Case No: CL-2015-000679

Neutral Citation Number: [2018] EWHC 1230 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2018

Before :

MR JUSTICE MALES

- -

Between :

ST VINCENT EUROPEAN GENERAL PARTNER LIMITED	**Claimant**
- and -	
(1) BRUCE ROBINSON **(2) WINTERBOURNE PTE LIMITED** **(3) PPL WINTERBOURNE LIMITED** **(4) POLAD LIMITED** **(5) MOLYNEUX INVESTMENTS LIMITED** **(6) THISTLE AVIATION LIMITED** **(7) JENIFER COPELAND** **(8) STEPHEN COPELAND** **(9) JAMES HOSEASON** **(10) DAVID TOMS** **(11) ALASTAIR NICHOLSON (deceased, through the administrator of his estate, Alistair David John Nicholson Jr)**	**Defendants**
(12) KOREA FUEL-TECH POLAND SP. Z.O.O. **(13) JOHN CLARKE** **(14) MACDONALD & PARTNERS LIMITED** **(15) PICTON JONES (ASSET MANAGEMENT) LIMITED** **(16) HAUSSMANN DEVELOPMENTS POLSKA SP. Z.O.O.**	**Proposed Defendants**

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Paul Downes QC and Joseph Sullivan (instructed by **Trowers & Hamlins LLP**) for the **Claimant**
Clare Stanley QC (instructed by **Clyde & Co LLP**) for the **1st, 3rd and 5th Defendants**
Thomas Braithwaite (instructed by **ASB Law**) for the **4th, 6th and 11th Defendants**
Jason Evans-Tovey (instructed by **Aaron & Partners**) for the **Proposed 12th Defendant**
Tom Roscoe (instructed by **DWF LLP** and **Temple Bright LLP**) for the **Proposed 13th (DWF) and 14th (Temple Bright) Defendants**
Ben Quiney QC and Carlo Taczalski (instructed by **Mills & Reeve LLP**) for the **Proposed 15th Defendant**
The Proposed 16th Defendant was not represented

Hearing dates: 9 and 10 May 2018

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Judgment

Mr Justice Males :

Introduction

1. There are three applications before the court:

   (1) an application by the 1st, 3rd and 5th defendants ("the Robinson defendants") to strike out the claim against them, alternatively for summary judgment;

   (2) an application by the 4th, 6th and 11th defendants ("the Nicholson defendants") to strike out the claim against them, alternatively for summary judgment;

   (3) an application by the claimant ("St Vincent") to re-amend its Particulars of Claim against the existing defendants and to add five new defendants to the claim.

2. The procedural background, in brief, is that in a judgment delivered on 15 December 2017 ([2017] EWHC 3267 (Comm)) Phillips J set aside a worldwide freezing order obtained by St Vincent against the 1st and 3rd defendants on the ground that St Vincent did not have a good arguable case. On 9 January 2018 Flaux LJ refused permission to appeal, saying that the proposed appeal was hopeless and misconceived. St Vincent contends nevertheless that its claim should be allowed to continue to trial because (1) the test of "real prospect of success" required to resist an application for summary judgment is less demanding than the standard of "good arguable case" applicable for deciding whether to set aside a freezing order, (2) the conclusions reached by Phillips J and Flaux LJ are wrong and in any event do not deal with all the ways in which St Vincent puts its case, and (3) there is new evidence which was not before the court on the application for the worldwide freezing order.

3. The trial of the action is currently due to begin on 15 October 2018 with an estimate of four weeks. However, there have been delays on both sides with the consequence that disclosure has not yet taken place and witness statements have not been exchanged. Indeed, if the application to re-amend is allowed, pleadings have not yet closed. Clearly there will be much to do between now and October if this claim survives the present applications. Nevertheless no party is asking for the trial to be adjourned.

4. St Vincent has obtained a default judgment against the 2nd defendant ("Winterbourne Pte") and has settled its claims against the 7th to 10th defendants. Winterbourne Pte, a Singaporean company, was dissolved on 8 May 2017. Accordingly the Robinson defendants and the Nicholson defendants are the only remaining existing defendants to the claim.

Legal principles

5. The court may give summary judgment against a claimant if the claimant has no real prospect of succeeding at trial and there is no other compelling reason why the case should go to trial: CPR 24.2. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR observed – optimistically but in my view accurately – that "the words 'real prospect of succeeding' do not need any amplification, they speak for themselves". Despite this, a certain amount of case law has built up. For present purposes it is sufficient to say that the claimant need not show that it will probably succeed; what is required is a

realistic as distinct from fanciful prospect, that is to say a prospect which is better than merely arguable and which carries some degree of conviction; this is a relatively low hurdle for a claimant to jump.

6. The court's approach to late amendments was summarised by Sir Geoffrey Vos C in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 at [41]:

> "In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it."

7. The Chancellor referred also to the judgment of Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm). Carr J said at [38]:

> "38. Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

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

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

Background

8. I can take the background largely from the judgment of Phillips J.

9. St Vincent is a property investment company incorporated in the Isle of Man. During 2006 and 2007 it acquired the entire issued share capital of Haussmann Holdings Limited ("HHL"), a company incorporated in Cyprus. HHL in turn was the 100% owner of Haussmann Developments Polska sp. z.o.o. ("HDP"), a Polish company. HDP held various leasehold and freehold interests in a commercial development project in Zory, Poland, known as the Cross Point Development. St Vincent was incorporated for the purpose of investing in this development by acquiring what became these wholly-owned subsidiaries.

10. The 1st defendant Mr Bruce Robinson and the 4th to 11th defendants (together "the Creditors") had each invested in the Cross Point Development, their investment taking the form of loans to HHL and HDP; Mr Robinson's own investment was about £200,000. In February 2008 St Vincent agreed to assume liability for HHL's and HDP's indebtedness to the Creditors.

11. However, St Vincent was unable to repay the Creditors pursuant to the obligations it had assumed. The Creditors therefore commenced proceedings against St Vincent and, on 4 February 2010, obtained judgment for sums totalling £880,563.21 and €751,863.40 ("the Judgment Debt").

12. On 13 April 2010 the Creditors and St Vincent (among others) executed an agreement ("the Framework Agreement") pursuant to which St Vincent agreed to provide a charge over the entire issued share capital of HHL. The charge required by the Framework Agreement was provided by way of a deed dated 17 December 2010 ("the Shares Pledge"), by which St Vincent charged and mortgaged its shares in HHL to the Creditors, as security for the Judgment Debt, together with interest, costs and other expenses ("the Secured Indebtedness"). Although there was a pledge of the share certificates, the shares themselves were mortgaged to the Creditors. The Shares Pledge recorded that St Vincent had delivered to the Creditors the share certificates, blank share transfer forms and signed letters of resignation from the directors and secretary of HHL. The Shares Pledge was governed by the law of Cyprus and provided for the exclusive jurisdiction of the courts of that country.

13. St Vincent defaulted on its obligations under the Framework Agreement, entitling the Creditors to enforce the Shares Pledge. The Creditors duly gave notice of such enforcement on 8 March 2011. Thereafter they:

(1) countersigned the executed share transfer forms to effect a transfer of the shares in HHL to Winterbourne Pte, a company incorporated in Singapore which was owned and controlled by Mr Robinson, as nominee of the Creditors;

(2) completed the signed letters of resignation so as to remove the directors of HHL and replace them with Mr Robinson and another;

(3) procured the removal of Simon Lees, who had been appointed by St Vincent as the President of the Management Board of HDP and replaced him with Mr Robinson.

14. The result was that, from 8 March 2011, Winterbourne Pte was the legal owner of the shares in HHL, which meant that the Creditors had control over HHL and HDP and thereby the Cross Point Development, subject however to St Vincent's right to redeem the HHL shares by payment of the Secured Indebtedness. It is not disputed that Winterbourne Pte acquired the shares in HHL subject to St Vincent's equity of redemption. St Vincent makes and can make no complaint about these steps. The Creditors were entitled to enforce their security and to transfer the HHL shares to Winterbourne Pte which was named in the Shares Pledge as the entity to which the shares would be transferred in the event of such enforcement.

15. On 18 April 2011 HDP (through its authorised representative, Mr Robinson) petitioned the District Court in Gliwice, Poland, for its own bankruptcy on the ground that its liabilities exceeded its assets. It sought a composition with its creditors and to be allowed to manage its own assets, subject to a court supervisor. It proposed a plan which it was hoped would enable it to increase the value of its assets. On 10 June 2011 the District Court issued a Decision granting the relief sought in HDP's petition.

16. St Vincent was interested in regaining control of HHL and HDP in order to benefit from the development of the Cross Point Development and, for this purpose, was investigating sources of funding which would enable it to repay the Secured Indebtedness and redeem the shares. On 10 August 2011 an English company in the same group as St Vincent (St Vincent Cross Point Limited) entered a joint venture agreement with companies named Alterco SA ("Alterco") and Reinhold Polska AB ("Reinhold") ("the JV Agreement"). The JV Agreement provided for the formation of a joint venture company under Polish law ("RAS-JV") for the purpose of gaining the Cross Point Development and investing further in it. For this purpose, Alterco and Reinhold agreed that they were able to provide funding of €10.5 million, including a minimum cash amount of €6.5 million.

17. The JV Agreement envisaged that RAS-JV would gain control of the Cross Point Development by purchasing the shares of HHL from Winterbourne Pte. The JV Agreement therefore provided that (1) RAS-JV would not be established until Winterbourne Pte had given written consent to such sale; and (2) the cooperation envisaged between the parties was conditional on RAS-JV concluding an agreement with Winterbourne Pte for the sale, including the following provisions: (a) an assignment of the debts owed to the Creditors and the security for those debts

(including the Shares Pledge); (b) the resignation of the directors of HHL and HDP appointed by the Creditors and their replacement by appointees of RAS-JV; and (c) the agreement of Winterbourne Pte and the Creditors that they had no further relevant claims and would not proceed with the "settlement plan regarding HDP bankruptcy petition".

18. Following the conclusion of the JV Agreement a representative of St Vincent (and/or Alterco or Reinhold) named Paul Hassall sought to engage with the Creditors (and Winterbourne Pte) through Mr Robinson. On 17 August 2011 Mr Hassall emailed Mr Robinson, stating:

> "… I just wanted to update you on the proposed repayment of your group's debt, interest and legal fees. I requested and now have received a print off of the total amount outstanding from the accountant of St Vincent which amounts to a figure of a little short of EUR2.1 million.
>
> In addition I have been in contact with our JV partners in Poland and a member of the board will be able to fly to London … on Monday 22nd August to meet with you. This way you can speak to the cheque writer.
>
> Please also note that I have requested proof of funds as you requested and this is being arranged but I can assure you that the JV agreement has been signed and is subject to repaying your debt and your group handing back full control of the shares in HHL and at the HDP level. It is understood by us both that the charges will be left in place on the Cross Point land properties but controlled by our joint venture company and that you will leave us to deal with the courts and other creditors. We are fully aware of the pending bankruptcy and will handle all legal matters directly with the court administrator.
>
> … I have been asked, as you will appreciate, the cost of the legal fees and disbursements that you and your group have incurred and perhaps you can obtain this from your lawyers and have this at least ready for our meeting."

19. The same day Mr Robinson replied by email, on behalf of Winterbourne Pte, as follows:

> "… Please advise me of the identity and any information you have about your joint venture partner. We will contact them direct to establish their bona fides, and if satisfactory, will arrange for them to meet the administrator if he is willing.
>
> I note from your email that your [*sic*] in touch with St Vincent, who do not reply to any of our correspondence. …
>
> Please remember that we are under no obligation to settle with you at the price you indicate. The administrator decides the amount of debt and attributable costs, and in any event his authority does not extend to the ownership of the shares. …
>
> Please be advised that Winterbourne acts for the Polad Group and has the full authority of all members of the Group, who have asked that as you are now in contact with me you do not correspond with them further …"

20. Mr Hassall responded, again on 17 August 2011, pointing out that matters could be resolved by an agreement on commercial terms with St Vincent and the Creditors at a level above HDP and without involving the legal process in Poland. He stated that he was aware of the outstanding debt and interest and continued:

> "The only missing figure is the amount for the fair and reasonable legal costs incurred by yourself and in this respect please note that as I represent the equity investors I would mention that they are not prepared to pay any sum that cannot be fully substantiated or are not directly relevant to the recovery of your/your group's aforementioned debt.
>
> ….
>
> HDP creditors whom I have dealt with directly – the majority by value – are not convinced that anybody has any funds to resolve the current bankruptcy situation. The JV clearly does. Once we have agreed terms between us, and I aim to do so as amicably as possible, I will introduce myself and my plans together with the JV partners and major creditors to the court administrator to table a workable solution which satisfies everybody. These negotiation [sic] would not include yourself/Winterbourne in any capacity. …
>
> …
>
> All that I wish to achieve is to reach a fair conclusion which includes settling your debt and in this respect please note that I will be party and present to all negotiations whether at home or in Poland. As I had mentioned before I wish to conclude this simply, subject to observing any legal requirements and of course with your full cooperation. You receive the money owed under the original Agreement and we take over everything from that point."

21. The following day, 18 August 2011, Mr Robinson sent a response to Mr Hassall. Mr Robinson's response included the following:

> "… for the avoidance of doubt, we are not obliged to treat with you. You are not in any position to demand anything whatsoever from us.
>
> …
>
> I will continue discussions with you when I know who I'm dealing with, have been able to establish their credentials, am satisfied with their ability to perform, and have discussed matters with the administrator. In the meantime I will not deal with any further correspondence."

22. Mr Hassall replied later the same day, disclosing the identity of St Vincent's joint venture partners and pressing Mr Robinson to meet their representative (Michael Scully of Reinhold) on Monday 22 August 2011, stating that this would be "a good opportunity to establish a working agreement and show you, not only proof of funds, but the ability to assist you as well as the other investors involved".

23. A meeting then took place on 22 August 2011 in London, attended by Mr Hassall, Mr Robinson and Mr Scully, among others. There is no contemporary record of that meeting. St Vincent's pleaded case (which Mr Robinson denies) is that:

(1) Mr Hassall (on behalf of St Vincent) informed Mr Robinson that St Vincent was ready, able and willing to pay and discharge the debts it owed to the Creditors, together with all expenses and other sums to which the Creditors were entitled.

(2) Mr Scully confirmed that the funding was available to enable St Vincent to pay the Creditors.

(3) Mr Robinson refused to confirm that the Creditors would accept the payment referred to, stating that a payment in excess of €3m would be required, plus a further "fee" for himself.

(4) Mr Robinson privately indicated that the inflated sum he was demanding would enable him to "carve out a slice" for Mr Hassall, which Mr Hassall took to be the offer of a bribe.

24. The next day, 23 August 2011, Mr Hassall emailed Mr Robinson, stating that it had been good to meet Mr Robinson and to obtain a greater understanding of the ownership situation of HDP. Mr Hassall also stated that he "did not realise that you had severed the link to St Vincent by selling the share ownership from HHL to a UK company you have set up." Mr Hassall further stated as follows:

> "… I am working on putting together a more attractive solution based on what we privately discussed yesterday that will be to our mutual benefit … I know that you do not wish to go down a protracted legal battle … and I would not recommend anyone to do so if we can reach a settlement that is financially attractive to you."

25. Mr Robinson replied the same day as follows:

> "To clarify, the link with St Vincent was severed when we took possession of the Cyprus company, the transfer subsequently is an administrative detail. …"

26. After complaining about "the history of default and reckless and unprofessional behaviour by St Vincent", he continued:

> "… We have rescued this project while everyone else has done nothing, we are not about to step down or cede control now."

27. On 1 September 2011 Mr Hassall again emailed Mr Robinson. He said that "initially I believed that we had the framework to agree settlement" and expressed surprise that the Creditors had refused to accept the cash on offer. He continued:

> "Therefore the consensus (the investors I represent and HDP creditors) is to offer you the EUR 2.1m because it is widely understood that you/Winterbourne are owed no more as a secured creditor, plus reasonable legal fees deemed to be fair and appropriate however you have seized ownership in Cyprus in HHL or made subsequent changes to the ultimate ownership of HDP which is of no relevance in determining the fair and reasonable settlement of EUR 2.1m plus legal costs.

> Please see the attached basis of calculation to see how the E2.1m has been derived at. Such amount will be paid as soon as the terms are clarified and agreed including exchanging the receipt of funds for total ownership and control of HDP without any action or claims against you by the investors and creditors. The creditors will shortly be providing to the courts (via your close friend the court administrator) evidence substantiating the acceptance of the Joint Venture offer. We will also ensure, as you requested, that employment will continue for the staff currently on site. That deals with 2 of the 3 points you wished me to cover in concluding your acceptance of a cash settlement; the third point was for you to be paid EUR500,000 cash on top, this has not gone down particularly well. Although I have not been directly in contact with John Clark and Alistair McDonald [*sic*] I understand that inevitably there has been relevant professional fees incurred to date which I have arranged with the JV partners to be fully settled in cash.
>
> Perhaps you could respond so that I can inform everyone accordingly so that we can settle this matter promptly both on the ground in Poland and in the UK. As already stated, through the Joint Venture agreement with Alterco/Reinhold we are offering you a cash solution for your group represented by Winterbourne and we would be happy to meet again to discuss this in greater detail. Please confirm your willingness to meet. …"

28. Mr Robinson did not reply to this email. There was no further communication as to St Vincent's proposals to re-acquire the shares of HHL and thus control of the Cross Point Development.

29. It is St Vincent's case that Mr Robinson was acting dishonestly in the course of the exchanges described above, in particular at the meeting on 22 August 2011, seeking to frustrate St Vincent's exercise of its right to redeem the HHL shares unless he was paid a substantial bribe. Mr Robinson denies that version of events, saying that he was sceptical about St Vincent's ability to pay the Secured Indebtedness after a long history of broken promises by St Vincent, that the purpose of the meeting as explained by Mr Hassall was to discuss the purchase of the HDP shares which, because of the Polish bankruptcy proceedings, was not something which could be agreed, and that in any event there was never an unconditional offer to pay the Secured Indebtedness as distinct from an attempt to negotiate an agreement hedged about with conditions.

30. On 24 October 2011 HHL sold its shareholding in HDP to the 3rd defendant, PPL Winterbourne, an English company 85% owned and thereby controlled by Mr Robinson, for £1, the agreement recording that "the shares have no value by reason of [HDP's] bankruptcy". It appears that this was the transfer about which Mr Hassall had been forewarned and to which he was referring in his email of 23 August 2011 (see above). St Vincent's case is that Mr Robinson's statement was false in view of its offer to repay the Secured Indebtedness. Mr Robinson's evidence is that he did not regard this as a serious offer and that in view of HDP's debts the shares appeared to have no value. The defendants point out also that the transfer of the HDP shares to an English company was not done in secret. On the contrary, Mr Hassall was told about it.

31. A year later, in October 2012, Mr Robinson submitted a report to the Creditors entitled "Proposals for the settlement of debts of [HDP] (In Settlement Bankruptcy)",

in which he referred to "the persistent failure of St Vincent to repay you …". Mr Robinson stated that HDP was now in a position to settle the Creditors' debts at 71% of the registered amount. This was on the basis of (1) an offer from the proposed 12th defendant Korean Fuel-Tech Poland sp. z.o.o. ("KFTP"), the "anchor" tenant of property forming part of the Development, of €7 million for the factory site and (ii) an offer from a UK developer of €3 million for the rest of the Development. St Vincent points out that Mr Robinson failed to mention in this document that, through Mr Hassall, it had "offered" to repay the Creditors in full. As already noted, Mr Robinson denies that there had been any such offer, let alone one on which reliance could be placed.

32. The sale to KFTP took some time. However, in about May 2013 HDP entered into an agreement to sell the Cross Point Development to KFTP, for approximately €9.7 million, subject to approval of its creditors and of the court.

33. St Vincent (and two associated companies) attempted to stop the sale by commencing proceedings in Cyprus against 19 defendants, including Mr Robinson, Winterbourne Pte and the other defendants to these proceedings and also HHL and HDP. On 5 August 2013 the District Court of Nicosia granted an injunction, purporting to restrain any dealings with HDP's assets.

34. Notwithstanding the Cyprus order, on 30 September 2013 the creditors of HDP approved the sale to KFTP. The arrangement was then approved by the District Court of Gliwice on 24 October 2013. The Polish court did not regard the order of the Cyprus court as an impediment to the sale, taking the view that it had exclusive jurisdiction over a Polish company under its supervision and was not required to recognise the Cypriot order in accordance with the provisions of the Brussels Regulation. The court did not rule on any issue whether the proposed sale to KFTP was at market value and was not asked to do so.

35. The sale, for approximately €9.7 million, completed in about June 2014. KFTP also paid the following sums: €110,000 to Winterbourne Pte and €150,000 to each of the proposed 13th to 15th defendants, John Clarke, MacDonald & Partners Ltd and Picton Jones (Asset Management) Ltd.

36. The proposed re-amendment of the Particulars of Claim alleges that the sale for €9.7 million was a sale at an undervalue, the true value being between €14 million and €17 million, and that the payments made to Winterbourne Pte and the proposed 13th to 15th defendants were bribes paid to Mr Robinson, routed through these recipients to conceal their true nature.

37. HHL was dissolved in Cyprus on 11 January 2016. HDP is in liquidation in Poland.

38. There are, as a result of this history, three periods of time about which St Vincent complains in this action. The first is in August 2011 when it is said that the defendants refused to allow St Vincent to redeem the HHL shares. The second is shortly after that, in October 2011, when HHL sold its shareholding in HDP to PPL Winterbourne for a nominal consideration. The third and final period is in October 2013 (or perhaps June 2014) when HDP sold the underlying assets held by it to KFTP.

St Vincent's existing claims

39. The claim form in this action was issued on 16 September 2015. The claims currently pleaded by St Vincent's Amended Particulars of Claim served on 15 January 2017 are as follows.

40. First, it is alleged that the offer made by Mr Hassall at the meeting on 22 August 2011 amounted as a matter of law to a tender of monies sufficient to pay and discharge all that was required to be paid and discharged in order to redeem the pledged shares in HHL.

41. Second, it is alleged that there were implied terms of the Shares Pledge or duties arising from the relationship between St Vincent and the Creditors as pledgor and pledgees. Although these are pleaded in a variety of ways, they can be summarised as follows, namely that: (1) St Vincent would be entitled to pay the Secured Indebtedness and redeem the HHL shares by such a tender, (2) the Creditors would cooperate with St Vincent by providing it with a full account of the amounts which were required in order to redeem the shares, (3) the Creditors would accept such a tender and would cooperate in facilitating the redemption of the shares, and (4) the Creditors would do nothing to prejudice St Vincent's right of redemption.

42. From these premises St Vincent contends that the Creditors' refusal to accept tender of payment of the Secured Indebtedness at the meeting on 22 August 2011 and by Mr Hassall's email of 1 September 2011, thereby refusing to permit redemption of the HHL shares, was a breach of the express terms of the Shares Pledge and/or of the Creditors' duties as pledgees and/or of section 135 of the Contract Law of Cyprus; and that their refusal to provide information regarding the amount of the Secured Indebtedness, demanding sums in excess of those to which they were entitled under the Shares Pledge, refusing to treat with St Vincent and requesting a bribe were breaches of the pleaded implied terms. It contends also that the refusal of the tender and the breaches of the implied terms constituted a repudiation of the Shares Pledge whereby the Creditors' rights thereunder were extinguished, with the consequence that they were obliged to restore the HHL shares to St Vincent and/or held them on a constructive trust in favour of St Vincent.

43. Third, St Vincent contends that by causing Winterbourne Pte to cause HHL to transfer the HDP shares to PPL Winterbourne in October 2011 for a nominal consideration the Creditors were in breach of the implied term not to prejudice St Vincent's right of redemption.

44. Fourth, St Vincent contends that the beneficial interest in the HHL shares remained with St Vincent following their transfer to Winterbourne Pte, which therefore held them subject to an implied trust in favour of St Vincent, and that the Creditors and Winterbourne Pte acted in breach of this implied trust by procuring HHL to transfer its shares in HDP for a nominal consideration.

45. Fifth, St Vincent contends that by accepting the shares in HDP for a nominal consideration in October 2011, PPL Winterbourne was guilty of dishonest assistance in breach of trust.

46. Sixth, it is alleged that there was a conspiracy to injure St Vincent between Mr Robinson, Winterbourne Pte and PPL Winterbourne (but not the Nicholson defendants or the 5th defendant Molyneux Investments Ltd ("Molyneux")) by unlawful means. The conspiracy is said to have been entered into prior to the meeting on 22 August 2011, the unlawful means in question being the matters already described, that is to say the refusal to accept the tender, the breaches of the implied terms of the Shares Pledge and the breaches of implied and constructive trusts. It is alleged that the object of the conspiracy was to prevent St Vincent from redeeming the HHL shares and to strip them of their value by causing HHL to divest itself of its shares in HDP which owned the Cross Point Development.

47. Finally, it is alleged that the Creditors and/or Winterbourne Pte and/or PPL Winterbourne have been unjustly enriched at the expense of St Vincent by the sale of the Cross Point Development by HDP to KFTP. This is said to have been at the expense of St Vincent because, if St Vincent had been able to redeem the shares as it was entitled to do but for the defendants' wrongful rejection of the tender of payment on 22 August 2011, it would have been the principal beneficiary of the sale.

48. Save for the conspiracy claim, these claims are pursued against both the Robinson and Nicholson defendants. The wrongdoing alleged is said to be that of Mr Robinson. Winterbourne Pte and PPL Winterbourne are said to be companies which Mr Robinson controlled. The Nicholson defendants and Molyneux are said to be liable because Mr Robinson was acting as their agent. It is not alleged that they were personally involved in or conscious of any wrongdoing. The original version of the Particulars of Claim included the Nicholson defendants in the conspiracy allegation, but that was subsequently deleted by amendment.

49. St Vincent claims that it has suffered loss and damage as a result of these matters, with damages to be assessed "by reference to the fact that the whole object and purpose of the said wrongs was to deprive St Vincent of the Pledged Shares and their value as represented by HHL's ownership of HDP which owned the Cross Point Development" (para 42 of the Particulars of Claim). It contends that these losses, essentially the loss of the opportunity to profit from successful development of the Cross Point Development, are not less than €30 million.

The judgment of Phillips J

Tender

50. It is apparent that many and perhaps all these ways of putting St Vincent's case depend on either (1) the validity of the "tender" at the meeting on 22 August 2011 or (2) a breach of one or other of the pleaded implied terms of the Shares Pledge or equivalent duties owed by the Creditors as pledgees (or more accurately as mortgagees), whereby the Creditors prevented St Vincent from exercising its right to redeem the HHL shares.

51. St Vincent's case in this regard was rejected by Phillips J at [45] to [50] of his judgment. He held that there was never any tender of monies to St Vincent or even an unconditional offer of payment and that St Vincent had never attempted either to effect a transfer of monies or to pay the monies due into a separate account or into court. Accordingly there was no actual tender. Moreover, St Vincent's alternative

case (in fact "the real thrust" of its case) – that the refusal of Mr Robinson to treat with Mr Hassall constituted a breach of an implied term of the Shares Pledge that the Creditors cooperate with St Vincent should St Vincent wish to redeem the shares and that because the Creditors prevented St Vincent making a tender by their breach, the requirement of actual tender was deemed to be waived or fulfilled – was "hopelessly misconceived". It was clear on the facts that there was never an unconditional offer of payment as distinct from an attempt to negotiate an agreement of much broader scope. Moreover, there was no arguable basis for implying a term into the contracts between St Vincent and the Creditors. The entitlement of a debtor to redeem security was well established as a matter of law, and it was clear that a debtor could start a redemption action if the creditor did not cooperate.

52. There was, therefore, no good arguable case that the Shares Pledge was terminated or should otherwise be treated as satisfied.

Asset stripping and reflective loss

53. Phillips J went on to consider at [51] to [62] the "asset stripping" claim, that is the claim that the transfer of the HDP shares to PPL Winterbourne for a nominal consideration was a breach of the Shares Pledge or equivalent duties at common law or in equity. Having considered the leading authorities in this area (*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, *Johnson v Gore-Wood & Co* [2002] 2 AC 1 and *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554), he concluded that the party with the primary cause of action against Mr Robinson and PPL Winterbourne was HHL as the owner of the shares in HDP which had been transferred; that St Vincent's only loss was the diminution in the value of the shares in HHL to which it claimed to be entitled; that any claim by St Vincent was therefore barred by the rule against the recovery of reflective loss; and that the exception to that principle recognised in *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618 did not apply. His conclusion at [61] was that:

> "I am in any event satisfied that the reflective loss principle applies with full force to St Vincent's claims in these proceedings."

Should there be summary judgment for the defendants on the existing claims?

54. Mr Paul Downes QC for St Vincent submitted that despite Phillips J's conclusion that St Vincent does not have a good arguable case on its existing pleadings, its claims should not be struck out, nor should summary judgment be entered against it. He submitted that:

(1) The judgment of Phillips J does not create any issue estoppel.

(2) Phillips J addressed only two elements of St Vincent's pleaded case, the "tender" claim and the "asset stripping" claim against the Robinson defendants.

(3) The test for summary judgment is that a claim has no realistic prospect of success, which is a less demanding test than the test of good arguable case required to obtain or maintain a freezing order.

(4) There is now additional evidence before the court on the merits of St Vincent's claims.

55. I accept that the judgment of Phillips J does not create any issue estoppel. Nobody suggested that it does. I am prepared to assume that the tests for summary judgment and for obtaining a freezing order are different, although the way in which Mustill J described the test for a freezing order in *The Ninemia* [1983] 2 Lloyd's Rep 600 ("more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success") seems indistinguishable from the test of "real prospect of success". Neither Miss Clare Stanley QC for the Robinson defendants nor Mr Thomas Braithwaite for the Nicholson defendants suggested that the present applications are in any way determined by the decision of Phillips J or that I need not reach my own decision. I shall therefore do so. However, it would be churlish not to acknowledge that the judgment of Phillips J is a comprehensive and carefully reasoned analysis of St Vincent's case after extensive argument, which has been endorsed by Flaux LJ, and which has at least considerable persuasive force. The arguments before me appear to have been essentially the same.

Tender

56. It is established law that a mortgagor is entitled to redeem the mortgaged property by payment of the principal sum secured together with interest and costs, if any, but that a tender improperly rejected is not equivalent to payment. Where a proper tender is refused, the mortgagor can pay into court a sum sufficient to cover the amount of principal and interest and the probable amount of costs, whereupon the mortgagee is obliged and can be compelled to return the mortgaged property, but until this is done it has no such obligation. These propositions appear from the decision of the Privy Council in *Bank of New South Wales v O'Connor* (1889) 14 AC 273 where they were regarded as already firmly established.

57. As also explained in *O'Connor*, it is the duty of a mortgagee, on proper notice, or without notice in a case where notice is not required, to accept a proper tender.

58. I would accept that it is at least arguable, that as part of or ancillary to this duty, a mortgagee is obliged to provide a statement of the sum required to redeem the mortgaged property if requested to do so. This appears to have been the view of Neuberger J in *Equatorial Corporation Plc v Shah* (18 October 1996, unreported):

> "In the absence of any clear authority to support the proposition that the plaintiff was not obliged to give a redemption statement in those circumstances, I am prepared to proceed at this interlocutory stage on the assumption that the plaintiffs were obliged to provide a redemption statement. I consider that there is practical force in the defendant's contention that the way that the property markets work, is that mortgagors who give mortgagees notice of a desire to sell expect to be given redemption statements so that they and their solicitors know how much of the money will have to be paid over on completion to the mortgagee and what balance remains in favour of the mortgagor.
>
> I have not seen any authority which supports the contention in law, and it is fair to say in the plaintiff's favour there are cases which suggest that, if the defendant

is right on this point, it could represent a change of the law in favour of mortgagors. Nonetheless, I think that it is an arguable point and not one on which I would want to base any decision shutting out the defendant at this stage."

59. Nevertheless, the remedy for a failure to provide the requested information is a redemption action which includes the requirement for a payment of the secured amount into court. There is no necessity for any further contractual term to be implied as these rights and remedies are inherent in the relationship of mortgagor and mortgagee. There is certainly no scope for any suggestion that mortgaged property should be treated as having been redeemed in the event of wrongful refusal of a tender without such a payment into court.

60. It is equally clear that a tender must be unconditional: *Mitchell v King* (1833) 6 Car & P 237.

61. Miss Stanley submitted that in order to constitute a valid tender, there must be a tender of gold coins or perhaps, in the case of euros, banknotes. She relied on section 1 of the Currency & Bank Notes Act 1954 and section 2 of the Coinage Act 1971, summarised in *Chitty on Contracts*, 32nd edition (2015), para 21-088. In my judgment, however, no sensible businessman would expect a debtor owing millions of euros (or for that matter any other currency) to turn up with a briefcase full of gold coins or banknotes in order to pay the debt. That would be highly inconvenient in modern conditions and might even raise suspicions of money laundering when the creditor attempted to pay the money into his bank account. I would therefore accept that it is at least arguable that an unconditional offer to pay by means of a bank transfer would constitute a valid tender.

62. In circumstances such as the present case, there would (or it is at least arguable that there would) have been a valid tender of the Secured Indebtedness if St Vincent had made an unconditional offer to pay the amount outstanding, for example by requesting Mr Robinson to provide details of the bank account to which the funds should be transferred so that, without more, such a transfer could be made. I would accept also that if the only reasons why such a transfer could not be made were that the Creditors would not provide such details or would not give a figure for costs, it would have been open to St Vincent to pay the amount of principal and interest together with a reasonable figure for costs and expenses into court and that, upon doing so, it would be entitled to be treated as having redeemed the HHL shares.

63. However, even taking St Vincent's evidence at its highest, it is clear that none of these things happened. No unconditional offer of payment or attempt to pay was ever made. No request was made for information about how to pay. There was a request to be provided with a figure for costs, but this was never on the basis that once the figure was provided, payment would be made unconditionally. Rather it was all part of a negotiation which, so far as Mr Hassall was concerned, was intended to lead to some form of broader settlement agreement. That is abundantly clear from the contemporary documents summarised above both before and after the meeting of 22 August 2011, while Mr Hassall's evidence does not suggest, and St Vincent has no real prospect of proving, otherwise.

64. Moreover, it is clear that St Vincent made no attempt to make any payment into court in Cyprus (or elsewhere) or otherwise to set aside funds to repay the Secured Indebtedness.

65. Accordingly to the extent that St Vincent relies on a case of tender, whether to say that it should be treated as having made a valid tender or that there was a wrongful failure by the Creditors to provide the information required in order for it to do so, that case has no real prospect of success.

66. That is so despite what is said in a letter dated 27 April 2018 from St Vincent's Cypriot lawyer Mr Gregoris Philippou. What he says is that in his experience a redemption action in Cyprus would typically take between two and five years to result in a final order. That evidence carries no weight. First, Mr Philippou is not in a position to and does not purport to give independent expert evidence. On the contrary, as St Vincent's own lawyer, he has a clear interest in the issue. Second, he gives no information about his experience of redemption actions in Cyprus on which his opinion is said to be based. Third, as he acknowledges, interim relief would be possible. Fourth, what he says is in any event hypothetical as he assumes in St Vincent's favour that it made a valid tender when (for the reasons which I have explained) it did no such thing. There is in the circumstances no reason to suppose that the position in Cyprus would have been any different from the position under English law. There is, moreover, an order of this court that Cypriot law is to be treated as the same as English law in this action, save in two specified respects which do not include the law and procedure for redemption actions by mortgagors.

Asset stripping and reflective loss

67. The rule against the recovery of reflective loss was established by *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, holding that a shareholder cannot recover damages merely because the company in which he is interested has suffered damage. His shares may have suffered a diminution in value but such a loss is merely a "reflection" of the loss suffered by the company. The company is the proper claimant in such circumstances.

68. This reasoning was approved by the House of Lords in *Johnson v Gore-Wood & Co* [2002] 2 AC 1. Lord Bingham set out at 35E to 36A three propositions derived from the relevant authorities:

> "(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. … (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. … (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the

company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other."

69. He added at 36D to E that if an application is made to strike out a claim, close scrutiny of the pleadings will be necessary, the object being "to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible". If the answer is clear after resolving any reasonable doubt in favour of the claimant, striking out or summary judgment is appropriate.

70. Although the rule against the recovery of reflective loss involves no exercise of discretion (see Lord Millett in *Johnson v Gore-Wood & Co* at 62F and *Day v Cook* [2001] EWCA Civ 592, [2002] 1 BCLC 1 at [38] and [39]), the rule does not apply where the wrong done to the company has made it impossible for the company to pursue its cause of action against the wrongdoer. This exception to the rule was established by *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618 but, as later cases show, is of limited scope.

71. Accordingly two questions arise. The first is whether St Vincent's claim falls within the scope of the rule against the recovery of reflective loss, the burden being on the defendant to show that it does. The second is whether, if so, St Vincent can rely upon the exception, the burden here being (as Mr Downes accepted) on St Vincent.

Reflective loss

72. I have already referred to para 42 of the Particulars of Claim in which St Vincent pleads that its damages are to be assessed "by reference to the fact that the whole object and purpose of the said wrongs was to deprive St Vincent of the Pledged Shares and their value as represented by HHL's ownership of HDP which owned the Cross Point Development".

73. Paras 48 and 49 of the Particulars of Claim are to similar effect:

> "48. St Vincent's case is that damages it claims in each case are to be assessed by reference to the value of the HHL shares (as represented by the value of the HDP shares and thus the value of the Cross Point Development) in August 2011, or alternatively September 2011 or alternatively October 2011 or alternatively June 2014 or alternatively such date as the court deems fit. The value of HHL shares, the HDP shares and the Cross Point Development are a matter of expert evidence, for which St Vincent will seek permission in due course.
>
> 49. Further, or in the alternative, St Vincent will seek compensation based on its lost opportunity, through its shareholding in HHL and control of HDP, to develop the Cross Point Development to the extent allowed by the outline planning permission that existed and thereby increase the value of: (i) the HDP shares; and (ii) consequently the HHL shares. However, St Vincent's case is that this is no less than €30 million."

74. It is hard to imagine a clearer pleading of a claim for reflective loss.

75. St Vincent has restated its case in its proposed amendment to the Particulars of Claim, contending at para 53A that the loss suffered is not reflective loss at all:

> "53A.1 Its loss is not the loss in value of the HHL shares, its loss is the failure of the Creditors to restore what was due to it as pledgor/mortgagor and/or the failure of the Creditors to repay to it the true residual value of the security after payment of the Creditors' debts and HDP's debts."

76. I do not accept this. The only interest which St Vincent ever had was its ownership of and (after the Shares Pledge was enforced) its equity of redemption in the HHL shares. If it was a breach of duty for Mr Robinson to procure the sale of HHL's shareholding in HDP to PPL Winterbourne in October 2011, the breach was of the duty owed to HHL whose assets were disposed of. On those facts HHL had a claim against Mr Robinson for breach of his duty as a director and enforcement of that claim would make good the loss suffered. The only loss suffered by St Vincent was that, as a result of the transfer, its right to redeem the HHL shares was less valuable.

77. The sale by HDP of its underlying assets, that is to say its interest in the Cross Point Development, is even more remote from St Vincent. In the absence of any plea that this was a sale at an undervalue, there is no sustainable pleaded case that this was a breach of any duty, or that it caused any loss, at all. If such a plea were to be made, the loss would be suffered by HDP which would have a claim against Mr Robinson for breach of his duty as a director of HDP. Enforcement of that claim would make good any loss suffered by HDP and would therefore restore the value of the HHL shares and, in turn, the value of St Vincent's equity of redemption of the HHL shares.

78. Contrary to Mr Downes' submission, it is not the law that the rule against recovery of reflective loss is limited to a situation where there is a realistic possibility of the company recovering the loss itself. That is apparent, if authority is needed, from *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554, where the company had released the wrongdoer from liability so that there was no possibility of double recovery. Similarly in *Norcross v Georgallides* [2015] EWHC 1290 (Comm) Hamblen J pointed out at [65] that the rule applies even when "a company has not brought a claim in time and is now statute barred". Accordingly it does not avail St Vincent to say that a claim by HHL or HDP is no longer a practical possibility.

79. Mr Downes submitted that even if a claim against Mr Robinson is barred by the rule against the recovery of reflective loss on the ground that he was a director of HHL and HDP so that those companies would have a claim against him for breach of duty as a director, the position is different in relation to the other Creditors. That is because none of the other Creditors were directors of HHL or HDP, and therefore could not be sued for breach of duty as directors. Accordingly, said Mr Downes, the other Creditors fell within Lord Bingham's second proposition: the company had no cause of action against them and therefore the shareholder (St Vincent) could sue even though its loss was a diminution in the value of its shareholding.

80. If this were so, it would be an ironic and artificial result. The only alleged wrongdoer, Mr Robinson, would escape liability to St Vincent in reliance on the rule against recovery of reflective loss, while his innocent associates would not. (It may be that they would have a claim for recourse against Mr Robinson, but that is a point which I need not decide).

81. Be that as it may, however, I reject Mr Downes' submission. The only basis on which the Creditors other than Mr Robinson are alleged to be liable to St Vincent is that he was acting as their agent. If they are to be treated as his principals and he was their agent acting on their behalf in any wrongdoing for which he is liable to St Vincent, they must be liable together with him. If there is no agency, there is no claim against them. There is no basis on which the other Creditors could be liable to St Vincent but not to HHL, or at any rate none for which St Vincent was able to give a coherent explanation.

82. Mr Downes submitted also, relying on the decision of Knowles J in *Marex Financial Ltd v Sevilleja* [2017] EWHC 918 (Comm), [2017] 4 WLR 105, that the rule against the recovery of reflective loss does not apply to a cause of action for conspiracy. I do not accept this. As Neuberger LJ made clear in *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554, in a judgment with which Mance LJ and Bodey J agreed, the rule is not concerned with barring causes of action but with barring recovery of certain types of loss:

> "49. It is clear from the analysis and discussion in the cases to which I have referred, that the rule against reflective loss is not concerned with barring causes of action as such, but with barring recovery of certain types of loss. On that basis, there is obviously a powerful argument for concluding as this court did in *Shaker*'s case [*Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350], that, whether the cause of action lies in common law or equity, and whether the remedy lies in damages or restitution, should make no difference as to the applicability of the rule against reflective loss. Furthermore, given that the foundation of the rule is the need to avoid double recovery, there is a powerful case for saying that the rule should be applied in a case where, in its absence, both the beneficiary and the company would be able to recover effectively the same damages from the defaulting trustee/director."

83. While Knowles J in *Marex* at [39] did cite *Gardner v Parker*, he did so for a different point, that the rule against recovery of reflective loss is not limited to barring a claim by a shareholder in his capacity as such.

84. For these reasons I have no doubt that St Vincent's claim against all the existing defendants is a claim for reflective loss.

The Giles v Rhind exception

85. It is therefore necessary to examine the scope of the exception established by *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618. In that case one of the directors left to establish a competing business, using confidential information to lure away the company's principal customer which caused it to go into administrative receivership. When the company sued, the former director obtained an order for security for costs with which the company was unable to comply. It therefore had to discontinue its claim. The remaining director then sued in the capacity of shareholder to recover damages for breach of a shareholders' agreement, the damages consisting of the loss of the value of his shares. This was reflective loss, but the claim succeeded.

86. Waller LJ held that this situation was not covered by the decision in *Johnson v Gore-Wood & Co*:

> "34. One situation which is not addressed is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that a wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying, 'The company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody'.
>
> 35. In my view there are two aspects of the case which Mr Giles seeks to bring which point to Mr Giles being entitled to pursue his claim for the loss of his investment. … Second, even in relation to that part of the claim for diminution which could be said to be reflective of the company's loss, since, if the company had no cause of action to recover that loss the shareholder could bring a claim, the same should be true of a situation in which the wrongdoer has disabled the company from pursuing that cause of action."

87. Chadwick LJ agreed, saying at [61] that previous cases including *Johnson v Gore-Wood & Co* had not addressed the question whether the rule against the recovery of reflective loss "applies in a case where, by reason of the wrong done to it, the company is unable to pursue its claim against the wrongdoer". He held that it did not, saying:

> "66. To put the point more starkly, the effect of the judge's decision – as he himself recognised – is that a wrongdoer who, in breach of his contract with the company and its shareholders, 'steals' the whole of the company's business, with the intention that the company should be so denuded of funds that it cannot pursue its remedy against him, and who gives effect to that intention by an application for security for costs which his own breach of contract has made it impossible for the company to provide, is entitled to defeat a claim by the shareholders on the grounds that their claim is 'trumped' by the claim which his own conduct was calculated to prevent, and has in fact prevented, the company from pursuing. That were, indeed, the law following the decision in *Johnson v Gore-Wood & Co* [2002] 2 AC 1, I would not find it easy to reconcile the result with Lord Bingham of Cornhill's observation, at p 36C, that 'the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation'."

88. Thus the exception established by *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618 was stated in narrow terms as being limited to a case where (1) it was impossible for the company to pursue its remedy against the wrongdoer, (2) this impossibility was caused by the wrongdoing, and (perhaps, although this is not pursued in the later cases) (3) this consequence was intended by the wrongdoer.

89. *Gardner v Parker* [2004] EWCA Civ 781, [2004] 2 BCLC 554 was a claim by a shareholder against a company director alleging that in breach of duty the director had caused the company to dispose of its principal asset at a substantial undervalue. It was alleged that, as in *Giles v Rhind*, the breach of duty had caused the company to become insolvent and to go into administrative receivership. The administrative receiver compromised a claim on terms which included releasing the director from claims. The Court of Appeal held that this was a claim for reflective loss. The loss was claimed to have been suffered in the claimant's capacity as a shareholder and

would have been made good if the company had enforced its rights against the wrongdoing director. However, the claimant alleged that he could rely upon the *Giles v Rhind* exception because, by joining in the compromise agreed with the administrative receiver, the director had effectively disabled the company from bringing proceedings against him.

90. Neuberger LJ held at [33] that the effect of *Johnson v Gore-Wood & Co* and *Giles v Rhind* could be stated as being that:

> "(1) a loss claimed by a shareholder which is merely reflective of a loss suffered by the company – i.e. a loss which would be made good if the company had enforced in full its rights against the defendant wrongdoer – is not recoverable by the shareholder [*save in a case where, by reason of the wrong done to it the company is unable to pursue its claim against the wrongdoer*]; (2) where there is no reasonable doubt that that is the case, the court can properly act, in advance of trial, to strike out the offending of claim; (3) the irrecoverable loss (being merely reflective of the company's loss) is not confined to the individual claimant's loss of dividends on his shares or diminution in the value of his shareholding in the company but extends … to 'all other payments which the shareholder might have obtained from the company if it had not been deprived of its funds" …; (4) the principle is not rooted simply in the avoidance of double recovery in fact; it extends to heads of loss which the company could have claimed but has chosen not to and therefore includes the case where the company has settled for less than it might …; (5) provided the loss claimed by the shareholder is merely reflective of the company's loss and provided the defendant wrongdoer owed duties both to the company and to the shareholder, it is irrelevant that the duties so owed may be different in content."

91. The italicised words in square brackets are Neuberger LJ's formulation of what was decided by *Giles v Rhind*. He expanded upon this at [60] to [62]:

> "60. Secondly, over and above any point that might be taken on the pleadings, it is important to bear in mind the limits of the exception established in *Giles* to the rule against reflective loss. As was made clear by Lord Millett in *Johnson* at 66D-E, cited above in paragraph 30, the mere fact that the company chooses not to claim against the defendant, or settles with the defendant on comparatively generous terms, does not, at least without more, justify disapplying the rule against reflective loss (and in this connection it is perhaps worth noting that he was supported by similar observations in this court in *Prudential* at 223E-F). Accordingly, the court must be satisfied that the sort of circumstances described in *Giles* by Waller LJ at paragraph 34 or by Chadwick LJ at paragraph 66 exist, before the fact that the company has abandoned, or settled on apparently generous terms, its claim against the defendant, justifies disapplying of the rule against reflective loss.
>
> 61. In my judgment, there was simply no evidence before the judge to support the contention that the release of Mr Parker, as contained in the 1995 Settlement, was forced upon Scoutvale by Mr Parker, let alone that Scoutvale was prevented from pursuing Mr Parker because of its impecuniosity, or even that any such impecuniosity had been caused by the wrongdoing alleged in the reamended statement of claim against Mr Parker.

62. The mere fact that Scoutvale was in administrative receivership plainly did not of itself prevent that company starting an action, as is evidenced by the existence of the s423 proceedings. Further, in paragraph 47 of his judgment, the judge said that:

> 'It is not suggested by [counsel then appearing for Mr Gardner] that it can be shown (and it is certainly neither pleaded nor a matter of common ground between the parties) that Scoutvale was disabled from pursuing any claim against Mr Parker by reason of a lack of financial means caused by his wrongdoing. On the contrary, [counsel] very fairly conceded in his skeleton argument that 'the financial pressures on … Scoutvale … may have that effect [i.e. an inability to pursue any claim against Mr Parker] independent of any action taken by Mr Parker to deplete its assets'. Nor does the fact, if fact it be, that Mr Parker has continued to control Scoutvale mean that Scoutvale has been disabled from bringing a claim'."

92. This last point is of some importance. It recognises that, even where a wrongdoer remains in control of the company, there can be a claim against the wrongdoer by the company in the form of a derivative action brought by the shareholders in the name of the company. Where such a claim is possible, the company cannot be regarded as disabled from bringing a claim to make good the director's wrongdoing.

93. Accordingly *Gardner v Parker* (1) supports the first two (but not the third) of the limitations on the scope of the *Giles v Rhind* exception identified above and (2) demonstrates that for the purpose of that exception a company is not to be regarded as disabled by the wrongdoing from bringing a claim against the wrongdoer when a derivative action is possible.

94. Although *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch 618 has not been followed in Hong Kong (see *Waddington v Chan Chun Hoo* [2008] HKCFAR 370), it is binding on courts in this jurisdiction short of the Supreme Court, as the Court of Appeal held in *Webster v Sandersons Solicitors* [2009] EWCA Civ 830, [2009] 2 BCLC 542 at [36]. Lord Clarke MR affirmed the summary by Neuberger LJ in *Gardner v Parker* at [37] and noted at [38] that "the critical point in *Giles v Rhind* was … that the company was disabled from bringing the claim by the very wrongdoing which the defendant had by contract promised him, as a shareholder, and the company that he would not carry out". In contrast, there was nothing equivalent on the facts of *Webster*. Other cases have emphasised the limited scope of the exception and the demanding nature of the test of impossibility caused by the wrongdoing which a shareholder claimant must meet (*Towler v Mills* [2010] EWHC 1209 (Comm) at [25], *Norcross v Georgallides* [2015] EWHC 1290 (Comm) at [65], and *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [33]).

95. Finally, *Peak Hotels & Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 3048 (Ch) is a further case affirming the test of impossibility and holding that this test is not satisfied when a derivative action is possible, even where the wrongdoer remains in control of the company. Birss J said at [58]:

> "58. … The loss referred to in paragraph 190Y is reflective loss. The shares are said to be worthless in the relevant circumstances and that loss is the loss of the

value of the company's asset. The important question, it seems to me, is whether this is within *Giles v Rhind*. I'm not satisfied that it would be impossible for the company to sue for that loss. The fact is that the company simply chooses not to do so, no doubt, assuming the conspiracy was proven, because the conspirators control it at least to the level of leaving it deadlocked. The company could bring a derivative claim if it wanted to and I'm satisfied that *Giles v Rhind* as explained in *Kazakhstan Kagazy Plc v Arip* does not apply to permit this claimant to bring this claim for reflective losses."

96. Birss J rejected a submission that the issue should be left to the trial and struck out the claim for reflective loss.

97. In the result, therefore, it appears that although *Giles v Rhind* establishes the existence of an exception to the rule against recovery of reflective loss, there is hardly any other case in which that exception has been applied. (It has been pointed out that *Perry v Day* [2005] 2 BCLC 405, although not cited at the hearing, is such a case).

98. In his judgment setting aside the freezing order Phillips J explained why the *Giles v Rhind* exception did not assist St Vincent in the following terms:

> "59. The difficulty for St Vincent in this regard is that it brought proceedings against both the Creditors and HHL in Cyprus between 2013 and 2015. It is unclear why such claim could not have included a derivative claim against Mr Robinson and PPL as equitable shareholder (both the holder of the shares and the company being parties). After the first day of the hearing before me Mr Downes sought permission to adduce a further witness statement dealing with the present difficulties in bringing a derivative claim in the name of HHL. I refused permission to rely on that evidence, the issue having been known to St Vincent for some time and Mr Robinson and PPL having no opportunity to respond. But in any event, I did not understand that evidence to deal with the position in the years 2013 to 2015.
>
> 60. Mr Downes referred to s.260 of the Companies Act 2006 (assuming for these purposes that the law of Cyprus is the same as the law of England), which refers to derivative claims by a member of a company, suggesting that such a reference limits derivative claims to those brought by a registered shareholder (in this case PTE, the nominee of the Creditors). Whilst that may be so, I see no reason why an equitable shareholder (as it is accepted St Vincent must be) cannot bring such a claim in the name of the legal holder of the shares, joining them to the proceedings if appropriate so as to perfect the cause of action."

99. That remains the position. There is no pleaded case and no evidence to explain why St Vincent could not have included a derivative claim against Mr Robinson and PPL Winterbourne in the proceedings which it brought in Cyprus between 2013 and 2015. (Even if permission to bring such a claim is required under Cypriot law, there is no reason and no evidence to suppose that it could not have been obtained). Indeed, that is so despite the letter dated 27 April 2018 from St Vincent's Cypriot lawyer Mr Philippou to which I have already referred, which does not address this question. That omission is surprising in circumstances where the purpose of the letter, according to the 11th witness statement of St Vincent's English solicitor was to address "issues arising from Phillips J's judgment". Even now, although it is said that St Vincent has

instructed Cypriot lawyers to commence the process of restoring HHL to the companies register in Cyprus, Mr Downes confirmed at the hearing that nothing has actually been done in that regard.

100. In any event there would have been no need for a derivative action or for an application to restore HHL to the register if St Vincent had exercised its right to redeem the HHL shares, if necessary by paying the Secured Indebtedness into court in Cyprus and starting a conventional redemption action. St Vincent would then have regained control of HHL and could have caused it to bring proceedings against Mr Robinson and those on whose behalf he was acting or with whom he was conspiring (assuming that is what he was doing).

101. In these circumstances there is no real prospect that St Vincent will be able to discharge the burden of showing that it is able to rely upon the *Giles v Rhind* exception to the rule against recovery of reflective loss.

102. Mr Downes sought to avoid this conclusion by suggesting that a different approach is necessary when the wrongdoer (as distinct from the victim) is in control of the company. However, as he acknowledged, that is not the analysis adopted in the cases. Indeed, *Peak Hotels* [2015] EWHC 3048 (Ch) was a case where the conspirators controlled the company but the exception was nevertheless held not to apply because a derivative action was possible. I would accept that the wrongdoers' continuing control of the company is a relevant factor, but the question remains whether the company has been disabled by the wrongdoing from pursuing its remedy. Where a derivative action is possible, that will not be the case. Mr Downes submitted that, if this is so, *Giles v Rhind* must have been wrongly decided, but the issue simply was not considered in that case. It was treated as a case where, as a matter of fact, the wrongdoing did prevent the company from pursuing its remedy and, on that factual basis, the rule against recovery of reflective loss was held not to apply.

Conclusion on reflective loss

103. For these reasons I conclude that the claim against the existing defendants is barred by the rule against recovery of reflective loss and that St Vincent has no real prospect of succeeding at trial. That conclusion applies equally to the new claim that the sale by HDP to KTFP of the Cross Point Development assets was a sale at an undervalue. Any loss suffered as a result of that sale was HDP's loss, not St Vincent's or even HHL's. Accordingly it is appropriate to give summary judgment for the defendants now.

The proposed amendments

104. The amended case which St Vincent proposes to make is that the 12th to 15th defendants and the Robinson defendants conspired together to cause loss to St Vincent by unlawful means, namely procuring the sale to KFTP of the Cross Point Development assets at a gross undervalue in breach of Mr Robinson's duties as a director. It is alleged that (1) the sale was in fact at an undervalue; (2) payments of €150,000 each were made to the 13th to 15th defendants Mr Clarke, MacDonald & Partners and Picton Jones (Asset Management) Ltd (together, "the Consultants") who were all associates of Mr Robinson; (3) these payments were in fact part of a bribe totalling €980,000 paid to Mr Robinson by KFTP but were routed through the

Consultants in order to conceal their true nature; and (4) by inference, at any rate, the Consultants knew this to be the case.

105. My conclusions so far remove the principal justification advanced by St Vincent for adding new parties to this action, namely that it would be convenient for all claims relating to the alleged wrongdoing of Mr Robinson to be dealt with in a single action. They mean also that these new claims, against the new defendants as well as the Robinson defendants, would also fall foul of the rule against recovery of reflective loss, as any loss was suffered by HDP. But I would in any event have refused permission to join the new defendants. In the circumstances I can state my reasons briefly.

106. First, there is (as Mr Downes accepted) at least an arguable limitation defence. When limitation is raised as a potential defence, the burden lies on the claimant seeking to join the new parties to demonstrate that the defence is not reasonably arguable, as Tomlinson LJ explained in *Ballinger v Mercer* [2014] EWCA Civ 996, [2014] 1 WLR 3597 at [27]:

> "… Working from first principles however it is plain that, provided the defendant can show a *prima facie* defence of limitation, the burden must be on the claimant to show that the defence is not in fact reasonably arguable. The claimant is after all in effect inviting the court to make a summary determination that the defence of limitation is unavailable. If the availability of the defence of limitation depends upon the resolution of factual issues which are seriously in dispute, it cannot be determined summarily but must go to trial. Hence it can only be appropriate at the interlocutory stage to deprive a defendant of a prima facie defence of limitation if the claimant can demonstrate that the defence is not reasonably arguable."

107. This is because the effect of the doctrine of relation back introduced by section 35(1) of the Limitation Act 1980 is that if the amendment is allowed, the defendant will be deprived of the potential limitation defence. On the other hand, if the claimant is required to start a new action, the defendant can plead the limitation defence and the court can determine, either by a preliminary issue or at trial, whether the defence is sound. Mr Downes submitted that this problem could be sidestepped by giving conditional permission to join the new defendants, the condition being that the joinder would not take effect if it is held at trial that the limitation defence would have succeeded but for the doctrine of relation back.

108. St Vincent has not attempted to discharge the burden of showing that the limitation defence is not reasonably arguable. On the contrary Mr Downes accepts that it is. The approach described by Tomlinson LJ in *Ballinger* is well established. Although Mr Downes sought to cast doubt on its correctness, it represents the considered view of the Court of Appeal, in preference to the somewhat cumbersome concept of a conditional or provisional joinder.

109. Second, there is no sufficient case that the sale to KFTP of the Cross Point Development assets was a sale at an undervalue. The proposed amendment asserts that the true market value of these assets was "at least €14 to €17 million" but there is no evidence whatever to substantiate that figure. Mr Downes told me that it represents his client's instructions but he was not in a position to provide any further explanation. That is nowhere near good enough, particularly when this is the essential

foundation for a case of conspiracy and bribery. Allegations of dishonesty should not be made on such a flimsy basis. In contrast there is contemporary evidence of a valuation carried out by a surveyor whose integrity and competence have not been attacked which values the assets at the Polish equivalent of €9.668 million, a figure very close to the actual sale price.

110. Third, there is no sufficient case that the payments made to the Consultants were bribes or that the Consultants were conduits for the payment of such bribes to Mr Robinson. On the contrary it is reasonably apparent that each of them was entitled to fees for work done on the project over a period of months or even years. The evidence that the payments they received were passed on to Mr Robinson is threadbare. Moreover, the suggestion does not make sense. If the Consultants passed on the payments they received to Mr Robinson, they sacrificed their own claims to be paid their fees.

111. Fourth, there is no good explanation why the application to join the new defendants is made at such a late stage. At the latest, St Vincent knew everything which it now knows in June 2017 and could have made this application at any time since then. Mr Downes accepted that St Vincent could have moved more quickly but referred without further explanation to "funding issues". I do not find it surprising that St Vincent's backers should be reluctant to fund this claim, at any rate after the date when Phillips J gave judgment, but that is not a justification for leaving this application so late.

112. Fifth, it would be unfair to expect or require the proposed new defendants to be ready for trial in October. I doubt whether they could be. That applies to all the new defendants who would in effect be starting from scratch, but with particular force to KFTP, a Polish subsidiary of a Korean company whose documents would require translation and whose witnesses are likely to be in Korea.

113. Each of these is a powerful reason to refuse the joinder (and, so far as the existing defendants are concerned, the amendment) application. Together, applying the approach set out in *Nesbitt* and *Quah Su-Ling* (see above), they are fatal.

Disposal

114. For the reasons which I have explained:

(1) there will be summary judgment for the existing defendants.

(2) the application to re-amend the Particulars of Claim and to join additional defendants is refused.