

**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, QC, with Mr. Joshua Folkard and Mr. Malcolm Arthurs for the Claimants

Ms. Blair Leahy, QC, with her Mr. Alex Riddiford, Mr. David Harby and Mr. Dave Marshall for the Defendants.

2021: December 8, 9;

2022: May 16.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the Judgment of the Court in respect of:

- (1) An application filed by the Defendants on 27th May 2021, by which they seek primarily to strike out the claim, or parts of it and/or for reverse summary judgment; and
- (2) An application filed by the Claimants on 15th November 2021, seeking the Court's permission to re-re-amend their Statement of Claim.

The Defendants' Application

[2] The Court will deal first with the Defendants' application.

[3] On 27th May 2021 the Defendants filed a Notice of Application seeking relief under four specific heads:

- (1) An order striking out the Claimants' statements of case under Part 26.3(1)(b) of the Civil Procedure Rules, 2000, ('CPR') on the basis that they disclose no reasonable grounds for bringing the claims; alternatively
- (2) Parts of the Claimants' statements of case be struck out on the same basis and/or summary judgment on a number of discrete issues;
- (3) An order discharging an injunction granted by this Court on 20th August 2019 and a consent order dated 28th November 2019 continuing the injunction;
- (4) Costs.

[4] Before considering more closely the applications currently before the Court for determination, and the grounds advanced in support of them, it is useful to give a broad overview of the claims and the defences raised in the pleadings. This summary contains no findings of fact and is taken only from the statements of case that have been filed, not from draft pleadings or evidence.

The Claimants' case

- [5] Mr. Carlos Ghosn ('Mr. Ghosn') used to be employed by Nissan, the Japanese car manufacturer. From 2000 until 2018 he was Nissan's Chairman and from 2001 until 2017, he was its Chief Executive Officer ('CEO').
- [6] Mr. Ghosn was born in Brazil. At the age of six, he moved to Lebanon. The Claimants believe he currently resides there again. During his employment at Nissan, Mr. Ghosn lived in Japan. Mr. Ghosn's career at Nissan ended with the Japanese authorities placing him under house-arrest whilst certain criminal law matters were being investigated. He nonetheless managed to leave Japan and went to Lebanon.
- [7] Mr. Ghosn has a son, Mr. Anthony Ghosn.
- [8] Mr. Ghosn has a wife, Mrs. Carole Ghosn, née Nahas, whom he married in 2016. Mrs. Ghosn also resides in Lebanon.
- [9] Mr. Ghosn has a sister, Ms. Claudine Oliveira.

Alleged diversion of US\$32 million of Nissan's money to Mr. Ghosn via SBA

- [10] The Claimants allege that during his employment at Nissan, Mr. Ghosn unlawfully diverted at least US\$32 million to himself between June 2012 and July 2018.
- [11] As I understand the Claimants' case, the way the unlawful diversion is alleged by the Claimants to have happened is this.
- [12] Nissan has a subsidiary in Dubai, called Nissan Middle East FZE ('NME'). It is the Claimants' case that NME acted at all material times as Nissan's agent. Mr. Ghosn was not a *de jure* director of NME.
- [13] Nissan has a distributor in Oman, which the Claimant refers to as 'SBA'. SBA sells Nissan vehicles in Oman, Libya and Iraq, and, since 2016, by way of re-export to China and Iran. The Chairman of SBA is or was a Sheikh Bahwan. Sheikh Bahwan's son, Mr. Omar Bahwan, was a Board Member of SBA. A Mr. Kumar was the Managing Director of SBA.
- [14] Nissan has or had a budget called the 'CEO Reserve Fund'. This had originally been established to provide resources for unexpected, unbudgeted events or to fund specific, CEO-

led, projects. The CEO Reserve Fund was a ledger, rather than a bank account, with funds being applied to projects by means of accounting entries and then actual monies being paid from available funds.

- [15] There was a three-stage, formal process for obtaining monies from the CEO Reserve Fund. First, a payment had to be proposed by a General Manager of Nissan or equivalent, then it had to be approved by a corporate officer from the Control department (known as 'CNTRL') such as the Chief Financial Officer, as well as by a member of Nissan's Executive Committee and a senior Vice President in the CEO's office, and finally by the CEO.
- [16] Nonetheless, allege the Claimants, from 2008 until 1st April 2017, during Mr. Ghosn's tenure as CEO of Nissan, the process for obtaining moneys from the CEO Reserve Fund operated on an informal basis, with Mr. Ghosn giving direct instructions to Senior Vice Presidents as to sums to be paid. This is the first anomaly upon which the Claimants build their case.
- [17] During this period, the CEO Reserve Fund was used in part to pay substantial special incentives to certain distributors in the Middle East, including SBA.
- [18] The Claimants say Mr. Ghosn caused Nissan to pay SBA at least US\$32million through the CEO Reserve Fund. The Claimants have identified ten payments, in varying amounts, on specific dates, which together make up this amount. This is the second anomaly, or set of anomalies, upon which the Claimants build their case.
- [19] The Claimants say that there are reasons to think that these payments had not been made for a proper purpose.
- [20] The Claimants allege that, significantly:
 - (1) SBA already had the benefit of contractually agreed incentives, such that there was no commercial justification for the payment of additional, discretionary, sums;
 - (2) SBA appears to have provided no consideration (in the sense of nothing discernible in return) for the payments; and
 - (3) the payments made were not within the purpose for which the CEO Reserve Fund had been established.

- [21] According to the Claimants, the money trail did not end at SBA. They allege it ended with Mr. Ghosn himself, in the following manner.

The money trail in respect of US\$9.6million

- [22] The Claimants allege that approximately US\$9.6million was transferred on, in four tranches, by SBA's Chairman, Sheikh Bahwan or his son Mr. Omar Bahwan to a company called Brasilensis S.A.L. ('Brasilensis'), between around July 2013 and November 2013.
- [23] Brasilensis is a company incorporated in Lebanon. On its face, Brasilensis has nothing to do with Mr. Ghosn. But, say the Claimants, there are indicators that Mr. Ghosn is the underlying beneficial owner of this company. The Claimants made a point of observing that Mr. Ghosn had been born and raised in Brazil, before moving to Lebanon, implying that it is not coincidental that this Lebanese company should bear an apparent and curious reference to Brazil in its name. The Claimants say they understand that Mr. Ghosn's sister, Ms. Claudine Oliveira, was purportedly Brasilensis's sole shareholder. If that is right, it begs the question why a Nissan vehicle distributor (SBA) in Oman should be paying large sums of money to a Lebanese company ostensibly owned by someone (Ms. Oliveira) who herself is not said to have any connection with Nissan but whose brother was Nissan's CEO. The connection between Mr. Ghosn and Brasilensis deepens, according to the Claimants, in that directors of Brasilensis were a Mr. Fady Gebran ('Mr. Gebran') and a Ms. Amal Aboujaoude ('Ms. Aboujaoude'). Mr. Gebran had been Mr. Ghosn's Lebanese lawyer until Mr. Gebran's death on 16th August 2017, and Ms. Aboujaoude had been Mr. Gebran's associate. Mr. Gebran was also the lawyer of Brasilensis. The Claimants allege that Mr. Ghosn's sister held the shares in Brasilensis as, and/or acted as Mr. Ghosn's nominee.
- [24] These payments were made from SBA to Brasilensis, say the Claimants, following email requests from Mr. Gebran to Mr. Omar Bahwan.
- [25] Somewhat over a year later, on 5th March 2015, Mr. Gebran instructed Brasilensis's bankers to pay US\$7.5 million to Mr. Ghosn's account. So, in respect of this US\$7.5 million, the money trail identified by the Claimants was that monies went from Nissan or NME to SBA, from SBA to Brasilensis and then from Brasilensis to Mr. Ghosn.

- [26] On or about the same day, 5th March 2015, Mr. Gebran also instructed Brasilensis's bankers to pay €1,230,000 to a company called Beauty Yachts Pty Ltd ('Beauty Yachts'). The same day, a sum of €1,219,914.70 was instructed to be paid by Beauty Yachts to an Italian yacht builder, Ferretti S.p.A. ('Ferretti') as the first instalment for the purchase price of a new yacht (on which, more later).
- [27] The **visible** link between Brasilensis and Beauty Yachts was Mr. Gebran. The Claimants allege that Mr. Ghosn had always been the true underlying beneficiary owner of Beauty Yachts.
- [28] The Claimants point to the following. Mr. Gebran was sole Director and Secretary of Beauty Yachts from 16th February 2015 to 11th August 2017, about a week before he died. Beauty Yachts is a company incorporated in this jurisdiction (the 'BVI'). It has an issued share capital of 50,000 shares with no par value. On 16th February 2015, all 50,000 shares in Beauty Yachts were issued to Mr Gebran.
- [29] A few days after the shares in Beauty Yachts had been issued to Mr. Gebran, on 19th February 2015, Beauty Yachts entered into a sale and purchase contract with Ferretti to buy a new motor yacht that Ferretti would design and build, called a 'Ferretti Custom Line Navetta 37'. The total purchase price was €12,199,147.00, payable in five instalments. The yacht (the 'Yacht') was eventually delivered to Beauty Yachts on 27th June 2017. She was registered here in the BVI on 21st June 2017. At the time, she was named *M/Y Shachou*. The Claimants say that 'Shachou' has a primary meaning in Japanese as 'company president', which was one of the descriptions used of Mr. Ghosn's position at Nissan in his contract of employment.
- [30] Mr. Ghosn purportedly replaced Mr. Gebran as sole Director and Secretary of Beauty Yachts on 11th August 2017, a few days before Mr. Gebran died. On or around the same date, all 50,000 shares in Beauty Yachts were purportedly transferred to Mr Ghosn. The Claimants say 'purportedly', because they have documentary evidence by way of an apparent email from Mr. Gebran's associate, Ms. Aboujaoude, dated 20th August 2017 (i.e., a few days after Mr. Gebran had died), in which she stated that she had previously lied that Mr. Gebran had signed the transfer documents before his death, and that she would have the documents signed, in essence, immediately.

- [31] Slightly less than a year later, on 7th May 2018, the Claimants say Mr. Ghosn was replaced as sole Director and Secretary of Beauty Yachts by his wife, Mrs. Ghosn. All 50,000 shares in Beauty Yachts were also purportedly transferred at around that time from Mr. Ghosn to Mrs. Ghosn.
- [32] That was not the end of the matter however. The Claimants rely upon a number of apparent email communications in April and May 2018 recording that whilst Mrs. Ghosn appears as the registered owner of the shares in Beauty Yachts, she was to sign a share transfer instrument, to be left undated, for retransfer of the shares back to Mr. Ghosn, with Mr. Ghosn's intention being that the Yacht (through ownership of the shares in Beauty Yachts) should be transferred 'back' to Mr. Ghosn 'after I [i.e. Mr. Ghosn] transfer officially my residence to Lebanon'.
- [33] The Claimants allege that Mr. Ghosn 'has always had personal use of (or control over the use of)' the Yacht.
- [34] The Claimants allege that while Mr. Gebran ostensibly owned and controlled Beauty Yachts until this was transferred to Mr. Ghosn in August 2017, Mr. Gebran had done so on behalf of Mr. Ghosn or as his nominee. The Claimants rely in this regard upon apparent email correspondence between Mr. Gebran and what appears to be a yacht broker in January and February 2015 in which they discuss the appropriate ownership structure for the Yacht, with a view, it would appear, to avoiding European Union VAT. In this series of communications there is an apparent email from Mr. Gebran to the yacht broker dated 6th February 2015 in which Mr. Gebran stated:
- "After getting all the needed information the client will prefer to have the contract signed with the shipyard directly. This supposes a company in which he doesn't appear."
- [35] This communication suggests, upon a natural reading, that Mr. Gebran is himself not the 'client' but that he is referring to another male individual. This would exclude Mrs. Ghosn, or indeed Ms. Claudine Oliveira, as 'the client'. It also suggests that if 'the client' was not to 'appear' in respect of the Yacht owning company, Mr. Gebran was going to 'appear' in that company on behalf of that male individual. The Claimants say that individual was Mr. Ghosn.
- [36] The Claimants allege that Mr. Ghosn had been intimately involved in matters concerning:

- (1) production of the Yacht, including change of the Yacht's product designation in December 2014 to a '*Navetta 37m#3*' to reflect her correct length;
- (2) establishment of the company Beauty Yachts, including the name of that company;
- (3) the hiring and compensation of crew and crewing issues;
- (4) the fitting out of the Yacht, including the purchase of jet skis and a tender;
- (5) other aspects of the Yacht's and/or Beauty Yachts' management, including a penalty due from Beauty Yachts.

[37] The Claimants also point to an apparent email dated 3rd August 2017 from Mr. Gebran's email address, but not written by Mr. Gebran, in which the procedure for payment of 'boat expenses' was explained. The source of funds was identified as Mr. Kumar, who was the managing Director of SBA. That email stated that Mr. Kumar was 'from Nissan'.

[38] The Claimants apply the numerous connecting factors set out above to allege that the 'client' Mr. Gebran had been referring to was none other than Mr. Ghosn.

[39] The circumstances, as alleged by the Claimants, surrounding payment of the first instalment of the purchase price for the Yacht, were related above (i.e., from SBA to Brasilensis to Beauty Yachts to Ferretti).

[40] The other four instalments were funded in a slightly different way, allege the Claimants. This involved Beauty Yachts first receiving approximately US\$12.265 million from a company called Good Faith Investment Holding S.A.L. ('Good Faith') in several tranches shortly before the purchase price instalments were each made by Beauty Yachts to Ferretti. The Claimants allege that this money trail also leads back up to SBA, again through Mr. Gebran and Mr. Kumar.

[41] The Claimants allege that Good Faith is a Lebanese company incorporated on 24th April 2015 and of which, at all material times, Mr. Gebran and Mr. Kumar (as well as one Mr. Chadi Abi Rached) were Directors, and Mr. Kumar was the Chairman and General Manager. The Claimants say they understand that Mr. Kumar was purportedly the majority shareholder of

Good Faith, holding 19,998 of 20,000 shares. The Claimants allege that Mr. Kumar held such shares and/or acted as Mr Ghosn's nominee.

Payment of approximately US\$41 million from SBA to Good Faith

- [42] According to the Claimants, Good Faith itself had received the necessary further funds to pay for the Yacht, and other monies, together totalling at least US\$41 million, from SBA, through Mr. Kumar.
- [43] The Claimants say that these payments were made pursuant to an agreement or understanding reached between Mr. Ghosn, Mr. Kumar and Mr. Gebran on 12th September 2015 at a meeting between them at a certain hotel, Hotel Phoenicia, or at other times. The Claimants claim to have identified some thirteen payments totalling this amount, made from SBA to Good Faith between May 2015 and September 2018.
- [44] Beauty Yachts was not the only recipient of money from Good Faith. The Claimants allege that approximately US\$27.2 million was transferred from Good Faith to another company called Shogun Investments LLC ('Shogun'). The Claimants allege that Shogun is a company incorporated in California, owned and/or controlled by Mr. Ghosn and/or his son Mr. Anthony Ghosn. The Claimants say these payments were made between October 2015 and July 2018.
- [45] The Claimants claim that Mr. Ghosn received these monies in breach of various duties he owed to them, both as a matter of Japanese law and pursuant to his contract of employment with Nissan (the First Claimant). Such duties, allege the Claimants, were 'akin to' fiduciary duties and/or placed Mr. Ghosn in a position of trustee of such of Nissan's assets or property as were within his possession or control.
- [46] The Claimants bring claims against Mr. Ghosn personally under various heads. These are, in summary, that:
- (1) Mr. Ghosn, in breach of his duties, procured Nissan or NME to pay US\$32 million to SBA; and/or

- (2) Mr. Ghosn, in breach of his duties, received secret and undisclosed commissions from SBA and/or Sheikh Bahwan and/or Mr. Omar Bahwan and/or Mr. Kumar in the sum of US\$32 million or part thereof;
- (3) The Claimants suffered loss in such amount(s); and/or
- (4) Mr. Ghosn is liable to the Claimants in unjust enrichment and/or money had and received; and/or
- (5) The Claimants are entitled to an account of profits.

[47] The Claimants bring claims against Beauty Yachts, on the basis that it would be unconscionable for Beauty Yachts to retain the benefit of the sums paid to it, including to retain the Yacht, in circumstances where Mr. Ghosn's dishonest state of mind is to be attributed to Beauty Yachts and that moneys received by Beauty Yachts from Brasilensis and/or Good Faith were the traceable proceeds of sums transferred in breach of fiduciary duty and/or trust.

[48] In terms of relief sought against Beauty Yachts, the Claimants seek orders that:

- (1) Beauty Yachts is liable to account to both or either of the Claimants for the sum of at least US\$13.665 million as Mr. Ghosn's *alter ego*; and/or
- (2) Beauty Yachts is liable to account to both or either of the Claimants for that part of the US\$13.665 million that is traceable to sums diverted by Mr. Ghosn (including by Mr. Ghosn's breaches of duty to Nissan) as personal liability in knowing receipt; and/or
- (3) The Claimants are entitled to trace the sum of at least US\$13.665 million (or such part of that sum as is traceable to sums diverted by Mr. Ghosn, including by Mr. Ghosn's breaches of duty to Nissan) into, and claims equitable title (in whole or in part) to the Yacht, which Beauty Yachts holds (in whole or in part) on constructive trust for either of the Claimants as knowing recipient or otherwise; and/or
- (4) Beauty Yachts has the same liability to the Claimants as Mr. Ghosn has, consequent upon his receipt (or the receipt of his nominees) of secret commissions. Further or in the alternative, Beauty Yachts has such liability limited to the amount that it received from Brasilensis and Good Faith and/or the amount that it received that is traceable to the secret commissions Mr. Ghosn received; and/or
- (5) Nissan, alternatively NME, is entitled to an account of profits.

[49] The Claimants seek relief to set aside the conveyance of the shares in Beauty Yachts from Mr. Ghosn to Mrs. Ghosn in May 2018 as a wrongful device to defraud, delay or hinder creditors.

[50] The Claimants also claim interest (simple or compound) on all sums which they may be awarded.

The Defendants' case

[51] The Defendants assert that the claim has been brought on a number of false premises. They say the Claim is part of a campaign by Nissan to impugn the reputation of Mr. Ghosn and to remove him as Chairman of Nissan and to block his plans to complete an irreversible integration between Nissan and the Renault car manufacturer.

[52] The Defendants assert that the payments of US\$32 million to SBA were in fact legitimate payments made by NME from its own resources (not as agent of Nissan) pursuant to annual agreements entered into between NME and SBA under an incentive program (the 'Incentive Program'). The Defendants assert that the Incentive Program was very successful and that Japanese law, which governed contracts with SBA, does not require consideration in order for contracts to be legally binding and enforceable.

[53] The Defendants point out that NME has not sought to set aside the contracts with SBA and the Claimants have not sought to terminate their contractual relationships with SBA.

[54] The Defendants deny that the CEO Reserve Fund had been used to make incentive payments to SBA and that the CEO Reserve Fund had been operated informally.

[55] Mr. Ghosn says he has never received any payments from SBA. Although Mr. Ghosn had business dealings with Sheikh Bahwan, Mr. Kumar and Good Faith, these did not relate to, and were entirely independent of SBA and SBA's business dealings with the Claimants. The

Defendants say Mr. Ghosn has never had a legal or beneficial interest in Brasilensis or Good Faith.

- [56] The Defendants assert that Beauty Yachts was incorporated by Mr. Gebran and that Mr. Gebran was the sole legal shareholder of 50,000 shares in Beauty Yachts. The legal structure of Good Faith and Beauty Yachts, and the interaction between the two companies as to equity holding or funding was put in place by Mr. Gebran and consented to by Mr. Kumar, not by Mr. Ghosn. Throughout this time, Mr. Gebran also served as Mr. Kumar's attorney and provided legal advice to Mr. Kumar in that capacity.
- [57] The Defendants assert that at all relevant times, neither Mr. Ghosn nor his wife were aware of the particulars of the incorporation of Beauty Yachts. The Defendants aver that Mr. Ghosn became the sole shareholder of Beauty Yachts on 11th August 2017, and was the sole shareholder until 7th May 2018, when he transferred his shares to his wife.
- [58] The Defendants accept that Shogun is controlled by Mr. Ghosn and has been owned in proportions of 90% by Mr. Ghosn and 10% by his son Anthony.
- [59] The Defendants say that Mr. Gebran was an eminent Lebanese lawyer who had an international portfolio of clients extending over various jurisdictions, including Europe, Japan and Oman, where he advised large contracting groups and other business. At some point, he advised Sheikh Bahwan on local and international business transactions. According to the Defendants, Mr. Gebran had his own business interests separate to his legal practice. As is common in Lebanon, say the Defendants, he would often conduct private business with clients of his legal practice.
- [60] The Defendants aver that they have no knowledge of the affairs of Brasilensis, including alleged transfers to Brasilensis from Sheikh Bahwan or Mr. Omar Bahwan, save information that:
- (1) Brasilensis was initially set up by Mr. Gebran to undertake property investments funded by Sheikh Bahwan;

- (2) Brasilensis and Sheikh Bahwan entered into an agreement dated 1st July 2013 which contemplated Brasilensis, as broker, identifying and brokering property investments for Sheikh Bahwan (the 'Brokerage Agreement'). The Defendants assert that the property investment ventures did not ultimately proceed. They first asserted that Sheikh Bahwan then redirected funds held by Brasilensis into investments, in financial instruments, structured products, capital markets and portfolio management through Mr. Ghosn. The Defendants amended this to assert that the funds were redirected by Brasilensis to Mr. Ghosn as payment of a fee for Mr. Ghosn's assistance with and advice on such investments.

[61] The Defendants admit that Mr. Ghosn has a sister named Ms. Claudine Oliveira. They say that Ms. Oliveira has informed Mr. Ghosn that:

- (1) Mr. Gebran provided legal services to Ms. Oliveira;
- (2) As Brasilensis was no longer required for the property investment venture, Mr. Gebran determined that it should be used instead for the business interests of Ms. Oliveira;
- (3) Accordingly, in or around early 2015, the ownership of the shares in Brasilensis were transferred to Ms. Oliveira.

[62] The Defendants deny that Ms. Oliveira was a shareholder of Brasilensis prior to the termination of the Brokerage Agreement. They also deny that Ms. Oliveira held any shares in Brasilensis as Mr. Ghosn's nominee or 'acted' as such in connection with Brasilensis.

[63] Concerning the company Good Faith, the Defendants assert the following.

[64] In or around 2015, Mr. Kumar and Mr. Gebran determined to pursue a business opportunity project together which involved:

- (1) incorporation of an investment holding company, Good Faith, which was, to the best of Mr. Ghosn's knowledge and belief, to be wholly beneficially owned by Mr Kumar;
- (2) investment in financial instruments, structured products, capital markets and portfolio management;

- (3) acquisition of a luxury yacht for chartering to wealthy contacts of Messrs Kumar and Gebran; and
- (4) soliciting subscriptions from the same or other wealthy contacts to reimburse the acquisition of the Yacht.

