UK Gambling Commission and UK press in respect of the absence of links between Mansion Europe and Mansion Asia

64 The case as pleaded in the DAD&C is to be found at its para. 8 which is quoted above at para. 41. Thereafter, without any specificity as to dates or the illegality alleged, at para. 19 it is said that:

> “The public persona of Mansion Gibraltar was showing large losses, up to $470,000,000, but this figure did not consider the illegal profits being made from the grey area and the links with Mansion Asia.”

Although later at para. 21 the reference is to accumulated net losses of $47m.

65 By his witness statement of April 26th, 2024, KM at para. 10 merely asserts that he came to realise that:

> “The Mansion Group operating from Gibraltar . . . was principally a front and cover for their Asian/China operation to gain the legitimacy the [ultimate beneficial owners] required for their Western corporate and banking activities in relation to the public persona of their gaming operations. The real money, I came to understand, was being made through illegal gaming worldwide, including Europe, the latter being operated from Gibraltar, which is the only factor that could explain why the Mansion Group was continuously being financed to such a huge extent by the [ultimate beneficial owners].”

And although not pleaded or particularized in the DAD&C in support of his assertion that he was compelled to mislead the UK regulator and the press by denying any link between Mansion Asia, he makes reference to "M88" (as I understand it, a trading name of the Mansion Asia operation) which he says sponsored an English football team and in very generic terms KM goes on to state that it did so through a UK "B2B" company and that the "UK Regulator was investigating Mansion's M88's licence and its European operation in June 2020, which was a matter for coverage in the UK press."

Re-tagging of commissions due to affiliates

66 The pleaded case in the DAD&C in respect of the re-tagging is in effect limited to para. 7(ii)(e) which is summarized at para. 43 above and at para. 10a of the pleading in which it is given as an example of an "unlawful and fraudulent practice" conducted by the claimants:

> "Affiliates are persons and entities that introduce gamers, or punters as they are sometimes called, to the Mansion group in return for a contractual commission. Re-tagging is the process whereby the First and Second Claimants re-tag or replace a losing or small player's activity in the relevant account for an affiliate in the place of a successful big player (from the Claimants' perspective), which effectively deprives the affiliates of legitimate commissions in respect of the difference which the Claimants would otherwise be contractually bound to pay. This is false accounting and fraud."

That allegation is not supported by any concrete evidence and was dealt with by Mr. Block by way of reply in his fifth witness statement at para. 75 stating:

> "The process of retagging is the name provided to the process whereby clients which are introduced by Affiliates are given direct access with gaming operators. This process however is neither illegal nor immoral and occurs frequently in the industry. I understand that at most, the process of re-tagging may constitute a breach of contract with the affiliate (depending on the terms of the specific contract entered into with the affiliate)."

Thereafter asserting that the re-tagging had been done as part of one of KM's initiatives to increase revenues and pay affiliate partners less commission and that it had not come about as a result of a direction or instruction by the representative of the shareholders.

67 Also Mr. Block's evidence, that as part of the investigation into KM's conduct that was carried out by the claimants, by letter dated November 9th, 2021 clarification was sought from KM in relation to re-tagging, on the following terms:

> "Affiliate Player XSell—
>
> Instructing the VIP team to move high value player accounts, tagged as affiliate, to direct accounts. By doing this Mansion no longer pays the affiliate the commission they earned for the customer involved in these transactions.
>
> • Why did you instruct Matteo Astolfi to do this?"

The reply to that issue was contained in a letter from KM's former lawyers, Peter Caruana & Co., of December 1st, 2021 which stated:

> "Affiliate Player xSell
>
> When our client assumed the position of CEO, the aggressive practice of moving high value player accounts from affiliate tagged accounts to direct accounts, which is commonly done in the industry at large, was already being extensively done by the Company, to save costs. Our client curtailed and controlled the practice, limiting it to accounts tagged to affiliates that had already stopped sending new traffic to the company."

