Case No: HC-2015-002539

Neutral Citation Number: [2017] EWHC 99 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: Thursday 26 January 2017

Before :

MR JUSTICE SNOWDEN

- -

Between :

JOSEPH ACKERMAN	**Claimant**
- and -	
(1) ANDREW ROBERT THORNHILL QC **(2) NAOMI ACKERMAN** **(3) BARRY ACKERMAN** **(4) BANA ONE LIMITED**	**Defendants**

- -

Philip Coppel QC and David Bedenham (instructed by **Forsters LLP**) for the **Claimant**
Graeme McPherson QC and Amanda Savage (instructed by **Kennedys Law**) for the **First Defendant**
John Wardell QC and Andrew Mold (instructed by **Berwin Leighton Paisner LLP**) for the **Second to Fourth Defendants**

Hearing dates: 7, 8 and 11 April 2016

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Judgment

MR. JUSTICE SNOWDEN:

1. This is an application by the Defendants to strike out the claim against them or for summary judgment in their favour. The claim was issued in June 2015 (the "2015 claim") and followed the trial and settlement of an earlier claim between the same parties that had been commenced in 2011 (the "2011 claim").

2. The application to strike out or for summary judgment is essentially made on the basis that the Claimant is barred by the doctrine of *res judicata*, or by the terms of a settlement of the earlier claim, from pursuing the 2015 claim. In response to the application, the Claimant has produced drafts of an Amended Claim Form and Amended Particulars of Claim (which were further amended at the hearing) for which he seeks permission to amend. The most significant proposed amendment is that the draft amended claim and pleading now includes an application to set aside the judgment of Vos J handed down on 21 December 2011 in the 2011 claim on the grounds that it was obtained by fraud, collusion and dishonesty.

3. In the conventional way, I shall consider whether the claim sought to be made in the final version of the draft Amended Particulars of Claim ought to be struck out, rather than consider that question on the basis of the existing pleadings.

Background

4. The litigation arises out of the ownership of a property business that Mr. Joseph Ackerman ("Joseph"), and his brother Mr. Jack Ackerman ("Jack") established in the early 1960s, known as the Ackerman Group (the "Group"). The Group consisted of a large number of property companies, some individual properties, a sub-group of companies known as the Superetto group, a Gibraltarian trust, a charitable company (Delapage Limited) and its two non-charitable subsidiaries (Haysport Limited and Twinsectra Limited) and a company called Loch Tummel Limited. In general terms, Joseph and Jack each had a 50% interest in the various parts of the Group and when Jack died in 1989, his widow, Mrs. Naomi Ackerman ("Naomi") inherited his share.

5. After Jack's death, the affairs of the Group were run by Joseph, assisted by his son-in-law Daniel Wulwick ("Danny"). However, from 2001, Jack and Naomi's son, Barry Ackerman ("Barry") became involved in the Group's business and began to work part-time with Joseph. After a relatively short time, in about 2004, the relationship between Joseph and Danny (on the one hand) and Naomi and Barry (on the other) deteriorated. This culminated in a decision in February 2006 that there should be a demerger of Joseph's and Naomi's one-half interests in the Group.

6. The demerger did not proceed without difficulty. Naomi complained about the lack of information provided by Joseph and about a number of transactions which he undertook on his own account.

7. Mr. Andrew Thornhill QC ("Mr. Thornhill") is a barrister specialising in tax matters, who first met Joseph in 1977 and had been a long-standing adviser to him in relation to both personal matters and matters in relation to the Group. When Mr. Thornhill heard about the difficulties which had arisen, he offered his services to the parties to assist in concluding the agreed demerger, and in September 2008 he was appointed by both sides to act as an expert to determine the basis for the demerger of the Group.

Mr. Thornhill's appointment was initially made under a document dated 22 September 2008, which was then superseded by a revised document dated 5 December 2008 entitled the "Further Agreed Way Forward Agreement".

8. In outline it was agreed that Mr. Thornhill should undertake a lottery (the "Lottery") to decide how the various individual companies, properties and other assets of the Group should be allocated between Joseph and Naomi, and that he would have exclusive authority from both of them to determine the form of the demerger. It was also agreed that after the Lottery but before the division took place, Mr. Thornhill would have authority to determine adjustments to be made in respect of a variety of matters including, in particular, any cash taken out of the companies for private purposes and in respect of inter-company indebtedness.

9. The Lottery to divide the various assets was performed by Mr. Thornhill on 3 March 2009, but the results were not immediately disclosed to the parties. The Further Agreed Way Forward Agreement of 5 December 2008 was then superseded by an agreement drafted by Mr. Thornhill and entered into on 25 June 2009 entitled "A Revised Further Agreed Way Forward Agreement" (the "RFAWF Agreement"). Under the RFAWF Agreement, both sides gave Mr. Thornhill extensive powers of investigation and decision-making, together with the authority to deal on their behalves with the assets of the Group in order to ascertain the adjustments that were required so as to achieve a fair division of the Group between Joseph and Naomi.

10. In his judgment in the 2011 claim, Vos J held that Joseph and Danny sought to undermine the process to which they had agreed under the RFAWF Agreement by refusing to provide Mr. Thornhill with the necessary information concerning the Group to allow him to ascertain the adjustments to make. Vos J expressed the view that this was very likely to have been because Joseph did not want to separate the Group, but wanted to be able to continue to run it himself using Naomi's half interest without consulting her, as he had in the past.

11. Eventually, on 5 January 2011, Mr. Thornhill published a "Provisional Adjustment Report" setting out the result of the Lottery in 2009 and the adjustments he had decided to make, together with what he had done to give effect to those matters. In the Provisional Adjustment Report, Mr. Thornhill determined that Joseph had removed a substantial quantity and value of assets from the Group, and that as a consequence (i) the entirety of the Group and jointly owned properties should be transferred to Naomi or a company that she owned (the Fourth Defendant, BANA One Limited ("BANA")); (ii) Naomi had a further claim of £20.33 million against Joseph; and (iii) Haysport Limited and Twinsectra Limited had claims for £9 million against Joseph. The Provisional Adjustment Report also disclosed that in late December 2010 Mr. Thornhill had used his powers and authority under the RFAWF Agreement to carry his determination into effect as regards the transfers of shares and assets to Naomi and BANA, and the resignation of Joseph from the boards of the relevant companies.

12. After an exchange of letters before action, on 22 April 2011, Joseph commenced the 2011 claim against Mr. Thornhill, Naomi, Barry and BANA, challenging the Provisional Adjustment Report and what Mr. Thornhill had done in purported exercise of his power of attorney on behalf of Joseph.

13. Mr. Thornhill gave early disclosure in the proceedings in May 2011, and this was followed by disclosure being given by all parties in August 2011. Following disclosure having taken place, Amended Particulars of Claim were served by Joseph on 19 October 2011, and an expedited trial commenced before Vos J on 23 November 2011.

14. Vos J handed down judgment in the 2011 claim on 21 December 2011: see [2011] EWHC 3428 (Ch). In paragraph 6 of his judgment, Vos J summarised Joseph's allegations,

> "In these proceedings, Joseph alleges that Mr Thornhill was guilty of actual bias, collusion and partiality in favour of Naomi and her side of the family, that he acted unfairly and deceitfully, and that he materially departed from his instructions contained within the [RFAWF] Agreement. As a result, Joseph contends that the Report and the steps taken in pursuance of it are invalid and of no effect, and the breaches are so serious as to amount to a repudiation of the [RFAWF] Agreement which is said to have been accepted and therefore be at an end."

15. This summary was expanded in paragraphs 152 - 160 of the judgment which included a list of issues based upon a list produced by Joseph's counsel after the evidence had been concluded. At paragraphs 257-279 of his judgment, Vos J identified the four main legal questions underlying the case – the binding nature of expert determination, procedural unfairness, the materiality of any departure from the expert's instructions, and bias. In relation to the last of these, Vos J made the point, at paragraph 275, that the allegation of bias was an allegation of actual bias as opposed to the appearance of bias. He supported that point with citation of a passage from the judgment of Robert Walker J in Macro v Thompson (No.3) [1997] 2 BCLC 36 at page 65 that referred to older cases which equated actual bias with "fraud or collusion" or "gross fraud or partiality".

16. At the trial, Joseph did not give evidence, and it was left to Danny to explain his position. Vos J was critical of this, given the "serious allegations" that were being levelled at Mr. Thornhill (see e.g. paragraphs 173 and 186 of the judgment). He also found that Danny was a wholly unsatisfactory witness, who had "little or no grasp of the difference between truth and falsehood" (paragraph 182). Vos J was not wholly impressed with Barry either, commenting that he was on occasions deliberately evasive (paragraph 191). Vos J did, however, accept Naomi's evidence in broad terms, and apart from a couple of relatively minor reservations, in relation to Mr. Thornhill he concluded at paragraph 252, that,

> "…I found Mr. Thornhill a reliable and careful witness. He was faced with a most difficult task, which I believe he tried very hard to carry out to the best of his ability."

17. On the issues of whether Mr. Thornhill had acted in accordance with the terms of the RFAWF Agreement and with procedural fairness, Vos J dismissed most of Joseph's allegations. He did, however, find that Mr. Thornhill had breached the terms of the RFAWF Agreement in not giving Joseph notice of certain adjustments that Naomi

had proposed, and that he had also failed to copy some questions and answers from Barry to Joseph. Vos J did, however, describe the latter breach as an extremely technical one, and he rejected any suggestion that the breaches of contract that he had found proved were procedurally unfair or improper, stating, at paragraphs 343-345,

> "343. This is the nub of the case. I have already held that Mr. Thornhill failed, in breach of clause 9(B)(c) to give Joseph notice that Naomi was proposing the transfer of the Superetto companies and all the jointly-owned properties and companies to her.
>
> 344. The level and nature of unfairness is, however, very important to the consequences. I should say first that Mr. Thornhill never acted, in my judgment in anything other than perfect good faith. He genuinely believed that his interpretation of the [RFAWF] Agreement was the correct one. I have concluded that it was not, but that does not mean that he acted in bad faith in acting as he did.
>
> 345. In his closing submissions, Mr. Kitchener focussed on a few crucial points in the chronology in an effort to demonstrate that Mr. Thornhill lost any sense of the necessary impartiality, fairness and independence, and simply associated himself with Barry, Naomi and Mr. Robinson, looking to them for his instructions. I completely reject this analysis, which is wholly contrary, in my judgment, to the evidence. It is a description of events, which was, in my judgment, borne of Joseph's desire to criticise everything that Mr. Thornhill did, without any sense of balance, and to find conspiracies and mis-dealings where there were none."

18. The points made in paragraph 345 were also echoed in Vos J's emphatic rejection of the allegations of actual bias and collusion against Mr. Thornhill. Vos J concluded, at paragraphs 338-340,

> "338. As appears from my factual findings on the evidence, I am not satisfied that Joseph has made good any allegation that Mr. Thornhill acted with actual bias or that he colluded with Naomi's side or with Barry in particular.
>
> 339. The allegations of bias and collusion are, however, much bound up with the allegations of unfairness dealt with below in issue 4. Those findings should, therefore, be considered as part of my findings under this issue.
>
> 340. I should say under this head, however, that I have concluded that Mr. Thornhill retained at all times an attitude of mind which allowed and allows him to make an objective and independent determination of the issues that he had and has to resolve. He never colluded with Naomi, Barry or Mr. Robinson, nor did he actually favour the interests of Naomi and

> Barry over the interests of Joseph and Danny. He was in no sense affected by any prejudice against Joseph. He may have become frustrated and even annoyed by some of Joseph's conduct during the process of reaching the provisional report stage, but I am entirely satisfied that he never became prejudiced against Joseph."

19. The same approach was apparent from Vos J's conclusion as to the materiality of the breaches of the RFAWF Agreement that had occurred. He concluded, at paragraph 383,

> "383. The materiality of the breach would also in my judgment be radically affected if it could be said that Mr. Thornhill had been shown to have lost his impartiality or independence, or to have been biased or collusive with one side…In my judgment, a breach will be very likely to be material if, objectively judged, the challenging party has reasonably lost confidence in the independence of the expert on solid evidential grounds. In other words, one relevant and important circumstance making it most likely that a determination will not stand will be if, objectively viewed, the expert has demonstrated any lack of proper independence. I do not think that is the case here. Mr. Thornhill has acted in such a way as to upset both sides. Ultimately, his provisional Report comes down more on Naomi's side than on Joseph's side; though it may be noted that he only accepted some £23 million of the £70 million worth of adjustments suggested by Naomi. It might well be that the interim nature of the Report would be less relevant if, viewed objectively, Mr. Thornhill had lost his independence so that the court could not be satisfied that he would continue the process with the necessary degree of fairness and independence. But that is not the case here. I am entirely satisfied on the evidence that Mr. Thornhill will, if that is the effect of the court's decision, proceed impartially, independently and fairly to undertake the third stage of the determination process."

20. Vos J refused permission to appeal. He also made an order that Joseph should pay the costs of the Defendants and that Joseph should make payments totalling about £1.4 million on account of costs (subject to a stay if permission to appeal was sought and granted by the Court of Appeal). Joseph then applied to the Court of Appeal, which granted him limited permission to appeal on 13 June 2012, solely in relation to Vos J's findings that Mr. Thornhill had not materially departed from his instructions.

21. However, before the appeal could be heard, on 20 July 2012, the parties signed an order by consent ("the Consent Order") by which they agreed that Joseph's appeal be dismissed on the terms of a settlement agreement contained in the schedule to the order. Those terms included an agreement by the Defendants not further to enforce the costs orders which had been made and set out a revised timetable for completion by Mr. Thornhill of a "Further Provisional Adjustment Report" and then a "Final Adjustment Report" for the purposes of the RFAWF Agreement, which was

confirmed to continue in full force and effect subject to the variations contained in the schedule to the Consent Order.

22. The last clause of the schedule to the Consent Order was in the following terms,

> "18. Save as provided for in this agreement, the rights of Joseph Ackerman against Naomi Ackerman, Barry Ackerman and BANA One Limited remain fully reserved and have not been waived or released pursuant to this agreement or the terms of this Order and its schedule. For the avoidance of doubt, Joseph Ackerman agrees not to continue to pursue or to seek to revive in these proceedings or in new proceedings the claims which are the subject matter of these proceedings."

23. Thereafter, and following representations from both sides, Mr Thornhill provided his "Further Provisional Adjustment Report" to the parties on 15 August 2012. This replaced the Provisional Adjustment Report that had been at the centre of the 2011 proceedings. On 11 February 2013, Mr Thornhill published his "Final Adjustment Report", in which (among other things) he found that Joseph owed Naomi £36 million.

<u>The 2015 claim</u>

24. Joseph's case is that within days of the publication of the Final Adjustment Report in February 2013, an unknown person delivered an envelope to the homes of himself and Danny. He says that the envelope contained documents that related to two transactions from 2008 and 2009 concerning Mr. Thornhill, Naomi and Barry. Joseph contends that he had not seen these documents before. This account is not accepted by the Defendants, but I cannot resolve that factual dispute on the present application.

25. The two transactions which are the subject of the documents that Joseph says were first seen by him in 2013 were referred to in argument as "the Rally Transaction" and "the Edenholme Transaction".

The Rally Transaction

26. In 2008, Mr. Thornhill was the beneficial owner of a number of shares in a company engaged in a waste materials/energy conversion project known as Ethos Energy (Worldwide) Limited ("Ethos"). By a deed dated 24 December 2008 ("the Rally Deed"), a company, Rally Investments Limited ("Rally") of which Naomi and Barry were directors, agreed to pay £500,000 to Mr. Thornhill, who declared himself the trustee of 25% of his beneficial interest in Ethos. In effect, Rally bought one quarter of Mr. Thornhill's shares in Ethos for £500,000.

27. Rally was a wholly-owned subsidiary of Raleigh Limited ("Raleigh"), which was a company that had been established as a registered charity by Naomi in 2008. Naomi and Barry were directors of Raleigh. The £500,000 which was paid by Rally to Mr. Thornhill was provided by Raleigh.

28. In the Rally Deed, Mr. Thornhill further agreed that if the distributions before tax on the Ethos shares concerned fell below £500,000 for the period ending in September

2011, he would pay the shortfall to Rally; or if Rally so elected within two months of the end of the same period in September 2011, that he would repay the £500,000 plus compound interest at 7.5% per annum to Rally and accept a retransfer of the beneficial interest in the Ethos shares. Mr. Thornhill also agreed that by 24 March 2009 he would provide security to Rally over a number of residential properties said to be worth in excess of £1 million to secure his obligations under the Rally Deed.

29. Although Mr. Thornhill was paid the £500,000 by Rally according to the Rally Deed, he never provided the promised security to Rally as required by the Rally Deed. Nor did Naomi and Barry cause Rally to press for the security to be provided.

The Edenholme Transaction

30. A year later, on 24 December 2009, SRS (R&D) Limited ("SRS"), a Jersey company, agreed to buy all of Mr. Thornhill's interest in the shares in Ethos (including the shares that he held on trust for Rally) in return for the allotment of 4,625 shares representing 4.625% of the share capital of SRS to Mr. Thornhill. SRS was a company, the majority of the shares in which were owned by a Mr. John Sweeney.

31. On the same date, Edenholme Estates Limited ("Edenholme"), a company owned and controlled by Naomi and Barry, also subscribed a further £1 million for 7.5% of SRS's issued share capital pursuant to a subscription agreement (the "Subscription Agreement"). It was further agreed pursuant to a shareholders' agreement (the "Shareholders' Agreement") that £200,000 of the £1 million invested by Edenholme would be used to provide working capital to Ethos, and some of the remainder would be used to repay a debt that Ethos owed to an associated company.

32. Joseph alleges that Edenholme's investment into SRS made it more likely that Ethos would be able to pay dividends and hence reduced the chance that Mr. Thornhill would have to pay money to Rally under the Rally Deed. He further alleges, however, that Ethos never in fact paid any dividends or was likely to be in any position to do so.

33. Joseph contends that as well as not taking any steps to cause Rally to require the provision of security by Mr. Thornhill, Naomi and Barry also did not seek any shortfall payment from Mr. Thornhill, or to exercise Rally's option to require repayment of the £500,000 plus interest from Mr. Thornhill, or seek to enforce any such debt. The draft pleading describes these omissions by Rally to enforce its rights under the Rally Deed as the "forbearances".

Joseph's allegations

34. The first conclusion that Joseph seeks to draw from these facts in his 2015 claim is that the entry into the Rally Deed and the forbearances given to Mr. Thornhill in relation to it, placed Mr. Thornhill in a position of conflict of interest and duty which prevented him from acting fairly, impartially and in an unbiased manner as required by the Further Agreed Way Forward Agreement or the RFAWF Agreement. In addition, Joseph further alleges that Rally's payment of £500,000 to Mr. Thornhill pursuant to the Rally Deed and the forbearances given to him by Rally amounted to a bribe or secret commission which Naomi and Barry dishonestly caused to be paid to Mr. Thornhill to induce him to favour Naomi in the demerger process.

35. Joseph's allegation is that instead of rejecting the £500,000 or disclosing the Rally Transaction to Joseph, Mr. Thornhill accepted the money and failed to make disclosure to Joseph. It is said that this amounted to a breach of the contractual and fiduciary duties owed by Mr. Thornhill to Joseph under the Further Agreed Way Forward Agreement and the RFAWF Agreement. I shall refer to these allegations as the "allegations of breach of duty". It is also alleged that Naomi and Barry dishonestly assisted Mr. Thornhill's breaches of fiduciary duty and that the payment to Mr. Thornhill under the Rally Deed and the forbearances given to him were an unlawful means conspiracy entered into between Mr. Thornhill, Naomi and Barry with the intention that Mr. Thornhill should injure Joseph by providing a more advantageous outcome for Naomi and Barry under the RFAWF Agreement than would otherwise have been the case.

36. Joseph further alleges that the existence of the dealings relating to the Rally and Edenholme Transactions were deliberately and dishonestly concealed by Mr. Thornhill, Naomi and Barry during the conduct of the 2011 claim, and in particular that they were concealed from Vos J at the trial in December 2011. Joseph places particular reliance upon the fact that Mr. Thornhill did not disclose the Rally Deed, the Subscription Agreement or the Shareholders' Agreement in the litigation; and he alleges that each of Mr. Thornhill, Naomi and Barry deliberately made no mention of the Rally Transaction or the Edenholme Transactions in any of their pleadings, evidence or submissions to Vos J.

37. Joseph also accuses Naomi and Barry of concealing the existence of a Charity Commission inquiry into their management of the affairs of Raleigh during the proceedings in 2011, and he accuses Mr. Thornhill of deliberately misleading the Charity Commission so as to dissuade it from bringing the Rally Deed to the attention of Vos J at the trial in November 2011.

38. The background to these allegations is that in August 2011, the Charity Commission had opened a regulatory compliance case in relation to the corporate governance and management of the financial affairs of Raleigh by Naomi and Barry. The decision to use Raleigh's money in the Rally Transaction was part of the inquiry, and during the inquiry the Commission was given a copy of the Rally Deed. The Commission was also aware of the 2011 claim, and a member of its Compliance Investigations Unit in London wrote to Mr. Thornhill on 4 October 2011, referring to its inquiry and stating,

> "The Commission considers that the aforementioned deed is directly relevant to issues to be tried in the upcoming proceedings being brought by Joseph Ackerman, and therefore ought to be disclosed pursuant to the test under Part 31 of the Civil Procedure Rules. As a result, the Commission would welcome your views on this matter, and would like to know if you are considering whether or not to disclose this information to the court yourself given the nature of the duty under the CPR."

39. Although the Commission sought a response by 11 October 2011, and sent a chasing letter on 21 November 2011, Mr. Thornhill did not respond. This prompted the same representative of the Commission to write to Mr. Thornhill on 25 November 2011, shortly after the trial had commenced, stating,

> "As our queries remain outstanding we have given further consideration to this matter and it is now our intention to disclose the documents directly to the court on Monday 28 November 2011."

40. Mr. Thornhill responded by email to the Charity Commission on Saturday 26 November 2011 stating,

> "In reply to your letters especially that of 25th November it is my belief that the documents to which you refer have been disclosed. No issue is taken upon them in the pleadings. I give you full permission to speak to Mr. Hughes, my solicitor, on the matter. He will be in court on Monday. Can I assume you will be there?"

41. That email was followed by a further email to the Commission from Mr. Thornhill's solicitor, Mr. Hughes of M&S Solicitors Limited, late on Sunday 27 November 2011. Mr. Hughes stated,

> "I attach a copy of the Agreement dated 24 December 2008 which has been disclosed in these proceedings and should be grateful if you would please confirm that this is the transaction to which you refer.
>
> I shall be travelling by train to London and would be grateful if I may discuss with you further the contents of your letter in order to be clear of your concerns. As I am aware that the Judge has already directed that he wants no slippage in the court timetable, my suggestion would be that I come to see you at your office in the morning if that would be convenient with Mr. Thornhill, and deal with matters with you promptly.
>
> As an officer of the court, I have direct responsibilities where matters of disclosure are concerned and I would like please the opportunity to be briefed about the concerns personally."

42. The representative of the Commission responded by email to Mr. Hughes early on the Monday morning, copied to Mr. Thornhill, stating,

> "The purpose of our correspondence with Mr. Thornhill was to establish whether this matter had been disclosed to the court. In light of the confirmation provided in your email we have no further concerns and do not now consider it necessary to disclose any further information to the court."

43. In a subsequent email dated 21 July 2014, responding to questions from the solicitors acting for Joseph in these proceedings, a different representative of the Charity Commission stated that although the Commission had had no understanding one way or the other in 2011 as to the process by which the Rally Deed had been disclosed, it was the Commission's understanding that the Rally Deed "was before the Court and/or seen by the Judge", and that if that had not been the case the Commission

would have taken steps to ensure that the existence of the document was known to Vos J.

44. In his draft amended pleading, Joseph contends that Mr. Thornhill knew that the Charity Commission had understood from his email, and that of his solicitor, that the Rally Deed had been disclosed to the court; and that by both emails Mr. Thornhill deliberately misled the Charity Commission into thinking that he had disclosed the Rally Deed to the court. Joseph alleges that Mr. Thornhill acted in this way in order to avoid the Commission directly bringing the Rally Deed to the attention of Vos J, because he feared that if it did so, this would damage his credibility as a witness and his defence to the 2011 claim.

45. Joseph alleges that if Vos J had known of the payment of £500,000 made to Mr. Thornhill and the alleged forbearances given to him in connection with the Rally Transaction, or of the Edenholme Transaction, or of the Charity Commission inquiry into Raleigh, Vos J's judgment "would have been materially different … and the outcome would have been more favourable" to Joseph. Joseph contends that by failing to reveal such matters, Mr. Thornhill, Naomi and Barry "colluded to conduct their defence" to the 2011 claim and "improperly influenced the outcome of the trial". As a consequence, Joseph contends that, "By reason of the Defendants' fraud, collusion and dishonesty in securing the judgment", Vos J's judgment in the 2011 claim should be set aside.

46. Joseph further contends that the Defendants continued fraudulently to conceal their dealings from him at the time at which he agreed to the Consent Order, under which it was envisaged that Mr. Thornhill would provide the Further Provisional Adjustment Report and the Final Adjustment Report. Joseph contends that as a consequence, he is also entitled to set that order and those reports aside.

47. The result is that Joseph claims to set aside the RFAWF Agreement, Vos J's judgment in the 2011 claim, the Consent Order and each of the Adjustment Reports. He also seeks further relief to reverse all of the steps taken by Mr. Thornhill under those agreements and reports.

<u>The Defendant's contentions and their application to strike out</u>

48. As might be expected, Joseph's allegations are strenuously denied by each of the Defendants. They deny all allegations of bribery, fraud or collusion, and contend that the Rally and Edenholme Transactions were entirely genuine commercial arrangements that were not intended to and did not affect Mr. Thornhill's impartiality and objectivity in relation to his performance of his duties under the RFAWF Agreement.

49. They further deny that there was any requirement under the RFAWF Agreement or otherwise that all commercial dealings between Mr. Thornhill and either side should cease or be disclosed, pointing out that the history of the matter was that Mr. Thornhill had a long-standing prior relationship with Joseph, and there was nothing in the agreements to suggest that he was required to give that up or disclose his relations with either side. The Defendants also deny any breach of their disclosure or other obligations in the course of the 2011 claim and reject any suggestion that Vos J was misled or that his decision in December 2011 would have been any different had he

known of the Rally and Edenholme Transactions or of the Charity Commission inquiry into Raleigh.

50. The Defendants' evidence is that Mr. Thornhill had actually introduced the opportunity to invest in Ethos to Joseph between 2004 and 2006 and that matters had progressed to the extent that Joseph had deposited substantial sums of money into a solicitors account for the purposes of investing but had not proceeded with the investment. They say that Mr. Thornhill then introduced Ethos to Naomi and Barry; and that Naomi and Barry thought that the agreement in the Rally Deed represented a good investment opportunity for Raleigh which had surplus funds. Barry and Naomi also suggest that they have exercised the right to require Mr. Thornhill to repurchase the shares after the expiry of the period in September 2011. Barry's evidence is that Mr. Thornhill has repaid some of the money due but continues to owe in excess of £520,000 with interest accruing at a compound rate.

51. The Defendants also place significant emphasis on the fact that Barry, Naomi and BANA disclosed the Rally Deed, the Subscription Agreement and the Shareholders' Agreement in their list of documents served in the 2011 claim in August 2011, and then provided electronic copies of the documents to Joseph's solicitors. It is said that this disclosure was inconsistent with any secrecy or dishonesty on the part of the Defendants concerning the Rally and Edenholme Transactions.

52. Mr. Thornhill did not disclose these documents in the course of the 2011 claim. His evidence is that he took the view that they were irrelevant, because he believed that Joseph knew all about the Rally Transaction and had not referred to it in the pleadings. He also states that all of his legal team involved in the 2011 claim knew of the Rally and Edenholme Transactions and of the relevant documents and continued to act for him. Mr. Thornhill also points to the fact that he had disclosed an email dated 22 November 2010 to him from the managing director of Ethos, which made reference to himself, Naomi and Barry.

53. Mr. Thornhill further denies any attempt to mislead the Charity Commission. He contends that the Commission's letter to him was plainly directed at disclosure in the litigation – hence its reference to CPR 31 – and that his response was entirely accurate. Mr. Thornhill also points out that his own email of 26 November 2011 did not in any way seek to discourage the Charity Commission from attending court on 28 November 2011, but offered to meet them at court with his solicitor to discuss matters openly; and that Mr. Hughes' email was in similar terms.

54. Although this is the broad thrust of the Defendants' response to Joseph's allegations on the facts, and they contend that the allegations are obviously without merit, their application to strike out the 2015 claim or for summary determination of it in their favour is primarily based upon a contention that the 2015 claim seeks to raise issues that were either decided against Joseph in 2011, or issues which could and should have been raised by Joseph in those proceedings. They therefore contend that the 2015 claim is barred by the principles of *res judicata*. Alternatively they rely upon the terms of clause 18 of the schedule to the Consent Order as being an express bar to the proceedings.

55. In particular, the Defendants submit that even if (which they do not accept) Joseph was not actually aware of the Rally and Edenholme Transactions during the trial of

the 2011 claim, the documents disclosing such matters were available to him because they were disclosed during the proceedings, and that all of the matters now alleged could with reasonable diligence have been discovered by Joseph or his legal team as a consequence and raised during the 2011 claim in the same way that they have been raised now.

56. In addition, the Defendants say that the alleged non-disclosure of the Rally and Edenholme Transactions and the Charity Commission inquiry into Raleigh would not have been of sufficient importance that they could conceivably have caused Vos J entirely to change the way he approached the evidence at the trial or the way in which he came to his judgment on the 2011 claim.

57. The Defendants accordingly say that this means that there is no basis for permitting Joseph now to re-litigate the issues that were or could have been raised and decided in 2011, or to set aside Vos J's judgment or the Consent Order.

The law on res judicata

58. The modern law on *res judicata* was considered by the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93 ("Arnold") and by the Supreme Court in Virgin Atlantic Airways v Zodiac Seats UK [2014] AC 160 ("Virgin Atlantic").

59. In Arnold, at pages 104-106, Lord Keith described and explained the difference between cause of action estoppel and issue estoppel,

> "It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened …
>
> Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action. In Henderson v Henderson (1843) 3 Hare 100, Sir James Wigram V-C expressed the matter thus: "
>
> > "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances)

> permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
>
> …..
>
> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue …
>
> ….
>
> Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier."

60. In Virgin Atlantic, Lord Sumption concluded,

> "22. Arnold v National Westminster Bank plc is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

61. Lord Sumption then considered the relationship of the rule in Henderson v Henderson to the principles of cause of action estoppel and issue estoppel and cited the following

passage from the speech of Lord Bingham in Johnson v Gore-Wood [2002] 2 AC 1 at 31,

> "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

62. In Johnson v Gore-Wood, Lord Bingham also held that the principles set out in Henderson v Henderson apply with at least equal force if the first set of proceedings have been compromised by a settlement. He stated, at pages 32-33,

> "The second subsidiary argument was that the rule in Henderson v Henderson did not apply to Mr Johnson since the first action against GW had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

63. As Lord Keith indicated in the passage from Arnold referred to in paragraph 59 above, it has always been the case that the principles of *res judicata* will not apply if a

litigant can satisfy the court that the judgment in the earlier litigation was obtained by fraud or collusion, such that it ought to be set aside.

64. The requirements for the setting aside of a judgment on the grounds that it was obtained by fraud or collusion were summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners LP [2013] EWCA Civ 328 ("Highland Financial") at paragraph 106,

> "There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

65. In addition to the three requirements expressly identified as discussed by Aikens LJ, there has recently been some disagreement in the authorities as to whether there is an additional requirement before a judgment can be set aside, namely a requirement that the evidence of fraud or collusion relied upon in the second set of proceedings must be evidence that was not available, and could not have been discovered with reasonable diligence by the innocent party, at the time that the first judgment was given.

66. One of the earliest statements of principle in this regard was that of Lord Cairns in Phosphate Sewage Co. v Molleson (1879) 4 App Cas 801. The claimant company alleged that it had been a victim of a fraud by the members of a Scottish firm, and lodged a proof of debt in the Scottish bankruptcy of one of them. It also brought proceedings in the Chancery Division in England. The proof of debt was rejected and a challenge to the rejection of proof failed in the Scottish courts. Subsequently, the claimant's action in England succeeded and a declaration was made that the claimant was entitled to compensation from the bankrupt. The claimant then lodged a second proof of debt in Scotland. The only difference between the original proof of debt and the second proof was the addition of some facts that had been known to the claimant

when the first proof of debt was adjudicated upon, but which had not been sought to be included in its proof.

67. The trustee rejected the second proof of debt and successfully raised the defence of *res judicata* against a challenge to the rejection of the second proof. In upholding this plea, Lord Cairns recorded, at pages 814-815, that the additional facts included in the second proof of debt had been known to the claimant company before the first proof was adjudicated upon, and could have been the subject of an application to add them by way of amendment to the first proof. He then continued,

> "As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before."

68. The requirement that a claimant must be able to show new facts which were not available, and could not with reasonable diligence have been available to him, was unanimously reaffirmed by the Court of Appeal and the House of Lords in Hunter v Chief Constable of West Midlands [1980] QB 283 and [1982] AC 529 ("Hunter"). The case involved an attempt by the claimants, who had been convicted of the Birmingham bombings in 1974, to sue the police who had arrested them, alleging that they had been assaulted whilst in custody. The trial judge at the criminal trial had held a *voir dire* and ruled the claimants' confessions to be admissible, accepting the evidence of the police that there had been no physical violence or threats made against them. The defendant chief constables applied to have the civil claim struck out as an abuse of process on the basis that it was an attempt by the claimants to mount a collateral attack upon their convictions.

69. The Court of Appeal unanimously held that a claimant who wished to escape from an estoppel arising out of an earlier decision against him had to adduce evidence that was not available and could not have been obtained by reasonable diligence at the earlier trial. Each of the members of the court referred to such evidence as "fresh evidence": see [1980] QB 283 per Lord Denning at page 318, per Goff LJ at pages 334-335 and per Sir George Baker at page 347. In particular, Lord Denning and Goff LJ expressly affirmed the approach of Lord Cairns in Phosphate Sewage v Molleson. Goff LJ concluded,

> "So, it is not permissible to call further evidence which was available at the trial or could by reasonable diligence have been obtained and the fresh evidence must be likely to be decisive."

70. In the House of Lords, Lord Diplock (with whom all the other members of the Judicial Committee agreed) stated, at page 545,

> "There remains to be considered the circumstances in which the existence at the commencement of the civil action of "fresh evidence" obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court.
>
> I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff LJ He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail *in limine* because the so-called "fresh evidence" on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App. Cas. 801, 814, namely that the new evidence must be such as 'entirely changes the aspect of the case.' This is perhaps a little stronger than that suggested by Denning LJ in Ladd v Marshall [1954] 1 WLR 1489, 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz., that the evidence '... would probably have an important influence on the result of the case, though it need not be decisive; ...'
>
> The latter test, however, is applicable where the proper course to upset the decision of a court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division), is by way of a rehearing. I agree with Goff LJ that in the case of collateral attack in a court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate."

71. Hunter was referred to by Lord Keith in Arnold at page 108D. Lord Keith then went on to consider the question of whether an issue estoppel might be held not to apply if a party adduced "further relevant material that he could not by reasonable diligence have adduced in the earlier". He concluded, at page 109A-B,

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings."

72. A further modern statement of the requirement is that of Lord Bridge in Owens Bank Limited v Bracco [1992] 2 AC 443. The case concerned the question of whether a defendant could resist the registration of a foreign judgment under section 9(2)(d) of the Administration of Justice Act 1920 on the basis that it had been "obtained by fraud". Lord Bridge stated, at page 483F-H:

> "It is not in dispute that if the loan documents were indeed forgeries and the account given by Nano in his evidence in the court in St. Vincent of the transaction on 31 January 1979 at the Hotel du Rhone in Geneva was a fabrication, the St. Vincent judgment was obtained by fraud. But it is submitted for the bank that the language of section 9(2)(d) must be construed as qualified by the common law rule that the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered. Here, it is said, there is no such fresh evidence. This is the rule to be applied in an action brought to set aside an English judgment on the ground that it was obtained by fraud. The rule rests on the principle that there must be finality in litigation which would be defeated if it were open to the unsuccessful party in one action to bring a second action to re-litigate the issue determined against him simply on the ground that the opposing party had obtained judgment in the first action by perjured evidence. Your Lordships were taken, in the course of argument, through the many authorities in which this salutary English rule has been developed and applied and which demonstrate the stringency of the criterion which the fresh evidence must satisfy if it is to be admissible to impeach a judgment on the ground of fraud. I do not find it necessary to examine these authorities. The rule they establish is unquestionable and the principle on which they rest is clear."

73. These authorities were relied upon by Burton J in Chodiev v Stein [2015] EWHC 1428, accepting and reiterating the requirement for new evidence that could not with reasonable diligence have been adduced at the first trial. Burton J also referred to, and relied upon first instance decisions to similar effect by Langley J in Sphere Drake Insurance plc v The Orion Insurance Company plc (unreported, 11 February 1999), and by David Steel J in KAC v IAC [2003] 1 Lloyd's Rep 448 at para 146.

74. Burton J also endorsed the summary of the legal position in *Dicey, Morris & Collins on the Conflict of Laws*, (15th ed) at para 14-138,

> "Any judgment whatever, and therefore any foreign judgment, is, if obtained by fraud, open to attack. A party against whom an English judgment has been given may bring an independent action to set aside the judgment on the ground that it was obtained by fraud; but this is subject to very stringent safeguards, which have been found to be necessary because otherwise there would be no end to litigation and no solemnity in judgments. The most important of these safeguards is that the second action will be summarily dismissed unless the claimant can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence, and which is so material that its production at the trial would probably have affected the result, and (when the fraud consists of perjury) so strong that it would reasonably be expected to be decisive at the rehearing and if unanswered must have that result."

75. To the contrary effect, however, is the decision of Newey J in Takhar v Gracefield Developments [2015] EWHC 1276 (Ch) ("Takhar"). Newey J considered an application to strike out a claim as an abuse of process. The claim was to set aside an earlier judgment dismissing the claimant's claim to be the beneficial owner of various properties. The claimant alleged that the earlier judgment against her had been obtained by fraud, namely that her signature had been forged on a critical document in the case by the defendants. The question of whether the claimant had signed the document was live during the first trial, but no case of forgery was advanced, and hence no expert evidence was admitted on the point. The second claim was principally founded upon the evidence of a handwriting expert, who had provided a report to the claimant after the dismissal of the first claim, and who had concluded that the signature of the claimant on the relevant document had been forged.

76. After referring to Highland Financial, Newey J addressed the issue of whether there was an additional requirement that the new evidence could not reasonably have been obtained in time for the original trial. At paragraphs 28-32, Newey J considered the decisions in Phosphate Sewage v Molleson (supra), Owens Bank v Bracco (supra), and Owens Bank v Etoile Commerciale SA [1995] 1 WLR 44. He expressed the view that none of these cases was authority for the proposition that, as a matter of English law, the evidence required to set aside a judgment on the grounds of fraud needed to be new evidence that was not available and could not with reasonable diligence have been available at the time of the judgment.

77. Newey J then went on to consider the state of the authorities in the Commonwealth, noting that in Australia and Canada, there was no such requirement: see e.g. Toubia v Schwenke [2002] NSWCA 34. He concluded,

> "37. To my mind, the reasoning in the Australian and Canadian cases is compelling. Finality in litigation is obviously of great importance, but "fraud is a thing apart". Supposing that a party to a case in which judgment had been given against him

could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenge the judgment even if the fraud could reasonably have been discovered. Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.

38. None of this would matter, of course, if Owens Bank Ltd v Bracco and Owens Bank Ltd v Etoile Commerciale SA provided binding authority that a judgment cannot be set aside for fraud unless there is new evidence which could not have been discovered with reasonable diligence before the judgment was delivered. I do not think, however, that they do. What was said in each case about the domestic rule must, as it seems to me, have been obiter. Neither case was about that rule, and (as I have said) no such rule was held to apply in the context of registration of judgments under section 9 of the Administration of Justice Act 1920 (with which Owens Bank Ltd v Bracco was concerned)…

41. In all the circumstances, the better view seems to me to be that a judgment can be set aside if the loser satisfies the requirements summarised in Royal Bank of Scotland plc v Highland Financial Partners LP…. He does not also have to show that the new evidence could not reasonably have been discovered in time for the original trial."

78. In Chodiev v Stein, after Burton J had drafted his judgment, he was referred to Takhar. This caused Burton J to add a postscript to his judgment declining to follow Takhar. Burton J commented,

"I respectfully disagree with Newey J's decision, by which of course I am not bound… Although I was not referred to the two other Commonwealth decisions, to which Newey J was referred (paragraphs 33 and 34 of his judgment), I specifically addressed the point which plainly weighed with him, drawn from the views of Handley JA both judicially and as Editor of *Spencer Bower & Handley*. I note that Newey J was not referred to Hunter, the House of Lords decision which I consider binding upon me, and which Newey J might well have also concluded to bind him; and although Newey J concluded that the unanimous opinion, after full argument, of the Law Lords and the Court of Appeal in Owens Bank Ltd v Bracco did not bind him, and although he was referred to, but did not follow, the views of *Dicey, Morris & Collins*, he was also not referred to the consistent views of Langley J in Sphere Drake and David Steel J in KAC v IAC…;"

79. Agreeing with Burton J, and respectfully differing from Newey J, I consider that the decision of the House of Lords in Hunter is binding authority for the proposition that a party who wishes to avoid the consequences of an earlier judgment against him on the grounds that it was obtained by fraud (in that case the dishonest evidence of the police officers given at the *voir dire*) must be able to point to new evidence that was not available, and which could not with reasonable diligence have been obtained, at the time of the first judgment. That requirement is consistent with the dicta in all of the other cases to which I have referred.

80. I also think that this conclusion is implicit in the summary of Aikens LJ in Highland Financial to which I have referred in paragraph 64 above. It is notable that the first instance judge in Highland Financial was Burton J, whose judgment expressly referred to and relied upon the decisions of Langley J in Sphere Drake and of the House of Lords in Hunter: see [2012] EWHC 1287 (Comm) at paras 106-112. As such, I think that when Aikens LJ referred in Highland Financial to "*fresh evidence* that is adduced after the first judgment has been given", he was plainly referring to the same type of "fresh evidence" which the Court of Appeal and House of Lords had required to be adduced in Hunter.

Analysis

Res judicata

81. It is evident from the description that I have given of the issues that Vos J addressed in the 2011 claim, that Joseph's claim that he was not bound by the RFAWF Agreement or by Mr. Thornhill's determinations and actions under it was based in part upon an allegation that Mr. Thornhill had acted with actual bias in the sense which I have described in paragraph 15 above. This necessarily entailed an allegation that Mr. Thornhill was acting in bad faith and that he had deliberately colluded with Naomi and Barry so as to favour their interests. Given the terms of his judgment, it is plain that Vos J did not regard the issues of bias and collusion as in any way limited to questions of construction or procedural fairness. Those issues were decided against Joseph by Vos J and permission to appeal in relation to them was refused by the Court of Appeal.

82. Although the draft pleading now sought to be introduced in the 2015 claim seeks to characterise the wrongdoing alleged by Joseph in a number of different ways, it is in my judgment clear that the fundamental issue that it raises is the same issue of actual bias involving fraud and collusion that Vos J considered and decided in 2011. Although the majority of the claim is cast in the form of allegations of breach of Mr. Thornhill's express and implied contractual duties under the Further Agreed Way Forward Agreement and RFAWF Agreement, together with breach of the fiduciary duties that are said to have arisen from Mr. Thornhill's engagement as Joseph's agent pursuant to those terms, the essence of the allegations of breach of those duties is that the Rally and Edenholme Transactions gave (and were dishonestly designed to give) Mr. Thornhill a secret incentive to favour Naomi and Barry over Joseph in his performance of the agreements. The result is that Joseph again seeks to contend that the RFAWF Agreement and the determinations made under it are not binding upon him as a result of Mr. Thornhill having dishonestly colluded or conspired with Naomi and Barry so as to be biased in their favour in his determinations.

83. The correlation between the allegations of actual bias, collusion and lack of good faith considered by Vos J in the 2011 claim, and the allegations in the draft pleadings in the 2015 claim, can be illustrated by the alleged content of the contractual and fiduciary duties said to have arisen from the terms of the Further Agreed Way Forward Agreement and RFAWF Agreement, together with the pleading of breach and of the alleged purpose of the Rally and Edenholme Transactions.

84. In that regard, paragraphs 40 and 43 of the draft Amended Particulars of Claim assert that in order to give business efficacy to the Further Agreed Way Forward Agreement and RFAWF Agreement,

> "Mr. Thornhill was under an implied obligation…
>
> (i) to act fairly, impartially and in an unbiased manner;
>
> (ii) not to engage, or continue to engage, in any personal dealings with any person or entity which put him in conflict (or have the potential to put him in conflict) with his duty to act fairly, impartially and in an unbiased manner, unless with the prior consent of all those involved;
>
> (iii) not to accept any payment or benefit from any person or entity intended (or which might be intended) to influence, or which had the potential to influence, the performance of his functions under the RFAWF Agreement; and
>
> (iv) not to make any arrangements whereby he secured any other financial benefit from any of the other parties to the RFAWF Agreement, whether directly or indirectly, other than as provided by that agreement."

It will readily be seen that the core of those alleged duties are duties to act fairly, impartially and in an unbiased manner and not to engage in dealings or accept benefits that might compromise such impartiality.

85. The content of the alleged fiduciary duties said to have been owed by Mr. Thornhill necessarily follow this analysis. The alleged fiduciary duties owed by Mr. Thornhill are set out in paragraph 46 of the draft pleading, but as paragraph 44 makes clear, these are said to have arisen from the role assumed by Mr. Thornhill under the Further Agreed Way Forward Agreement and the RFAWF Agreement and the terms of those agreements. Moreover, given the nature of the task that Mr. Thornhill was performing under the agreements, any fiduciary duties that he owed must necessarily have been constrained or modified by the express terms of the agreements and any duties to Joseph would necessarily be mirrored by equivalent duties owed to the other parties. As might be expected, therefore, whilst the alleged fiduciary duties are expressed in relatively conventional equitable language (being in essence a duty to act in good faith, a duty not to put himself into a position of actual or potential conflict of interest and duty, and an obligation not to obtain an unauthorised benefit from the other parties to the agreements), such alleged duties broadly track the alleged contractual duties referred to above. In that regard it is also notable that the allegations of breach of duty made against Mr. Thornhill are all simply made by

reference to the alleged contractual and fiduciary duties collectively: see e.g. paragraphs 89 and 90 of the draft pleading.

86. The essence of the case of wrongdoing pleaded against the Defendants is apparent from paragraphs 91 and 92 of the draft pleading. Those paragraphs allege that the making of the payment of £500,000 to Mr. Thornhill pursuant to the Rally Deed, and the alleged forbearances granted to him in not seeking to enforce the terms of the Rally Deed lead to the inference,

> "That the [payment and forbearances] in fact constituted a secret commission to Mr. Thornhill made at the instigation of Naomi and Barry (or either of them) with a view to inducing Mr. Thornhill to be more favourably disposed towards Naomi in the Provisional Adjustment Report and thereafter in the Revised Provisional Adjustment Report and in the Final Report.."

Again, that allegation raises essentially the same issue that Mr. Thornhill was actually biased in Naomi's favour in conducting the process under the RFAWF Agreement that was rejected by Vos J.

87. Further, even if for some reason it were thought that the issues of bias, fraud and collusion now sought to be raised are not in substance the same as the issues that were raised and decided in the 2011 claim, they are issues that were so closely connected with those issues, and which concerned precisely the same relationship between the parties and Mr. Thornhill arising out of the RFAWF Agreement, that in my judgment, unless the material upon which those allegations are based was not available to Joseph or could not, with reasonable diligence have been obtained by him at the time, they could and should have been raised in the 2011 claim. As such, they would fall squarely within the expanded issue estoppel doctrine identified by Lord Sumption in paragraph 22 of Virgin Atlantic (above).

88. Alternatively, and subject to the same caveat, I think that the pursuit of the 2015 claim is clearly barred by the Henderson v Henderson doctrine. To use the concept explained by Wigram V-C, the issues of alleged bribery, collusion and partiality now sought to be raised by Joseph in the 2015 claim as a justification for setting aside the RFAWF Agreement and the determinations "properly belonged" to the 2011 claim which was aimed at precisely the same target and sought essentially the same relief. Applying a "broad, merits-based judgment which takes account of the public and private interests involved" (per Lord Bingham in Johnson v Gore-Wood), I am entirely satisfied that having already taken up considerable court time and resources in fighting a lengthy expedited trial in 2011, it must be an abuse of process for Joseph to seek to have further recourse to the limited resources of the courts to subject the Defendants to a second attempt to show that they had dishonestly colluded and that Mr. Thornhill was biased against him.

89. In that regard I have no doubt that the trial of the 2015 claim would be just as hostile, fiercely fought, lengthy and expensive as the first in 2011. Further, neither the fact that there are substantial sums of money involved, nor the fact that the 2015 claim involves allegations that the Defendants have been guilty of fraud and had given false evidence at the trial in 2011, must necessarily mean that the second claim should be

allowed to proceed. There is a substantial public interest in finality in litigation, and that is reinforced where the parties have entered into a settlement agreement of the litigation. It would not be in the public interest to permit settlement agreements to be undermined, except on the clearest possible grounds.

90. In this case, by clause 18 of the settlement agreement annexed to the Consent Order, Joseph agreed – in consideration of the appeal for which he did have permission being dismissed and the costs order against him not being further enforced – that he would not "seek to revive in new proceedings the claims which are the subject matter of [the 2011 claim]". To my mind that clause plainly contemplates that Joseph would not seek to repeat in new proceedings the claim that Mr. Thornhill had colluded with Naomi and Barry and that he was biased against Joseph.

91. Although Joseph contends that this settlement was, from his perspective, founded on an implicit understanding that the Defendants had not and were not continuing to conceal anything material from him in breach of their alleged duties to him, it is perfectly clear that throughout, Joseph had a deep distrust of Mr. Thornhill, Naomi and Barry and strongly suspected that they were colluding against him. It will also be recalled that Joseph had sought permission to appeal against Vos J's finding that Mr. Thornhill was not actually biased against him and had not dishonestly colluded with Naomi and Barry. Joseph had therefore not accepted Vos J's decision on that point. He was, nonetheless, prepared to enter into the settlement agreement anyway.

92. Accordingly, and for similar reasons to those that were advanced by Mann J in holding that a second claim was barred by the Henderson v Henderson doctrine in Gaydamak v Leviev [2014] EWHC 1167 (Ch) and by Vos LJ in refusing permission to appeal in the same case, [2015] EWCA Civ 256, I consider that unless Joseph can show that he has a realistic prospect of showing that the 2011 judgment should be set aside on the grounds that it was obtained by fraud, I see no answer to the argument that the 2015 claim is barred by the doctrines of issue estoppel and Henderson v Henderson abuse of process.

Can the 2011 judgment be set aside on the grounds of fraud?

93. The critical question which falls to be determined, therefore, is whether Joseph can show that he has a reasonable prospect of setting aside Vos J's judgment on the grounds that it was obtained by fraud. For the reasons that I have explained, and paraphrasing the requirements which I have discussed above, to succeed in setting aside Vos J's judgment, Joseph would have to show (i) that there is some fresh evidence that was not available, or which could not with reasonable diligence have been obtained, at the time of the judgment in the 2011 claim; (ii) that there was 'conscious and deliberate dishonesty' in relation to the concealment of that evidence; and (iii) that the fresh evidence is material, in the sense that was an operative cause of Vos J's decision to give the judgment the way that he did, i.e. that it would have entirely changed the way in which Vos J approached and came to his decision.

94. The first – and fundamental - difficulty which Joseph faces in this regard is that the three documents upon which he now relies - the Rally Deed and the Subscription Agreement and Shareholders' Agreement two documents relating to the Edenholme Transaction – were all disclosed to him by Naomi, Barry and BANA in the course of the 2011 claim. They were, therefore, available in the 2011 claim and could have

been used as a basis for making the same allegations in those proceedings in precisely the same way as Joseph now makes his allegations in the 2015 claim.

95. Joseph attempts to meet this point by contending, first that Mr. Thornhill did not disclose the documents, and secondly that they were "tucked away" by the other Defendants in their lengthy list of documents and were described in such a way that did not draw his attention to the significance of them.

96. I think that the first point is irrelevant: the question is not who disclosed the documents but whether they were available to Joseph. The second point is also not well-founded on the facts or as a matter of law. As a matter of fact, the documents were not simply included in the lengthy electronic disclosure, but were separately included in a list of only 112 documents available in hard copy. Moreover, the documents were provided electronically to Joseph's solicitors at their request. The documents were accurately described and provided in precisely the manner which the CPR requires in order that relevant documents are required to be produced to parties to litigation so that they can be reviewed and, if appropriate, deployed in that litigation. There is, in particular, no obligation upon a disclosing party to describe documents or add commentary to them in a way that highlights their potential relevance to an opponent.

97. It should also be borne in mind that this was fiercely fought litigation over large sums of money with substantial resources being deployed by both sides. Joseph and his solicitors must have been keenly interested to collect evidence to support their case that Mr. Thornhill had colluded with Naomi and Barry and had wrongly favoured them in his determinations under the RFAWF Agreement. Disclosure was also taken into account in a later amendment to Joseph's pleadings. I therefore cannot see how Joseph can contend that the relevant documentary evidence upon which he now relies was not available to him before the trial in 2011.

98. Further, once the documents were available to Joseph, I do not think that the consequences are dependent upon an inquiry into why they were not acted upon. That is doubtless for good practical and policy reasons. The same point was made clearly in Gaydamak v Leviev by Mann J at paragraph 53, and Vos LJ at paragraph 37, each of whom referred to the dictum of Wigram V-C in Henderson v Henderson to which I have referred above,

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."
>
> (my emphasis)

99. In that regard I should also refer to paragraph 114 of the draft Particulars of Claim. That paragraph asserts that,

> "Had Mr. Thornhill not breached his disclosure obligations … Joseph would have relied on those documents to the advantage of his case [and] the judgment of the Court would have been materially different from the Judgment."

The obvious difficulty with that plea is that the relevant documents had been disclosed by the other Defendants, and yet Joseph did not make use of them in the manner he now alleges. Quite apart from the merits or otherwise of the contention that Mr. Thornhill dishonestly failed to disclose the documents, I therefore cannot see how Mr. Thornhill's conduct in that regard can be said to have been an operative cause of Vos J's decision to give his judgment in the way that he did.

100. Further, I also cannot see how the requirement that there be "conscious and deliberate dishonesty" in the concealment of the documents by the Defendants could possibly be made out in circumstances in which Naomi, Barry and BANA actually disclosed the documents, and Mr. Thornhill's unchallenged evidence was that his legal team were aware of the documents throughout and continued to act for him.

101. Standing back, the simple facts are that in an attempt to avoid the consequences of Mr. Thornhill's determinations under the RFAWF Agreement, Joseph mounted a wide-ranging attack in the 2011 claim upon Mr. Thornhill's professionalism and probity, claiming in particular that he had dishonestly colluded with Naomi and Barry and was actually biased against him. That claim was rejected after a lengthy trial, and Joseph agreed to settle it and not to seek to revive the allegations. He now contends he should be entitled to have such a second attempt at obtaining essentially the same result by raising further allegations of fraud and collusion using documents that had been disclosed to his lawyers and which were available to him in the first action. The public interest in finality in litigation must mean that this attempt cannot be permitted. That would certainly be the case if the reason that the documents were not utilised was deliberate choice on the part of Joseph and his lawyers. But the conclusion can be no different if the reason is oversight or negligence on the part of Joseph's lawyers so that, as he claims, Joseph did not see the documents in question until they were mysteriously delivered to him by some anonymous person shortly after Mr. Thornhill delivered his Final Adjustment Report.

102. The further points relied upon by Joseph as a basis for seeking to set aside the 2011 judgment for fraud are (i) the allegations that Mr. Thornhill misled the Charity Commission so as to prevent it from bringing the Rally Deed directly to the attention of Vos J, and (ii) that Naomi and Barry deliberately omitted to refer in their evidence to, and caused their counsel in his submissions to conceal the existence of, the Charity Commission inquiry into Raleigh. I also do not consider that there is any realistic prospect of the 2011 judgment being set aside on either or both of these grounds.

103. As to the charge that Mr. Thornhill misled the Charity Commission, I have set out the relevant exchanges between the Charity Commission and Mr. Thornhill and his solicitor in paragraphs 38-43 above. Although the original Charity Commission letter of 4 October 2011 made a reference to disclosure to the court, taken as a whole and given its repeated references to disclosure under the Civil Procedure Rules, that letter

could plainly be understood to be directed at the question of whether the Rally Deed and associated documents had been disclosed to Joseph in the litigation. In that regard, both Mr. Thornhill's eventual answer by email of 26 November 2011, and that of his solicitor on 27 November 2011, accurately stated that the documents had been disclosed to Joseph in the litigation.

104. The real thrust of Joseph's allegation against Mr. Thornhill is that his email response of 26 November 2011 was dishonestly designed to dissuade the Charity Commission from bringing the Rally Deed directly to the attention of Vos J at the trial as the Commission had threated to do in its email of 25 November 2011. Joseph's draft pleading also makes the same allegation in relation to Mr. Hughes' subsequent email of 27 November 2011 that confirmed what Mr. Thornhill had said and contained a suggestion that he should attend a meeting at the Charity Commission to discuss their concerns.

105. Although the Charity Commission's email of 2014 indicates that it mistakenly believed that the Rally Deed had been seen by Vos J, the fact that the Commission might have been mistaken is not enough to support an allegation of fraud. The relevant question is whether the terms or circumstances of either or both of Mr. Thornhill's or Mr. Hughes' emails provide any support for a finding that Mr. Thornhill thereby dishonestly intended to induce such a misunderstanding to deflect the Commission from its stated course.

106. In that respect, the simple fact is that Mr. Thornhill's email did not seek to dissuade the Charity Commission from pursuing the matter, or from attending court. Quite the contrary, it expressly invited the Charity Commission to speak directly to Mr. Hughes, and ended by assuming that the Charity Commission would indeed be attending court on the following Monday. There is, moreover, no allegation that Mr. Hughes, a solicitor, was involved in any improper or dishonest conspiracy to conceal the documents, or that he was dissembling when he referred to his own direct responsibilities as an officer of the court concerning disclosure, and no evidence was produced to support or explain any such allegation.

107. I therefore simply cannot see how Mr. Thornhill's email, making it clear that the Charity Commission were expected to attend court and were entirely free to talk to his solicitor, still less Mr. Hughes' email confirming Mr. Thornhill's response and offering to meet the Charity Commission, could all be taken to be a dishonest scheme by Mr. Thornhill to throw the Charity Commission off the scent.

108. The final point said to support the allegation that Vos J's judgment was obtained by fraud is the allegation that Naomi and Barry dishonestly concealed the existence of the Charity Commission's inquiry into the management and affairs of Raleigh during their defence of the 2011 claim.

109. I should say at the outset that I have very considerable doubt that there is a realistic case that the existence of the Charity Commission inquiry was dishonestly concealed at all, given that such allegation would seem to involve an implicit, but unpleaded, allegation that the Defendants' legal team were complicit in the concealment. But even if such a case could be put, I simply cannot see how, of itself, and distinct from the question of the disclosure of the Rally Deed and other documents which I have considered above, knowledge that the Charity Commission was inquiring into the

affairs of Raleigh, could possibly have altered the way in which Vos J approached the 2011 claim and came to his decision. Still less can I see that such knowledge would have entirely changed the way that Vos J approached the case. The fact that an inquiry was taking place would not, of itself, have been evidence of anything.

110. I therefore conclude that there is no prospect of Joseph succeeding in his allegation that the judgment of Vos J in the 2011 claim was obtained by fraud.

Conclusion

111. The result is that I find that Joseph's 2015 claim is barred by the principles of *res judicata* and the 2011 judgment cannot be set aside on the grounds that it was obtained by fraud. The 2015 claim must therefore be struck out.