

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM2019/0121

BETWEEN:

[1] **NISSAN MOTOR CO., LTD**
[2] **NISSAN MIDDLE EAST FZE**

Claimants

and

[1] **CARLOS GHOSN**
[2] **CAROLE NAHAS GHOSN**
[3] **BEAUTY YACHTS PTY LTD**

Defendants

Appearances:

Mr. George Spalton, KC, with him Mr. Joshua Folkard, Mr. Andrew Gilliland and Mr. Malcolm Arthurs for the Claimants;

No appearance for the Defendants.

2024: July 2, 3, 4, 8, 9, 22;
August 9.

JUDGMENT

Introduction

- [1] **Wallbank J.:** This is the Court's written judgment following the trial of the claims in this action which took place between Tuesday 2nd July and Tuesday 9th July 2024. The Court convened a hearing to be held on 22nd July 2024 for the purposes of handing down judgment in this Claim, however, upon the legal representatives for the Claimants informing the Court that the Defendants had not had notice of that hearing, the Court did not hand down judgment but announced that the written Judgment would first be circulated in draft. Following this review, the judgment was handed down on 9th August 2024.
- [2] The trial of this action concerned civil fraud claims made by the First Claimant ('Nissan') and its Middle East subsidiary, the Second Claimant ('NME'), against Nissan's former CEO and Chairman Mr. Carlos Ghosn; the First Defendant. The Claimants allege that US\$ 32 million was misappropriated from Nissan's 'CEO Reserve Fund' (the nature of which is explained further below) and paid by NME through a network of Middle Eastern individuals and companies to the Third Defendant ('Beauty Yachts'), in order to purchase a Ferretti Custom Line Navetta 37 model motor yacht (the 'Yacht'). The Claimants also bring claims against Mr. Ghosn's wife, Ms. Carole Ghosn (the Second Defendant) seeking declarations that a purported conveyance of the shares in Beauty Yachts from Mr. Ghosn to Ms. Ghosn is void or voidable (and, in the latter case, voided).
- [3] Following half a day opening oral submissions on Wednesday 3rd July 2024, the Court heard from the following witnesses for the Claimants:
- (1) Witnesses of fact:
- a. Mr. Motoo Nagai, the outside independent director and Chairperson of the audit committee of Nissan, on Thursday 4th July 2024;
 - b. Mr. Atsuo Kosaka, who between 2009 and 2013 was the President and Managing Director of NME, on Thursday 4th July 2024; and
 - c. Mr. Hiroto Saikawa, CEO of Nissan between April 2017 to September 2019, on Tuesday 9th July 2024.
- (2) Expert witnesses:
- a. Ms. Yumiko Ito, the Claimants' Japanese law expert, on Monday 8th July 2024; and

b. Mr. Barry Robinson, the Claimants' forensic accounting expert on Monday 8th July 2024.

- [4] As further explained below, the Defendants did not appear and were not represented at trial based on their conduct in recent months and in light of recent correspondence (addressed in the next section).

Procedural matters: Debarring Order and its effect

- [5] The Defendants made an unsuccessful application for strike out/summary judgment of the entirety of Nissan's and NME's claims in this action on 27th May 2021 (the 'Strike Out/Summary Judgment'). Following the Court's dismissal of that application by a judgment dated 16th May 2022, the Defendants entered into a Consent Order agreeing to pay the Claimants' costs of US\$ 278,505.76 relating to the Strike Out/Summary Judgment. The Claimants have never received that money.
- [6] Messrs. Collas Crill L.P. ('Collas Crill'), who had acted as the legal representatives for the Defendants, subsequently applied to come off the record as the Defendants' legal representatives. The Court acceded to this application, but only from the date on which the Case Management Conference Order was entered. That happened on 11th April 2023. Following Collas Crill's withdrawal, if continuing to act in person, the First and Second Defendants were required to file and serve notices of acting in person pursuant to Part 63.4 of the Civil procedure Rules 2000 ('CPR'). They did not do so.
- [7] The Claimants provided the Defendants with their list of documents for disclosure pursuant to CPR 28.7(2) on 15th September 2023. The Defendants did not provide any list of documents, or other form of disclosure.
- [8] By virtue of those breaches, on 18th October 2023 the Court made the following Order (the 'Debarring Order'):

"The Defendants shall be disbarred from taking any further steps in these proceedings unless by 4pm on 2 November 2023: (a) the First and Second Defendants file and serve notices of acting in person pursuant to CPR 63.4; (b) they provide list(s) of documents for standard disclosure pursuant to paragraph 3 of the Case Management Order as amended by the consent order dated 4 August 2023; and (c) they put MKS in cleared

funds in respect of the agreed costs of the Summary Judgment/Strike Out Application set out in the consent order dated 15 June 2023.”

- [9] None of those requirements were fulfilled by 2nd November 2023 (or at all), with the result that the Defendants were debarred from defending this action from 2nd November 2023. The effect of such a debarring order was set out by the English Court of Appeal in **Hirachand v Hirachand**¹ in which King LJ characterised as the ‘*proper approach*’ (at [37]) that adopted by Edwin Johnson QC (sitting as a Deputy High Court Judge) in **Times Travel v Pakistan International Airlines**², in which his Lordship stated *inter alia* at [55]:

“(2) Where an order debars a defendant from defending a particular proceedings [sic], this should mean what it says: At the trial of the relevant proceedings the defendant should not be permitted to participate in the normal way. That is to say by doing such things as adducing evidence, cross-examining witnesses on the other side, or making submissions.

(3) The case law does appear to demonstrate the existence of a residual discretion or trial management power to permit a debarred defendant to take some part in the trial of the relevant proceedings. It seems to me that this discretion is a narrow one ...

(4) The overriding principle however is that debarring orders should mean what they say. The debarred defendant should not normally be permitted to participate in the relevant trial in a way which undermines the debarring order, and permits the defendant to escape the effect of the debarring order. A debarring order is an important sanction available to the court in the exercise of its case management powers, and an important method of ensuring that the court's case management orders are respected. As such, defendants should not normally be allowed to escape from the consequences of a debarring order when the trial of the relevant proceedings takes place”

- [10] This is consistent with the approach taken in this jurisdiction in **Oscar Trustee Limited v MBS Software Solutions Limited**,³ in which an Appellant was debarred on an ‘unless’ basis from pursuing a motion for conditional leave to appeal to His Majesty in Council: see [11]-[12] & [50(3)]. In deciding whether to grant a debarring order, Pereira CJ applied the test of whether it was ‘just and appropriate in all the circumstances to make a debarring order’ and emphasised that ‘[t]he rationale behind debarring orders is to ensure that costs orders are promptly obeyed’: at [43] & [45]. The effect of those authorities in this case is fourfold:

¹ [2021] EWCA Civ 1498; [2022] 1 WLR 1162.

² [2019] EWHC 3732 (Ch).

³ BVIHCMAP2021/0034 (Unreported, delivered 8th February 2023).

- (1) First, the Defendants were not entitled to have any participation in the trial except - if they so chose - to attend in person (or, in the case of Beauty Yachts, by a director or representative) only to observe the proceedings. There was and is no basis for the Court to exercise any 'residual discretion or trial management power' to the contrary. The Defendants did not in fact attend the trial to observe.
- (2) Second, although the Claimants did not seek strike out of the Defendants' Amended Defence the focus of the trial was on whether the Claimants had proved their case to the satisfaction of the Court: **Times Travel**, at [55(6)] (Edwin Johnson QC), approved in **Hirachand**, at [37] (King LJ). The Court need not expressly examine the defences advanced by the Defendants in the Amended Defence, including limitation (albeit that certain key defences advanced by the Defendants whilst still represented were drawn to the Court's attention in oral opening submissions).
- (3) Third, there is no requirement that the Court disregard the Amended Defence but the purpose of its consideration should be limited to 'understanding the statements of case in the relevant proceedings as a whole': **Times Travel**, at [55(5)] (Edwin Johnson QC), approved in **Hirachand**, at [37] (King LJ). In particular, admissions made by the Defendants in the Amended Defence can be relied upon by the Claimants: **Thevarajah v Riordan**,⁴ at [33] (Tomlinson LJ).
- (4) Finally, the Claimants accepted that the Defendants should be given the opportunity to: (i) review and suggest any typographical errors in the draft judgment; (ii) comment on the Minute of Order to be produced by the Claimants' legal representatives; and (iii) make submissions on costs.

[11] The Claimants have given the Defendants every chance to comply with orders of the Court, and to remedy their procedural defaults:

- (1) On 9th June 2023, the Claimants' solicitors MKS wrote to Aboujaoude Associates (Lebanese lawyers who liaised with MKS and the Court on behalf of the Defendants: 'AJA') communicating that the cheque they had received through Collas Crill for settlement of the Strike Out/Summary Judgment costs had been returned unpaid and sought - pursuant to the consent order - payment by an alternative method within 7 days.

⁴ [2014] EWCA Civ 14; [2014] CP Rep 19.

- (2) AJA responded on 22nd June 2023, saying that they understood from the bank which issued the cheque that it had not been presented for payment, and said they would make sure that the cheque had been presented for clearing in accordance with the proper due processes 'as a matter of courtesy with the aim to rectify any defects in the cheque's presentation and clearing process'.
- (3) MKS replied on 7th July 2023 noting that, although they had requested confirmation from their bankers of the specific manner in which the cheque was delivered to the issuing bank for payment, the terms of the consent order clearly now required payment by an alternative method and 'the Claimants reserve their right, without further reference to you, to seek orders preventing the Defendants from taking any further steps in the claim in this jurisdiction (the 'BVI') until the sums due under the Costs Order are paid in full'. That letter also set out in detail over three pages the Defendants' obligations under CPR 63.4 and CPR Part 28, as well as hyperlinking the relevant CPR provisions and forms.
- (4) On 14th July 2023, AJA wrote to MKS, thanking them for 'providing clarification about' the CPR rules and stating that they would 'consult the reference that you provided to us together with the Defendants in an effort to understand how best to procure that the Defendants be able to exercise their defense rights'. By that letter, AJA also agreed to MKS' proposed extension of time for disclosure to 15th September 2023. AJA subsequently provided comments on a draft Consent Order, and ultimately agreed a Consent Order with MKS, extending that deadline.
- (5) On 19th July 2023, MKS wrote requesting 'once more' that the Defendants 'take steps to execute Notices of Acting if they do not intend to retain alternative BVI legal representation'.
- (6) On 9th August 2023, MKS wrote to AJA stating that Nissan's Lebanese lawyers would be willing to accept a cash payment for the outstanding strikeout costs (with them then making a transfer to MKS to settle the outstanding costs) and asked whether the Defendants would accede to that request if the cheque had not cleared within 21 days. That letter also: (i) set out in detail, once again, the requirements of CPR Part 28; and (ii) stated that under CPR 63.4 the Defendants were required to file notices of acting in person and invited them to remedy that breach 'forthwith'. MKS chased a response to

this letter on 24th August 2023 and were told that AJA would respond 'on or around 7 September 2023'.

- (7) On 8th September 2023, MKS chased once again by letter expressly stating: (i) '[s]hould we not hear from you within 14 days of the date of this letter ... Nissan reserves the right to seek orders from the Court compelling payment of the outstanding Strike Out Costs and/or barring the Defendants from taking any steps in these proceedings until the outstanding Strike Out Costs are paid'; and (ii) that the CPR 63.4 requirement was 'not simply a technicality' and required the Defendants' 'immediate attention'. That letter also attached an example of the format in which disclosure documents should be listed.
- (8) AJA responded on 12th September 2023 (i.e. three days before standard disclosure was due) stating that 'in light of the Defendants' inability to defend themselves in the ongoing proceedings, the Defendants lack the legal means to be able to exchange lists of documents ... on 15 September 2023'. They invited MKS to 'discuss a reconsideration of the procedural calendar set out in the Case Management Order'.
- (9) MKS wrote to AJA on 13th September 2023, giving the Defendants a final opportunity to remedy their procedural defaults before the Claimants applied for the Debarring Order. That letter set out the Claimants' BVI legal responsibilities in detail and warned that: '[O]ur clients reserve their right to apply forthwith for relief (including orders debarring your clients from defending the proceedings) if the non-compliance with orders persists'.
- (10) MKS received no response to that letter and, on 27th September 2023, sent the Claimants' filed Notice of Application (and associated documents) in respect of the Debarring Order to AJA.
- (11) Following the Debarring Order, MKS wrote to AJA or the Defendants personally, as follows:
 - a. On 3rd October 2023 enclosing a Notice of Hearing and giving notice that the hearing of the Debarring Order would take place in person. MKS 'once again encourage[d] the Defendants to normalise their position before the BVI Court'.
 - b. On 18th October 2023, confirming that the Court had granted the Orders sought by the Claimants and considered AJA's 5-page letter dated 16th October 2023.