[65] The Defendants claim that the structure of this venture envisaged that Beauty Yachts would be incorporated by Mr. Gebran for Good Faith, in order to acquire the Yacht. Beauty Yachts' acquisition of the Yacht would be significantly funded by funds provided by Mr. Kumar through Good Faith. Mr. Kumar and Mr. Gebran would solicit subscriptions to Beauty Yachts amongst their clients and contacts. These subscriptions would assist with payment of later instalments of the purchase price of the Yacht or repayment of Good Faith's shareholder's loan. In return, subscribers would obtain rights to use the Yacht. Upon delivery of the Yacht, Mr. Kumar and Mr. Gebran would then market the Yacht for charter.

[66] The Defendants say that at the time of Mr. Gebran's death, this project was partly completed. The project was then disbanded as a result of Mr Gebran's illness, which led to his death in August 2017.

[67] The Defendants admit that Mr. Kumar held 19,998 of the 20,000 shares in Good Faith, but they deny that that Mr. Kumar held any of the shares as Mr Ghosn's nominee or 'acted' as such in connection with Good Faith. The Defendants deny that Good Faith was 'used' by Mr. Ghosn for anything.

[68] Concerning the Yacht, the Defendants claim that they have no direct knowledge of the purchase and delivery of the Yacht, save for documents, such as the sales contract, which are amongst the books and records of Beauty Yachts.

[69] The Defendants deny the inference that the Yacht's name reflected Mr. Ghosn's ownership of the Yacht. They say that Mr. Ghosn had many titles in his contracts of employment with Nissan, including 'President', 'Chief Executive Officer', 'Managing Director', 'Chairman' and 'Statutory Director'. Instead, they claim that it is to be inferred that Mr. Gebran, who had

extensive dealings with Japanese clients and businesses in his professional career, and with a partner in his law firm in Lebanon being married to a Japanese citizen, chose a suitably aspirational yet exotic sounding Japanese word that reflected and was attractive to the clientele he wished to attract, including Mr. Ghosn. The Defendants deny that Mr. Gebran held the shares in Beauty Yachts as Mr. Ghosn's nominee and/or on Mr. Ghosn's behalf. They aver that Mr. Ghosn only acquired an interest in Beauty Yachts on 11th August 2017.

[70] The Defendants deny that Mr. Ghosn has *always* had personal use of (or control over the use of) the Yacht. They say that the Yacht has at all material times been owned by Beauty Yachts and prior to 11th August 2017, Beauty Yachts was owned and controlled by Mr. Gebran and, between 23rd September 2015 and 11th August 2017, was also owned by Good Faith.

[71] The Defendants say that prior to 11th August 2017, Mr. Ghosn used the Yacht upon the invitation of Mr. Gebran for 3 days from 18th – 20th June 2017 and then again in July 2017 for testing. The purpose of the testing was to ascertain whether or not Mr. Ghosn wished to acquire the Yacht (*via* the shares in Beauty Yachts). At that time, say the Defendants, Mr. Gebran's medical condition was worsening and he was winding up his affairs, including disposition of the shares in Beauty Yachts.

[72] The Defendants say that from time to time, Mr. Gebran consulted Mr. Ghosn in relation to the acquisition of the Yacht and the business opportunity project associated with it. They say this was because Mr. Ghosn had previous experience of chartering boats, and Mr. Gebran lacked such experience, and also because of Mr. Gebran's desire that Beauty Yachts acquire a boat that would be attractive to Mr. Ghosn who he viewed as a potential chartering client.

[73] The Defendants assert that Mr. Ghosn's ownership of Beauty Yachts came about as follows:

(1) In or around May 2017, Mr. Gebran informed Mr. Ghosn that he was suffering from pancreatic cancer and was following a strict medical treatment plan. As a result of Mr. Gebran's illness he informed Mr. Ghosn that he could no longer manage his business interests, including that of Beauty Yachts.

- (2) Mr Gebran was aware of Mr Ghosn's interest in chartering the Yacht which was to his taste, and capitalised on this interest when he offered to sell his personal shares (being 40,000 shares) in Beauty Yachts to Mr Ghosn.
- (3) At that time, (i) Mr. Gebran owned 40,000 shares in Beauty Yachts and (ii) Good Faith owned the other 10,000 shares in Beauty Yachts. 50,000 shares in Beauty Yachts were in issue. The original purchase of the Yacht was funded by way of a loan from Good Faith. In light of Mr. Gebran's failing health, the Defendants say they understand that Good Faith also, as well as Mr. Gebran, wished to sell its shares in Beauty Yachts.
- (4) Mr. Ghosn agreed to purchase 100% of the shares in Beauty Yachts. At that stage the shares in Beauty Yachts were of nil or negligible value as Beauty Yachts had debts against one asset being the Yacht, which suggests such that Beauty Yacht's financial position presented a negative net asset value.
- (5) Mr. Ghosn was provided with stock transfer forms and consent to act as a director on 11th August 2017 by Beauty Yachts' BVI Registered Agent, which he duly signed and returned. The Defendants say that Mr. Ghosn's understanding is and was that the stock transfer forms and resolution had been signed by Mr. Gebran before his death.

[74] The Defendants admit that Mrs. Ghosn was the registered owner of the shares in Beauty Yachts and that she was to sign a share transfer instrument, to be left undated, for retransfer of the shares back to Mr. Ghosn, with Mr. Ghosn's intention being that the Yacht (through ownership of the shares in Beauty Yachts) should be transferred 'back' to Mr. Ghosn after he officially transferred his residence to Lebanon.

[75] The Defendants admit that Mr. Ghosn was paid US\$7.5 million from Brasilensis following instructions from Mr. Gebran to Brasilensis's bankers on 5th March 2015. The Defendants say that this payment was payment of a fee for Mr. Ghosn's assistance with and advice on investments.

- [76] The Defendants admit that a meeting that took place on 12th September 2015 at Hotel Phoenicia in Beirut, between Mr. Ghosn, Mr. Kumar and Mr. Gebran. The Defendants say the purpose of the meeting was to discuss investment opportunities available to Mr. Kumar, via Good Faith, which had been identified by Mr. Ghosn. These investments were, say the Defendants, in the nature of 'start ups' and portfolio management. The discussion considered what level of funding would be appropriate and available to support these investments. In the event, allege the Defendants, the funding was provided by way of loans by Good Faith to Shogun.
- [77] The Defendants admit that a cumulative amount of US\$27.2 million was transferred from Good Faith to Shogun. They say this amount was transferred as a loan from Good Faith to Shogun for the purposes of investing in start-ups, financial instruments, structured products, capital markets and portfolio management. Under the terms of the loan, say the Defendants, Shogun is required to pay an uplift in the loan if the performance of the investment achieves a certain level of performance. The Defendants aver that the loan from Good Faith to Shogun remains outstanding.
- [78] The Defendants say they do not understand the Claimant's case in respect of which law or laws govern(s) the claims, namely that '*save for Japanese law establishing the nature and/or scope (sic) duties owed by Mr. Ghosn to Nissan, Nissan pleads its claims (including in relation to proprietary remedies) under the law of the BVI*'. The Defendants claim that Japanese law instead applies to the claims, save that limitation issues are governed by BVI law as the *lex fori*.
- [79] The Defendants aver that the Claimants' claims relating to SBA payments, since they were made over six years before Nissan filed its claim form in these proceedings, are statute barred and ought to be struck out accordingly. Further, any claim NME has made or has relating to the SBA payment made on 2nd July 2014 is statute barred as it was made more than six years before NME became a party to these proceedings.
- [80] The Defendants plead that under Japanese law:

- (1) The content of the duties owed by directors under Article 644 of the Japanese Civil Code and under Article 355 of the Japanese Companies Act ('Duties') are the same.
- (2) A director of a Japanese company is not a trustee of the company's property.
- (3) A director of a Japanese company is not subject to the same duties as a trustee of a trust under the Japanese Trust Act. The content of the duty of loyalty owed by a trustee under Articles 30 and 31 of the Japanese Trust Act is different to the Duties.
- (4) Monies misappropriated by a director from a Japanese company in breach of the Duties are not impressed with a trust in favour of that company and do not otherwise remain the property of that company.
- (5) Secret commissions or bribes received by a director of a Japanese company in breach of the Duties are not impressed with a trust in favour of that company and do not otherwise become the property of that company.
- (6) A director who breaches the Duties will be liable to compensate the company in damages under Article 423 of the Japanese Companies Act to the extent that, and only to the extent that, the director's breaches of duty have caused that company loss.

[81] The Defendants aver that Mr. Ghosn has not benefitted from the Claimants' property or labour without legal cause and that Nissan has suffered no loss as a consequence. They deny that Mr. Ghosn diverted any sums of money from the Claimants.

[82] The Defendants deny that Mr. Ghosn received any secret commissions, on the basis that this allegation was pleaded by the Claimants so vaguely as to be embarrassing.

[83] The Defendants pleaded that a number of other aspects of the Claimants case are also embarrassing for want of particularity. These included details of alleged agreement(s) between one or both of the Claimants and SBA and of alleged secret commissions. Nonetheless, the Defendants denied, with a positive case of their own, anything improper in respect of agreements between the Claimants and SBA and that secret commissions had been paid.

The Claimants' Reply

[84] The Claimants responded to the Defendants' defence case through an Amended Reply, filed on 15th April 2021.

[85] The Claimants alleged that the Defendants' defence case makes no sense because:

- (1) The Defendants do not (because they cannot) deny that at least US\$ 32 million was paid from the Claimants' regional partners to: (i) Mr. Ghosn personally; (ii) Shogun, a company which the Defendants accept is owned by Mr. Ghosn and his son Anthony; and (iii) Beauty Yachts, a company of which the Defendants accept Mr. Ghosn became sole Director and (on the Defendants' case) a significant shareholder.
- (2) Beauty Yachts was a company which owned the Yacht, registered in the BVI.
- (3) In the closing stages of Mr. Ghosn's relationship with Nissan, he sought to transfer ownership and control of Beauty Yachts (and hence, the Yacht) to his wife.
- (4) When criminal charges were instigated against him in Japan, Mr. Ghosn fled house arrest and unlawfully absconded to Lebanon – conduct which, say the Claimants, on any view is wholly inconsistent with Mr. Ghosn's protestations of innocence and the narrative which the Defendants now advance.
- (5) Mr. Ghosn's explanations for the payments from Nissan's regional partners to Beauty Yachts, Shogun and himself personally have materially changed between the filing of the Defendants' Defence and the filing of its Amended Defence. The most recent explanations given are commercially absurd and must be rejected.

[86] The Claimants deny 'in the strongest possible terms' the Defendants' allegations that this claim is part of a campaign against Mr. Ghosn to harm his reputation, remove him as chairman and to block his plans to integrate Nissan with Renault.

[87] Otherwise, the Claimants maintained and sought to support the allegations they had pleaded earlier. For example, in support of their allegations that the Yacht was, in reality, always Mr. Ghosn's, the Claimants aver to an apparent email of 29th September 2016, by which one Mr. Tarek Abboud of Sea Pros Yachts S.A.L. (a Lebanese company) emailed Mr. Ghosn stating: *'You are kindly requested to settle the amount of 37'582 GBP representing 50% down payment on your Williams Diesel Jet Tender 565S ...'*. The Claimants' point here is that if Mr. Ghosn

was not the true owner of the Yacht, but merely someone whom Mr. Gebran consulted on yachting details, this apparent email begs the question why the request for payment was addressed to Mr. Ghosn and why Sea Pros spoke in terms of 'your ... Tender'.

- [88] The Claimants admit that Mr. Gebran emailed Mr. Bahwan on 7th May 2013 attaching drafts of the following: (i) an *'Exclusive Agreement with Real Estate Broker to Locate Suitable Property to Purchase'*; (ii) a document headed *'Termination of an Agreement'* which purported to terminate the said draft agreement; and (iii) a power of attorney for Mr. Gebran to represent Brasilensis. The Claimants also admit that a purported agreement dated 1st July 2013 entitled *'Exclusive Agreement with Real Estate Broker to Locate Suitable Property to Purchase'* was purportedly signed by: (i) Sheikh Bahwan; and (ii) Mr. Gebran for Brasilensis (apparently pursuant to a *'power of attorney'*) as alleged broker. But, allege the Claimants, this agreement was a sham and/or not a genuine agreement and/or not intended by Mr. Gebran and/or Mr. Kumar to be legally binding, but rather sought to provide a legal explanation for the payments (or certain of the payments) subsequently made by Brasilensis to Beauty Yachts and/or Mr. Ghosn and thereby to conceal the true nature and/or purpose of such payments.
- [89] The Claimants assert that Mr. Ghosn's explanation that he had received sums of money as a fee for investment assistance and advice is commercially absurd, given the extraordinarily large sum in question (totalling some US\$7.5 million) and the alleged payment of those sums at a time when Mr. Ghosn was working as CEO and Chairman of Nissan.
- [90] The Claimants averred that the Defendants' criticism of the Claimants' pleading is unjustified and misplaced. The Claimants, for their own part, also accused the Defendants of not adequately particularising part of their own pleadings.
- [91] The Claimants allege in relation to the appropriate governing law(s), that it is only the nature and scope of the duties owed by Mr Ghosn to Nissan that are governed by Japanese law as the law of the place of Nissan's incorporation. The Claimants seek to explain that all their other causes of action are governed, for various reasons as a matter of law, by BVI law.

[92] The Claimants deny that their claims are statute barred, for reasons they also seek to explain.

[93] The Claimants then set out, in outline form, an alternative analysis in the event that the Court should be persuaded that Japanese and not BVI law should apply to the various claims. The Claimants assert that Nissan has self-evidently suffered loss by the payment of monies to a corrupt former officer for his personal benefit.

Other pleadings

[94] On 5th March 2021 the Defendants served a Request for Further Information in respect of the Claimants' Amended Statement of Claim. This sought clarification by way of some 23 requests. The Claimants filed their Responses on 15th April 2021. Although the latter was a lengthy and involved document, much of the Claimants' Responses was taken up with showing how the other pleadings already covered the requests for information sought.

[95] The Claimants have also filed, apparently on a voluntary basis, Further Information in respect of Japanese law. The Defendants have taken issue with this filing, on the basis that it constitutes an amendment of the Claimants' pleadings without the Court's permission to do so, and thus is an abuse of process.

The Grounds of the Defendants' application

1. The Strikeout application

[96] The Defendants seek an order striking out all the claims pleaded in the statements of case for breach of duty, unjust enrichment and knowing receipt, on the basis that they disclose no reasonable grounds for being brought. In particular:

- (1) These three heads of claim are all premised on the contention that the sum of US\$32m paid by NME to SBA was in fact Nissan's own money, rather than NME's money. However, even on the Claimants' pleaded case the money in question belonged to NME and not to Nissan. It follows that these three heads of claim are bad in law and should be struck out.

- (2) As regards Nissan's (first) alternative breach of duty claim, that Mr. Carlos Ghosn procured this payment by NME to SBA in breach of his duty to Nissan, this claim is not sustainable because the Claimants have failed to plead that Nissan has sustained any loss as a result of that alleged breach. It follows that this head of claim should also be struck out.
- (3) As regards Nissan's (second) alternative breach of duty claim, that the payments by NME to SBA were 'secret commissions', this claim is bad in law. For a benefit to constitute a 'secret commission' it must (by definition) come from the briber and not from the principal itself, whereas on the Claimants' pleaded case the alleged payment comes from the principal itself and not from the alleged briber. Accordingly, the Claimants' pleaded 'secret commissions' claim is bad in law and should be struck out.
- (4) The claims for breach of duty, unjust enrichment and knowing receipt should be struck out, as they are unsustainable on the Claimants' pleaded case for various reasons, including the following:
- (a) Mr. Carlos Ghosn was not and is not alleged to have been a director of NME. This makes NME's breach of duty claim against him unsustainable.
 - (b) The payments made by NME to SBA were made pursuant to contracts between those two companies. The Claimants appear to contend that these contracts were a sham. This contention is inherently implausible. Moreover, the contracts have been substantially performed, such that the Claimants cannot now properly allege that SBA and NME had no intention of honouring their respective obligations under those contracts. This makes NME's unjust enrichment claim unsustainable.
 - (c) Moreover, NME's knowing receipt claim is also bad in law, given that:
 - (i) the US\$32 million was paid pursuant to binding contracts, which is a bar to a knowing receipt claim; and
 - (ii) there is no properly pleaded case that NME retained any proprietary interest in the US\$32m.

- (5) The Claimants' statements of case for bribery, fraud, deceit and dishonest assistance should be struck out as these heads of claim have been pleaded in a wholly inadequate and perplexing manner.
- (6) All the claims pleaded by Nissan and NME against Beauty Yachts, in the latter's alleged capacity as Mr. Ghosn's nominee or alter ego should be struck out, on the basis that they disclose no reasonable grounds for being brought. If what the Claimants intend here is some form of veil piercing claim then it is not properly pleaded and should be struck out accordingly. Moreover, if the Claimants rely upon the same causes of action as they advance against Mr. Ghosn directly, then they all fall to be struck out as against Beauty Yachts for the same reasons as against Mr. Ghosn.
- (7) Concerning those claims pleaded by the Claimants which seek relief premised on the transfer of Beauty Yacht's shares from Mr. Ghosn to Mrs. Ghosn being:
 - (a) voidable pursuant to s.81(l) of the Conveyancing and Law of Property Act 1961; and/or
 - (b) void and/or voidable pursuant to the Fraudulent Conveyances Act 1571 (13 Eliz. 1, c.5); and/or;
 - (c) voidable at common law as a '*transaction intended to defraud creditors and/or impeached by fraud*',these pleas assume that the Claimants have sustainable claims against the Defendants. Since they do not it follows that these pleas should be struck out.

2. The Summary Judgment and Strikeout Application

[97] The Applicants request that the Court:

- (1) enter summary judgment under CPR 15.2(a) that Japanese law is the proper law of each substantive element of Nissan's claims against Mr. Ghosn, including the remedies which are in principle available to Nissan under such heads of claim, on the basis that Nissan's case that BVI law is the proper law of these issues has no real prospect of succeeding; and

- (2) consequently, under CPR 26.3(l)(b), strike out Nissan's BVI law claims against Mr. Ghosn pleaded in the statements of case, including all claims for remedies under this head of claim, on the basis that they disclose no reasonable grounds for being brought.

3. Strikeout of Japanese law claims

[98] The Defendants seek an order that each of the following Japanese law claims pleaded by the Claimants be struck out on the basis that they disclose no reasonable grounds for being brought:

- (1) Nissan's claims against Mr Carlos Ghosn under Articles 423 and 709 of the Japanese Civil Code;
- (2) Any claims brought by the Claimants under Article 703 of the Japanese Civil Code; and
- (3) NME's claims against Mrs. Ghosn and Beauty Yachts under Article 719 of the Japanese Civil Code.

[99] The Defendants say each of these heads of claim has been so inadequately pleaded by the Claimants as to be impossible to plead to. The Claimants' pleading of these Japanese law claims fails to identify clearly, or with any proper degree of particularity, what the case is which the Defendants/Applicants are required to meet. On this basis, these heads of claim should be struck out.

4. Discharge of the injunction and the consent order which continued it

[100] Beauty Yachts seeks an order discharging the consent order dated 28th November 2019, which continued the injunction initially granted on 20th August 2019 by this Court as well as the injunction itself, on the basis that there are good grounds for the Court to discharge them. Specifically:

- (1) The injunction was a proprietary injunction granted *ex parte* on the basis that there was a '*serious issue to be tried*' as to whether: (i) US\$32m was '*wrongfully diverted by Mr. Ghosn away from Nissan*'; and (ii) Nissan accordingly had a BVI law proprietary claim against Beauty Yachts (*'both as Mr Ghosn's alter ego and in its own right'*).

- (2) Since Nissan has no claim against Mr. Ghosn, or in any event no claim for any proprietary and/or tracing-based remedy relating to the subject matter of the injunction/consent order, the basis on which the injunction was granted falls away.
- (3) This constitutes '*good ground*' for the consent order to be discharged.

The Defendants' submissions

[101] The following represents the Defendants' skeleton arguments made in support of their Application. Nothing in this part is to be taken as a finding by the Court. It is merely a recital of the Defendants' positions. The Defendants refer to the first order they seek as their 'First Application', and the second, third and fourth orders as the Second, Third and Fourth Applications respectively. The Court adopts the Defendants' nomenclature for convenience. We pick up their narrative at part 'D' of their submissions. For convenience, we shall retain this heading style.

D1. Overview

- [102] By the First Application the Defendants seek the strike-out of the entirety of the Claimants' BVI law claims.
- [103] The submissions in this section thus proceed on the assumption that the Claimants are correct to contend that their claims are governed by BVI law (see paragraph 41A.2 of the Amended Reply).
- [104] The Claimants' **primary case** is that **Nissan** has claims against Mr. Ghosn for breach of duty and unjust enrichment and against Beauty Yachts for knowing receipt. This primary case is addressed in **section D2** below.
- [105] The Claimants' **alternative case** is that **NME** has claims against Mr. Ghosn for unjust enrichment, and against Beauty Yachts for knowing receipt. This alternative case is addressed in **section D3** below.
- [106] The Claimants also make reference (in passing) to a number of other claims in, *inter alia*, bribery and deceit in their Amended Reply and have included an 'alter ego' claim against

Beauty Yachts and claims for declarations in relation to the ownership of the shares in Beauty Yachts. These are addressed in **sections D4-D6** below.

- [107] If the Defendants succeed on the First Application, then the Court will not need to go on to consider the Second and Third Applications. However, in case the matter goes further, the Court is nevertheless respectfully invited to determine all four Applications.

D2. Nissan's claims in breach of duty, unjust enrichment and knowing receipt

(i) The US\$32 million was not Nissan's monies

- [108] When the proceedings were commenced in August 2019, Nissan was the sole Claimant. Nissan informed the Court in its skeleton for the ex parte hearing that (**emphasis** Defendants' own):

*"21. US\$32 million was **wrongfully diverted by Mr Ghosn away from Nissan** between around 2012 and 2017 ...*

...

*23. The scheme was based on payments being made **from Nissan to [SBA]** with onward payments, which were secret commissions, being made for the ultimate benefit of Mr Ghosn.*

*24. The CEO Reserve Fund was set up **to provide resources** for unexpected, unbudgeted events **or fund** specific, CEO-led projects.*

*25. However, insofar as is relevant to this claim, **the relevant funds were paid to [SBA].**"*

- [109] Thus, as at the date of the ex parte hearing in August 2019, Nissan's case was that wrongful payments had been made to SBA from Nissan's CEO Reserve Fund such that **Nissan** had both personal and proprietary claims against Mr. Ghosn and Beauty Yachts. The factual case set out in the Original SOC, the Amended SOC and the RASOC (and indeed the Draft RASOC) is in substantially the same terms.