By his witness statement of April 26th, 2024, KM asserts that Mr. Bock's narrative is "untrue and amounts to nothing more than prejudicial speculation as part of a cover up." KM also asserts that it was a process deployed by Mansion prior to his employment in 2010, and that it was Mansion who trained him in this system, on the assurance that this was common practice in gaming. That although he subsequently learned that it was not lawful, whilst employed with Mansion he was required to do so.

68 The obvious point to be made is that the position which is now adopted by KM is not entirely consistent with the reply provided in December 1st, 2021 letter. Simply put KM could have unambiguously stated that he had been directed to engage in conduct which those concerned knew to be unlawful.

Unlawful online casinos including Casino Midas

69 As regards the alleged illegal trading with online casinos, the only entity which is specifically identified in the draft pleading is "Midas." At para. 11 of the DAD&C it is said that:

> "The Mansion group is also involved with Mansion Iberico in Spain and the illegal on-line brand of Casino Midas and Midas Entertainment Limited that holds the licence in Curacao that operates the illegal Casinos on behalf of Mansion in Europe and other jurisdictions. This is part of the illegal structure known as the grey area averred above."

Thereafter, Midas is identified as providing "significant evidence" of illegality. It is averred that it began operating in France "after the French

had declared gaming illegal" and that "[t]his was designed and executed as a deliberate illegal act against the French authorities, so there can be no doubt that B2B was there to embrace illegality." At para. 18 the case becomes somewhat more difficult to follow in that it is said that a decision by the French authorities to investigate, led to the "higher echelons" deciding to shut everything down "until the storm blew over" although also averred that "[t]here is evidence that Casino Midas continued working subsequently."

70 In very short, the evidence advanced by Mr. Block as regards Midas is that it is an entity wholly unrelated to the claimants and that no services were provided to it. But that even if it had provided "B2B" services to Midas, that this would not have been illegal and would have constituted a legitimate business practice. The legitimate question which is raised by the claimants is how Midas can be relevant to the claim, considering that this Casino (on KM's own account) had purportedly been in operation between 2012–2015, well before KM had been appointed CEO and well before this claim was commenced.

71 In response to Mr. Block's witness statement, by his witness statement of April 26th, 2024, KM at paras. 5 and 6 provides an extraordinarily muddled explanation of what he says is the structure of the Mansion Group. He provides no explanation as to how, for example Midas (Apollo and Violet Star with which I shall deal shortly) fit into it. No attempt is made to explain whether they are subsidiaries, and if so what entity or entities are the parent companies or whether what is in fact meant is that they are separate standalone companies with the same ultimate beneficial ownership. The evidential high-water mark of KM's case in relation to Midas is to be found at Exhibit 4 to his witness statement, which is described in the index to the exhibits as: "Illegal B2B Structure Schedule 3," albeit no explanation is given as to what document it is a schedule to. The possibly relevant document is entitled "Corporate Legal Structure," it is divided into four distinct columns each respectively entitled: "Mansion UBO," "Consultant UBO," "B2B UBO" and "B2C UBO." Presumably "UBO" is an acronym for "ultimate beneficial owner" which would suggest that that the companies within each column have distinct ultimate beneficial owners. Various Midas entities feature as part of a group within the "B2C UBO" column. However, there is on the face of the document no corporate nexus whatsoever between any of these entities and the claimants or indeed any of the companies which are to be found in the "Mansion UBO" column.

Apollo and Violet Star consultancy agreements

72 The allegations in the DAD&C in relation to Apollo and Violet Star are set out at paras. 16 and 17 which are set out above at para. 52. By his

April 26th, 2024 witness statement, KM asserts that Apollo was the company, together with Hermes (Israel) and Violet Star, which serviced Casino Midas through Curaçao.

73 The material exhibited at tab 23 of KM's witness statement merely evidences that Apollo Online Consultancy Ltd., Hermes Online Consulting Ltd. and Violet Star Group Ltd. employed individuals (including KM) who had formerly been employed by Mansion Gibraltar and Convertonet Ltd. (which from the context it appears was an Israeli company). Mansion's then Gibraltar lawyers informed the gambling commissioner of the restructuring and how senior executives would be engaged through a separate consultancy company rather than through conventional direct employment contracts. By email dated October 21st, 2012 the Gambling Commissioner approved the arrangement.

The alleged theft of the jackpot winnings

74 Some background is required to properly understand this allegation.

75 The case advanced by Mansion is that on or around October 22nd, 2018, a customer of the Mansion Companies won a Jackpot prize of CAN$16m. Onisac entered into a settlement agreement with the player which saw the sum of CAN$8.45m. paid out in a lump sum rather than the full sum being paid in periodic instalments. That jackpot arises in the claim because on October 31st, 2018, WWML invoiced Mansion Gibraltar the sum of €504,165.17 in respect of its alleged involvement in negotiating that settlement, with the invoice paid in full by Onisac on June 13th, 2019. Essentially the claimants' case is that WWML did not provide any such service and that the claimants were defrauded by KM of those moneys.

76 By his original defence KM's case was in part that:

> "WWML's services and advice to the [claimants] resulted in a gain very significantly in excess of the total amount earned by *WWML* from the whole agreement."

KM now seeks to amend his defence by also alleging illegality as set out at its most detailed at paras. 84(v) and 91(iv) of the DAD&C as follows:

> "However, it has not been disclosed that the jackpot winner in Canada was lied to in conversation with [XX]. The winner was told that she could wait for years (up to 30), to recover her jackpot winnings or take a reduced lump sum payable immediately by the Claimants. She chose to take the immediate payment. What the winner was not told was that the entire $15 million jackpot winnings had been transferred by Playtech to the Claimants in full before this approach to settle took place. This means that the winner was duped by a blatant lie to settle for a sum far less than that to which she was entitled. When the UBOs pocketed the balance from the jackpot winners' funds, the UBOs

> knew exactly how and why this windfall payment had come into their possession, which was paid into one of their companies called Ventana Limited, where other irregular payments were made. Even [YY] the corporate lawyer denounced the scam as out and out theft. It is as well that Playtech were not informed as the consequences would be very serious for the Claimants. KM will say that he did not know of the subterfuge until after the event, and was obliged to pay WWML, because they did know and the UBOs as he was directed."

And:

> "Further, WWML were part of the unlawful and immoral scam to divest the jackpot winner of her lawful winnings, and their advice resulted in many millions of dollars finding their way into the UBOs coffers instead of hers, because of lies and deception. The claim speculates with conspiracy theories, but the unanswerable fact is that the Claimants had benefited unlawfully and immorally from this association and dressing it up as a legitimate business settlement is specious and without honour, Mansion Gibraltar received the full jackpot figure and were therefore under an obligation to use those moneys for the purpose for which they were provided and if they did not do so, the obligation was to return the balance to Playtech and not line the pockets of the UBOs. Further, as Canada is now one of Mansion's biggest regulated market, the defrauding of a Canadian player so extensively, would be a matter viewed very seriously by the Canadian Regulator."

77 By his fifth witness statement Mr. Block asserts that settlements of these nature are common within the industry and that it was one which was mutually beneficial for all parties and was freely accepted by the winner of the jackpot. The detail behind that assertion is set out at para. 99 of his witness statement as follows:

> "99.1. On 20th October 2018 a Canadian customer won a jackpot on one of the slots offered through Playtech for EUR 10,710,489.30 (CAD 16M). I would clarify that there was therefore an obligation on Playtech to transfer the amounts to the Mansion Companies.
>
> 99.2. In accordance with the Claimants terms and conditions and in particular the withdrawal policy, the winner would only be entitled to withdraw $50,000 per month. Accordingly, [XX], contacted the winner to see whether she would prefer to enter into a one-time immediate sum of CAD $8,450,000 which would be accepted in full and final settlement of the jackpot win, which the winner agreed to accept.

99.3. On the 24th October 2018, a player settlement disclaimer was entered into with the disclaimer and paragraph 4 of that agreement provided that [Exhibit CB5/p.310]:

> 'The Player acknowledges that she has entered into this agreement freely and with full understanding and has no outstanding claims or disputes with the Company and releases the Company from all obligations relating to the Jackpot Win and will not initiate any action against the Company arising out of or connected with her previous course of dealings with the Company.'"

To Mr. Block's explanation, the response by KM in his April 26th, 2024 witness statement, albeit not supported by any documentary evidence, is that this was a networked jackpot and not a Mansion gaming win and the payment was not subject to Mansion's terms and conditions.

78 A short point to be made, is that KM's assertion "that he did not know of the subterfuge until after the event" is simply not supported by the contemporaneous material, with internal Mansion emails showing that he was provided with a copy of a draft settlement agreement and that he was closely involved in ensuring that the payment to the jackpot winner was made. It may not be a coincidence that on October 25th, 2018 (immediately after the agreement with the jackpot winner had been signed) KM emailed the representative of the shareholders reporting on the financial position and the profits of the Mansion companies.

Discussion

79 As I understand the DAD&C and the supporting evidence, no clear distinction is drawn between the alleged illegal B2B business and the alleged illegal operations falling within the scope of the "grey areas," with no specificity in respect of those overarching allegations being provided beyond the specific allegations which are described above. As regards both the overarching and the specific allegation there are in my judgment a number of headline points.

80 First, in respect of each allegation of illegality or immorality advanced by KM there is insufficient detail to enable the claimants to respond to the allegations. The purpose of pleadings is to define the issues to be tried but the proposed amendments are drafted in such broad terms that whilst they are not incoherent, they are so unreasonably vague so as to make it impossible to identify the issues with sufficient precision. KM has by some margin failed to provide the necessary detailed factual information or particulars in support of each allegation of illegality. The importance of providing sufficient particulars when alleging fraud or dishonesty was discussed by Lord Millett in *Three Rivers District Council* v. *Bank of England* (13), who said ([2001] UKHL 16, at paras. 184–186 and 189):

> "184. It is well established that fraud or dishonesty . . . must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence . . . This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal . . .
>
> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."
>
> "189. It is not, therefore, correct to say that *if there is no specific allegation of dishonesty* it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud." [Emphasis in original.]

81 Second, although by virtue of para. 8 of the DAD&C it is averred that the Mansion group of companies is essentially a criminal organization, no attempt whatsoever is made to particularize the corporate links between the multiple companies through which it is alleged much of the illegality was conducted and the claimant companies and how that conduct is to be attributed to the claimants.

82 Third, other than the allegation of evasion of Gibraltar tax (and possibly the re-tagging of commissions due to affiliates and the alleged theft of the jackpot winnings in respect of which matters the governing law of those contractual relationships are not pleaded) the allegations of illegality are predicated upon breaches of foreign law. It is a long-established principle that foreign law is a matter of fact that must be pleaded (see Dicey, Morris and Collins, *The Conflicts of Law*, 16th ed., at para. 3–002 (2023)). The DAD&C fail to plead any precise provisions of foreign law which it is said have been breached.

83 Fourth, as the Chancery Guide at para. 4.2(m) and the King's Bench Guide at para. 5.33(12) provide, when it is necessary for the proper understanding of a statement of case for substantial parts of a lengthy document to be included, the passages in question should be set out in a schedule. However, as the King's Bench Guide in the same paragraph also makes clear, "evidence should *not* be included in statements of case." [Emphasis in original.] The schedule to the DAD&C does precisely that in a particularly egregious way. The documentation provided is voluminous and disparate, moreover beyond very generic references to the schedule no attempt is made in the body of the DAD&C to link any particular allegation to any specific document.

84 Fifth, the extant defence that KM as sole director of the claimants could take decisions to the exclusion of all others, and which is maintained in the DAD&C, absent an explanation appears to contradict the case which KM now seeks to advance that he participated in immoral or illegal activities on behalf of the claimants under duress.

85 Finally, and sixth, the short point is that the evidence relied upon is in effect limited to bare assertions by KM which are not supported by contemporaneous documents.

86 The upshot is that in my judgment the DAD&C does not properly particularize the elements of the allegations of fact relied upon and to the extent that it does they are extremely vague and not supported by any contemporaneous documents. In my judgment they fail to establish a proper factual basis which meets the threshold merits test. For these reasons the application to amend in so far as it relates to the allegations underpinning the *ex turpi causa* defence are dismissed.

87 It evidently follows that it is unnecessary to consider the application of the more exacting test which arises when an application to amend is made late or very late. In the event that relevant allegations of illegality had been made out and the more exacting test had fallen to be considered then, given the chronology I would have treated this as a late rather than a very late application and likely that it would have been a case in which the interests of justice would have required that any such amendment be allowed.

88 In the preceding paragraph I say "relevant allegations of illegality" because not every illegal act will necessarily provide a basis for the illegality defence. The defence of illegality arises from Lord Mansfield's judgment in *Holman* v. *Johnson* (6) (1 Cowp. at 343): "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." The basis of the defence is that a claimant should not be entitled to their normal remedies because they have been involved in illegal conduct which is linked to the claim. I accept Mr. Malek's general point that in the present case the illegality defence being advanced cannot engage, as the claims brought against KM are not based upon immoral or illegal acts, rather they are based on simple breaches of fiduciary and common law duties.

89 But even if the cause of action was founded upon illegal or immoral acts the draft defence advanced would not have a realistic prospect of success. Relatively recently the doctrine of illegality was considered by the United Kingdom Supreme Court in *Patel* v. *Mirza* (8) and in *Stoffel & Co.* v. *Grondona* (11). In *Patel* v. *Mirza*, the claimant paid a sum of money to the defendant pursuant to an agreement that he would use it to bet on the movement of shares on the basis of inside information. The agreement contravened the prohibition on insider dealing. In the event the agreement could not be carried out because the expected inside information was not forthcoming. The claimant brought a claim against the defendant for the repayment of the money. The core issue was whether the maxim in *Holman* v. *Johnson*, that the court would not assist a claimant who based his cause of action on an immoral or illegal act, precluded a party to a contract tainted by illegality from recovering, on the basis of unjust enrichment, money he had paid under the contract to the other party. The United Kingdom Supreme Court upheld the Court of Appeal's judgment that the claimant was entitled to restitution of sums paid under that contract to carry out an illegal act. Of significance Lord Toulson, J.S.C. said ([2016] UKSC 42, at paras. 120–121):

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may

> be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.
>
> 121. A claimant, such as Mr. Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal."

90 In *Stoffel & Co.* v. *Grondona* (11), the United Kingdom Supreme Court considered the operation of the defence of illegality in the context of solicitors' negligence in a conveyancing transaction where an underlying mortgage had been obtained fraudulently. The court provided guidance on the way in which the "trio of necessary considerations" in *Patel* v. *Mirza* should be applied and Lord Lloyd-Jones, J.S.C. who gave the only judgment of the court ([2020] UKSC 42, at para. 26), commenting on Lord Toulson's "trio of necessary considerations" said:

> "It is important to bear in mind when applying the 'trio of necessary considerations' described by Lord Toulson in *Patel* that they are relevant not because it may be considered desirable that a given policy should be promoted but because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions. Equally such an evaluation of policy considerations, while necessarily structured, must not be permitted to become another mechanistic process. In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court . . . The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect . . . In considering proportionality at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand."

In the same paragraph later stating that if, on an examination of the relevant policy considerations, the clear conclusion emerges that the defence should not be allowed, there is no need to go on to consider proportionality. In the present case (had I been satisfied that the allegations of illegality in the

DAD&C were sufficiently particularized and the merits threshold test met) the trio of considerations would then have had to be considered (albeit in the context of the summary judgment threshold test). For reasons which will become apparent I only deal with the first two.

(a) ***Would the underlying purpose of the prohibition which has been transgressed be enhanced by the denial of the claim?***

91 It is undoubtedly an important policy consideration that trading companies operating from Gibraltar strictly comply with their tax and regulatory obligations both within and outside of Gibraltar. But if any such organization were minded to maximize their profits by acting in an unlawful or immoral way, in my judgment, the risk that they might not be able to recover from a CEO or director who had improperly benefitted from breaches of fiduciary and common law duties would very unlikely feature as a consideration when the company through its officers was contemplating any illegal or immoral activities or operations to maximize profit.

(b) ***Is there any other relevant public policy on which the denial of the claim may have an impact?***

92 In the context of the factual matrix of this case there is a strong public policy that directors/senior employees of companies should not profit from breaches of fiduciary and common law duties and escape liability, particularly in circumstances in which on KM's own case he actively participated in much of that illegality.

93 Proportionality therefore does not fall to be considered.

94 It follows that in my judgment, applying the test in *Patel* v. *Mirza* (8), KM's defence of illegality even if sufficiently pleaded and supported by evidence would not as a matter of law have afforded a defence to the claim.

Amendments to the counterclaim

95 The draft amendments to the counterclaim are predicated on the allegations of unlawful and immoral conduct on the part of the claimants "and their associated representatives" that they failed to inform KM that he would be expected to engage in that type of conduct on behalf of the claimants and "that he was compelled to be compliant and accept the directions given to him by the UBOs and/or their representatives or lose his job." He now seeks to claim "whistleblower" status on the basis that he was acting under duress and that he was dismissed because he refused to mislead the Israeli authorities, that the claimants' conduct—

> "constituted a serious breach of his contract of employment, which would unavoidably contain an implied condition not to act unlawfully or immorally."

96 The quantified loss and damage amounts to £2,195,000 and is based on loss of salary, bonuses and "consequential legal fees." He also seeks general damages said to arise from his loss of employment which are detailed at para. 185 as follows:

"(d) Loss of reputation

(e) Mental distress and anxiety

(f) Loss of opportunity in the Bitcoin market, including loss of a sale opportunity in a company known as 'Bitquin' and licence application

(g) Health issues created with KM's wife, [X], as a result."

The breaches of contract of employment which are predicated on the alleged unlawful/immoral conduct on the part of the claimants raise the same issues which arise in the context of the proposed amendments to the defence. It follows that the proposed amendments to the counterclaim which are predicated on the allegations of illegality and immorality do not meet the threshold test for permission to amend.

97 The specific claims which KM now seeks to advance are in turn based on the alleged breaches of the contract of employment and therefore also do not meet the threshold test for permission to amend. They are in any event of themselves wholly inadequately particularized. Notwithstanding, I shall deal with each in turn, albeit mindful of the broader point that no explanation whatsoever is advanced reconciling the proposed claims with KM's resignation from his employment as CEO and from his directorships on December 1st, 2021 beyond the position taken in the original defence that he resigned "because of the hostile, biased, unfair and improper manner in which the investigation was being conducted."

Unfair dismissal/constructive dismissal/wrongful dismissal

98 It is not easy to discern whether any of these claims are advanced but if they are, as aforesaid, a claim for wrongful dismissal would appear to be predicated on the alleged unlawful/immoral conduct. As an aside I would add that in a wrongful dismissal claim, the period of loss will usually be the contractual notice period and it is difficult to reconcile that general principle with the sums being claimed.

99 As regards a possible claim for unfair or constructive dismissal (the latter more obvious given that KM resigned) the very short point is that jurisdiction for any such claim is vested in the Employment Tribunal.

The whistleblowing claim

100 The whistleblowing claim is limited to a bare assertion that:

> "KM now claims whistleblower status, as he was acting under duress. KM will rely on the fact that he lost his job when he refused to mislead the Israeli authorities at the insistence of the UBOs. The UBOs and their representatives constituted a dominant and controlling power over KM at all relevant times in matters relating to the grey areas."

KM has failed to identify the relevant legislative provisions which apply nor how they are engaged. If KM is referencing the "public interest disclosure" provisions in Part IVA of the Employment Act then a number of potential issues arise, namely:

(i) KM has failed to plead what disclosure was made, when and to whom;

(ii) the Employment Act provides that any such claim must be brought to the Employment Tribunal, therefore it would appear that this court does not have jurisdiction to determine any such claim; and

(iii) if brought in the Employment Tribunal, it would be time barred.

Loss of reputation

101 If what is being advanced is a claim in tort for defamation premised upon the allegations advanced by the claimants against KM in these proceedings and which may have resulted in some media coverage, then no explanation is provided as to why any such statements are not absolutely privileged.

Bitcoin and Bitquin

102 KM has failed to particularize how the alleged breaches by the claimants resulted in a loss of opportunity in the Bitcoin market or indeed how it resulted in the loss of a sale opportunity in "Bitquin."

Mental distress and anxiety

103 A claim for mental distress and anxiety is a claim for personal injuries. Beyond the bare assertion no particulars whatsoever are provided and the requirements in the CPR in relation to any such claim have not remotely been complied with.

KM's wife's consequential health issues

104 Leaving to one side that no particulars whatsoever are provided or that the requirements in the CPR in relation to personal injury claims have not been complied with, it is very difficult to understand the basis upon which KM seeks damages in respect of an individual who is not a party to the action.

The disclosure application

105 By an application notice issued on May 6th, 2024 the defendants seek the following relief:

> "[An] Order for Specific Disclosure or inspection, as the case may be, of the documents in the attached list pursuant to CPR 31.12 for the just determination of the issues between the parties."

The list identifies ten different classes of documents. By item (a) the defendants seek full access to KM's mailboxes, including "mansion.com," "apollocsg.com" and "violet.com." By item (b), the defendants seek full access to KM's "Mansion PC" and "Apollo/Midas PC" and presumably distinctly "documents and related financial records" including correspondence with certain named individuals and entities. Thereafter, all except one of the items, namely (f), relate to the issues of illegality/ immorality raised in the DAD&C. By item (f) the defendants seek:

> "Correspondence between the Gaming Commissioner and Mansion regarding the suggested compliance penalty and settlement deal, including any input from the Gaming Minister and MR. BLOCK, including minutes of meetings and the contents of a call between the Gaming Minister and PS in the early stages of the Claim originating."

106 CPR, 31.12 provides:

> "(1) The court may make an order for specific disclosure or specific inspection.
>
> (2) An order for specific disclosure is an order that a party must do one or more of the following things—
>
> (a) disclose documents or classes of documents specified in the order;
>
> (b) carry out a search to the extent stated in the order;
>
> (c) disclose any documents located as a result of that search.
>
> (3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2)."

In the context of the present application the following commentary in the White Book is of some relevance. At 31.12.1:

> "The application should set out the document or classes of documents for which disclosure or inspection is sought, or the extent of the search sought. If a class of documents is specified, the class should be carefully defined so it is limited to what is relevant and proportionate, and so the disclosing party is in no doubt as to the scope of their obligation: City of Gotha v Sotheby's [1998] 1 W.L.R. 114 at 123H, CA; Berkeley Administration v McClelland [1990] F.S.R. 381 at 382.

> It may also be appropriate to explain why it is reasonable and appropriate for that disclosure or search he done."

And at 31.12.2:

> "The court has a discretion as to whether it makes the order. It may make an order at any time, regardless of whether standard disclosure has already occurred; and it may make orders for specific disclosure against the claimant before the service of the defence where it would assist the defendant to plead a full defence rather than an initial bare denial: Dayman v Canyon Holdings Ltd, 11 January 2006, unrep., HH Judge Macie QC.
>
> The court will need to satisfy itself as to the relevance of the documents sought, and that they are or have been in the party's control, or at least that there is a prima facie case that these requirements will be met. The relevance of documents is analysed by reference to the pleadings, and the factual issues in dispute on the pleadings: Harrods Ltd v Times Newspaper Ltd [2006] EWCA Civ 294; [2006] All E.R. (D) 302 (Feb) at [12]."

107 In support of the application in his witness statement of April 26th, 2024, KM asserts that the claimants have refused his repeated and formal requests for access to his company email account and other important records and suggests that the ulterior motive for such failure is "because it reveals levels of illegality on their part which they have tried to suppress." At para. 50 of his witness statement he challenges the disclosure provided by the claimants and states:

> "The recent claim by Mr. Malek from the bar in court on behalf of the Claimants concerning disclosure that 'they have given the defence everything' is incorrect and should not have been made. The disclosure provided by Isolas, to which he might be referring, is comprised of a huge number of unreadable document descriptions, the majority of which appear to have no bearing on the issues between the parties and leaves the reader no wiser. I am advised by my legal representative that only documents relevant to the issues need to be disclosed, but they should be provided in a format to assist readability, comprehension, and search. Disclosure of every conceivable document in one's possession on a selective basis, without the relevant ones, makes no sense at all. And I may be forgiven for not accepting the Claimants' assurances that I have been given everything where the dispute between the parties involves substantial dishonesty and misrepresentations on their part, and when I know important documents are being suppressed."

108 As required by the order of June 5th, 2023 the claimants have provided disclosure by way of list of documents together with a disclosure statement signed by Mr. Montado which states:

> "The Claimants carried out searches as required by the terms set out in the Order and the Schedule to the Order dated 5th June 2023. The Claimants passed those results to the Claimants' Solicitors who carried out the exercise of sorting what documents were relevant for disclosure purposes. The Claimant was not involved in that process."

And it is instructive to note that the list of keyword searches identified at Schedule 1 to the order was an agreed list.

109 The list of documents provided by the claimants which runs to 170 pages and comprises 5197 items is perfectly readable and to the extent applicable each document is identified by subject matter; the person sending and receiving; details of attachments; and dates. In the circumstances I fail to understand the criticism which KM seeks to levy upon the disclosure provided by the claimants. It may be that there are shortcomings in the disclosure but on the basis that the defendants' lawyers have evidently not undertaken a detailed analysis of the list that one would expect in the context of this type of litigation, any criticism at this stage is evidently premature.

110 Against that backdrop I turn to the various classes of documents in respect of which disclosure is sought. As regards items (a) and (b) what in effect the defendants seek is that they be provided with all the data in KM's erstwhile mail boxes and personal computers. There may be circumstances in which failure by a party to comply with its disclosure obligations might make such an order appropriate but evidently this is not such a case. Moreover, to the extent that such disclosure is sought for the purposes of the defence of illegality, given my dismissal of the application to amend, it fails the relevance test. Evidently, the seven items by which material relating to the illegality defence is sought also fail the relevance test.

111 Finally, as regards item (f), that material may well be relevant in the context of the pleadings as they stand. However, at this stage, the defendants' lawyers having failed to consider the list and request inspection, they cannot properly advance the submission that the claimants have failed in their disclosure obligations. This request is also dismissed.

Conclusion

112 The claimants' application to exhibit into evidence the purported without prejudice correspondence is granted, save that for the reasons I have given it is not material to the determination of the amendment application.

113 The defendants' application to amend the defence and counterclaim is to the extent that it is covered by this judgment dismissed. Unless the parties are able to agree, I shall hear them in respect of any proposed amendments to be found in the DAD&C which do not fall within the scope of the issues I have determined.

114 The defendants' application for specific disclosure is dismissed.

115 Orders accordingly and I shall hear the parties as to costs.

Judgment accordingly.