- c. On 20th October 2023, confirming whether AJA intended in their 5-page letter to waive privilege in certain advice given by Collas Crill, to which AJA responded in the negative.
 - d. On 15th November 2023, sending the Debarring Order as approved by the Court.
 - e. On 22nd November 2023, giving the names and roles of the expert witnesses the Claimants intended to rely upon.
 - f. On 14th December 2023, asking whether (notwithstanding the Debarring Order) the Defendants were intending to exchange witness statements by the deadline.
 - g. On 16th February 2024 attaching the Claimants' application to vary the Debarring Order and on 6th March 2024 attaching the Court's Order.
 - h. On 8th April 2024, attaching the Claimants' application to rely on certain banking documents obtained from the Swiss Federal Prosecutor's Office and on 25th April 2024 sending the Claimants' application to rely on an additional witness statement.
 - i. On 22nd May 2024, attaching consequent orders of the Court and notifying the Defendants that the Pre-Trial Review (the 'PTR') had been listed for a remote hearing on 30th May 2024.
 - j. On 27th May 2024, attaching the Claimants' written submissions and authorities for the PTR and enquiring whether the Defendants required a copy of the Hearing Bundle.
 - k. On 25th June 2024 rejecting the Defendants' request made personally to 'support the suspension of the court proceedings' until an application apparently made by Mr. Ghosn for 'legal aid' is 'finally determined'.
- (12) On 2nd July 2024 (the first day of trial, which in the event in this case was a designated reading day) MKS received a letter from Mr. Ghosn which was apparently signed by all the Defendants on 1st July 2024 (the 'Defendants' Letter'). This stated, *inter alia*, that the Defendants are 'financially unable to comply with the requirements of the debarring order' and that, as a result of 'a travel ban [which] has been imposed on us by the General Prosecution's Office in Lebanon', the Defendants were 'unable to attend the proceedings in person'. This letter was apparently written by the Defendants in person, notwithstanding their previous representation by AJA (as set out above), although the

position remains unclear and (on any view) wholly unsatisfactory. Whilst the Overriding Objective requires, among other things, ensuring so far as practicable that the parties are on an equal footing (see CPR 1.1(2)(1)), as a matter of substance the Defendants' Letter took matters no further, not least because:

- a. The letter stated that between September 2019 and 31st October 2023 Mr. Ghosn had 'disbursed' US\$ 1,847,202 'to cover the [Yacht's] operational expenses, maintenance and insurance'. If the Claimants wished to seek clemency on the basis of impecuniosity, they should have given full disclosure of their financial position to this Court. They have not done so.
- b. The Defendants made no request to attend this trial remotely, including by Zoom. Any 'travel ban' which may be in force is therefore a 'red herring'. The Court allowed the Defendants to appear at previous hearings on this case by Zoom, including the CMC (and, had they chosen to attend, also the PTR) and they had notice of all hearings.
- c. The Defendants argued in their letter that '[i]t is a fundamental principle under the rule of law that the right of defense cannot be suspended or conditioned upon the payment of moneys'. Whatever the position under any other law, that is not the case under BVI law: see paragraphs 9 to 10 above. In any event, the Debarring Order has taken effect in part because the Defendants failed to: (i) provide any disclosure; and/or (ii) in the case of the First and Second Defendants, file and serve notices of acting in person pursuant to CPR 63.4. Those defaults had nothing to do with the payment of money by the Defendants.

Procedural matters: Witness statement of Mr. Hemant Kumar Nadanasabapathy

[12] On 2nd July 2024 (again, the first day of trial) a '*WITNESS STATEMENT OF HEMANT KUMAR NADANASABAPATHY*' ('W/S HN') was filed by the online portal by a BVI legal practitioner apparently unconnected with this matter. Mr. Nadanasabapathy (who also goes by the name 'Hari Nada') (for convenience, 'Mr. Nada'), was at the relevant time Nissan's chief legal officer and Head of the CEO's and Chairman's offices.

[13] As explained at paragraphs 5 to 11 above, the Defendants were debarred from participating in this trial. Neither of the Claimants has called, or sought to call, Mr. Nada. Mr. Nada has not

applied to be joined as a party or interested party to this litigation and neither the BVI legal practitioner (or any other Counsel), nor Mr. Nada appeared at the trial. In the circumstances as they have unfolded, it is unclear how W/S HN 1 was filed on the online portal, but in any event, it is a document with no evidential status.

[14] Even if Mr. Nada had applied to be added as a party or intervene, CPR 29.11(1) provides that: 'If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits'. The Case Management Order gave a standard direction that: 'The parties shall file and exchange witness statements by 4:00pm on 24 November 2023', subsequently extended by the Debarring Order to 15th December 2023. Thus, unless any application had also been made pursuant to CPR 26.8 for an out-of-time extension to the deadline for filing and serving a witness statement (and so relief from sanctions), no reliance could have been placed on the witness statement by any party or person. Even then, a party who has served a witness statement would have to call the witness to give oral evidence in order to rely at trial on his or her evidence (and so tender him or her for cross-examination): **Phipson on Evidence** (20th edn., with 1st supp., Sweet & Maxwell 2023), at [11-06].

[15] As a consequence, although Mr. Nada has uploaded a witness statement to the online portal, he has not put any evidence before this Court which the Court could properly take into account. In any event, W/S HD1 does not change the key analysis or materially affect the claim since Mr. Nada agrees that Mr. Ghosn acted corruptly in this case, and - indeed – Mr. Nada states that he was the whistleblower whose protected disclosures led to Mr. Ghosn's arrest in Japan. Mr Nada's evidence also confirms that, as alleged by the Claimants, Mr. Ghosn informally directed payments from the CEO Reserve Fund. The status of Mr. Nada's Witness Statement is returned to in accessing Mr. Saikawa's evidence at paragraph 32(5) below.

Factual background

[16] Prior to the Debarring Order, the following was common ground between the parties on the pleadings (as to which, paragraph 10(3) above is repeated).

[17] Nissan is incorporated and registered in Japan.

- [18] Nissan has a subsidiary incorporated and registered in Dubai, called Nissan Middle East FZE ('NME').
- [19] Mr Carlos Ghosn was Nissan's: (i) Chief Executive Officer at all material times until 1st April 2017; and (ii) Chairman at all material times until 22nd November 2018. Mr. Ghosn was not a *de jure* director of NME.
- [20] Ms. Carole Ghosn (née Nahas) is Mr. Ghosn's wife.
- [21] Beauty Yachts Pty Ltd ('Beauty Yachts') is a British Virgin Islands ('BVI') Business Company with 50,000 shares with no par value.
- [22] The formal, registered shareholding/directorship position of Beauty Yachts shown in the company documentation was as follows:
- (1) Mr. Fady (also sometimes called 'Fadi') Gebran was sole shareholder and director of Beauty Yachts from its incorporation on 16th February 2015 until 23rd September 2015. It was common ground that Mr. Gebran was a lawyer who provided legal services to Ms. Ghosn from 1996 until Mr. Gebran's death on 16th August 2017;
 - (2) On 23rd September 2015, 10,000 shares in Beauty Yachts were transferred to a Lebanese company called Good Faith Investment Holdings S.A.L ('Good Faith'), with company number 1903048 and registered in Beirut;
 - (3) From 11th August 2017 until 7th May 2018, Mr. Ghosn was sole shareholder and director of Beauty Yachts; and
 - (4) From 7th May 2018 Ms. Ghosn has been the sole shareholder and director of Beauty Yachts.
- [23] Whether this formal, registered position reflects the true position is considered below.
- [24] Nissan contracts with distributors, including its so-called National Sales Companies ('NSCs'), which, according to Nissan, generally import its automobiles and spare parts into a whole country and sell them in bulk in that country. At all material times, Nissan's NSC's included: (i) Suhail

Bahwan Automobiles LLC ('SBA'), part of the Suhail Bahwan Group, in Oman; and (ii) Arata International FZC ('Arata'), another company in the same group, in Libya and Iraq.

[25] As to the personnel at SBA and/or the Suhail Bahwan Group:

- (1) Sheikh Bahwan was Chairman of the Suhail Bahwan Group;
- (2) Mr. Omar Bahwan was Sheikh Bahwan's son; and
- (3) Mr. Divyendu Kumar was SBA's Managing Director.

[26] Shogun Investments LLC is a Californian company, which is owned by Mr. Ghosn and his son, Mr. Anthony Ghosn (according to the Defendants, with 90% owned by Mr. Ghosn and 10% by Mr. Anthony Ghosn).

[27] Mr. Ghosn received US\$ 7.5 million in or around March 2015, by virtue of instructions given by Mr. Gebran.

[28] Beauty Yachts received €11 million and US\$ 1.62 million between March 2015 and 2017, as follows:

- (1) Approximately US\$ 1.4 million on or around 5th March 2015, on instructions from Mr. Gebran;
- (2) Approximately €2.5 million on or around 9th October 2015;
- (3) €2.5 million on or around 31st March 2016;
- (4) €2.5 million on or around 19th September 2016;
- (5) US\$ 20,000 on or around 7th April 2017;
- (6) US\$ 100,000 on or around 25th April 2017;
- (7) €3.4 million on or around 19th May 2017; and
- (8) €100,000 and US\$100,000 on or around 28th June 2017.

[29] By a sales contract dated 19th February 2015, amended by an annex (collectively, the 'Yacht Sales Contract'), Beauty Yachts had contracted to buy the Yacht with a purchase price of €12,199,147, to be paid in five instalments. The alignment of those instalments with the funds received by Beauty Yachts is considered below.

[30] Shogun received US\$ 27.2 million between October 2015 and July 2018, comprising:

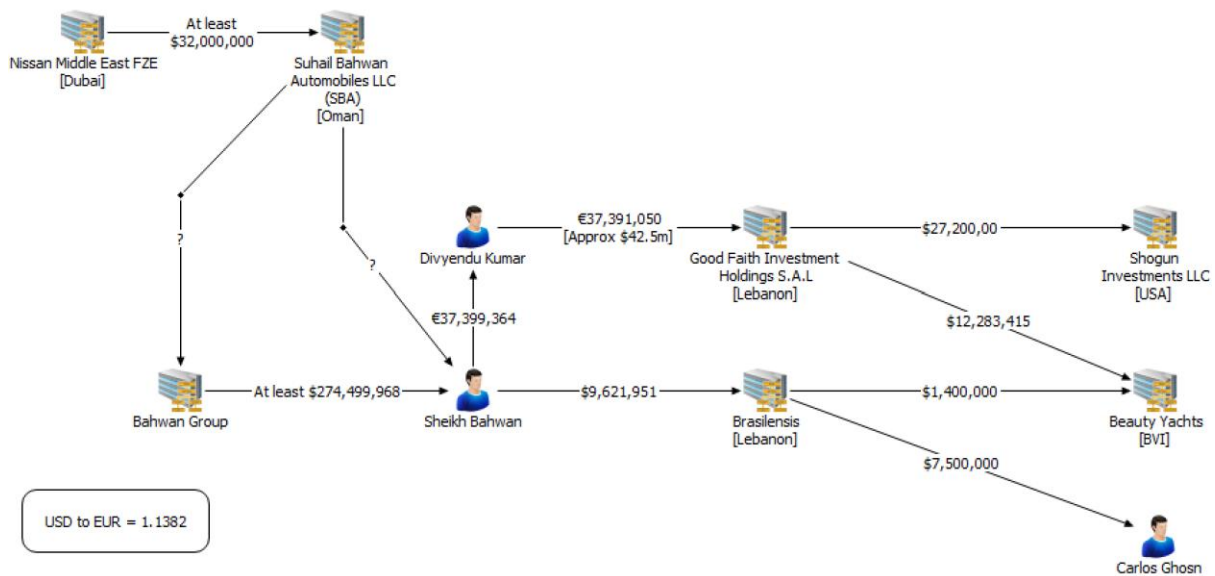
- (1) US\$ 5.5 million on or around 5th October 2015;
- (2) US\$ 2 million on or around 20th July 2016;
- (3) US\$ 2.5 million on or around 25th November 2016;
- (4) US\$ 3 million on or around 23rd May 2017;
- (5) US\$ 3 million on or around 13 July 2017;
- (6) US\$ 3.5 million on or around 7 August 2017;
- (7) US\$ 3 million on or around 12 December 2017;
- (8) US\$ 2 million on or around 5 June 2018; and
- (9) US\$ 2.7 million on or around 20 July 2018.

[31] The questions remaining for this Court in relation to the relevant money flows are: (i) where did the money which went to Mr. Ghosn, Beauty Yachts (and Shogun) come from; and (ii) what did Beauty Yachts do with that money when it was received?

The money flows and Mr Robinson's reports

[32] The following explains the relevant money flows, according to the factual and expert evidence adduced by the Claimants:

- (1) The money flows are summarised in Mr. Robinson's second report ('Robinson 2') as follows:⁵



- (2) US\$ 32 million was paid by NME to SBA between 11th June 2012 and 30th July 2018 as follows, adopting the numbering used in Mr. Robinson's first report ('Robinson 1'). Whether these sums should be treated as traceable to Nissan, rather than merely NME, is dealt with at paragraphs 61-67 below.

Number	Date	Payment (US\$)
BDO1	11 June 2012	3,000,000
BDO2	18 October 2012	2,000,000
BDO3	20 June 2013	4,500,000
BDO4	2 July 2014	2,500,000
BDO5	11 March 2015	2,000,000

⁵ Mr. Robinson made one correction to his reports in oral evidence, namely confirming that the '\$27,200,00' figure at Chart 3.1 in his second report should have read: '\$27,200,000 [emphasis added]'.