- [110] In their Original Defence (to the Amended SOC), the Defendants pointed out that: (i) the CEO Reserve Fund was **not** a fund holding a cash balance; (ii) that the CEO Reserve Fund was in fact an internal ledger which permitted the reallocation of certain expenses and/or anticipated

profits across the Nissan organisation; and (iii) that NME (rather than Nissan) had made the SBA Payments. Nissan conceded all three points in its Amended Reply and thereafter applied to join NME to the proceedings and amend the Amended SOC (Original Reply §22.1c). Nevertheless, it did not seek to make any consequential amendments to Nissan's claims as set out in the RASOC.

[111] However, if the monies paid out by NME to SBA were NME's monies, then this has significant consequences for Nissan's claims for breach of duty, unjust enrichment and knowing receipt as pleaded in the Amended SOC, which should have been reflected in the RASOC. Taking each in turn:

[112] Breach of Duty (C1 v D1): Nissan's primary breach of duty claim is that Mr. Ghosn is liable to compensate Nissan for misappropriating US\$32 million of Nissan's monies (i.e. its 'wrongful diversion' claim in RASOC, §31A). However, if the US\$32m was NME's monies then this breach of duty claim is plainly not sustainable (because no monies were diverted from Nissan) and should be struck out, in particular on the basis that the Claimants' pleadings disclose no reasonable grounds for Nissan to advance such a claim. (This would still leave Nissan with its two alternative breach of duty claims. However, these also fall to be struck out for the reasons set out in section (iii) below.)

[113] Unjust enrichment (C1 v D1): The general requirements for a claim in unjust enrichment under BVI law are as follows: (i) that D was enriched; (ii) that D was enriched at C's expense; and (iii) that the Defendant's enrichment was unjust. See Goff & Jones: The Law of Unjust Enrichment (9th edn. Sweet & Maxwell 2016), §1-09. As to (ii), if the US\$32m was the property of NME, and not of Nissan, then Nissan's unjust enrichment claim is bound to fail on the basis that element (ii) is absent. Accordingly, Nissan's unjust enrichment claim is bad in law and should be struck out. (It is in any event bad in law for the reasons set out below in the context of NME's claims.)

[114] Knowing receipt (C1 v D3):

(1) The general requirements for a claim in knowing receipt are as follows: (i) there is property subject to a trust; (ii) the property is transferred; (iii) the transfer is in breach of trust; (iv) the property (or its traceable proceeds) is received by the defendant; (v) the receipt is for the defendant's own benefit; (vi) the defendant receives the property with

knowledge that the property is trust property and has been transferred in breach of trust, or if not a *bona fide* purchaser of a legal estate without notice, retains the property, or deals with it inconsistently with the trust, after acquiring such knowledge. See Lewin on Trusts (20th edn. Sweet & Maxwell 2020), (§42-023).

- (2) Having regard to these basic elements of a claim in knowing receipt, the Claimants' pleadings disclose no reasonable grounds for advancing a knowing receipt claim in the name of Nissan. In particular, if the US\$32m sum was the property of NME and not Nissan's property, elements (i) and (ii) of the cause of action are absent (and consequently, so are the other elements).
- (3) Accordingly, Nissan's claim in knowing receipt should be struck out, in particular on the basis that the Claimants' pleadings disclose no reasonable grounds for Nissan to advance such a claim. (It is in any event bad in law for the reasons explained below in relation to NME's knowing receipt claim.)

[115] Proprietary claims (C1 v D3): Nissan may not advance any proprietary and/or tracing-based claim to the proceeds of the SBA Payments (i.e. the Yacht, on the Claimants' case)¹ if the SBA Payments were made with NME's monies. Accordingly, on any basis, the Court should strike out those claims advanced by Nissan for proprietary and/or tracing-based remedies in relation to the Yacht regardless of whether it strikes out any of Nissan's other claims.

[116] Thus, Nissan ought to have discontinued the claims set out above when NME was joined to the proceedings (at the very latest). Instead, it has sought to explain away the inconsistencies between its pleaded case and its admission that the US\$32 million was paid by NME as a question of semantics rather than substance: see the Amended Reply and the Response to the RFI.

[117] In particular, in the Amended Reply and Response to the RFI the Claimants say that the Claimants' case at §20 of the RASOC – “US\$32 million was **wrongfully diverted** by (or at the

¹ This is trite law, but see *Shalson v Russo* [2005] Ch 281, at [102], per Rimer J: “As Lord Millett explained in *Foskett v McKeown and others* [2001] 1 AC 102, at 128, tracing is neither a claim nor a remedy. It is the process by which a claimant seeks to show that an interest he had in an asset has become represented by an interest in a different asset.”

direction of) Mr Ghosn **from Nissan's CEO Reserve Fund** through ... NME to SBA" (emphasis added) – does not mean what the Defendants' thought it meant (i.e. that US\$32m was paid by Nissan to SBA) and that the Defendants are therefore attacking a straw man. Instead, the Claimants say that §20 of the RASOC should be understood to mean that "*monies ultimately paid by NME were subject to the internal ledger and (re-) allocation mechanism applicable to the CEO Reserve Fund*": see paras 22.1f of the Amended Reply.²

[118] Read in this way, §20 of the RASOC is indeed consistent with the Claimants' (belated) concession that the US\$32 million was paid by NME. However, if NME's payment of the US\$32m to SBA triggered a 're-allocation' under the mechanism applicable to the CEO Reserve Fund, this can only have been on the basis that NME incurred an expense in paying that sum of US\$32m to SBA for which it required reimbursement from the CEO Reserve Fund. In other words, NME can only have incurred an expense if it paid its **own** money to SBA.

[119] Accordingly, whichever way §20 of the RASOC is interpreted the point remains that, since the US\$32 million paid to SBA was not Nissan's monies (now, at least tacitly, common ground), it follows that there can be no sustainable basis for Nissan's misappropriation and unjust enrichment claims against Mr. Ghosn or its knowing receipt claim against Beauty Yachts. The Claimants have simply failed to deal with this point. The Court is accordingly respectfully requested to strike out each of these claims in their entirety.

(ii) C1's alternative breach of duty claims against D1

[120] In the alternative to its misappropriation claim addressed above, Nissan pleads (or appears to plead) two alternative breach of duty claims against Mr. Ghosn.

[121] Nissan's first alternative breach of duty claim is (or appears to be) a convoluted claim that Mr. Ghosn procured the payment by NME of NME's monies to SBA in breach of his duties to Nissan (RASOC, §31A). It is trite law that the company must plead and show that it has sustained a loss as a result of the director's breach of duty. However, the Claimants have

² See further paragraphs 21A, 22.1a-d and 31A of the Amended Reply; also paragraph 23 of Mr. Gilliland's third affidavit dated 9th August 2021, to like effect.

failed to plead in the RASOC that Nissan has sustained any loss as a result of that alleged breach.³ As such, this claim is not sustainable.

[122] For the avoidance of doubt, this is not a defect that has been addressed in the Draft RASOC, and not a defect that could in any event be cured. The only conceivable loss which Nissan could have suffered (on the Claimants' case) is a diminution in the value of any dividends payable by NME to Nissan. As to this:

- (1) A brief reference is made at paragraph 47A.1 of the Amended Reply to Nissan suffering a loss as a result of the diminution in the value of dividends payable by NME to Nissan. However, it is wholly inadequate to plead an essential element of a claim, such as loss, in an Amended Reply (rather than in the RASOC).
- (2) In any event, on the basis of the information set out in the Response to the RFI, it is clear that the payment of US\$32 million between 2012 and 2018 would have had no material impact on the size of the dividends declared in that six-year period.
- (3) Moreover, even if it could have made a material difference, any claim for such losses would be barred by the rule against reflective loss.⁴

[123] Nissan's second alternative breach of duty claim (§31B of the RASOC) is that Mr. Ghosn, in breach of his duties to Nissan, "*received secret and undisclosed commissions*". This claim is not adequately pleaded:

- (1) A secret commission means "*(i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that the person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that*

³ The Claimants (attempt to) plead C1's alleged loss in the context of C1's breach of duty claim under Japanese law (Amended Reply, §41C.1e.), and in the context of C1's primary breach of duty claim (Amended Reply, §47A.1), but they have failed to plead to C1's alleged loss in the context of this alternative breach of duty claim under BVI law.

⁴ See *Sevilleja v Marex Financial Ltd* [2020] UKSC 31, esp. [108] to [109].

he has made that payment to the person whom he knows to be the other person's agent": **Industries and General Mortgage Co Ltd v Lewis**.⁵

- (2) The Claimants' case is not that SBA made payments to Mr. Ghosn out of its own resources but that the SBA Payments were paid by SBA to the SBA Associates and by the SBA Associates to the Lebanese companies (as nominees for Mr. Ghosn).⁶ This is not surprising: for the reasons set out in Section D.2(i) above, if the SBA Payments were not the source of the Other Payments, there is no pleaded (or any sensible) basis for the allegation that the SBA Payments were dishonest or that the Other Payments were secret commissions.
- (3) However, the Claimants' case that the Other Payments are linked (traceably) to the SBA Payments is inadequately pleaded. The focus of the RASOC is on pleading out connections between the Other Payments and Mr. Ghosn. By contrast, in relation to the (alleged) connections between the SBA Payments and the Other Payments, the Claimants merely make a handful of bare assertions that Sheikh Bahwan and/or Mr. Omar Bahwan and/or Mr. Kumar acted "*on behalf of or for the benefit of SBA*" in making the Other Payments (see e.g. RASOC, para 26, 26A). However, no particulars are pleaded in support of these bare assertions. In other words, there is a glaring hole in the centre of the Claimants' second alternative breach of duty case.
- (4) Therefore, the allegation that the SBA Payments are (traceably) the source of the Other Payments is unsustainable.
- (5) Moreover, the Claimants have failed to plead in the RASOC that (i) SBA made payments to Mr. Ghosn "*knowing that the person is acting as the agent of the other person with*

⁵ [1949] 2 All E.R. 573 at 575, *per* Slade J

⁶ "*The secret commissions of which the Claimants currently have knowledge were ultimately paid away from NME, and NME has accordingly suffered loss in the amount of those commissions*" (Response to RFI, 9.c.; "*Mr Ghosn breached a range of duties by improperly causing the Claimants' funds to be paid out to [SBA] in circumstances whereby senior executives at SBA ultimately paid corresponding sums back to Mr Ghosn through two Lebanese companies*" (Gilliland Four, para. 4)).

whom he is dealing”; or that (ii) SBA failed to disclose the alleged secret commissions to Nissan.⁷

- [124] Accordingly, Nissan’s alternative breach of duty claims should be struck out, in particular on the basis that the Claimants’ pleadings disclose no reasonable grounds for Nissan to advance such claims.

D.3 NME’s claims in unjust enrichment and knowing receipt

- [125] As set out above, the Claimants’ alternative case names (or appears to name) NME as the proper Claimant for the unjust enrichment and knowing receipt claims. Each of these heads of claim is hopelessly pleaded and should be struck out.

(i) Unjust enrichment

- [126] §31D of the RASOC states as follows: *“Further or in the alternative, Mr Ghosn is liable to Nissan, **alternatively NME**, in unjust enrichment and/or money had and received for the sum of US\$ 32 million or such lesser sum as he and his nominees may have received as alleged above.”* This is not a proper pleading of an unjust enrichment claim.
- [127] As noted in Goff & Jones: The Law of Unjust Enrichment (9th edn. Sweet & Maxwell 2016) *“there is in English law “no general rule giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff’s expense””* (§1-26). As such, *“It will not do to plead a generalised claim in unjust enrichment... Nor is it acceptable to assert that the circumstances make the defendant’s enrichment unfair in a broad sense, or in accordance with the claimant’s own idiosyncratic notions of unfairness: specific reasons anchored in the case law must be given to justify the assertion that the defendant’s enrichment is unjust”* (§1-38). In particular, a claimant *“must be able to point to a ground of recovery that is established by past authority, or at least is justifiable by a process of principled analogical reasoning from past authority”* (§1-26).
- [128] In the present case, no specific grounds are pleaded in support of a claim by NME (rather than by Nissan) in unjust enrichment, in particular as to why Mr. Ghosn’s (alleged) enrichment was

⁷ The Claimants have tried (somewhat clumsily) to rectify these defects in (3) in the Draft RASOC (paras. 31.B.1 & 31.B.2).

unjust.⁸ Nissan's unjust enrichment claim appears to be based on Mr. Ghosn's alleged breach of duty to Nissan, although even this is not clearly particularised. However, it is common ground that Mr. Ghosn was not a director of NME.

[129] Further and in any event, Mr. Ghosn has a complete answer to the unjust enrichment claim:

- (1) It is common ground that the US\$32m payments made by NME to SBA were paid pursuant to series of annual contracts entered into between NME and SBA by which cash payments were to be paid by NME to SBA (the "**Contracts**"): see §24.1(f) of the Amended Defence and §27B of the Amended Reply. Those contracts have now been substantially performed.
- (2) Accordingly, the payments were made in lawful discharge of NME's obligations under the Contracts. It follows that NME cannot claim that SBA's (alleged) onward application of those monies to Mr. Ghosn amounted to an unjust enrichment at NME's expense, **unless the Contracts are shams**.⁹ (For the avoidance of all doubt, Nissan and its unjust enrichment claim also falls to be struck out on this basis.)
- (3) The Claimants have only addressed the Contracts in reply. Although they admit that the Contracts have **not** been terminated, cancelled or rescinded by NME (Amended Reply, §27B), they say that the Contracts were produced "*in order to provide a legal explanation*

⁸ By paragraph 11(b) of the Response to the RFI, the Claimants say that full particulars of C2's unjust enrichment claim are provided at §31D of the RASOC ("*based on the facts and matters pleaded at paragraphs 20 to 27A*") and §47B-C of the Amended Reply. What is pleaded in the Amended Reply should be ignored for present purposes, having regard to CPR 8.7(1) but in any event, (i) §47B of the Amended Reply relates to **Nissan's** unjust enrichment claim and (ii) §47C of the Amended Reply relies only on §31D of the RASOC ("*based on the facts and matters pleaded at paragraphs 20 to 27A*").

⁹ In other words, there was no direct transfer of value from C2 to D1 (and nothing which the law would treat as the equivalent of a direct transfer of value, such as a discharge by C2 of D1's debt to a third party): the intervening payment by C2 to SBA in discharge of C2's obligations to SBA precludes a finding that value has been transferred directly from C2 to D1. See *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275, at [50]: "*It has often been suggested that there is a general rule, possibly subject to exceptions, that the claimant must have directly provided a benefit to the defendant. The situations discussed in the two preceding paragraphs can be reconciled with such a rule, if it is understood as encompassing a number of situations which, for the purposes of the rule, the law treats as equivalent to a direct transfer, in the sense that there is no substantive or real difference. So understood, the suggested rule is helpful.*"

for the payments made to SBA (or certain of the payments) and thereby conceal the true nature and/or purpose of such payments” (Amended Reply, §27.2).

- (4) On the face of it this allegation appeared to be an allegation that the Contracts were shams, although the case is not clearly stated or particularised (and ought, of course, to have been pleaded in the RASOC and not in the Amended Reply). This impression was reinforced by paragraph 7 of Mr. Gilliland’s third affidavit dated 9th August 2021, which contended that Mr. Ghosn diverted funds from Nissan via SBA “*using **sham** contracts or using contracts with SBA for improper purposes*”.
- (5) The Claimants have since expressly clarified that they do not contend that the Contracts were shams. See page 3 of the MKS letter of 5th October 2021.
- (6) In any event, a contention that the Contracts were shams would, on any view, be inherently implausible and unsustainable. In particular, for the Claimants to show that the Contracts were shams they must particularise and prove that “*all the parties thereto ... have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating*” (see Arden LJ in **Hitch v Stone** at [1]¹⁰ (citing Diplock LJ in **Snook v. London & West Riding Investments Ltd**¹¹)). This they simply could not do, for any number of reasons including because on the Claimants’ own case, NME could not have had the requisite intention (because it was not the shammer but the party deceived by the shammer).¹²
- (7) For all these reasons, it is clear that the NME’s unjust enrichment claim is bad in law and should be struck out.

¹⁰ [2001] EWCA Civ 63.

¹¹ [1967] 2 QB 786, 802.

¹² **Second** in any event, as the Contracts have been substantially performed, the Claimants cannot now properly allege that SBA and C2 had no intention of honouring their respective obligations under the Contracts given that the whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement, while in fact they have no intention of honouring with their respective obligations, or enjoying their respective rights, under the provision or agreement. **Finally**, even if (which is denied) the Contracts were entered into for an ulterior purpose, or were artificial, this is irrelevant: **Hitch v Stone** at [67]

(ii) Knowing receipt

- [130] NME appears to advance a claim in knowing receipt against Beauty Yachts. See, for example, §36 of the RASOC.
- [131] Having regard to the basic elements of a claim in knowing receipt (see above), the Claimants' pleadings disclose no reasonable grounds for advancing a knowing receipt claim in the name of NME. In particular, no relevant breach of trust or fiduciary/ director's duty has been committed for the purposes of establishing element (iii) of the cause of action, i.e. "*the transfer is in breach of trust*". It is common ground that Mr. Ghosn was not an officer of NME and did not owe any duties (fiduciary or otherwise) to NME.
- [132] There are two other free-standing reasons why the knowing receipt claim should be struck out:
- (1) First, as explained above, the US\$32m sum was paid pursuant to the Contracts. There can be no liability for knowing receipt if the payment is made pursuant to a binding contract which is not set aside: See **Criterion Properties Plc v Stratford UK Properties LLC**¹³ especially at [4]. (This is also another reason why Nissan's knowing receipt claim against Beauty Yachts is bad in law.)
 - (2) Secondly, there is no properly pleaded case that NME retained any proprietary interest in the monies paid by NME to SBA. At §47B.4 of the Amended Reply, the Claimants plead that NME retained proprietary interests in the sums paid to SBA (and thereafter paid onwards). It is unacceptable for the Claimants to plead a positive case in their Amended Reply. In any case, §47B.4 of the Amended Reply cross-refers and relies solely on the Claimants' averments at §§33, 35 to 36 and 40A of the RASOC, where there is **no** pleaded case as to how NME retained any proprietary interest in the US\$32m.
- [133] Accordingly, NME's claim in knowing receipt should be struck out.

¹³ [2004] 1 W.L.R. 1846.

D.4. Bribery/ fraud claim, Deceit and Dishonest Assistance (Claimants v D1/D3)

- [134] The Original Claim Form and SoC, and the Amended Claim Form and Amended SoC contained some unparticularised references to claims in bribery and deceit.
- [135] However, the Claimants subsequently (and rightly) struck through the references to “*bribery*” and “*deceit*” in the Claim Form and the few passing references to “*bribery*” and “*deceit*” in the SoC, specifically at prayer (1)e and paragraph 40.2 (see, respectively, the relevant passages in the Re-Amended Claim Form and the RASOC).
- [136] There is no mention of a dishonest assistance claim in the Re-amended Claim Form or the RASOC (or in their predecessors).
- [137] Nevertheless, at §41A.2 of the Amended Reply, the Claimants, refer in passing to their claims for “*bribery, deceit, and dishonest assistance...*” (the “**Reply Torts**”), which they say fall to be determined under BVI law.
- [138] It is entirely unclear from the Claimants’ pleaded case what the specific factual allegations are in support of each of these elements of these various torts. Beyond the passing reference to the Reply Torts in §41A.2 of the Amended Reply, no further particulars are provided.
- [139] Accordingly, the Claimants’ pleadings in relation to the Reply Torts are not proper pleadings. They are hopelessly sparse and in breach of CPR 8.7(1). Indeed, it is not even clear from the Claimants’ pleadings who the relevant claimant(s) and defendant(s) to these causes of action are said to be. This has been pointed out to the Claimants, whose bare denial that their particulars of these claims are “*in any way insufficient or inadequate*” (MKS letter of 5th October 2021, page 2) is plainly unhelpful.
- [140] Despite the bullish tone of their correspondence, the Claimants have belatedly sought to plead out claims in bribery and dishonest assistance (but not deceit¹⁴) in the Draft RASOC.

¹⁴ The elements of this tort are well known: (i) the defendant makes a false representation; (ii) the defendant knew the representation was made and that it was untrue or was reckless as to the truth; (iii) the defendant intended that the representation would induce the claimant to act or refrain from acting; (iv) the claimant was in fact induced by the representation so to act or refrain from acting; and (v) the claimant has suffered loss. The Claimants have not tried to plead out these elements in the Draft RASOC.

- [141] Subject to the Claimants' Amendment Application being allowed, it is beyond dispute that all references to a bribery / fraud, deceit and dishonest assistance should be struck out, whether on the ground that the Claimants' pleadings do not disclose any reasonable ground for bringing such claims (CPR 26.3(1)(b)), on the ground that this part of their pleadings is an abuse of the court's process (CPR 26.3(1)(c)), and upon the ground that the Claimants have failed to comply with the requirement under CPR 8.7(1) to plead all the facts on which they rely in support of the Reply Torts (CPR 26.3(1)(d)).

D.5 Alter ego claim (Claimants v D3)

- [142] At §35 of the RASOC, the Claimants contend as follows:

"Beauty Yachts is liable to account to Nissan, alternatively NME for the sum of at least US\$13.665 million as Mr Ghosn's alter ego."

- [143] The phrase "alter ego" appears to be a US import. If what is intended here is some form of veil piercing claim, it is not properly pleaded. In any event, in correspondence the Claimants have now disavowed any veil piercing claim, clarifying that their case is instead limited to an (unsubstantiated) allegation that Beauty Yachts was acting as Mr. Ghosn's nominee (see the MKS letter of 5th October 2021, page 2).

- [144] In any event, insofar as the Claimants' "alter ego"/ "nominee" claims against Beauty Yachts rely on the same causes of action as those pleaded against Mr. Ghosn personally (see Response to RFI, paragraph 13(b)(iv)(2)), these are liable to be struck out for the same reasons why those causes of action against Mr. Ghosn personally are liable to be struck out.

D.6 Claimants' other claims (Claimants v D1 & D2)

- [145] In §§41-47 of the RASOC, the Claimants plead that the transfer of Beauty Yacht's shares from Mr. Ghosn to Ms. Ghosn is: (i) voidable pursuant to s.81(1) of the Conveyancing and Law of Property Act 1961; and/or (ii) void and/or voidable pursuant to the Fraudulent Conveyances Act 1571 (13 Eliz 1, c.5); and/or (iii) voidable at common law as a "*transaction intended to defraud creditors and/or impeached by fraud*".
- [146] Each of these pleas assume that the Claimants have sustainable claims against Mr. Ghosn. Accordingly, the claims in §§41-47 of the RASOC are liable for strike-out for the same reasons

that the causes of action against Mr. Ghosn personally. They should accordingly be struck out if the Claimants' claims against Mr. Ghosn are struck out.

E. THE SECOND APPLICATION

[147] In the event that the Court does not strike out all of Nissan's¹⁵ claims for the reasons set out in Section D above, then the Defendants seek reverse summary judgment on a number of points of conflict of laws in relation to Nissan's breach of duty claim (Section E1), as well as its unjust enrichment claim and knowing receipt claim (Section E2). The Defendants also seek various strike-out orders which, for the reasons explained below, are logically consequential upon any reverse summary judgment which the Court may enter on the conflict of laws points. For the avoidance of doubt, the Defendants do not seek reverse summary judgment in relation to NME's claims.

E.1 Breach of Duty Claim (C1 v D1)

Reverse summary judgment: Japanese law governs all substantive elements of C1's breach of duty claim

[148] Nissan pleads a breach of duty claim against Mr. Ghosn in relation to his alleged misconduct as an officer of Nissan.

[149] Nissan accepts, as it must, that the "*relationship between Nissan and Mr Ghosn in his capacity as CEO and/or Chairman was governed by Japanese law*" (RASOC, §29). Nevertheless, in its Amended Reply served in May this year, Nissan pleaded that Japanese law governs only the issue as to "*the nature and scope of the duties*" owed by Mr. Ghosn to Nissan (Amended Reply, §41A.1) **but** (ii) BVI law applies to all other aspects of Nissan's breach of duty claim against Mr.

¹⁵ C2's claims are so hopelessly pleaded that there is real difficulty in understanding the Claimants' choice of law position in relation to these claims. The Defendants therefore only pursue summary judgment in relation to C1's choice law of position (but reverse their position to pursue summary judgment against C2 in due course to the extent necessary). For the avoidance of doubt, however, by the Second Application, the Defendants do seek the striking out of C2's Japanese law claims on the basis that they have not been properly pleaded: see Section F below.

Ghosn “by virtue of the ‘flexible exception’ to the double actionability rule” (Amended Reply, §41A.2).

- [150] For the reasons which follow, the Claimants’ case as set out in the Amended Reply is contrary to principle and authority.

The governing law is Japanese law

- [151] It is well established that the law of incorporation of a company determines whether a director has acted in breach of his or her duties to the company, in the present case, Japan, regardless of whether the breach of duty was omitted, or the loss incurred, in some other jurisdiction: See **Base Metal Trading Ltd v Shamurin**,¹⁶ **Fiona Trust & Holding Corporation v Nikitin**,¹⁷ at [141] (“the claims against them for breach of their fiduciary duties as directors of Sovcomflot and NSC are also governed by Russian law because that is the place of incorporation of the companies”) and [143-148]. This is because “any other result would create huge uncertainty and hamper the requirement for good corporate governance and proper regulatory control”: see **Base Metal**, per Tuckey LJ at [56].
- [152] It follows from the above that Japanese law, being the proper law of Mr. Ghosn’s duties to Nissan, is the proper law of each substantive element of Nissan’s breach of duty claim, i.e. it is the *lex causae*. Accordingly, Japanese law governs the question of breach and liability: see **Fiona Trust**, per Andrew Smith J at [142].
- [153] The *lex causae* (in this case, Japanese law) also determines the substantive questions regarding the remedies available to Nissan.¹⁸ In particular, the *lex causae* of a company’s claim against a director for breach of fiduciary duty (here, Japanese law) will also determine the

¹⁶ [2005] 1 WLR 1157.

¹⁷ [2010] EWHC 3199 (Comm).

¹⁸ The well-established rule of English law is that questions about what heads of damage are recoverable are questions of substantive law. This was clearly stated in *Boys v Chaplin* [1971] AC 356, p379 per Lord Hodson; p393 per Lord Wilberforce; pp394-5 per Lord Pearson. See also *Fiona Trust*, at [157] citing Lord Hoffmann in *Harding v Wealands* [2007] 2 AC 1 at [24]: “... it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability”.

remedies available to the company, in the following sense: (i) BVI law, as the *lex fori*, will determine whether a particular remedy (e.g. a remedy for an account or some other remedy) will be available to Nissan; but (ii) the Court will conduct this analysis having regard to whether a particular remedy under BVI law is analogous to the remedy which is available to Nissan under the *lex causae* (here, Japanese law).

[154] See Andrew Smith J in **Fiona Trust** at [158]:

“... if English law as the lex fori does determine whether a remedy of an account or other remedy is available for a wrong established under a foreign law as the lex causae, this does not mean that, having established liability against a defendant, the court will then determine what remedies would be available on the particular facts under English law. The questions would be what is the nature of the liability under the foreign law, and what remedy or remedies would English law provide for English law liability similar or analogous to the kind of liability established under the foreign law.”

[155] In other words, the *lex fori* will provide a remedy which harmonises, or is “cognate”, with the liability according to its nature and extent as fixed by the *lex causae*. See also Dicey, Morris & Collins: *The Conflict of Laws* (15th edn. Sweet & Maxwell 2018) §36-056 (“*Where restitution is sought for breach of fiduciary duty, the law which governs the fiduciary relationship should also determine whether the fiduciary is liable to disgorge the value of that enrichment*”).

[156] For all these reasons, Japanese law (as the *lex causae*) is the proper law of each substantive element of Nissan’s breach of duty claim against Mr. Ghosn, including the remedies which are in principle available to Nissan.

The double actionability rule (and the “flexible exception”)

[157] The double actionability principle is a choice of law rule which provides that an action for an alleged tort committed in a foreign jurisdiction can be successful in a domestic court only if it would be actionable under both the laws of the home jurisdiction and the foreign jurisdiction, unless the “flexible” exception to that rule applies. See, for example, **Athanasios Sophocleous & Others v The Secretary of State for Foreign and Commonwealth Affairs**,¹⁹ at [2].

¹⁹ [2018] EWCA Civ 2167.

[158] As above, however, the choice of law rule for claims for breach of duty is now well established. Accordingly, the double actionability rule (*a fortiori*, its “flexible” exception) has no application in this context.

[159] In any event, the Claimants have failed to plead where the substance of the cause of action arose (for the purposes of arguing that the double actionability rule, or its “flexible” exception, applies). The burden is on the Claimants to plead out and make good an affirmative case on this point²⁰: its failure to plead such a case is fatal. Nor are there any sensible grounds for arguing for the applicability of the “flexible” exception to the double actionability rule, and the Claimants have pleaded no such grounds (still less particularised them).²¹

[160] It is instructive to consider the facts in **Boys v Chaplin** itself (and Lord Wilberforce’s application of the law to those facts), since this exercise highlights how far removed the present case is from one in which the “flexible exception” to the double actionability rule might sensibly be said to apply (even assuming, for present purposes, that the double actionability rule does apply).

[161] As to this:

- (1) In **Boys v Chaplin** a tort had been committed in Malta. Although it was actionable in England, the law of Malta denied recovery of damages for pain and suffering. *Prima facie* English law should do the same. Lord Wilberforce noted: “*if the parties were both Maltese residents it ought surely to do so; if the defendant were a Maltese resident the same result might follow. But in a case as the present, where neither party is a Maltese resident or citizen, further inquiry is needed rather than an automatic application of the rule*”.

²⁰ Before the Court can determine whether the double actionability rule applies, it must first determine that the cause of action arose in some other jurisdiction (see *Athanasios Sophocleous & Others v The Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 2167, at [11]). Logically, therefore, the burden is on the Claimants to plead (and prove) that (i) the cause of action arose in some other specific jurisdiction, and (ii) the double actionability rule applies.

²¹ It is trite that the “flexible” exception to the rule will not apply “*unless clear and satisfying grounds are shown why it should be departed from*” (see *Boys v Chaplin* [1971] A.C. 356, 391; also *Athanasios Sophocleous & Others v The Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 2167, at [33]). No clear and satisfying grounds for the application of the “flexible” exception are pleaded by the Claimants.

- (2) Since both parties in that case were ordinarily resident in England (and neither a Maltese citizen), *“further inquiry is needed rather than an automatic application of the [double actionability] rule. The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case, negligence or otherwise, related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties so circumstanced.”*
- (3) Lord Wilberforce continued: *“The foreign rule must be evaluated in its application. The rule limiting damages is the creation of the law of Malta, a place where both plaintiff and defendant were temporarily stationed. Nothing suggests that the Maltese state has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties. No argument has been suggested why an English court, if free to do so, should renounce its own rule. That rule ought, in my opinion, to apply.”*
- (4) By contrast, in the present case:
- a. The Court is concerned with a Japanese company (C1) and one of its former directors (D1), neither of whom has any particular connection with the BVI. D1 was ordinarily resident in Japan at the time the SBA Payments were made. He is now resident in Lebanon, but is not (and has never been) resident in the BVI. This scenario is about as far removed as it is possible to be from a claimant and defendant who are both citizens of the *lex fori*, engaged in litigation in the *lex fori*, which just happens to concern a foreign law tort which arose in another jurisdiction (the *lex loci*).
 - b. The Claimants seek to apply the “flexible exception” to the double actionability rule, not just to the question of remedies, but to the questions of breach (of Japanese law duties), causation and loss as well. It is striking that the Claimants have failed to plead any *“clear and satisfying grounds”* for splitting (i) the contents of D1’s directors’ duties, from (ii) the question of breach of those Japanese law duties – these two topics being, fundamentally, two sides of the same coin. Such an approach would be artificial in the extreme and no grounds justifying such an approach have been pleaded (nor could they be sensibly pleaded).

- c. In short, the Claimants apparently wish to ask the Court to disregard the applicable foreign law altogether (save for the rump topic of the content of D1's duties). This is not how the "flexible exception" is to be applied (even assuming, for present purposes, that the double actionability rule is in principle applicable in this context). See **Athanasios Sophocleous & Others v The Secretary of State for Foreign and Commonwealth Affairs**,²² at [32]: *"It is one thing to say that an otherwise valid claim should not be entirely defeated by a technical rule of the forum, if the forum has no close connection with the subject-matter of that claim; it is quite another to say that the law of the place of the tort should be completely disregarded. No case has gone as far as that."*
- d. In any event, the Claimants' approach to the "flexible exception" does not appear to be based on any careful "evaluation" (*per* Lord Wilberforce) of a particular foreign law rule in its application to the instant case.

[162] For these reasons, the Claimants' case that the double actionability rule and its flexible exception both apply to C1's breach of duty claim against D1 is inadequately pleaded, inherently implausible and (in any event) incorrect as a matter of law.

Conclusion

[163] In short, therefore, judgment should be entered in the Defendants' favour on the issue of the governing law of the breach of duty claims.

[164] If the Court grants reverse summary judgment in favour of the Defendants on this issue, it follows that the Court should also strike out the entirety of Nissan's primary (i.e. BVI law-governed) breach of duty claims against Mr. Ghosn (as well as Nissan's BVI law-governed "secret commissions" claim). This is because, if Japanese law applies to each substantive element of Nissan's breach of duty / secret commissions claims against Mr. Ghosn, those passages of the Claimants' pleadings which refer to these heads of claim under BVI law, including all of the remedies sought pursuant to those BVI law heads of claim (alternatively, the proprietary and/or tracing-based remedies), fall to be struck out, on the basis that they do not "disclose any reasonable ground for bringing ... a claim" (CPR 26.3(1)(b)).

²² [2018] EWCA Civ 2167.

E.2 Unjust enrichment claim (C1 v D1) / knowing receipt claim (C1 v D3)²³

Reverse summary judgment/ strike-out: the unjust enrichment claim (C1 v D1) and the knowing receipt claim (C1 v D3)²⁴

- [165] Nissan pleads a BVI law claim in unjust enrichment against Mr. Ghosn (RASOC, §31D) and a BVI law claim in knowing receipt against Beauty Yachts (RASOC, §33). Nissan's case is that BVI law is the proper law of both claims because it is "***the law of the country in which the enrichment (or, at least a substantial part of the enrichment) occurred***" (Amended Reply, §41A.3).
- [166] It is well established (indeed, "*beyond argument*"²⁵) that the governing law of claims for both unjust enrichment and knowing receipt is the law of "...*the country with which the obligation has its closest and most real connection*": **Sibir Energy plc v Gregory Trading SA & Ors**²⁶ at [23]. See also per Christopher Clarke J in **OJSC Oil Co Yugraneft v Abramovich**²⁷ at [246] to [247] recording his agreement with the ECCA in *Sibir*.
- [167] In determining which country is most "closely connected" to the claim, important considerations include (i) where any breach of fiduciary duty that caused or allowed the payment to be made took place, and (ii) how and where the recipient came to know that the claimants were entitled to the monies paid: **Fiona Trust**, [180]. The place of enrichment is a factor in the analysis, and in some cases may be of very little importance at all: "*the place of enrichment may, depending on the facts, be of the greatest importance or very little importance at all*": **Yugraneft** at [247] and see further **Fiona Trust** at [162], **Sibir** at [23] and **Dexia Crediop SpA v Comune Di**

²³ C2's unjust enrichment claim against D1, based on its alternative case theory that C2 is the proper Claimant, is addressed at Section D.3 above (where it is explained why it should be struck out).

²⁴ C2's knowing receipt claim against D3, based on its alternative case theory that C2 is the proper Claimant, is addressed at Section D.3 above (where it is explained why it should be struck out).

²⁵ See *Sibir*, at [23].

²⁶ (Civil Appeal No 26 of 2005) (unreported, delivered 18th September 2006) (Barrow JA).

²⁷ [2008] EWHC 2613 (Comm).

Prato²⁸ at [161-162].²⁹ Further “*If there is a contractual or similar relationship between the claimant and the defendant, the law of that relationship is likely to govern*”: **Yugraneft**, at [247] (*emphasis* Defendants’ own). The relationship between a director and his company is clearly, on any view, a “*similar relationship*”.

[168] In the present case, Japanese law governs Mr. Ghosn’s relationship with Nissan including his contracts of employment. Further, the other important connecting factors are all with Japan:

- (1) Japan is the country where the alleged fiduciary relationship was created;
- (2) Japan is the country where Nissan is incorporated and its centre of operations;
- (3) Japan is the country where Mr. Ghosn was habitually resident at the time the SBA Payments were made; and, on the Claimants’ case, Beauty Yachts is a mere nominee of Mr. Ghosn;
- (4) Japan is the country where Mr. Ghosn is alleged to have authorised the SBA Payments in breach of his duties to Nissan;
- (5) Japan is the country where Nissan suffered its alleged loss.

[169] It follows that Nissan’s unjust enrichment and knowing receipt claims are most closely connected to Japanese law, being the law governing Mr. Ghosn’s duties to Nissan (and Nissan’s breach of duty claim against Mr. Ghosn), and that all of the substantive elements of these claims (including the substantive question of remedies) are governed by Japanese law.³⁰

[170] Thus this is not a case where the connections with the BVI and Japan need to be explored in disclosure and at trial, to determine with which country the obligation had a closer connection. In the words of Barrow JA in **Sibir**, “*the situation in the instant case is as uncomplicated as clarity could desire*”.

²⁸ [2016] EWHC 2824 (Comm).

²⁹ Reversed in part without consideration of this point: [2017] EWCA Civ 428.

³⁰ For a close analogy see *OJSC TNK-BP Holding v Lazurenko* [2012] EWHC 3286 (Ch) where the Court held at [119], that the claims, which arose from alleged breaches of duty under Russian law to be performed in Russia, should be governed by Russian law and ***not*** the law of the place of enrichment.

- [171] In any event, the Claimants are wrong to say that the BVI is the place of enrichment. On the Claimants' case, Mr. Ghosn was enriched when the SBA Associates made payments into the bank accounts of two Lebanese companies located in Lebanon. On the Claimants' case Beauty Yacht's place of enrichment was also Lebanon. This is because on the Claimants' case, payments were made by Good Faith into Beauty Yacht's Lebanese bank account which were then paid over to an Italian company to pay for the Yacht. Thus, the BVI is merely (on the Claimants' case) the place of enjoyment of the ultimate benefit of part of the SBA Payments.
- [172] Accordingly, the Court is invited to enter summary judgment on the conflict of law points addressed above, i.e. that Japanese law governs Nissan's unjust enrichment claim against Mr. Ghosn and its knowing receipt claim against Beauty Yachts.
- [173] If the Court grants summary judgment on this issue, then it follows that the Court should also strike out the entirety of Nissan's knowing receipt and unjust enrichment claims including the remedies sought by Nissan in response to those claims (alternatively, just the proprietary and/or tracing-based remedies,) on the basis that they do not "*disclose any reasonable ground for bringing ... a claim*" (CPR 26.3(1)(b)). Finally, for completeness, to the extent that the Court strikes out these parts of the Claimants' statement of claim (as against D1), then, by parity of reasoning and to the same extent, the Court should also strike out those parts of the Claimants' statements of case (as against D3) based on their "alter ego" analysis and the fraudulent conveyance claims in relation to the shares in Beauty Yachts.

F. THE THIRD APPLICATION

- [174] The Defendants also seek an order striking out the Claimants' alternative Japanese law claims.
- [175] The Claimants accept that NME cannot advance a breach of duty claim against D1 under Japanese law. It is further common ground that Japanese law recognises no cause of action in knowing receipt (or any cause of action analogous to it): see §55A.3(a) of the Amended Defence ("*Japanese law does not recognise claims for knowing receipt*") and §41C.4 of the Amended Reply ("*Paragraph 55A.3(a) [of the Amended Defence] is admitted*").
- [176] However, the Claimants say they have the following Japanese law claims against the Defendants:

- (1) A claim by C1 against D1 under Article 423 of the Japanese Civil Code (for breach of duty);
- (2) Claims by C1 and C2 against D1 under Article 709 of the Japanese Civil Code (for intentionally or negligently infringing any right of others);
- (3) A claim by C2 against D2 and D3 under Article 719 of the Civil Code (for allegedly assisting D1's tortious conduct); and (possibly)
- (4) Claims by C1 and C2 against D1 under Article 703 of the Japanese Civil Code (for unjust enrichment).

[177] The Claimants' Japanese law claims are referred to only at §41C of the Amended Reply. This passage of the Claimants' pleadings is so sparse and inchoate as to be impossible to plead to. It is for the Claimants to plead out and prove their claims under Japanese law and yet, in their pleading, the Claimants seek to turn the rules of pleading on their head and shift the burden on to the Defendants. See in particular Amended Reply §41C: "*the Claimants [sic] are put to strict proof of the principles of Japanese law alleged at paragraphs 43.3, 47.4, 48 (and its following sub-paragraphs), 54.5, 55A.3, 56.02 to 55.03, 57.02, 58.0 and 63.1 to 63.2*". What then follows in the remainder of §41C of the Amended Reply is a summary of the Japanese law claims, rather than a proper pleading out of those claims. For example, the Claimants make bare assertions as to liability at §41C.1a. to d., including against Ms. Ghosn, without particularising the alleged breaches. This gives the Defendants far less than they need to be able to identify the case they are required to meet at trial. For the avoidance of doubt, the ordinary rules of pleading are not displaced by the fact that the Claimants are advancing claims based on foreign law. See *per* Lord Leggatt in the recent Supreme Court decision in **FS Cairo (Nile Plaza) LLC v Brownlie**,³¹ at [161-166].

[178] This point has been made emphatically clear to the Claimants in correspondence but has been met with an unhelpful (bare) denial that the Claimants' particulars are "*in any way insufficient or inadequate*" (MKS letter of 5th October 2021, page 2).

³¹ [2021] UKSC 45.

[179] As set out above, the Further Particulars should be excluded from the determination of whether the Japanese law claims pleaded in the Amended Reply should be struck out as there is no application for permission to amend.

[180] The dangers of the Claimants being permitted to side-step the requirements of the CPR through service of the Further Particulars can be seen even from the limited material on Japanese law currently before the Court. For example (but without limitation):

(1) First:

- a. In the Amended Reply, the Claimants clearly accepted that they were not entitled to any proprietary remedies under Japanese Law.
- b. This was consistent with the Claimants' own Japanese law evidence filed in support of the *ex parte* application for an injunction.
- c. Nevertheless, in paragraph 50 of the Further Particulars the Claimants now seek "specific restitution" of the Yacht.
- d. This new proprietary claim is also internally inconsistent. The Claimants accept (as they must) that the Yacht was not purchased by C1 or C2. It follows that the Yacht is not "*the original subject matter constituting the benefit*" allegedly received by Mr. Ghosn. It also therefore follows (on the Claimants' own pleaded case) that the Yacht cannot be the subject of an order for 'specific restitution' under Japanese Law.

(2) Second, many of the pleas are premised on the contention that the US\$32m was Nissan's monies (which it was not, as set out above).

[181] Given that the Claimants' pleading of their Japanese law claims fails to identify clearly or with any proper degree of particularity what the case is which the Defendants are required to meet, and the Further Particulars cannot be used to plug the gaping holes in Claimants' pleading, it follows that the whole of §41C of the Amended Reply should be struck out.

G. THE FOURTH APPLICATION

- [182] Finally, Beauty Yachts seeks an order discharging the Consent Order continuing the Injunction (i.e. the “subject matter preservation order”), on the basis that it has “good grounds” or “good cause” for the Consent Order to be discharged.
- [183] The Court will discharge an injunction (including one which has been continued by consent) where there are “good grounds” to do so. What are “good grounds” will depend upon all the circumstances of the case, although typically, a change of circumstances or the discovery of some new fact will be required.³² There will of course be “good grounds” to discharge a proprietary injunction where it is established on a strike out or summary judgment application that there was no “serious issue to be tried”.
- [184] The Injunction is a proprietary injunction. It was granted *ex parte* on the basis that there was “a serious issue to be tried” as to whether: (i) US\$32m was “*wrongfully diverted by Mr Ghosn away from Nissan*”; and (ii) Nissan accordingly had BVI law proprietary claims against Beauty Yachts (“*both as Mr Ghosn’s alter ego and in its own right*”).
- [185] For the reasons given above, Nissan has no claim against any of the Defendants, or in any event no claim for any proprietary and/or tracing-based remedy relating to the subject matter of the Consent Order / Injunction. The basis on which the Injunction was sought and granted has now, therefore, fallen away.
- [186] In these circumstances, it would be appropriate for the Court to discharge the Consent Order, the Defendants having shown “good grounds” in the relevant sense.

H. DEFENDANTS’ CONCLUSION

- [187] In short, as matters stand, the entirety of the Claimants’ claim against the Defendants falls to be struck out. Moreover, the Claimants’ conduct in their desultory and unreasonable prosecution of these meritless proceedings is plainly abusive and the Court should not permit them to continue. This is especially so given that the Claimants’ claims are predicated on serious

³² See *Montvale Invest Limited (in Liquidation) v Terra Raf Trans Trading Limited* [2015] EWHC 3710 (Ch), at [17] to [20].

allegations of fraud which, for the reasons summarised above, are inherently implausible and false.

[188] For all of these reasons, the Defendants request the Court to grant the relief sought, with costs awarded to the Defendants.

The Claimants' arguments in response to the application

[189] The Claimants opposed the application, for the reasons here summarised. Nothing in this part is to be taken as a finding of law or fact.

[190] There are essentially four different points taken by the Defendants in the Application.

BVI Law Pleading and Defendants ('Defendants' First Application')

[190] None of the points taken on BVI law establish that the Claimants' claims are not brought on reasonable grounds:

- (1) The Claimants have properly pleaded that the bribes/secret commissions were received from third parties, rather than Mr. Ghosn's principal;
- (2) The Claimants' primary claim is that the relevant funds were paid away from Nissan, alternatively NME. Whether that primary or secondary case will prevail is a matter for trial;
- (3) The Claimants have pleaded that Nissan has sustained loss as a result of Mr. Ghosn's breaches of duty;
- (4) Whether Mr. Ghosn owed fiduciary duties to NME is a matter of fact to be determined at trial;

- (5) The Memoranda of Understanding (which on the Claimants' case were produced in order to conceal the fraud) between NME and SBA do not exclude claims brought by NME against the Defendants; and
- (6) The Claimants have pleaded that NME retained proprietary interests in the misappropriated US\$ 32 million.

Applicable Law ('Defendants' 'Second Application')

[191] The applicable law of all the Claimants' claims is BVI law. In any event, as set out below the Claimants' claims are actionable under Japanese law and this point goes nowhere.

Japanese Law Pleading ('Defendants' 'Third Application')

[192] The Claimants deny that their existing (alternative) Japanese law claims are inadequately pleaded. In order to deal with the Defendants' criticisms with a view to narrowing the issues before the Court, however, the Claimants have served Voluntary Further Particulars of Japanese Law.

Discharge of Injunction ('Defendants' Fourth Application')

[193] Discharge of the Injunction is sought (only) on the basis that the other parts of the Application succeed. Those parts fail and the Injunction should therefore be maintained until trial.

[194] Developing these points, the Claimants argued as follows.

[195] The applicable principles on an application to strike out are well established: **Hope-Ross v Dinning et al.**,³³ at [21]. In particular:

³³ AXAHCVP2020/0005 (unreported, delivered 30th April 2021) (Farara JA).

- (1) In order to strike out a claim, the Defendant(s) must show that the Statement of Claim is *'incurably bad'* (at [21(i)]);
- (2) *'A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence ... or where the strength of the case may not be clear because it has not been fully investigated'* (at [21(ii)]);
- (3) *'[A] statement of claim should not be struck out where the dispute between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development'* (at [21(ii)]); and
- (4) *'Striking out is a draconian step or 'nuclear option' and ought only to be deployed sparingly, in the clearest of cases ... As striking out is a draconian step, the court must consider whether the interests of justice are better served by permitting an amendment, to pleadings [sic] or deploying some other sanction, instead of striking out the statement of claim'* (at [21(iv)-(v)]).

[196] For the reasons set out below, applying those principles the Defendants have come nowhere near to establishing an entitlement to strike out the Claimants' claims.

I. APPLICABLE LAW

[Defendants' "Second Application" at **Application, Section C**]

A. Introduction

[197] The Defendants apply for *'summary judgment under CPR 15.2(a) that Japanese law is the proper law of each substantive element of Nissan's breach of duty and secret commissions claims against Mr Carlos Ghosn, including the remedies which are in principle available to Nissan'*. They apparently do so because they argue that under Japanese law: (i) the claims for breach of fiduciary duty; and (ii) the Secret Commission Claims disclose no reasonable grounds for having been brought, and should therefore be struck out.

[198] As a preliminary point, this argument is based on a false premise. It is obvious from the Claimants' Japanese law case set out in their **Amended Reply, [41C]**, and the Claimants' Voluntary Further Particulars of Japanese Law (the '**Further Particulars**'), that under Japanese law there are reasonable grounds for bringing those claims. In particular:

- (1) As to the breach of fiduciary duty claim, the Claimants plead that Mr. Ghosn breached various duties which fall to be characterised as fiduciary duties: (i) **Re-Amended SOC, [29] & [30]**; and (ii) **Further Particulars, [9]-[15]**. Those breaches were committed intentionally **[Further Particulars, [16(a)] & [17]** and give rise to substantial damages claims under Japanese law for at least US\$ 32 million in favour of both Nissan and NME **[Further Particulars, [20]**.
- (2) With regard to the Secret Commission Claim, the Claimants' Japanese law case is that Mr. Ghosn breached the duty he owed Nissan under Article 355 of the Companies Act of Japan (Act No. 86 of 2005) (the '**Companies Act**') by allowing conflicts of interest to arise between himself and Nissan, in particular through receiving secret commissions from SBA and/or Sheikh Bahwan and/or Mr Omar Bahwan and/or Mr Kumar: **Further Particulars, [10(b)(ii)]**. Those breaches were also committed intentionally **[Further Particulars, [16(a)] & [17]** and give rise to the same damages **[Further Particulars, [20]**.

[199] Accordingly, whichever law applies those claims cannot be struck out. This section of the Defendants' Application goes nowhere.

[200] In any event, in order to obtain summary judgment the Defendants would have to establish that in respect of every issue raised by the Claimants' claims, the argument that BVI law applies is '*fanciful*': **Comodo Holdings Ltd. v Renaissance Ventures Ltd.**³⁴ at [83]. That is a hurdle they cannot possibly clear.

[201] On the contrary, the applicable law of all the Claimants' claims is BVI law because:

³⁴ BVIHMAP2014/0032 (unreported, delivered 3rd May 2016) (Blenman JA).

- (1) The Claimants' claims in: (i) bribery; and (ii) dishonest assistance fall to be characterised as tortious.
- (2) The dishonest assistance was committed in the BVI, alternatively substantial and efficacious acts of assistance were committed here. Beauty Yachts' dishonest assistance was accordingly a domestic tort to which the rule of 'double actionability' does not apply.
- (3) With regard to the applicability of the 'double actionability' rule to bribery (and, in the alternative, dishonest assistance):
 - a) The 'flexible exception' to that rule applies to make BVI law applicable to the entirety of those claims, alternatively the issues relating to remedies.
 - b) In any event, the Defendants have not pleaded that Japanese law (or, indeed, any other law) is the law of the place of the tort as the *lex loci delicti*. That law is accordingly presumed to be the same as BVI law, such that in practice only BVI law applies.
- (4) The Claimants' remaining claims in: (i) unjust enrichment; (ii) knowing receipt; and (iii) breach of fiduciary duty fall to be characterised as restitutionary.
- (5) The applicable law of restitutionary claims is the law of the place with which the relevant events had their 'closest and most real connection'. That place was the BVI, such that BVI law governs.
- (6) Further or alternatively, the place where the relevant enrichment(s) took place was the BVI and BVI law accordingly applies.

[202] The remainder of this section deals with: (i) characterisation of the issues arising from the Claimants' claims (in Section B); and (ii) the applicable law rules for those issues (Section C).

B. Characterisation of the issues arising from the Claimants' claims

(i) Process of characterisation

[203] 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, the *lex fori*, 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*': Anderson: Caribbean Private International Law (2nd edn., Sweet & Maxwell 2014), at [2-002].

(ii) Bribery

[204] There can be no serious dispute that the Claimants' bribery claims fall to be characterised as tortious: **Livingston Properties Equities Inc et al. v JSC MCC Eurochem et al.**,³⁵ at [51]. This is also the position in England under the Private International Law (Miscellaneous Provisions) Act 1995: **Fiona Trust & Holding Corp v Skarga**.³⁶

(iii) Dishonest assistance

[205] Dishonest assistance claims also fall to be characterised as tortious, or at the very least such an argument has a reasonable prospect of success:

(1) In **Sibir Energy PLC v Gregory Trading SA**³⁷ Hariprashad-Charles J characterised dishonest assistance claims as tortious and therefore applied the 'double actionability' rule: at [107] & [115]-[116]. Whilst this is clear from the report of **Sibir Energy**, that the 'double actionability' rule had been applied to the dishonest assistance claims in **Sibir Energy** was confirmed: (i) by Hariprashad-Charles J herself in the subsequent case of **Cukurova Holdings A.S. v Imanagement Services Ltd et al.**,³⁸ at [99] & fn. 43; and (ii)

³⁵ BVIHCMAP2016/0042-46 (unreported, delivered 18th September 2018) (Webster JA).

³⁶ [2013] EWCA Civ 275, at [2] & [7]-[8] (Longmore LJ).

³⁷ BVIHCV2005/0174 (unreported, delivered 29th November 2005).

³⁸ BVIHCV2006/0305 (unreported, delivered 17th July 2007).

by the Court of Appeal in **Imanagement Services Ltd v Cukurova Holdings A.S. et al.**,³⁹ at [54] (Edwards JA).

- (2) Hariprashad-Charles J's conclusion was not challenged on appeal,⁴⁰ which concerned the applicable law rule for knowing receipt.
- (3) The English common law⁴¹ also characterises dishonest assistance claims as tortious: **OJSC Oil Company Yugraneft v Abramovich et al.**⁴²

[206] Whilst the contrary approach appears to have been adopted by the Court of Appeal in **Eurochem** (subsequently applied in **Wilton Trustees (IOM) Ltd v AFS Trustee Ltd**⁴³):

- (1) There was apparently no detailed discussion of this issue by the Court of Appeal; and
- (2) Neither **Sibir Energy** (first instance)⁴⁴ nor **Yugraneft** were referred to by the Court.⁴⁵
- (iv) Unjust enrichment

[207] Unjust enrichment / had and received claims are obviously characterised as restitutionary: (i) **EI-Ajou v Dollar Land Holdings PLC et al. (No.1)**,⁴⁶ at 738a-b (Millet J);⁴⁷ and (ii) **Yugraneft**, at [262] (Christopher Clarke J).

³⁹ HCVAP 2007/025 (unreported, delivered 6th October 2008).

⁴⁰ Civil Appeal No.26 of 2005 **Sibir Energy PLC v Gregory Trading S.A.** (CA).

⁴¹ The position is the same under the Private International Law (Miscellaneous Provisions) Act 1995: (i) **OJSC Oil Company Yugraneft v Abramovich et al** [2008] EWHC 2613 (Comm), at [223]; and (ii) **Fiona Trust & Holding Corp et al v Privalov et al** [2010] EWHC 3199 (Comm), at [154].

⁴² [2008] EWHC 2613 (Comm), at [170]-[217] (Christopher Clarke J).

⁴³ BVIHC (COM) 2018/154 (unreported, delivered 15th April 2019).

⁴⁴ **Sibir Energy** (CA) was cited at [54]; fn. 29 but for a different proposition, namely the applicable law rule for restitutionary claims.

⁴⁵ There was no discussion of characterisation by the Judicial Committee of the Privy Council in **Livingston Properties Equities Inc et al v JSC MCC Eurochem et al** [2020] UKPC 31 because the Privy Council considered the first-instance judge's view that he could not make any finding as to the governing law (including expressly in relation to dishonest assistance) "*unassailable*": at [32] (Lady Arden).

(v) Knowing receipt

[208] As the equitable ‘twin’ of unjust enrichment / had and received claims,⁴⁸ knowing receipt claims also fall to be characterised as restitutionary: (i) **Sibir v Gregory** (CA), at [12] (Barrow JA); and (ii) **Yugraneft**, at [237] (Christopher Clarke J). This is also the position in England following the passing of the Private International Law (Miscellaneous Provisions) Act 1995: **Fiona Trust & Holding Corp v Privalov**,⁴⁹ at [159]-[162] (Andrew Smith J).

(vi) Breach of fiduciary duty

[209] For the purpose of this Application (only), the Claimants are prepared to accept that their breach of fiduciary duty claims would fall to be characterised as restitutionary:⁵⁰ **Eurochem** (CA), at [51].⁵¹

[210] The Defendants’ apparent pleaded position that the Claimants’ breach of fiduciary claims should be characterised as matters of company law would be misguided, in particular because:

- (1) Mr. Ghosn was not a *de jure* director of NME;
- (2) 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*⁵²) was not a director of NME;
- (3) With regard to Nissan’s claims against Mr. Ghosn:

⁴⁶ [1993] 3 All ER 717.

⁴⁷ Reversed by the Court of Appeal ([1994] 2 All ER 685, but not on this point.

⁴⁸ *El-Ajou v Dollar Land Holdings PLC et al* (No.1) [1993] 3 All ER 717, at 738a-b (Millet J).

⁴⁹ [2010] EWHC 3199 (Comm).

⁵⁰ They expressly reserve the right to argue at the trial of this action that those claims should be characterised as tortious, as pleaded at **Amended Reply**, [41A.2].

⁵¹ See also the English Court of Appeal decision in *Kuwait Oil Tanker v Al-Bader* (No.3) [2000] 2 All ER (Comm) 271, at [190]-[193].

⁵² **Re-Amended SOC**, [35] & [40A].

- a) The decision of the English Court of Appeal in **Base Metal Trading Ltd v Shamurin**⁵³ has not been followed in the Eastern Caribbean: **Eurochem** (CA), at [4],⁵⁴ [9] & [51] (Webster JA).
- b) The BVI position is 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, i.e. the *lex incorporationis*. 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 below.
- c) That is unsurprising, not least because application of the law of incorporation of the company would lead to different laws governing issues concerning whether similar or identical facts gave rise to liabilities to different Claimants and/or Defendants: Dicey, Morris & Collins: *The Conflict of Laws*, (15th edn. with 5th Supp, Sweet & Maxwell 2018), at [36-073]; fn. 225.

C. Applicable law rules

(i) Tortious claims (bribery and dishonest assistance)

[211] Subject to the preliminary 'false premise' point set out above, the Claimants' position on the choice of law rules applicable to their claims which fall to be characterised as tortious is three-fold:

- (1) First, Beauty Yachts' dishonest assistance was committed in the BVI, alternatively substantial and efficacious acts of assistance were committed here. The Claimants' dishonest assistance claims against Beauty Yachts therefore concerns purely domestic tort(s) to which BVI law applies: Anderson: *Caribbean Private International Law* (2nd edn., Sweet & Maxwell 2014), at [12-007].

⁵³ [2004] EWCA Civ 1316; [2005] 1 All ER (Comm) 17.

⁵⁴ At which it was recorded that the Eighth Defendant (Mr Rogalskiy), in addition to being an employee of JSC MCC Eurochem ("*Eurochem Russia*": at [3]), was: (i) a member of its managing board; and (ii) its sales and marketing director. Mr. Rogalskiy was also recorded as the "*curator*" of Eurochem Trading GmbH ("*Eurochem Trading*": at [3]), an affiliate of Eurochem Russia.

- (2) Second, the bribery (and, in the alternative, dishonest assistance) claims are in principle subject to the 'double actionability' rule. However, the 'flexible exception' applies to make only BVI law applicable to the entirety of those claims, alternatively the issues relating to remedies: **Red Sea Insurance Co Ltd v Bouygues SA et al.**⁵⁵
- (3) Third, in the alternative 'double actionability' provides for application of the law of the forum⁵⁶ to the extent congruent with the rights available under the law of the place of the tort⁵⁷. The burden practically lies on the Defendants to prove that their conduct was not actionable under the law of the place of the tort: **Kuwait Oil Tanker Co SAK et al v Al-Bader et al (No.3)**,⁵⁸ at [184] (Nourse LJ, giving the judgment of the Court⁵⁹). The fraud practised on the Claimants was an international one and the Defendants have not pleaded the applicability or content of any law other than Japanese law. The law of the place of the tort is accordingly presumed to be the same as BVI law, such that in practice only BVI law applies.⁶⁰

Beauty Yachts' dishonest assistance purely domestic tort to which BVI law applies

[212] The 'double actionability' rule applies only to foreign torts: Dicey, Morris & Collins: The Conflict of Laws, (15th edn. with 5th Supp., Sweet & Maxwell 2018), at [35R-099] (Rule 256(3)). By contrast, BVI law applies solely to both: (a) 'purely' domestic torts; and (b) torts which: (i) were in substance and/or substantially committed in the BVI; and/or (ii) are most closely connected with the BVI: **Kuwait Oil Tanker Co SAK et al v Al-Bader et al (No.3)**,⁶¹ at [172]-[174] (Nourse LJ, giving the judgment of the Court).

⁵⁵ [1995] 1 AC 190, at 207A-B (Lord Slynn, giving the judgment of their Lordships).

⁵⁶ i.e. the *lex fori*.

⁵⁷ The *lex loci delicti*.

⁵⁸ [2000] 2 All ER (Comm) 271.

⁵⁹ See 273f.

⁶⁰ Amended Reply, [41A.2(b)].

⁶¹ [2000] 2 All ER (Comm) 271.

[213] In this case, the dishonest assistance was in substance and/or substantially committed in the BVI, alternatively most closely connected with the BVI. The acts of assistance alleged against Beauty Yachts are '*receiving and retaining; and/or agreeing to receive and retain; and/or facilitating the onward transfer of the monies paid to SBA, including to Beauty Yachts*': **Re-Re-Amended Statement of Claim, [36A.2]**.

[214] Beauty Yachts was incorporated in the BVI and was at all material times registered here: (i) **Re-Am SOC, [2]**; and (ii) **Gilliland 3, [12] & [32]**. The Yacht ultimately received by Beauty Yachts was registered in the BVI: (i) **Re-Am SOC, [2]**; (ii) **Gilliland 3, [36] & [39]**. The pleaded acts of receipt and/or retention accordingly took place in the BVI. As a result, no question of 'double actionability' arises in relation to the dishonest assistance claim(s). BVI law alone applies.

The 'flexible exception'

[215] As regards the bribery claims (and, alternatively to the case set out above in relation to the dishonest assistance claim), the *prima facie* 'double actionability' rule is subject to a 'flexible exception' whereby 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 Insurance Co Ltd v Bouygues SA et al.**,⁶² at 206C (Lord Slynn, giving the judgment of their Lordships⁶³).

[216] The 'flexible exception' can apply to make the law of the forum⁶⁴ applicable to: (i) '*specific isolated issues*'; or (ii) '*the whole claim*': **Red Sea**, at 207B. Whilst the Privy Council said that case (ii) '*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.

⁶² [1995] 1 AC 190.

⁶³ See 194G-H.

⁶⁴ Whilst in *Red Sea Insurance Co Ltd et al v Bouygues SA et al* [1995] 1 AC 190 the law of the forum (i.e. the *lex fori*) was displaced by the 'flexible exception' in favour of law of the place of the tort (i.e. the *lex loci delicti*), in *Boys v Chaplin* [1971] AC 356 the law of the place of the tort was displaced by the law of the forum: see *Red Sea*, at 206E-H.

[217] The Claimants' position is that, at the very least, BVI law has the most significant relationship with the occurrence and the parties in respect of 'issues' relating to the remedies available to the Claimants for bribery and (in the alternative) dishonest assistance. In particular:

- (1) The pleaded purpose of the bribery/dishonest assistance was to funnel money to a BVI company, Beauty Yachts: (i) **Re-Am SOC, [24] & [27]**; and (ii) **Gilliland 3, [35]-[39]**.
- (2) Those sums were used to purchase the Yacht, which was at all material times (and remains) registered in the BVI: (i) **Re-Am SOC, [2] [2/12/323]**; (ii) **Gilliland 3, [36] & [39]**.
- (3) Whilst the Claimants do not allege that Mr. Ghosn was ever domiciled or resident in the BVI, they have pleaded that Beauty Yachts was the nominee and/or agent and/or *alter ego* of Mr. Ghosn: **Re-Am SOC, [32.2]**.
- (4) The Claimants seek multiple remedies against Beauty Yachts as a BVI company. See: (a) **Re-Am SOC, [35], [36] & [40A]**; and (b) Claimants' Response to Request for Further Information dated 15th April 2021 ('**Response to RFI**'), at **Request 5, Response (b)**.
- (5) Importantly, the Claimants seek [**Re-Am SOC, [36] & Response to RFI; Request 5, Response (b)**]:
 - a) Against both Beauty Yachts and Mr. Ghosn: (i) accounts and/or enquiries of them as constructive trustees; and (ii) a declaration that equitable title to the Yacht is held on constructive trust for Nissan, alternatively NME.
 - b) Against Beauty Yachts only, an Order that Beauty Yachts deliver up the Yacht.

'Double actionability'

[218] Alternatively, in principle 'double actionability' provides for application of the law of the forum,⁶⁵ but only to the extent congruent with the rights available under the law of the place of the tort.⁶⁶

⁶⁵ i.e. the *lex fori*.

⁶⁶ The *lex loci delicti*. Dicey, Morris & Collins: The Conflict of Laws, (15th edn. with 5th Supp., Sweet & Maxwell 2018), at [35-111]

As noted above, if that place were Japan the Claimants' bribery and dishonest assistance claims would in any event be actionable under both BVI and Japanese law.

[219] However, the Defendants have not pleaded that the law of the place of the torts of bribery and/or dishonest assistance was Japan. They have merely pleaded (without any explanation) that: (i) '*Japanese law applies to all of the issues raised by Nissan's putative claims pleaded in [Re-Am SOC, [28]-[40B]]*' **[Amended Defence, [41B.3]]**; and (ii) '*Japanese law applies to the issues which are the subject of NME's putative claims*' **[Amended Defence, [41B.4]]**.

[220] Further, it would be surprising if Japan were the place of the torts of bribery and/or dishonest assistance, not least because:

- (1) The fraud/bribery scheme was an international one, involving:
 - a) Payments made to and/or by: (i) SBA, Nissan's distributor and NSC in Oman;⁶⁷ (ii) Sheikh Bahwan, resident in Oman, or his son Mr Omar Bahwan;⁶⁸ and/or (iii) Mr Kumar, resident in Oman⁶⁹.
 - b) The cycling of monies through intermediate Lebanese companies, namely: Brasilensis⁷⁰ and Good Faith⁷¹.
 - c) At the 'back end', payments currently known to the Claimants were made to: (i) Beauty Yachts, a BVI company;⁷² and (ii) Shogun, a Californian company.⁷³

⁶⁷ **Amended Defence, [15.1A] & [15.5]; and Amended Reply, [13.1]-[13.2].**

⁶⁸ **Re-Am SOC, [7]; Amended Defence, [14].**

⁶⁹ **Re-Am SOC, [6].** This is not admitted by the Defendants but should be assumed to be true for the purposes of this Application: AXAHCVP2020/0005 Hope-Ross v Dinning et al., at [21(iii)].

⁷⁰ **Re-Am SOC, [9]; Amended Defence, [16.1].**

⁷¹ **Re-Am SOC, [10]; Amended Defence, [17.1].**

⁷² **Re-Am SOC, [2]; Amended Defence, [8.1].**

⁷³ **Re-Am SOC, [3A]; Amended Defence, [10].**

- d) Beauty Yachts used those payments to purchase the Yacht, which was at all material times (and remains) registered in the BVI: (i) **Re-Am SOC**, [2]; (ii) **Gilliland 3**, [36] & [39].

- (2) NME's claims are the claims of a company incorporated and registered in Dubai, UAE: **Re-Am SOC**, [1A].

[221] The Defendants have not pleaded that any of the Claimants' claims would not be actionable under any law other than Japanese law. The significance of this is that '*the burden in practice lies upon the defendant to plead and prove that his conduct was not actionable under the lex loci delicti*': (i) **Kuwait Oil Tanker Co SAK et al v Al-Bader et al (No.3)**,⁷⁴ at [184] (Nourse LJ, giving the judgment of the Court); and (ii) **Imanagement Services Limited v Cukurova Holdings A.S. et al.**,⁷⁵ at [60]-[61] (Edwards JA).

[222] The Defendants have failed to discharge that practical burden, so in this international fraud/bribery case the law of the place of the tort is presumed to be the same as BVI law and in practice only BVI law is applicable. Alternatively, the Claimants' contention to that effect is not '*fanciful*'⁷⁶ and the Defendants' application for summary judgment on this point must fail.

- (ii) Restitutionary claims (unjust enrichment, knowing receipt and breach of fiduciary duty)

[223] 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]. This rule appears to derive from the Scottish decision of the Court of Session (Outer House) in **Baring Brothers & Co Ltd v Cunninghame District Council**,⁷⁷ at 127C-D: '*In my view, however, on the flexible approach one may*

⁷⁴ [2000] 2 All ER (Comm) 271.

⁷⁵ HCVAP 2007/025 (unreported, delivered 6th October 2008).

⁷⁶ BVIHCMAP2014/0032 Comodo Holdings Ltd. v Renaissance Ventures Ltd. at [83] (Blenman JA).

⁷⁷ [1997] CLC 108.

reasonably accept two propositions: (a) that the restitutionary or quasi-contractual obligation is governed by the proper law of that obligation; and (b) that the proper law of the obligation is the law of the country with which, in the light of the whole facts and circumstances, the critical events have their closest and most real connection' (Lord Penrose).

[224] In reaching that conclusion, Barrow JA in **Sibir v Gregory** (CA, at [23]) cited an earlier edition of Cheshire and North's Private International Law. That argument is carried into the current edition (15th edn., Oxford University Press 2017), which states at P779 that:

"It can be stated with some confidence that in English cases of unjust enrichment decided under the pre-Rome II Regulation law, the obligation to make restoration is governed by the proper law of the obligation. Dicey, Morris and Collins identified the proper law by means of three sub-rules, each one dealing with a different type of claim to restitution ...

Although there has been a tendency for the courts to apply these sub-rules, some cases have preferred to adopt a flexible solution, according to which the closest and most real connection is identified in light of the whole facts and circumstances, without the case of sub-rules".

[225] As a preliminary point, the Defendants must submit on this interlocutory application - prior to disclosure or witness evidence - that the argument that their obligation(s) to make restitution have their '*closest and most real connection*' to the BVI is '*fanciful*'⁷⁸. This is a hugely ambitious submission, not least given: (i) the broad and fact-specific nature of the test; and (ii) the point that only limited facts (from the Claimants' side alone) are currently before the Court.

[226] The Claimants' position on choice of law for restitutionary claims is that:

- (1) 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:

⁷⁸ Comodo Holdings Ltd. v Renaissance Ventures Ltd. BVIHCMAP2014/0032 (unreported, delivered 3rd May 2016), at [83] (Blenman JA).

a) In **Sibir v Gregory** (at first instance), Hariprashad-Charles J held (at [77]) that: *'Applying the general rule of private international law, it appears that Sibir was correct to conclude that the law governing receipt-based restitutionary claims is the law of the country where the enrichment took place'*. An appeal from that conclusion in respect of knowing receipt was dismissed in **Sibir Energy v Gregory** (CA).

b) In this case:

(1) Beauty Yachts was a BVI company which was obviously enriched in the BVI by: (i) receipt of the funds pleaded at **Re-Am SOC**, [24] & [27]; and/or (ii) its purchase of the Yacht.

(2) Mr. Ghosn was enriched in the BVI by virtue of the receipt of those benefits by (on the Claimants' case) his nominee and/or agent and/or *alter ego* Beauty Yachts.

(3) In any event, Mr. Ghosn was enriched by the Yacht, at all material times registered in the BVI: (i) **Re-Am SOC**, [2]; (ii) **Gilliland 3**, [36] & [39].

(4) For the avoidance of doubt, the Claimants are presently unaware of any enrichment of Shogun in the BVI [**Re-Am SOC**, [27A]]. Shogun is not, however, a Defendant to this action.

(2) In any event, in this case the '*closest and most real connection*' is with the BVI for the detailed reasons set out above. Standing back, the action concerns an international 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.

D. Proprietary claims and tracing

(i) Proprietary claims

[227] In respect of the Claimants' proprietary restitutionary claims [**Re-Am SOC**, [36]]; [**Reply to RFI, Request 5, Response (b)**] & [**Response to RFI, Request 17, Response (a)(ii) & (b)**], to

the extent necessary they rely upon the principle that, since the transfer to and/or receipt of property in the BVI ‘*had the effect ... of preserving or constituting [Nissan/alternatively NME] as owner*’, the choice of law rules for property claims govern: Dicey, Morris & Collins: The Conflict of Laws, (15th edn. with 5th Supp., Sweet & Maxwell 2018), at [36-076].⁷⁹

[228] The applicable law of property claims relating to a tangible moveable is the law of the country where a thing is situated, the *lex situs*: Dicey, Morris & Collins: The Conflict of Laws, (15th edn. with 5th Supp., Sweet & Maxwell 2018), at [24R-001]. The Yacht, like many other vessels, is deemed to be located in the jurisdiction of her registration: Harneys: British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell Hong Kong 2018), at [4.003]; fn. 9. Here that was (and is) the BVI: (i) **Re-Am SOC**, [2]; (ii) **Gilliland 3**, [36] & [39]. Where a thing is situated (i.e. its *situs*) is determined by the law of the forum (the *lex fori*): Dicey, Morris & Collins: The Conflict of Laws, (15th edn. with 5th Supp., Sweet & Maxwell 2018), at [22-024].

(ii) Tracing

[229] 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: The Conflict of Laws, (15th edn. with 5th Supp., Sweet & Maxwell 2018), at [36-097]-[36-098].⁸⁰

[230] For the avoidance of doubt (and the Claimants do not understand the Defendants to dispute this point), ‘*the fact that the money may have passed through other jurisdictions which would not have recognised the concept of equitable ownership is irrelevant, for these intermediate laws are not the lex causae*’ and English rules of tracing in equity ‘*do not require these to have been a fiduciary relationship arising under each law through whose jurisdiction the funds were passed ...*’: Dicey, Morris & Collins: The Conflict of Laws, (15th edn. with 5th Supp., Sweet & Maxwell 2018), at [36-099].⁸¹

⁷⁹ As pleaded at **Amended Reply**, [41A.4(a)(i)].

⁸⁰ It is noted that the Defendants appear to adopt this as their alternative case: **Amended Defence**, (i) [54.5]; & (ii) [34B.2(c)].

⁸¹ Citing *El-Ajou v Dollarland* [1993] 3 All ER 717, at 736g-j (Millet J), reversed by the Court of Appeal ([1994] 2 All ER 685 but not on this point).

E. Conclusion on applicable law

[231] For the reasons set out above, it is the case (or, at the very least, it is not '*fanciful*'⁸² to suggest) that:

- (1) The Claimants' bribery and dishonest assistance claims fall to be characterised as tortious;
- (2) The Claimants' unjust enrichment, knowing receipt and breach of fiduciary duty claims fall to be characterised as restitutionary;
- (3) The applicable law of the entirety of all those claims (alternatively, certain issues including available remedies) is BVI law, without any condition that those claims/issues be actionable under Japanese law.
- (4) Proprietary restitutionary claims and tracing issues are governed by BVI law.
- (5) In any event, the Claimants' claims are actionable under Japanese law and Section C of the Application is based on a false premise.

[232] The Court ought thus to dismiss the Defendants' '*Second Application*' / Section C of the Application.

II. BVI LAW DEFENCES

[Part of Defendants' '*First Application*' at **Application, Paragraphs (B)(3)(1)&(2)**]

[233] For the reasons given above, BVI law applies to every claim raised by the Claimants. As will also be clear from the above, the Defendants have very weak defences on the facts.

[234] Apparently in recognition of that fact, the Defendants have sought to strike out: (i) certain of Nissan's claims on three 'legal' bases [**Application, [B(3)(1)] [1/1/8]**] (the '**Nissan Claim**

⁸² *Comodo Holdings Ltd. v Renaissance Ventures Ltd.* BVIHCMAP2014/0032 (unreported, delivered 3rd May 2016), at [83] (Blenman JA).

Defences’); and (ii) some of NME’s claims on four⁸³ further ‘legal’ bases [**Application, [B(3)(2)]**] (the ‘**Nissan Claim Defences**’). Each group of defences is dealt with in turn below. None of them succeed in showing that either Nissan’s or NME’s claims are ‘*fanciful*’.⁸⁴

A. Nissan Claim Defences

[235] The third of the Defendants’ Nissan Claim Defences at **Application, [B(3)(1)(c)]** can be dealt with shortly. The Defendants argue that Nissan’s Secret Commission Claims are ‘*bad in law*’ because ‘*[f]or a benefit to constitute a ‘secret commission’ it must (by definition) come from the briber and not from the principal itself, whereas on the Claimants’ pleaded case the alleged payment comes from the principal itself and not from the alleged briber*’: **Application, [B(3)(1)(c)]**.

[236] That argument is based on a misconstruction of the Claimants’ pleading. The Claimants have expressly pleaded that [**Re-Am SOC, 31B**]:

“Further or in the alternative, in breach Mr Ghosn’s duties ... Mr Ghosn (or his nominees) received secret and undisclosed commissions from SBA and/or Sheikh Bahwan and/or Mr Omar Bahwan and/or Mr Kumar in the sum of US\$ 32 million or some part of US\$ 32 million [emphasis added]”.

[237] The Claimants do not understand this to be inconsistent with the plea at **Response to RFI; Request 9, Response (c)** that ‘*[t]he secret commissions of which the Claimants currently have knowledge were ultimately paid away from NME, and NME has accordingly suffered loss in the amount of those secret commissions*’ because NME ultimately was out of pocket as a result of bribes paid to Mr. Ghosn and/or his nominees. Alternatively, the Claimants are prepared to delete that plea and rely only upon **Re-Am SOC, [31B]**.

[238] The Claimants have pleaded that the relevant secret commissions came from the briber and this application accordingly falls away. That leaves two Nissan Claim Defences:

⁸³ Although collected in four sub-paragraphs, at **Application, [B(3)(2)(c)] [1/1/9]**.

⁸⁴ *Comodo Holdings Ltd. v Renaissance Ventures Ltd.* BVIHCMAP2014/0032 (unreported, delivered 3rd May 2016), at [83] (Blenman JA).

[239] First, that Nissan's: (i) breach of fiduciary duty; (ii) unjust enrichment; and (iii) knowing receipt claims are '*bad in law*' because the US\$ 32 million paid by NME to SBA '*belonged to NME and not to Nissan*': **Application, [B(3)(1)(a)]**. Confusingly, the Defendants refer throughout the **Application, Section B**, to the Claimants' claims for '*breach of duty*'. The Claimants understand this reference to be to '*breach of fiduciary duty*' and adopt that terminology herein.

[240] Second, that Nissan's Misappropriation Claim based on breach of fiduciary duty is '*not sustainable*' because '*the Claimants have failed to plead that Nissan has sustained any loss as a result of the alleged breach*': **Application, [B(3)(1)(a)]**.

(i) First Nissan Claim Defence that the US\$ 32 million paid by NME to SBA '*belonged to NME and not to Nissan*'

Breach of fiduciary duty, knowing receipt and unjust enrichment

[241] The Defendants' Application Notice also mischaracterises the Claimants' pleading. The Claimants have not pleaded that '*the money in question belonged to NME and not to Nissan*': **Application, [B(3)(1)(a)]**. The Claimants have pleaded that the US\$ 32 million was misappropriated '*from Nissan's CEO Reserve Fund*' **[Re-Am SOC, [20]]**, notwithstanding that this was done '*through ... NME*' **[Re-Am SOC, [20]]** with the said sum '*ultimately paid from [NME]*' **[Amended Reply, [22.1(f)]]** whilst NME acted as Nissan's agent **[Amended Reply, [9A.1]]**.

[242] The Claimants' position is simple. The US\$ 32 million will ultimately be held to have been paid away from either Nissan or NME. The Claimants' primary case is that the said funds were paid away from Nissan: **Re-Am SOC, [22F]**. Their alternative case is that those funds were paid away from NME: **Re-Am SOC, [22F]**. There is nothing improper in the Claimants pleading those cases in the alternative.

[243] If the US\$ 32 million was paid away from Nissan, Nissan's claims which require a 'proprietary base' will succeed. If that sum was paid away from NME, NME's claims requiring a 'proprietary base' will succeed. In any event, both Nissan's and NME's personal claims not requiring such a base will succeed (subject, or course, to the bar on 'double recovery').

[244] There is accordingly no question of claims being struck out on this basis. These issues set out above (including whether the Claimants' primary or alternative case would ultimately be held to prevail) are matters for trial.

Unjust enrichment

[245] In so far as it relates to Nissan's unjust enrichment claim, the first Nissan Claim Defence also faces an insuperable legal obstacle.

[246] 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. The Defendants assume that the fact Nissan was the indirect payor bars unjust enrichment claims by Nissan. That is wrong because unjust enrichment claims are sustainable by indirect payors, a process described by Professor Birks as 'leapfrogging': Birks: Unjust Enrichment (Second Edition, Oxford University Press 2005), P86-9.

[247] In determining whether an indirect payor (C) can 'leapfrog' a direct payer (X), the Court should focus on: (a) whether there 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**,⁸⁵ at [27], [33] (Lord Clarke) & [73] (Lord Neuberger);⁸⁶ and (ii) **Relfo Limited (in liquidation) v Varsani**,⁸⁷ at [91]-[94] & [97] (Arden LJ), [103] (Gloster LJ) and [115] (Floyd LJ). The same approach was applied specifically to equitable proprietary remedies sought to be established through tracing in **Brazil v Durant International Corp**,⁸⁸ at [32]-[40].

⁸⁵ [2015] UKSC 66; [2016] AC 176.

⁸⁶ Discussed with approval by the Supreme Court in *Commissioners for HMRC v Investment Trust Companies (in liquidation)* [2017] UKSC 29; [2018] AC 275, at [63]-[66].

⁸⁷ [2014] EWCA Civ 360; [2015] 1 BCLC 14.

⁸⁸ [2015] UKPC 35; [2016] AC 297.

[248] Specifically, 'leapfrogging' is permissible where:

- (1) The direct payor (X) acts as the indirect payor's (C's) agent: **Commissioners for HMRC v Investment Trust Companies (in liquidation)** [2017] UKSC 29; [2018] AC 275, at [48] (Lord Reed). The Claimants have pleaded that NME made the relevant payments as Nissan's agent: (i) **Re-Am SOC, [22F]**; (ii) **Amended Reply, [9A.1-2]**; & (iii) **Amended Reply, [22.1(e)]**.
- (2) 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: (i) **Re-Am SOC, [20]**; & (ii) **Re-Am SOC, [22F]**.
- (3) 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: Goff & Jones: The Law of Unjust Enrichment (9th edn. Sweet & Maxwell 2016), at [6-83]-[6-93]. In **Investment Trust Companies**, Lord Reed stated that the 'suggested' general 'direct providers only' rule '*may nevertheless require refinement to accommodate other apparent exceptions, and it would be unwise at this stage of the law's development to exclude the possibility of genuine exceptions, or to rule out other possible approaches*': at [50].

[249] Nissan accordingly has a good claim in unjust enrichment as an indirect payor. There is no basis to strike out Nissan's claims as argued at **Application, [B(3)(1)(a)]**.

- (ii) Second Nissan Claim Defence that 'the Claimants have failed to plead that Nissan has sustained any loss as a result of the alleged breach'

Claimants' pleading

[250] The Claimants have pleaded that it sustained loss as a result of Mr. Ghosn's breach of fiduciary duty as follows:

- (1) **Re-Am SOC, [31C]** pleads that: *“Nissan, alternatively NME, has suffered loss of at least [US]\$ 32 million and/or the amount of any secret commissions. That loss is represented by the sums that Mr Ghosn procured to be paid by Nissan, alternatively NME, to SBA or; alternatively, some other commercial benefits that he procured should be given by Nissan to SBA in return for the monies received by him or his nominees that Nissan or NME has yet to identify [emphasis added]”.*
- (2) **Amended Reply, [34C.5(f)]** pleads that payments made by NME pursuant to allocation from Nissan’s CEO Reserve Fund ‘were to Nissan’s disbenefit, not least because the dividend which NME paid to Nissan was accordingly reduced’. That paragraph cross-references **Amended Reply, [21A]**, which pleads that:

“[T]he CEO Reserve Fund was an internal ledger which allowed the reallocation of certain expenses and/or anticipated profits across the Nissan organisation ...

21A.1 *NME paid regular dividends to Nissan when distributable profits accumulated within NME. To the extent that NME made increased payments to third parties, its income was reduced and accordingly the dividend which NME paid to Nissan was reduced;*

21A.2 *A routine ‘settlement payment’ is made between Nissan and NME (the ‘Routine Payment’). Dividends payable by NME to Nissan could be set off against the Routine Payment”.*
- (3) **Amended Reply, [47A.1] [2/15/456]** pleads that: *“Nissan has self-evidently suffered loss by the payment of monies to a corrupt former officer for his personal benefit. Without prejudice to that, as a result of the relevant payments the dividend(s) which NME paid to Nissan were reduced, which resulted in loss being suffered by Nissan”.⁸⁹*
- (4) **Response to RFI; Request 1, Response (b)(i)-(ii)** pleads that: *“The CEO Reserve Fund is not a fund holding a cash balance but an internal ledger which allowed the reallocation of certain expenses and/or anticipated profits across the Nissan organisation*

⁸⁹ Also cross-referencing **Amended Reply, [47A.1]**.

... Payments made by NME from the CEO Reserve Fund were made as agent for Nissan”.

- (5) **Response to RFI; Request 1, Response (b)(iii)** pleads that: “NME paid regular payments to Nissan where there were distributable profits, capital or reserves within NME and NME had no concern about its cash position for its operation. To the extent that NME made increased payments to third parties, its income was reduced and accordingly the dividend which NME paid to Nissan was reduced”.
- (6) **Response to RFI; Request 1, Response (c)(3)** pleads that: “The dividend(s) which NME paid to Nissan were reduced by reference to the reduction in NME’s income by virtue of the payments”.
- (7) The dividends actually paid by NME to Nissan for the financial years ended 2009 to 2018 (inclusive) are set out at **Response to RFI; Request 7, Response (b)**.

[251] Accordingly, the Defendants’ second Nissan Claim Defence (that ‘*the Claimants have failed to plead that Nissan has sustained any loss as a result of the alleged breach*’) is factually incorrect. In any event:

- (1) Even if the Claimants had failed to plead any loss suffered by Nissan (which they have not) it would not follow that their claims are ‘*not sustainable*’: **Application, [B(3)(1)(b)]**. Claims for breach of fiduciary duty are sustainable where no equitable compensation is sought but the remedies of: (i) account of profits; and/or (ii) constructive trust(s) are pursued: Snell’s Equity (34th edn. with 1st Supp. Sweet & Maxwell 2020), at [7-051]. The second Nissan Claim Defence is accordingly also based on a false premise.
- (2) Where a company’s property is misappropriated by its director, the remedy is measured by the value of the property misapplied (whether or not any further loss has been suffered by the company): (i) **Gwembe Valley Development Co Ltd v Koshy et al**

(No.3),⁹⁰ at [142] (Mummery LJ, giving the judgment of the Court); and (ii) **Madoff Securities International Ltd (in liquidation) v Raven et al**,⁹¹ at [291]-[292].

- (3) Whether loss directly suffered by a (wholly-owned) subsidiary gives rise to loss on the part of the principal company is a question of fact: **George Fischer (Great Britain) Ltd v Multi-Construction Ltd**,⁹² at 312E-G, 313G, 316D & 317F-H (Glidewell LJ); and (ii) **Gerber Garment Technology Inc v Lectra Systems Ltd**,⁹³ at 477/30-5, 478/20-35 & 479/10-25 (Hobhouse LJ) and 482/35-50 (Hutchison LJ).⁹⁴ This factual question must be determined at trial.

[252] For the reasons given above, the Defendants have failed to establish that the Nissan Claim Defences render Nissan's claims '*fanciful*'.⁹⁵ Paragraph B(3)(1) of the Application should therefore also be dismissed.

B. NME Claim Defences

[253] The Defendants advance four defences to the claims made by NME:

- (1) First, NME's breach of fiduciary duty claim against Mr. Ghosn is '*unsustainable*' because he '*was not and is not alleged to have been a director of NME*': **Application, [B(3)(2)(a)]**.

⁹⁰ [2003] EWCA Civ 1048; [2004] 1 BCLC 131.

⁹¹ [2013] EWHC 3147 (Comm).

⁹² [1995] BCC 310 (CA).

⁹³ [1997] RPC 443.

⁹⁴ George Fischer and Geber were endorsed by the United Kingdom Supreme Court in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31; [2021] AC 39, at [45]-[46] & [128].

⁹⁵ *Comodo Holdings Ltd. v Renaissance Ventures Ltd.* BVIHCMAP2014/0032 (unreported, delivered 3rd May 2016), at [83] (Blenman JA).

(2) Second, NME's unjust enrichment claim is '*unsustainable*' because '*[t]he payments made by NME to SBA were made pursuant to contracts between those two companies*': **Application, [B(3)(2)(b)]**.

(3) Third, NME's knowing receipt claims are '*bad in law*', since '*the US\$ 32 m[illion] was paid pursuant to binding contracts ... which is a bar to a knowing receipt claim*': **Application, [B(3)(2)(c)(i)]**.

(4) Fourth, NME's knowing receipt claims are also '*bad in law*' because '*there is no properly pleaded case that NME retained any proprietary interest in the US\$ 32 m[illion]*': **Application, [B(3)(2)(c)(ii)]**.

(i) First NME Claim Defence that NME's breach of fiduciary duty claim against Mr Ghosn is '*unsustainable*' because he '*was not and is not alleged to have been a director of NME*'

[254] It is correct that Mr. Ghosn was not (and is not) a director of NME. However, the Defendants' conclusion that NME's breach of fiduciary duty claim against Mr. Ghosn is therefore '*unsustainable*' is a *non sequitur*.

[255] Whether fiduciary duties are owed outside the 'settled categories' in which such duties are automatically imposed (for example, a solicitor's relationship with his or her client) 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**,⁹⁶ at [344].

[256] In support of their argument that such duties were owed by Mr. Ghosn, the Claimants will rely in particular on the following points:

(1) It is common ground that the payments ultimately made by NME to SBA had to be approved by officers and/or representatives of Nissan, including Mr. Ghosn:⁹⁷ (i) **Re-Am**

⁹⁶ BVIHCM 2015/0047 (unreported, delivered 4th May 2021).

⁹⁷ Save for two payments made after Mr. Ghosn's resignation as Nissan's CEO: **Amended Defence, [26.2]**. In respect of both those payments, the Claimants' case is that the CEO who replaced Mr. Ghosn (Mr. Hiroto

SOC, [20.2]; and (ii) **Amended Defence, [24.1(e)(ii)]**. Mr. Ghosn (with his *de jure* position as officer of Nissan) therefore determined to whom NME would make payments, and in what amounts. It would be very surprising if, having done so, Mr. Ghosn did not owe NME duties in respect of those payments.

- (2) The Claimants' case is that 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: (i) **Re-Am SOC, [21]**; and (ii) **Amended Reply, [29.2]**.⁹⁸

[257] Thus, whether Mr Ghosn owed fiduciary duties to NME (including as: (i) the director of NME's principal company on the facts set out above; (ii) a *de facto*⁹⁹ or shadow¹⁰⁰ director of NME; and/or (iii) as a thief of money stolen from NME) will be a matter for trial.

[258] With regard to (iii) above, the Claimants intend to rely at trial on Lord Browne-Wilkinson's *dictum* in **Westdeutsche Landesbank Girozentrale v Islington LBC**¹⁰¹ that stolen money is held on constructive trust for its rightful owner (at 715H-716D), giving rise to fiduciary duties which are breached by subsequent mishandling of that money or its traceable proceeds.

[259] The first NME Claim Defence is accordingly misguided and gives rise to factual issues which are inappropriate for summary determination.

Saikawa) was reassured by Mr. Ghosn that they were required and legitimate payments: **Amended Reply, [32.2]-[32.3]**.

⁹⁸ This is denied by the Defendants **Amended Defence, [25.2]**, but must be assumed to be correct for the purposes of this application: AXAHC VAP2020/0005 Hope-Ross v Dinning et al., at [21(iii)].

⁹⁹ There is no legal bar to such a conclusion which is a "*question of degree*" in relation to which the court "*takes into account all the relevant factors*", making it "*a kind of jury question*": Re Kaytech International Plc [1999] BCC 390, at 401H-402D (Robert Walker LJ).

¹⁰⁰ Whilst English law has oscillated as to the test for when a person would be found to be a shadow director owing fiduciary duties to the company, it is "*clear*" that the answer to this question is "*highly fact dependent*": Sukhoruchkin et al v Van Bekestein et al [2014] EWCA Civ 399, at [39]-[41].

¹⁰¹ [1996] AC 669.

- (ii) Second and Third NME Claim Defences that NME's (i) unjust enrichment; and (ii) knowing receipt claims are 'unsustainable' or 'bad in law' because the payments from NME to SBA were made pursuant to contracts between those parties

Unjust enrichment and knowing receipt

[260] As preliminary points in respect of both classes of claims:

- (1) The Second and Third Nissan Claim Defences overlook that the relevant Memoranda of Understanding were not between the Claimant (NME) and the Defendants (here, Mr. Ghosn/Beauty Yachts), but rather between the Claimant (NME) and a third party, X (SBA). The relevant question is therefore the effect of a contract between C and X on claims brought by C against D. As explained below, contracts with third parties (X) do not have the effect contended for by the Defendants.
- (2) In any event, as is common ground, the relevant Memoranda of Understanding were just that: mere MOUs. The Defendants plead that Nissan has not '*terminated, cancelled and/or rescinded*' the MOUs,¹⁰² but those documents purport merely to '*confirm*' certain allegedly existing '*understanding[s]*' or '*agreement[s]*'.
- (3) The Claimants' position is that the MOUs were merely '*produced in order to seek to provide a legal explanation for the payments made to SBA (or certain of the payments) and thereby conceal the true nature and purpose of such payments*': **Amended Reply, [27.2]**. The Defendants' position accordingly amounts to a submission that documents produced to '*conceal*' a fraud¹⁰³ bar claims for unjust enrichment and knowing receipt made in respect of that fraud. That would be a very odd result.
- (4) There can be no argument that the MOUs contain any express (or implied) contractual exclusion of right(s) to claim in unjust enrichment or knowing receipt. They contain no such terms.

¹⁰² **Amended Defence, [24.1(f)]**.

¹⁰³ Although this factual allegation is understood not to be accepted by the Defendants, it must be assumed for the purposes of this Application: AXAHCVP2020/0005 Hope-Ross v Dinning et al., at [21(iii)].

- (5) For the avoidance of doubt, a Claimant can obtain restitution of a bribe/secret commission even if the contract tainted by that bribe or secret commission remains valid and binding: (i) **Logicrose Ltd v Southend United Football Club Ltd (No.2)**,¹⁰⁴ at 1263C (Millet J); and (ii) Grant & Mumford: Civil Fraud: Law, Practice & Procedure (Sweet & Maxwell 2018), at [7-049].

Knowing receipt

- [261] Knowing receipt claims are not barred by contracts between the part(ies) to the action and third part(ies): **Group Seven Ltd v Nasir**,¹⁰⁵ at [493]¹⁰⁶.

Unjust enrichment

- [262] As noted above, the question before this Court is not the effect of Memoranda of Understanding between C and D, but between C and X. Even assuming that the MOUs should be treated as contracts, the question is therefore whether *'the unjust enrichment claim ... would undermine the contractual arrangements between the parties, i.e. the claimant and the third party'*: GDAHCV2014/0465 **Merrit Jones v Elizabeth Jones**, at [60] (Master Fidela Corbin Lincoln).¹⁰⁷
- [263] Master Fidela Corbin Lincoln's approach is consistent with that summarised by the leading text on unjust enrichment (Goff & Jones: The Law of Unjust Enrichment (9th edn. Sweet & Maxwell 2016). C can sustain unjust enrichment claims against D save that Courts *'may'*¹⁰⁸ have *'concern[s]'*¹⁰⁹ or *'objection[s]'*¹¹⁰ in the following situations:

¹⁰⁴ [1988] 1 WLR 1256.

¹⁰⁵ [2017] EWHC 2466 (Ch); [2018] PNLR 6.

¹⁰⁶ Reversed in part by the Court of Appeal, but not on this point: [2019] EWCA Civ 614; [2020] Ch 129.

¹⁰⁷ Citing Etherton LJ in the English Court of Appeal case of MacDonald Dickins & Macklin v Costello [2011] EWCA Civ 930; [2012] QB 244, at [23].

¹⁰⁸ Goff & Jones: The Law of Unjust Enrichment (9th edn. Sweet & Maxwell 2016), at [3-73].

¹⁰⁹ Goff & Jones, at [3-71]; [3-72]; & [3-76].

¹¹⁰ Goff & Jones, at [3-70] & [3-74]-[3-75].

- (1) Such claim(s) by C against D would be '*inconsistent with the terms of C's contract with X*', which turns on the contract's proper construction in light of the '*wider history of the dealings between all three parties*' (at [3-71]);¹¹¹
- (2) Those claim(s) would '*illegitimately relieve C of risks that he assumed when transacting with X*' (at [3-72]); and
- (3) Where claims would '*illegitimately undermine the law of insolvency's rules governing the distribution of an insolvent's assets, and in particular, the basic pari passu priority rule*' (at [3-76]).

[264] The third category above is not relevant to this case. In circumstances where NME seeks to recover funds fraudulently misappropriated pursuant to Memoranda of Understanding produced in order to '*conceal*' that fraud, it is clear (alternatively, NME has a reasonable prospect of success in arguing) that:

- (1) There is no inconsistency between the terms of the MOUs and enabling NME to recover the said funds. NME did not contract with SBA on the basis that it would not sue Mr. Ghosn (and/or his nominees) if it transpired that the relevant payments were part of a fraudulent scheme to misappropriate money: Goff & Jones: The Law of Unjust Enrichment (9th edn. Sweet & Maxwell 2016), at [3-71].
- (2) Allowing NME to recover those fraudulently misappropriated funds would also not illegitimately relieve NME of risks which it assumed when contracting with SBA. NME did not voluntarily assume the risk that Mr. Ghosn would fraudulently misappropriate funds.

[265] For the reasons given above, the Second and Third NME Claim Defences advanced at **Application, [B(3)(2)(b)] & [B(3)(2)(c)(i)]** must fail.

¹¹¹ Goff & Jones, at [3-74]-[3-75].

- (iii) Fourth NME Claim Defences that ‘there is no properly pleaded case that NME retained any proprietary interest in the US\$ 32 m[illion]’

[266] This argument is simply wrong. The Claimants have pleaded (in the alternative) at **Re-Am SOC, [22F]** that, to the extent that ‘*the funds set out at paragraphs 20 and 22 above [i.e. the funds paid to SBA]*’ were ‘*wrongfully diverted, originated from or are traceable only to NME*’, ‘*NME seeks the same relief against Mr Ghosn, Ms Ghosn and Beauty Yachts as set out at paragraphs 31C to 40B and 41 to 47 below*’. As to this:

- (1) **Re-Am SOC, [36]** pleads (in the alternative) that ‘*NME ... is entitled to trace the sum of US\$ 13.665 million ... into and claims equitable title (in whole or in part) to the Yacht, which Beauty Yachts holds (in whole or in part) on constructive trust for ... NME ...*’.
- (2) NME’s tracing claim (brought in the alternative to Nissan’s tracing claim) is set out fully at **Re-Am SOC, [23]-[27A]**. In particular:
 - a) **Re-Am SOC, [23]** pleads that NME’s proprietary interest in part of the US\$ 32 million can be traced into payments made by Sheikh Bahwan or Mr. Omar Bahwan to Brasilensis.
 - b) **Re-Am SOC, [24]** pleads that NME’s proprietary interest in the sums paid to Brasilensis can be traced into a payment made to Beauty Yachts.
 - c) **Re-Am SOC, [25]** pleads that NME’s proprietary interest in other sums paid to Brasilensis can be traced into a payment made to Mr Ghosn personally.
 - d) **Re-Am SOC, [26] & [26A]** plead that NME’s proprietary interest in part of the US\$ 32 million can be traced into certain payments made by Mr Kumar to Good Faith.
 - e) **Re-Am SOC, [27]** pleads that NME’s proprietary interest in the sums paid to Good Faith can be traced into several, specific payments made to Beauty Yachts.

[267] For the reasons given above, the Defendants have failed to establish that the NME Claim Defences render NME claims ‘*fanciful*’¹¹². Paragraph B(3)(2) of the Application should also be dismissed.

III. DEFENDANTS’ BVI LAW PLEADING POINTS

[Part of Defendants’ “*First Application*” at **Application, Paragraph (B)(3)(3)**]

[268] As noted above, the Defendants have very weak defences on the facts. Instead of addressing those difficulties, they seek to strike out ‘*all the claims pleaded by Nissan and NME in the statements of case for bribery, fraud, deceit and dishonest assistance*’ on the basis that “[t]hese heads of claim have been pleaded in a wholly inadequate and perplexing manner”: **Application, [B(3)(3)]**.

[269] This argument is confused in two respects:

- (1) First, neither Nissan nor NME have pleaded any claim in deceit.
- (2) Second, ‘*fraud*’ is not a free-standing cause of action. The Claimants advance the cause of action of bribery, which is frequently referred to as a claim in ‘*fraud*’: see Grant & Mumford: Civil Fraud: Law, Practice & Procedure (Sweet & Maxwell 2018), at [7-013].¹¹³

[270] The only question for this Court is accordingly whether the Claimants’: (a) bribery; and (b) dishonest assistance claims have been adequately pleaded.

[271] The Claimants maintain that (a) and (b) were (and are) properly pleaded in the **Re-Am SOC**. In order to deal with the Defendants’ criticisms with a view to narrowing the issues before the Court, however, the Claimants have filed and served a draft Re-Re-Amended Statement of Claim (‘**Re-Re-Am SOC**’). They apply for leave to rely on this draft (the ‘**Amendment Application**’), for the reasons set out in the Fourth Affidavit of Andrew Gilliland (‘**Gilliland 4**’).

¹¹² Comodo Holdings Ltd. v Renaissance Ventures Ltd. BVIHCMAP2014/0032 (unreported, delivered 3rd May 2016), at [83] (Blenman JA).

¹¹³ To the extent that some confusion has been caused by the reference in the **Response to RFI** to “(i) bribery; and (ii) fraud” [**Request 12, Response (c); Request 17, Response (a)(iv) Request 21, Response (d)**], the Claimants are prepared to delete the text ‘(ii) fraud’ from those paragraphs.

[272] The Claimants attached to their Written Submissions as an Annex a table: (i) setting out the elements of the causes of action advanced by the Claimants; and (ii) showing where, in the Statement of Claim, those elements are pleaded.

[273] The Claimants had hoped that **Application [B(3)(3)]** could accordingly be resolved by the parties without troubling the Court. Unfortunately, by a letter dated 26th November 2021 Collas Crill stated that the Defendants would oppose the Amendment Application on the following bases:

- (1) *'[The Claimants] now seek permission to introduce two new (BVI law) claims – one in bribery and one in dishonest assistance';*
- (2) *'[N]one of your clients' proposed new claims has any real prospect of success';*
- (3) *'[I]t is reasonably arguable that a limitation defence applies to your clients' proposed new claims; and (ii) your clients cannot overcome the jurisdictional threshold imposed by CPR 20.2'; and*
- (4) *'[T]he Court should exercise its discretion to refuse the Amendment Application having regard to those discretionary factors set out at CPR 20.1(3)'.*

[274] The points are non-starters because the **Re-Re-Am SOC** does not advance any new claims. It merely 'fleshes out' existing claims which the Defendants allege **[Application, [B(3)(3)]]** (but the Claimants do not accept) were inadequately pleaded in the **Re-Am SOC**.

[275] This is absolutely clear from the Defendants' own position in their Application Notice for the main Application, which was that: (i) bribery and dishonest assistance were '*claims pleaded by Nissan and NME in the statements of case*'; but (ii) those claims ought to be struck out because they were '*pleaded in a wholly inadequate and perplexing manner*': **Application, [B(3)(3)]**. The Defendants' own position was accordingly that the Claimants had pleaded claims in bribery and dishonest assistance, which claims should be struck out. They cannot have it both ways.

[276] In any event, the (original) **Re-Amended SOC** did plead claims in bribery and dishonest assistance. In particular:

Bribery

- (1) **Re-Am SOC, [31B]** pleaded that: '*[I]n breach of Mr Ghosn's duties ... Mr Ghosn (or his nominees) received secret and undisclosed commissions from SBA and/or Sheikh Bahwan and/or Mr Omar Bahwan and/or Mr Kumar in the sum of US\$ 32 million or some part of US\$ 32 million*'.
- (2) Nissan's loss arising from the bribery was pleaded at **Re-Am SOC, [31C]**; the alternative remedies sought were pleaded at **Re-Am SOC, [31D]-[31E]**.

Dishonest assistance

- (3) The breach of fiduciary duty owed to Nissan was pleaded at **Re-Am SOC, [29]-[31]**.
- (4) The assistance relied upon (**Re-Re-Am SOC, [36A.2]**) concerns the receipt and retention by Beauty Yachts of the monies paid to SBA, which was originally pleaded at **Re-Am SOC, [23]-[24] & [26]-[27]**.
- (5) Beauty Yachts' dishonesty was pleaded at **Re-Am SOC, [32]-[33]**.
- (6) The resulting losses were pleaded at **Re-Am SOC, [22] & [31C]**.

[277] No limitation or jurisdictional issues accordingly arise and only CPR 20.1 is applicable.

[278] The Defendants' (wholly unparticularised) reliance on the '*discretionary factors set out at CPR 20.1(3)*' is hopeless. The bribery and dishonest assistance claims obviously have reasonable prospects of success, not least by virtue of the facts and matters set out above. It is telling that the Application did not seek to strike out the bribery or dishonest assistance claims pleaded in the **Re-Am SOC** on the merits, but rather only on the basis that those claims were allegedly inadequately pleaded. The Amendment Application becomes relevant only if (contrary to the Claimants' submissions above) the Court finds merit in the Defendants' criticism of how the bribery and dishonest assistance claims were originally pleaded in the **Re-Am SOC**. In that eventuality, the Court would ordinarily at that stage '*permit ... an amendment, to pleadings [sic]*': **Hope-Ross v Dinning et al.** at [21(v)] (Farara JA). Rather than wait for such an Order,

the Claimants sought to pre-empt matters and assist the Court by providing that draft amended pleading on 15th November 2021 (over three weeks before this hearing).

[279] For the reasons given above, Paragraph B(3)(3) of the Application should also be dismissed.

IV. DEFENDANTS' *ALTER EGO* POINTS

[Part of Defendants' "*First Application*" at **Application, Paragraph (B)(3)(4)**]

[280] The Defendants seek to strike out '*all the claims pleaded by Nissan and NME in the statements of case against [Beauty Yachts], in the latter's alleged capacity as Mr ... Ghosn's nominee or alter ego*': **Application, [(B)(3)(4)**. The basis for this argument is, however, (only) that:

"If what the Claimants intend here is some form of veil piercing claim then it is not properly pleaded and should be struck out accordingly. Moreover, if the Claimants rely upon the same causes of action as they advance against Mr Ghosn directly, then they all fall to be struck out as against [Beauty Yachts] for the same reasons as against Mr Carlos Ghosn".

[281] The Claimants have confirmed that:

- (1) They do not assert any form of veil piercing claim; and
- (2) They rely upon the same causes of action against Beauty Yachts as against Mr. Ghosn: **Response to RFI; Request 13, Response (b)(iv)(2)**, a matter in any event clear from the **Re-Am SOC**, in particular at **[35] & [40A]**.

[282] Accordingly, the Claimants understand that the only basis on which the Defendants seek to strike out the claims pleaded against Beauty Yachts in the latter's capacity as Mr. Ghosn's nominee, agent and/or *alter ego* is that those claims '*fall to be struck out ... for the same reasons as against Mr. Carlos Ghosn*'. The Claimants accordingly repeat their submissions above.

[283] For the avoidance of doubt:

- (1) Veil piercing is now generally 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**,¹¹⁴ at [35] (Lord Sumption) & [60]-[61] (Lord Neuberger). The Claimants say ‘generally’, because in **Prest v Petrodel Resources Ltd et al**¹¹⁵ 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).
- (2) **Gencor ACP Ltd et al v Dalby et al**.¹¹⁶ (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). The ‘concealment principle’ was defined by Lord Sumption as meaning that ‘*the 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*’: at [31].

V. DEFENDANTS’ POINTS ON CLAIMS TO SET ASIDE TRANSFER OF YACHT TO Ms GHOSN

[Part of Defendants’ “*First Application*” at **Application, Paragraph (B)(3)(5)**]

- [284] The Claimants advance three claims which seek to set aside the purported transfer of the shares in Beauty Yachts from Mr. Ghosn to Mrs. Ghosn in the closing stages of his relationship with the Nissan group:

¹¹⁴ [2013] UKSC 34; [2013] 2 AC 415.

¹¹⁵ [2013] UKSC 34; [2013] 2 AC 415.

¹¹⁶ [2000] 2 BCLC 734.

- (1) First, that that conveyance was voidable under section 81(1) of the Conveyancing and Law of Property Act 1961: **Re-Am SOC, [44]**.
- (2) Second, that the said conveyance amounted to an attempt to defraud, delay or hinder creditors and is accordingly void or voidable pursuant to the Fraudulent Conveyances Act 1571: **Re-Am SOC, [45]**. The argument that this statute continues to apply in the BVI has at the very least a real prospect of success: Harneys: British Virgin Islands Commercial Law (4th edn, Sweet & Maxwell Hong Kong 2018), at [1.048]-[1.050] & [4-050].
- (3) Third, that the conveyance is voidable at common law as a transaction intended to defraud creditors and/or impeached by fraud: **Re-Am SOC, [46]**.

[285] The remedy sought by the Claimants is a ‘*declaration that the purported transfer of the 50,000 shares in beauty yachts from Mr Ghosn to Ms Ghosn on or around 7 May 2018 was void and/or be set aside and/or constitutes a conveyance with intent to defraud creditors*’: **Re-Am SOC, [47]**.

[286] The Defendants’ response to this is only that: ‘*[T]hese pleas assumes [sic] that the Claimants’ [sic] have sustainable claims against the Defendants. Since they do not it follows that these pleas should be struck out*’: **Application, [B(3)(5)]**. This argument is so vague that the Claimants do not understand the case which they have to meet. The Claimants: (i) reiterate their claims set out at **Re-Am SOC, [41]-[47]**; and (ii) reserve their rights to respond orally on clarification of the Defendants’ position.

[287] For the reasons given above, the Court ought to dismiss the Defendants’ “*First Application*” Section B of the Application.

VI. DEFENDANTS’ JAPANESE LAW PLEADING POINTS

[Defendants’ “*Third Application*” at **Application, Section D**]

[288] The Claimants’ case has always been that all their claims are governed by BVI law: (i) **Amended Reply, [41A]**; and (ii) **Response to RFI; Request 23, Response (a)(ii)**. This was

implicitly clear from the **Re-Am SOC** which (save for paragraph 29) was pleaded only under BVI law. In response to the Defendants' plea that Japanese law applies (save for the issue of limitation: **Amended Defence, [41B.5]**), the Claimants pleaded an alternative case under Japanese law: **Amended Reply, [41C]**.

[289] The Claimants maintain that its alternative Japanese law case was adequately pleaded in their **Amended Reply**. In order to deal with the Defendants' criticisms with a view to narrowing the issues before the Court, however, the Claimants have served Voluntary Further Particulars of Japanese Law.

[290] Once again, it had been hoped that **Application, Section D** could therefore have been resolved by the parties without troubling the Court. Unfortunately, the Defendants responded that '*[t]hey shall object in the event that your clients seek to rely on these Voluntary Particulars at the forthcoming hearing in any way*'. Collas Crill's letter dated 26th November 2021, P3. This is simply unreasonable.

[291] The basis of the Defendants' '*Third Application*' was said to be that the Claimants had '*fail[ed] to identify clearly, or with any proper degree of particularity, what the case is which the Defendants/Applicants are required to meet*': **Application, Section D**.

[292] The Defendants have since 10th November 2021 had a 23-page document setting out in extreme detail (including by reference to case law and the Japanese Supreme Court Research Law Clerks Commentary: **Further Particulars, [20(b) & (c)]**) the Claimants' alternative, Japanese law case(s). On any view, **Application, Section D** is now unsustainable and must be dismissed.

VII. ATTEMPTED DISCHARGE OF THE INJUNCTION

[Defendants' "*Fourth Application*" at **Application, Section E**]

[293] The injunction over the Yacht was: (i) initially granted by Adderley J on 20th August 2019; and (ii) continued by the Consent Order on 28th November 2019 (the '**Injunction**').

- [294] The Defendants appear to seek to discharge the Injunction on the basis that: *‘Nissan has no claim against Mr Carlos Ghosn, or in any event no claim for any proprietary and/or tracing-based remedy relating to the subject matter of the Injunction ... for the reasons set out in detail at [Application, Sections B to D] above’*: **Application, Section 9(2)**.
- [295] The relief sought in **Application, Section E** accordingly stands or falls with **Application, Sections B to D**. That is particularly so because whether there is a ‘serious issue to be tried’ is the same test as for summary judgment: **AK Investment CJSC v Kyrgyz Mobil Tel Limited**,¹¹⁷ at [71].
- [296] For the reasons set out above, **Application, Sections B to D** fail and the Injunction should be maintained until trial.

Discussion on Defendants’ strikeout and summary judgment application

Strike out

- [297] At this point, it is apt to take stock with some general remarks. The reader will have seen that the Defendants have engaged upon many pages of detailed factual and legal argument in support of their application to have the claims struck out or for summary judgment. The Claimants have responded in similar great detail. It is important to note, however, that the matter as a whole has not yet passed beyond the initial case management stage. The first Case Management Conference was held on 12th January 2021. At that Case Management Conference, the Claimants were permitted to re-amend their pleadings and directions were given which included a further Case Management Conference to be held after service of an Amended Reply. Such further Case Management Conference has not yet taken place.

¹¹⁷ [2011] UKPC 7; [2011] 4 All ER 1027.

[298] What has also not yet taken place is exchange of witness statements. Thus, at this stage, the parties' statements of case are as yet far from complete.¹¹⁸

[299] This begs the question whether such a detailed and highly technical deconstruction of the Claimants' pleaded claims is not fatally premature. In my respectful judgment it is.

[300] In this regard, the Claimants referred to the principles pertaining to strike out summarized by the Court of Appeal in **Hope-Ross v Dinning et al.**¹¹⁹ It is instructive to set out the material passage in the Court of Appeal's judgment in full:

"[21] As with every discretion conferred upon the court by the CPR, the discretion to strike out must be exercised in accordance with law and with a view to furthering the overriding objective.⁹ (See rule 1.2 of the Civil Procedure Rules 2000) The central principles which undergird the court's jurisdiction to strike out all or part of a statement claim are now settled, have been consistently cited and applied by this Court, and need not be extensively recited. In brief, these principles are as follows:

(i) The court must be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the case in the sense that it has no real prospect of succeeding at trial. (CITCO Global Custody NV v Y2K Finance Inc [2009] ECSCJ No. 165 (delivered 19th October 2009).

(ii) A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. Further, a statement of claim should not be struck out where the dispute between the parties involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development, or where the strength of the case may not be clear because it has not been fully investigated. Ian Peters v Robert George Spencer [2009] ECSCJ No. 212 (delivered 22nd December 2009), per Pereira CJ; Tawney Assets Limited v East Pine Management Limited and others [2012] ECSCJ No. 284 (delivered 17th September 2012) per Gordon JA [Ag].)

¹¹⁸ See Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea, St Vincent & the Grenadines, Civil Appeal No. 12 of 2006, (unreported, delivered 16th July 2007) at paragraphs [43] and [44] (Barrow JA).

¹¹⁹ AXAHC VAP2020/0005 (unreported, delivered 30th April 2021) (Farara JA).

(iii) On hearing an application to strike pursuant to CPR 26.3(1)(b), the pleadings alone are to be examined. The trial judge should assume that the facts alleged in the statement of claim are true unless they are manifestly incapable of proof. (CITCO Global Custody NV v Y2K Finance Inc [2009] ECSCJ No. 165 (delivered 19th October 2009) per Edwards JA at para. 13, and Martin Didier G.C et al v Royal Caribbean Cruises Ltd. SLUCVAP consolidated appeals 2014/0024 and 2014/0004 (delivered 6th June 2016, unreported) per Pereira CJ at para. 28.)

(iv) Striking out is a draconian step or “nuclear option” and ought only to be deployed sparingly, in the clearest of cases. The reason for proceeding cautiously is that the exercise of the jurisdiction to strike out deprives a party of its right to a trial and of its ability to strengthen its case through the process of disclosure, the filing of witness statements or witness summaries and other procedures such as requests for further information. (Ian Peters v Robert George Spencer ANUHC VAP2009/0016 (delivered 22nd December 2009) per Creque JA; see also HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another [2014] EWCA Civ 1106.)

(v) As striking out is a draconian step, the court must consider whether the interests of justice are better served by permitting an amendment, to pleadings or deploying some other sanction, instead of striking out the statement of claim. (14 Pereira CJ in The Attorney General of Saint Lucia v Darrel Montrope [2020] ECSCJ No. 235. (delivered 9th July 2020); See also Peerless Limited v Gambling Regulatory Authority and others [2015] UKPC 29 and Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6.)”

[301] It seems to me that the answer to the Defendants’ strike out application lies in the application of these principles, without the need to engage upon the gargantuan exercise of determining the rights and wrongs of the many other arguments made by the parties. I will now seek to apply these principles.

[302] First, I am satisfied that the Claimants’ statements of case raise serious live issues of fact which can only be determined by hearing oral evidence.¹²⁰

[303] In this regard, too, it is appropriate to take a step back. Upon a first review of the Defendants’ application and submissions, the impression they gave was that the Claimants statements of case, even after re-amendment, are hopelessly shambolic; so badly pleaded that the

¹²⁰ Cf paragraph [21ii].

Defendants could not know what they are alleged to have done and thus unable to put their own case. The Defendants also urge that the Claimants' factual case is inherently implausible.

[304] Such impressions, however, immediately evaporate when the Claimants' statements of case and their submissions are read. The Claimants appear to have an answer to all the Defendants' many points.

[305] Far from a case where the Defendants cannot tell what the case is that they have to meet, it is abundantly clear that the basic facts are extremely simple, the Defendants understand them perfectly, and they have their own positive case in response.

[306] In a nutshell, the Claimants' case is that whilst Mr. Ghosn was Nissan's CEO, he became the recipient of certain large sums of money and received the benefit of a high value Yacht. The Claimants allege that those sums of money came to Mr. Ghosn through SBA, either as a consequence of misappropriation from either or both the Claimants at Mr. Ghosn's behest, or as secret commissions. The Claimants appear not to be altogether clear at this point as to precisely how the alleged wrongdoing occurred, and so they have pleaded their claims in a manner designed to cover all the eventualities as they might emerge upon further investigation.

[307] The Defendants do not deny that Mr. Ghosn received large sums of money but claim a number of legitimate reasons for such receipt. The Defendants do not deny that Mr. Ghosn now has the benefit of the Yacht, but they have a detailed and specific positive case that Mr. Ghosn only recently acquired it, and that previously it had other individuals, and not himself, as its erstwhile beneficial owners.

[308] These are ultimately issues of fact for trial.

[309] Even on the Defendants' own application, however, there is a need for issues of fact to be determined before the Court can consider strike out. By way of example, the Defendants argued that

“...if the US\$32m was the property of NME, and not of Nissan, then Nissan’s unjust enrichment claim is bound to fail on the basis that element (ii) [of the criteria for unjust enrichment claims] is absent. Accordingly, Nissan’s unjust enrichment claim is bad in law and should be struck out.”

[310] In arguing that the Court should, now, strike out Nissan’s unjust enrichment claim on this basis, the Defendants overlook the little word ‘if’. Even on the Defendants’ formulation here, there is a factual issue whether the US\$32 million was NME’s property, alternatively Nissan’s property (or neither NME’s or Nissan’s property). That is typically a factual issue for trial and not for summary disposal, prior even to standard disclosure and the exchange of witness statements, at the case management stage. The Claimants, for their part, advance a primary claim that the relevant funds were paid away from Nissan and a secondary case that they were paid from NME. They submitted that which of these cases prevails will be a matter for trial. I agree.

[311] Moreover, the respective strength of the parties’ cases is not yet clear because they have not yet been fully investigated.¹²¹

[312] The Defendants submitted that the Claimants’ case as presented is inherently improbable. I struggle to see precisely what in the Claimants’ case is said to be improbable, and why. Indeed, the conduct of which Mr. Ghosn stands accused is of a piece with that of countless other prominent businessmen whose acts are regularly adjudicated upon in this Court – the allegations may or may not be true. This submission of inherent improbability does not take the matter much further. It does not equate to saying that the claim advanced is so far-fetched that there is nothing sensible that should proceed to trial.

[313] The Defendants’ own case also is not immune from inherent improbability. In this regard, the following parts of the Defendants’ case invite particular question marks:

- (1) The alleged conspiracy on the part of the Claimants to discredit the reputation of Mr. Ghosn, to remove him as Chairman of Nissan and to prevent him merging Nissan with another automobile manufacture is in essence an allegation that the Claimants are

¹²¹ Cf at paragraph [21(ii)]

bringing these proceedings for irrational reasons. In circumstances where Mr. Ghosn is not alleged to be a majority (nor indeed any) shareholder in Nissan, and thus with no ability to control Nissan, the Claimants would not seem to need to bring these proceedings in order to govern the company's strategic commercial direction.

- (2) The receipt by Mr. Ghosn of a sum in excess of US\$7 million as an alleged fee for informal investment advice and management to individuals connected with SBA, at a time when Mr. Ghosn was employed to work for Nissan, in circumstances where the explanation of a 'fee' was radically different from the Defendants' first explanation cannot, by any conventional standard, be considered 'normal' - it begs many questions; and
- (3) The Defendants' insistence that Mr. Ghosn had been no more than a potential chartering customer for the Yacht, and his input into its outfitting and equipment had been provided only on a consulting basis for the Yacht's true beneficial owner(s), appears to be in complete contradiction with correspondence from third parties, who appear to have understood Mr. Ghosn to have been the owner of the Yacht.

[314] However, at this early stage in the proceedings, prior to disclosure, witness statements and oral evidence at trial, the Court simply cannot make any factual assumptions, save where the parties have admitted facts.

[315] Furthermore, there is a substantial dispute, ultimately of law, as to which law or laws govern the various claims. The Claimants contend that significant parts are governed by BVI law, based upon private international law principles. The Defendants, on the other hand, argue that it is Japanese law that applies. The competing arguments, which I have set out in an earlier part of this judgment, demonstrate that there is no plain and obvious answer to this point.¹²²

¹²² Cf at paragraph [21ii].

- [316] This is not one of those 'clearest of cases' where the draconian step of strike out, to be deployed sparingly, seems to be appropriate at this stage, whether in whole or part.¹²³
- [317] The Defendants have criticised the way the Claimants have pleaded their claims. One of the criticisms levelled is that the Claimants advance new elements of a case in a Reply, as opposed to in a Statement of Claim. That, however, does not amount to good grounds for striking out that pleading. This approach, espoused by the Defendants, discloses a desire to score victories on technical grounds. Instead, directions can easily be given, if required, to ensure that the Defendants have an adequate opportunity to understand and plead to allegations. Rules about pleadings are not intended to create opportunities to gain a procedural advantage (such as a strike out). Rather, they are about procedural fairness, so that claims and defences can be advanced in an orderly fashion in order that they can ultimately be determined in a fair manner upon their legal and factual merits.
- [318] Another criticism levelled by the Defendants concerns the fact that the Claimants have voluntarily filed Further and Better Particulars of their Japanese law claims, with the Defendants alleging that this is a thinly disguised attempt to amend pleadings without the Court's necessary permission.
- [319] The Court has some sympathy with this criticism. Such a voluntary filing appears, on its face, to be an imaginative adaptation of the procedure concerning further and better particulars to achieve such an amendment of pleadings in a way the CPR did not intend. In other words, this appears to be an abuse of process, thus, something the Court should not countenance. However, since witness statements can properly be used to set out particulars where statements of case have already set out the basic allegations, and since matters of foreign law (here Japanese law) are to be treated as matters of fact, there is very little, if any, mischief done here. The important point, of which sight should not be lost, is that the Claimants have made their factual foreign law case clear now.

¹²³ Cf at paragraph [21iv].

[320] In the totality of these circumstances, in my respectful judgment this is not a suitable case for a strike out in whole or in part.

Summary judgment

[321] The Defendants seek reverse summary judgment. They do so predominantly in favour of a proposition that it is Japanese law, and not BVI law, that applies to the claims. However, the Claimants point out that in order to obtain summary judgment, the Defendants would have to establish that in respect of every issue raised by the Claimants' claims, the argument that BVI law applies is '*fanciful*', following **Comodo Holdings Ltd. v Renaissance Ventures Ltd.**,¹²⁴ at [83] and that this is a hurdle the Defendants cannot possibly clear.

[322] I agree with the Claimants in this regard. The Claimants advanced closely argued and detailed submissions why they say BVI law governs key aspects of their case, with reference to a considerable number of authorities. The conflicts of laws issues involved are hugely complex. It may possibly turn out to be the case that the Claimants could be wrong in respect of some of their reasoning, but at this point, it is not clear to me that the Claimants' arguments are '*fanciful*'.

[323] This is thus not a matter in which reverse summary judgment is appropriate.

Discharge or continuation of the injunction

[324] The Defendants submitted that there will of course be 'good grounds' to discharge a proprietary injunction where it is established on a strike out or summary judgment application that there was no 'serious issue to be tried'. Thus, the Defendants had hoped that the injunction would fall to be discharged as a consequence of success with their strike out and reverse summary

¹²⁴ BVIHCMAP2014/0032 (unreported, delivered 3rd May 2016) (Blenman JA).

judgment applications. Those applications, though, have failed. The Defendants have thus equally failed to establish that the injunction should be discharged or set aside.

The Claimants' application

[325] The Claimants seek the Court's permission to file a Re-Re-Amended Statement of Claim, pursuant to CPR 20.1(2). They do so, without prejudice to their primary position that their existing statements of case have been adequately pleaded.

[326] The allegations or elements which the Claimants seek to include are in essence the following:

- (1) Mr. Ghosn was at all material times an agent of Nissan and/or of NME; and/or
- (2) Mr. Ghosn had a role in, and/or was in a position to influence decisions taken by Nissan and/or NME;
- (3) Under Japanese law, a company's officers, including directors, are its agents, and this was known to SBA and the individuals connected with SBA;
- (4) The impugned payments made to Mr. Ghosn and/or to his nominees were unknown to Nissan or to NME, and/or any officer or representative of Nissan or NME other than Mr. Ghosn;
- (5) The said payments resulted in Mr. Ghosn having personal interests which conflicted, or could have conflicted with his duties;
- (6) Nissan, alternatively NME is entitled to an account of profits (or any other benefits) made by Mr. Ghosn and/or his nominees; such profits or benefits were procured by SBA's bribery of Mr. Ghosn, or that of individuals connected with SBA, or by their payment of secret commissions to Mr. Ghosn;
- (7) In support of claims by Nissan against Beauty Yachts in dishonest assistance and knowing receipt, Mr. Ghosn breached duties owed to Nissan which were and/or were akin to fiduciary and/or trust duties;
- (8) These breaches of duty were assisted and/or procured by Beauty Yachts, in particular by: receiving and retaining; and/or agreeing to receive and retain; and/or facilitating the onward transfer of the monies paid to SBA, including to Beauty Yachts. These acts of

assistance were committed in the BVI, alternatively in substance and/or substantially committed in the BVI;

- (9) This was done by Mr. Gebran acting as a director and/or agent of Beauty Yachts acting within the scope of his actual or ostensible authority, such that the said acts are attributable to Beauty Yachts. The Claimants then cite two factual details and add that Beauty Yachts and/or the officers and/or persons whose state of mind is attributable to Beauty Yachts were dishonest in relation to the said breaches of duty;
- (10) Nissan, alternatively NME, seeks a declaration that the secret commissions and/or all profits for other benefits obtained by Mr. Ghosn or Beauty Yachts procured by SBA's and/or Sheikh Bahwan's and/or Mr. Omar Bahwan's and/or Mr. Kumar's bribery of Mr. Ghosn or by the payment of secret commissions are held on constructive trust for Nissan, alternatively NME.

[327] The Claimants stated that they seek leave to expand on and further amend the Re-Amended Statement of Claim, and in particular the claims against the First Defendant in bribery and against the Third Defendant in dishonest assistance, in the event that the Court finds merit in the Defendants' criticisms of the Claimants' pleaded case, made as part of the Defendants' strike-out and/or reverse summary judgment application.

[328] The Claimants also urge that the amendment should be allowed, because the Claim herein has not yet been fully case managed, no trial dates will be disturbed, and no parties will be prejudiced accordingly.

[329] The Claimants also observe that the Defendants admit, in principle, that the Claimants seek to advance bribery/fraud and dishonest assistance claims, but that their primary contention is that these claims have been inadequately pleaded. In the circumstances the Claimants say they do not seek to add new claims or make sweeping changes to the Statement of Claim. Rather, the amendments only seek to supplement those claims which the Defendants have acknowledged are being advanced.

[330] The Claimants assert that the Court will not be required to consider any issues regarding limitation by virtue of the proposed amendments.

[331] Thus, contend the Claimants, having regard to the early procedural state of the claim herein, it is proportionate and appropriate to grant the relief sought herein and allow the additional amendments so that the substance of the Claimants' valid claims can be considered.

The Defendants' position

[332] The Defendants strongly opposed the application for the Claimants to have permission to re-amend their Statement of Claim. The Defendants opposed this on three bases:

- (1) In substance, the proposed amendments introduce two new claims – one in bribery and one in dishonest assistance, but neither has any real prospect of success;
- (2) The Court has no power to allow the amendments, because it is reasonably arguable that a limitation defence applies to the proposed claims and the Claimants cannot overcome the jurisdictional threshold imposed by CPR 20.2, namely that an amendment can only be allowed if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings.
- (3) Even if the Court has power to allow the amendment, permission should be refused as a matter of the Court's discretion, applying the discretionary factors set out at CPR 20.1(3).

Those are:

“When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –

- a. how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;
- b. the prejudice to the applicant if the application were refused;
- c. the prejudice to the other parties if the change were permitted;
- d. whether any prejudice to any other party can be compensated by the payment of costs and or interest;
- e. whether the trial date or any likely trial date can still be met if the application is granted; and
- f. the administration of justice.”

[333] The Defendants submit that the Court should adopt a restrictive approach to applications for leave to amend under CPR20.1(2), following **Mohammad Sadek Atassi et al v Raghed Murtada et al**.¹²⁵

[334] The Defendants then devoted considerable efforts, in a highly technical analysis, to show that the 'new' claims are not reasonably arguable and that the Defendants have a reasonable argument that a limitation defence applies.

Discussion on permission to re-re-amend the Statement of Claim

[335] As a matter of the exercise of the Court's discretion, it is in my respectful judgment not appropriate to allow the re-re-amendment of the Claimants' Statement of Claim, for the following reasons.

[336] The proposed re-re-amendments are largely formulaic in nature. By this, I mean that they 'introduce' the legal basis for the Claimants to make two 'new' claims. These 'new' claims have not recently come to light. Rather, this desire to re-re-amend the Statement of Claim comes about as a result of wishing to improve the drafting of the already re-amended Statement of Claim. As such, there would appear to be no reason why these 'new' claims could not have been included in either the original iteration of the Statement of Claim in August 2019, or in one of the two subsequent rounds of amendments. Thus, objectively speaking, this attempt to amend the Statement of Claim yet further has not been made promptly.¹²⁶ Whilst, relatively speaking, the proceedings are still at an early stage, with case management not finished yet, and no trial date yet fixed, allowing these further amendments would introduce further delay while a new Defence is filed, and possibly a yet further Reply.

¹²⁵ SKBHCV2015/0283 (unreported, delivered 12th January 2018) at paragraphs 13 and 14 (Actie, M).

¹²⁶ Cf CPR 20.1(3)(a).

[337] The scheme of the CPR is to permit a single set of amendments without the Court's permission, before the first Case Management Conference.¹²⁷ Then, permission to amend requires careful consideration of a number of factors, including a balance of prejudice and the need to keep protection of the administration of justice expressly in view. In other words, permission to amend is not given lightly, or as a formality. Whatever a defendant is alleged to have done wrong, the due administration of justice entails that a defendant has a legitimate expectation that any claims will be prosecuted promptly and that a claimant will not be afforded endless opportunities to re-write his claims. Certainly, this places a high professional burden upon the legal practitioners concerned, but it is not an unreasonable one. Those members of the legal profession who recall the transition from the old Rules of the Supreme Court to the Civil Procedure Rules will remember that the Civil Procedure Rules introduced the notion of 'front-loaded case preparation', in other words that litigants would be expected to get their cases ready, as far as possible, before filing a Claim Form, with the days of improving one's case as one went along long gone. The 'one amendment without permission' rule is precisely a reflection of that approach.

[338] In this case, the Claimants have had considerable and indeed ample opportunity to express their claims properly. Indeed, the Claimants submit that they have in fact already done so. On their own case, they therefore do not need to re-re-amend their Statement of Claim. If that is right, and it is reasonable for the Court to hold the Claimants to this, then the Claimants would suffer no prejudice whatsoever if permission is refused. Simply put, on the Claimants' own case they do not need to amend their claim. That being so, the Court need not, and in the necessary exercise of judicial restraint, thus should not accord the Claimants this further permission now.

[339] On the other hand, permitting the re-re-amendment will inevitably put the Defendants to the trouble – for the third or fourth time – of preparing and filing a Defence. Whilst this can be compensated for through costs, this would involve extra work that could be invested in other

¹²⁷ CPR20.1(1).

things. Particularly where the Claimants' position is that these 'new' claims have already been pleaded, and properly so, it would be unnecessary to put the Defendants to such extra work.

[340] Concerning the administration of justice, I accept that the proposed re-re-amendments are likely to be of assistance to the parties and to the Court in that they would encapsulate a somewhat neater formulation of the two heads of claim concerned, and thereby also obviate further arguments about what exactly the Claimants have claimed. However, the same end can be achieved in due course before trial through the medium of Lists of Issues. Moreover, if the Defendants genuinely do not understand parts of the Claimants' case that they have to meet, no prejudice would be caused if the Court were to give directions for further Requests for Further Information to be served and answered, with the Defendants then being accorded an opportunity to plead to them.

[341] Moreover, in circumstances where the Claimants have brought this application to meet the eventuality that the Defendants' strike out and/or reverse summary judgment application might succeed in whole or part (which it has not), there would seem to be no need, nor any significant utility, in granting this application. It should therefore stand dismissed.

Disposition

[342] For the reasons set out above:

- (1) the Defendants' application filed on 27th May 2021; and
 - (2) the Claimants' application filed on 15th November 2021
- stand dismissed.

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

[344] The Court expresses its gratitude to Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar