Michaelmas Term
[2014] UKSC 64
On appeal from: [2014] EWCA Civ 1106

JUDGMENT

HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud (Appellant) *v* Apex Global Management Ltd and another (Respondents)

before

Lord Neuberger, President
Lord Clarke
Lord Sumption
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

26 November 2014

Heard on 13 October 2014

Appellant	*Respondents*
Justin Fenwick QC	Daniel Lightman
Daniel Saoul	Thomas Elias
Michael Ryan	
(Instructed by Mishcon de Reya)	(Instructed by Teacher Stern)

LORD NEUBERGER: (with whom Lord Sumption, Lord Hughes and Lord Hodge agree)

A brief summary of the background

1. This is an appeal against a decision of the Court of Appeal upholding a series of case management decisions by judges of the Chancery Division. It arises out of a joint venture between Apex Global Management Ltd ("Apex"), a Seychelles company owned by Mr Almhairat, and Global Torch Ltd ("Global"), a BVI company owned by Prince Abdulaziz ("the Prince"), Mr Abu-Ayshih and Mr Sabha. Apex and Global set up an English company Fi Call Ltd ("Fi Call"), and then fell out badly. On 2 December 2011, Global issued a petition under section 994 of the Companies Act 2006 against Apex, Mr Almhairat and Fi Call seeking share purchase orders, and pecuniary and declaratory relief. Ten days later, Apex issued a not dissimilar cross-petition against Global, the Prince, Mr Abu-Ayshih, the Prince's father, and Fi Call. Allegations and counter-allegations of seriously unlawful misconduct are involved, including money-laundering, financial misappropriation, and funding of terrorism. The two petitions were ordered to be heard together.

2. It is relevant to mention that the pecuniary relief sought by Apex included a claim for just under $6m (and for convenience I shall treat it as $6m) plus interest, which it contended was owing to Apex by the Prince. The Prince denied that the $6m was owing on the ground that he had paid it into various bank accounts of Fi Call for which Mr Abu-Ayshih and Mr Almhairat were apparently joint signatories. Apex accepted that it had been agreed that the Prince could pay the $6m to Apex by paying it into Fi Call bank accounts, but did not accept that the payments relied on by the Prince were intended to discharge, or did discharge, his liability to pay Apex $6m.

3. A Case Management Conference took place before Vos J on 30 and 31 July 2013, at which he considered and resolved a number of disputed case management issues, and his directions were set out in a detailed order ("the Order"). For present purposes, only paras 14 and 15 of the Order are relevant. Both paragraphs contain a direction that all parties (save Fi Call) should by 6 August (para 14) or 12 August (para 15) "file and serve a statement, certified by a Statement of Truth signed by them personally in the case of individuals and by an officer of the company in the case of the two companies". The statements under para 14 were required to identify the location and other details of servers, electronic devices and email accounts of Fi Call to which

the party concerned had or had had access. The statements under para 15 were required to identify the location and other details of email accounts and electronic device not provided by Fi Call to which the party concerned had or had had access.

4. The Prince did not object to this form of order when it was proposed on 30 July, but, on the following day, his counsel argued that he ought not be required to sign the statements referred to in paras 14 and 15 of the Order personally, but Vos J rejected the argument.

5. Thereafter, the Prince purported to comply with paras 14 and 15 of the Order, but his statements did not deal with mobile devices, and, more to the point, the accompanying Statements of Truth were signed not by the Prince, but by Mr Abu-Ayshih, who was his close adviser, on his own and on the Prince's behalf.

6. As the Prince had failed to comply with paras 14 and 15, Apex and Mr Almhairat ("the Apex parties") applied to Norris J on 9 September 2013, seeking an "unless order", ie an order that, unless the Prince complied with those paragraphs of the Order, and in particular signed a Statement of Truth, his defence be struck out and judgment be entered against him. On the basis that he was being asked to "enforce[e] compliance with rules, practice directions and orders" under CPR 1.1(2)(f), Norris J made the unless order sought, giving the Prince nine days to comply, and refused permission to appeal.

7. The Prince maintained his position, and accordingly the Apex parties applied to Norris J on 14 October 2013 under CPR 3.5(2) for judgment to be entered in their favour, and in particular Apex applied for judgment to be entered in its favour for the $6m plus interest. Norris J granted that application on the papers - ie without an oral hearing.

8. The Prince then applied under CPR 3.1(7) for a variation of Vos J's order so as to permit his solicitor to confirm on oath, on his behalf, that he had given full disclosure and for relief from sanctions. He also filed a witness statement from his solicitor, seeking to make it clear that the Prince had had explained to him the effect of paras 14 and 15 of the Order, and that he had complied with it. In a judgment given on 30 October 2013, Mann J refused to vary the order of Vos J on the ground that there had been "no change of circumstances". Subsequently, in a judgment given on 29 November he rejected the Prince's application to be "relie[ved] from sanctions" under CPR 3.9.

9. On 31 July 2014, Hildyard J refused, with some reluctance, an application (the precise nature of which is unimportant for present purposes) for summary judgment in relation to the question whether the $6m had in fact been repaid by the Prince. Meanwhile, the Prince appealed the decisions of Vos J, Norris J and Mann J to the Court of Appeal which rejected his appeals for reasons contained in a judgment, which (like that of Hildyard J) was given on 31 July 2014, the reasons being expressed by Arden LJ with whom McFarlane and McCombe LJJ agreed - [2014] EWCA Civ 1106. The Prince now appeals to this court against that decision.

10. The Prince sought permission to appeal to this Court against the decision of the Court of Appeal, and he was given permission on terms that he paid $6m (plus interest) to his solicitors to abide the order of the court, a condition which he complied with, albeit late. Because the trial was due to start shortly, the Prince's appeal was heard on 13 October, and on the day following the hearing we informed the parties that the appeal would be dismissed for reasons which would be given later, on the basis that the parties could thereafter make written submissions as to the order which should be made in relation to the monies paid to the Prince's solicitors.

The attack on the decisions below: general

11. Subject to arguments based on (i) general disproportionality, (ii) the fact that there will be a trial in any event, and (iii) the strength of the Prince's case (arguments which I consider in the next three sections of this judgment), it appears clear to me, as it did to the Court of Appeal, that the decisions of Vos J, Norris J and Mann J, as summarised above, cannot be faulted.

12. It was suggested on behalf of the Prince by Mr Fenwick QC and Mr Saoul (neither of whom appeared before Vos J or Norris J) that Vos J erred in making the order in paras 14 and 15, because he mistakenly believed that this was the "usual" order. The fact that Vos J and the Court of Appeal (see per Arden LJ in the Court of Appeal at para 44) considered that it was the usual order to make renders it very hard for this court to take a different view. However, while it is unnecessary to decide the point, I incline to the view that the standard form of disclosure by a party does require personal signing by the party. CPR 31.10(6) refers to a "disclosure statement" as being "a statement made by the party disclosing the documents", and the notion that it should be the party himself also seems to get support from CPR 31.10(7). Similarly, that conclusion is supported by para 4 of PD31A, especially sub-paras 4.2, 4.3, 4.4 and 4.7 (and also the annex to PD31A). It also seems clear that, no doubt when good reasons are made out, the court can permit a departure from this - see CPR 31.5(1)(a) and (b). It is true that para 3.7 of

PD22 specifically permits a statement of truth to be signed by a party's solicitor and that para 15 of the Order referred to statements of truth not disclosure statements. However, it seems to me that, although it referred to statements of truth, para 15 was actually referring to disclosure statements - a view supported by paras 1.1 and 1.4 of PD22 and CPR 22.1(1).

13. Accordingly, at least as at present advised, I consider that the view taken by Vos J and the Court of Appeal, namely that a direction requiring personal signing of disclosure statements reflected the normal practice, was correct. However, that is not, in my view, the essential question when it comes to challenging paras 14 and 15 of the Order. The essential question is whether it was a direction which Vos J could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" as Lewison LJ expressed it in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743, para 51.

14. It appears clear from the transcript of the hearing before Vos J that the ground on which he was being invited not to order the Prince to sign the disclosure statement personally was that the Prince would not sign the document because there was a Saudi Arabian protocol (to use Vos J's description) that members of the Royal Family should not become personally involved in any way in litigation. Vos J was sceptical as to the existence and the applicability of this protocol. This is unsurprising, as (i) the evidence as to its existence was principally given by a witness, whose evidence on other points the Judge had previously rejected as incredible, (ii) Vos J was also told by the Prince's counsel that he understood that the question of his client giving evidence was still being considered, (iii) another Saudi prince had given evidence in a case before Peter Smith J, and (iv) even if the protocol existed, it was hard to accept that it can have been intended to apply outside Saudi Arabia. In any event, as Arden LJ put it in para 29 in the judgment of the Court of Appeal, Vos J "considered it of the utmost importance having regard to the gravity of the allegations that there should be proper pleadings and full disclosure".

15. Given the very serious and bitterly disputed allegations and counter-allegations in the proceedings, the doubts as to the existence, status and reach of the alleged protocol and the fact that all other parties were being required to sign disclosure statements personally (and it was not suggested by anyone to Vos J that all the parties should have the same indulgence as the Prince), it is very difficult to see how Vos J's conclusion could be faulted; it appears to me to have been well within the generous margin accorded to case management decisions of first instance judges.

16. As for the hearing before Norris J on 9 September ([2013] EWHC 2818 (Ch)), the Prince again raised the alleged protocol, and suggested that Mr Abu-Ayshih could sign the required statement on his behalf confirming that full disclosure had been given. In the course of a careful judgment, Norris J accepted, at para 8, that "the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified". He also accepted, at para 11, that he should consider "the effect of making, or not making, the order sought on the overall fairness of the proceedings and the wider interests of justice as reflected in the overriding objective" (quoting from Christopher Clarke J in *JSC BTA Bank v Ablyazov (No 3)* [2010] EWHC 2219).

17. Norris J then rejected the Prince's proposal, saying at para 13 that, if that suggestion was adopted "there is a real risk that the overall fairness of the proceedings will be jeopardised. Everyone else will have put their cards on the table. The Prince will deal through an agent". He explained that this would be unfair because "[e]veryone else will be exposed to criticism and have their credibility attacked if they are shown to have concealed some relevant account, relevant device, or relevant communication. But, the Prince says that he should be exempt from that criticism." He therefore considered (para 15) that some sanction must be applied and was "satisfied that an unless order … is the only proper relief to grant in these circumstances", not least because it gave the Prince another opportunity to comply with paras 14 and 15 of the Order.

18. Again, I find it very hard to discern any grounds for challenging Norris J's first decision, which resulted from a correct approach in principle and a careful consideration of the competing arguments, unless it can be said to have resulted in a disproportionate result - the first point mentioned in para 11 above, and which I shall consider below. Similarly, there is no basis for challenging the second decision of Norris J (which was almost administrative in nature).

19. The first decision of Mann J ([2013] EWHC 3478 (Ch)), rejecting the Prince's application to vary paras 14 and 15 of the Order, was based on a very full analysis of the factual and procedural position, and he approached the issue by reference to the guidance given by Rix LJ in *Tibbles v SIG plc* [2012] 1 WLR 2591, para 39. He concluded, at para 20, that "the requirements for attacking" the decision of Vos J "within the *Tibbles* catalogue … have [not] come even close to being fulfilled". It is unnecessary to expand on this brief and allusive summary of Mann J's first decision, because, realistically, the reasoning has not been questioned on this appeal. What is relied on by the Prince are the three arguments summarised in para 11 above, which I shall consider below.

20. The second judgment of Mann J ([2013] EWHC 3752 (Ch)) dealt with many issues which are irrelevant for present purposes. However, he dealt in some detail with the Prince's application to be relieved from the sanction imposed and enforced by Norris J, which amounted to an application to set aside the judgment entered against the Prince. This was proposed on the basis that the Prince had substantially complied with paras 14 and 15 of the Order in the light of a very full witness statement from his solicitor. Mann J thought that the Prince was raising points which had already been decided. In any event, he was concerned that, if the Prince's proposal was adopted, there would not be what he called "a level playing field" so far as the other litigants were concerned - a point which had also weighed with Norris J, as explained in para 16 above. Mann J was also sceptical about the existence of the alleged protocol, which he described as having "emerged in a piecemeal and relatively casual way for something which is as central as it is now said to be". He also described it as "a matter of collective choice" for members of the Saudi Royal Family, to which an English court should not "defer" (para 41, viii). He also rejected arguments based on the points mentioned in para 11 above, which I deal with below. At any rate subject to those points, it seems to me that the second decision of Mann J was unassailable.

21. In the light of my conclusion that, at least subject to the three points mentioned in para 11 above, the decisions of Vos J, Norris J and Mann J in these proceedings were unassailable, it follows that, in dismissing the appeals against those decisions, I consider that the Court of Appeal was right, albeit again subject to the three points to which I now turn.

Alleged disproportionality

22. There is undoubtedly attraction in the contention that preventing the Prince from challenging his liability for $6m is a disproportionate sanction in circumstances where he appears to have what was referred to on his behalf at first instance as "a substantive defence" (and as it was put by Mann J in his first judgment). A stark view of the Court of Appeal's decision is that it deprived a defendant of the opportunity to maintain a defence to a claim for $6m simply because he has failed to comply with an order that he sign a document, when his solicitor was prepared to sign it on his behalf. Expressed thus, the decision may indeed look like an overreaction, and that is no doubt how it would strike the Prince.

23. This contention effectively involves saying that, although each decision on the way to the final result is unassailable (at least subject to the Prince's two remaining arguments), the final result is wrong on the ground of lack of proportionality. I suppose that may be logically possible, but it is a difficult

position to maintain. More to the point, in my view, on analysis, the contention does not stand up. The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction.

24. In the present case, essentially for the reasons given by the three judges in their respective judgments, there do not appear to be any special factors (subject to what I say in the next two sections of this judgment). Further, it is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place.

25. One of the important aims of the changes embodied in the Civil Procedure Rules and, more recently, following Sir Rupert Jackson's report on costs, was to ensure that procedural orders reflected not only the interests of the litigation concerned, but also the interests of the efficient administration of justice more generally. The Prince has had two very clear opportunities to comply with the simple obligation to give disclosure in an appropriate fashion, namely pursuant to the orders of Vos J and of Norris J. Indeed, there would have been a very good chance that, if he had offered to sign the relevant statement after judgment had been entered against him, the court would have set aside the judgment and permitted him to defend (provided that no unfair prejudice was thereby caused to the other parties, and he satisfied any appropriate terms which were imposed).

26. The offer made to Mann J and repeated to the Court of Appeal that the Prince's solicitor would confirm, on the Prince's instruction, that full disclosure had been given, does not assist the Prince. It would not, I think, have complied with the normal procedure as set out in the relevant Practice Direction, and while the court had the power to depart from that procedure, there is no obvious reason why it should have done so in this case. It would have involved undermining the case management decisions of Vos J, Norris

J and Mann J. It would also have been unfair on the respondents as it would have meant that the intended contemporaneous exchange of disclosure statements could not take place. Further, the Prince would have been accorded a privilege over the other parties. In addition, even now the disclosure given by the Prince's solicitor is self-evidently defective as he failed to give details of all email addresses and electronic devices to which the Prince had access. It also seems quite probable that the hearing date would have been lost if the Prince had been permitted to take part in the trial at such a late stage.

27. Mr Fenwick relied on *Cropper v Smith* (1884) 26 Ch D 700, 710, where Bowen LJ said that he knew of "no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party". There are three problems for the Prince in this connection. The first is that these observations were made in connection with a proposed amendment to a pleading, ie an attempt by a litigant to do something which he would be entitled to do, but to do it late; whereas here we are concerned with a party who does not even now intend to obey a court order. Secondly, as the points made in the last few sentences of the immediately preceding paragraph of this judgment illustrate, there would be prejudice to the other parties if the Prince's current proposal was adopted. Thirdly and even more importantly, the approach laid down in *Cropper* has been overtaken by the CPR.

The strength of the Prince's defence

28. Mr Fenwick also relied on the fact that the Prince's contention in his pleaded case that he had already paid the $6m was very strong, that this should have been taken into account by the courts below, and should have resulted in his being permitted to defend the claims against him. Presumably, this would be on the basis that some other unspecified sanction should be imposed on the Prince. Some of the evidence relied on to justify this contention came into existence after the Court of Appeal gave its decision, but I am prepared to assume, without deciding, that it can be taken into account.

29. In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject matter of the decisions of Vos J, Norris J and Mann J in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment. Both the general rule and the exception appeared to be common ground between the parties, although Mr Fenwick seemed to be inclined at one stage

to suggest that the exception might be a little wider. In my view, the general rule is justifiable on both principled and practical grounds.

30. A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature or the enforcement of those directions and decisions. While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way. Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.

31. In principle, where a person has a strong enough case to obtain summary judgment, he is not normally susceptible to the argument that he must face a trial. And, in practical terms, the risk involved in considering the ultimate merits would be much reduced: the merits would be relevant in relatively few cases, and, in those cases, unless the court could be quickly persuaded that the outcome was clear, it would refuse to consider the merits. Accordingly, there is force in the argument that a party who has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions. For present purposes, I am prepared to assume in the Prince's favour that that is indeed correct.

32. I should add that I do not think that it would be enough for a party to show that, while his arguments were not strong enough to justify summary judgment, his arguments were strong enough to justify the other party being required to bring the disputed sum into court if he was to be entitled to proceed with his case. For present purposes, as with an outright order for summary judgment, a claim or defence is either unanswerable or it is not. A conditional order, typically requiring a party to provide security if it wishes to proceed with its claim or defence, is granted in rather nuanced and case-specific circumstances. Neither as a matter of principle nor as a matter of practicality would it be appropriate to extend the exception to such a case.

33. Turning to the facts of this case, I do not need to set them out, not least because they are clearly recited by Lord Clarke in paras 48-61, 64-66 and 68-73 of his judgment. I readily accept that the evidence shows that the Prince would have had a good prospect of establishing that the $6m was paid as he

contends in his defence. However, I cannot accept that his prospects can be said to be any higher.

34. In the first place, it would risk unfairness to the Apex parties to hold that the Prince had an unanswerable case, as that point had not really been flagged up as part of his argument until the Prince was given permission to appeal to this court. As mentioned, before Mann J, the Prince argued that he had "a substantive defence", and before the Court of Appeal it was argued that the merits of the case should be considered, but it does not appear to have been claimed that he had an unanswerable case (see para 87 of Arden LJ's judgment). Even in his printed case for this appeal, the Prince is described as having "a very strong defence on the merits", not an unanswerable defence. If, at an interlocutory hearing which is not a summary judgment hearing, a party wishes to rely on the contention that he has an unanswerable claim or defence, it seems to me that he should spell out that contention very clearly in advance, as otherwise the raising of the contention at the hearing could wreak obvious unfairness on the other party.

35. Secondly, even based on the current evidence, I do not consider that it can be said that it is plain that the Prince will succeed in establishing that he had paid the $6m as he alleges. It is true that payments totalling around $6m were made by the Prince into accounts in the name of Fi Call mentioned in para 2 above. However, the payments were not made on the dates or into the accounts into which they ought to have been made if they were paid pursuant to the arrangements relied on by the Prince. The Apex parties' suggestion that the money was paid by the Prince under a $20m loan agreement does not appear fanciful, although it may ultimately be rejected: it is common ground that the loan agreement exists. Further, the fact that much of the money may have been subsequently paid out to the Prince may be inconsistent with the Prince's case. We have seen some of the payments into and out of the bank accounts into which the Prince paid the $6m, but we have not seen all of them. It is also true that the Apex parties' case on the payments by the Prince has not been consistent. However, the proceedings involve many serious allegations by and against the Prince, and it would require a particularly clear case before any court could properly conclude that the claim for $6m against him was plainly bound to fail - or indeed to succeed. It is also true that, when the matter was before him, Hildyard J described the case against the Prince on this issue as "[to] put it lightly, frail". But he did not think it right to enter summary judgment, and in any event we have to form our own view.

The fact that there will be a trial

36. The final point relied on by Mr Fenwick was that the issue of whether the $6m had been paid may well be raised at the trial, and at least will be the basis on an attack on the credibility of Mr Almhairat. Thus, the very issue which the Prince would be precluded from contesting if his appeal is dismissed may be determined in the very proceedings which he would have been debarred from defending. This was a point which featured in the Prince's argument before Mann J, who rejected it. And although it has some attraction, I consider that he was right, and certainly entitled, to reject it.

37. While, as I say, this argument has some attraction, in the end it seems to me that it simply represents, as Lord Hodge pointed out in argument, a relatively extreme example of what happens if the court orders that a default judgment be entered against a defendant. It is inherent in such an order that the claimants will obtain judgment for relief to which it may subsequently be shown that they were not entitled. Indeed, it is fair to say that, even where judgment for some relief is obtained by claimants after a full trial, evidence may emerge in a later case which establishes that they were not entitled to that relief.

38. So far as this case is concerned, it is worth considering the point a little further. It seems unlikely that, if the contention that the Prince had already paid the $6m is maintained at trial, it will be ruled on by the trial judge unless it is necessary to do so in order to resolve a live issue between the remaining parties, ie an issue which will affect the terms of any court order. And, if the contention had to be resolved in order to determine such an issue between the remaining parties, and the trial judge concluded that the $6m had in fact been paid by the Prince, it is conceivable that the Prince would be able to recover the $6m or its equivalent. That is, I must emphasise, mere speculation on my part, but it illustrates that the Prince may not be without some hope, albeit of a highly speculative nature, of getting the $6m returned, if he had in fact paid it. To that extent, he is actually better off than if this was a more normal case involving the enforcement of a sanction.

Concluding remarks

39. It is right to acknowledge that, in the course of this judgment, I have expressed myself in some places in somewhat tentative terms (eg in paras 12-13, 23, and 31). This reflects the point that issues such as those raised by this appeal are primarily for the Court of Appeal to resolve. It would, of course, be wrong in principle for this court to refuse to entertain an appeal against a

decision simply because it involved case management and the application of the CPR. However, when it comes to case management and application of the CPR, just as the Court of Appeal is generally reluctant to interfere with trial judges' decisions so should the Supreme Court be very diffident about interfering with the guidance given or principles laid down by the Court of Appeal.

40. It is also right to say that nothing in this judgment is intended to impinge on the decisions or reasoning of the Court of Appeal in *Mitchell v. News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795 or *Denton v TH White Ltd* [2014] EWCA Civ 906.

41. As it is, for the reasons I have given, I consider that we should dismiss the Prince's appeal.

Postscript

42. After the argument on this appeal had been concluded and we had notified the parties of our conclusion, but before we handed down this judgment, we were advised of recent judgments of Hildyard J in the principal action, given on 3 and 5 November, when he reluctantly adjourned the trial to 2015 (subject to certain conditions) on the application of Mr Almhairat and, in light of Mr Almhairat's own evidence as to what had happened to some of the assets of Fi Call, gave some protection to the Prince in respect of the monies held by his solicitors.

43. It would not be right for this Court to address the question whether to reconsider its decision to dismiss the Prince's appeal in the light of these developments, and in particular in the light of any breaches of the CPR or any orders by any of the Apex parties. If, in the light of events which have occurred since we heard and decided the Prince's appeal, reconsideration, revocation or modification of any of the orders affirmed by the Court of Appeal is appropriate (as to which it would be wrong for this Court to give any encouragement or discouragement), then that is a matter which should be raised before a Judge of the Chancery Division. As I have already indicated, case management and procedural issues should be determined by a first instance judge, and, occasionally, on appeal, by the Court of Appeal, when they decide it is right not to send a matter back to a judge, but to decide it for themselves. It may be worth emphasising that, if such an application were made, then the effect of the previous first instance decisions of Vos J, Norris J and Mann J should not be treated as having any greater (or any lesser) force

than if they had not been upheld by the Court of Appeal and the Supreme Court.

44. As to the monies held by the Prince's solicitors, we can well understand what led Hildyard J to be concerned about the possibility of the monies being released to the Apex parties or any of them. It seems to me that the appropriate order for this Court to make in connection with the monies is that they continue to be held by the Prince's solicitors until such time as a High Court Judge directs them to be paid out, whereupon they should be paid out in accordance with the Judge's direction.

45. The parties' counsel should draw up and agree a form of order which gives effect to our decision.

LORD CLARKE:

46. I have reached a different conclusion from the majority in this appeal.[1] I would have allowed the appeal on the ground that, in all the circumstances, justice requires that Prince Abdulaziz ("the Prince") should be allowed to challenge the claim by Apex and Mr Almhairat that he owes them the US$6m referred to by Lord Neuberger in para 1 of his judgment. I would allow him to do so on terms that the monies amounting to US$8,699,988.49 (ie US$8,700,000 less US$11.51 bank charges) secured by the Prince's solicitors in an undertaking given to the Supreme Court by letter dated 8 October 2014 should be made available to the respondents if they succeed. In this way all parties would be protected and justice would be done because the court would be able to resolve all the issues between the parties, both to this appeal and to the underlying proceedings. Moreover there would be no possibility of inconsistency between the outcome of this appeal and the outcome of the underlying proceedings.

47. Lord Neuberger has set out in detail an account of the proceedings to date. I do not disagree with his conclusions at paras 1 to 21. Indeed, I agree that the Prince only has himself to blame for the predicament he is in. However, each case depends upon its own facts and this is in some respects a most unusual case. In a somewhat different context, in *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004, I expressed the view in para 48 (on

[1] In this judgment I will for the most part use the same abbreviations as Lord Neuberger has used in his judgment.

behalf of the court) that, in deciding whether to strike out an action, both under the inherent jurisdiction of the court and under the CPR, the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of controlling the process of the court and deciding cases justly. Then, before expressing the view that the draconian step of striking a claim out is always a last resort, I then referred (at para 49) to a number of cases and, in particular, this statement of Rix LJ in *Aktas v Adepta* [2011] QB 894, para 92:

> "Moreover, it should not be forgotten that one of the great virtues of the CPR is that, by providing more flexible remedies for breaches of rules as well as a stricter regulatory environment, the courts are given the powers and the opportunities to make the sanction fit the breach. That is the teaching of one of the most important early decisions on the CPR to be found in *Biguzzi v Rank Leisure plc*." [1999] 1 WLR 1926, 1933

As I see it, the same principles apply to the striking out of a defence.

48. In my opinion it would be disproportionate to allow the judgment to stand, at any rate on the basis that the respondents would forthwith be able to call upon the undertaking referred to above. I have reached this conclusion on the particular facts of this case. It is important to have regard to the stance taken by all the parties in this litigation. Lord Neuberger has referred to what I agree have been the failings of the Prince in this litigation. However, account must in my opinion also be taken of the stance taken by the respondents as well as the Prince. If such account is taken, it is my opinion that the just course is that proposed above.

49. The position on the pleadings is as follows. In paras 64 to 71 of the amended points of claim Apex and Mr Almhairat pleaded their case in relation to the Al Masoud SPA shortly in this way. The agreement included the following. Apex would sell 4,400,000 A shares in Fi Call to Mr Al Masoud for US$5,984,000 and Global Torch would sell 2,933,333 B shares in Fi Call to Mr Al Masoud for US$4,016,000. The total purchase price was thus US$10,000,000. Payment was to be by bankers drafts into the bank account of Fi Call at HSBC in London. Fi Call would receive the monies as agent for Apex and Global Torch respectively. It was alleged in para 67 that Mr Al Masoud did not pay any part of the price into a Fi Call company account at HSBC. Instead (it is said) on or about 7 February 2010 he or his agent paid the sum of US$10m to the Prince, purportedly in satisfaction of the debts owed by Mr Al Masoud to Apex and Global Torch, and the Prince accepted

that payment in purported satisfaction of those debts. It was alleged in para 68 that Apex was entitled to treat the Prince as having received the sum of US$5,984,000 on behalf of and for the benefit of Apex.

50. It was alleged in para 69 that Apex elected to treat the Prince as having received the sum of US$5,984,000 on its behalf on various bases and in para 70 that the Prince held that sum on trust for Apex. It was then alleged in para 71 that the Prince had failed to account for any part of the US$5,984,000 or indeed of the US$10m. In para 151.5 it was asserted that there should be added to the notional value of Apex's shares the sum of US$5,984,000 to which Apex was entitled pursuant to the Al Masoud SPA but which was instead paid to the Prince.

51. In para 75 of the defence and counterclaim of Global Torch (and the defence of Mr Abu-Ayshih) the following pleas were advanced in response to para 67 of the amended points of claim. It was admitted that Mr Al Masoud paid the share purchase consideration to the Prince on 7 February but not that it was done without the knowledge or consent of Apex. On the contrary it was alleged that Mr Almhairat knew full well how the payment would be made because it was discussed beforehand. The following was alleged in para 75.3. It was admitted that the Prince accepted the payment as being in satisfaction of the debt owed under the Al Masoud SPA. However, it was averred that he did not retain the whole sum for his own benefit. He retained US$1,999,985 in his account as representing part payment of the sum that would have been due to Global Torch under the Al Masoud SPA. The remainder of the monies were paid as follows: US$1,999,985 to Fi Call's bank account held at Al Mawarid Bank in the Lebanon; US$1,999,985 to Fi Call's bank account held by HSBC in London; and on 11 March 2010 US$3,999,973 to Fi Call's bank account held at the ABC Bank in Jordan. It was noted that once regard is had to bank charges the total of those sums is US$10m.

52. In para 76 it was alleged that on 15, 24 and 26 March 2010 Mr Almhairat withdrew from those various bank accounts a total of US$4,410,115 for his own purposes, leaving the balance of the sale proceeds as a contribution by Apex to the working of Fi Call. In para 77, para 68 of the amended points of claim was denied and it was specifically denied that the Prince received any element of the funds for the benefit of Apex.

53. In para 39 of the reply and defence to counterclaim, which was dated 24 January 2014, it was admitted that Mr Al Masoud made the payments alleged but it was denied that they were made pursuant to, or in performance of, the Al Masoud SPA. By para 42, paras 75 and 76 of the defence and counterclaim

were not admitted. Thus no positive case was pleaded as to the detailed payments alleged in paras 75.3 and 76 summarised in paras 5 and 6 above.

54. The position of the Global Parties (ie Global Torch and Mr Abu-Ayshih) was summarised in a notice to admit the following facts served on 5 February 2014. On or about 7 or 8 February 2010 the equivalent of US$10m was paid into the Prince's SABB bank account. That payment represented the payment by Mr Al Masoud in consideration of the shares sold by Apex and Global Torch to him under the Al Masoud SPA. Between 16 and 18 February, the equivalent of US$1,999,985 was transferred from the Prince's SABB bank account to his M300 bank account. Between 16 and 17 February 2010 the equivalent of US$1,999,985 was transferred from the Prince's SABB account to Fi Call's Al Mawarid bank account. On or about 11 March 2010 the equivalent of US$3,999,373 was transferred from the Prince's SABB account to Fi Call's Arab Banking Corporation (Jordan) bank account. Between 13 and 15 March 2010 the equivalent of US$1,999,871 was transferred from the Prince's SABB account to Fi Call's Arab Banking Corporation (Jordan) bank account. As a result of those transactions, out of the US$10m paid to him by Mr Al Masoud in connection with the Al Masoud SPA, the Prince paid about US$8m (or US$7,999,829) to accounts in Fi Call's name and did not retain any part for his own purposes except for the US$1,999,985 transferred to his M300 account.

55. Further, the notice to admit invited admission of the following further facts. On or about 15 March 2010 Mr Almhairat withdrew (or transferred to an account controlled by him and/or Apex) US$2,310.115 from Fi Call's Arab Banking Corporation (Jordan) bank account. On or about 26 March 2010 Mr Almhairat withdrew (or transferred to an account controlled by him and/or Apex) US$1,850,000 from Fi Call's Al Mawarid bank account.

56. The respondents declined to respond to the notice to admit or to explain the position. Thereafter, on 9 May 2014 Mr Jeremy Marshall made his 14th statement in support of the application to strike out, alternatively for summary judgment dismissing, paras 70, 71 and 151.5 of the amended points of claim, which are summarised in paras 49 and 50 above. The statement described the nature of the pleaded issues as set out above. It then relied upon the first witness statement, dated 28 October 2013, of an independent accountant, Mr Sumail Nerula, which is based on accounts which showed the payments identified above.

57. The Court of Appeal heard the appeals referred to in detail by Lord Neuberger, beginning on 21 May 2014, although they did not give judgment until the morning of 31 July. In the meantime, on 17 June 2014, there was a

directions hearing on the strike out/summary judgment application before Chief Registrar Baister to which the Prince was not of course a party, although Global Torch was. Counsel for Global Torch (Mr Saoul) submitted to the Registrar that, if the Prince's appeal to the Court of Appeal succeeded, the issues identified above would have to go to trial. However, he also submitted that the allegations were part of the wider undue prejudice issues so that they were likely to go to trial in any event. He invited counsel for the respondents (Mr Lightman) to identify the true issues between the parties relating to the payment of the US $6m. The Chief Registrar was attracted by that approach but Mr Lightman said that the issue would have to go to trial in any event, if only as between Prince Mishal and the respondents. At best, he said, Global Torch were seeking to strike out allegations only as against themselves, that the issue would survive as against Prince Mishal and that both Global Torch and Prince Mishal would have to give disclosure relating to it. Mr Lightman added (at A/3/45):

> "It is very likely that they [ie Global Torch and Mr Abu-Ayshih] will want to put in evidence anyway about this issue. If the summary judgment application fails of course they will have to do it anyway. If it succeeded, clearly they would want to do a proxy defence for the Princes, as they have in the past. Mr Saoul represents the Prince in other hearings. Also they will want to say, 'We issue a summary judgment application in respect of something, we succeeded, this allegation should never have been made, so this is unfair prejudice.' It is fanciful to say that this is a side issue which, if it was disposed of now, would not nevertheless be live at trial."

58. The Chief Registrar said that this seemed to him to be an important issue which, if Mr Lightman was right, should be resolved sooner rather than later. He therefore gave directions for the filing of evidence.

59. Mr William Christopher made a statement on 30 June 2014 on behalf of Apex and Mr Almhairat, in response to the application to strike out and for summary judgment by the Global Torch parties. So far as I can see, while throwing some doubts upon the way the payments were made, Mr Christopher does not say that no payments were made to Fi Call by the Prince. He said in para 9 that Mr Almhairat informed him that he only discovered that Mr Al Masoud had made a payment direct to the Prince on or about 23 February and he was not aware that the Prince had subsequently made any payments into bank accounts of Fi Call which were intended to be in satisfaction of the share purchase monies payable to Apex under the Al Masoud SPA. Mr Almhairat told Mr Christopher that he only became aware of the Global Torch Parties' present position when Mr Narula's statement of

28 October 2013 was served. Mr Christopher said that there remained issues of fact, which could only be resolved at a trial after hearing oral evidence in the light of the disclosure given by the parties. Importantly, he noted that the Prince was debarred from defending the proceedings and that Prince Mishal had refused to take part in the proceedings but that the issues would continue to be live at the trial, at the very least in the context of Apex's claim against Prince Mishal and so would be an issue in respect of which the Global Torch Parties would be obliged to give disclosure regardless of the outcome of the application. He concluded that that was a compelling reason why the application should be dismissed even if (contrary to the Apex Parties primary contention) the court were to form the view that Apex had no real prospect of succeeding on the issue against the Global Torch Parties. The Apex Parties also relied upon the first statement of Victoria Middleton, a chartered accountant, dated 30 June 2014 in response to Mr Narula's first statement. She cast doubt on some of his conclusions.

60. Mr Marshall and Mr Narula responded in their seventeenth and second statements respectively, each dated 14 July 2014. Their main point was that the respondents did not rely upon any positive case. In summary they said that it was undisputed that the Prince received the US$10m from Mr Al Masoud. Further, it was accepted that the Prince had paid US$7,999,829 to Fi Call. The Global Torch Parties' case was that, of that sum, US$5,984,000 was due to Apex as its share of the share purchase price. In the absence of any explanation to the contrary the only reasonable inference to be drawn was that the monies were intended to be payments for the shares under the Al Masoud SPA and that the Prince had accounted to Apex for its share of the proceeds by paying the money to Fi Call. It is true that the monies were paid to a Fi Call bank account other than that provided for in the SPA but there is no evidence that anything turns on that. On the contrary, as I see it, based on the evidence which was available in July, there was no arguable case that payment to a Fi Call company did not have the effect of accounting to Apex for the US$5,984,000 in respect of the price of the shares. As stated in para 4 above, the Apex parties pleaded that payment under the Al Masoud SPA was to be by payment into a Fi Call bank account and that Fi Call would receive the monies as agent for Apex and Global Torch respectively.

61. I note in passing that in a solicitors' letter dated 24 May 2012 the Apex Parties' case was advanced on the basis that Mr Al Masoud's payment should be paid into Fi Call's bank account and that this

> "would have been received by the Company … as agent for Apex and … as agent for Global Torch, although it was envisaged that the Company might subsequently be permitted

to retain some or all of the money by way of loans from Apex and Global Torch."

62. In these circumstances, viewed on the basis of that evidence, the Apex parties had no defence to the application for summary relief because Fi Call had received approximately US$6m on behalf of Apex and there was no basis upon which the Prince could have been held separately liable for it.

63. In the absence of a satisfactory explanation, there is also force in the point that a reasonable inference can be drawn from the fact that on or about 15 and 26 March 2010 Mr Almhairat withdrew (or transferred to an account controlled by him and/or Apex) the sums of US$2,310.115 and US$1,850,000 from Fi Call's Arab Banking Corporation (Jordan) and Mawarid bank account respectively. They were the opening balances in each account. The inference is that the monies used came from Mr Al Masoud and that Mr Almhairat regarded those sums as his to use.

64. No positive case was made by the Apex Parties at any time before the matter came before Hildyard J on the afternoon of 31 July 2014, which was after the Court of Appeal had given judgment that morning. Both the transcript of the hearing and of his judgment, which is now available, are in my opinion instructive. They show that, although he declined to grant either of the Global Torch Parties' applications for summary relief, he made it clear that he would have granted summary relief but for the fact that the trial was so soon.

65. Hildyard J had before him the evidence to which I have referred above. The position was explained to him by Mr Fenwick, who was representing the Global Torch Parties, in much the same way as I have set it out above. With respect to Mr Lightman, who represented the Apex Parties before the judge, it is far from clear what their case was. He accepted that some payments were made into Fi Call's accounts. He at first suggested (at A8/124) that his clients did not regard the payments as accounting for the monies due to them under the SPA. He suggested that the Prince was lending money to the company. The judge asked him whether Apex thought the payments were a loan. He said that it was unclear what they were, whereupon the judge said that his clients had not been very forthcoming as to what they thought (A8/125). As I see it, the difficulty for them was that, while for the purposes of this application they were saying that there was a triable issue, their pleaded case was that the Prince held the monies for them on the basis that he had received monies from Mr Al Masoud as agent or trustee for them. Yet, as stated above, there was strong evidence that those monies were paid into the Fi Call company accounts referred to above for the benefit of the shareholders. However that may be, Mr Lightman told the judge at A8/125 that his clients

were saying that there was a triable issue as to the extent to which the Prince discharged his obligation as trustee.

66. In giving judgment, Hildyard J expressed some concern (at A9/137/para 3) that, if the decision of the Court of Appeal stood, with the result that the Prince owed US$6m, and it was subsequently held that Apex had been paid, that would "give rise to an inconsistency and, one might have thought, some anxiety". As I read paras 4 to 6 of the judgment, the judge would have afforded the Global Torch Parties a summary remedy disposing of the Apex parties' claim but concluded that the safest course was to allow the issue to go to trial. He said at A9/138-139:

> "4. …. If the respondents are right in the matter now, they will be right then. It is not suggested that the trial will be seriously disrupted if the issue is held over until then: it is of short compass.
>
> 5 Accordingly I have approached the matter by reference to what is loosely described as the approach in … *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368 and I have sought simply to weigh the advantages and disadvantages of dealing with the matter now, safe in the knowledge that the ultimate merits will not spoil. As I have said, my initial instinct - and my abiding instinct - is that the balance is in favour of allowing the matter to proceed. I say that with particular regard to an argument which may or may not be proved correct, which was raised by Mr Lightman, that it is inevitable that the issues regarding the $6m, even if decided on a point of liability, will be ventilated on the broader questions which arise in the petition. These include issues as to the honesty of Mr Almhairat generally and in procuring this claim to be brought forward, it being my assumption that if at any stage he had accepted and told his solicitors that he accepted payment, that should of course have been reflected in the claim being withdrawn.
>
> 6. I do this in some senses with a heavy heart because, notwithstanding the general rule that the court at this stage should not poison the water, I should say by way of warning that as matters presently appear to me at this stage, the arguments on behalf of the petitioners seem, if I can put it lightly, frail. I quite understand that they may be entitled to contend that it is the third respondent who agreed to accept the

> monies in effect as a fiduciary and who bears the responsibility of explaining each and every twist and turn and has not done so. But I consider there to be at least a powerful argument that if receipt is demonstrated and not allocated to any other reason, that will conclude the matter against the petitioners. I do not dare in a sense say more than that, since to say more would falsify my approach of leaving the matter over for determination at trial. But I do caution the petitioners in persisting with this and call upon them to exercise restraint and utmost care. If at trial it were to emerge that there was never any proper defence, though I cannot tie the hands of the trial judge - which may very well be myself - I would expect the trial judge to separate out these costs and make the strongest possible order in respect of them."

67. For the reasons given above, I agree with Hildyard J that, but for the reasons advanced by Mr Lightman why the matter should proceed to trial, this would have been a proper case for summary disposal based upon the strength of the Global Torch Parties' case and the failure on the part of the Apex Parties to advance an arguable defence. What then changed thereafter?

68. There was further evidence before us in the form of the sixth and seventh statements of Mr Almhairat which were dated 8 September and 6 October 2014 respectively. They were prepared for the trial and thus cover many different aspects of the dispute, including the issues discussed above. They were put before this court without demur.

69. In para 43 of the sixth statement he says that on 1 November 2009 the Prince entered into a loan agreement with Fi Call under which he agreed to lend up to US$20m to Fi Call. In para 46 he says that the Prince advanced £1m to Fi Call pursuant to that loan facility. There is however no evidence that any of the monies referred to above were part of a loan.

70. The sixth statement accepts at para 62 that on or about 7 February 2010 Mr Al Masoud (or someone at his request) paid the sum of US$10m to the Prince. He says in para 63 that Apex has never received any of the purchase price paid to the Prince. He says in para 64 that he has seen that it is alleged that the Prince paid about US$6m into various accounts of Fi Call in February and March 2010, although he says that he was not aware of it. He further says that, if it is said that those payments are proceeds of the Al Masoud SPA, neither he nor Apex agreed to its share being paid to the Company rather than Apex. This is odd in circumstances where the SPA originally provided to the monies to be paid to a Fi Call account, namely HSBC.

71. It is fair to say that Mr Almhairat does give an explanation in paras 65 to 68 for the receipt of US$4.41m referred to in para 52 above. He says that it was a loan agreed to by the Prince and the other Global Torch Parties, that some of it was paid back and that he ultimately received a net loan of US$2.1m.

72. In Mr Almhairat's most recent statement, the seventh, which was dated 6 October 2014, he again focuses on payments that the Global Torch parties say were paid to the Prince and then to various Fi Call accounts. He now says (contrary to para 64 of his sixth statement) that he was aware that the sums set out above had been paid into Fi Call's accounts. As to their source, he simply says that he did not know precisely where they had originated, although he understood that they had been paid by the Prince or on his behalf. He says that he did not understand that they were the proceeds of the Al Masoud SPA. It is thus unclear on what basis he now says that the Prince was liable to him for the US$6m.

73. In the remainder of the seventh statement Mr Almhairat speculates that the Prince used money paid into the various Fi Call accounts to discharge various obligations of his own, to make transfers to his other accounts and to facilitate what he calls the Prince's money laundering activities referred to in the pleadings as the "Beirut Transaction" (at paras 13 et seq). This statement has been prepared for the trial and gives some indication of the issues at the trial. It appears to me that there may be a close relationship between the Prince's alleged liability for US$6m and the shareholders' liabilities inter se which will are likely to be the subject matter of dispute at the trial. I recognise, however, that ultimately the question of what issues are to be determined at the trial are matters for the trial judge.

74. In all these circumstances it seems to me (as I stated at the outset) that the just disposal of this appeal would be to allow the appeal to the extent of setting aside the default judgment against the Prince but ensuring that the monies secured by the undertaking referred to above would be available to Apex if they succeed at the trial.

75. I recognise the force of the points made by Lord Neuberger in paras 22 to 27 of his judgment. However, I am of the opinion that each case depends upon its own facts and that it is almost always wrong in principle to disregard the underlying merits altogether as irrelevant. In paragraphs 28 to 35 Lord Neuberger expresses the view that the merits will be relevant where party has a case whose strength would entitle him to summary judgment. Although I entirely agree that the court should not conduct a trial of the issues, I would not limit the relevance of the merits to such a case. On an application for summary judgment it is not uncommon for the judge to refuse summary

judgment but only to grant leave to defend on terms that the defendant pays the amount in dispute into court (or otherwise provides satisfactory security) in order to permit the defendant to advance what the judge thinks is a weak case provided that the claimant's claim is secured.

76. On a summary judgment application the court has power to make a conditional order: see CPR 24.6.1 and 24PD5 under which it may order a party to pay a sum of money into court. In volume 1 of Civil Procedure, para 24.6.6 notes that in *Olatawura v Abiloye* [2002] EWCA Civ 998, [2003] 1 WLR 275 Simon Brown LJ gave guidance as to the court's approach to the making of conditional orders requiring a party advancing an improbable case to give security for their opponent's costs. In the present case, for the reasons given above, it is Apex that has the improbable case on the merits, not the Prince. Apex would be fully protected if my proposed order were made.

77. I appreciate that, as Lord Neuberger observes, there is now a good deal of evidence which was not available to the Court of Appeal. However, that is in large part due to the fact that the proceedings before Hildyard J took place after the decision of the Court of Appeal and evidence relevant to the trial has been put before this court. Those circumstances make this a very unusual case. I would add that, notwithstanding the position as it was before Norris J as explained in para 15 of his judgment delivered on 9 September 2013, nobody suggested before Hildyard J (or this court) that it will not now be possible to have a fair trial because of the Prince's breach of the orders which led to judgment being entered against him. That seems to me to be a further reason why it would be disproportionate not to afford the Prince relief.

78. For my part, I hope that, if it is established at the trial that the Prince did account for the US$6m as he says he did, it will be possible for that fact to be taken into consideration in resolving the issues between the parties.

79. Finally, I would like to express my agreement with para 39 of Lord Neuberger's judgment. As to para 40, as in his case, nothing in this judgment is intended to impinge on the decision or reasoning of the Court of Appeal in *Mitchell* or *Denton*.

Postscript

80. I learned of the developments referred to by Lord Neuberger in his para 42, only after completing paras 46 to 79 above. As to those developments, I agree with the approach described by Lord Neuberger in his paras 42 to 44.