BDO6	17 June 2015	3,000,000
BDO7	30 December 2015	2,000,000
BDO8	9 January 2017	3,000,000
BDO9	25 July 2017	5,000,000
BD10	30 July 2018	5,000,000
Total		32,000,000

- (3) Formally, the payments set out above required a three-stage approval process: (a) proposal for payment by a General Manager or Vice-President of Nissan (or individual at a certain level within the Claimants) by filling out an *'Application for Budget Usage'* form; (b) approval of the proposed payment by (i) a corporate officer from Control (known internally as *'CNTRL'*); (ii) a member of Nissan's Executive Committee; and (iii) a senior Vice-President in Nissan's CEO office; and (c) final approval from the CEO of Nissan. In practice, however, the process for obtaining those monies operated on an informal basis on Mr. Ghosn's instructions.
- (4) As to BDO01-08, Mr. Ghosn called the relevant Senior Vice Presidents into his office and provided directions as to the amount to be paid and signed them off himself at stage (c) set out above. There is a documented example of this in an email entitled *'CEO called me on KSA'* where Hiroki Muto told Takashi Hata: *'I believe CEO's message was 'take care of SBA'. So I'll prepare ... B) CEO reserve proposal to SBA ...'*
- (5) At the time of payments BDO09-10, Mr. Ghosn had been replaced as Nissan's CEO by Mr. Hiroto Saikawa. However:
- a. As to BDO09, Mr. Saikawa's evidence is that half the payment had been approved by Mr. Ghosn prior to Mr. Saikawa taking over from him. In or around May or June 2017, Mr. Saikawa was approached by Mr. Ghosn after a meeting

and told that there was an approval request from a Mr. Peyman (in charge of the Middle East business) pursuant to an incentive programme which would need to be actioned. Mr. Saikawa understood that BDO09 had already been agreed with SBA, so approved (the second half of) that payment.

- b. With regard to BDO10, Mr. Saikawa was again approached by Mr. Ghosn after a meeting in or around June or early July 2018 and told that - although the FY 2017 budget had already closed - an incentive payment to SBA which should have been paid in FY 2017 had not been paid, and there would be a problem if Nissan did not make the payment. Mr. Saikawa understood that there was a contractual obligation to pay that sum to SBA, so approved the payment.
- c. As noted at paragraphs 12 to 15 above, limited aspects of this evidence were questioned by Mr. Nada in his Witness Statement (relating to the extent to which Mr. Saikawa might have spoken to certain members of the Nissan legal team at the time). For the reasons given in those paragraphs, however, that Witness Statement has no evidential status. Further Mr. Saikawa confirmed his evidence by affirmation on Day 7 of the trial (9th July 2024) and, as explained at paragraphs 5 to 11 above, Mr. Saikawa's evidence was not challenged by the Defendants at the trial and Mr. Saikawa's evidence did not in fact identify an individual with whom he is said to have discussed matters (contrary to speculation in Mr. Nada's Witness Statement). Accordingly, the Court has nothing to go on to query or affect the weight of Mr. Saikawa's evidence.

(6) Between July 2012 and December 2018, the Suhail Bahwan Group (of which SBA formed part) transferred at least US\$ 274,499,968 to a UBS bank account held by Sheikh Bahwan with number 230-713212.70T. Mr Robinson concluded that:

- a. *"From my review of the Swiss Banking Documents,⁶ I have identified that the Suhail Bahwan Group transferred at least [US]\$ 274,499,968 to accounts held by Sheikh Bahwan, between July 2012 and December 2018";*

⁶ i.e. Certain documents received from the Federal Prosecutor's Office in Switzerland: per Robinson 2, [1.7].

- b. *“Based on the Swiss Banking Documents, I have now reviewed documents showing that the Suhail Bahwan Group (of which SBA is a part) significantly funded Sheikh Bahwan’s account from which transfers to Good Faith (via an account bearing Mr. Kumar’s name, beneficially owned by Sheikh Bahwan) and Brasilensis were made.”*

Payments through Good Faith

- (7) A UBS account with number 206-193711.70V was opened by Mr. Kumar, but the beneficial owner of the money in that bank account was declared to be Sheikh Bahwan.
- (8) All the payments into UBS account 206-193711.70V came from a UBS account referred to as 713212.71 (CQUE 713212), which was the ‘master number’ for the account held at UBS by Sheikh Bahwan set out at sub-paragraph (6) above. Between 4th May 2015 and 4th October 2017, €37,391,050 were transferred from Sheikh Bahwan’s 713212.71 (CQUE 713212) ‘master’ account to 206-193711.70V.
- (9) All payments out of the UBS account 206-193711.70V (save for charges and similar expenses) were made to Good Faith. By those transfers, between 19th May 2015 and 17th October 2017 €37,391,050 was funnelled from Sheikh Bahwan - through the account in Mr. Kumar’s name - to Good Faith. Specifically:
- a. The total sums paid: (i) from the 713212.71 (CQUE 713212) ‘master’ account to account 206-193711.70V; and (ii) from 206-193711.70V to Good Faith over that period are virtually identical, with only a €8,314 difference.
- b. As shown by the chart at Robinson 2, [5.16], there is a striking correlation between payments into UBS account 206-193711.70V and the payments out to Good Faith.
- c. Mr. Robinson concludes that [Robinson 2, [5.18]-[5.19]]: (i) *‘I am satisfied that an amount of at least €37,391,050 was transferred to Good Faith from an account bearing Mr. Kumar’s name, which was beneficially owned by Sheikh Bahwan’*; and (ii) *‘[i]n my view, account 206-193711.70V was being used as [a]n intermediary account for Sheikh Bahwan to send funds to Good Faith, the*

purpose of which was to conceal the source of the funds being sent to Good Faith, which in my view originated from Nissan/NME'.

- (10) Prior to the Debarring Order, it was common ground that a cumulative amount of €10,850,000 and US\$ 334,000 was transferred from Good Faith to Beauty Yachts between 2015 and 2017. Those payments were made on the following dates and in the following amounts, adopting the numbering used at Robinson 1, [8.2]:

Number	Date	Payment (€, save where otherwise specified)
BDO30	9 October 2015	2,450,000
BDO31	31 March 2016	2,500,000
BDO32	19 September 2016	2,500,000
BDO33	7 April 2017	<u>US\$</u> 20,000
BDO34 ⁷	25 April 2017	<u>US\$</u> 100,000
BDO35	19 May 2017	3,400,000
BDO36	28 June 2017	100,000
BDO37	28 June 2017	<u>US\$</u> 100,000
BDO9	25 July 2017	5,000,000
BD10	30 July 2018	5,000,000
Total (US\$)		12,683,415

⁷ Whilst Mr. Robinson notes that he has not been provided with any documentation supporting this payment, it was not disputed by the Defendants' pleadings prior to the Debarring Order; and so is accepted: Robinson 1, [8.6].

- (11) Prior to the Debarring Order, it was common ground that a cumulative amount of US\$ 27.2 million was transferred from Good Faith to Shogun (set out at paragraph 30 above). Those were the relevant payments through the 'Good Faith' route.

Payments through Brasilensis

- (12) Banking documentation (*per* Robinson 2, [6.5]) shows that:
- a. US\$ 4,500,000 was paid to Brasilensis S.A.L. (a Lebanese company with registration number 1802456 and registered at Corniche du Fleuve, First Floor, Nassar Building, Beirut: 'Brasilensis'⁸) from Sheikh Bahwan's account with number 230-713212.70T in two instalments: (i) US\$ 2,000,000 on 30th September 2013; and (ii) US\$ 2,500,000 on 29th October 2013.
 - b. A further €2,000,000 was transferred from Sheikh Bahwan's account with number 230-713212.71Z to Brasilensis on 30th July 2013.
 - c. Mr. Robinson accordingly confirms that he has '*vouched [US]\$ 6,776,423⁹ out of [US]\$ 9,621,951 to documents within the Swiss Banking Documents*': Robinson 2, [6.8].
- (13) As regards Brasilensis payments, that leaves a single transfer of €2,500,000 (numbered BDO14 by Robinson 1, [6.5]) alleged by the Claimants to have been made on or around 20th November 2013: Re-Amended Statement of Claim, [23.4]. Although there is no banking documentation directly evidencing this payment, several documents show on the balance of probability that the payment was made:
- a. On 20th November 2013, Mr. Gebran emailed Mr. Omar Bahwan to request that €2.5 million be transferred to Brasilensis.

⁸ As was common ground between the parties on the pleadings prior to the Debarring Order: Re-Am SOC, [9]; Amended Defence, [16.1].

⁹ At an exchange rate in respect of the Euro payment of €1: US\$ 1.1382: see Robinson 1, [1.16].

b. Mr. Gebran emailed Mr Omar Bahwan on 5th December 2013 listing '[t]he amounts we received till today, 5 December 2013' as totals of: (i) US\$ 8,528,049; and (ii) €100,000. At an exchange rate of €1: US\$ 1.1382 (adopted at Robinson 1, [1.16]), that would be a total amount received of US\$ 8,641,869. That message would not have made sense if only US\$ 4,500,000 and €2,000,000 (at the same exchange rate, a total of US\$ 6,776,400) had been transferred by Sheikh Bahwan to Brasilensis.

(14) Prior to the Debarring Order, it was common ground on the pleadings that Brasilensis: (i) transferred US\$ 1.4 million to Beauty Yachts on or around 5th March 2015; and (ii) US\$ 7.5 million was transferred from Brasilensis to Mr. Ghosn personally in or around March 2015: Amended Defence, [36]-[37].

(15) On the basis of the above, Mr. Robinson confirmed his view expressed at Robinson 1, [2.8] as follows:

"I stated [in Robinson 1] I was satisfied that the [US]\$ 32 million transferred from Nissan (alternatively NME) to SBA is mixed with amounts transferred to and from parties set out in Sections 6 to 10 of my First Report. Based on the Swiss Banking Documents, I have now reviewed documents showing that the Suhail Bahwan Group (of which SBA is a part) significantly funded Sheikh Bahwan's account from which transfers to Good Faith (via an account bearing Mr. Kumar's name, beneficially owned by Sheikh Bahwan) and Brasilensis were made."

Use of the money by Beauty Yachts

[33] As noted in the 'Factual Background' section above, it is common ground that Beauty Yachts contracted to buy the Yacht at a purchase price of €12,199,147, to be paid in five instalments. Prior to the Debarring Order, however, the Defendants had merely admitted that '*the corporate records of Beauty Yachts contain a contract to this effect*'. The Defendants did not admit that '*any amounts were paid on any particular dates as specified*': Amended Defence, [18.2].

[34] The Court finds as a fact that Beauty Yachts used the funds it received from Good Faith and Brasilensis to pay Ferretti each instalment for the Yacht:

- (1) As identified at Robinson 1, [10.9], there is the following corroborating contemporaneous correspondence in respect of each payment by Beauty Yachts (using the numbering adopted at Robinson 1, [10.9]):

Number	Amount (€)	Date	Correspondence
BDO47	1,219,914.70	5/6 March 2015	Mr. Gebran's email to NECB Bank requesting that Beauty Yacht's account be debited by €1,219,914.70 to Ferretti, giving the ' <i>Reference</i> ' as ' <i>Sale and Purchase Contract for Ferretti Custom Line ... as the first payment of the price</i> ': Robinson 1, Exhibit 18A
			NECB Bank's transfer document in that amount, giving the ' <i>Ordering Customer</i> ' as Beauty Yachts: Robinson 1, Exhibit 18A
			Ferretti's email to Mr. Gebran confirming ' <i>receipt of the down payment</i> ' for the Yacht in that sum: Robinson 1, Exhibit 18A
BDO48	2,439,829.40	9 October 2015	Mr. Gebran's handwritten note (in French) to NECB Bank requesting that Beauty Yacht's account be debited by €2,439,829.40 to Ferretti, giving the ' <i>Reason</i> ' as: ' <i>Second instalment as per the Sale and Purchase Contract for Ferretti Custom Line ...</i> ': Robinson 1, Exhibit 18B
BDO49	2,439,829.40	31 March 2016	Mr. Gebran's handwritten note (in French) to NECB Bank requesting that Beauty Yacht's account be debited by €2,439,829.40 to Ferretti,

			giving the 'Reference' as: ' <i>Third instalment as per the sale and Purchase contract for Ferretti Custom Line ...</i> ': Robinson 1, Exhibit 16F
			Saradar Bank's (renamed from NECB) ' <i>ON LINE STATEMENT</i> ' showing a debit of €2,439,829.40 from Beauty Yachts' account to Ferretti: Robinson 1, Exhibit 16M
BDO50	2,439,829.40	20 September 2016	Mr. Gebran's handwritten note (in French) to Saradar Bank requesting that Beauty Yacht's account be debited by €2,439,829.40 to Ferretti, giving the 'Reference' as: ' <i>Sale and Purchase Contract for Ferretti custom line ... Fourth Installment [sic]...</i> ': Robinson 1, Exhibit 16G
			Saradar Bank's ' <i>ON LINE STATEMENT</i> ' showing a debit of €2,439,829.40 from Beauty Yachts' account to Ferretti: Robinson 1, Exhibit 16M
BDO51	3,315,358.50	22 May 2017	Saradar Bank's transfer document in that amount, giving the ' <i>Ordering Customer</i> ' as Beauty Yachts: Robinson 1, Exhibit 18C

- (2) As shown by the chart at Robinson 1, [10.13], there is a striking correlation between: (i) the amounts paid to Beauty Yachts by Good Faith and Brasilensis; and (ii) and the sums paid by Beauty Yachts to purchase the Yacht in each relevant quarter. Thus, the relevant money flows were as alleged by the Claimants in their Re-Amended Statement of Claim.

The Japanese law evidence

[35] For the reasons given at paragraphs 40 to 42 below, Nissan's and NME's claims are all governed by BVI law (save for the content of the duties owed by Mr. Ghosn to Nissan). Without prejudice to that, the Japanese law evidence as confirmed by the Claimants' expert on Japanese law, Ms. Ito, on affirmation was as follows:

- (1) Both Nissan and NME would be entitled to recover against Mr. Ghosn US\$ 22 million as loss and damage reasonably and probably caused by Mr. Ghosn's breach of his duties to Nissan, in respect of payments authorised by Mr. Ghosn, under Japanese law: Ito 1, [(D)1.3(i)].
- (2) As to the two US\$ 5 million payments finally authorised by Mr. Saikawa, these can also be recovered as loss and damage from Mr. Ghosn provided that his informal direction of the CEO Reserve Fund can be considered to have reasonably and probably caused the payments: Ito 1, [(D)1.3(ii)]. This requires either that: (a) those damages would ordinarily arise from Mr. Ghosn's failure to perform his obligations; or (b) (if those damages do not count as such 'ordinary damage'), they would flow from special circumstances foreseen or foreseeable by Mr. Ghosn: Ito 1, [(D)2.3.2]. The Claimants' position is that it was reasonably foreseeable (and, indeed, intended by Mr. Ghosn) that his lobbying of Mr. Saikawa would lead to payment of the payment of US\$ 10 million away from Nissan/NME.
- (3) Moreover, Nissan and NME have tort claims against Mr. Ghosn and Beauty Yachts (through its representation by Mr. Gebran [Ito 1, [(Q)3]], but not Ms. Ghosn) in tort in the same sums: Ito 1, [(H)1, 2 & 4].
- (4) Ms. Ghosn would be liable in tort to Nissan and NME in the sum of US\$ 5 million if Ms. Ghosn encouraged Mr. Ghosn to become involved in the decision-making process to make the 20th July 2018 transfers in that sum from the CEO Reserve Fund to SBA: Ito 1, [(J)5.2].

- (5) Under Japanese law, both Nissan and NME can recover the said damages because the damage of a wholly-owned subsidiary is held to be equivalent to that of its parent: Ito 1, [(D)2.4.4] & Ito 1, [(B)4].
- (6) NME (but not Nissan) has the right to return of the unjust enrichment of Mr. Ghosn (in the sum of US\$ 7.5 million); and (ii) Beauty Yachts (in the sum of approximately US\$13.665 million): Ito 1, [(M)1.4].
- (7) No proprietary remedies are available under Japanese law.

[36] The Claimants rely upon the contents of Ito 1 and Ito 2, save for the following corrections to **Ito 1** which she confirmed during examination in chief and/or cross-examination:

Ito 1 Section & Paragraph	Hearing Bundle Reference	Original Text	Corrected Text (emphasis underlining added)
A(5.1); fn.12	C/1439	'Hanji No. 2019, p.90'	'Hanji No. 20 <u>9</u> 1, p.90'
G(4.3.2); fn. 4	C/1478	'January 9, 1919'	' <u>December</u> 9, 1919'
G(4.3.2); fn. 5	C/1478	'February 26, 1957, Minshu Volume 11, No. 3, p.343'	' <u>March</u> 26, 1957, Minshu Volume 11, No. 3, p. <u>5</u> 43'
O(2.2) (x 2)	C/1512	'Article 261, Paragraph 1'	'Article 261, Paragraph <u>3</u> '
Q(4.1); fn. 2	C/1519	'Saibanminshu No. 99, p.8'	'Saibanminshu No. 99, p. <u>8</u> 9'
S(4.1.2); fn. 2	C/1525	'Article 266, Paragraph 31'	'Article 266(<u>3</u>), Paragraph <u>3</u> 1'

[37] Ms. Ito was subject to questioning by the Court on three points, none of which materially affect the substantive conclusions set out above:

- (1) Ms. Ito was asked about the difference between Japanese law and common law (on the basis that the CV annexed to Ito 1 indicated that she was admitted to the Bar of the State of New York in 1995). Her response was that Japan is a civil law system, but that if there is a relevant Supreme Court authority then that would be at least strongly persuasive.
- (2) Ms. Ito was questioned on the constituent elements for a binding contract under Japanese law. Her answer was that Japanese law is similar in requiring - for example - a matching expression of will (i.e., under BVI law, offer and acceptance) and certainty, but that Japanese law does not require consideration for an agreement to be binding and enforceable. This was consistent with the opinion expressed in her report at Section R.
- (3) Ms. Ito was asked whether she had summarised the '*range of opinions*' in her expert report (as required by CPR 32.14(1)(e)), on the basis that she had used the terms '*conclude, determine or consider*' when she considered that there was a greater than 50% chance that a Japanese Court would reach a particular decision. This appeared largely to be a matter of expression, since in re-examination Ms. Ito was taken to parts of her original report in which she had, in substance, summarised a range of opinions and given reasons for her opinion: for example, in discussing whether Japanese law recognised the concept of '*shadow*' or '*de facto*' directors at Section P(3.1-5). In any event, it is not the role of the Court to search for possible alternative conclusions on Japanese law. That would have been the Defendants' legal representatives' role in cross-examination, had they not been debarred as explained at paragraphs 5 to 11 above.

Nature of the payments

[38] The Claimants' case is that: (i) the sums paid away from Nissan/NME were '*for purposes other than the proper purposes of Nissan or NME*' [Re-Amended Statement of Claim, [22A]]; and (ii) the payments to Mr. Ghosn, Beauty Yachts and Shogun were '*made in order to benefit Mr. Ghosn or his nominees and in order to corrupt him so that he would exercise the powers he held as*

CEO and Chairman of Nissan for the benefit of SBA and for the benefit of himself and his nominees': Re-Amended Statement of Claim, [22C]. That is correct, by reference to the following findings:

- (1) At first blush, the payment of US\$ 32 million from the subsidiary of a Japanese car producer, through the Chairman of the group of one its National Sales Companies and two Lebanese companies, ultimately to: (i) its (ex-) CEO and Chairman; (ii) a BVI company to buy a yacht; and (iii) a company owned 90% by its CEO/Chairman and 10% by his son, is highly suspicious.
- (2) As to the BVI company (Beauty Yachts), this was used by Mr. Ghosn as a vehicle for: (a) the dishonest receipt and disbursement of monies for his own benefit and the benefit of his nominees; (b) the acquisition of assets for the benefit of Mr. Ghosn and his nominees; and (c) to conceal his participation in a wrongful scheme.¹⁰ In particular:
 - (i) Mr. Ghosn attended a meeting with Mr. Alain Maaraoui of Sea Pros (a distributor of yacht brands based in Lebanon) as early as 31st December 2013 to discuss *inter alia* 'the required documents to establish a new BVI company'. Mr. Maaraoui's email to Mr. Ghosn (only) dated the next day asked Mr. Ghosn for 'the company name you would like to have'. Mr. Maaraoui subsequently forwarded that email to Mr. Gebran, noting that 'these were already sent to Mr. Ghosn'.
 - (ii) Sea Pros subsequently corresponded about setting up Beauty Yachts with Mr. Gebran and Ms. Claudine (Bichara) Oliviera, who it was common ground on the pleadings prior to the Debarring Order is Ms. Ghosn's sister: Re-Amended Statement of Claim, [9] [A/2/33] & Amended Defence, [16.3(b)].
 - (iii) At some point in December 2014, a dispute arose with the Board of the Ferretti Group about whether the Yacht would be named 'Navetta 36m' or 'Navetta 37m'. Mr. Maaraoui emailed Mr. Ghosn on 19th December 2014 stating:

¹⁰ As pleaded by the Claimants at: Re-Am SOC, [11].

'Dear **Mr. Ghosn**,

*I am pleased to inform **you** that finally the board of the Ferretti Group have been convinced and accepted my request to change the Name of the Navetta 36m into Navetta 37m, since in fact she is a 37m Yacht ...*

*Finally **your boat** will be Navetta 37m#3". (Emphasis added.)*

- (iv) Mr. Charles Maaraoui (Mr. Alain Maaraoui's brother) wrote to Mr. Gebran on 26th January 2015 giving two options for ownership of the Yacht; the second of which was incorporation of a BVI company with the 'advantage' that *'the Client's name or other details will not appear anywhere with the shipyard (or in Italy for that matters) ...'*. This email was forwarded by Mr. Gebran to Mr. Ghosn, who reported (in French) that he had *'told him [Mr. Maaraoui] of your [Mr. Ghosn's] intention'*.
- (v) On 6th February 2015, Mr. Gebran emailed Mr. Maaraoui concerning the pending issue of the *'company of the client [emphasis added]'*. Mr. Gebran stated that *'the client would prefer to have the contract signed with the shipyard directly. This supposes a company in which he does not appear ... [emphasis added]'*.
- (vi) On 11th February, Mr. Gebran emailed Mr. Ghosn saying (in French): *'Mr Maaraoui writes to me directly now since I am legally his client :)'*.
- (vii) On 13th February 2015, Mr. Gebran emailed Mr. Ghosn recording his meeting with *'the two Maaraoui brothers'* on 11th February, relaying that *'I passed on the message to them about the final price of 12,200,0000'* and *'[t]hey told me that indeed this price was final'*.
- (viii) On 19th February 2015, Mr. Gebran emailed Mr. Ghosn (in French) stating: *'I would like to inform you that the contract has been signed. Payment should be expected next week'*. This was a reference to the Yacht Sales Contract, which was concluded on the same date.

- (ix) UBS correspondence notes record Mr. Kumar as being asked about the rationale for transfers through Good Faith. Mr. Kumar responded:

'[H]e has been working for [Sheikh Bahwan] for many years ... The payments from [Sheikh Bahwan] can be looked at as bonus payments or other kind of compensation. Client understands that it is not logical in our eyes to give such a large amount of money to somebody without any legal contract or agreement but he asked me to understand that this is how business between two trusted persons is done in the Middle East (very old school)'.

- (x) It is unfortunate that this was considered by UBS to satisfy its regulatory requirements. On 2nd September 2015, Mr. Gebran emailed Mr. Kumar stating: *'Our friend is available for a meeting in Beirut on Saturday 12 September at 11:30 at my office or at his hotel (Phoenicia) [emphasis added]*'. As to this meeting:

- i. Prior to the Debarring Order, it was common ground on the pleadings that this meeting took place between Mr. Ghosn, Mr. Kumar and Mr. Gebran on 12th September 2015 at the Hotel Phoenicia in Beirut: Re-Amended Statement of Claim, [26] & Amended Defence, [38.4]. Accordingly, it must have been accepted that the reference to *'our friend'* in Mr. Gebran's email was a clandestine reference to Mr. Ghosn.
- ii. That meeting took place: (i) 11 days before 10,000 shares in Beauty Yachts were transferred to Good Faith (see paragraph 22(2) above); and (ii) the month before the first payment from Good Faith to Beauty Yachts was made: see paragraph 32(10) above.
- iii. It is to be inferred that the meeting between Mr. Ghosn, Mr. Gebran and Mr. Kumar on 12th September 2015 at the Hotel Phoenicia was to discuss and arrange the corrupt scheme by which sums paid away from Nissan/NME other than for their proper purposes were cycled through Mr. Kumar and Good Faith to benefit Mr. Ghosn or his nominees; in particular, through Beauty Yachts.

- iv. Incidentally, the Hotel Phoenicia was the same hotel at which Mr. Ghosn and Ms. Ghosn met Ms Aboujaoude on 21st August 2017, following Mr. Gebran's death, to sign '*acceptation [sic] of the share transfer*' for Beauty Yachts.
- (xi) On 1st August 2016, Mr. Kumar emailed Mr. Gebran requesting confirmation of his understanding that the difference between the '*Total demand*' and '*Total paid till date*' was '*US\$ 2.88 [million]*'. Mr. Gebran forwarded that email to Mr. Ghosn, who responded the next day: '*There is only one question that helps to understand the difference. Can we talk on the phone today or tomorrow?*'. On 5th August 2016, Mr. Gebran responded to Mr. Kumar saying '*I spoke to our friend. In his opinion the remaining amount is around 3 [million] Euros*'. Given the preceding email exchange between Mr. Gebran and Mr. Ghosn, '*our friend*' was clearly a reference to Mr. Ghosn.
- (xii) On 17th May 2017, Sea Pros were chasing Mr. Gebran for payment of the final instalment of the Yacht. He responded: '*I am waiting for the confirmation of Mr Carlos Ghosn on the amount to be transferred. The transfer will be done as soon as possible after his confirmation*'. Mr. Alain Maaraoui nevertheless forwarded the email chain to Mr. Ghosn, saying '*[s]orry I forgot to copy you in the below email*'.
- (xiii) Mr. Gebran died on 16th August 2017.¹¹ The Master of the Yacht, Chady Haddad, sent the petty cash, credit card expenses and crew salary slip for July 2017 to Mr. Gebran's email address on 2nd August 2017. That email was forwarded to Ziad Gebran, who referred to Fady Gebran as '*Papa*'. One of Fady Gebran's family members then used Fady Gebran's email address to tell Ziad:
- "For example the boat expenses are paid from a company in saradar called beauty yachts and when beauty yachts is out of money, we have to transfer from Phoinos that is in Audi and when Phoinos is out of money we have to ask from diviendu kumar from Nissan to transfer money to phoinos and we transfer to*

¹¹ As was common ground between the parties on the pleadings prior to the Debarring Order: Re-Am SOC, [15]; Amended Defence, [22.1].

beauty yachts. It's all a procedure that I found out lately when Fady went to hospital and I had to look through the file of Phoinos for a transfer needed from the architect. Fady used to work by himself on all of that and he handled the matters in his own way ...".

(xiv) On 18th January 2018, Mr. Maaraoui emailed Mr. Ghosn stating:

"After our several discussions and meetings regarding the trimming issue on your Navetta 37m#2, I have reached a final agreement with the shipyard which technical terms have been reviewed and approved by our appointed surveyor ... all of which reflected and incorporated in the attached agreement. Should you approve the contents kindly have it signed by yourself or if you prefer by Mrs. Amal Abou Jaoude [sic] on your behalf and I will forward to the shipyard, and in case of any comments also please let me know".

(3) In addition to the above, it is clear that the Yacht was - and was treated by all the Defendants (including Beauty Yachts' directors and representatives including Mr. Gebran) - as 'Mr. Ghosn's boat' by reference to his close involvement with the operation of the Yacht and payment of its expenses. In particular:

- (i) Mr. Alain Maaraoui emailed Mr. Ghosn on 8th June 2016, attaching '*two detailed estimates for annual operational expenses*' of the Yacht for 2017 and 2018.
- (ii) On 29th September 2016, Seas Pros emailed Mr. Ghosn requesting that he settle the '*50% down payment on your Williams Diesel Jet Tender 565S [emphasis added]*' of £37,582. Mr. Ghosn forwarded that email to Mr. Gebran, stating (in French) in the covering email: '*This invoice concerns the boat. Please pay it through the usual channels by putting the invoice in the name of the company that owns the boat [emphasis added]*'.
- (iii) On 5th December 2016, Mr. Ghosn wrote to Mr. Gebran (in English) stating: (i) '*[f]or the boat itself, the remaining balance will be between €3,361,000 and €3,386,041 ... To this will have to be added 37,582 pounds for the remaining 50% of the tender and 33,245 euros for two jetskis*'; (ii) '*we will start the captain whose name is Chadi Haddad whose salary is set to 5000 dollars per month. Then the engineer whose salary would be around \$3,000 per me. These two individuals would be employed from February 2017*'; (iii) '*I suggest that once the*

drafts of the contracts have been drawn up, you send them to me to check all the terms before signing definitive'; and (iv) 'a credit card should be set up on the beauty yachts account ...'.

- (iv) Further to the above email exchange, Mr. Gebran emailed Mr. Ghosn on 26th January 2017 (in French) enclosing a draft of the Master's employment contract *'for your [Mr. Ghosn's] comments before sending it to Mr Maaraoui'*.
- (v) On 8th December 2016, Mr. Alain Maaraoui emailed Mr. Ghosn attaching the final invoice for *'two jet skis with their requested accessories'*. That email asked for prompt payment *'so that we can confirm the order and have them delivered on time for installation on board of your Navetta 37 by the shipyard'*. Mr. Ghosn forwarded that email to Mr. Gebran, asking him (in French) to have Beauty Yachts pay the bill. On 1st February 2017, Mr. Gebran confirmed to Mr. Ghosn (in French) that *'we used the Beauty yachts account to pay for the purchase of the two jetskis'*.
- (vi) On 15th August 2017, Mr. Alain Maaraoui emailed Mr. Ghosn attaching *'the final settlement of the penalty due that you should hav receive [sic] in the company owning the boat'*. This related to a credit of €93,743.99 from Ferretti, as explained by Mr. Ghosn's email of the same date to Ms. Aboujaoude.
- (vii) Mr. Ghosn decided who visited the Yacht, as shown by an email dated 16th September 2018 to the Master stating: *'I want to inform you that at the request of Alain Maaraoui I authorized (exceptionnally [sic]) Elias el Murr to visit my boat'*.
- (viii) Mr. Ghosn also asked the Master for updates of the Yacht and the crew, for example by an email dated 6th October 2018.
- (ix) The Master emailed Mr. Ghosn with the timetabling of hauling and lifting the Yacht for on-board work.

- (x) On 20th October 2018, Mr. Alain Maaraoui sent Mr. Ghosn CVs of potential stewardesses and asked him to advise if he wanted to arrange an interview with any of them.
- (4) The conclusions above are consistent with Mr. Robinson's findings at Robinson 2, [2.9] (confirming his view at Robinson 1) that:

"[M]y opinion that the flow of funds is consistent with a fraudulent disbursements scheme designed ultimately to benefit the person who initially approved the payments out of NME, i.e., Mr Carlos Ghosn, is reinforced by the documentary evidence contained within the Swiss Banking Documents, particularly the direct correlation I have identified between the transfer of funds from Sheikh Bahwan to Mr. Kumar and the transfer of those funds onwards to Good Faith."

Specifically, Mr Robinson confirmed his conclusions in Robinson 1 that:

- (i) He was 'not satisfied as to the explanations given by the Defendants regarding their explanations of why payments were made to Mr. Ghosn and his related companies' [Robinson 2, [2.2(b)] & [2.7]; and
- (ii) '[T]he use of blank entries in the SBA receivables ledger and the payment of funds received by SBA from Nissan/NME to its promoters who are the same individuals who made payments to entitles related to Mr Carlos Ghosn, is consistent with a fraudulent disbursements scheme designed ultimately to benefit the person who initially approved the payments out of NME, i.e. Mr Carlos Ghosn' [Robinson 2, [2.2(e)] & [2.7]].

[39] For the reasons set out above, it is in the Court's respectful judgment clear as a matter of fact that the sums paid away from Nissan/NME were for purposes other than the proper purposes of Nissan or NME; and the payments to Mr. Ghosn, Beauty Yachts and Shogun were made in order to benefit Mr. Ghosn or his nominees. The 'legal' consequences of this are set out below.

Applicable law

[40] The first step in determining the applicable law is 'characterisation', namely classification of the issues into broad categories of law such as tort, restitution and property. Characterisation is a

matter for the law of the forum, but should be conducted: (i) with ‘*an eye to the substance of the issue*’ rather than ‘*the formal clothes in which it is dressed*’; and (ii) ‘*in [a] broad spirit of tolerance and compromise*’.¹² As to this:

- (1) The Claimants’ bribery claims fall to be characterised as tortious: **Livingston Properties Equities Inc et al. v JSC MCC Eurochem et al.**,¹³ at [51] (Webster JA).
- (2) Dishonest assistance claims also fall to be characterised as tortious:
 - a. In **Sibir Energy PLC v Gregory Trading SA**¹⁴ Hariprashad-Charles J. characterised dishonest assistance claims as tortious and therefore applied the ‘double actionability’ rule: at [107] & [115]-[116]. Her Ladyship’s conclusion was not challenged on appeal, which concerned the applicable law rule for knowing receipt (dealt with at paragraph 40(4) below).
 - b. The English common law also characterises dishonest assistance claims as tortious: **OJSC Oil Company Yugraneft v Abramovich et al.**,¹⁵ at [170]-[217] (Christopher Clarke J).
 - c. Whilst the contrary approach seems to have been adopted by the Court of Appeal in **Eurochem** (subsequently applied in **Wilton Trustees (IOM) Ltd v AFS Trustee Ltd**¹⁶): (i) there was apparently no detailed discussion of this issue by the Court of Appeal; and (ii) neither **Sibir Energy** (at first instance) nor **Yugraneft** were referred to by the Court.
- (3) Unjust enrichment / had and received claims are obviously characterised as restitutionary: (i) **El-Ajou v Dollar Land Holdings PLC et al (No.1)**,¹⁷ at 738a-b (Millet J); and (ii) **Yugraneft**, at [262] (Christopher Clarke J).

¹² Anderson: Caribbean Private International Law (2nd edn., Sweet & Maxwell 2014), at [2-002].

¹³ BVIHCV2016/0042-46 (Unreported, delivered 18th September 2018).

¹⁴ BVIHCV2005/0174 (Unreported, delivered 29th November 2005).

¹⁵ [2008] EWHC 2613 (Comm).

¹⁶ BVIHC (COM) 2018/154 (Unreported, delivered 15th April 2019).

¹⁷ [1993] 3 All ER 717.

- (4) As to the equitable 'twin' of unjust enrichment / had and received claims, knowing receipt claims should be characterised as restitutionary: (i) **Sibir v Gregory** (CA), at [12] (Barrow JA); and (ii) **Yugraneft**, at [237] (Christopher Clarke J).
- (5) Breach of fiduciary duty claims also fall to be characterised as restitutionary: **Eurochem** (CA), at [51]. Although there is some English authority characterising breach of fiduciary duty claims as matters of company law:
 - a. This argument does not in any event work in respect of NME's claims, since: (i) Mr. Ghosn was not a *de jure* director of NME; and (ii) Beauty Yachts (against whom breach of fiduciary duty claims are pleaded on the basis that it was Mr. Ghosn's agent and/or nominee and/or alter ego) was not a director of NME.
 - b. With regard to Nissan's claims against Mr. Ghosn, the decision of the English Court of Appeal in **Base Metal Trading Ltd v Shamurin**¹⁸ has not been followed in the Eastern Caribbean: **Eurochem** (CA), at [4], [9] & [51] (Webster JA). The BVI position is accordingly that only the substantive content of duties owed by a director to his or her foreign company are determined by the law of incorporation of the company. The requirements of any claims arising from breach(es) of such duties are governed by the law determined in accordance with the principles set out at paragraph 41(2) below.

[41] The next step in the conflict of laws analysis is to determine which governing law rules apply to each category of claims (as characterised above). As to this:

- (1) The Claimants' tortious claims (bribery and dishonest assistance) are governed by BVI law, because:
 - a. As to the dishonest assistance claims, Beauty Yachts' dishonest assistance was committed in the BVI; or at least substantial and efficacious acts of assistance were committed here. The acts of assistance alleged against Beauty Yachts are receiving and retaining (or agreeing to do so); and/or facilitating the onward

¹⁸ [2004] EWCA Civ 1316; [2005] 1 All ER (Comm) 17.

transfer of the monies paid to SBA, including to Beauty Yachts. Beauty Yachts was incorporated in the BVI and registered here, and the Yacht ultimately received by Beauty Yachts was registered in the BVI. The Claimants' dishonest assistance claims against Beauty Yachts therefore concern purely domestic tort(s) to which BVI law applies: (i) **Anderson: Caribbean Private International Law** (2nd edn., Sweet & Maxwell 2014), at [12-007]; and (ii) **Kuwait Oil Tanker Co SAK et al v Al-Bader et al (No.3)**,¹⁹ at [172]-[174] (Nourse LJ, giving the judgment of the Court).

- b. As to the Claimants' bribery (and, if the above analysis were wrong, dishonest assistance) claims, the application of any 'double actionability' rule is subject to the 'flexible exception' which applies to make only BVI law applicable to the entirety of those claims; or at least the issues relating to remedies: **Red Sea Insurance Co Ltd v Bouygues SA et al**,²⁰ at 207A-B (Lord Slynn, giving the judgment of their Lordships). Pursuant to the 'flexible exception', a foreign tort '*may be governed by the law of the country which, with respect to the issue, has the most significant relationship with the occurrence and with the parties*': **Red Sea**, at 206C. The 'flexible exception' can apply to make the law of the forum applicable to '*specific isolated issues*', or '*the whole claim*': **Red Sea**, at 207B. Whilst the Privy Council said that the latter '*may be rare*', it would be appropriate where '*all or virtually all of the significant factors are in favour of the [relevant law]*': **Red Sea**, at 207B. The 'flexible exception' is applicable here because: (i) the pleaded purpose of the bribery/dishonest assistance was to funnel money to a BVI company, Beauty Yachts; (ii) those sums were used to purchase the Yacht, which was at all material times (and remains) registered in the BVI; and (iii) the Claimants seek multiple remedies against Beauty Yachts as a BVI company (see, in particular, Re-Amended Statement of Claim, [35], [36] &

¹⁹ [2000] 2 All ER (Comm) 271.

²⁰ [1995] 1 AC 190.

[40A]). At the very least, BVI law is applicable to the ‘issue’ of available remedies.

- (2) As to the Claimants’ restitutionary claims (unjust enrichment, knowing receipt and breach of fiduciary duty), the applicable law rule for restitutionary claims in the Eastern Caribbean is that those claims are governed by ‘*the proper law of the obligation ... to restore the benefit of an enrichment obtained at another’s expense*’: **Sibir v Gregory** (CA), at [23] (Barrow JA). ‘*[T]he proper law of the obligation*’ is ‘*the law of the country with which the obligation has the closest and most real connection*’: **Sibir v Gregory** (CA), at [23]. In the Eastern Caribbean, the law with which the relevant obligation(s) have their ‘*closest and most real connection*’ is generally the place where the enrichment took place: **Sibir v Gregory** (at first instance), at [77] (Hariprashad-Charles J). In this case: (i) Beauty Yachts was a BVI company which was enriched in the BVI by receipt of the relevant funds and/or its purchase of the Yacht; and (ii) Mr. Ghosn was enriched by the Yacht, at all material times registered in the BVI.²¹ Standing back, this action concerns a fraud/bribery scheme which was directed at the funnelling of funds to a BVI company in order to enable Mr. Ghosn’s ill-gotten gains to be held from the BVI.
- (3) As to any remaining proprietary issues, the applicable law of property claims relating to a tangible moveable asset is the law of the country where a thing is situated.²² The Yacht, like many other vessels, is deemed to be located in the jurisdiction of her registration.²³ Here that was (and is) the BVI.
- (4) With regard to both (a) knowing receipt; and (b) the Claimants’ equitable proprietary claims, BVI law governs issues of tracing: (i) **Yugraneft**, at [347]-[353] (Christopher Clarke J); and (ii) **Dicey, Morris & Collins on The Conflict of Laws** (16th edn., Sweet & Maxwell 2022), at [36-097]-[36-098].

[42] For the reasons given above, save for the content of the Japanese company law duties of Mr. Ghosn as a director of Nissan, the applicable law of the entirety of the Claimants’ claims against

²¹ No enrichment of Shogun in the BVI is advanced by the Claimants, but Shogun is not a Defendant to this action.

²² Dicey, Morris & Collins on The Conflict of Laws (16th edn., Sweet & Maxwell 2022), at [25R-001].

²³ Harneys: British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell 2018), at [4.003]; fn. 9.

all the Defendants is BVI law (without any condition that those claims/issues be actionable under Japanese law). The BVI law position on each claim advanced by the Claimants is set out below.

Causes of action under BVI law against Mr. Ghosn and/or Beauty Yachts

[43] The Claimants advance five causes of action against Mr. Ghosn and/or Beauty Yachts:

- (1) Breach of fiduciary duty;
- (2) Bribery;
- (3) Unjust enrichment;
- (4) Dishonest assistance; and
- (5) Knowing receipt.

Breach of fiduciary duty

[44] As the *de jure* director of Nissan (indeed, at the material time its CEO and/or Chairman), Mr. Ghosn owed the following duties to Nissan under Japanese law: Ito 1, [A(1.1)]-(6.3):

- (1) A duty to make decisions regarding Nissan's business activities with the due care of a faithful manager under Article 644 of the Japanese Civil Code (Act No. 89 of 1896: the 'Civil Code') [Ito 1, [A(2.2.1)]];
- (2) A duty to perform his duties in compliance with laws and regulations, the articles of association and resolutions of shareholders' meetings of Nissan under Article 355 of the Companies Act of Japan (Act No. 86 of 2005: the 'Companies Act') [Ito 1, [A(3.1)]] (which include what is now Article 644 of the Civil Code: Ito 1, [A(3.2)]];
- (3) A duty of loyalty to Nissan, including not to seek to advance his own or any third party's interests at the expense of Nissan's interests under Article 355 of the Companies Act [Ito 1, [A(4.1-2)]]; and

- (4) A duty immediately to report any fact detected which may cause substantial detriment to Nissan to a board of statutory auditors under Article 357 of the Companies Act [Ito 1, [A(1.1(e))].
- [45] These duties were fiduciary in character, or at the very least were akin to fiduciary duties. Under Japanese law, a company and its directors are in an agency relationship: Ito 1, [A(2.1)]. Specifically:
- (1) Article 330 of the Companies Act states that: *'The relationship between a Joint Stock Company and its Officers or accounting auditors shall be governed by the provisions on an agency relationship'*. The term 'Officers' is defined in Article 329, paragraph 1 of the Companies Act to include directors.
- (2) Article 646 of the Civil Code requires an agent to account for monies and other benefits received during the course of administering his or her agency work: Ito 1, [A(i)(3.3)].
- [46] On the basis of the factual conclusions set out above, Ms. Ito is correct in concluding that on the balance of probabilities Mr. Ghosn breached his Japanese law duties as a director by his involvement in use of the CEO Reserve Fund for payments to SBA: Ito 1, [C(1.2)-(4.7)]. Those breaches were intentional, in particular because Mr. Ghosn knew that his conduct was illegal and was aware of his duty of loyalty, which he breached. In particular, Mr. Ghosn signed *'NISSAN CODE OF CONDUCT (JAPAN) ~ Our Premises ~ Pledges'* in 2008, 2014, 2016 and 2017 in which he promised to: (i) *'give first priority to the best interests of Nissan under the applicable laws'*; (ii) *'not do any act that conflicts with interest of the company'*; and (iii) *'not use any asset or fund of the company for any private, wrongful or improper purposes'*: Ito 1, [C(4.4)]. In light of the material facts in this claim, those were promises which Mr. Ghosn did not keep.
- [47] As to the claim for breach of fiduciary duty against NME, Mr. Ghosn was not a *de jure* director of NME. Whilst the 'settled category' of fiduciary relationship between a company and its director accordingly does not apply in respect of NME, whether fiduciary duties are owed outside those categories depends on a close analysis of the facts in order to determine whether the alleged fiduciary *'has undertaken to act for or on behalf of another in a particular matter in circumstances that give rise to a relationship of trust and confidence'*: **Kathryn Ma Wai Fong v Incredible**

Power Ltd,²⁴ at [344]. In this case, Mr. Ghosn did undertake to act for NME in respect of payments from the CEO Reserve Fund (explained in greater detail at paragraph 55 below) in circumstances that gave rise to a relationship of trust and confidence between himself and NME. In particular:

- (1) The payments ultimately made by NME to SBA had to be approved by officers and/or representatives of Nissan, including (in respect of all such payments whilst he was CEO of Nissan), Mr. Ghosn.²⁵ Mr. Ghosn, with his *de jure* position as officer of Nissan, therefore determined to whom NME would make payments, and in what amounts.
- (2) As set out at paragraph 32(3) above, the allocation of monies from Nissan's CEO Reserve Fund to NME for subsequent payment to third parties operated on an informal basis, with Mr. Ghosn giving direct instructions to the relevant officers and/or representatives that those sums be paid.

[48] Accordingly, both Nissan and NME can sustain claims against Mr. Ghosn for breach of fiduciary duty.

Bribery

[49] Both Nissan and NME bring claims against Mr. Ghosn and Beauty Yachts (as Mr. Ghosn's *alter ego*) in bribery. This cause of action requires (i) a payment or other inducement; (ii) made (or promised) to an agent of the other person with whom the briber is dealing; (iii) known to the briber to be an agent; and (iv) unknown to the principal: see **Bullen & Leake & Jacob's Precedents of Pleadings** (19th edn., Sweet & Maxwell 2019), at [61-01]²⁶. Each of these requirements is satisfied here:

²⁴ BVIHCM 2015/0047 (Unreported, delivered 4th May 2021).

²⁵ As was common ground between the parties on the pleadings prior to the Debarring Order: Re-Am SOC, [20.2]; Amended Defence, [24.1(e)(ii)].

²⁶ Citing: (i) *Hovenden and Sons v Millhoff* [1900] 83 LT 41; (ii) *Industries and General Mortgage Co. Ltd. v Lewis* [1949] 2 All ER 573; (iii) *Mahesan v Malaysian Govt. Officers' Co-Operative Housing Society Ltd.* [1979] AC 374; and (iv) *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

- (1) As set out above: (i) Mr. Ghosn received US\$ 7.5 million personally; (ii) Beauty Yachts received total payments of US\$ 12.265 million, which it used to buy the Yacht; and (iii) Shogun (owned 90% by Mr. Ghosn and 10% by his son, Anthony) received US\$ 27.2 million.
- (2) Those payments or inducements were made to Mr. Ghosn as agent of Nissan and/or NME. As set out at paragraphs 28-39 above, the payments to Beauty Yachts were made (and the Yacht purchased) to benefit Mr. Ghosn or his nominees. Mr. Ghosn was the CEO and Chairman of Nissan, so self-evidently an agent of Nissan. As set out at paragraph 47 above, Mr. Ghosn also acted as agent for NME, in particular by allocating and approving payments made by NME to SBA.
- (3) Sheikh Bahwan, Mr Omar Bahwan and Mr. Kumar, as employees and/or representatives of SBA, knew that Mr. Ghosn was acting as agent for Nissan and/or NME. It was self-evidently common knowledge in the automobile industry that at the material time Mr. Ghosn was CEO/Chairman of Nissan which was widely publicised. As set out at paragraph 38(2)(x) above, it is to be inferred that the clandestine meeting between Mr. Ghosn, Mr. Gebran and Mr. Kumar on 12th September 2015 at the Hotel Phoenicia was to discuss and arrange the corrupt scheme by which sums paid away by NME were cycled through Mr. Kumar and Good Faith to benefit Mr. Ghosn or his nominees. Accordingly, Sheikh Bahwan, Mr Omar Bahwan and Mr. Kumar knew that Mr. Ghosn also acted as agent for NME.
- (4) Mr. Nagai's evidence is that it was not until in or around January 2019 that he (and, accordingly, Nissan and NME) gained knowledge of the Defendant's frauds relating to payments made by NME to SBA.

[50] Accordingly, both Nissan and NME can sustain claims against Mr. Ghosn in bribery. That leaves the bribery claim against Beauty Yachts, on the basis that it was Mr. Ghosn's *alter ego*. This *alter ego* allegation does not involve any form of veil-piercing:

(1) Veil piercing is now generally²⁷ limited to claims based on breaches of the ‘evasion principle’, namely *‘when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control’*: **Prest v Petrodel Resources Ltd et al**,²⁸ at [35] (Lord Sumption) & [60]-[61] (Lord Neuberger).

(2) **Gencor ACP Ltd et al v Dalby et al**²⁹ (in which Rimer J held that a BVI company was *‘simply ... the alter ego through which [an individual] enjoyed the profit which he earned in breach of his fiduciary duty ...’*: at [26]) was upheld in *Prest* and conceptualised as an application of the ‘concealment principle’, which did not involve piercing the corporate veil: at [28], [31] & [33] (Lord Sumption) and [68] (Lord Neuberger).

[51] The Claimants in this case rely on the ‘concealment principle’, which Lord Sumption in **Prest** described (at [28]) as follows: *‘[T]he interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the ‘façade’, but only looking behind it to discover the facts which the corporate structure is concealing’*.

[52] As set out at paragraph 38(3) above, Beauty Yachts was interposed between Mr. Ghosn and the Yacht to conceal Mr. Ghosn’s ownership of the Yacht. The Court can accordingly look behind the façade and hold that Beauty Yachts acted as Mr. Ghosn’s *alter ego*.

²⁷ In *Prest v Petrodel Resources Ltd et al* [2013] UKSC 34; [2013] 2 AC 415 Lords Mance and Clarke appeared to countenance veil piercing claims based on further bases, although they said that such further bases were *‘likely to be novel and very rare’* (at [100], Lord Mance) and *‘very rare’* (at [103], Lord Clarke).

²⁸ [2013] UKSC 34; [2013] 2 AC 415.

²⁹ [2000] 2 BCLC 734.

Unjust enrichment

[53] The Claimants claim against Mr. Ghosn and Beauty Yachts in unjust enrichment. The ingredients of an unjust enrichment claim are (**Bullen & Leake & Jacob's Precedent of Pleadings** (19th edn., Sweet & Maxwell 2019), at [108-02]):³⁰

- (1) Benefit of the Defendant in the sense of an enrichment;
- (2) That enrichment was at the expense of the Claimant(s); and
- (3) The enrichment was unjust, due to an 'unjust factor' affecting the transaction.

[54] As set out above, (i) Mr. Ghosn or his nominees were enriched by receipt of at least US\$ 32 million; and (ii) Beauty Yachts was enriched by receipt of US\$ 12.265 million, which it used to buy the Yacht. The 'unjust factor' in this case was mistake.³¹ Nissan and/or NME as principals believed that they were paying legitimate incentive payments from the CEO Reserve Fund to SBA, not having money funnelled away to buy Mr. Ghosn (or his nominees) a yacht.

[55] That leaves the 'at the expense of' requirement. It is clear that the benefits received by Mr. Ghosn were at the expense of the Claimants generally, but the question arises whether both can sustain causes of action in unjust enrichment. As to this:

- (1) The structure of Nissan's unjust enrichment claim is that: (i) Nissan (C) was the indirect payor; (ii) NME (X) was the direct payor; and (iii) Mr. Ghosn and/or Beauty Yachts (D) were the recipients. Unjust enrichment claims can be sustained by the direct payor, in this case NME.
- (2) Unjust enrichment claims can also, however, be sustained by indirect payors, a process described by Professor Birks as 'leapfrogging'³². In determining whether an indirect payor (C) can 'leapfrog' a direct payer (X), the Court should focus on: (a) whether there

³⁰ Citing: (a) *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275; and (b) *Swynson Ltd. v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313.

³¹ See *Goff & Jones on Unjust Enrichment* (10th edn., Sweet & Maxwell 2022) at [9-77]-[9-88].

³² *Birks: Unjust Enrichment* (2nd edn., Oxford University Press 2005), P86-9.

is a close or sufficient causal connection between the relevant transfers; and (b) the substance and/or economic and commercial reality of the transactions: (i) **Bank of Cyprus UK Ltd v Menelaou**,³³ at [27], [33] (Lord Clarke) & [73] (Lord Neuberger); and (ii) **Relfo Limited (in liquidation) v Varsani**³⁴ at [91]-[94] & [97] (Arden LJ), [103] (Gloster LJ) and [115] (Floyd LJ). Specifically, 'leapfrogging' is permissible where:

- a. The direct payor (X) acts as the indirect payor's (C's) agent: **Commissioners for HMRC v Investment Trust Companies (in liquidation)**³⁵ at [48] (Lord Reed).
- b. The indirect payor (C) can trace into money paid away by the direct payor (X): **Investment Trust Companies**, at [48] (Lord Reed). The Claimants have pleaded that Nissan can trace into payments made by NME.
- c. Even where: (i) there is no agency relationship; and (ii) tracing is impossible, there is a sufficient relationship between the transfers by virtue of causally connected transactional links.³⁶

(3) All three circumstances in which 'leapfrogging' is permissible apply in this case:

- a. As explained by Mr. Nagai, NME acted as Nissan's agent pursuant to distribution agreements entered into by Nissan and SBA (in respect of Oman) and Arata FZA (a subsidiary of the Suhail Bahwan Group which covered Iraq and Libya: 'Arata'). Pursuant to those distribution agreements, Nissan reserved the right to designate any '*Person*' to act as its intermediary. NME was so appointed in respect of the distribution agreements with SBA, Arata and any other relevant distributors. As Nissan's intermediary: (i) NME did not have authority to appoint a distributor or terminate a distribution agreement or relationship, which could only be done by Nissan; and (ii) all payments made to SBA by NME were made for and on behalf of Nissan pursuant to the relationship

³³ [2015] UKSC 66; [2016] AC 176.

³⁴ [2014] EWCA Civ 360; [2015] 1 BCLC 14.

³⁵ [2017] UKSC 29; [2018] AC 275.

³⁶ Goff & Jones on The Law of Unjust Enrichment (10th edn., Sweet & Maxwell 2022), at [6-59]-[6-63].

which existed between those companies. In addition to the facts set out at paragraph 32 above, this was sufficient to render NME as Nissan's agent in making the relevant payments.

- b. With regard to tracing, the key issue is whether payments from the CEO Reserve Fund, which was an internal ledger rather than a fund holding a cash balance, can be traced by Nissan. This is the case for the reasons set out at paragraphs 61-67 below.
- c. In any event, for the same reasons set out at paragraphs 61-67 below, there was a sufficient relationship between the transfers by Nissan to NME and NME to SBA by virtue of causally connected transactional links.³⁷

[56] Subject to the bar on double recovery, it accordingly follows that both Nissan and NME can recover from Mr. Ghosn and Beauty Yachts in unjust enrichment. The appropriate quantum of that recovery is dealt with at paragraphs 68-72 below.

Dishonest assistance and knowing receipt

[57] Claims are made against Beauty Yachts for dishonest assistance and knowing receipt in respect of Mr. Ghosn's breaches of fiduciary duty: as to which, see paragraphs 40 to 48 above. Save for (disposal of assets in) breach of a fiduciary or trust duty, those causes of action require:

- (1) For dishonest assistance, assisting or procuring of the breach of fiduciary duty by the Defendant in a dishonest manner.³⁸
- (2) For knowing receipt: (i) beneficial receipt by the Defendant(s) of assets traceable as representing the assets of the Claimant(s); and (ii) knowledge of

³⁷ Goff & Jones on The Law of Unjust Enrichment (10th edn., Sweet & Maxwell 2022), at [6-59]-[6-63].

³⁸ Bullen & Leake & Jacob's Precedents of Pleadings (19th edn., Sweet & Maxwell 2019), at [62-10]. Citing: (i) *Barnes v Addy* [1873-4] LR 9 Ch App 244, at 251-2; (ii) *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; (iii) *FM Capital Partners v Marino* [2018] EWHC 1768 (Comm); and (iv) *Iranian Offshore Engineering and Construction Company v Dean Investment Holding SA* [2019] EWHC 472 (Comm).

the Defendant(s) that those assets were traceable to breach(es) of fiduciary duty or trust.³⁹

[58] For the reasons set out above, the approximately US\$13.665 million paid to Beauty Yachts and the Yacht are traceable to a 'proprietary base' held by the Claimants. The only remaining question is therefore whether representatives of Beauty Yachts: (i) assisted or procured Mr. Ghosn's breach(es) of fiduciary; and/or (ii) knew that the US\$13.665 million (and Yacht) were traceable to those breach(es). Both were the case because:

- (1) Beauty Yachts assisted or procured Mr. Ghosn's breach(es) of duty by: (i) receiving and retaining; (ii) agreeing to receive and retain; and (iii) facilitating the onward transfer of the monies paid to SBA. Specifically, between 16th February and 11th August 2017 Mr. Gebran was formally registered as the sole Director and Secretary of Beauty Yachts and instructed payments of the misappropriated sums to be paid to Beauty Yachts. For example, on 5th March 2015, Mr. Gebran instructed Brasilensis' bankers (in French) to pay €1,230,000 to Beauty Yachts.
- (2) Mr. Gebran acted dishonestly and knew that the sums paid to Beauty Yachts were the traceable proceeds of Nissan's or NME's money misappropriated by Mr. Ghosn. The test here is an objective one,⁴⁰ as applied in the BVI in **Akai Holdings v Brimlow Investments**,⁴¹ and is met in particular because:
 - a. Mr. Gebran was closely involved in the scheme by which Mr. Ghosn's ownership of the Yacht was sought to be hidden behind the façade of Beauty Yachts, as set out at paragraphs 38 to 39 above.
 - b. Mr. Gebran attended the clandestine meeting between Mr. Ghosn, Mr. Gebran and Mr. Kumar on 12th September 2015 at the Hotel Phoenicia in Beirut. It is to be inferred that the purpose of that meeting was to discuss and arrange the corrupt scheme by which sums paid away from Nissan/NME were cycled

³⁹ Bullen & Leake & Jacob's Precedents of Pleadings (19th edn., Sweet & Maxwell 2019), at [62-02], citing: *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685, at 700.

⁴⁰ See *Barlow Clowes International Limited v Eurotrust International Ltd* [2006] 1 WLR 1476.

⁴¹ BVIHCV 2006/0134 (Unreported, delivered 1st November 2006).

through Mr. Kumar and Good Faith to benefit Mr. Ghosn or his nominees, including through Beauty Yachts.

- c. Mr. Gebran repeatedly referred to Mr. Ghosn in email correspondence as '*our friend*', thereby seeking to obscure Mr. Ghosn's identity. Mr. Gebran would not have done so had he believed the scheme to be an honest one.

Remedies/quantum

[59] For the reasons set out above, the Claimants' claims against the Defendants succeed on liability. As confirmed by the Claimants' Response 5(b) to the Defendant's Request for Further Information, they seek the following remedies from Mr. Ghosn and Beauty Yachts:⁴²

- (1) From both Mr. Ghosn and Beauty Yachts:
 - a. Damages in the sum of US\$ 32 million, alternatively some lesser sum;
 - b. Restitution of US\$ 32 million, alternatively some lesser sum;
 - c. An account of profits;
 - d. An account and/or inquiries of constructive trustees;
 - e. Equitable compensation;
 - f. A declaration that equitable title to the Yacht is held on trust by constructive trustees;
- (2) From Mr. Ghosn only, a declaration that any secret commissions or bribes and/or all profits or other benefits obtained by way or as a result of any secret profits or bribes are held on constructive trust; and
- (3) From Beauty Yachts only, an Order for delivery up of the Yacht.

⁴² Save for the setting aside of the conveyance of the Yacht to Ms. Ghosn, which is dealt with at paragraph 73 *et seq.* below.

[60] However, both Nissan's and NME's claims are expressly limited to 'US\$ 32 million and/or its proceeds': Re-Amended SOC, [22D].

Proprietary claims and tracing

[61] Proprietary remedies are available in respect of the causes of action of: (i) bribery; (ii) knowing receipt; and (iii) breach of fiduciary duty.⁴³ Which of the Claimants can sustain proprietary claims depends (in particular, for the requirements of knowing receipt) on tracing. As explained by Lord Millett in **Foskett v McKeown**,⁴⁴ '*[t]racing is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property*'.

[62] As explained above, the money flows in this case can be traced by banking documents all the way from NME; through SBA; Sheikh Bahwan/Mr. Kumar; Good Faith; Brasilensis and (in so far as presently material) Beauty Yachts and the Yacht. It accordingly follows that at least NME can trace part of the US\$ 32 million paid away from the CEO Reserve Fund into the Yacht. The only remaining question is whether Nissan can also so trace, on the basis that the US\$ 32 million in the CEO Reserve Fund was attributable to Nissan. Nissan's position on this is as follows:

- (1) The relevant payments to SBA were in fact made by NME, but from Nissan's CEO Reserve Fund: Nagai 1, [10(1)].
- (2) The CEO Reserve Fund was established in March 2009 upon approval by the Executive Committee of Nissan: Nagai 1, [28].
- (3) The CEO Reserve Fund was not a fund holding a cash balance, but instead was an internal ledger which was used and which reflected or recorded (for Nissan's management accounting) certain expenses and/or anticipated profits across the Nissan

⁴³ Grant & Mumford on Civil Fraud: Law, Practice & Procedure (1st edn., Sweet & Maxwell 2018) at [7-056/7] & [12-051] and Snell's Equity (34th edn., Sweet & Maxwell 2019) at [7-057].

⁴⁴ [2001] 1 AC 102 (HL) 128.

group to manage the performance of all functions and group companies of Nissan: Nagai 1, [31].

- (4) Payments from the CEO Reserve Fund were taken into account on an intercompany basis for the management accounting and, in terms of the financial accounting, via reduced dividend payments by NME to Nissan: Nagai 1, [36]. Specifically, allocation of expenses or anticipated profits recorded to the CEO Reserve Fund for the management accounting: (i) would trigger a readjustment and update to the overall budget and budget allocations for the management account; and (ii) would be recorded in NME's financial accounts with lowered profits: Nagai 1, [36(1)].

[63] It is well-established that it is possible to trace through inter-account bank transfers.⁴⁵ In the simplest case of an 'in-house' inter-account bank transfer (i.e. a transfer of value from one account to another held at the same bank), however, there is no 'exchange' of assets *per se*, but simply a matched adjustment of the debts owed by the bank to each customer.⁴⁶ Thus, if A and B have accounts at the same bank and A transfers money to B, there is no 'exchange', but merely: (i) the reduction of the value of A's chose in action against the bank in respect of money held in A's account; and (ii) an increase in the value of B's chose in action against the bank in relation to money held in B's account. Thus, even in that simple case there is no 'exchange' from A to B, but A can nevertheless trace its money into the credit balance held in B's account.

[64] The same logic is applicable to inter-company accounting adjustments within the Nissan group. When payments from the CEO Reserve Fund were accounted for, there was no 'exchange' from Nissan to NME, but intercompany adjustments were made for management accounting and (in terms of the financial accounting) reduced dividends were paid by NME to Nissan. This is sufficient to enable Nissan to trace into the beginning of the chain, leading ultimately to the Yacht.

[65] As regards the cause of action in bribery specifically, it is well-established that a principal has a proprietary interest in a bribe or secret commission paid to his agent: **FHR European Ventures**

⁴⁵ Goff & Jones on Unjust Enrichment (10th edn, Sweet & Maxwell 2022), at [7-32]; citing (*inter alia*) *Relfo v Varsani* [2014] EWCA Civ. 360; [2015] 1 BCLC 14.

⁴⁶ Goff & Jones on Unjust Enrichment (10th edn, Sweet & Maxwell 2022), at [7-32].

v Cedar Capital LLP.⁴⁷ As set out at paragraph 49(2) above, Mr. Ghosn was acting as Nissan's agent and received bribes and/or secret commissions (in particular, in the form of the Yacht).

[66] Accordingly, Nissan has equitable title to the Yacht and the Yacht is held by Beauty Yachts for Nissan on constructive trust. If that is wrong, NME has equitable title to the Yacht and the Yacht is held by Beauty Yachts for NME on constructive trust.

[67] That leaves the question of how Nissan's equitable title to the Yacht should, in practice, be realised. If successful, the Claimants indicated an intention to seek enforcement of any judgment by a Receiver under CPR 45.2(e) & 51.1(1).

Personal remedies

[68] As to the Claimants' causes of action in unjust enrichment, as set out at paragraphs 53-56 above, in principle both Nissan and NME can sustain actions for money had and received in respect of the US\$ 32 million paid away by NME from the CEO Reserve Fund: by Nissan as the indirect payor; and by NME as the direct payor (subject to the rule against double-recovery). Beauty Yachts received the sum of US\$13.665 million (translated from Euros) and Nissan/NME are entitled to restitution of at least that sum from Beauty Yachts. As against Mr. Ghosn, the analysis of the money flows above shows that at least US\$ 32 million has been transferred to him or his nominees, such that US\$ 32 million should be awarded against him as money had and received.

[69] Under the cause of action of bribery specifically, the principal is required to elect between: (i) the value of the bribe itself; or (ii) damage for any loss flowing from entry into the contract or transaction which has been induced by the bribe: **Grant & Mumford on Civil Fraud: Law, Practice & Procedure** (1st edn., Sweet & Maxwell 2018), at [7-071]. In this case, Nissan elects for recovery of the amount of the bribe paid, namely: (i) US\$13.665 million against Beauty Yachts; and (ii) US\$ 32 million against Mr. Ghosn personally; again, because that sum was transferred to him or his nominees.

⁴⁷ [2014] UKSC 45.

[70] That leaves the personal claims for damages or equitable compensation. Equitable compensation is available as a remedy for breach of fiduciary duty, dishonest assistance and knowing receipt.⁴⁸ The basic measure of equitable compensation for breach of trust is loss which would not have occurred but for the relevant breach.⁴⁹ There is some dispute about whether this 'but for' limitation applies to breaches of duty by other fiduciaries (in particular, directors).⁵⁰ In this case, however, but for Mr. Ghosn's breaches the US\$ 32 million would not have been paid away from the CEO Reserve Fund (or otherwise used for the proper purposes of Nissan). On that basis, US\$ 32 million would be awarded as damages on either approach to the party which paid the money away from the CEO Reserve Fund; here, NME.

[71] That leaves Nissan's position in respect of the quantum of equitable compensation. This is a moot point, given that (as set out at paragraph 66 above), Nissan has equitable title to the Yacht and the Yacht is held by Beauty Yachts for Nissan on constructive trust. Discussing the impact of **AIB v Redler** on cases in which directors cause company funds to be misapplied, **Grant & Mumford** suggest that the better analysis is that *'[w]here the director or other fiduciary has himself received the principal's misapplied property, the remedy is restorative in the fullest sense [i.e., no 'but for' test applies] but that is because the property represents a profit in the fiduciary's hands made by reason of his position, which will be held on constructive trust'*.⁵¹

[72] The Court has accordingly been invited to award the following remedies:

- (1) A declaration that Nissan has equitable title to the Yacht, which is held on constructive trust by Beauty Yachts for Nissan;
- (2) An Order that: (i) Mr. Ghosn pay Nissan and NME US\$ 32 million; and (ii) Beauty Yachts pay Nissan and NME US\$13.665 million as money had and received (subject to the bar on double recovery);

⁴⁸ See (i) Grant & Mumford on Civil Fraud: Law, Practice & Procedure (1st edn., Sweet & Maxwell 2018) at [12-051] & [13-053; and (ii) Snell's Equity (34th edn., Sweet & Maxwell 2019) at [7-058].

⁴⁹ AIB v Mark Redler [2015] AC 1503.

⁵⁰ Grant & Mumford on Civil Fraud: Law, Practice & Procedure (1st edn., Sweet & Maxwell 2018) at [22-114] et seq.

⁵¹ See: Grant & Mumford on Civil Fraud: Law, Practice & Procedure (1st edn., Sweet & Maxwell 2018) at [22-118(1)].

- (3) An Order that the amount of the bribe paid be returned to Nissan, namely: (i) US\$13.665 million against Beauty Yachts; and (ii) US\$ 32 million against Mr. Ghosn personally.
- (4) Damages/equitable compensation of US\$ 32 million, to be paid by Mr. Ghosn and Beauty Yachts to NME (subject to the bar on double recovery); and
- (5) As against Mr. Ghosn, a declaration that any secret commissions or bribes and/or all profits or other benefits obtained by way or as a result of any secret profits or bribes are held on constructive trust.

The purported conveyance of shares in Beauty Yachts to Ms. Ghosn

[73] That leaves one narrower claim advanced against all Defendants, including Mr. Ghosn's wife Ms. Ghosn. On 7th May 2018, Mr. Ghosn purported to transfer all 50,000 shares in Beauty Yachts to her. Nissan and NME seek two declarations in respect of this transfer against Mr. Ghosn, Ms. Ghosn and Beauty Yachts, namely that: (i) the conveyance is void or voidable (and, in the latter case, voided); and (ii) that conveyance constituted a conveyance with an intention to defraud creditors: (i) Re-Amended Statement of Claim, Prayer, (2); and (ii) Response to RFI, [Request 5(b)]. These declarations are sought by common law and under two statutory provisions:

- (1) Section 81(1) of the Conveyancing and Law of Property Act 1961 (the '1961 Act'), which provides that: *'[E]very conveyance of property ... with intent to defraud creditors, shall be voidable at the instance of any person prejudiced'*. As to this:
 - a. As made clear in **Harneys: British Virgin Islands Commercial Law** (4th edn., Sweet & Maxwell 2018), the reference to *'any person thereby prejudiced'* means that the right to redress is not limited to parties to the conveyance, but rather encompasses *'[a] third party who considers their interests to have been prejudiced'*, including *'a simple creditor of the transferor whose position is prejudiced by the transfer of a valuable asset limiting the recourse for payment of his debt'*.⁵²

⁵² [4.046(1)].

- b. The only express defence set out in the 1961 Act is that any person who received property in good faith and for value, without notice of the intent to defraud, is not affected by the section: section 81(3) of the Act.

(2) The Fraudulent Conveyances Act 1571 (the '1571 Act'):

- a. The application of the 1571 Act depends upon whether, as a matter of British constitutional theory, the BVI was a settled or conquered territory: **Harneys: British Virgin Islands Commercial Law** (4th edn., Sweet & Maxwell 2018).⁵³ If the former, the settlers brought with them the entirety of English law including statutes; as well as the common law: **Kielley v Carson**,⁵⁴ at 233 (Parke B). If not - and the territory had previously been settled - only the English common law would be transposed: **Hendry & Dickinson: British Overseas Territory Law** (2nd edn., Hart 2007), at page 147.
- b. On this point, Jack J held in **Great Panorama v Qin Hui**⁵⁵ that the 1571 Act was in force in the BVI (and, therefore, that the BVI was a settled territory). There is also copious academic writing confirming that the BVI was settled (i.e., as so-called '*terra nova*').⁵⁶ **Harneys** (at [1.049]) expresses the view that the historical position on this issue is unclear, but accepts that there is a well-settled principle that once a British Overseas Territory has been regarded as a settled territory that designation will not be changed as a result of subsequent historical examination (and that the BVI is regarded as such a settled territory in the writings set out above). The BVI therefore counts as a settled territory and the 1571 Act applies as an English statute in force before its settlement. The 1571 Act was not impliedly repealed by the 1961 Act.⁵⁷

⁵³ [1.048]-[1.050] & [4.050].

⁵⁴ [1842] 13 ER 225, at 233 (Parke B).

⁵⁵ BVI2019/0180 *Great Panorama v Qin Hui* (Unreported, delivered 13th August 2020) at [59] (Jack J).

⁵⁶ (i) Halsbury's Laws of England (Volume 13 (2021)), at [770]; (ii) Hendry & Dickinson, *British Overseas Territory Law* (2007), at P147-8; and (iii) Antione: *Commonwealth Caribbean Law and Legal Systems* (2nd edn., Routledge-Cavendish 2008), page 76.

⁵⁷ BVI2019/0180 *Great Panorama v Qin Hui* (Unreported, delivered 13th August 2020) at [59] (Jack J).

[74] On this point, the Court makes the following findings of fact:

- (1) Nissan's internal investigation into Mr. Ghosn (including the \$32 million paid away from the CEO Reserve Fund) with the assistance of an external law firm started in mid-2018. The investigation was commenced because a preliminary, internal investigation had found a strong likelihood of Mr. Ghosn's conduct: Nagai 1, [52].
- (2) By 7th May 2018, Mr. Ghosn was no longer CEO of Nissan (although he remained its Chairman until his arrest by the Japanese criminal authorities in November 2018): Nagai 1, [53]-[54].
- (3) Mr and Ms. Ghosn's preparation for transfer of the shares in Beauty Yachts commenced in April 2018. On 23rd April 2018, Mr. Alain Maaraoui emailed Mr. Ghosn stating:

"In preparation for the Company 'Beauty yachts' shares transfer in the name of Mrs Carole [Ghosn], could you please arrange to send us a copy of her passport, in addition please confirm if you wish that Mrs. Carole [Ghosn] is nominated as sole director of the company (with your resignation) or if she will be nominated as an additional Director."

Mr. Ghosn replied on the same day attaching Ms. Ghosn's passport, stating:

"I would prefer her to be the sole director assuming that when we do the paperwork in Beirut she will simultaneously sign a non dated document of cession of the boat to me [emphasis added]."

- (4) On 24th April 2018, Mr. Alain Maaraoui emailed Mr. Ghosn, listing the documents required for the transfer and asking:

"Please advise if you would like us to liaise directly with Ms Amal Abou Jaoude for providing these or if you would like us to keep everything related to his matter strictly within your hands [emphasis added]."

- (5) On 25th April 2018, Mr. Alain Maaraoui sent Ms. Ghosn instructions (attaching relevant documents) to execute the transfer, which was said to be '[f]or further clarification of our email below' (i.e. the 'strictly in your hands' email). It is to be inferred from this that Mr. Ghosn did instruct Mr. Maaraoui to keep the matter within his and Ms. Ghosn's 'hands'.
- (6) On 7th May 2018, Mr. Alain Maaraoui emailed Mr. Ghosn stating: *"[I]n order to prepare the documents (not dated) to transfer the shares back to you we will need a residential*

address in Lebanon noting that such an address needs to be confirmed by a utility bill'.

Mr. Ghosn responded on the same day, stating:

"The transfer of the boat back to my name will happen after I transfer officially my residence to Lebanon.(probably in 2019) [sic] ... In the meantime, you can use the address for the non dated document to be signed by my wife."

- (7) As to the prior purported transfer of the shares in Beauty Yachts to Mr. Ghosn, Mr. Gebran died on 16th August 2017. It then apparently came to light that Mr. Gebran had never signed the purported transfer documentation for the shares in Beauty Yachts from himself to Mr. Ghosn:

- a. The day before Mr. Gebran died, Mr. Ghosn emailed Ms Aboujaoude stating: *'I wanted to make sure that the documents asked by Alain Maaraoui relative to the ownership of the boat have been signed by Fady [Gebran] to my benefit'.*
- b. Ms. Aboujaoude responded to Mr. Ghosn on 20th August 2017 using Mr. Gebran's email address to confirm that Mr. Gebran had signed documents including *'[s]hare transfer (50,000 shares) from Fady Gebran to Carlos Ghosn'* but stating that the *'documents were signed, not dated and not sealed'.*
- c. However, on the same day Ms. Aboujaoude sent an email to one of Mr. Gebran's family members using Mr. Gebran's email address which said:

"As I told you yesterday, there are papers that had to be signed by Fady but they weren't. I lied and said that they were signed (or else it would become a big mess for Carlos and I know that Fady did not remember signing the papers due to all what he was passing through :(! ! ! ! ! ! ! .) If you don't mind, I shall pass them for Cathy tonight to sign in case he asks me to hand them to him tomorrow."

- (8) On 21st August 2017, Ms. Aboujaoude met Mr. Ghosn and Ms. Ghosn in their room at the Hotel Phoenicia in Beirut for Mr. Ghosn to sign the *'acceptation of the share transfer'.*

[75] Accordingly, the purported conveyance of the 50,000 shares in Beauty Yachts from Mr. Ghosn to Ms. Ghosn did not reflect Mr. Ghosn or Ms. Ghosn's shared intentions, which was that Mr. Ghosn would retain ownership of those shares (and hence, the Yacht), with an undated share

transfer back from Ms. Ghosn to Mr. Ghosn waiting in the wings as and when it were to be required. This purported conveyance took place at a time when Mr. Ghosn was no longer CEO of Nissan, and at a time when Nissan had commenced its investigation involving external lawyers into Mr. Ghosn's conduct, including in relation to payments from the CEO Reserve Fund. It is to be inferred that the said conveyance took place in order to seek to secure the Yacht from any execution by Nissan, were its investigations into Mr. Ghosn to discover the corrupt scheme detailed above.

[76] It is also to be inferred from the above facts that Ms. Ghosn was aware of, and shared, Mr. Ghosn's intention that her shareholding would be transferred back to Mr. Ghosn as and when required, hence defrauding Mr. Ghosn's potential creditors (including Nissan and NME): Nagai 1, [141]. As at 7th May 2018, Mr. Ghosn the sole *de jure* shareholder and director of Beauty Yachts and his dishonest state of mind in this regard is attributable to Beauty Yachts.

[77] It follows that Nissan's claims for declarations succeed. As to the defence in section 81(3) of the Conveyancing and Law of Property Act 1961, Ms. Ghosn neither gave value for the shares nor acted in good faith in relation to their transfer.

Conclusion

[78] For the reasons set out above, the Court gives judgment in the Claimants' favour and orders:

- (1) A declaration that Nissan has equitable title to the Yacht, which is held on constructive trust by Beauty Yachts for Nissan;
- (2) An Order that (i) Mr. Ghosn pay Nissan and NME US\$ 32 million; and (ii) Beauty Yachts pay Nissan and NME US\$13.665 million as money had and received (subject to the bar on double recovery);
- (3) An Order that the amount of the bribe paid be returned to Nissan, namely: (i) US\$13.665 million against Beauty Yachts; and (ii) US\$ 32 million against Mr. Ghosn personally (subject, again, to the bar against double recovery);
- (4) Damages of US\$ 32 million, to be paid by Mr. Ghosn and Beauty Yachts to NME;

- (5) As against Mr. Ghosn, a declaration that any secret commissions or bribes and/or all profits or other benefits obtained by way or as a result of any secret profits or bribes are held on constructive trust; and
- (6) Declarations that Mr. Ghosn's purported transfer of all 50,000 shares in Beauty Yachts to Ms. Ghosn was: (i) void or voidable (and, in the latter case, voided); and (ii) constituted a conveyance with an intention to defraud creditors.

[79] The Court will hear the parties further in relation to costs.

[80] The Court thanks Counsel for their assistance to the Court during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar