Neutral Citation Number: [2024] EWHC 2976 (Comm)

Case No: CL-2021-000412

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

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

Date: 21/11/2024

Before :

MR JUSTICE CALVER

- -

Between :

INVEST BANK P.S.C	**Claimant**
- and -	
(1) AHMAD MOHAMMED EL-HUSSEINI	**Defendants**
(2) MOHAMMED AHMAD EL-HUSSEINY	
(3) ALEXANDER AHMAD EL-HUSSEINY	
(4) ZIAD AHMAD EL-HUSSEINY	
(5) RAMZY AHMAD EL-HUSSEINY	
(6) JOAN EVA HENRY	
(7) VIRTUE TRUSTEES (SWITZERLAND) A.G.	
(8) GLOBAL GREEN DEVELOPMENT LIMITED	

- -
- -

Tim Penny KC, Marc Delehanty and Frederick Wilmot-Smith (instructed by **PCB Byrne LLP**) for the **Claimant**

Niranjan Venkatesan and Constantine Fraser (instructed by **Debenhams Ottaway LLP**) for the **Second and Sixth Defendants**
The Third and Fourth Defendants were unrepresented and appeared in person
Ramzy El-Husseiny (in person) for the **Fifth and Eighth Defendants**
Tiffany Scott KC and Emma Hargreaves (instructed by **Edwin Coe LLP**) for the **Seventh Defendant**

Hearing dates: 02 - 26 July 2024

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Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Thursday 21 November 2024.

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ANNEX 119

Mr Justice Calver :

Introduction

1. This trial, which lasted four weeks, largely focussed upon one central question as follows: why did the First Defendant, the Lebanese businessman Ahmad El-Husseini ("**Ahmad**") transfer, and cause his holding companies to transfer, between 2016 – 2018, a number of valuable assets and interests – shares, real estate and monies – to his family members, companies under their control and a discretionary trust of which they were beneficiaries, and was at least one of his purposes in doing so, in respect of each of the relevant transactions, to put the asset in question beyond the reach of the Claimant ("**the Bank**") as a potential creditor?

2. If so, then in principle the Court's powers under section 423 of the Insolvency Act 1986 ("**section 423**") will potentially be engaged to reverse the transfers or otherwise order appropriate relief against the relevant Defendants for satisfaction of the now established English judgment debt against the First Defendant of over £21.94m (including interest) in favour of the Bank.

3. In applying section 423, the purpose of a person in entering into a transaction is a matter of the subjective intention of that person: what did he aim to achieve?[1] The purpose of Ahmad in entering into each of the impugned transactions is potentially central to the outcome of the case and yet, despite haunting this trial like Banquo's ghost, the court has not heard from Ahmad himself. That is because once his jurisdictional challenge failed in February 2022, Ahmad chose no longer to participate in these proceedings (other than by serving an acknowledgment of service), thereby depriving the Court of his disclosure, any trial witness statement(s) and his evidence under cross-examination. The Bank invites the court to draw adverse inferences as to Ahmad's purpose in transferring the various assets by reason of his failure to engage in these proceedings once his challenge to this court's jurisdiction failed. Whether the Court should draw any of the adverse inferences sought by the Bank against Ahmad or the other defendants is complicated by the fact that to do so would, amongst other things, be inconsistent with the Bank's pleaded case. I return to this below.

The Parties

4. Ahmad was born in Chemstar, Lebanon, in 1951. He never graduated, but went into business in the UAE 45 years ago. He started in the catering business, but his principal business came to be in the civil engineering and construction industry.

5. Ahmad met his now ex-wife, the Sixth Defendant ("**Joan**"), while she was working as a kindergarten teacher in Abu Dhabi in the late 1970s. They married on 26 June 1980. They had four sons: the Second Defendant ("**Mo**"), the Third Defendant ("**Alex**"), the Fourth Defendant ("**Ziad**") and the Fifth Defendant ("**Ramzy**"). Ramzy, Alex and Ziad all appeared in person before me and presented their case in a measured and articulate way. It is common ground that Ahmad went on to become a wealthy and successful international businessman, acquiring citizenship by investment in St Kitts and Nevis and Seychelles.

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[1] ***BTI 2014 LLC v Sequana SA*** [2019] 2 All ER 784 at [66].

6. The Bank is a UAE bank headquartered in Sharjah, with (then) branches in Abu Dhabi and Beirut. Ahmad's debt in this case arises from judgments obtained by the Bank in Abu Dhabi on his personal guarantees (of his UAE companies' debts), with default judgment subsequently entered in England on 13 January 2023 on common law debt actions upon those Abu Dhabi judgments.[2] Joan challenged Ahmad's liability under the default judgment, but that liability was fully established in September 2023 at a preliminary issues trial and hearing of Joan's application to set aside the default judgment.[3] No part of the debt has been paid.

7. The Seventh Defendant is a Swiss corporate trustee of a trust which Ahmad settled on 4 April 2017 ('**the Spring Blossom Trust**'). The Eighth Defendant ("**Global Green**") is an English company (formerly called Commodore Contracting Company Limited[4]) whose ultimate ownership was transferred from Ahmad to his sons (and which itself was a transferee of assets), with Ramzy now its sole director.

8. Ahmad is or was the owner or otherwise had ultimate control of several companies which are central to this litigation as follows.

9. Ahmad had two relevant UAE construction companies, Al-Tadamun Glass & Aluminium Co ("**Tadamun**") and Commodore Contracting Company LLC ("**Commodore UAE**"). Before its liquidation, Commodore UAE consisted of three divisions: (i) the mechanical, electrical and plumbing (MEP) division operating in Abu Dhabi; (ii) the Civil Division operating in Abu Dhabi; and (iii) the Dubai Branch operating in Dubai. Each of these divisions were apparently treated as separate although they were not (or not always) separate legal entities. It is common ground that in general the Bank only financed the projects of the MEP Division. The Bank's claims against Ahmad which resulted in the English judgment debt arose by reason of the fact that Ahmad had personally guaranteed the debts of Commodore UAE and of Tadamun to the Bank (he had also given personal guarantees to (at least) Doha Bank, National Bank of Fujairah and First Gulf Bank).

10. At that time, the majority registered shareholder in both Commodore UAE and Tadamun was Ahmad's business partner, Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nahyan ("**Sheikh Tahnoon**"), an Emirati royal. This was a consequence of local legislation then in force which prohibited non-Emiratis such as Ahmad from holding a majority stake in a UAE company. But it is common ground that Ahmad was the beneficial owner of both companies, and he ran them day-to-day as director and CEO, with powers of attorney.

11. There are several other companies sharing the "Commodore" name which played a part in the relevant events with which this litigation is concerned. At the material times, Commodore Contracting (Offshore) SAL ("**Commodore Offshore Lebanon**") owned Commodore Insaat Taahhut Yatirim Sanayi Ve Ticaret Limited ("**Commodore Turkey**"), which in turn owned Commodore Procurement Services FS BV ("**Commodore Netherlands**"), and which in turn owned Commodore Procurement Services FS NV ("**Commodore Belgium**"). Commodore Netherlands and Commodore

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[2] Ahmad remains a defendant to the s.423 claims.

[3] Judgment of 20 September 2023 of Stephen Houseman KC (sitting as a Deputy High Court Judge).

[4] In this Judgment for simplicity I refer to this company throughout as "**Global Green**".

Belgium were the valuable non-UAE operational companies of the group, which were engaged in substantial construction projects in Asia and Africa as main contractors providing financing and procuring export credit insurance. For example, Commodore Netherlands signed a contract with the Ministry of Public Health in Niger on 6 April 2015 for the design and construction of the Maradi Reference Hospital (the "**Maradi Contract**"), which was said to have a value of US$100 million of which Commodore Netherlands was entitled to 5%, i.e. US$5 million. Sheikh Tahnoon pledged US$35 million as a donation towards the construction of the Maradi hospital.

12. Ahmad also owned or controlled several Lebanese companies. Global Green was formerly owned by one of them, being Commodore Contracting Company SAL ("**Commodore Lebanon**"). Another company owned by Ahmad which played a significant role in the events with which this trial is concerned is Medstar Holding SAL ("**Medstar**"), a Lebanese holding company. Ahmad also had a minority share in a Lebanese company called Mistar Investment Group Holding SAL ("**Mistar**"), as discussed below.

13. There are other companies which are linked to Ahmad through Kendris AG ("**Kendris**"), a Swiss company which was his long-standing financial advisor. Kendris managed several companies on Ahmad's behalf. These included a Jersey company called Marquee Holdings Limited ("**Marquee**") of which Ahmad was the beneficial owner, which company owned in particular two properties, namely 9 Hyde Park Garden Mews ("**9HP**") and 18 Hyde Park Square ("**18HP**"); and a BVI company called Cardena Holding and Finance Ltd ("**Cardena**") of which Ahmad was the beneficial owner, which company owns a property called "**Cansol**" in Ibiza.

14. Kendris itself owned a BVI company called Norton Corporate Services Inc ("**Norton BVI**") which served as nominee shareholder for companies administered by Kendris and a Swiss company called Virtue Trustees (Switzerland) AG ("**Virtue**"), which is the Seventh Defendant, being a professional trustee company which acts as trust company for approximately 150 trusts holding assets worth CHF 4.98 billion. At all material times, Norton BVI was the registered shareholder of Marquee and it held the shares in Marquee on trust for Ahmad until the events in 2017.

15. Several Kendris personnel were involved with the Ahmad mandate. The most important were Mr Adrian Escher ("**Mr Escher**") (the Chairman of Kendris), Ms Margareta Zweifel ("**Ms Zweifel**") (the Partner in Charge of the mandate), Mr Pablo Collazo ("**Mr Collazo**") (the "Mandate Head" until December 2017), Mr Colin Ferris ("**Mr Ferris**") (the "Mandate Head" from December 2017), and Mr David Knight ("**Mr Knight**") (Kendris' UK tax consultant). Mr Escher and Ms Zweifel were the directors of Norton BVI, Marquee, and Virtue at all relevant times.

16. Finally, Ahmad controlled a UAE company called Federal Development Establishment ("**Federal**"), which was wholly owned by Sheikh Tahnoon. Under a contract between Ahmad and Sheikh Tahnoon dated 8 March 2010, Ahmad managed Federal pursuant to a power of attorney, in exchange for an entitlement to 75% of its net profits.

The pleading issue

17. The reason I say "potentially" in paragraphs 2 and 3 of the introduction to this judgment above is because before considering the merits of the central question identified in

paragraph 1 above, it is necessary for the Court to determine the issue of whether the Bank is entitled, on its pleaded case, to advance the case which it sought to advance at trial, namely that Ahmad was concerned about potential claims by the Bank on his personal guarantees as a result of the fact that Commodore UAE was balance sheet insolvent or had serious liquidity problems in late 2016/early 2017, and that was why he transferred his assets to his family members, beyond the reach of the Bank. It is accordingly necessary to consider this issue first, before considering the merits of the Bank's case.

Relevant legal principles

18. Before turning to consider the precise nature of the Bank's pleaded case, I address the relevant legal principles concerning what needs to be pleaded and proved in order to satisfy the statutory requirements of section 423.

19. Section 423 reads as follows:

423 Transactions defrauding creditors.

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

… or

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

…

(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor".

20. Section 423 is accordingly concerned with transactions entered into at an undervalue; and the person entering into such a transaction is referred to as '*the debtor*'. An order can be made under section 423 only if three conditions are satisfied:

(1) First, the debtor must have '*entered into*' a '*transaction*' with another person.

(2) Second, that transaction must be a transaction '*at an undervalue*', either because it is a gift or because its terms provide for the debtor to receive no or inadequate consideration.

(3) Third, the debtor must have entered into the transaction for the purpose specified in section 423(3), namely (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make ("**the Alleged Purpose**").

21. Further:

(a) Whether the debtor had the statutory purpose is essentially a question of fact.[5] In determining this question, the Judge must make primary findings of fact and then make a global evaluation of all the relevant facts.[6]

(b) The burden of proving that the debtor acted for this purpose rests upon the claimant.[7]

(c) The statutory purpose must be established separately for each transaction that is challenged under section 423[8].

(d) The statutory purpose cannot be inferred from the bare fact of a transaction entered into at an undervalue because it is a separate statutory requirement.[9]

(e) The test under section 423(3) is subjective, not objective: '*the purpose of a person in entering into a transaction is a matter of the subjective intention of that person: what did he aim to achieve*?'[10]

(f) If prejudice to the claim or potential claim was only a consequence, and not a purpose, of the transaction, section 423(3) is not satisfied, even if that consequence was foreseeable and actually foreseen by the debtor.[11] This reflects the fact that a person can subjectively intend X only if '*he deliberately does an*

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[5] ***BTI 2014 LLC v Sequana SA*** [2019] 2 All ER 784 (CA), [66] (David Richards LJ, as he then was).

[6] ***Henwood v Barlow Clowes*** [2008] EWCA Civ 577 at [68].

[7] ***Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2017] EWHC 2426 (Ch) at [443]; see also ***Inland Revenue v Hashmi*** [2002] BCC 943 (CA) [22] ('*the onus is on the claimant to show the statutory purpose*').

[8] ***Pugachev*** (supra) at [443]

[9] ***Royscott v Lovett*** [1995] BCC 502, 507 (CA) and ***Pugachev*** [443].

[10] ***Sequana*** (supra) at [66].

[11] ***JSC BTA Bank v Ablyazov*** [2019] BCC 96 (CA) at [15] (Leggatt LJ, as he then was).

act which is liable to bring X about, desiring it to happen'.[12]

(g) If the prejudice to the claim was *a purpose*[13] and not merely a consequence, section 423(3) is satisfied even if that was not the sole or dominant purpose. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within s 423(3), even if it was also entered into for one or more other purposes[14].

(h) If the debtor would have entered into the transaction in any event (i.e. even if it would have had no impact on creditors), '*the court should not too readily conclude that he also had the purpose of defeating his creditors*'[15].

(i) If the debtor did not believe that a claim would or might be made against him in the future, then it is unlikely that he had the statutory purpose by reference to that claim, because he is unlikely to act for the purpose of prejudicing a claim which he does not believe to be a risk[16].

(j) In ***BAT v Sequana*** [2016] EWHC 1686 (Ch), Rose J (as she then was) said "*The first limb of the s 423 purpose - putting assets beyond the reach of a person who is making or may at some time make a claim against him - has inherent in it the assumption that following the transaction, the person does not have sufficient funds remaining with him to satisfy the actual or potential claim made against him. If a person or a company has plenty of assets left with which to meet the claim, then however many additional assets are gifted to people, he or it cannot have the s 423 purpose. This must be inherent in the wording of section 423(3)(a), and is confirmed by the second limb which refers to action "otherwise prejudicing the interests of" the claimant, implying that the transaction in the first limb must prejudice those interests too.*" I respectfully consider that it goes too far to say that "he or it cannot have the section 423 purpose" in such a case; rather, I consider that it may be said that it is less likely that he or it had the relevant purpose in such a case.

(k) Finally, since the court has power under section 423 to override the property rights of innocent recipients of such property, there is a need for close scrutiny of a claimant's case that the property was indeed transferred for an improper purpose.

Inference

22. The Bank accepts that, as is typically the case with a section 423 claim, its case in these proceedings is an inferential one: it contends that the court may draw an inference from the factual circumstances concerning the particular transaction that the, or a, purpose of the asset transfer was the Alleged Purpose. An inference is simply a conclusion which

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[12] ***Generics v Warner Lambert*** [2019] Bus LR 360 at [72] (Lord Sumption).

[13] But it does not have to be a substantial purpose: ***JSC BTA Bank v Ablyazov*** [2019] BCC 96 at [14].

[14] Ibid.

[15] ***Pugachev*** at [443]

[16] Contrary to the submission of Mo and Joan, I consider that to say, definitively, that the debtor *cannot* have had the statutory purpose in such a case goes too far as it is possible to envisage a case where the debtor does not *believe* that a claim would or might be made against him in the future, but where he enters a transaction with the statutory purpose nonetheless in order to protect his assets *in case* a claim is in fact made.

flows logically, reasonably or rationally, through a process of reasoning, from proven or admitted facts[17]. But:

(a) Any inference must be drawn from, and be consistent with, all the relevant proved and admitted facts.[18]

(b) An inference of this kind must be drawn on the balance of probabilities[19]. This means that the court must be satisfied that the inference the Bank seeks to draw as to Ahmad's purpose was more likely than not on all the relevant and proved facts. If there are '*conflicting inferences of equal degrees of probability, so that the choice between them is mere matter of conjecture, then the applicant has failed to prove [its] case*'.[20] It is important to bear this in mind in the instant case.

Section 423: an allegation of discreditable conduct?

23. Furthermore, although dishonesty is not an element of section 423, the Defendants submit that an allegation that the debtor acted for the section 423 purpose – deliberately putting their assets beyond the reach of their creditors – amounts to an allegation of serious wrongdoing or discreditable conduct, and that is the nature of the allegation which is advanced in the present case against Ahmad. Any inferential case (as here) that this was Ahmad's subjective purpose (rather than merely the consequence of his actions) requires a clear pleading of the primary facts said to give rise to the inference, and a case proved by cogent evidence.

24. Thus, in ***DGFI v Bank Frick & Co AG*** [2022] EWHC 2221 (Ch), Sir Anthony Mann (sitting as a Judge of the High Court) stated as follows at [39]-[40]:

> "*39. When considering how the claim is advanced it is important to bear in mind the nature of the allegations made. The directors are accused of serious dishonesty in misappropriating assets, and whether or not one views the present claim as actually founded in dishonesty (as opposed to being made in the context of a dishonest transaction) it is nonetheless an accusation of serious wrongdoing – deliberately prejudicing creditors. That requires a clear pleading of a sufficiently cogent case. In Lakatamia Shipping Co Ltd v Nobu Su and others [2021] EWHC 1907 (Comm) Bryan J said:*
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> *"42. In the present case, Lakatamia alleges two unlawful means conspiracies (the Monaco Conspiracy and Aeroplane Conspiracy). Neither of these requires, or involves, any specific plea of dishonesty as such (nor are fraud claims such as in deceit or the like pleaded) as part of any element of the causes of action. They involve, however, allegations of serious wrongdoing, and as such they must be clearly pleaded (not least so the Defendants*

[17] ***NTN Corp v Stellantis*** [2022] EWCA Civ 16 at [62] per Green LJ.

[18] ***Henwood v Barlow Clowes*** [2008] EWCA Civ 577, [65], [68]-[69].

[19] ***Henwood***, [68].

[20] ***Richard Evans & Co v Astley*** [1911] AC 676, 687 (Lord Robson).

> *know the case they have to face, on the applicable principles), and convincingly proved by cogent evidence (as the passages identified above rightly emphasise). Allegations of participation in an unlawful means conspiracy, whilst not necessarily requiring dishonesty or a fraud to be committed, undoubtably involve what can properly be characterised as "discreditable" conduct. In this regard, and as stated by Moore-Bick LJ in Jafari-Fini v Skillglass Ltd [2007] EWCA Civ 261 at [73] (in a passage cited with approval by Andrew Smith J in Fiona Trust v Privalov [2010] EWHC 3199 (Comm) at [1438] and by me in Bank of Moscow v Kekhman, supra, at [52]), "It is well established that "cogent evidence" is required to justify a finding of fraud or other discreditable conduct"."*
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> *40… Bryan J referred there to evidence and proof. The present application is not concerned with that level of finding, but I agree … that the seriousness of the allegation requires the clear pleading of an apparently sustainable case. The present case is one of inference, and what is required is a clear pleading of the facts which give rise to the inference. As Lord Millett said in Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1:*
>
> > *"186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."*
> >
> > *This is a case of inference, and inference from disreputable conduct. The primary facts relied on must be alleged. That means in the present case the claimant will be confined to its pleading, and it is legitimate to scrutinise its pleaded case with care."*

25. I respectfully agree with Sir Anthony Mann's approach to this question, namely that a clear pleading of a sufficiently cogent case is required in respect of a claim under section 423.

26. His analysis is supported by ***Barclays Bank plc v Eustice*** [1995] 1 WLR 1238 at 1252C per Schiemann LJ:

> "*For reasons given earlier in this judgment we start here from a position in which, on a prima facie view, the client was seeking to enter into transactions at an undervalue the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of these transactions be discoverable.*"

27. If the purpose of prejudicing creditors is sufficiently iniquitous as a matter of public policy to displace a claim to privilege, then it must be sufficiently iniquitous to engage the pleading rules in ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1.

28. Whilst the generality of the statement of Schiemann LJ in ***Eustice*** (viz, the extension of the scope of the fraud/crime exception generally in order to override a claim to privilege) is open to debate, in the context of section 423 of the Insolvency Act, I consider the statement is apposite. It was cited by Popplewell LJ without criticism in ***Al Sadeq v Dechert LLP*** [2024] EWCA Civ 28 at [55].

29. Support for this view is also derived from the judgment of Sir James Munby in ***Kerman v Akhmedova*** [2018] EWCA Civ 307 at [57], where the President of the Family Division stated:

> "*The second observation relates to Eustice. Even if the test is correctly dishonesty and not merely iniquity, it does not follow that the actual decision in Eustice was wrong. In the course of an illuminating discussion, the authors of Thanki (ed), The Law of Privilege, ed 3, para 4.48, fn 116, say this: "In so far as the decision confirms that privilege is overridden in proceedings for declarations under section 423 [of the Insolvency Act 1986] there can be no objection. However, the dicta in the case go further in extending the scope of the fraud/ crime exception generally." Given the decision in Williams v Quebrada Railway, Land and Copper Company [1895] 2 Ch 751*[21]*, which, so far as I am aware, has never been questioned, it is not easy to see why the actual decisions in Eustice in relation to section 423 of the Insolvency Act 1986 and in C v C (Privilege) [2006] EWHC 336 (Fam), [2008] 1 FLR 115, in relation to section 37 of the Matrimonial Causes Act 1973, should be questioned, whatever criticisms there may be of some of the reasoning.*"

[21] In which the defendant's conduct was called "commercial dishonesty" by Kekewich J which amounted, he said, to fraud. The plaintiffs were debenture holders in the defendant company with a first charge on the property of the company. The company was insolvent and the defendant company gave another charge in favour of their agents with the intention of defeating the plaintiff's security.

30. To similar effect, in ***Akhmedova v Akhmedov*** [2019] EWHC 3140 (Fam), Mrs Justice Knowles stated as follows at [26]:

> *"26.The question of what sort of wrongdoing engages the [iniquity] exception [to privilege] is somewhat vexed. In the circumstances of this case, it is sufficient to observe that devising a scheme to dissipate assets so as to frustrate enforcement of an anticipated judgment of this Court will engage the exception. The following establishes that proposition clearly:*
>
> *a. In O'Rourke v Darbyshire [1920] AC 581 at 613, Lord Sumner held that no privilege applies to documents "brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties". He drew a distinction between obtaining advice on prior conduct and "consulting [a lawyer] in order to learn how to plan, execute or stifle an actual fraud".*
>
> *b. Fraud here is not confined to "civil fraud in the narrow sense". It has been applied to "all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances" and "things which commercial men would say was fraud or which the law treats as contrary to public policy".*
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> *c. In Barclays Bank v Eustice [1995] 1 WLR 1238, the Court of Appeal held that the purpose of "enter[ing] into transactions at an undervalue the purpose of which was to prejudice the bank" (which fell within the scope of s. 423 of the Insolvency Act 1986) was "sufficiently iniquitous" to engage the exception. The same logic was applied by Munby J (as he then was) to s.37 of the Matrimonial Causes Act 1973 in C v C (Privilege) [2008] 1 FLR 115 at paragraphs 34-35.*
>
> *d. In the present case, the Court of Appeal has previously considered the fraud exception in Z v Z (Legal Professional Privilege: Fraud Exception) [2018] 4 WLR 52. On that appeal, Mr Kerman argued that Haddon-Cave J (as he then was) had wrongly applied an "iniquity" test rather than a "dishonesty" test. The Court of Appeal decided not to resolve the question of the appropriate test, but observed at paragraph 57 that "it is not easy to see why the actual decision in Eustice in relation to section 423 of the Insolvency Act 1986 and in C v C (Privilege) in relation to section 37 of the Matrimonial Causes Act 1973, should be questioned, whatever criticisms there may be of some of the reasoning".*
>
> *e. Both Z v Z and C v C (Privilege) have referred to the long-standing decision in Williams v Quebrada Railway, Land & Copper Co [1895] 2 Ch 751. Williams was a case in which it was alleged that a company had given a charge in favour of its*

> *agents in order to defeat a prior floating charge. For arcane reasons, that charge did not fall within the scope of the avoidance legislation at the time. Kekewich J nevertheless held that privilege was not available because "… it is difficult to say that this is not commercial dishonesty. It is, in my opinion, commercial dishonesty of the very worst type; and that is fraud".*
>
> *f. For completeness, it should be noted that the Court of Appeal recently declined to decide whether Eustice remains good law in the light of the subsequent decision of the House of Lords in R (ex p. B) v Derby Magistrates Court [1996] 1 AC 487. It was argued that Eustice involves a retrospective evaluative judgment, contrary to Derby Magistrates. The Court of Appeal held that this was as "an important argument which will no doubt have to be decided one day" [see Curless v Shell International Ltd [2019] EWCA Civ 1710 at paragraphs 54-60]. Nevertheless, Eustice has consistently been applied at first instance and any reconsideration of that case should be left to the Court of Appeal. I observe that, as held in Z v Z, even if the "sufficiently iniquitous" test employed in Eustice might be open to question, the application of the exception to cases of fraud on creditors is difficult to criticise.*"

31. In this case, the Bank's allegation is that Ahmad deliberately transferred his assets to his family members, companies under their control and a discretionary trust with the purpose (or at least a purpose) of putting his assets beyond the reach of his potential creditors, of which the Bank was one[22]. Moreover, it is the Bank's case that Ahmad has purposefully sought to hide the fact that this is what he was doing in transferring the assets. On any view, that is an allegation of disreputable conduct or serious wrongdoing on Ahmad's part which accordingly requires to be properly pleaded and proved.

32. However, Mr. Delehanty, who argued his part of the Bank's oral submissions at trial in spirited fashion, takes issue with this analysis, contending that ***Bank Frick*** is not authority for the proposition that the ***Three Rivers*** test[23] applies to section 423 claims. Mr. Delehanty relied upon two authorities for this contention, namely ***Arbuthnot Leasing International Ltd v Havelet Leasing Ltd*** [1990] BCC 636 (Scott J) and ***National Westminster Bank Plc v Jones*** [2001] 1 BCLC 98 (Neuberger J). I do not consider, however, that either of those authorities support Mr. Delehanty's analysis.

33. In ***Arbuthnot***, the defendant to the section 423 claim deliberately transferred its business and assets to a different company at an undervalue in order to avoid the claimant's judgment debt. It did so on its solicitor's advice and, in the absence of any cross-examination on the defendant's affidavit, the court was prepared to accept that it did so without any dishonest intent. The court held that that did not matter for the purpose of the section 423 claim, as the defendant's assets were nonetheless deliberately put out of the reach of the claimant.

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[22] See paragraphs 2 and 3 of the Bank's Skeleton Argument for trial.

[23] That an allegation of fraud or dishonesty must be sufficiently particularised.

34. The second case relied upon by Mr. Delehanty is ***National Westminster Bank v Jones*** [2001] 1 BCLC 98. In that case the defendants ran an agricultural business on freehold land. They granted their bank a mortgage over the land as well as floating charges over their stock. The defendants fell into financial difficulties and the bank demanded repayment of sums due from them. In order to protect the farm's assets from the bank as mortgagee the defendants formed a company (of which they were beneficial owners) and granted it a 20-year agricultural tenancy of the farm at full market rent (without the bank's consent, contrary to the mortgage) and they then sold it with the farming assets. The bank maintained and the court held that these transactions were transactions at an undervalue pursuant to section 423 of the Insolvency Act. Neuberger J (as he then was) stated at [107]:

> "*Accepting that neither of the agreements was a sham, it remains the case that they were entered into for the purpose of improving the defendants' position as against the bank. The defendants, or at least their advisers, were well aware of the risks this involves, and in particular were well aware of s 423 ... While anyone would have sympathy for Mr and Mrs Jones, who faced, and now face, eviction from their home and farm in which they have lived and worked for 25 years, it seems to me that the court should not go out of its way to assist people who have entered into artificial transactions to improve their position as against third parties. I emphasise that nothing that Mr and Mrs Jones did was improper or dishonest. They did what their advisors told them, and they were anxious to protect their home and their farming business. However, those who live by the sword die by the sword, and the fact that they lived by a sword which is conceived and manufactured by others does not alter the fact that it is the sword which they used against the bank.*"

35. Again, the assets were deliberately put out of the reach of the bank and, moreover, the defendants' solicitors were well aware of the risks thereby involved and of the terms of section 423 of the Insolvency Act.

36. Mr. Delehanty submitted on behalf of the Bank that these cases demonstrate that there is "no requirement for there to be any dishonesty or discreditable conduct or anything like that" in order for section 423 to be engaged and so the ***Three Rivers*** test does not apply to section 423 claims. But the short answer to this submission is that all that these two cases establish is that dishonesty is not a *necessary* ingredient of a claim under section 423 of the Insolvency Act. However, that does not mean that an allegation that a party has entered into a transaction with the Alleged Purpose does not (ordinarily at least) carry with it an imputation of inherently disreputable conduct. Indeed, the Bank itself had stated in paragraph 44 of its closing submissions that whilst a "*section 423 claim does not necessitate a finding of dishonesty, it does allege disreputable conduct on the debtor's part.*"

37. As Sir Anthony Mann rightly stated in ***Bank Frick***, "*when considering how the claim is advanced it is important to bear in mind the nature of the allegations made"*. Depending upon the nature of the allegation levelled in a particular case, it may very well (and frequently will) amount to an allegation of dishonest conduct. I consider that the nature of the allegations made against Ahmad in this case are of serious wrongdoing

on his part, amounting to dishonest behaviour, or at the very least, disreputable conduct. That conclusion is reinforced by the fact that the Bank's position in evidence (on a previous interim application) has been that it is "*the victim of a thoroughly dishonest scheme*": see Mascarenhas 2 at [17].

38. In these circumstances, the primary facts on which the Bank relies in inviting the court to infer the Alleged Purpose must be pleaded (and proved with cogent evidence). This means that the Bank was required to plead the fact that (i) "going into 2017" both Tadamun and Commodore UAE were balance sheet insolvent (which was indeed its case: see its skeleton argument for trial, paragraphs 41(a) and 41(b)) or suffering from a serious liquidity crunch (see for example paragraphs 40(c), 114 and 135-136 of the Bank's written closing) which was known to Ahmad; (ii) that Ahmad had given personal guarantees in respect of sums advanced by the Bank to those companies; and (iii) the relevant transaction was accordingly entered into by him for the purpose of his putting his assets beyond the reach of the Bank by making the relevant transfers.

39. In fact, regardless of the debate concerning whether the approach adopted in ***Bank Frick*** is correct or not, I would still have found that it was necessary for the Bank to plead and prove these matters. That is because the Bank's case is inferential, and where particular elements of the cause of action are said to be established by inference from primary facts, the primary facts relied upon should, out of fairness to the defendant, be identified: see ***Crypton Digital Assets v Blockchain Luxembourg SA*** [2021] EWHC 3194 (Ch) at [54(2)].

The Bank's case as pleaded in its Particulars of Claim – Category 1 claims

40. Accordingly, I turn next to the Bank's pleaded case. I set out here in full the relevant paragraphs of the Re-Re-Re-Re-Re-Amended Particulars of Claim ("**the PoC**") as follows:

"B(1)(b) The Tadamun UAE Facility, related guarantees and failure to discharge liabilities

14. At all material times, the shares in Tadamun UAE were held as to 51% by H.H. Sheikh Tahnoon Bin Saeed Shakhboot Al Nahyan ("Sheikh Tahnoon") and as to 49% by Commodore Offshore Lebanon. It is the Claimant's understanding that Sheikh Tahnoon's ~~Thanoon's~~ shareholding was held by him as nominee for Ahmad.

15. The Claimant and Tadamun UAE entered into a credit facility agreement dated 28 April 2016 with reference ADRC/37/OL/NR/16 (the "Tadamun UAE Facility") under which:

15.1 Tadamun UAE acknowledged that it was indebted to the Claimant in the sum of AED 44,645,522.02 as of 21 April 2016.

15.2 The Claimant agreed to provide ongoing facilities to Tadamun UAE with an aggregate limit of AED 112,996,000 on the terms set out in the Tadamun UAE Facility including the provision of:

(a) a corporate guarantee by Commodore Offshore Lebanon "for AED 55,370,000/ - covering 49% of total limits"; and

(b) a personal guarantee by Ahmad "for AED 57,630,000/ - covering 51% of total limits".

16. On or around 16 May 2016, Ahmad executed a personal guarantee in favour of the Claimant of Tadamun UAE's liabilities to the Claimant up to a limit of AED 57,630,000 (the "Tadamun UAE Guarantee").

17. Across the second half of 2016 and through to August 2017 Tadamun UAE was experiencing severe financial difficulties and it ultimately failed to discharge its liabilities under the Tadamun UAE Facility. Tadamun UAE was placed into liquidation on 13 October 2019. [24]

18. Ahmad has not made any payment to the Claimant under the Tadamun UAE Guarantee in respect of the debts owed by Tadamun UAE to the Claimant (nor did Commodore Offshore Lebanon under the guarantee it gave).

B(1)(c) The Commodore UAE Facility, related guarantees and failure to discharge liabilities

19. At all material times prior to 19 October 2017, the shares in Commodore UAE were held by Sheikh Tahnoon as to 51%, Commodore Offshore Lebanon as to 34% and Ahmad as to 15% ~~and Joan and Ahmad together as to 49%~~. It is the Claimant's understanding that Sheikh Tahnoon's ~~Thanoon's~~ shareholding was held by him as nominee for Ahmad. However, on 19 October 2017, Sheikh Tahnoon became the owner of 100% of the shares in Commodore UAE.

20. On 27 July 2015, Ahmad executed a personal guarantee in favour of the Claimant in respect of Commodore UAE's liabilities to the Claimant up to a limit of AED 180 million (the "Commodore UAE Guarantee").

21. The Claimant and Commodore UAE entered into a credit facility agreement dated 18 July 2016 with credit facility number ADRC/44/OL/NR/16 (the "Commodore UAE Facility") under which:

21.1 Commodore UAE acknowledged that it was indebted to the Claimant in the sum of AED 138,540,021.62 as of 13 July 2016.

21.2 The Claimant agreed to provide ongoing facilities to Commodore UAE with an aggregate limit of AED 157,121,000 on the terms set out in the Commodore UAE Facility including that the Commodore UAE Guarantee remain in place.

22. On or around 5 September 2016, the Commodore UAE Facility was amended so as to reduce the limit of one facility provided by the Claimant to Commodore UAE from AED 300,000 to AED 48,000.

23. By May 2017 Commodore UAE had ultimately failed to discharge its liabilities under the Commodore UAE Facility. Commodore UAE was placed into liquidation on 16 May 2018. [25]

[24] Emphasis added

[25] Emphasis added

24. Ahmad did not make any payment to the Claimant under the Commodore UAE Guarantee in respect of the debts owed by Commodore UAE to the Claimant (nor did Commodore Offshore Lebanon under the guarantee it gave).

C. THE CLAIMANT'S CLAIMS IN RELATION TO THE ASSETS TRANSFERRED

~~*UNDER THE SCHEME*~~

C ***(1) Other persons making claims against Ahmad in addition to the Claimant***

C(1)(a) Rheinmetall A.G.

44. Ahmad has been the subject of criminal proceedings in Germany in relation to an alleged misappropriation of least €15m from a German defence contractor, Rheinmetall A.G. ("Rheinmetall") between 3 February 2015 and 27 December 2016. In connection with this, a Public Prosecutor of Luneburg, Germany, issued a European Arrest Warrant against Ahmad on 28 March 2018. That warrant was withdrawn but an indictment was filed by the public prosecutor in May 2019 with ~~and, as at November 2019,~~ the Luneberg District Court ~~had yet to decide on further steps as regards the prosecution~~. The Claimant's best understanding as to the progression of the proceedings thereafter is as follows. The Luneberg District Court subsequently dismissed the indictment and an appeal by the prosecutor to the Higher Regional Court of Celle resulted in the case being referred for further investigation in June 2020. The case was then transferred to the Public Prosecutor of Stade, Germany, where it remained ongoing until at least September 2020, when it was formally closed by the Stade office.

C(1)(b) Sheikh Tahnoon

45. In 2017 and thereafter Sheikh Tahnoon has considered and pursued legal action to recover substantial sums of money from Ahmad. The minutes of a meeting which the Claimant held with an associate of Sheikh Tahnoon on 5 December 2017 in relation to the Facilities record that the Claimant was informed that the Sheikh:

> *"proceeded with a Legal case, personally, against [Ahmad] & all members of his family claiming an amount of AED 400 Million which [Ahmad] has transferred from different companies' accounts to his accounts in Lebanon & Switzerland. Case is expected to escalate to Interpol by the end of this year / beginning of 2018".*

46. On 9 January 2019, Sheikh Tahnoon brought proceedings against Ahmad and Mohammed in the Dubai Court of First Instance. It was alleged that there had been a misappropriation of funds by Ahmad abusing a power of attorney to transfer funds from the bank account of a company of Sheikh Tahnoon to various bank accounts belonging to Mohammed for their benefit. The Court's judgment dated 29 May 2019 records that a court appointed expert had determined Ahmad had removed AED 4.7m (c. £903,000)

from the account but that the courts of Abu Dhabi (and not Dubai) had jurisdiction over the matter.

C(1)(c) Doha Bank

47. On 11 June 2020, the Abu Dhabi branch of a Qatari bank, Doha Bank, brought a claim against Ahmad in the courts of Lebanon for payment of AED 150,008,595 (c. US$40,846,452) plus interest, pursuant to a personal guarantee which Ahmad ~~have~~ had given in favour of Doha Bank in relation to debts owed to it by Commodore UAE. The claim relies on findings made in previous litigation brought by Doha Bank against Commodore UAE in the courts of Abu Dhabi, which resulted in a final ruling on 31 December 2019 (after two appeals) that Commodore UAE owed the sum claimed by Doha Bank. The Claimant infers that those UAE proceedings were brought in 2018 in respect of debts of Commodore UAE incurred before that time. In the Lebanese proceedings, Doha Bank claims that these debts have not been paid by Commodore UAE and that Ahmad has failed to make payment under the guarantee.

…

C (5) Section 423 claims: general

106. ~~90 It is to be inferred that the Transactions were entered into for the purpose of putting~~ The Claimant avers that Ahmad's purpose in carrying out acts in connection with the various transactions pleaded herein below was to put assets beyond the reach of a person who was making or might at some time make a claim against Ahmad or ~~of~~ to otherwise prejudice~~ing~~ the interests of such a person in relation to the claim which it was making or might make ("Alleged Purpose"), within the meaning of section 423 of the Insolvency Act 1986 ("1986 Act"). In this regard, the Claimant relies on: (i) paragraphs 17, 23, 44 to 47 above (concerning potential claims against Ahmad)[26], and (ii) the facts and matters pleaded in Section C(3) above as to Ahmad's interests in each of the relevant assets, and (iii) the timing of the acts in connection with the various transactions in respect of those assets (and the timing of the dealings with assets pleaded in Section C(2) above)…

107. ~~91~~ Where it is pleaded herein below that ~~T~~the Claimant is a victim of a transaction ~~the Transactions~~, within the meaning of section 423(5) of the 1986 Act, ~~in that it~~ this includes that the Claimant has been or is capable of being prejudiced by said transaction as follows:

107.1 ~~91.1~~ The ~~Transactions~~ relevant transaction impacted Ahmad's ability to discharge his liabilities under the Guarantees and the UAE Judgments; and/or

107.2 ~~91.2~~ The ~~Transactions have~~ relevant transaction has hindered and/or will hinder the Claimant's ability to enforce the UAE Judgments and any judgment in debt based on the UAE Judgments, or on the Guarantees, which this or any other Court enters in its favour."

41. Against that pleaded case, as Bryan J correctly observed at [96] and [98] of his judgment at the Pre-Trial Review:

[26] Emphasis added.

> "*96. The allegation on which all of the Bank's claims depend is that [Ahmad] transferred each relevant asset for the purpose of prejudicing the interests of a person "who is making, or may at some time make, a claim against him" (Section 423(3)). The existence of a claim or potential claim by such a person and the debtor's purpose of prejudicing such a claim are essential elements of Section 423. A claimant invoking Section 423 must therefore plead which claim or potential claim of which person it says the debtor intended to prejudice, at least by class (e.g. claims of future creditors of a risky business the debtor is about to embark upon).*
>
> …
>
> *98. This central allegation is pleaded by the Bank at PoC at [106], where the Bank alleges that D1 acted for the purpose specified in section 423(3), which it defines as "the Alleged Purpose". The Bank alleges that the Alleged Purpose is to be inferred from three matters: (1) the existence of potential claims against [Ahmad]: see at [106(i)], cross-referring to [17], [23], [44] to [47]. (2) [Ahmad's] alleged interest in each of the assets which are the subject of the Bank's claim: see at [106(ii)], cross-referring to Section C(3); and (3) the timing of the transfer of those assets and certain other assets: see at [106(iii)].*"

42. Paragraph 106 of the PoC accordingly pleads the claims or potential claims for the purposes of *section 423* and it does so by cross-referring to paragraphs [17] and [23] of the PoC (being claims of the Bank) and paragraphs [44]-[47] (being certain specific claims by third parties rather than the Bank).

43. It can be seen that in the case of Tadamun, the Bank pleads at [17]: "*Across the second half of 2016 and through to August 2017 Tadamun was experiencing severe financial difficulties which led to its failure to discharge its liabilities under the Tadamun UAE Facility granted by the Bank.*" In contrast, in the case of Commodore UAE, paragraph [23] does not allege (i) that Commodore UAE was experiencing severe financial difficulties, or indeed any financial difficulties, across the same period; (ii) <u>which led</u> to its failure to discharge its liabilities under the Commodore UAE Facility. As can be seen from the evidence of Mr Mascarenhas below, this appears to have been intentional on the part of the Bank. Thus, whilst the Bank does advance a pleaded case that, once Commodore UAE had ultimately failed "*by May 2017"* to discharge its liabilities under the Commodore UAE Facility, there existed a potential claim against Ahmad under the Commodore Guarantee which he had given to the Bank, crucially it does not advance a case that Commodore UAE was in serious financial difficulties before that date (and in particular in late 2016/early 2017) from which it can be inferred that, before May 2017, Ahmad was aware of the existence of a potential claim against him under his Commodore Guarantee and that he acted before that date with the Alleged Purpose (of putting his assets beyond the reach of the Bank).

44. In closing, Mr. Delehanty for the Bank sought to suggest that the words "*by May*" and "*ultimately*" in paragraph 23 convey a case that Commodore UAE was in financial difficulties before May 2017 (see also the Bank's written closing at [124]). I do not

accept that. The contrast between paragraph [23] and [17] of the PoC is notable and it seems deliberate. Indeed, the Bank confirmed as much in paragraph 176 of a witness statement of Mr. Mascarenhas (set out in paragraph 48 below), who also confirmed that paragraph 23 of the PoC was confined to the fact of (the first) default on the Commodore UAE facility in May 2017. Indeed, the wording of paragraph 23 is equally consistent with the possibility of the occurrence of an event in or by May 2017 – such as a falling out between Ahmad and Sheikh Tahnoon - which resulted in a default by Commodore UAE on its facility at some point during that month, even though it had not experienced any financial difficulties before May 2017 (and as will be seen below, I consider this explanation to be the likely one).

45. Mr. Delehanty also sought to argue that the Defendants could have made, but did not make, a Part 18 request of paragraph 23 "had it actually genuinely vexed [them]". He suggested that they could have made a request as to "why is it that what happened with Commodore UAE by May 2017 led to Ahmad having the purpose to transfer the assets?". That seems to me to be the wrong way round. The burden is upon the Bank to plead the primary facts to support a case that Ahmad was moving his assets beyond the reach of his creditors because Commodore UAE *was in financial difficulties in late 2016/early 2107* and that that was what led, ultimately, to its failure to discharge its liabilities under the Commodore UAE facility in May 2017. It has not done so.

The Freezing Order

46. The Bank's understanding of its own pleaded case became apparent in the context of it obtaining a freezing order against Ahmad at a *without notice* hearing before Cockerill J on 8 July 2021. This was served on Ahmad on 12 July 2021, who then instructed English solicitors (Streathers Solicitors LLP) to act for him. In their first letter to the Bank, Streathers indicated that Ahmad would contend that there were '*numerous very serious breaches by your client of the duty of full and frank disclosure in obtaining ex parte relief from the English Court*…' {**L/15/2**}.

47. Those alleged breaches were particularised by Ahmad in paragraph 30 of his witness statement dated 17 September 2021. Paragraph 30(2) reads as follows:

> "*The Claimant relies in its application on its own internal records of its assessments of Tadamun UAE's financial position. These were considered and addressed in evidence of Mr Mascarenhas but the equivalent material in relation to Commodore UAE was omitted without explanation or any attempt to even explain that very serious omission to the judge at the ex parte hearing. The Claimant knew, or must have known, from its own financial assessments carried out when providing lending and assessing risk from time to time (and the restructuring talks to which Mr Mascarenhas refers at paragraph 77 in which I was not involved) that until Sheikh Tahnoon took over the company in 2017 (in the circumstances I set out below) it had very substantial assets which were more than sufficient to cover all of my alleged liabilities. This is a particularly egregious breach of duty by the Claimant because this completely undermines the allegations made against me to the effect that I and the companies affiliated with me were in*

> *financial distress at the time of the impugned asset transfers and had orchestrated those transfers as part of an asset shielding scheme.*"

48. The Bank responded to this by the first witness statement of Mr Trevor Mascarenhas dated 10 December 2021. He asserted that there was no breach of the Bank's duty to give full and frank disclosure because it formed no part of its case that Commodore UAE was in financial difficulties before Sheikh Tahnoon's intervention. In particular he stated:

> "*165. Paragraph 30(1) of Ahmad-WS-1 refers to reports from the liquidation committees of Commodore UAE and Tadamun UAE, which are said to refer to substantial receivables and assets held by those companies. Ahmad states that, given both companies hold substantial assets, there was no reason to for him to have thought (at the time of the impugned transfers) that they would be unable to pay their debts at the time of the impugned transfers. It is suggested that the Bank's failure to disclose those financial assessments to the Court amounts to a breach of its duty of full and frank disclosure.*
>
> *166. As an initial point, I refer to paragraphs 61 to 67 above, which explain (with reference to Ahmad's own evidence and other contemporaneous documents) the Bank's position as to why, irrespective of the contents of those reports, there were independently clear grounds for Ahmad to be concerned about the financial position of Tadamun UAE and Commodore UAE in early 2017. In short, the Bank has provided contemporaneous documents which suggest Tadamun UAE[27] was sustaining heavy losses in the period immediately prior to Ahmad's alleged asset shielding scheme (see paragraph 75 of Mascarenhas-1).*
>
> *167. Importantly, the Bank did not rely on Commodore UAE having been unable to meet its debts in 2016 leading into 2017 at the ex parte hearing. The evidence of Tadamun UAE's deteriorating financial position was presented as sufficient to show Ahmad was facing financial pressure at the relevant time.*
>
> …
>
> *175. The allegation is made in paragraph 30(2) of Ahmad-WS-1 that the Bank breached its duty of full and frank disclosure by failing to provide the court with records concerning Commodore UAE's financial position (which Ahmad says would show that the company was solvent "until Sheikh Tahnoon took over the company").*
>
> *176. However, the Bank did not allege that Commodore UAE faced the same financial issues to Tadamun UAE in 2016/early*

[27] Not, it is to be noted, Commodore UAE.

> *2017 (prior to the alleged intervention of Sheikh Tahnoon) (see paragraphs 75 and 76 of Mascarenhas-1). It is the Bank's case that Tadamun UAE's financial difficulties alone would give Ahmad reasonable grounds to anticipate the Tadamun UAE guarantee being called on (see paragraph 17 of the POC). In paragraph 2.3.3 of the Bank's ex parte skeleton argument, the argument which was presented to the Court was that Commodore UAE "failed to meet [its] obligations to the Claimant under the Facilities by in or around May to August 2017" which was indeed the case and did not represent that the reason why Commodore UAE so failed was because it was in financial difficulties in 2016, whether the same as Tadamun UAE or otherwise. It is, however, noted that Commodore UAE had defaulted on the Commodore UAE Facility (see paragraph 23 of the POC)".* (emphasis added)

49. It follows that the Bank made clear in 2021 that, consistently with paragraphs 17 and 23 of its PoC, *its case* was that Commodore UAE did not face the same serious financial issues as Tadamun in 2016/early 2017 (prior to the alleged intervention of Sheikh Tahnoon) and so Commodore UAE's financial position in 2016/early 2017 was not material because it formed no part of the Bank's claim that Commodore UAE was in financial difficulties during this period. Indeed, this has remained, ever since, the Bank's case for trial. Paragraphs 17 and 23 have never changed.

50. Mr. Delehanty sought to argue that the summary of the Bank's case contained in paragraph 176 of Mr. Mascarenhas' witness statement was only making clear that the Bank did not need to and did not rely upon the financial position of Commodore UAE in order to obtain the freezing order and that it was not intended to, and did not, delimit the pleaded claim. I do not agree. If that were so the Bank had plenty of opportunity to amend paragraph 23 but it never did so. Moreover, Mr. Mascarenhas stated: "*It is the Bank's case that …*", and he sets out that case by reference, specifically, to paragraphs 17 and 23 of the PoC. Mr. Mascarenhas points out that in paragraph 23 of the PoC the Bank merely noted that Commodore UAE had defaulted on its facility by May 2017, without any separate allegation of financial difficulty akin to that of Tadamun.

51. There was then a CMC before HHJ Pelling KC on 24 April 2023. The Bank formulated 63 Issues for Disclosure, but (consistently with its pleaded case) none of them concerned the financial position of Commodore UAE in late 2016/early 2017, or indeed any other period. Nor, crucially, did any of the parties seek permission to call expert accountancy evidence as to Commodore UAE's financial position in late 2016/early 2017, including as to the content, reliability or otherwise of Commodore UAE's (i) Deloitte-audited accounts ending 31 December 2015; (ii) in-house unaudited financial statements of Commodore UAE as at 31 December 2016 and (iii) Commodore UAE's liquidity in late 2016/2017. This is significant and I come back to this below.

The Sheikh Tahnoon amendments

52. Significantly, at the PTR before Bryan J on 16 and 17 May 2024, the pleaded case of the Bank remained the same so far as paragraphs [17] and [23] are concerned, but the Bank sought belated permission, by an application dated 25 April 2024 (i.e. shortly before the trial), to make highly material amendments to its PoC, including a new claim

for the purposes of section 423(3) that Ahmad transferred the relevant assets in order to prejudice unspecified civil or criminal claims which *from late 2016 he was concerned that* (i.e. he had knowledge that) Sheikh Tahnoon or third parties at the behest of Sheikh Tahnoon might bring against him[28]. Bryan J refused the amendments (alongside proposed amendments to the Bank's Medstar claim – see further below). The Judge held that the Tahnoon Amendments: (i) were very late and would have required an adjournment of the trial; (ii) could all have been pleaded in 2021, 2022 or in one instance 2023; and (iii) constituted a new factual basis for the section 423 claim and therefore a new cause of action, which was arguably time barred and could not be introduced by amendment.

53. This ruling is important in the context of this trial: if it is to be inferred that the reason that Ahmad transferred a particular asset was to avoid a claim being brought against him by Sheikh Tahnoon or by a third party at Sheikh Tahnoon's behest, then that is a case which it is not open to the Bank to run at trial.

54. On 5 June 2024 Males LJ refused the Bank permission to appeal against Bryan J's judgment and order.

The Bank's pleaded Reply to Joan's Defence

55. Five days later, by its Reply of 10 June 2024 which was served in response to paragraph [20A] of Joan's Re-Re-Re-Re-Amended Defence (in which she pleaded that a Personal Loan of $6m was granted to Ahmad by the Bank in January 2017 because, amongst other things the Commodore Group was in a *sound* financial condition), the Bank sought to advance a detailed case for the first time, by way of Reply, that Commodore UAE *was* in financial difficulty in 2017. This then led to the Bank's plea for the first time, in its Reply to Joan's Defence (but not in any Reply to the Defences of the other Defendants), that from at least January 2017 onwards Ahmad had reason to consider, and did consider that as a result of this the Bank would or might make claims against him in the future. This was just four weeks before the start of the trial.

56. This plea was only introduced by way of Reply 5 days after Males LJ refused the Bank permission to appeal against the judgment and order of Bryan J at the PTR, thereby refusing the Bank permission to make the Tahnoon Amendments. There would appear to be force in the suggestion of Mr. Venkatesan (who appeared for Mo and Joan, together with Constantine Fraser) that having been refused permission to run the Tahnoon Amendments (which would have avoided the difficulties inherent in proving a case that Commodore UAE was in dire financial straits in early 2017[29]), the Bank then realised that it needed to run a case that Commodore UAE *was* in serious financial difficulties in late 2016/early 2017 if it were to succeed in its section 423 claim, and the way in which it sought to do that was via the "back-door" of its Reply to Joan's Defence.

57. The relevant paragraphs of the Bank's Reply are as follows:

> *"4(c) It is denied that the Commodore Group was in good financial condition; in this regard, the Claimant relies on the*

[28] In seeking to plead this case, the Bank must have considered this to be at least one of the purposes which Ahmad had in making the relevant transfers.

[29] See [188] ff below.

facts and matters pleaded at paragraph 6 below. Tadamun UAE was in severe financial difficulties, and the Claimant was aware of this. The Claimant did not have sufficient information to assess whether the financial condition of Commodore UAE or the overall Commodore Group was good. The Claimant did not have details as to the financial condition of other entities in the Commodore Group. So far as concerns Commodore UAE:

(i) The audited financial statements for the year ended 31 December 2015 were not signed off by the auditors until 26 January 2017;

(ii) Commodore UAE prepared its financial statements on the basis that significant proportions of its borrowing (used by related parties) were not included in its financial statements; and

(iii) The Claimant had only limited information concerning Commodore UAE's lending with banks other than the Claimant.

…

6. The 2017 Personal Loan was sought, obtained and utilised in the following circumstances:

(a) Tadamun UAE was in severe financial difficulties; as to which [the Re-Re-Re-Re-Re-Amended Particulars of Claim], paragraph 17 is repeated.

(b) Commodore UAE was indebted to the following banks (in addition to the Claimant) in 2016: (i) National Bank of Furjairah; (ii) HSBC; (iii) Noor Islamic Bank; (iv) National Bank of Abu Dhabi; (v) Union National Bank; (vi) ARAB Bank; (vii) First Gulf Bank; (viii) Doha Bank; (ix) Abu Dhabi Islamic Bank; (x) Al Hilal Bank; (xi) Dubai Islamic Bank; (xii) Al Khaliji France; and (xiii) BNP Paribas. Save as pleaded at sub-paragraph 6(c) below regarding the overall level of Commodore UAE's indebtedness and paragraph (d) below regarding Doha Bank, the Claimant did and does not have details of the particulars of that indebtedness with each of (i) to (xiii).

(c) Commodore UAE's indebtedness to the Claimant was a small percentage of its overall indebtedness to other banks in the UAE. As at March 2016, the outstanding debt of Commodore UAE to the Claimant was only 8% of its overall outstanding indebtedness.

(d) Commodore UAE's indebtedness to Doha Bank (subject of the proceedings referred to in [the Re-Re-Re-Re-Re-Amended Particulars of Claim], paragraph 47) arose under facility agreements entered into on 21 January 2014 and by 31 March

> *2018 was at AED 150,008,595.48 (c. US$40 million). The principal drawn down totalled AED 145,407,555.70).*
>
> *(e) The Claimant's best understanding is that, across 2016, Ahmad had procured Commodore Netherlands to make, on an urgent basis, transfers of cash to Commodore UAE (and related entities). In this regard, Commodore UAE entered into contractual arrangements with Commodore Netherlands on 18 April 2016 and with Commodore Belgium on 21 December 2016.*
>
> *(f) Ahmad obtained the 2017 Personal Loan instead of Commodore UAE itself obtaining further lending from any of the banks referred to in sub-paragraph 6(b) above. It is to be inferred that those other banks were either unwilling to provide such further lending for the purposes identified in paragraph 3(c) above or Ahmad was unwilling to reveal to them the necessity for lending for such purposes.*
>
> *(g) The Claimant had no security for the Facilities over the fixed or physical assets of Commodore UAE.*
>
> *7. In the premises, it is to be inferred that Commodore UAE was in significant financial difficulties in January 2017. Further:*
>
> *(a) If Commodore UAE were unable to meet its liabilities to the other banks, then:*
>
> *(i) It would not be able, or would be significantly hindered in its ability, to meet its liabilities to the Claimant under the Commodore UAE Facility and the Claimant would or might claim against Ahmad upon the Commodore UAE Guarantee.*
>
> *(ii) It would not be able, or would be significantly hindered in its ability, to provide financial support to Tadamun UAE and the Claimant would or might claim against Ahmad upon the Tadamun UAE Guarantee.*
>
> *(b) In any event, the Claimant would or might claim against Ahmad upon the Tadamun UAE Guarantee.*
>
> *(c) Therefore, from at least January 2017 onwards, Ahmad had reason to consider, and considered, that the Claimant would or might make claims against him in future*." (emphasis added)

58. This was the first time that the Bank had pleaded that from at least January 2017 onwards Ahmad had reason to consider, and considered, that the Bank would or might make claims against him in future by reason of Commodore UAE's significant financial difficulties. This is the very case that the Bank could and ought to have pleaded in paragraph 23 of its PoC, had it wanted to run it at trial as a positive case under section 423.

59. Mr. Delehanty nonetheless submitted (and the Bank submitted in paragraphs 130-131 of its written closing) that the financial condition of Commodore UAE, from at least January 2017, is "wrapped up with" the Defendants' own case and that it is accordingly open to the Bank to run this positive case as part of its section 423 claim.

60. Mr. Venkatesan submitted, however, that it is not open to the Bank to seek to advance this new case in this way. He submitted that the allegation that Commodore UAE was in financial difficulties in early 2017 constitutes a new factual basis for its section 423 claim: until the Reply was served, the Bank had never pleaded that such financial difficulties were a reason to infer that Ahmad acted for the Alleged Purpose. Nor was it pleaded that Ahmad was aware that Commodore UAE was in financial difficulties in early 2017. If the Bank wished to rely upon the allegedly poor financial condition of Commodore UAE in early 2017, then that is a primary fact which it had to plead in its PoC. A new factual basis for a claim such as that amounts to a new cause of action, at least for limitation purposes (see Bryan J's judgment at the PTR, [109], [112]) and cannot be pleaded in reply. It can be pleaded only by amending the Particulars of Claim: see CPR PD16, para 9.2 ("*A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example a reply to a defence must not bring in a new claim. Where new matters have come to light a party may seek the court's permission to amend their statement of case*") and see also ***Martlet Homes Ltd v Mulalley & Co Ltd*** [2021] EWHC 296 (TCC) [20]-[21].

61. Indeed, Mr Venkatesan pointed out that in closing the Bank refined its (unpleaded) case further by alleging that Commodore UAE was particularly vulnerable to a "liquidity crunch or crisis" in early 2017. He again submitted that it was not open to the Bank to do so.

62. I consider Mr. Venkatesan's submissions to be well-founded. The case as pleaded in the PoC is that it is to be inferred that Ahmad entered into the specified transactions in order to put assets beyond the reach of the Bank which might at some time make a claim against him (or otherwise prejudice its interests). In the case of the Commodore UAE Facility, there is no suggestion that Ahmad would have had reason to consider that "potential claim" before May 2017, when the company first failed to discharge its liabilities under that facility (and not even then, if he was not aware of the fact). To now seek to run a case, by reference to a belatedly served Reply, *pleaded only against Joan*, that from at least January 2017 onwards Ahmad had reason to consider, and considered, that the Claimant would or might make claims against him under his personal guarantees in future by reason of Commodore UAE's alleged serious financial difficulties, is an entirely new factual basis for the claim under section 423.

63. On any view, it should have been pleaded in the PoC against <u>all</u> Defendants and in my judgment it would be wholly unjust to allow the Bank to advance this case in this way. This new case cannot be run as a positive section 423 case at trial simply because one defendant (Joan) has pleaded in her Defence that the Commodore Group was in a sound financial condition (as evidenced by the fact that a Personal Loan of $6m was granted to Ahmad by the Bank in January 2017), with the Bank having taken issue with that defence plea in its Reply. No application to amend the PoC to advance such a claim has ever been made by the Bank.

64. The unfairness of allowing the Bank to adopt such a course is apparent from the Bank's own pleaded case in paragraph 6(b) of its Reply, set out above. The Bank pleads that

Commodore UAE was indebted to many other banks and this caused it to be in significant financial difficulties in January 2017. Yet it also pleads in paragraph 6(b) that it does not have details of the particulars of that indebtedness. But that is because no disclosure had been given in respect of the same, it not being an issue in the action up to that point[30]. Nor had any expert evidence been adduced on this topic.

65. It is true to say that Joan and Mo's response to paragraph 17 of the PoC is that Ahmad would not have feared any claim on the Tadamun guarantee because Tadamun was very small, some 20 times smaller than Commodore UAE, and so its debts would have been covered by Commodore's vast resources. But that response does not mean that the financial condition of Commodore UAE then becomes subject to scrutiny *as a separate head of the Bank's section 423 case.*

66. Mr. Delehanty further argues that the Bank's analysis of the scope of its pleaded case is consistent with the analysis of Bryan J at the PTR. He points out that the Judge stated at [100(1)] that "*[17] and [23] plead the Bank's own claims against Tadamun and Commodore, whose liabilities D1 had guaranteed, and assert that* ***those companies*** *were experiencing financial difficulties in the second half of 2016 and in 2017*" (emphasis added).

67. This seems to me to be clutching at straws:

(a) Bryan J gave an ex tempore judgment on day 2 of the PTR because of the urgency of disposing of the Bank's belated application to amend. It is unsurprising that his language in this respect was looser than it might have been in a reserved judgment.

(b) At paragraph [100(1)] of his judgment, Bryan J stated that paragraphs [17] and [23] of the PoC plead the Bank's claims against Tadamun and Commodore '*and assert that those companies were experiencing financial difficulties in the second half of 2016 and 2017*'. The judge's compendious expression, given in the context of an *ex tempore* judgment, was obviously intended to be a shorthand summary of [17] and [23] which allege that Tadamun UAE (but not Commodore UAE) was experiencing financial difficulties in the second half of 2016 and 2017; and that Commodore UAE failed to discharge its liabilities by May 2017. The next sub-paragraph ([100(2)]) introduces the Category 2 (third party) claims, and the remainder of this section of the judgment analyses the scope of the Category 2 claims pleaded by the Bank.

(c) The reason why the infelicitous plural '*those companies*' was used by the Judge is no doubt because, as Mr. Venkatesan accepted, paragraph 70(1) of Joan and Mo's skeleton for the PTR itself compendiously and (inadvertently) loosely described the Bank's category 1 claims in this way:

> *"[17] and [23] [P/30, 32] plead the Bank's own claims against Tadamun and Commodore, whose liabilities D1 had guaranteed, and assert that those companies were experiencing financial difficulties in the second half of 2016 and in 2017. In the interests of clarity, these are described below as the 'Category 1*

[30] As Joan and Mo's written closing submissions (at [107]-[110]) rightly point out, it seems likely that the Bank possesses further undisclosed documentation relating to the assets and liabilities of the other Commodore Group companies.

claims'."

(d) As Mr. Venkatesan rightly submitted, the context to [100(1)] of Bryan J's judgment was Joan and Mo's contention that the Bank relies on two different types of claim – Category 1 and Category 2 – as the '*claims*' that it says Ahmad intended to prejudice for the purposes of section 423(3). That was relevant because the Bank was seeking by the Tahnoon Amendments to expand the range of its Category 2 claims (i.e. third party, non-Bank claims). But there was no issue before Bryan J as to the scope of the Bank's Category 1 claims because the Bank was not seeking to make any amendment to Category 1. Bryan J accordingly was not deciding that the Bank's pleaded case extends to Commodore UAE's financial position in early 2017.

68. In any event, even if (contrary to the above) Bryan J is to be taken as acknowledging that the Bank's pleaded case extends to Commodore UAE's financial difficulties, that still does not preclude the Defendants from inviting the Court now to conclude otherwise and I accept the submissions of Mr. Venkatesan in this respect. That is because there can be no issue estoppel as this "finding" was not '*necessary to the decision, and fundamental to it*'.[31] Indeed, I do not consider that it is in the nature of a "finding" of Bryan J at all.

69. Finally, the Bank contends that the Defendants knew the case which they had to meet so far as Commodore UAE is concerned through inter-solicitor correspondence between some of the parties: see [127]-[129] of the Bank's closing submissions.

70. So far as Joan and Mo's correspondence is concerned, the Bank relied upon a letter dated 7 February 2024 from the solicitors for Joan and Mo, in which they state, in relation to paragraphs 17 and 23 of the PoC:

> "*These matters are not admitted by the Defendants and must therefore be proved by the Bank. They are of course highly relevant to the Bank's case on D1's alleged purpose. For the same reason, the broader financial position of al-Tadamun, Commodore UAE and their affiliated companies over 2016-2017 is relevant, as are the reasons for their alleged failure to discharge their alleged liabilities to the Bank. The Bank's present or former employees can be expected to have significant knowledge of these matters. We accordingly expect the Bank to call all such witnesses, in particular any witnesses who were involved in the management of the Commodore Group companies' accounts, such as the Commodore Group's Credit Manager Ms Al Rifai and her manager Mr Al Khoumassi.*"

Neither of these witnesses were called by the Bank.

71. The Bank relied further upon a letter dated 4 March 2024 in which the solicitors for Joan and Mo stated:

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[31] ***Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada*** [2005] 1 Lloyd's Rep 606, [41] per Mance LJ (as he then was).

> "*…the financial situation of the Commodore Group in late 2017 (including its asset position and any ability to borrow against its assets) is clearly relevant to its financial situation in early-to-mid 2017 and prior thereto, and thus to D1's understanding of and concern about his personal contingent liabilities. This is particularly so given that we understand your client's case to be that the financial situation of the Group deteriorated in the course of 2017: see, eg, your Re-Re-Re-Amended Particulars of Claim, [17], [23].*"

72. Mr. Lilani stated in paragraph 5 of his first witness statement for trial dated 1 March 2024: "*I understand that a relevant issue for the trial is the financial position of those two companies in 2016 and 2017*" and Mr. Delehanty pointed out that when Joan and Mo's solicitors wrote on 4 March 2024 to take issue with parts of that statement they did not say that Mr. Lilani had misunderstood that this was a relevant issue for trial.

73. In a further letter from Joan and Mo's solicitors dated 19 March 2024, they stated as follows:

> "*We also note that your client's claim is based on credit facilities provided by your client to the First Defendant no earlier than April 2016 and you state that both Commodore and Tadamun ultimately failed to discharge their liabilities under the facilities in August 2017 and May 2017 respectively. Even your client's sole witness, Mr Salman Ali Lilani, acknowledges in paragraph 5 of his trial Witness Statement that the relevant issue for trial is the financial position of Commodore and Tadamun in 2016 and 2017. It is not appropriate for you to demand that our client request documents from a third-party spanning tens of years, when your own client and witness and even the partner with the conduct of this matter at your firm have acknowledged that the relevant dates begin in 2016 – 2017*".

74. The Bank also relied upon a passage in the witness statement dated 9 May 2024 of Ms Schalker, solicitor for Joan and Mo, served in opposition to the Bank's belated application to amend its PoC. She stated as follows at paragraph 23:

> "*I infer that the reason why the Bank is seeking to amend in this manner is that its own disclosure has undermined the inferences drawn in its existing Particulars of Claim from the financial situation of the companies. Merely by way of illustration, that disclosure has revealed that:*
>
> *(1) As at 31 December 2016, Commodore UAE (of which Ahmad was the UBO: [JS6/208-222] had positive net assets of AED 189 million [JS6/223-224]. Al-Tadamun had negative net assets and was dependent on shareholder support, but these were only in the much smaller sum of AED 18.47 million.*"

75. So far as Ramzy and Global Green's understanding of the case which they had to meet is concerned, the Bank had little material to fall back upon. The Bank suggested that

paragraphs 10-12 of Ramzy and Global Green's written opening showed "*an understanding of Ramzy that the issues of Commodore UAE were in play*" because he refers to the Deloitte auditors report (referred to in paragraph 190ff below) and he also asserts that "*the future prospects of Commodore UAE in 2017 were glowing*". That falls well short of an understanding that it was a positive part of the Bank's section 423 case that Commodore UAE was in significant financial trouble in late 2016/early 2017. The Bank also relied upon the fact that he was copied in to the 4 March 2024 letter from Joan and Mo's solicitors, but that again adds little or nothing.

76. So far as Alex and Ziad are concerned, the Bank had even less material that it could rely upon. Alex was copied in to the 4 March 2024 letter. Aside from that, Mr. Delehanty was left to argue that Alex's disclosure demonstrates an understanding of the pleaded case: because Alex disclosed documents concerning the assignment of the receivables from Commodore UAE to the Bank, that suggests that he knew that Commodore UAE's financial position in 2016, leading into 2017, was "in play". Again, that is obviously insufficient, and falls well short of an understanding that it was a positive part of the Bank's section 423 case that Commodore UAE was in significant financial trouble in late 2016/early 2017.

77. Mr. Delehanty, counsel for the Bank, also asked, rhetorically, "*where did all these thousands of documents which are in the bundle [concerning Commodore's financial position] come from if there was no understanding that Commodore's financial position in 2016, leading into 2017, was "in play*". But it is no answer to a failure to plead a coherent case that a party might be able to divine or assume the case to be run at trial by piecing together parts of the disclosure. Importantly, and as mentioned above, the Bank formulated 63 Issues for Disclosure and none of them concerned the financial position of Commodore UAE in late 2016/early 2017, or indeed any other period.

78. Moreover, these broad statements in the correspondence, which refer to the financial position of the companies in 2016-2017, are wide enough simply to capture the case as pleaded in paragraphs 17 (2016: Tadamun) and 23 (May 2017: Commodore UAE). But in any event, I do not consider that these generalised statements, made in a handful of items of correspondence, amount to any sort of substitute for the Bank's failure properly to plead its case.

79. As Stuart-Smith LJ stated in ***Clements-Siddall v Dunbobbin Hotels Ltd*** [2023] EWCA Civ 1300 at [77]:

> "*77. It is perhaps convenient to start with general principles about the formulation of issues in adversarial litigation. These are not new and can be summarised by reference to established authority:*
>
> *i) It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points raised by the other: see Al-Medeni v Mars UK Ltd [2005] EWCA Civ 1041 at [21] per Dyson LJ;*
>
> *ii) Statements of Case play a critical role in identifying the issues to be determined. That is not to say that a trial judge may not*

> *permit a departure from a pleaded case where it is just to do so, although in such a case it is good practice to amend the pleading, even at trial: UK Learning Academy Limited v Secretary of State for Education [2020] EWCA Civ 370 at [47] per David Richards LJ;*
>
> *iii) The function of the judge is to adjudicate upon the issues identified by the parties alone: Al-Medeni ibid;*
>
> *iv) Adherence to the issues that have been identified by the parties (in particular by the pleadings) prevents the trial from becoming a disorderly free-for-all: Dhillon v Barclays Bank [2020] EWCA Civ 619 at [19] per Coulson LJ;*
>
> *v) The task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather than to carry out some wider inquisitorial function as a searcher after truth: Sainsbury's Supermarkets Ltd v MasterCard Inc [2020] UKSC 24, at [242].*"

80. And in ***Gamatronic v Hamilton*** [2013] EWHC 3287 (QB) Andrew Smith J stated as follows at [26]:

> "*…I reject any suggestion that a pleading is sufficient if the other parties can discern what lies behind it: parties should not have to dig behind what is pleaded to detect what is alleged (particularly where dishonesty or comparable impropriety is alleged); and, perhaps more important, its meaning should be plain to the court as well as other parties.*"

81. This observation becomes even more pertinent in a case such as this where the correspondence relied upon by the Bank concerns only some and not all of the Defendants. Remarks made in correspondence to which certain of the Defendants (here, the unrepresented Defendants) were not even parties cannot subject them to a claim which is not pleaded. In any event, in none of the statements in the correspondence relied upon by the Bank do the Defendants unequivocally state that they understood that the Bank's pleaded case, as part of its claim under section 423, was that Commodore was balance sheet insolvent or suffering from serious liquidity issues in late 2016/early 2017 and the Bank accordingly is unable to - and does not - advance any case of estoppel by convention or representation arising from such correspondence.

Expert evidence

82. Perhaps most importantly, it would be unjust to the Defendants to allow the Bank to run this new substantive claim because the Defendants have been deprived of the opportunity of adducing expert accountancy evidence on this issue (as well as obtaining relevant disclosure). The Bank's inferential case as to the Alleged Purpose relies upon it establishing that Commodore UAE was in serious financial trouble in late 2016/early 2017. Indeed, at trial the Bank's case became even more nuanced as it developed into a case that Commodore UAE was particularly vulnerable to a "liquidity crunch or crisis" in early 2017. I consider that aside from a properly pleaded case, expert evidence

was reasonably required to resolve that issue. Mr. Delehanty said in closing that there had always been a case "about financial condition generally, including liquidity", but since that was never pleaded (other than by way of a limited Reply point against Joan), it is difficult to understand how the Defendants could have properly prepared to meet that case at trial (albeit they did their very best to do so, despite the lack of expert assistance).

83. To determine the solvency or the liquidity of Commodore UAE in late 2016/early 2017 requires an analysis of Commodore UAE's financial documents. But the analysis of those documents gives rise to complex accounting issues, the fair determination of which required expert accountancy evidence. Instead, the court had Mr. Delehanty making submissions as to what the Bank gleans from these documents and Mr. Venkatesan doing his best to meet that case and argue a contrary case (as to which, see further below). Without expert accountancy evidence, it is impossible on the scant material available to the court for it reliably to determine whether Commodore UAE had serious liquidity issues in early 2017 and whether Commodore UAE's contemporaneous financial statements are unreliable, as is alleged by the Bank.

84. Mr. Delehanty also sought to argue that there was no prejudice to the Defendants in allowing the Bank to run this case on Commodore UAE's financial plight because the case which the Defendants have themselves run is that the financial position of Tadamun was not a cause for concern for Ahmad because Commodore UAE was in a position to meet its liabilities if necessary. That meant, he submitted, that Commodore UAE's financial position was "in play" in any event. I do not accept that submission. It is the Defendants' case that in carrying out the relevant transactions, Ahmad did not have the subjective purpose of seeking to put his assets beyond the reach of his creditors (to avoid a claim on his Tadamun guarantee) because he had sufficient other assets to meet any possible claim against Tadamun. Alleging that Commodore UAE was itself in serious financial trouble in late 2016/early 2017 is an entirely different case, focussing on a specific period of time and requiring much more extensive disclosure and expert evidence[32].

85. More particularly, the Bank submitted in closing that both a review of the financial documentation available, and Ahmad's sons' evidence as to the liquidity crunch Commodore UAE was facing, establish that Ahmad had good reason to perceive going into 2017 that he was at risk of his personal guarantees being called upon by the Bank. Mr. Delehanty submitted that (i) Commodore UAE was rolling over lending with the Bank; (ii) its counterparties were not paying it; (iii) it was massively exposed to aged trade receivables and to two counterparties in particular on huge projects; and (iv) Ahmad was driven to fund it and other Commodore entities by procuring an "*urgent*" US$6m personal loan – including to cover labour costs for one of those huge projects.

86. Furthermore, Mr. Delehanty submitted that the Bank was not Commodore UAE's only lender. It had 14 other lenders and its primary bank was First Gulf Bank. As at March 2016, Commodore UAE's borrowing from the Bank was less than 10% of its total

[32] Similarly, the generalised reference in paragraph 20A(ii) of the Re-Re-Re-Re-Amended Defence of Joan to the effect that "Commodore Group was in good financial condition", which is why the personal loan was granted to Ahmad in January 2017, obviously does not mean that the Bank should be allowed to run a positive case that Commodore UAE was in a dire financial state in late 2016/early 2017, which Ahmad knew to be the case, and which caused him to transfer his assets away so as to defeat the claims of the Bank.

overall borrowing. This is said to be an essential matter for the Court to have in mind when considering the emphasis which the Defendants place on contemporaneous comments made by Bank officials in their records in which they appear unconcerned by Commodore UAE's financial position in 2017. The reality, submitted Mr. Delehanty, is that Commodore UAE had broad and large exposure to many banks and the company's viability (and the threat of a claim on a personal guarantee by the Bank) did not depend only upon the company's lending relationship with the Bank.

87. The difficulty with this new "liquidity crunch" submission is that (i) it is not pleaded; (ii) it was raised for the first time in closing submissions; (iii) it was speculative; (iv) there was little or no disclosure on these issues and no expert evidence; and (v) (consequently) the court had before it limited and partial evidence/information about these factual matters such that it could not reach reliable conclusions in respect of the same.

88. In contrast to these submissions of the Bank, Mr. Venkatesan submitted that Commodore UAE's liquidity had actually improved over 2015 and 2016, having been at its weakest in 2014. He contended that whilst it is true that Commodore UAE had less cash at the end of 2016, that is because it had won and was executing new projects, notably an AED 1 billion project to build the Burjeel Medical City. In other words, the reason why Commodore UAE had less cash in early 2017 is not that its business was collapsing but the exact opposite: it was deploying its cash on new projects, which is why turnover rose while cash decreased[33]. He maintained that this account is supported by the fact that in March 2017 the Bank upgraded Commodore UAE's credit rating and maintained its account classification at 'Standard' (the highest possible classification) until 22 April 2018, a full year after most of the asset transfers challenged in this case. In short, Joan and Mo maintain that this was not a dangerous liquidity crisis but a market-leading business using its cash to execute new projects, which also explains why Commodore had hundreds of millions of dirhams in approved but unused credit facilities with banks in early 2017.

89. How is the court to resolve this stark conflict without the benefit of expert evidence and proper issue-focussed disclosure?

90. Mr. Delehanty submitted that the lack of expert accountancy evidence in this case did not matter and that such evidence was "unnecessary" because the key fact which the Court has to determine is Ahmad's subjective purpose at the time of entry into each of the relevant transactions. That is informed, he argues, by his ***perception*** of the financial state of Commodore UAE (and Tadamun and related entities). The objective position is ***indirect*** evidence only of Ahmad's purpose and the Court need not make findings of fact as to what was ***in fact*** the financial state of Commodore UAE to ascertain the purpose.

91. I do not accept that submission which I consider to be unrealistic. The critical importance of this feature of the case is that if, as a matter of objective fact, Commodore UAE was not in serious financial trouble in early 2017, this will obviously have a central bearing upon what the subjective intention of Ahmad is likely to have been in transferring his assets to family members, and whether he feared a claim against him

[33] Which he pointed out was supported by the evidence of Ziad (day 9/83:23); Alex (Day 9/138/lines17-21; 139/lines 2-15; 182/lines 4-9); Ramzy (day 8/22/lines 15-19; Mo (Day 6/69/lines 13-14).

by the Bank on his personal guarantee of Commodore UAE's liabilities. The Bank invites the court to draw the inference that Ahmad transferred his assets to defeat the claim of the Bank against him under his personal guarantees. But if Ahmad had no reason to fear such a claim, objectively, it is unlikely that, subjectively, he would have feared such a claim and it is then unlikely that the court will be persuaded to draw that inference[34]. Indeed, if it were the case[35] that the Bank was untroubled by Commodore UAE's financial position well into 2017, and indeed, until early 2018, then the fact that Sheikh Tahnoon took control of Commodore UAE sometime from May 2017 onwards would still not have been likely to cause Ahmad to fear a claim *from the Bank*, as opposed (potentially) to a claim from Sheikh Tahnoon. Indeed, the Bank appears to have been further reassured about Commodore UAE's financial strength once Sheikh Tahnoon took over the running of Commodore UAE (at least up until early 2018) because of his great wealth and influence.

92. As Bryan J rightly explained in his judgment at the Pre-Trial Review in this action on 17 May 2024: [2024] EWHC 1235 (Comm):

> "*The Bank seeks to counteract this by submitting that what matters is not some objective fact but D1's state of mind in 2017 and therefore that evidence as to the objective fact is irrelevant - see, for example the Bank's skeleton at [52], [54(b)], 56(a), 56(b) (what was referred to before me as the "State of Mind Point"). I am satisfied, however, that the Defendants are correct in their submission that the State of Mind Point is a fallacy. It is a fallacy because the objective fact is often relevant evidentially to someone's perception of it. For example, if someone believes that a claim against him is hopeless, he is less likely to wish to prejudice it than if he believes it to be a strong claim. Thus, it is established by authority (contrary to what the Bank contends) that the objective merits of claims are evidentially relevant to the debtor's state of mind - see Morina v McAleavey [2023] EWHC 1234 (Ch) [119]-[120]. The Bank also seeks to submit that evidence or disclosure, even if relevant, would be disproportionate, but the litmus test to this is that it cannot be seriously suggested that if the amendments had been pleaded at the outset additional evidence and disclosure, as sought by Joan and Mo, would not be allowed.*"

93. In short, the objective facts about Commodore UAE's financial health in late 2016/early 2017 would plainly inform the assessment of Ahmad's likely state of mind at the date of each of the relevant transactions and whether he had the Alleged Purpose or not. Those objective facts could only reliably be ascertained through the provision of expert accountancy evidence (and relevant disclosure). But that is not before the court.

94. Mr Delehanty further submitted that the Court is not being invited to undertake a valuation exercise or to establish the balance sheet position of Commodore UAE as at a particular date. The Bank's case, he argued, need only demonstrate that there were

[34] See in particular paragraph 21(i) and (j) above.

[35] As I find to have been the case, see further below.

sufficient "red flags" concerning the financial position of Commodore UAE at the relevant times such that, taken with all the other evidence in the case, it is more likely than not that Ahmad had the Alleged Purpose. The Court can decide, on the basis of the material before it and without expert evidence, what is likely to have been Ahmad's perception of the financial state of the business.

95. It is of course correct that, were there other evidence in the case which clearly demonstrated that Ahmad's subjective purpose was the Alleged Purpose, then Commodore UAE's actual financial position would be unimportant. But it is much more difficult for the Bank to prove that case in the absence of reliable evidence as to Commodore UAE's financial position. That is because the Bank's case is based upon inference; and in order to infer that Ahmad had the Alleged Purpose, the financial position of Commodore UAE is central. If Commodore UAE was not in financial difficulty any claim on Ahmad's personal guarantee was unlikely and it is then, in turn, unlikely that Ahmad would have entered into the relevant transactions with the Alleged Purpose, absent any strong, alternative evidence to the contrary.

96. A further difficulty with Mr. Delehanty's "red flag" submission is that without expert accountancy evidence it is very difficult for the court to conclude whether there *were* "red flags" concerning the financial position of Commodore UAE at the relevant times, and whether those red flags would have been apparent to Ahmad. Indeed, Joan and Mo dispute the suggestion that there were any "red flags" at all.

97. The Bank was ultimately driven to contend (paragraph 146(c) of its closing submissions) that if the Court cannot assess the financial position of Commodore UAE in 2016/2017 without expert evidence, then the Bank can nonetheless establish its case without any financial data, by reference to the inferences and circumstantial evidence before the court, such that the opinion of an expert is unnecessary.[36] I do not agree: as will be seen from the narrative below, in the absence of expert evidence there is simply insufficient material before the court for it to draw the inference which the Bank seeks, particularly in the light of contemporaneous documents. Indeed, the contemporaneous evidence which is before the court as to Commodore UAE's financial position in 2016/2017 is firmly contrary to the Bank's case in that respect.

98. Finally on this point, the Bank submits that there is no meaningful way in which any expert could have reconstructed the full financial position of Commodore UAE in early 2017 in circumstances where: (i) audited financial statements for y/e 2016 are not available; (ii) the audited financial statements are caveated in the way they were; and (iii) underlying documentation as to Commodore UAE's projects financed by other banks had never been made available to the Bank. The Bank argues that the audited financial statements are not in themselves wrong. Rather, that what they show: (i) is an incomplete picture; and (ii) Commodore UAE's vulnerability to liquidity issues.

99. I do not accept this submission. Whether Commodore UAE was suffering from serious liquidity issues is an expert issue upon which the court required the assistance of expert evidence so as to determine the same. Both parties advanced extensive submissions as to Commodore UAE's financial position based upon their respective "take" on the financial documents disclosed: see in particular schedules 4 and 5 of the Bank's closing

[36] ***Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas*** [2012] EWCA Civ 1417 at [80] (Gross LJ); ***Kennedy v Cordia (Services) LLP*** [2016] UKSC 6 at [45].

submissions and paragraphs 218-266 of Joan and Mo's closing submissions. But the court required the assistance of expert accountants in order to ascertain where the truth lies in these rival accounts. Mr. Venkatesan gave some compelling illustrations of this point[37].

100. The unfairness to the Defendants of the lack of expert accountancy evidence on the Bank's case is compounded by the fact that the Bank called no factual witnesses who could give evidence as to the liquidity of Commodore UAE at the relevant time. Mr. Lilani had no first-hand knowledge of any of the relevant events. As Mr. Venkatesan pointed out, the Bank failed to call a number of its present or former employees who were involved in the management of Commodore UAE and Tadamun's accounts (as can be seen from the contemporaneous documents) and who were likely to have had important first-hand evidence to give concerning the financial position of those companies in 2016 and 2017. Indeed, several of them recommended lending to Commodore UAE at the very time when the Bank alleges that Commodore UAE was balance sheet insolvent or suffering from serious liquidity issues. Those individuals included:

(a) Ms Nada Al-Rifai, who managed their accounts day-to-day[38];

(b) Mr Nader Al-Khoumassi, who gave evidence for the Bank in Canada and to whom Mr Lilani spoke while preparing his second witness statement;

(c) Mr Ziad Nsouli, their manager, who signed off numerous credit applications by Commodore UAE and also oversaw the restructuring talks in December 2017;

(d) Mr Amanullah Memon, who was employed by the Bank's credit risk management division and was also involved in approving facilities for the companies;

(e) Ms Aya Hamieh, who liaised with Ahmad in January 2017 in connection with his personal loan of US$6m and from whom Mr Lilani obtained (hearsay) evidence for his second witness statement.

(f) Ms Sylvia Chandel[39], a former employee of the Bank on whose instructions the Bank's solicitors twice gave evidence earlier in these proceedings, in particular for the witness statement in which the Bank clarified that its case was <u>not</u> that Commodore UAE was in financial difficulty prior to the intervention of Sheikh Tahnoon.

(g) Mr Sami Farhat (former General Manager), Dr Lola Ahmed (Assistant General Manager), Mr Athar Anis (Credit Senior Manager), Mr Omran Taryam or Mr Amjad Al Dweik (both former members of the Bank board) who signed off a facility application for Commodore UAE in May 2016 which commented favourably on the company and on the conduct of its account.

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[37] Day 12/p. 88-90

[38] The Bank explained, however, that Ms Al-Rifai and Mr. Khoumassi were involved in litigation and so it said that they could not be called.

[39] Now apparently employed by Burford Capital, litigation funders, and who was, I was told, physically present in the courtroom when Mr. Lilani was giving evidence.

Conclusion regarding the Bank's pleaded case

101. In all the circumstances, it follows in my judgment that it is not open to the Bank to advance a case that Commodore UAE was in financial difficulties (viz, that it was balance sheet insolvent or suffering from a liquidity crisis) in late 2016/ early 2017 (or thereafter). (In any event and as will be seen below, I find that the Bank has failed to prove that case on such evidence as is before the court).

102. What is the significance of my refusal to allow the Bank to advance this unpleaded case? The significance is that the Bank's inferential case as to Ahmad's Alleged Purpose is much more likely to fail. Indeed, I find that it does fail. Then as Mr. Venkatesan points out, so far as the Bank's other potential claims are concerned which are relied upon in paragraph 106 of its PoC (namely the Tadamun and Category 2 claims), the Bank itself pleads that Ahmad had more than sufficient assets to discharge any potential debts arising by reason of those claims, such as the EUR 27.695m held by Medstar by 16 April 2017 (see PoC [104]) and the Lebanese assets which Ahmad sold in 2018 for $15m to discharge his debts to First National Bank (PoC [49B]) (see below). Moreover, if Commodore UAE was not in financial trouble, whilst Tadamun's position was loss-making and had been since 2012, it was secure as it benefited from the financial support of Commodore UAE (see the table as to Commodore UAE's financial position in paragraph 200 below). Tadamun's liabilities were also secured by receivables assigned to the Bank. It follows that if the Bank cannot establish that Commodore UAE was in financial difficulties, then that has serious consequences for the remainder of its claims. Indeed, they must fail.

The Bank's Category 2 claims

103. At this stage it is appropriate to say something about the Bank's Category 2 claims. The Bank focussed at trial almost exclusively upon its "Category 1 claims", that is those claims considered above which are pleaded in paragraphs [17] and [23] of its PoC, being the Bank's own claims against Tadamun and Commodore UAE, whose liabilities Ahmad had guaranteed. However, it also has a section 423 claim in respect of "Category 2 claims", being the claims of third parties against Ahmad, pleaded in paragraphs [44]-[47] of the PoC, which it is said independently establish the Alleged Purpose.

104. However, I consider the Category 2 claims, as pleaded, to be unsustainable.

105. The first of these Category 2 claims concerns a criminal complaint against Ahmad by a German defence contractor, Rheinmetall AG ("**Rheinmetall**"). It is pleaded that Ahmad was accused of misappropriating €15m from Rheinmetall between 3 February 2015 and 27 December 2016. In connection with this, a Public Prosecutor of Lüneburg, Germany, issued a European Arrest Warrant against Ahmad on 28 March 2018. That warrant was withdrawn but an indictment was filed by the public prosecutor in May 2019 with the Lüneburg District Court which, however, was also withdrawn and the case closed in 2020: paragraph [44] of the PoC.

106. There is no evidence to support the case that Ahmad was concerned about this complaint nor that he moved his assets to protect them from this complaint. Indeed, since the arrest warrant was only issued in March 2018, after the asset transfers of which the Bank complains, that is very unlikely to have been so. It is not pleaded that he knew

of the complaint before then; indeed, the date when he knew of the complaint is not pleaded at all.

107. The second Category 2 claim, pleaded at [45]-[46] of the PoC concerns claims by Sheikh Tahnoon. The Bank alleges that "*in 2017 and thereafter Sheikh Tahnoon has considered and pursued legal action to recover substantial sums of money from Ahmad*". But the Bank then specifically refers to a claim brought by Sheikh Tahnoon on 9 January 2019 against Ahmad and Mo in the Dubai Court of First Instance. It does not plead that Ahmad *knew of* this claim or, if so, when he knew of it (or, indeed, any other claims of Sheikh Tahnoon).

108. As Mr. Venkatesan rightly submitted, absent a pleaded allegation of knowledge, it is not arguable that Ahmad acted for the purpose of prejudicing any Tahnoon claims because it is not possible to act for the purpose of prejudicing claims of which the debtor is unaware. It seems most unlikely that Ahmad so acted in any event as the claim was for just AED 5.5 million (around £1m). Furthermore, the specific claim relied upon dates from January 2019, being dismissed in May 2019, and all of the asset transfers of which the Bank complains pre-date this claim.

109. As explained in paragraph 52 above, the Bank was refused permission to plead a broader case concerning possible claims by Sheikh Tahnoon from 2016 onwards.

110. The third Category 2 claim is the claim issued by Doha Bank in Lebanon against Ahmad on 11 June 2020 under his guarantee for payment of AED 150,008,595 (around US$40,846,452), founded upon a UAE judgment (after two appeals) against Commodore UAE in December 2019. The Bank pleads that it "*infers that those UAE proceedings were brought in 2018 in respect of debts of Commodore UAE incurred before that time*." Again, crucially the Bank does not plead when it alleges that Ahmad knew of this claim[40]. In paragraph 89 of his first witness statement dated 17 September 2021 in these proceedings, Ahmad stated that he was not a party to or involved in this claim against Commodore UAE.

111. The Bank adduced no evidence to support a case that Ahmad knew of or was concerned by this claim at the time when he made the relevant transfers.

112. Further, Mr. Venkatesan rightly points out that Doha Bank gave Commodore UAE a satisfactory credit report on 24 March 2016 and another as late as 20 August 2017, which suggests that Doha Bank's relationship with Commodore UAE in 2017 would not have given Ahmad any reason to be concerned about his guarantees.

113. In any event, the alleged liability only arose out of the (much later) December 2019 judgment brought against Commodore UAE, but it is Commodore UAE's financial health at the time of the (earlier) relevant transfers which matters. The Bank would need to establish that Ahmad was concerned about Commodore UAE's solvency or liquidity *at the time of the relevant transfers*, and the Bank runs up against all the same problems with its case which it faces in respect of its Category 1 claims.

[40] In paragraph 89 of his first witness statement dated 17 September 2021 in these proceedings, Ahmad stated that he had still not been served with the claim issued against him in June 2020.

114. In the circumstances, the Category 2 claims are unsustainable and, unsurprisingly, the Bank spent little or no time on advancing them at trial. In the circumstances, I find that the Bank has failed to prove any of the Category 2 claims.

Adverse inferences

115. There is one further topic which I need to address at this stage, before turning to the documentary and witness evidence, which is this. The Bank's case is that the Court should draw the inference that Ahmad transferred certain assets to family members to defeat the Bank's claim on his personal guarantees. That case is made difficult because, as I have already said (a) it is not pleaded that Commodore UAE was, objectively, balance sheet insolvent or suffering a liquidity crisis in late 2016/2017 and (b) (as will be seen below) the documentary evidence which is before the court does not appear to support that case in any event. However, this case is complicated by the fact that Ahmad withdrew from these proceedings at a very early stage. It is accordingly necessary to address the Bank's case that the court should draw certain adverse inferences against Ahmad and the other Defendants by reason of Ahmad's failure to attend the trial as well as, as a result, his failure to disclose documents.

116. In ***Efobi v Royal Mail Group Ltd*** [2021] UKSC 33 at [41] Lord Leggatt JSC stated:

> "*The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.*"

117. In the present case, the Bank submits that the central issue in the case is whether Ahmad had the Alleged Purpose and only he knows that; yet he did not attend to give evidence and failed to provide any disclosure. Moreover, Ahmad is a contemnor and, of his own

volition, is no longer participating in these proceedings.[41] The Bank therefore seeks an adverse inference against him in respect of the s.423 claims and claims that it is entitled to the inference "as of right."

118. I do not accept this submission which is overly broad and lacks proper analysis. It brings to mind the typically pithy observation of Charles Hollander KC in his seminal work ***Documentary Evidence*** (14th edn), where he states as follows at [11-28]: "*Parties say they will ask the judge to draw adverse inferences in many circumstances where such a conclusion would be entirely unjustified. Too often the use of the expression is meaningless and is simply used as a substitute for "we will ask the judge to reject your case*." Bryan J made this very point in ***Lakatamia v Su*** [2021] EWHC 1907 (Comm) at [903], when he stated that an inference that "*witnesses have not been called because they would irremediably damage a party's case [would] be too generic*." An adverse inference, if drawn, is a factual inference, and is not to be regarded as a penalty imposed on a party for his failure to call evidence or disclose documents.

Legal principles

119. In considering whether or not to draw a particular adverse inference the court will have, in particular, three points in mind:

(1) "*The first step must be to identify the precise inference(s) which allegedly should [be] drawn*": ***Efobi*** *at* [43].

(2) '*There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it*': per Lord Sumption put it ***Prest v Petrodel Resources Ltd*** [2013] 2 AC 415, [44]. In other words, there must be a case to answer.

(3) Even if there is a case to answer, whether an adverse inference is to be drawn turns on a factual analysis of all the relevant considerations, such as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence and the significance of those points in the context of the case as a whole: ***Efobi*** at [41].

120. The effect of drawing the inference is to strengthen the evidence adduced by the party seeking the inference or weaken the evidence adduced by the party resisting it.

Preliminary objection

121. Mr. Venkatesan raised a preliminary objection to the approach of the Bank to the drawing of adverse inferences in this case, which he submitted raises a conceptual problem, but upon which he said he was unable to find any relevant authority.

122. He points out that it is a matter of happenstance whether the transferor in a section 423 claim happens to be a defendant to the claim brought by the creditor against the

[41] He is also subject to a domestic Freezing Order, granted by Cockerill J without notice on 08.07.21 and continued by Andrew Baker J on 22.02.22.

transferee-defendants. Here, the Bank has chosen to make Ahmad a party to its claim. This enables it to seek an adverse inference against Ahmad, by reason of his absence (or his failure to give disclosure), that each of the transactions was entered into for the Alleged Purpose, which adverse inference it can then without more rely upon in its claims against the transferee-Defendants (Joan, Mo, Alex, Ziad, Ramzy. Virtue and Global Green). But had the Bank not joined Ahmad to the action, then in order to draw the adverse inference against the transferee-Defendants, it would have needed to show that *the transferee-Defendants* should reasonably have called Ahmad as a witness (or obtained the relevant disclosure) but that they failed to do so. It follows that the outcome of a s.423 claim against a transferee-defendant could vary depending upon the happenstance of whether or not the claimant has chosen to join the transferor as a co-defendant.

123. Mr. Venkatesan suggested that the solution lies in CPR 39.3: the creditor-claimant can apply for an order striking out the transferor's defence if there is one, or debarring the transferor from defending, at which point it can obtain a judgment in default of defence. The claimant must then establish its adverse inference independently against the transferee-defendants.

124. Despite Mr. Venkatesan's resourceful argument, I do not consider that there is any conceptual problem here. Whether the court considers it appropriate to draw the particular inference sought by the creditor as a matter of ordinary rationality will depend upon all of the factual circumstances. Having been joined to the action, the transferor may decide to play a full part in the proceedings and indeed assist the transferee-defendants in defeating the inference that each of the transactions was entered into for the Alleged Purpose. But if the transferor chooses not to engage in the proceedings at all, and so fails to give disclosure or evidence at trial (as here), then the court will be astute to ensure that it analyses carefully the inferences that it is invited to draw as a result, in particular that each of the transactions was entered into for the Alleged Purpose. The burden will be on the claimant-creditor to persuade it to draw such an adverse inference and it is open to the transferee-defendants to make submissions on that issue (as they have done here). If in all the circumstances the court is so persuaded, then it is just that that factual finding should bind the transferee-defendants who have received the assets which have been transferred to them in order to defeat the creditor's claim.

125. Ultimately, it seems to me that the point really just boils down to this. The central issue which the court is having to determine is whether the transferor transferred the assets for the Alleged Purpose. If the transferor is made a party to but fails to engage in the proceedings (by failing to give disclosure or evidence at trial) then that is a factor which the court *may* take into account, in the context of a possible adverse inference that a particular transaction was entered into for the Alleged Purpose, in determining whether that central issue is established at trial or not. That will depend upon all of the facts of the particular case.

Merits of the Bank's case on adverse inference

126. The factual background to Ahmad's withdrawal from these proceedings is as follows.

127. The Bank obtained a worldwide freezing order against Ahmad in Canada on 30 June 2021 and an English freezing order on 8 July 2021.

128. Ahmad challenged the jurisdiction of this court and he served two witness statements in support of that application dated 17 September 2021 and 21 January 2022, which application came before Andrew Baker J in February 2022. Ahmad's challenge failed. The order dismissing Ahmad's jurisdiction challenge was made on 9 September 2022 and Ahmad was ordered to make a payment on account of the cost of his jurisdiction challenge in the sum of £75,000.

129. On 16 September 2022 Ahmad provided an acknowledgment of service stating an intention to defend the claim.

130. However, Ahmad's English solicitors then came off the record on 26 September 2022.

131. The £75,000 costs award fell due on 30 September 2022 but Ahmad failed to pay it. A Canadian freezing order capped the worldwide amount Ahmad could spend on legal representation at £100,000. It is unclear whether Ahmad at any stage took steps in Canada to raise the cap.

132. Two days later, the Bank received an email from Ahmad. This explained that Ahmad was unable to pay the costs order and invited the Bank to consent to the sale of frozen property in Lebanon to enable him to do so. But the Bank did not consent: it sent Ahmad a list of questions to which it said it first required answers. This list included questions going to the substance of the claims, such as the Medstar claim (considered below). Ahmad's response was that the questions were not relevant to the costs issue and asked the Bank '*to respond practically so that we can work together to identify a property to sell*'. The Bank refused.

133. After that, Ahmad ceased to participate in these proceedings and the Bank obtained judgment in default of defence against him on 13 January 2023.

134. Having failed to pay the costs order, the Bank applied under CPR Part 71 for an order that Ahmad attend court for the purpose of providing information about his assets. Ahmad failed to attend court as ordered[42] and so the matter was referred to a High Court Judge under CPR 71.8.

135. Ahmad was ordered to produce his own and Medstar's bank statements (and other bank statements/transaction records) and to attend Court to be cross-examined on those documents.[43] Ahmad was also required by a CMC Order to provide disclosure – notwithstanding that he did not participate in the CPR PD57AD process.[44]

136. Ahmad failed, in breach of these obligations, to give any disclosure. He also, in contempt of court, did not attend for cross-examination on his assets following the asset disclosure order and was committed to prison for a period of 1 month.[45] The Bank obtained a warrant for Ahmad's arrest on 3 March 2023[46].

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[42] Order of Master Dagnall dated 26.10.22.

[43] Appendix to order of Mr Justice Andrew Baker dated 6.2.23.

[44] Order of HHJ Pelling KC dated 24.04.23 at [16].

[45] Order of Andrew Baker J dated 06.02.23.

[46] Order of Cockerill J.

137. Ahmad provided no witness evidence of fact for trial. Mo and Joan served hearsay notices in respect of Ahmad's interlocutory statements and his affidavits in these proceedings and the Canadian proceedings. Following the Bank's application, Ahmad was ordered to attend Court to be cross-examined on that evidence.[47] However, in breach of that order Ahmad failed to attend trial.

138. So far as Ahmad's health is concerned, the evidence before me was as follows. He is 73 years old and a resident of Beirut. Over 2021 and 2022, his health deteriorated. He was last cross-examined in Canada on 2 March 2022. A medical report dated 8 May 2023 from the Hospital Henri Mondor in Paris ("**the Medical Report**") records that Ahmad had suffered four strokes between December 2021 and September 2022; that he was cognitively impaired; suffered from dysarthria and since April 2022 has had difficulty moving unaided and communicating, even verbally. Joan gave evidence, which I accept, that he is a '*very sick man… he can hardly walk, and he doesn't seem to understand, make conversation*'[48]. When asked why Ahmad had not produced a recent medical report, Ziad said that '*my father is in the winter period of his life*'[49]. When Ziad tried to take Ahmad for a walk, '*he could not walk, and he fell down and I had to pick him up*'[50]. I accept Ziad's evidence.

139. The Bank took issue with the suggestion that Ahmad may have decided not to contest these proceedings by reason of mental or physical illness. It submits that it cannot be reconciled with the very substantial steps which Ahmad has taken internationally on other litigation. Further, the evidence submitted in support of the submission is, the Bank maintains, inadequate, applying the approach adopted in ***Levy v Ellis-Carr*** [2012] EWHC 63 (Ch) at [36] which the Bank submits establishes the kind of medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial:

> "*Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination.*"[51]

140. The Bank maintains that the Medical Report does not meet the ***Levy*** conditions:

    (i) It does not say (or even imply) that Ahmad would be unable to participate in the trial process. There is a vague reference to "*loss of memory,*

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[47] Order of Bright J dated 18.04.24.

[48] Day 9/75:19-20.

[49] Day 9/113:18-19.

[50] Day9 /113:3-10.

[51] Followed in ***Bruce v Wychavon DC*** [2023] EWCA Civ 1389 at [36] (Coulson LJ).

attention, and trouble concentrating"; but there is no detail on the issues identified, for example their severity or likely permanence.

(ii) The Report is now over a year old (dated 10 May 2023). It does not provide a "*reasoned prognosis*", as required: ***Levy*** at [36]. There is, therefore, no medical evidence of Ahmad's ability to give evidence *now*.

141. The Bank further argues that the Medical Report was apparently prepared after two visits to Paris on 28 December 2022 and 8 May 2023. Ahmad was therefore evidently able to travel after he resolved to abandon this litigation and not file a defence.

142. The Bank adds that the evidence of Joan and the sons is self-serving, and should be treated with considerable caution. It does not comply with ***Levy***.

143. However, in ***Levy*** Norris J was concerned with an argument, on appeal, that a Registrar erred in law in refusing to adjourn the proceedings when she had been informed that the appellant was medically unfit to attend court. Norris J rejected the appeal, holding that the doctor's letter obtained on the day of the hearing by the appellant fell far short of the medical evidence required to demonstrate that a party is unable to attend a hearing and participate in a trial.

144. That case is very different from the present case. In ***Levy***, the appellant was asking the Judge to interfere with the exercise of the Registrar's discretion not to adjourn the trial. In order to succeed on that argument, compelling evidence that the appellant was unable to participate in the trial was obviously required. Here, we are concerned with whether the court should draw an adverse inference in favour of the Bank as a matter of ordinary rationality in the light of all the evidence before the court. It is for the Bank to persuade the court that it should do so and that there is no other equally likely or more likely inference which could be drawn from the admitted or proved facts.

145. The fact that Ahmad had suffered four strokes shortly before he disengaged from these proceedings and lives in Lebanon is obviously a relevant consideration, to put it no higher, in determining whether to draw the adverse inference sought as a matter of ordinary rationality. The Bank points out that Ahmad gave oral evidence in Canada on 13 September 2021, 7 February 2022 and 2 March 2022 (it appears by video-link). However, Ahmad has not given evidence in any other jurisdiction since the last of these three dates, which is just one month after the jurisdictional challenge before Andrew Baker J in February 2022 and before the last of his strokes in September 2022.

146. Against this procedural and factual background, Mr. Venkatesan submits that it cannot sensibly be inferred, in a generalised way, that Ahmad's disengagement with these proceedings was because he feared having to confess to the Alleged Purpose in respect of any of the relevant transactions. He submits that a foreign defendant is perfectly entitled, having lost a jurisdictional battle, to take the view that he will not engage any further with the proceedings in this jurisdiction. Thus, Mr. Venkatesan points out that Ahmad may have adopted this course because he feared that his continuing as a litigant in person in England would prejudice his defence of proceedings in Canada, where the bank is attempting to recover against his assets; and/or faced with his declining health he decided that he was not physically and mentally able to defend this claim (as well as the claim in Canada). But it cannot simply be assumed that his reason for withdrawal was that he had no defence to the claim; and it must be remembered that an adverse

inference is not the imposition of a penalty for a party's failure to comply with court orders.

147. I accept this submission. Mr. Venkatesan's submission is, I consider, strongly supported by the following features of the case:

(1) Ahmad sought to pay the costs order by inviting the Bank to agree to the sale of frozen property in Lebanon. Thereafter, the failure to pay the costs order is more consistent with Ahmad's disengagement with the English proceedings after the Bank refused to agree to that course.

(2) Ahmad had served his two witness statements in these proceedings (on 17 September 2021 and 21 January 2022) in which he took issue with the suggestion that he carried out the transactions with the Alleged Purpose, because he maintained that (see for example paragraph 30(2) of his first witness statement) until Sheikh Tahnoon took over the company in 2017, Commodore UAE had very substantial assets which were more than sufficient to cover all of any alleged liabilities. And importantly, at this stage there was no suggestion by the Bank that Commodore UAE was itself in any financial trouble in late 2016/early 2017. Indeed, it was making clear at this time that that was not its case: see paragraph 176 of Mr. Mascarenhas' witness statement of 10 December 2021 in response to Ahmad's first witness statement ("*the Bank did not allege that Commodore UAE faced the same financial issues to Tadamun UAE in 2016/early 2017 (prior to the alleged intervention of Sheikh Tahnoon)*"). The Bank did not seek to run such a case until service of its Reply in June 2024 (and only then by way of a response to Joan's case). It follows that it cannot sensibly be inferred that Ahmad disengaged from the proceedings because he was aware that he would otherwise have had to admit, and give disclosure revealing that Commodore UAE was not in dire financial trouble in late 2016/early 2017. His case was that Commodore UAE had more than sufficient assets to keep Tadamun afloat.

(3) The witness evidence which Ahmad served in Canada also made clear that his case was that "*I had no reason to think that Commodore UAE and Tadamun UAE did not have sufficient assets to meet their liabilities, most especially considering that [the Bank] had over AED 190,000,000 worth in collateral assigned to it*."[52] He specifically denied having the Alleged Purpose in respect of certain of the transactions with which this action is concerned.

(4) The Bank contends that the Court should draw adverse inferences from what it describes as Ahmad's failure '*to give the full financial picture as to Commodore UAE*' (paragraph 48 of its opening submissions). But, crucially, since at the time when Ahmad disengaged from these proceedings the Bank had made clear that it was no part of its case that Commodore UAE was in financial difficulties in late 2016/early 2017, Ahmad was never asked to provide a '*full financial picture*' of Commodore UAE. It follows that after the Bank obtained default judgment against Ahmad in January 2023 it is entirely unsurprising that he did not provide disclosure in respect of such a case. As I have already explained, the Bank only ran this case against Joan alone, by way of Reply, in June 2024.

[52] Paragraph 61 of his affidavit dated 26 November 2021, upon which the Bank has cross-examined Ahmad three times.

(5) There is accordingly no evidential gap concerning Commodore UAE's financial health at the material times (late 2016 up to May 2017) which is capable of being filled by an adverse inference against Ahmad or any of the Defendants.

148. I should add here that Ahmad did not attend trial to be cross-examined on his statements notwithstanding the court's order pursuant to CPR 33.4 that he should do so. His evidence is nonetheless admissible although his statements (both here and in Canada) in consequence have reduced weight: "*the court is to be trusted to give the statement such weight as it is worth in all the circumstances of the case*", per Lady Hale in ***Polanski v Conde Nast*** [2005] 1 WLR 637 at [74][53]. An important factor in assessing the particular statement's reliability is whether it is consistent with other evidence, particularly the contemporaneous documents. I consider that Ahmad's evidence that he had no reason to think that Commodore UAE and Tadamun UAE did not have sufficient assets to meet their liabilities in late 2016/early 2017 is consistent with the overall tenor of the contemporaneous documents, which show the Bank being willing to continue to lend to Commodore UAE well into 2017 and to give it an improved credit rating in mid-March 2017[54].

149. In the circumstances I accept Mr. Venkatesan's submission that the Bank is wrong to contend that (i) because Ahmad is a contemnor and no longer participating in these proceedings, the Bank is entitled to an inference "as of right" in respect of the merit of its section 423 claims; and/or (ii) that the court must infer that Ahmad would have admitted, had he given evidence, that he had the Alleged Purpose in respect of the relevant transactions; and/or (iii) that had Ahmad disclosed his documents, they would have revealed that he acted for the Alleged Purpose. These generalised inferences cannot be drawn in the light of (i) the Bank's pleaded case and (ii) the contemporaneous documents concerning Commodore UAE's financial health in 2016 and 2017 (referred to below) which do not support it.

150. I therefore reject the Bank's generalised submission that "[*Ahmad's] non-participation is a voluntary decision, taken to ensure that adverse documents or evidence do not emerge in these proceedings*."

151. Whether the Court should draw a *specific* adverse inference on a particular issue in this case depends upon the application of the matters in paragraph 119 above to that issue, and whether as a matter of ordinary rationality the particular inference contended for should be drawn upon an assessment of all of the relevant considerations. This can only be considered after the evidence as a whole has been considered and accordingly I return to this issue below in respect of my conclusions concerning each of the impugned individual transactions.

The witnesses and the contemporaneous documents

152. Before analysing the totality of the evidence, I should state at the outset that I found all of the witnesses to be essentially honest witnesses, doing their best to recollect matters

[53] The Bank itself relies upon a number of Ahmad's statements and I accept Mr. Venkatesan's submission that it would be illogical to give those statements more weight than statements from the same examination relied upon by Joan and Mo.

[54] See the analysis below.

which took place 8 or more years ago. There are certain aspects of the family Defendants' evidence, set out below, which I reject, but I consider that that is because, with the passage of time, they have convinced themselves of the truth of it, probably borne out of a sense of grievance of what they perceive to be the "campaign" that the Bank has waged against them (and their father/husband) in its attempt to recoup its losses, putting at stake their homes and savings. I certainly do not find that any of them were dishonest.

153. In a case such as this where the relevant events took place a considerable time ago, it is important to keep firmly in mind the approach of Leggatt J (as he then was) in ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 (Comm), which was approved by Lord Kerr (in a dissenting judgment) in ***R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs*** [2018] UKSC 3 at [103] as follows:

> "*Although said in relation to commercial litigation, I consider that the observations of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), paras 15-22 have much to commend them. In particular, his statement at para 22 appears to me to be especially apt:*
>
> > *"… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.""*

154. In the present case, the following passage from ***Simetra Global Assets Ltd v Ikon Finance Ltd*** [2019] EWCA Civ 1413 at [48] is also of relevance:

> "*In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the*

> *contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence...*"[55]

The transactions and the overarching purpose question

155. It is helpful at the outset to describe the transactions in respect of which the Bank invited the Court to grant relief[56], which it contends were entered into by Ahmad for the Alleged Purpose. They are as follows:

(1) The transfer of the Commodore Netherlands shares from the ultimate beneficial ownership of Ahmad to that of Mo, Alex, Ziad and Ramzy; and the sub-transfers as follows:

(i) The transfer of the Commodore Netherlands shares from Commodore Turkey to Global Green;

(ii) The transfer of the Global Green shares to Medstar; and

(iii) The transfer of the Global Green shares from Medstar to Mo, Alex, Ziad and Ramzy.

(2) The transfer of 32 Hyde Park ("**32HP**") to Ramzy.

(3) The transfer of the sale proceeds of the Meribel property to Joan.

(4) The arrangements concerning the shares in Marquee (which held 9HP and 18HP) entered into by Ahmad between 5 February 2017 and 5 April 2017, alternatively on 5 April 2017 with Norton (as legal owner of the Marquee Shares) and Joan, Virtue and Ziad[57].

(5) The Medstar transaction, if the Bank can prove that any or all of Mo, Alex, Ziad and/or Ramzy received 25% of the Medstar $15m or the benefit thereof.

156. The parties are agreed that there is an overarching "purpose question" in respect of each of these transactions as follows:

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[55] See also the lecture given by Popplewell LJ to COMBAR last year: "*Judging Truth from Memory*" at [10]: "*...determining what happened is not the only task. Commercial litigation often involves an inquiry into a witness' state of mind. That state of mind may be an essential ingredient of the cause of action, as for example where claims are framed in constructive trust. But more generally, it matters what the witness knew, or believed, or was thinking or intended at a particular point in the narrative of events because that casts light on the events themselves. Fact-finding is concerned not only with what happened, but just as much with why it happened…*"

[56] It is common ground that if liability under section 423 is established by the Bank, then the question of what relief, if any, the court should grant will require to be determined in a second trial.

[57] The Bank's case as to what constitutes the relevant Marquee "transaction" was only clarified during the trial, and it is replicated in the Annex to this judgment.

"*Was at least one purpose of Ahmad in entering into the relevant transaction the Alleged Purpose in respect of one or more of the following potential claims against him:*

(a) *By the Bank on his personal guarantee in respect of Tadamun?*

(b) *By the Bank on his personal guarantee in respect of Commodore UAE?*

(c) *By Doha Bank on his personal guarantee in respect of Commodore UAE?*

(d) *In respect of the AED 4.7m subject of the claim brought against him in the Dubai Courts in January 2019?*

(e) *In respect of the €15m subject matter of the criminal complaint made against him by Rheinmetall in 2018?"*

157. It is convenient to address each of the matters referred to in paragraphs 155 and 156 in both the factual narrative below and then in my conclusions at the end of this judgment. I turn next to the relevant events and the documentary and witness evidence in relation to them.

The relevant factual events: the documentary and witness evidence before the court

1980-1994

158. Commodore UAE was incorporated in 1980. It first became a customer of the Bank in 1985.

159. Ahmad and Joan were married on 28 June 1980.

160. Marquee was incorporated in 1989 and acquired the leasehold title to 18HP later that year. It acquired 9HP in 1994.

161. Ahmad acquired 32HP in 1994.

2008-2015

162. Mo acquired a property in Berlin in 2008. A usufruct over the property was registered in favour of Ahmad and Joan.

163. On 12 February 2008, Ahmad personally guaranteed Commodore UAE's debts to the Bank up to AED 144 million.

164. On 19 June 2008, Ms Zweifel stated in an email to a Ms Ruth Mueller (another Kendris employee) that Ahmad and Joan were planning to divorce. Ahmad's instructions at this time were that Joan alone could give instructions concerning 9HP and she "*can do what she likes*" with it, including selling it. In the event, no divorce occurred.

165. Reflecting those instructions, on 18 December 2008, a Management Agreement was entered into between Ahmad and Mr Escher (in his capacity as a director of Marquee)

authorising Joan to give instructions in relation to 9HP, including transferring any sale proceeds to her own account.

166. On 21 August 2009, Cardena was incorporated in the BVI and its shareholding of 5000 shares was registered in the sole name of Ahmad.

167. On 23 October 2009, Cardena purchased the Ibiza property, Cansol, for €1.9 million.

168. On 19 May 2010, a company was incorporated in England and Wales with the name of Commodore Contracting Company Limited; this later became named Global Green.

169. On 31 October 2010, Ahmad personally guaranteed Tadamun's debts to the Bank up to AED 4,585,680.

170. Marquee's balance sheet of 31 October 2010 shows that it had made a loan of £1.62 million to Cardena (the "**Cardena Receivable**"). It is unclear precisely when this loan was made. (This may have been made in order that Cardena could purchase Cansol in Ibiza). The balance sheet also shows that Ahmad had loaned Marquee about £4 million.

171. Kendris had several meetings with Ahmad and his family in Abu Dhabi over the course of their relationship. These meetings, as evidenced by the meeting notes prepared after each meeting by Kendris, were always attended by Ms Zweifel, who was frequently joined by Mr Escher or other Kendris employees.

172. The first relevant meeting for the purposes of these proceedings occurred on 18 November 2012. The file note records that the participants were Ahmad, Joan, Alex, Ziad, Mr Escher, and Ms Zweifel. Two subjects were discussed at this meeting. The first concerned the tax implications for 9HP and 18HP which were held by Marquee. The second concerned an asset of Commodore UAE: "[*Commodore UAE] is one of the members of MPC Hamburg which owns Ferrostaal Germany. It is important for the client that part of the quotas held in MPC are transferred to one of his companies, preferably Commodore Offshore, Lebanon. Tax consequences need to be understood. Asset protection is important due to the fact that 51 % of [Commodore UAE] is held by a local*[58]*. Tax issues have to be analyzed (stamp duty if quotas will be transferred, DBA's etc.)*" (emphasis added). This first reference to asset protection in the documents shows that, and Ms Zweifel and Mr. Escher would no doubt have been aware throughout the course of the relevant events of the fact that, a central, if not the only, concern of Ahmad was that he needed his assets to be protected against the threat to them posed by Sheikh Tahnoon's 51% shareholding in Commodore UAE. That is important. (In 2016 and 2017 in particular, commercial companies and industrial companies were required in the UAE to appoint a UAE national with a minimum of a 51% shareholding in the company as a sponsor (see Lilani w/s (1), para 5)).

173. Ahmad must also have had the same concern in respect of Sheikh Tahnoon's shareholding in Federal, which was another of Ahmad's companies. Significantly, in paragraph 45A.5 of its *draft* proposed amendments to its PoC (accompanied by a statement of truth) which Bryan J refused, the Bank itself pleaded that:

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[58] Namely, Sheikh Tahnoon.

> "*At all material times from at least November 2012 Ahmad had asset protection concerns in relation to Sheikh Tahnoon's majority shareholding in Commodore UAE and, it is to be inferred, from at the latest December 2016 in relation to Sheikh Tahnoon's ultimate control of Federal Co.*" (emphasis added)

174. This was, the Bank itself sought to plead, because of the risk of civil or criminal claims being brought against Ahmad by Sheikh Tahnoon or third parties at Sheikh Tahnoon's behest (including Federal).

175. Ahmad's subjective meaning of the words "*asset protection*", which reappear frequently in the contemporaneous documents, is a subject of significant dispute between the parties. This file note of 18 November 2012 is one of only three which makes clear the sense in which the phrase "asset protection" was being used by him.

176. A further meeting with Kendris was held on 15 March 2013 in Abu Dhabi. In relation to the properties held by Marquee, "*the discussion focused on possible solutions how to reorganize the current structure to minimize tax exposure.*" It can be seen that tax exposure was also a central and constant concern for Ahmad and had been so from the outset. The meeting note states that at this point, 32HP was owned by Ahmad and rented out, but Ahmad did not intend to renew the tenancy agreement and wanted to "*use this property while [he and Joan] are visiting the UK.*" There is no express reference at this stage, in 2013, to the fact that 32HP had been earmarked for Ramzy.

177. Commodore Turkey was incorporated on 15 April 2013. On 19 September 2013, Commodore Turkey acquired all the shares in Commodore Netherlands. Ziad was appointed director of Commodore Netherlands on 2 November 2013.

178. It is common ground that the UAE construction sector was in decline and the market environment was challenging in the period from 2013 to at least 2015, with construction companies facing liquidity issues.

179. On 21 January 2014, Commodore UAE entered into a facility agreement with Doha Bank for approximately AED 584 million.

180. On 7 October 2014, Commodore UAE entered into a facility agreement with the Bank for approximately AED 45 million conditional upon guarantees from Ahmad and Commodore Offshore Lebanon for the same sum. Ahmad gave that personal guarantee on 14 October 2014.

181. On 16 November 2014, Tadamun entered into a facility agreement with the Bank for just short of AED 21 million.

182. On 6 April 2015, the Maradi Contract was entered into between Niger and Commodore Belgium. On the same day, the Zinder Contract (total value of €35 million) was entered into between Niger and Commodore Netherlands. It is clear that at this time Commodore UAE was landing very prestigious and substantial contracts.

183. On 8 July 2015, the UK government announced its intention to reform the "non-dom" tax regime in its Summer Budget, by bringing all UK residential property into charge for IHT purposes, including 'enveloped' property held indirectly by a non-dom via a

non-UK entity. It was envisaged that the proposed legislation would be included in the Finance Bill 2017 with the changes taking effect on 6 April 2017.

184. The effect of this change was that the shares of an offshore company, such as Marquee, would not be '*excluded property*' after 6 April 2017. That in turn meant that the shares would have attracted an immediate 40% IHT charge had they remained part of a non-dom's estate on his death. It was therefore necessary for many non-doms in this position to take steps to restructure enveloped property before 6 April 2017. A common restructuring technique adopted for this purpose was to settle the shares of the offshore company into a discretionary trust before 6 April 2017.

185. On 27 July 2015, Ahmad's personal guarantee for the debts of Commodore UAE to the Bank was increased up to AED 180 million (the "**Commodore Guarantee**"). On the same day, Commodore Offshore Lebanon also gave the Bank a corporate guarantee for Commodore UAE's debts in the same sum.

186. A Bank internal review document of 8 October 2015 shows that Commodore UAE had some liquidity issues and as a result was overdue on its loan repayments to the Bank, but the Bank was content to roll over Commodore UAE's debt to subsequent months. This is a practice which, as will be seen, the Bank consistently adopted in the case of Commodore UAE. The Bank's review document states: "*2 overdue BTL instalments totalling AED 906K for the month of July & Aug were overdue and settled on 22.09.2015 through an STGN for AED 906K (o/s AED 453K) with maturity 30.11.2015 (management approval). Due to liquidity crunch, customer also requested to defer the instalments of Sept. & Oct, and an STGN for AED 913K till 31.10.2015 was booked (management approval)*".

187. On 22 November 2015, Ahmad and Alex met Mr Escher and Ms Zweifel in Abu Dhabi. One topic of discussion was "*UK tax changes in regard to residential property*", no doubt as a result of the anticipated reform of the non-dom tax regime. Kendris' advice was to wait for more information before making any decision. The next section of the Kendris file note provides:

> "*[Ahmad] agreed with Alex that he will finance a Garden Mews in the range of GBP 3.5 mio … The client seeks advice in respect to an appropriate ownership structure and to optimize the tax situation. Asset protection is very important since Alex only recently married and it should be avoided that his wife can benefit in case of a divorce. [Mr Escher] recommended a pre-nup agreement since he was under the impression that the new residential property shall serve as a matrimonial home. Alex however informed that the property shall be considered for investment purpose and most likely be rented. He entered already into a pre-nup agreement in the Lebanon. He could enter into a post-nup agreement. It seemed that he is not so happy to do so. Tax issues were discussed…*"
> (emphasis added)

188. The note of this meeting demonstrates again Ahmad's concerns about tax issues. It also refers to the importance of asset protection and this is one of the other occasions where the meaning of that phrase is apparent from the relevant context: in this case it is a

reference to the danger of a claim to an asset by an ex-wife of Ahmad's son, Alex. The note shows Ahmad gifting a property worth £3.5m to Alex for investment purposes. It can be seen that Ahmad's wish to gift this asset to one of his family members long pre-dates any question of Commodore UAE having serious financial problems.

189. On 7 December 2015, the Bank sent Commodore UAE an email after an earlier telephone conversation, noting that "*the following are overdue: 1) AED 906K being the instalments of July/Aug; 2) AED 913K being the instalments of Sept/Oct; 3) AED 453K being instalment of Nov*". These sums are the deferred payments noted in the document of 8 October 2015 which it is apparent Commodore UAE had still not settled presumably because of liquidity issues. It appears that the Bank received no response to this, prompting a further email reminder on 10 December 2015 "*on the course of action to settle the overdues!!*"

Solvency issues? The Deloitte Report for 2015

190. At this juncture – the end of 2015 – it is convenient to break off from the chronology of relevant events to consider Commodore UAE's solvency position between 2015-2017, as Commodore UAE filed audited accounts for the year ending 31 December 2015. These accounts were audited by Deloitte (the "**Deloitte Report**") but not approved by Commodore UAE's management and authorised for issue until 26 January 2017. This is the latest set of audited accounts of Commodore UAE available to the court.

191. The Deloitte Report only concerns the financial position of the Commodore Civil Division: it expressly states that the financial position of the MEP Division and the Dubai Branch are not included[59]. Further, the Report expressly states that bank borrowings of AED 12 million and bank facilities of AED 168 million (AED 180m in total) obtained in the name of Commodore UAE on behalf of *related* parties were expressly not considered in these accounts. The Bank sought to argue that Commodore UAE had taken on *debt* of AED 180m for the benefit of other group entities which is excluded from the accounts. However, Mr. Venkatesan rightly pointed out that this was not "debt"; rather, as Mr. Lilani confirmed, AED 168m of it consisted of indirect facilities such as letters of guarantee. But the relevance of all of this from an accounting perspective is unknown as a result of the absence of (i) a pleaded case that Commodore UAE was balance sheet insolvent at the time; and (ii) any forensic accounting evidence before the court.

192. Indeed, the parties were at loggerheads concerning what the Deloitte Report can be said to demonstrate concerning Commodore UAE's financial position. The Bank argued that the audited Deloitte statements disguise the fact that Commodore UAE was balance sheet insolvent. Joan and Mo, on the other hand, argued that the Deloitte Report on its face shows that Commodore UAE was financially healthy.

193. In particular, Joan and Mo submitted that the Deloitte Report, which was signed off on 26 January 2017, shows that Commodore UAE was financially sound, with net assets of AED 175.6 million. As to this:

[59] The Bank provided facilities largely to Commodore UAE's MEP Division.

(i) This was up from AED 158.9 million in 2014.

(ii) This was also net of a debt of AED 40.8 million to Ahmad himself, meaning that the effective value of Ahmad's ownership of the company was AED 216.4 million (US$58.9m).

(iii) Commodore made a profit before management fees of AED 25 million. This was also up from AED 19 million in 2014. Further, 35% of these profits were paid directly to Ahmad's company Commodore Offshore Lebanon as management fees; and the profits were also shown after directors' expenses of AED 8m, all or most of which seems likely to have been paid to Ahmad.

194. In contrast, Mr. Delehanty for the Bank relied upon the fact that of the net asset figure of AED 175m for 2015, some 46% of that figure related to trade receivables which he suggested were highly vulnerable or "impaired" to use the IAS accounting term (see chapter 10, paragraph 36 of IAS). This formed the basis of the Bank's case that Commodore UAE was suffering at this time from serious liquidity issues.

195. He further pointed out that the Deloitte Report states that the "*average credit period on trade receivables is 60 days*". The breakdown of the net trade receivables shows that of the balance of AED 114 million, AED 49 million was due from the company's largest customer and approximately AED 82 million (out of AED 119m) was overdue (i.e. due for more than 60 days), including almost AED 18 million overdue for more than 730 days. The Deloitte Report expressly noted that:

> "*Included in the Company's trade receivable balance are debtors with a carrying amount of AED 82.45 million (2014: AED 87.1 million) which are past due but not impaired at the end of the reporting period. The management has made certain critical assumptions in assessing the recoverability of certain significant past due trade receivables as at 31 December 2015. In the current market environment, there exists a high degree of uncertainty regarding the full recoverability of such receivables which is not possible to quantify at this time. The Company does not hold any collateral over these balances.*"

These are, submitted Mr. Delehanty, substantial uncollateralised sums which were at risk. The report notes that the allowance made by management for doubtful or impaired receivables was only AED 4.7 million, which was not included in the total of AED 114 million.

196. However, the problem with the Bank's submission about trade receivables is twofold. First, Deloitte signed off on its report on 26 January 2017 from which, as Mr. Venkatesan submitted, it must be assumed that based upon objective evidence, they were comfortable from an auditor's perspective that they had sufficient evidence that the receivables were not at unusual risk of impairment[60]. Indeed, Deloitte deal with the

[60] The Deloitte Report confirms at p. 5 that "*In our opinion, the financial statements present fairly, in all material respects, the financial position of [Commodore UAE] as of 31 December 2015, and its financial performance and its cashflows for the year then ended in accordance with International Financial Reporting Standards.*" The financial statements were not in fact finally approved and authorised for issue until 26 January 2017.

question of impairment at p. 20 of their Report, in which they refer to the need for "*objective evidence of impairment for a portfolio of receivables*" which includes the company's past experience of collecting payments:

> "*Financial assets, other than those at fair value through profit or loss, are assessed for indicators of impairment at the end of each reporting period. Financial assets are impaired where there is objective evidence that, as a result of one or more events that occurred after the initial recognition of the financial asset, the estimated future cash flows of the investment have been affected.*
>
> *For certain categories of financial assets, such as trade and other receivables, assets that are assessed not to be impaired individually are assessed for impairment on a collective basis. Objective evidence of impairment for a portfolio of receivables could include the Company's past experience of collecting payments, an increase in the number of delayed payments in the portfolio past the average credit period, as well as observable changes in national or local economic conditions that correlate with default on receivables.*"

There is no reason to doubt therefore that Deloitte paid careful regard to this issue in signing off on the accounts.

197. Second, if the Bank wished to make this submission concerning impairment, it ought to have obtained permission to adduce expert accountancy evidence on the issue. Expert evidence would have been extremely helpful to the court, indeed it was necessary, in terms of understanding the impairment checks which an auditor such as Deloitte would and should have made in the circumstances of this case. Certainly without that evidence, I see no reason to doubt the reliability of the accounts on their face.

198. Indeed, it is strongly arguable that Deloitte could not have signed off on those financial statements unless they were satisfied on 26 January 2017, being the date when the accounts were authorised for issue, that there was no material doubt as to Commodore UAE's ability to operate as a going concern in early 2017 (and no adverse material developments in 2016 concerning trade receivables, market conditions and the like) because Deloitte would then have been obliged to note this in the accounts and they did not[61]. Once again, expert accountancy evidence on this topic would have been invaluable concerning the disclosures which require to be made after the end of a reporting period, how adjusting and non-adjusting events are treated in accounting terms and so forth.

199. In any event, the positive nature of these accounts so far as Commodore UAE's financial position is concerned is likely to have been the reason why, when the Deloitte Report was considered by the Bank in *mid-March 2017* the Bank (significantly) upgraded Commodore UAE's credit rating from BB to BBB. Indeed, Mr. Lilani accepted in his evidence that the BB rating was based upon the Deloitte auditor's report

[61] Pursuant to Chapter 10, paragraphs 8, 16 and 21 of International Accounting Standards.

for 2014 and the BBB rating was based upon the Deloitte Report. Mr. Lilani also accepted that at this time, the UAE Central Bank classified Commodore UAE as "normal", which is the *highest possible classification*. That does not suggest a company which was insolvent or suffering from serious impairment issues in January-March 2017. It also renders untenable any suggested adverse inference to the effect that had Ahmad disclosed further documents or given evidence concerning Commodore UAE's financial position or the financial position of the Commodore group as a whole, that that would have shown an entirely different picture, namely a company in financial distress. There is no reasonable basis for such a hypothesis in the evidence.

Table showing Commodore UAE financials, 2012 – 2016[62]

200. In their closing submissions, Joan and Mo presented a helpful summary table of Commodore UAE's financial statements which were before the court as follows:

Metric	**2012 audited**	**2013 audited**	**2014 audited**	**2015 audited**	**2016 in-house**	**2016 in-house (Bank skeleton, fn 77)**
Revenue	573.2m	675.4m	485m	298m	352.8m	-
Profit before fees	**17.4m** (implied)	**17.2m**	**19.1m**	**25.6m**	**21.3m**	**(-243.2m)** (implied)
Net profit margin	3.03%	2.56%	3.93%	8.59%	6.04%	-
Retained earnings for the year	11.3m	11.2m	12.4m	16.6m	13.9m	-
Total assets	643.7m	741.2m	684.6m	721.4m	656.8m	-
Total liabilities	508m	594.6m	525.6m	545.8m	467.3m	-
Net assets	**135.4m**	**146.6m**	**159m**	**175.6m**	**189.5m**[63]	**(-67.6m)**

201. As Mr. Venkatesan explained, Commodore UAE's business model involved the payment of a 35% management fee but the retention of the entirety of the profit that remained without paying dividends. Because the profits are retained in the business, the net assets can be seen to have grown, year on year. I agree therefore that the financial records which are before the court accordingly suggest a stable record of performance on the part of Commodore UAE and a profitable company, rather than a company in dire financial straits. Commodore UAE is shown as having net assets of AED 189.5m at the end of 2016, net of the loan owed to Ahmad of a further AED 40.8m. Furthermore, the table shows that whilst revenue was decreasing, profits were increasing, which does indeed suggest that Commodore UAE was doing less work but

[62] Audited accounts for 2012; 2013/14; and 2015. Accounts for 2016 are in-house and not audited. Profit margin is profits (before fees) as a percentage of revenues.

[63] Calculated by taking the audited figure for net assets for 2015 and adding to it the retained earnings for the 2016 year.

at higher profit margins. This was consistent with Alex's evidence[64] that the market downturn (2013-2015) resulted in a "boom" for Commodore UAE because competitors went out of business.

202. Again, all of this suggests that Commodore UAE was not balance sheet insolvent at all, unless these financial statements can be shown to be unreliable, as Mr. Delehanty was compelled to contend. But in order for the court even to begin to so find, I consider that the court would require expert accounting evidence to support a submission to that effect, which it does not have.

The 2016 Commodore UAE in-house accounts

203. The Bank also argued that so far as the Commodore UAE *in-house* financial statements for 2016 are concerned (which were unaudited), they are insubstantial in form and nature, not being supported by trial balances, ledgers or management accounts. The Bank argued that it can be inferred that they inflated the company's net asset position and disguised an actual balance sheet insolvent position. It contends that this inference follows from what can be gleaned from the previous year's *in-house* financials statements (*i.e.*, y/e 2015), which the Bank maintained radically inflated the company's net asset position for that year, as revealed by a comparison with the audited y/e 2015 audited financial statements. If the same level of disparities as were apparent from the y/e 31.12.15 financial statements were carried across to the 31.12.16 in-house financial statements then, rather than there being AED 467,332,149 of total liabilities, the true position would be around AED 725m (£155.5m) of liabilities with the result of an overall net liability / negative equity position of - AED 67.6m (£14.5m) for 2016 (see the last column of the table above).

204. The difficulty with this submission is that the 2016 Commodore UAE in-house figures are *consistent with* the company's performance in previous years, whereas the Bank's suggested figures in the last column are wholly inconsistent with the trend of the figures in previous years. Again, there is no reasonable basis to support the Bank's hypothesis in the evidence. On the Bank's case, the company would have had to have made a dramatic loss in the 2016 year of AED 243.2m for which I consider there to be no (or at least insufficient) supporting evidence. Moreover, the Bank's submission is flatly inconsistent with it having itself upgraded Commodore UAE's credit rating from BB to BBB in mid-March 2017.

205. What can be said is that it is evident from *Tadamun's* audited accounts for the year ending 31 December 2015 that *it* was in severe financial difficulties (although the Defendants have never denied this). Deloitte's audited report for Tadamun ("**the Tadamun Report**") states that "*the Group has incurred a loss for the year of AED 4,251,328, its accumulated losses exceeded its share capital by AED 13,351,971 and its current liabilities exceeded its current assets by AED 9,620,405. The combined financial statements have been prepared on a going concern basis and this depends on the continued financial support of the Shareholders. In the absence of such support, this basis would be invalid and adjustments would have to be made to reduce the financial position values of assets to their recoverable amounts, to provide for further*

[64] Day 9/151:21.

liabilities that might arise and to reclassify non-current assets and liabilities as current assets and liabilities, respectively."

206. The Tadamun Report also noted that "*At the end of the reporting period, an amount of AED 2,115,078 representing 54% of the trade receivables is due from the Group's two major customers (2014: AED 4,010,376 representing 43% of the trade receivables is due from two major customers). Management considers these customers to be reputable and creditworthy and is confident that this concentration of credit risk will not result in any significant loss to the Group.*" In other words, Tadamun's financial position is also heavily dependent on management's perception of the creditworthiness of its major customers, but those customers are perceived to be reputable and creditworthy.

Conclusions concerning Commodore UAE's alleged balance sheet insolvency

207. In summary, I see no reason to doubt or go behind either of these two Deloitte Reports and I consider that they are the best evidence, available to the court, of Commodore UAE's and Tadamun's financial position at the stated dates (Tadamun as at 25 December 2016 and Commodore UAE as at 26 January 2017). Taken together with the 2016 in-house financials, it suggests that Commodore UAE was solvent and, in so far as Tadamun was balance sheet insolvent, Commodore UAE had more than sufficient assets to ensure that Tadamun could meet its liabilities.

208. Whilst the Bank seeks to undermine the reliability or completeness of the Deloitte Report and the 2016 in house financials, it provides itself little or no evidence that Commodore UAE was insolvent or suffering from irremediable liquidity issues at this time. The Bank did, however, seek to rely upon the short judgment of the Abu Dhabi Court of First Instance of 16 May 2018 (being a year after Ahmad had left the country), which granted the application of Sheikh Tahnoon to put Commodore UAE into liquidation, in which the court stated: *"It is also established in the audited balance sheets, issued by the Auditor of the Defendant Company and its branches for the years 2015 and 2017, that the loss sustained by the Company ha[s] reached AED 948,953,914."*

209. However, it is wholly unclear how that court arrived at that figure which appears to be a figure for "Commodore UAE and its branches" but which is materially inconsistent with the figures in the table above. As Mr. Venkatesan pointed out, Commodore UAE's audited 2015 revenue was [AED] 258m and its profit approximately [AED] 25m. Even taking into account Commodore UAE Dubai and the MEP Division, it is difficult to believe that in two years the group could have recorded a loss equivalent to 47 years' worth of its mother company's profits or three times its annual revenue, or indeed how its profit margin could have fallen from 8.59% in 2015 to an average of -150% across 2016-2017. Indeed, if this figure were correct (which I do not accept), it could only have come about by reason of a complete cessation of business on the part of Commodore UAE after Ahmad left the country. It does not support a suggestion that Commodore UAE was in financial decline before then.

The liquidity crunch case advanced by the Bank

210. It is, no doubt, because of the difficulties which the Bank faced by reason of the terms of the Deloitte Report, that it sought to develop a case that Commodore UAE's financial difficulties were in the nature of a "liquidity crunch" in late 2016/early 2017, caused by

the failure of counter-parties on large scale projects to pay Commodore UAE in a timely fashion or at all. But none of this was pleaded by the Bank, not even in its Reply. Nor did it mention anything about liquidity issues in its written opening, when its case was only that Commodore UAE was balance sheet insolvent (see paragraph 41(b) of its written opening). In order to run this case, I consider that the Bank had to plead the primary fact that (on its case) Commodore UAE faced serious liquidity issues in late 2016/early 2017 because its counter-parties were not paying it the sums which they owed. But it failed to do so.

211. Indeed, as Mr. Venkatesan rightly submitted, the Bank only developed this case for the first time in its written closing, when it developed a detailed case, unforeshadowed until then, that both a review of the financial documentation available, as well as Ahmad's sons' evidence as to the liquidity crunch which Commodore UAE was facing, established that Ahmad had good reason to perceive, moving into 2017, that he was at risk of his personal guarantees being called upon. That was said to be because: (i) Commodore UAE was rolling over lending with the Bank; (ii) its counterparties were not paying it; (iii) it was massively exposed to aged trade receivables and to two counterparties in particular on large projects (Burjeel Medical City and the Akoya projects); and (iv) Ahmad was driven to fund it and other Commodore entities by procuring an "*urgent*" US$6m personal loan – including to cover labour costs for one of those huge projects.

212. I consider that it would be unfair to the Defendants to allow the Bank to run this detailed, unpleaded case in closing in this way; and I do not consider it is open to the Bank to do so. I accept Mr. Venkatesan's submission that his cross-examination of the witnesses would have been different had this case been pleaded and run in opening and so the Defendants were materially prejudiced by the Bank's failure to articulate this case in its pleading and in its opening[65]. In particular, as he rightly stated, his cross-examination of Mr. Lilani focussed on the liabilities side of Commodore UAE's balance sheet, as he did his best to focus on the issue of whether Commodore UAE was balance sheet insolvent or not. He did not, however, ask Mr. Lilani about Commodore UAE's assets and the extent to which its counterparties were meeting their payment obligations, as it was not in issue. Furthermore, in questioning Alex and Ziad, Mr. Venkatesan limited his cross-examination to questions showing that Commodore UAE was in a sound financial condition, having won valuable new contracts. He did not ask questions concerning the reliability of Commodore UAE's counter-parties on these and other contracts and whether if there were liquidity issues, what Commodore UAE could have done to ameliorate the situation. None of that was explored in evidence.

213. That stated, even had the Bank properly pleaded and run in opening its detailed liquidity case, I would nonetheless have found that it had not proven that case, particularly without the benefit of expert accountancy evidence. As the contemporaneous documents show, and as the Defendants explained in their evidence, liquidity problems and delays in receiving payments from counterparties, with consensual rolling over of the debt, are typical on large construction projects such as those which Commodore UAE was used to undertaking, and so this was nothing new to Commodore UAE or to

[65] "*the scope of a party's case is usually more precisely defined prior to the trial by lists of issues and skeleton arguments, which the opposing party is entitled to treat as confining the limits of the case being advanced by its opponent"*: ***Rhine Shipping v Vitol*** [2024] EWCA Civ 580 [55].

the Bank. The Bank adopted a consistent practice of rolling over debt in Commodore UAE's case.

214. By way of illustration of this point and as Joan and Mo point out in their written closing, in July and August 2015 Commodore UAE missed two instalments on one of its loans. Bank documents refer to Commodore UAE undergoing a '*liquidity crunch*'. At Commodore UAE's request, the Bank agreed to reschedule its July/August payments to October and its September/October payments to November. By December 2015, all five months' instalments still remained unpaid.

215. On 31 January 2016, a Bank document concerning Commodore UAE's loan repayments states that "*Customer settled the overdue 5 instalments by depositing AED 2,272K during the month of January (covered Jul/Aug/Sep/Oct &Nov).*" Commodore UAE requested the Bank "*to extend the overdue instalments of December & January instalments totalling AED 906K, till end of March*" and "*to extend the remaining two instalments till end of April*", the latter requiring the Bank to "*book a loan to cover February/March instalments*". These requests were approved in view of "*the long satisfactory relationship with Commodore Group*".

216. This is a good illustration of how Commodore UAE typically had liquidity issues which were known to the Bank and accommodated by it by rolling over the loan facilities. The Bank did not seem unduly concerned by any of this.

217. Moreover, on 17 February 2016 Commodore UAE applied to the Bank for further credit facilities. As part of this exercise, the Bank obtained credit information about Commodore UAE from the Central Bank of the UAE. This information is important in discerning where the truth lies concerning Commodore UAE's financial position in 2016 because it demonstrates the <u>overall</u> indebtedness of Commodore UAE in March 2016. It shows that in respect of <u>all</u> of its lending banks it had an overall credit or facility limit of AED 2.74 billion (of which the Bank's share was just AED 166.741m) with AED 1.56 billion credit outstanding, albeit AED 1.26 billion of that was contingent or "indirect borrowing", such as letters of guarantee which would only be called upon if Commodore UAE failed to perform its contractual obligations. However, Commodore UAE had total *direct* borrowing limits of AED 744.8m from across the UAE banking sector, of which it was using only AED 293m. As Joan and Mo rightly submitted, it is almost inconceivable that Commodore UAE exhausted those remaining limits by January 2017 (i.e. just over 10 months later): to do so, it would have had to borrow, in the space of just over 10 months, an amount greater than its entire annual turnover[66].

218. The same document also shows, importantly, that there were no adverse credit reports from any other of the lending banks. The Bank received Commodore UAE credit reports from 10 of the 13 other banks which were also creditors of Commodore UAE. Of these, First Gulf Bank which gave Commodore UAE a "satisfactory" credit report was described by Alex in his evidence as Commodore UAE's "*primary bank*"[67], while

[66] Indeed, the next set of figures disclosed by the Bank reveal that by August 2017, over seventeen months later and some time after Ahmad's departure, Commodore UAE had still only drawn down direct facilities of AED 316m.

[67] Day 9/147.

Mo commented that it was the bank he "*was most aware of*"[68]. It is fair to say that the credit report of First Gulf Bank was dated 14 July 2014, being one and a half years out of date; but most of the other credit reports were dated March 2016. There were no negative reports.

219. Consistently with this, on 28 April 2016 the Bank entered into a further credit facility agreement with Tadamun, whereby Tadamun's levels of borrowing with the Bank were increased almost three-fold. The facility agreement shows that Tadamun's outstanding liabilities under existing facilities stood at AED 45 million. The facilities were renewed and extended to AED 112 million. This is a good illustration of the fact that in view of Commodore UAE's sound financial health, the Bank had no concern in increasing its lending to Tadamun.

220. Furthermore, on 11 May 2016, the Bank's Executive Committee (which included Mr Athar Anis, Dr Lola Ahmed and Mr Sami Farhat) approved new project finance limits for Commodore UAE, significantly noting the '*satisfactory conduct of account, occasional excess (due to delayed payments from Govt) regularized subsequently'*.

221. It was around this time that Ahmad (i) entered into his personal guarantee with the Bank in respect of Tadamun's debts and (ii) continued his Commodore Guarantee which he had given on 27 July 2015:

(1) On 16 May 2016, Ahmad personally guaranteed Tadamun's debts to the Bank up to AED 57.6 million (the "**Tadamun Guarantee**"). On the same day, Commodore Offshore Lebanon similarly gave the Bank a corporate guarantee for Tadamun's debts up to AED 55 million. Together, these guarantees covered all of Tadamun's facilities; and

(2) On 18 July 2016, the Bank entered into a further credit facility agreement with Commodore UAE. The facility agreement shows that Commodore UAE's outstanding liabilities as at 13 July 2016 under existing facilities with the Bank stood at AED 138 million. The facilities were renewed and extended to AED 157 million. The guarantees which had been given by Ahmad personally and Commodore Offshore Lebanon for AED 180 million each on 27 July 2015 were continued.

222. On 7 September 2016, the Bank granted Commodore UAE's request for a short term loan of AED 1.1 million which was "*used to cover the current excess under main account*", with settlement "*from transfer of other proceeds*". In other words, the Bank was again happy to roll over the debt by granting Commodore UAE a new loan to meet its repayments. The payment dates of other debts were also extended by the Bank.

223. On 5 October 2016, an extension of the existing AED 1.1m loan of 7 September 2016 was approved by the Bank and it was clearly comfortable about lending: the "*customer has promised to deposit funds from other sources and upon receipt of funds, STL AED 1.1M will be settled*".

[68] Day 6/66.

224. On 13 February 2017, the Abu Dhabi Court Enforcement Division made an order addressed to the Governor of the Central Bank of the UAE for the seizure of Commodore UAE's funds up to AED 444,733 (around £90,000). The applicant was Euro Emirates Electrical and Mechanical Services LLC, another UAE company. This document was received by the Bank by 5 March 2017. The Bank suggested that this suggests that Commodore UAE had serious liquidity issues. However, nothing is known about this (relatively minor) dispute and I do not consider that it can be relied upon to displace the fuller financial analysis of Commodore UAE set out herein.

225. Indeed that conclusion is supported by the fact that on 9 March 2017 the Bank recommended a grant of a new AED 605,000 facility to Commodore UAE's Civil Division (which had not previously been funded by the Bank) for a project with a contract signed on 20 September 2016 and with a completion date of August 2017, with the counterparty being the Japanese company Toshiba. This request was framed as Ahmad/Commodore UAE wishing to "*revive relationship under the Civil Department of Commodore thus approached for new project facilities*". The handwritten comments on that document noted that while the request was "*recommended*" in view of the "*overall satisfactory relationship*", Commodore UAE had "*Many overdue facilities*", and the recommendation was stated to be "*subject to first regularizing the [account]*" (emphasis in original).

226. Had Commodore UAE been in serious financial trouble by this stage it would be very surprising for the Bank to have granted this substantial further, new facility for its Civil Division which the Bank had not previously funded.

227. Similarly, on 15 March 2017, the Bank's CRMD sent a letter to "DGM/Head of R[egional] C[orporate] C[entre] ("**RCC**"), Abu Dhabi" stating that Management had approved an extension on a facility to Commodore UAE up to 30 June 2017 and for "*RCC to follow-up with the customer for regularizing the [account] at earliest*". The accompanying internal document noted that as of 15 March 2017, Commodore UAE had "*9 overdue LTRs totalling AED 1,956K, Sub [account] 030 035 is overdrawn by AED 21K, Overdue STPC AED 3,530K related to Musanada Project (030 035), 3 LTRs totalling AED 648K maturing today (15.03.2017)*".

228. By this point, the Bank had, of course, received the Deloitte Report. On the basis of that report, at some point between 9 March and 15 March 2017, the Bank *upgraded* its internal rating of the Commodore UAE account, from "BB" (based on the 2014 financials) to "BBB" (based on the 2015 financials, i.e. the Deloitte Report) and maintained its account classification as standard which Mr. Lilani confirmed in his evidence is the highest possible classification.

229. Any overdue payments of Commodore UAE to the Bank in March 2017 were regularised over the remainder of March and April 2017. In particular, following a request for extensions dated 28 March 2017 '*to regularize the account*', on 2 April 2017 the Bank's management approved extensions for overdue February/March loans against trust receipts totalling AED 3.76m. The Bank's records from 28 February 2018 subsequently show that as of that date, the longest period that the facility for either Commodore UAE or Tadamun had been overdue was since 31 May 2017, which was shortly after the Defendants contend that, and I accept, Ahmad fell out with Sheikh Tahnoon. It follows that any overdue facilities in March 2017 must have been settled or, at least extended.

230. On 17 April 2017, Commodore Netherlands entered into the Padang Contract to build a hospital in Indonesia. The contract price was €40 million. This shows that the Commodore Group was continuing to acquire new, major building projects at this time.

231. Furthermore, on 24 April 2017, the Bank approved a further credit application by Tadamun, consisting of a renewal of lending facilities at a reduced level from AED 111.74 to 82.09m, relying on Ahmad's personal guarantee covering 51% of total limits and Commodore Offshore Lebanon's corporate guarantee covering the other 49%. In relation to the latter, the Bank relied on the financial information in the Deloitte Report and Commodore UAE's internal BBB rating. Under "Summary and Recommendations", the Bank stated that existing limits "*are sought to be renewed at overall reduced Levels and will primarily be Covering Limits on Reducing Basis*" (emphasis in original) with new limits opened in the case of one particular project; and "*Balance receivables from existing projects are just about covering the projected project liabilities*". Again, this demonstrates how the Bank was content to continue to lend to loss-making Tadamun by reason of Commodore UAE's sound financial position, coupled with Tadamun's liabilities being secured by receivables assigned to the Bank.

232. On 2 May 2017 an Addendum to the Bank's internal appraisal of Tadamun dated 24 April 2017 set out progress details for four of Tadamun's projects for which limits were sanctioned in April 2016. The CRMD commented that:

> "*RCC has discussed with the customer who advised that the above projects are progressing satisfactorily and they expect to complete the projects as per the scheduled dates listed above subject to the availability of the sites", which was "the responsibility of the main contractors*".

233. In an internal Bank Sanction Advice for the approved renewal of Tadamun lending facilities dated 3 May 2017, Mr. Farhat and Dr Ahmed of the Bank expressly record the fact that the relationship with Tadamun "*needs to be viewed on the strength of Commodore [UAE's] backing and support.*" The Bank accordingly continued to lend to Tadamun whose projects were said to be progressing satisfactorily as late as May 2017.

234. Commodore UAE also arguably had access to approved but unused credit facilities which were more than sufficient to address any liquidity problems, as set out in Joan and Mo's closing submission at paragraphs 254-263. As Joan and Mo succinctly put it in their closing submissions, "*If a profitable company worth AED 189m were encountering temporary cashflow problems, a wealthy owner with several decades of experience in the construction industry would be more likely to address it by injecting capital than with panic and a scheme to dissipate his personal assets*."

235. I say "arguably" because, again, I consider that for the court sensibly to be able to resolve these issues it required expert accountancy evidence, which it did not have.

236. I also accept Joan and Mo's submission that on the documentary evidence before the court, it appears that Commodore UAE was able to borrow if necessary to meet its liabilities, as between September 2016 and August 2017 it was by no means fully utilising its existing credit limits with the Bank itself. Out of a total approved limit of

AED 168.5m, only AED 95m had been used of which AED 16.4m was direct borrowing against direct borrowing limits of AED 67.9m. That is apparent from the Bank's internal documentary review of Commodore's facilities dated 6 February 2017 at p. 6.

237. Mr Al-Khoumassi's evidence on behalf of the Bank to the Canadian court was that by 8 August 2017 – being some 3 months after Ahmad fell out with Sheikh Tahnoon – Commodore UAE and Tadamun were still below their approved borrowing limits, and this was also confirmed by Mr Lilani[69]. That evidence is consistent with an internal Bank memorandum of 8 August 2017 (in which it was noted that Ahmad was in the process of selling Commodore UAE to Sheikh Tahnoon) which also showed that the amounts owed by Commodore UAE and Tadamun to the Bank were below the approved limits. Mr Lilani accepted in cross-examination that the Bank did not appear at this stage to be considering a claim against Ahmad on his personal guarantees[70], nor did it prepare such a memorandum to indicate "*red flags*" in the account (which was the Bank's practice) before this date.[71]

238. Moreover, as at 2 August 2017, the Bank chose to maintain Commodore UAE's internal credit rating at BBB and its account classification as "01 Standard" or "Normal". It follows that as late as August 2017 the Bank does not appear to have had concerns about Commodore UAE's financial position.

239. In particular, I consider it to be highly significant that an internal Bank Project Status Report for the Commodore group and Tadamun dated 24 February 2018 which was sent to the Bank's Executive Board (which is referred to in more detail below), states that:

> "*Financed projects were progressing satisfactorily till Mr Ahmed El Husseini left the country. Majority of the financed projects were in advanced stages of completion and the Project Liabilities had substantially reduced as compared to the limits granted at the time of original sanction.*"

240. Indeed, it was only on 28 March 2018, long after the takeover of Commodore UAE by Sheikh Tahnoon and following the collapse of restructuring talks with the Bank, that an internal Bank memorandum recommended to the CRMD that the Commodore UAE and Tadamun accounts be downgraded from "Normal" to "Substandard" and sought Management's feedback "*on whether to proceed with a Legal case against both companies and Mr Ahmad El Husseini being the beneficial owner (provider of the Personal Guarantee)*". Mr Lilani accepted that this was the first time the Bank's credit management team had proposed to sue Ahmad on his personal guarantees[72].

241. On 22 April 2018, the Bank's management duly gave its approval to downgrade the account classifications for Tadamun and Commodore UAE from "standard" to "sub-standard".

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[69] Day 3/57/line1 – Day 3/58/line 3.

[70] Day 3/111

[71] Day 3/113

[72] Day 3/126.

242. Mr. Venkatesan also had persuasive answers to further detailed arguments of the Bank concerning supposed liquidity issues[73] but since I do not consider that it is open to the Bank to run this detailed liquidity case not having pleaded it, and in view of my findings of fact concerning alleged liquidity issues which I have already set out above and which do not suggest any serious liquidity concerns concerning Commodore UAE on the part of the Bank itself, I do not add to the length of this judgment by dealing with all of them here.

Summary of my findings of fact concerning Commodore UAE and Tadamun's overall financial position between 2016-2018

243. In summary concerning Commodore UAE and Tadamun's overall financial position between 2016-2018:

(1) Commodore UAE was not balance sheet insolvent in 2016 or 2017, nor did it have serious liquidity issues which could not be overcome at that time. Indeed, as late as August 2017 it had sufficient borrowing limits available to it to address any liquidity issues; and

(2) The Bank was unconcerned by any liquidity issues which Commodore UAE had, at least up to August 2017 and probably until March 2018 (project funds were released to Commodore UAE up to the last quarter of 2017); and

(3) Ahmad accordingly had no reason to believe and there is no evidence to support a case that he did believe that Commodore UAE was balance sheet insolvent or that it had serious liquidity issues at least up to August 2017 and probably until March 2018.

244. As explained above, an inference must be drawn from and be consistent with all the relevant proved and admitted facts. In light of these findings of fact, there is no reasonable basis in the evidence to draw an inference that Ahmad (i) refused to give evidence at this trial and/or (ii) refused to give disclosure of Commodore UAE's financial documents and/or (iii) was transferring his assets to family members because he knew in 2016 or 2017 that Commodore UAE was balance sheet insolvent or suffering from serious illiquidity which could not be overcome, and that he consequently feared a claim by the Bank upon his personal guarantees. Such an inference would, I find, be wholly inconsistent with the relevant proved facts in this case concerning Commodore UAE's financial health at the time, by reference to the following contemporaneous documents in particular:

(i) The contents of the Bank Project Status Report for the Commodore group and Tadamun dated 24 February 2018;

(ii) The content of Commodore's contemporaneous financial documents discussed above (the Deloitte Report and the 2016 in-house financials);

[73] Day 12/p. 156ff.

(iii) The fact of the upgrading by the Bank in mid-March 2017 of Commodore UAE's credit rating from BB to BBB, with its account only being downgraded to substandard in March 2018;

(iv) The fact of the Bank's continued lending to Commodore UAE and its rolling over of Commodore UAE's debt late into 2017.

245. These proven facts demonstrate that Commodore UAE was not insolvent and liquidity was not an issue of concern to the Bank, and accordingly Ahmad had no reason to fear a call on his guarantees. The inference which the Bank invites the court to draw simply cannot be drawn on the evidence, even had the Bank properly pleaded its case in these respects.

246. In consequence, so far as Tadamun is concerned, which was around twenty times smaller than Commodore UAE with 2015 revenues of just AED 14.5m compared to Commodore UAE's AED 298m, I find as a fact that Ahmad would not have feared and did not fear a claim on his Tadamun Guarantee in late 2016 or 2017 by reason of the fact that Tadamun benefited from Commodore UAE's sound financial position. Indeed, as Mr. Venkatesan rightly pointed out, Ahmad could have returned Tadamun to a position of positive net assets by injecting capital of AED 19.22m (US$5m).

The relevant factual events from 2016 onwards

247. Against the background of this fundamentally important analysis of Commodore UAE's (and Tadamun's) financial health between 2016-2018 which I find would have been known to Ahmad, I now return to the chronological narrative from 2016 onwards.

248. On 1 January 2016, Ahmad became the sole shareholder of the 9 shares in Marquee.

249. On 2 April 2016, Ahmad and Joan met with Ms Zweifel in Abu Dhabi. There was again some discussion of "*proposed changes in UK tax law regarding residential properties*" (concerning non-dom status). 9HP was under renovation, while 18HP was uninhabitable. Ms Zweifel thought that the ownership structure might need to be reorganised once the tax changes were confirmed. As appears to have been customary at these meetings, there was no discussion (or at least none recorded) about Commodore UAE's or Ahmad's financial position.

250. On 25 April 2016, a Declaration of Trust was executed whereby Norton BVI (taking over from Sebastian's Company Ltd, as had been discussed at the meeting on 2 April 2016) held the 9 shares in Marquee on trust for Ahmad as beneficial owner.

251. As at 15 September 2016, another internal Bank document shows that Commodore UAE's total liabilities had reduced to AED 95.4 million.

252. It was around this time that Ahmad began transferring some of his assets. But, importantly, at this time, as I have explained, there were no apparent concerns about Commodore UAE's financial position. This undermines any suggested inference that Ahmad was doing this because he saw a claim from the Bank on his personal guarantees coming down the line.

253. On 21 September 2016, Mr Huseyin Ozcan, an employee at Federal, sent an email to Mr Arun Aggarwall ("**Mr Aggarwall**"), being Ahmad's long-standing accountant. The email addressed two matters: (1) Ahmad had decided to transfer the shareholding in Commodore Netherlands from Commodore Turkey, which was in turn owned by Commodore Offshore Lebanon, to Global Green (D8); and (2) to transfer the shares of four UK-based companies held by Commodore Lebanon, including Global Green, to Medstar (such that Medstar would ultimately own the shares in Commodore Netherlands). In relation to Commodore Netherlands, Mr Ozcan explained that the proposed plan was to "*cancel Turkish entity and transfer ownership to [Global Green]*", noting that the "*book value of [ie. Commodore Netherlands] is €735,000*".

254. On 30 September 2016, the Bassinko Contract (total value of €108 million) was entered into between Burkina Faso and Commodore Belgium: the Commodore group appeared to be thriving.

255. Minutes of a meeting of the board of Global Green on 6 October 2016, signed by Ahmad, record that the meeting was attended by Ahmad alone. It evidences a resolution that all the shares of Global Green held by Commodore Lebanon should be transferred to Medstar.

256. Further correspondence followed between Mr Ozcan and Mr Aggarwall, including a call on 15 November 2016. Following that telephone conversation, Mr Aggarwall asked some questions of Mr. Ozcan by email dated 18 November 2016, one of which was "*how will the consideration of the shares [in Commodore Netherlands] be satisfied by the UK Company [Global Green]. Accordingly to the email from the accountants in Holland the company is valued at 3.10 million euros*[74]*. Will the consideration remain outstanding? But as the Turkish Company is being liquidated will this not cause a problem?*" Mr Ozcan's response in his email of 20 November 2016 was: "*Yes, consideration will remain outstanding, we shall draft an agreement to satisfy payments over certain amount of years on instalments.*" Despite the accountants having valued Commodore Netherlands at €3.10m, in response to a question from Mr Aggarwal in a further email dated 23 November 2016 about possible "*taxes payable in Turkey on the transfer of the shares in the Turkish Company*", Mr Ozcan replied that "*since this is inter-group restructuring exercise and both current & future owners belongs to same group, we have decided to set share transfer price as it is original price of €735,000 in this scenario Turkish entity will transfer shares at same price it bought thus creates no gain.*" This appears, however, to have been done to reduce the tax which might be payable on the transfer.

32HP

257. On 18 November 2016, Mr Aggarwall sent an email to Ahmad enclosing a draft letter of instruction for the gift of 32HP to Ramzy. This is the first clear documentary reference to 32HP being earmarked for Ramzy by way of a gift. This documentary reference is important because it clearly suggests that Ahmad had decided by 18 November 2016 at the latest that he wished to transfer 32HP to Ramzy as a gift, albeit that it was not in fact transferred to Ramzy until May/June 2017.

[74] Compared to the book value of *€735,000*.

258. Mr Aggarwall noted that "*there will be capital gains tax to pay on the increased value of property between 6th April 2015 to the date the gift. But you were doubtful if there was any increase at all. But I need to get some valuations. I will get informal valuations rather than fully detailed ones.*" Again, the concern is tax related. There is no suggestion at this time of Ahmad having any concerns about the solvency of Commodore UAE and, as I have already stated, I do not consider there to be any reliable evidence that at this time Commodore UAE *was* in financial trouble. This fact renders it most unlikely that the subsequent transfer of 32HP to Ramzy was carried out in order to put this asset beyond the reach of the Bank in respect of an anticipated claim under Ahmad's personal guarantee, whether that be under the Commodore Guarantee or the Tadamun Guarantee.

259. In paragraph 65 of his Re-Re-Re-Amended Defence, Ramzy pleads that the transfer to him of 32HP by Ahmad was "*for the purpose of giving him a gift on the occasion of his engagement and upcoming wedding*". And in paragraph 65.2 Ramzy pleads that "[*t]he transfer of 32HP on 12 May 2017 was a gift to Ramzy from Ahmad shortly after Ramzy's engagement on 8 March 2017. The purpose of the gift was to mark and celebrate Ramzy's engagement and upcoming marriage."*

260. In paragraph 31 of his fifth witness statement, Ramzy stated that "*it was always known to me that 9 Hyde Park Gardens Mews had been earmarked for Ziad's future in London, and 32 Hyde Park Gardens Mews had been earmarked for my future in London*."

261. Ramzy said that the reason that Ahmad transferred 32HP to him when he did was to seek to avoid inheritance tax, because Ahmad was 66 years old, had held a stressful job and was a lifelong smoker: "*[B]y early 2017 it had already been left precariously late to transfer the property from my father to myself and prevent inheritance tax becoming due in the event of his passing. This was the reason for the transfer."* Inheritance tax would be avoided if the property had been transferred by the donor (Ahmad) at least 7 years before his death.

262. Ramzy did, however, add in paragraph 35 of his witness statement, that:

> "*The property was transferred to me in June 2017*[75]*, I had recently become engaged and would be married in April 2018. This was an <u>additional</u> reason for the timing of the transfer*." (emphasis added)

263. In Mr. Tim Penny KC's skilful cross-examination (Mr. Penny KC led Mr. Marc Delehanty and Mr. Frederick Wilmot-Smith as counsel for the Bank), Ramzy accepted that he did not become engaged until 8 March 2017, which is over four months after the draft letter of instruction had been prepared on 18 November 2016. But it is also to be noted that he stated that his engagement was an *additional* reason for the timing of the transfer, which prompted Ahmad to effect it when he did.

264. Ramzy also said for the first time in cross-examination that he and Ahmad had discussed his engagement plans in advance, that Ahmad helped him with obtaining an

[75] It was in fact transferred in May 2017.

engagement ring, and they had a conversation about the transfer of 32HP as an engagement gift[76]:

> *39:11 Q. Just in terms of timeline, 18 November 2016, that was*
> *12 about four months before you got engaged to be married.*
> *13 That's right, isn't it?*
> *14 A. Yes, that's right.*
> *15 Q. So the first steps taken by your father to transfer --*
> *16 to gift 32 Hyde Park to you were taken without knowing*
> *17 that you were going to get married.*
> *18 A. No, that's not true. It took me about six months to*
> *19 organise the engagement alone and my father helped me*
> *20 with the ring and he knew that I was planning to engage*
> *21 long before I proposed.*
> *22 Q. Well, you don't say that in your evidence. Why*
> *23 don't you say that in your evidence?*
> *24 A. I mean, it seems like a very peripheral point.*
> *25 Q. But you know that one of the issues, the central issue*
> *40: 1 in this case is your father's purpose in transferring 32*
> *2 Hyde Park to you, you know that, don't you?*
> *3 A. Yes, yes, I know that.*
> *4 Q. And one of the points you make is that his purpose, or*
> *5 one of his purposes, that he wanted to gift the property*
> *6 to you because you were engaged to be married, and what*
> *7 I'm putting to you here is that he had the purpose of*
> *8 gifting 32 Hyde Park to you long before you got engaged,*
> *9 because you got engaged on 8 March 2017, didn't you?*
> *10 A. I mean, four months is -- you say long before; that's*
> *11 a bit slanted perhaps, my Lord.*
> *12 Q. And you didn't allege in your -- you didn't say in your*
> *13 evidence, which is the forum for setting out your case,*

[76] Day 8/39-43.

14 that you had been liaising with your father for six
15 months before, I think was your evidence just now, in
16 a lead up to your engagement, so he didn't know that you
17 were going to get engaged at this stage, did he?
18 A. I think he knew that I was going to get engaged at least
19 six months before. He might have known from April 2016
20 when I decided to do it, or any time thereafter.
21 Q. He might have known, did you say?
22 A. Or any time thereafter. Certainly not before that. But
23 yes, any time from then.
24 Q. Well, I suggest that's not the case. If there's no
25 record at all of that prior to your engagement, that's
41: 1 unlikely to be the case, isn't it?
2 A. I don't think it would be likely that there were such
3 a record. I don't think it's likely, no.

265. I accept this evidence. Ahmad had decided in November 2016 to transfer 32HP to Ramzy, at a time when there is no evidence to support any suggestion that he knew that Commodore UAE was in financial trouble (or that it was in fact in financial trouble). The fact that Ramzy only got engaged to be married 4 months later is not inconsistent with the suggestion that an *additional* reason for the transfer, as well as it being for IHT purposes, was to celebrate Ramzy's engagement.

266. On 14 February 2017, Joan sent an email to a valuer requesting a valuation of 32HP for 2015 and 2017, "[*t]he reason being that we wish to gift our son this property*", the son being Ramzy; and on 12 May 2017, Ahmad duly transferred 32HP to Ramzy as a gift, for no consideration.

267. In the circumstances I find as a fact that the transfer of 32HP to Ramzy was a gift and that the transfer was not made for the Alleged Purpose.

Impending tax changes of 6 April 2017

268. Meanwhile, pursuant to a further request from Kendris on 16 November 2016, Mr Knight sent Ms Zweifel by email dated 23 November 2016 "*an overview of the position for [Marquee] in relation to the current UK tax position and the proposed changes to the treatment of UK residential property for inheritance tax purposes scheduled to come into effect on 6 April 2017.*" Again, Ahmad's concerns at this stage are clearly tax and, in particular, IHT related.

269. In his email Mr. Knight considered the current position at that time and the implications of the proposed tax changes, advising in particular that "*Assuming [the Marquee shares] are left to his wife then it is believed that something called the 'spouse*

exemption' will apply and that IHT will only be payable on her subsequent death." Mr Knight then also went on to consider several restructuring options. Option 3a was to gift the properties (9HP and 18HP) to the children; option 3b was to gift the properties into a trust for the children. Under the heading "*Gift of Real Estate to Next Generation*", he stated that transferring ownership of properties into a trust "*might be considered appropriate for estate planning or asset protection purposes.*" Whilst Mr. Knight uses the generalised terms "estate planning" and "asset protection", clearly, what is being considered here is a gift of the Marquee shares to the next generation – that is, Ahmad's sons. It accordingly appears from this email that in November 2016 (when Commodore UAE was in good financial health) Ahmad was at least considering as one possibility transferring the shares in Marquee to Joan, and gifting 9HP and 18HP to Ahmad's sons. This again makes it less likely that when he subsequently did so, Ahmad was seeking to move these assets beyond the reach of the Bank, anticipating a claim on his personal guarantees.

270. In his witness statement, Mr Knight's explanation was that "asset protection" is "*a common term used in relation to offshore trusts and can mean any number of things in addition to avoidable tax liabilities. For example, protection from forced heirship rules, sharia law or divorce. In this regard, "estate planning" and "asset protection" are used interchangeably sometimes*", but "asset protection" "*could also mean protection from third parties who may have a future claim against them in relation to an issue with that particular property or an unrelated matter*". However, Mr. Knight stated, and I accept, that there was nothing specific that he was made aware of by Kendris and the advice which he gave was not to do with anything like that. Whilst he did not give a great deal of thought to it, in addition to avoiding an unnecessary tax bill, he said he probably had the potential divorce of either the beneficial owner or his children in mind. That would certainly make sense in the case of Ahmad and Joan, who had been planning to divorce in 2008 and by this stage it appears had a difficult relationship. He further stated that when he was told on 20 February 2017 by Mr. Collazo that Ahmad wanted to transfer the shares in Marquee to Joan immediately for "asset protection purposes" that he did not really think about this; as far as he was concerned the only sort of asset protection for the purposes of his advice was to do with the changes to the IHT rules. He was advising as to how to make the structure Inheritance Tax efficient.

271. Mr. Knight was not cross-examined on his evidence and I accept it. The phrase "asset protection purposes" does not have a single, well understood meaning. Whilst, as Mr. Knight accepted, it *can* mean "protection from third parties who may have a claim against the transferor", it can also mean other things too. Ms Zweifel's evidence[77] was that, in this context, "*asset protection" can mean reducing taxes, organising overseas assets in a different way for estate and succession planning. But it's not necessarily third party claims.*" Kendris and Mr. Knight were advising Ahmad on the most tax efficient structure for his assets in the context of his instructions. The fact that Ahmad stated that he wanted to transfer assets to Joan for "asset protection purposes", particularly in view of the fact that Kendris (and indeed the Bank) clearly believed him to be a very wealthy individual, would not in my judgment have led Kendris/Virtue to believe that Ahmad's purpose in restructuring his assets was a nefarious one, namely to put his assets beyond the reach of his creditor, the Bank.

[77] Day 5/85/line 13.

272. Indeed, there is no evidence that Kendris/Virtue had any reason to believe that Ahmad had any financial difficulties. Furthermore, as explained in paragraph 172 above, Ms Zweifel and Mr. Escher would no doubt have been aware throughout the course of the relevant events that a central concern of Ahmad's which required his assets to be protected was his vulnerability to a claim by Sheikh Tahnoon as 51% shareholder in Commodore UAE.

273. On 24 November 2016, pursuant to the resolution referred to in paragraph 255 above, Commodore Lebanon transferred all 100 shares in Global Green (to which Ahmad had transferred the valuable shares in Commodore Netherlands) to Medstar.

274. On 25 November 2016 Ahmad, Joan, Mr Escher, and Ms Zweifel had a lunch meeting at the Yas Beach Club in Abu Dhabi ("**the Yas Beach Club meeting**"). There was still clearly some concern about the impending UK tax changes coming into effect from 6 April 2017 that would have subjected 9HP and 18HP to inheritance tax. Kendris wanted to ascertain Ahmad's and Joan's intentions regarding those properties "*to prepare a proposal for restructuring and to make sure that restructuring can be completed before April 2017 to avoid any unnecessary tax exposure.*" Again, the concern in respect of the intended gifting of the two Marquee properties is tax/IHT related.

275. Ahmad informed Ms Zweifel and Mr Escher that he did not intend to sell the properties: "*9 Hyde Park Garden Mews shall be used by [Ahmad and Joan] during their stay in London. 18 Hyde Park Square shall be rented once renovated.*" Ahmad wished to "*gift 9 Hyde Park Garden Mews to his son Ziad[78]. Joan shall however have the right of beneficial use during her lifetime (usufruct). In regard to 18 Hyde Park Square it was discussed to contribute the property to an irrevocable discretionary trust with Ramzy and Ziad as beneficiaries[79]. The use of a trust might be considered appropriate for estate planning purpose as long as Ahmed and Joan are excluded beneficiaries from the trust. Revert to David Knight's email of 23 November 2016.*"

276. The issue of Cardena and the Ibiza property, Cansol (held by Cardena since 2009), was also discussed. The decision made was that "*The property or shares in [Cardena] shall be transferred to Joan … We have been asked to provide a tax opinion in regard to the current situation and in case of a transfer of shares or real estate to Joan.*"

277. I accordingly find that the concerns relating to the proposed transfers of 9HP, 18HP and Cardena which were discussed at this meeting all related to tax/estate planning, and that is what Ms Zweifel and Mr. Escher would have understood. At no stage in 2016 did Ahmad mention any concern regarding any claim being brought against him by the Bank on his personal guarantees.

278. On 12 December 2016, Ms Zweifel sent an email to Mr Fabio Meier ("**Mr Meier**"), another Kendris employee, saying "*I must have received 10 WhatsApps from Joan El Husseiny about Ibiza. She told us to start the process.*" This suggests that Joan was very keen for the process of transferring the shares/property in Cardena to begin straight away, although none of these WhatsApp messages were disclosed, having

[78] Mr. Knight's option 3a.

[79] Mr. Knight's option 3b.

(understandably) been deleted. Ms Zweifel's evidence was that, again understandably, she could not remember what the messages said.

Ahmad's increased urgency in 2017 and his initial intention concerning the transfer of Marquee shares/9HP/18HP

279. Moving into 2017, on 9 January 2017 Ms Zweifel emailed Mr Meier, stating that "*Ahmed El Husseiny called. He wants to transfer the shares in Marquee Holdings Limited to his wife Joan as soon as possible, or else gift them to her. In my opinion, there's nothing standing in the way of this, and it shouldn't trigger stamp duty in the UK. But David Knight will have to confirm this tomorrow. Joan is also not a UK resident. … According to Ahmed, the pressure is on* (alternatively translated as "fast, urgent, or pressing" or "it's urgent"). *It's long been an issue that his wife is the beneficiary of the properties, but he's never wanted to do anything about it until today*". Ms Zweifel was correct about that. Ahmad had always wanted to transfer the shares in Marquee to Joan, but with a view to his sons ultimately acquiring the two properties, 9HP and 18HP.

280. But again, Ms Zweifel is considering the proposed transfer in the context of tax planning. It does not appear that Ahmad told her why the transfer to his wife was now urgent other than it appears that he may have made the generalised statement to Ms Zweifel that it was urgent for "asset protection purposes", as the email exchange which took place on 20 February 2017 between Mr. Collazo, Ms Zweifel and Mr. Knight (referred to below) refers to the reason for Ahmad wanting the transfer of the Marquee shares "*to be done immediately*" being "*for asset protection purposes*".

281. Later that day, Mr Meier replied asking whether "*the shares will then continue to be held by Norton?*" The next day, Ms Zweifel confirmed that they would be "*keeping Norton as a nominee shareholder*".

282. Ms Zweifel accepted, under cross-examination by Mr. Penny KC, that the proposed urgent transfer of the Marquee shares to Joan was not as a result of her advising him that it was necessary to do this for tax purposes[80]. She had advised Ahmad and Joan that the deadline for the proposed tax changes was 5 April 2017 and that the spouse exemption from inheritance tax would apply in the event of Ahmad's death. She agreed that "*it was maybe not an advantage from a tax point of view*"[81].

283. The following exchange then took place with the court:

> *82:20 MR JUSTICE CALVER: Well, the question is that in*
>
> *21 circumstances where -- you can take it in stages.*
>
> *22 You didn't advise Ahmad, did you, that he should*
>
> *23 transfer the beneficial interest in the shares to Joan*
>
> *24 for tax purposes?*

[80] Day 5/82, 83.

[81] Day 5/83.

25 A. I did not advise, no. It was the decision he made.

83: 1 MR JUSTICE CALVER: And so if he's telling you we need to
2 urgently transfer the beneficial interest in the shares
3 to Joan, looking at the position now, what Mr Penny is
4 putting to you is that that would have raised concerns
5 in your mind as to why he was doing that.
6 A. Yes, I understand now. I just cannot -- you know,
7 I don't see the explanation. I might have asked and --
8 but I don't see any explanation why he did that -- why
9 he wanted to do that. I mean, it was always
10 a discussion that he wants that his wife Joan is
11 benefiting from the property. So therefore -- I mean,
12 it was maybe not an advantage from a tax point of view
13 if you look at it, but it can also be that Joan can
14 settle a trust. But it didn't ring any alarm bells. It
15 would not ring any alarm bells.
16 MR JUSTICE CALVER: But at this time you were discussing
17 with him inheritance tax issues?
18 A. Yes.
19 MR JUSTICE CALVER: And so if he's then saying you need to
20 do this urgently and it's not for an inheritance tax
21 purpose, surely you would be saying to him, "Hang on
22 a minute, this isn't a very good idea, why do you want
23 to transfer the shares to Joan so urgently?"
24 A. Yes, I assume I asked him and I assume I also argued,
25 but I just cannot confirm because I don't remember.

84: 1 MR PENNY: So you assume -- is it your recollection that you
2 asked him and argued with him about this instruction or
3 not?
4 A. No.
5 Q. You don't have that recollection?
6 A. It is not my recollection now…

284. Ms Zweifel maintained that the transaction was not suspicious and did not raise any red flags or ring any alarm bells for her[82].

285. When pressed further that the circumstances of the instructions from Ahmad made it "*obviously suspicious*" and warranted more scrutiny, Ms Zweifel said that "*I might have asked the further questions, but I cannot recall the outcome*"[83]. She said that "*I assume I asked him and I assume I also argued, but I just cannot confirm because I don't remember*" and "*I cannot exactly remember what I discussed with Ahmad over the phone. I just see what I wrote in the email. That might have been that I asked and discussed. I would think so. But I can just not say what it was or what the background of this transaction was and what -- what the reason behind this gift was.*"[84] There was then the following exchange between Ms Zweifel and Mr. Penny KC[85]:

> "*Q – Let's -- assuming Ahmad rang you now, tomorrow -- yesterday, let's say. He rings you yesterday and he gives you the same instruction. "I want you to urgently transfer beneficial interest in my shares to my wife for asset protection purposes". Do you agree that you would need to ask him why he was intending to transfer those shares?*
>
> *A – Yes. I mean, I would ask and, as I said, I thought -- I'm just not sure whether -- about the details -- about the background related to my telephone call I had back in January 2017.*"

286. I find that Ms Zweifel, whom I consider to have been an honest witness, was telling the truth about this. There is no suggestion in any of the contemporaneous disclosed documents that Ahmad ever told her or Mr. Escher what "asset protection reasons" he had in mind and nor is there any suggestion that either of them believed that Ahmad or Commodore UAE had financial problems, or that Ahmad was in any way concerned about potential claims being brought against Commodore UAE or himself by the Bank.

287. Mr Escher's evidence was: '*I hear asset protection all over our industry… it's a general phrase that has multiple possible uses.*'[86] Mr. Knight's unchallenged evidence in paragraph 16 of his first witness statement was that:

> "*it is a common term used in relation to offshore trusts and can mean any number of things in addition to avoidable tax liabilities. For example, protection from forced heirship rules, sharia law or divorce. In this regard, the terms 'estate planning' and 'asset protection' are used interchangeable sometimes*".

[82] Day 5/81, 83.

[83] Day 5/82.

[84] Day 5/83, 87.

[85] Day 5/87-88.

[86] Day 4/106:5-9.

288. It has already been seen that as early as 2012 one of Ahmad's central concerns was recorded by Kendris as follows: '*Asset protection is important due to the fact that 51% of Commodore Contracting Abu Dhabi is owned by a local*'[87].

289. Consistently with this, the Bank's own recent draft amendments of its PoC, for which permission to amend was refused, asserted that Ahmad's relationship with Sheikh Tahnoon broke down in 2016[88] and that:

> "*at the beginning of 2017, Ahmad and Sheikh Tahnoon were engaged in discussions about the future of their business relationship (including the ownership of Commodore UAE)*"[89]
>
> and
>
> "*… by at the latest the beginning of 2017, Alexander and Ziad had become concerned that Mr. Ozcan[90] was not acting in Ahmad's interests in relation to the Commodore Netherlands business, and that generally he was courting Sheikh Tahnoon's favour. It is to be inferred that they shared these concerns with Ahmad, Mohammed and Ramzy before the date on which the shares in [Global Green] were transferred to the sons.*"

The Bank accordingly alleged that *from late 2016* Ahmad was concerned that Shiekh Tahnoon might procure that Federal bring claims against Ahmad and/or might use his shareholding in Commodore UAE and/or Tadamun and/or use his political influence in the UAE to take action vis-à-vis those companies which would expose Ahmad to claims under his guarantees or encourage others to bring claims against Ahmad.[91]

290. Based upon the documentary and witness evidence, I consider the most likely "asset protection" concerns of Ahmad's in February 2017 to have been (i) a concern to protect the asset from tax demands and/or (ii) a concern to protect his assets from a claim from Sheikh Tahnoon or third parties at Shiekh Tahnoon's behest.

291. There was also a third, related asset protection concern of Ahmad's which arose out of Ahmad's fears of political interference in his business interests in the UAE (whether through Sheikh Tahnoon or more generally), which appear to have begun in early 2017, being around the time when he went to the Bank's Beirut branch for his personal loan.[92] It can be seen from a Kendris file note that he told Kendris in March 2017 that he preferred to bank in Beirut rather than Abu Dhabi for '*asset protection purposes*'[93], and as has been seen, he subsequently transferred his personal loan not only to a Beirut branch but to a Lebanese bank (FNB). Mr Escher explained in cross-examination that

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[87] Kendris File Note of December 2012.

[88] Paragraph 45D.

[89] Paragraph 45E.

[90] Part of Commodore's management, apparently loyal to Sheikh Tahnoon.

[91] See paragraph 126 of the judgment of Bryan J, referring to paragraphs 45A.4 and 45H of the Bank's draft.

[92] Ahmad 1 at [47]-[48].

[93] This is the third time that Ahmad makes specific reference to the precise nature of an asset protection concern.

Ahmad's preference for banking in Beirut was because he did business in a number of countries (such as Iran and Qatar) which at that time had unfriendly relations with the UAE[94]. This may have been a, or the, reason why Ahmad preferred to take on the additional US$6m personal exposure in his home country, which I shall turn to next.

The personal loan: January 2017

292. At this juncture I accordingly pause in the narrative to discuss the Bank's personal loan to Ahmad of January 2017 which formed a key plank in the Bank's case against the Defendants.

293. At the time when Ahmad was instructing the transfer of the Marquee shares to Joan, on 18 January 2017 he applied for a *personal* loan of US$6 million to the Beirut branch of the Bank in Lebanon (the "**Personal Loan**"). According to Mr Lilani's evidence, he spoke to Ms Aya Hamieh, the former head of the Bank's Credit Department in Lebanon who dealt with the Personal Loan, and she informed him that "*Ahmad made a very urgent request to purchase steel, shipment charges and insurance, etc. as prices could go up in the future*".

294. Consistently with Mr. Lilani's evidence, the Bank's Loan Record records that Ahmad's reason for requesting this loan was because he "*purchased steel ahead of time, because it is expected that the price of steel will soon rise, and he has commenced in Abu Dhabi with the production process. (He is working ahead of time). So the funds requested are to be used for shipment, insurance, and clearing charges. (Since the produced products must be shipped to the Netherlands and then to Niger.)*" He requested the loan for a year, but the Bank was told that he "*is sure that he will settle ahead of time upon receiving the payments from Niger via the Ministry of Finance via ING Bank NV*."

295. The Bank's Loan Record at the time suggests that Commodore UAE had a turnover of US$200 million, profit of US$20 million, and that Ahmad's net worth was US$250 million. The Record stated that Ahmad was "*a high net worth individual who has been banking with us for almost 40 years*." Further, Ahmad himself informed the Bank that he was "*building 3 major hospitals in Niger*" with total contract values of €288 million, and all the projects "*are funded by the EU; mainly by Belgium and Holland*", so he was executing these works via Commodore Netherlands. The Bank accordingly appears to have been comfortable in making the personal loan to Ahmad.

296. The Loan Record included a proposed covenant that "*the facility mentioned above is utilized for the declared purpose. Otherwise, the borrower's liabilities towards the Bank shall become immediately due and payable.*" It also states that "*Upon loan granting, client will transfer the full amount to the account of [Commodore UAE] at [Invest Bank] Abu Dhabi … Client will provide us with all related receipts and transfers*".

297. The transfer requests were approved by Ms Rifai and Mr. Al-Khoumassi. Neither of those witnesses were called by the Bank, and nor was Mr. Farhat who signed the contract for the personal loan on behalf of the Bank. Mr. Delehanty suggested that the reason that the personal loan was obtained from the Bank's Beirut branch was because of Commodore UAE's "liquidity crunch" and its consequent inability to borrow from the Abu Dhabi branch. He also suggested that if Ahmad sought the loan from the other

[94] Day 4/109:3-12.

banks who were financing the relevant projects it might have caused them to call in their loans, leading to Commodore UAE's collapse - see paragraph 118 of the Bank's closing submissions.

298. I consider this to be unsupported speculation on the part of the Bank. As Mr. Venkatesan pointed out there are other equally plausible reasons why Ahmad might have gone to the Beirut branch, namely his friendship with Mr. Farhat; because he was politically exposed in Abu Dhabi (because of his business dealings in Iran and Qatar) and so Beirut was a safer place for him to obtain the loan; or simply because the security he was offering for the loan was a valuable property known as 3486 Ras Beirut (the "**Ras Beirut Property**") and it was easier to offer that security to the Beirut branch rather than the Abu Dhabi one.[95]

299. The Ras Beirut Property was valued at roughly US$12.5 million and so the Bank was fully secured for its loan of US$6m. In addition, Commodore UAE agreed to provide a guarantee of up to US$7.2 million, and Commodore Belgium was to assign the receivables and revenues of two of its infrastructure projects, the Tahoua Hospital Project and the Burkina Faso Hospital Project. The Bank appears to have had no concern about these receivables being impaired in any respect.

300. The relevant loan contract was executed on 19 January 2017 and was signed by Ahmad and Mr Farhat from the Bank.

301. On 21 January 2017 the pledge over the Ras Beirut Property was registered in favour of the Bank.

302. On 22 January 2017 US$6 million was drawn down from Ahmad's Personal Loan and duly paid into Commodore UAE's account with the Abu Dhabi branch of the Bank. However, between 23 January 2017 (the very next day) and 31 January 2017, on Ahmad's instructions, the US$6 million was transferred into various Commodore group bank accounts, Ahmad's personal bank accounts, and one of Joan's personal bank accounts. The documents show that while the Personal Loan was expressed to be for "*shipment, insurance, and clearing charges*" for projects of Commodore Netherlands and Commodore Belgium, it was in fact predominantly used to pay staff salaries and other expenses at several companies associated with Ahmad, including Commodore UAE, Commodore Services and Catering, Federal, Commodore Aluminium, and Commodore Consult. For example, AED 1 million was used to pay a company called Overseas Gulf, which had completed work for Commodore Aluminium and was owed payment, and AED 2.88 million was paid to Commodore Aluminium itself to pay staff salaries. Part of the Personal Loan was also used to discharge Commodore UAE's loan of AED 1.1 million on 5 October 2016, with most of the remainder transferred to Commodore UAE to pay staff salaries.

303. The Bank submits that this evidence suggests that Commodore UAE could not meet those liabilities from its own funds, its facilities with various banks, or through further borrowing of its own, and since there is no suggestion that the Commodore group's financial circumstances changed to any material extent during the five days between 18

[95] Day 13/p. 4.

January 2017 and 22 January 2017, the Bank asserts that the reason given by Ahmad to the Bank for the need for the urgent Personal Loan was a lie.

304. I do not accept the Bank's submission. In particular, it appears that the Bank knew of and consented to the change of use of the 2017 Personal Loan (in particular that it was being used to pay staff salaries). By way of illustration of this point, the Bank Payment Transfer Forms in January 2017 refer to the payments being made for "*staff salary*", as do the Funds Transfer Requests (being approved by Mr. Al-Khoumassi and Ms. Al Rifai). Furthermore, in one of the Bank's internal documents, being a Memorandum to the Executive Committee Board dated 24 February 2018, Ms Al-Rifai and Mr. Fernandes of the Bank noted that: "*Proceeds of this BTL were transferred to the account of M/S. Commodore Contracting Co. LLC to settle the group liabilities and improve its liquidity position (staff salaries, project payments etc.)*".

305. The Bank did not appear to be alarmed or even troubled in any way by this; there is no suggestion that this indicated that Commodore UAE was in financial trouble; nor is there any concern expressed that the loan was obtained from the Beirut branch. Mo suggested in cross examination that the change in the use of the funds by Ahmad may have been because Ahmad used money set aside for salaries to pay for the steel (because it was urgent) and then used the loan for the salaries. That too is speculation. The truth of the matter is that it is unknown why Ahmad did this, apparently with the Bank's approval or, if not approval, without the Bank ever objecting to the same. But the fact that the Bank appeared untroubled by it does not suggest that the Bank was concerned about Commodore UAE's financial position, and the evidence strongly suggests that Commodore UAE was *not* in financial trouble at the time.

306. There is also, in my judgment, some strength in Joan and Mo's contention that had Ahmad been devising an asset dissipation scheme at this time, it is unlikely that he would have offered up unencumbered property worth US$12.5m (Ras Beirut) by way of security for a loan for his business of $6 million: a debtor seeking to hide his assets from creditors would be unlikely at the same time to choose to mortgage other unencumbered assets. Further, Commodore UAE had significant amounts of unused credit facilities with the Bank (leaving aside other banks), which also lends weight to the suggestion that it would not have had too much difficulty in borrowing the necessary sums. Once again, if the Bank wished to submit to the contrary, it should have adduced expert accountancy evidence in support of such a submission.

307. The Bank submits that further support for its conclusion that Ahmad's taking out the personal loan suggests that Commodore UAE had serious liquidity problems, comes from Ahmad's own evidence, given by him on 7 February 2022 in Canadian proceedings brought by the Bank against him. When asked by the Bank's counsel about which UAE companies he paid the Personal Loan monies to, he answered[96]:

> "*A – That was (cut in audio) cash flow problems to help them continuing their work. And that's the reason I took the loan from Invest Bank, and I transferred it from Invest Bank, I believe, to wherever it went. I don't recall...*

[96] I/2592/57.

Q – Which…

A – ... where, which company. I don't recall which companies, because we run about five (5), six (6) companies, I don't recall really which companies, but definitely companies which is either Federal or Commodore or whatever, one of the companies we were running. And to assist in the cash flow for these companies.

Q – Did those companies … you said it included Commodore; did it consider … did it include Tadamun?

A – I don't remember."

(emphasis added)

It can be seen that Ahmad gave evidence that the reason he took out the personal loan was to assist with cash flow problems within the group, and not that it was in order to buy steel ahead of time.

308. Mo and Joan served a hearsay notice in respect of the transcript of Ahmad's examination on 7 February 2022 (and that of 2 March 2022) relying on the transcripts as evidence of the truth of the matters stated. The Bank submits that this therefore constitutes important evidence as to Ahmad's belief as to the liquidity of the Commodore group of companies during the relevant time[97].

309. The Bank also relies upon Ahmad's evidence given on 13 September 2021 in the Canadian court when he was asked about "*the sale of the Medstar building*". He said:

"*Q I would like to know what banks you have accounts with in Lebanon. Can you tell me?*

A What banks? BLOM Bank…

Q Any other bank in Lebanon?

A Yes, InvestBank. Your clients.

Q How about First National Bank?

A Yes, and First National Bank, because I used to have an account with them when we did this -- whatever they call it, the... the Ras Beirut thing. My sons made arrangements with First National Bank as Beirut company. I don't know the full name of the company, really. And that was it.

…

Q You talked about the transaction with Ras Beirut for the sale of the Medstar building. How much did you receive in consideration for that?

[97] As Hildyard J held in *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) at [682], "*the party which has sought to rely on the witness as a witness of truth, cannot invite the court to believe the parts identified by that party as helpful to its case and yet disbelieve other parts which go the other way. The whole is the evidence of that party's witness, for good and ill.*"

A Beg your pardon?

Q How much were you paid for the sale of the Beirut -- the ---

A Well, ---

Q Medstar building?

A. --- [inaudible] this -- the deal started with them. It's because InvestBank, I mortgaged -- I mortgaged a plot in Beirut, and I took a loan from InvestBank. And at one time, I knew I couldn't pay the loan and I was afraid that InvestBank will... will liquidate it, or whatever you call it. And my son, my sons, they have their own financial means because they have their own companies, and they work separately, and so they -- I wouldn't say they helped, and I wouldn't say they didn't help. They decided to acquire, and they went to First National Bank and they made the deal with them, and they mortgaged some of their own properties and they took a loan, and they paid me -- they paid me -- they closed the loan, the debt of InvestBank, and they paid me the money, the rest, which I used. That was four and a half years ago." (emphasis added)

310. This is a confusing passage of evidence.

311. The factual background to it is that Ahmad drew down his personal loan on 22 January 2017. As I have stated, by way of security Ahmad agreed to mortgage the Ras Beirut Property (which had been valued by BLOM Bank at US$12.5m).

312. On 13 June 2017 the pledge over the Ras Beirut Property was assigned to FNB and Ahmad's $6m loan from the Bank was settled in full four days later. Ras Beirut was not sold by Ahmad until April 2018.

313. Furthermore, on 7 June 2017 US$7.15 million of the Medstar monies had been transferred into a collateral deposit account with FNB in Ahmad's name. That money remained in that account until at least the end of 2017.

314. A Lebanese Register of Title dated 21 December 2020 for a plot of land at 685 Al Omaraa, Beirut records that by 16 November 2017 Ahmad's borrowing from FNB had risen to at least US$17m and FNB had been granted further security against property in Lebanon which had been valued by the Bank at US$4.674m, and also against Lebanese property owned by the Second to Sixth Defendants.

315. On 12 April 2018 US$15 million was transferred to Ahmad's FNB account, which was the consideration paid by an entity called Ras Beirut 3486 SAL ("**Ras Beirut Co**", a company incorporated on 23 February 2018), in respect of Ahmad's sale to it of the Ras Beirut Property, as well as sections of the Medstar Building at 4354 Chyah. The $15m for the purchase of the properties by Ras Beirut Co was raised by a loan taken out by Alex, Ziad and Joan from a third party. It is likely that this money was eventually used to discharge Ahmad's borrowing with FNB[98], this being over a year after the Bank alleges that Ahmad was transferring away his assets. The founders of Ras Beirut Co were Alex, Ziad, and Ramzy. Alex, Ziad, Ramzy, and Joan (but not Mo) were directors. Alex held 400 shares, with Ziad, Ramzy, and Joan having 200 shares each.

[98] In paragraph 49B of its PoC, the Bank pleads that $15m was so used

316. Against this factual background, when Ahmad admitted in the Canadian proceedings that "*I knew I couldn't pay the loan and I was afraid that Invest Bank will liquidate it*", it seems likely that he meant to refer to "FNB" rather than Invest Bank i.e. that he was worried that FNB would enforce its pledge over Ras Beirut in respect of Ahmad's borrowing. That is because he then says "[*My sons*] *decided to acquire, and they went to First National Bank and they made the deal with them, and they mortgaged some of their own properties and they took a loan, and they paid me -- they paid me -- they closed the loan, the debt of InvestBank, and they paid me the money, the rest, which I used."* Likewise, I consider that he likely meant to refer to the debt owed to FNB and not to Invest Bank for this passage to make sense, as he is saying that the sons mortgaged their land in favour of FNB in exchange for a loan, which was used to repay FNB (in 2018). There is no evidence that the sons had FNB pay off the Bank's loan to Ahmad.

317. In all the circumstances (including, in particular the documentary evidence as to Commodore UAE's apparently sound financial health at the relevant time), I am not willing to draw the inference that Ahmad obtained this loan because Commodore UAE was itself balance sheet insolvent or in some other respect in dire financial straits by reason of illiquidity; nor am I willing to draw the inference that he obtained the loan from the Beirut branch because to obtain it elsewhere would likely cause the Bank (or any other bank) to call in its loans. There is insufficient evidence even to begin to draw such inferences.

318. The use of the US$15m to discharge Ahmad's borrowing with FNB, which was paid to Ahmad by Ras Beirut, is important as it militates against the drawing of such inferences. By Mr. Mascarenhas' affidavit dated 5 July 2021, the Bank initially cast doubt on whether Ras Beirut had ever paid the purchase price of $15m to Ahmad. At paragraph 135.2 Mr. Mascarenhas said as follows:

> "*It is not known whether the US$ 15 million was actually transferred to Ahmad but such a payment would be inconsistent with the pattern of dealing described above in relation to other assets*" (that is the alleged asset dissipation scheme).

319. The Bank now accepts, in paragraph 49B of its PoC, that US$15m *was* indeed paid to Ahmad and that he used the money to discharge his debts to FNB:

> "*In their statements of case in these proceedings, Ramzy and Joan have confirmed that the pledges over the properties (including the Ras Beirut Pledge) have been discharged. It is to be inferred that the US$15 million paid by Ras Beirut Co to Ahmad will have been used by Ahmad to pay off his indebtedness to First National Bank.*"

320. In its *draft* amendments to the Particulars of Claim which the Bank sought permission to make and which were before Bryan J at the PTR on 25 April 2024, the Bank sought to plead (in paragraph 168A) that Ras Beirut had only paid the US$15m to Ahmad because the Medstar monies (the money which is subject to the Bank's Medstar-Mistar claim) had in fact been transferred by Medstar to the benefit of Ras Beirut, which Ras Beirut then used to pay Ahmad, such that the transaction was circular. Bryan J refused permission to amend to plead this; and in any event it is now apparent that Alex, Ziad

and Joan did indeed enter into a loan agreement with a third party in April 2018 pursuant to which they were granted a loan of $15m which was then disbursed to Ras Beirut to allow it to buy the two properties from Ahmad.

321. Mr. Venkatesan places considerable reliance on this transaction. It is, he says, a transaction by which in April 2018, being around a year into what the Bank alleges was an asset dissipation scheme, three of the Defendants borrowed money in order to buy property from Ahmad to help Ahmad discharge a debt owed to a bank (FNB) of US$15m. That is not, he submits, what someone who is trying to hide assets from their creditors would do. I agree. The Ras Beirut transaction is therefore inconsistent with the Bank's inferential case as indeed the Bank itself recognised in Mr Mascarenhas' affidavit of 5th of July 2021[99].

322. In conclusion therefore, I do not consider that the circumstances surrounding Ahmad's taking out of his personal loan in January 2017 alters my conclusions in paragraphs 243-246 above.

Ahmad's continued restructuring in 2017: his plans for the transfer of the Marquee Shares, 9HP/18HP and Cardena

323. The Bank's case is that around this time onwards, Ahmad must have known that "the writing was on the wall" for Commodore UAE and he feared action by the Bank. This is why, the Bank alleges, "a whole raft of transactions" took place shortly after this time (in May/June 2017), by which Ahmad divested himself of very substantial assets, such as the transfer of 32HP, the failed Medstar $15m payment, the transfer of land to ABR Real Estate and the charge over the Berlin property (*infra*), and he continued to do so thereafter with the transfer of the proceeds of sale of properties in Montreal, Paris and Meribel (also see *infra*). These transfers, it can be inferred says the Bank, amount to the unfolding of Ahmad's plan, hatched at the start of 2017, to begin passing assets away for the sake of 'asset protection'. That is, Ahmad's plan was to evade his creditors—and a particular creditor he had in mind was the Bank.

324. In view of my finding that Commodore UAE was not in financial trouble at this time and nor did Ahmad believe it to be so, I do not accept this submission of the Bank and I reject the alleged inference. Nonetheless, I shall now analyse in more detail the relevant events in 2017.

325. On 30 January 2017, being three weeks after Ahmad's urgent instruction to Kendris to transfer the Marquee shares to Joan, Mr Knight emailed Ms Zweifel, stating that he was "*asked to consider more closely the UK capital gains tax position*" and "*to comment on the proposal to transfer 9 Hyde Park Garden Mews to the current UBO's (Mr A El H) son, Ziad, but for a usufruct to be created over the property for Joan, the UBO' s wife,*

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99 The Bank also submitted that the 2017 Personal Loan followed hot on the heels of Commodore UAE having to obtain, in late 2016, a term loan from the National Bank of Fujairah, backed by a personal cheque from Ahmad as collateral. Once again, this was not pleaded by the Bank; but in any event I do not consider that the Bank established that there was anything unusual about this. Indeed, Commodore UAE had been given a positive credit report by the National Bank of Fujairah in March 2016 and in 2017, and in September 2016, the National Bank of Fujairah granted Commodore a new loan of at least 16.3m.

during her lifetime. It is also being considered whether 18 Hyde Park Square should be transferred to an irrevocable discretionary trust for the benefit of the UBO's children Ramsey and Ziad." He then set out a detailed explanation of the possible tax consequences based on that proposal, which had been raised at the meeting of 25 November 2016. It is clear therefore that at this stage Mr Knight's tax advice had not been sought regarding Ahmad's revised instructions urgently to transfer the Marquee shares to Joan and he was still advising on the proposed approach to restructuring which had been discussed at the earlier Yas Beach Club meeting.

326. On 31 January 2017 Joan emailed Mr Aggarwal with a list of days she spent in the UK in 2016 and 2017. This was done for the purposes of establishing whether she was domiciled in the UK, which would have had tax consequences. The focus is again on tax.

327. On the same day, Ms Zweifel emailed Mr Collazo stating that "*Ahmed El Husseini insists to transfer the shares in Cardena to his wife without waiting for the tax opinion. I am not sure but did you already prepare some documents for this transfer?*"

328. This is the highwater mark of the Bank's case against Ahmad. The Bank essentially argues that Ahmad's obtaining of his personal loan from the Beirut Branch, coupled with its analysis of Commodore UAE's financial position (which I have rejected), together with Ahmad's urgent instruction to transfer the Marquee shares and Cardena to Joan "for asset protection purposes" and without waiting for tax advice, all demonstrate that he is aware that the Bank will soon be bring claims against him under his personal guarantees of the debts of Tadamun and Commodore UAE.

329. On 2 February 2017, Ms Zweifel sent an email to Ahmad regarding the transfer of shares in Cardena:

> "*I refer to our recent tel con and herewith attach the transfer form for Cardena shares as instructed. May I kindly ask you to sign and return the originals to the below mentioned address.*
>
> *As discussed the tax opinion prepared by a Spanish tax accountants in regard to the transfer of shares in Cardena is still pending.*"

It is apparent that whilst Ahmad had decided to go ahead with this transfer without tax advice, Ms Zweifel had nonetheless sought advice on the tax position and she had clearly discussed with him the desirability of obtaining that tax advice. This is supportive of Ms Zweifel's account that she behaved in an entirely proper and professional way.

330. The attached share transfer form records that Ahmad was transferring 5,000 shares in Cardena to Joan "*for full and valuable consideration, receipt of which is hereby acknowledged*". It is not apparent, however, that any consideration was in fact given. The form also contains a document entitled "*Indemnity and Release*", the effect of which was to confirm that Ahmad had been advised on all relevant tax implications of the transfer and to indemnify Virtue Corporate Services Ltd/Kendris and its employees from any and all liability arising out of the transfer of the Cardena shares. There is no

reason to believe that this was anything other than a standard indemnity and release provision of Virtue Corporate Services Ltd/Kendris.

331. On the same day, 2 February 2017, Mr Aggarwall emailed Ms Sandra Boss (another Kendris employee) regarding Marquee, stating that "*he was contacted by Mrs El-Husseiny regarding the transfer of the properties*", i.e. 9HP and 18HP. It is not known what Joan had said to Mr Aggarwall.

332. On 5 February 2017, four documents were executed which concerned Marquee. First, Ahmad sent a letter to Norton BVI, consistently with his instruction of 9 January 2017, stating that he intended to "*transfer the legal title in the shares of Marquee*" to Joan and instructing Norton BVI "*to revoke the Declaration of Trust dated 25 April 2016 and to further on hold the shares in your name as nominee for and on behalf of with my wife, Joan El-Husseiny and therefore to enter into a Fiduciary Agreement regarding the nominee shareholding with my wife, Joan El-Husseiny*". Second, Ahmad and Joan signed a Share Transfer Form to transfer the Cardena shares to Joan. This was identical to the draft form sent to Ahmad by Ms Zweifel on 2 February 2017. Third, Joan entered into a Fiduciary Agreement with Norton BVI signed by her, Ms Zweifel, and Ms Sonja Zuberbuhler (another Kendris employee), which appointed Norton BVI as a fiduciary to hold the Marquee shares on trust for her. Ahmad was nonetheless authorised under it to continue to give instructions to Norton BVI in respect of the shares. Fourth, Ahmad, Joan, Mr Escher, and Ms Zweifel signed an Assignment Agreement by which Ahmad assigned to Joan his claim in respect of his loan to Marquee which was by now in the total sum of £5.36 million.

333. On 20 February 2017, Mr Collazo emailed Mr Knight (with Ms Zweifel in copy) to inform him that Kendris had "*received from [Ahmad] signed documentation to transfer the shares [in Marquee] from his name to his wife. <u>For Asset protection purposes, the client considered that the transfer of shares to his wife is been done immediately</u>. We understand that for the property 18 HP this transfer of shares could not trigger SDLT*[100] *but please advise otherwise. For the other property 9HP, we assume that this transfer of shares could trigger SDLT. We wait your feedback how this transfer of shares could change any of your comments outlined below*" (emphasis added). It is clear from this email that Mr Knight had not, before this point, been informed that the shares in Marquee were intended to be or had been transferred outright to Joan. It is also clear that Mr Knight had not previously been asked to consider the tax consequences of such a transfer: the transfer of Marquee shares to Joan for "asset protection purposes" was proceeding without Mr Knight's tax advice.

334. There was then a call between Mr Knight, Ms Zweifel, and Mr Meier regarding the transfer of the Marquee shares on 24 February 2017. Mr Knight referred to this call in his email to Ms Zweifel and Mr Meier the next day, in which he stated:

> *"You confirmed to me that the shares in Marquee Holdings had been transferred from the original beneficial owner (Mr A El H) to his wife, Joan. The reasons as to exactly why the client had requested that the transfer take place were not entirely clear but <u>he had referred to asset protection reasons and he had been</u>*

[100] Stamp duty land tax.

> *clear that his instructions to effect the transfer should be implemented immediately*."
>
> (emphasis added)

335. It must have been Ms Zweifel who informed Mr Knight about Ahmad's "asset protection reasons" not being clear. Mr Knight then went on to advise as to the tax consequences of the transfer of the Marquee shares to Joan for the first time.

336. It follows that exactly what asset protection reasons Ahmad had in mind at the time was unknown to Mr. Knight and, I find, to Kendris and Virtue at the time.

337. Mr Escher and Ms Zweifel both accepted that there was no *immediate* tax advantage to making this transfer to Joan, but Mr Escher referred to Ahmad's ill health and a desire to avoid inheritance tax upon his death by making gifts earlier[101]. He speculated that "asset protection" may accordingly have meant "*protecting the asset from an immediate tax charge of 40%"* but he said that he and Ms Zweifel were not suspicious about Ahmad's urgent instruction. Indeed, as Ms Scott KC (counsel for Virtue together with Ms Emma Hargreaves) pointed out Ms Zweifel gave evidence that she was used to high net worth clients suddenly asking her to do something urgently; but in any event there was no urgent follow-up on this instruction by Ahmad after he gave it.

338. I consider that any suggestion that Ahmad was intending by this transaction to put these assets beyond the reach of the Bank as he feared a claim on his personal guarantees is contradicted by the contemporaneous financial documents concerning Commodore UAE's financial health at this time (discussed above) and also belied by what happened subsequently (when Ahmad changed his mind about how to dispose of these assets), and I address that below at paragraph 350ff.

Shares in Global Green

339. The next important step in the restructuring took place on 28 February 2017, when the 100 shares in Global Green were transferred from Medstar to Mo, Alex, Ziad, and Ramzy equally, i.e. they each received 25 shares. All of the sons maintained that they paid £25 (£1 per unit) by way of consideration to Ahmad.

340. In cross-examination, Ramzy's and Ziad's evidence was that they paid the equivalent of £25 in cash to Ahmad[102], although they have no documentary proof of such fact. Alex also stated in his witness statement that "*My brothers and I each paid £25 for the Commodore UK shares*", but again there is no documentary proof of this fact.

341. Alex said that £25 represented the value of a dormant shell company. The Bank put to Ramzy[103] and Mo[104] in cross-examination that this consideration ought to have been paid to Medstar as the seller of the shares, although it is of course possible that Ahmad could be characterised as receiving the consideration as agent for Medstar.

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[101] Day 4/96-97.

[102] Day 8/89 (Ramzy said he paid in cash from his inside pocket); Day 9/132 (Ziad said he paid it in dirhams).

[103] Day 8/89.

[104] Day 6/89.

342. Mo, on the other hand, claimed that he paid for the shares in Global Green by buying Ahmad a bottle of whisky said to be evidenced by a photograph of it taken in June 2017, and he said that "*it was Alex who gave me this idea*". This photograph was only disclosed during cross-examination. He agreed that this account was first given in his trial witness statement[105], whilst in his earlier witness statements he had said "*I paid £25 for the Commodore UK shares*" and referred to "*the 25% shareholding which cost me £25 to acquire*". No clear reason was given for the change in his explanation. Alex, whom Mo says gave him the idea to pay with a bottle of whisky, makes no mention of it in his witness statement, in which he instead suggests that each of the sons paid in cash. In the circumstances, I am not persuaded by Mo's explanation.

343. There is no documentary evidence to support the suggestion that any consideration was paid by the sons for the shares in Global Green. Whilst it is possible, I consider it more likely to have been the case that Ahmad gifted these shares to his sons. But whether Ahmad did so or not, ultimately does not matter (for the reasons set out below).

344. On 8 March 2017, Ramzy was engaged to be married.

345. On 15 March 2017, Mr Collazo emailed Baccata, the registered agent of Marquee, notifying it that the new shareholder of Marquee was Joan, "*the wife of the client*". The next day, Baccata replied asking Mr Collazo to "*confirm rationale for this further change of shareholder i.e. last change was in April 2016. Has new tax advice been received on this proposed change, can you provide a copy for our records.*" There is no recorded response to this query from Mr. Collazo or Kendris.

Transfer of shares in Commodore Netherlands

346. The next stage in Commodore's restructuring took place on 16 March 2017, when all the shares in Commodore Netherlands were transferred from Commodore Turkey to Global Green pursuant to an agreement entitled "Sale and transfer of shares". The "Seller" was Commodore Turkey and the "Purchaser" was Global Green. The "Purchase Price" for the shares was €703,000, which is slightly lower than the €735,000 book value stated in Mr Ozcan's email of 23 November 2016 but much lower than the Dutch accountants' open market valuation of €3.1 million. The "Effective Date" of the sale was 31 March 2017. The agreement provides under Article 3.1 that "*The Seller hereby waives his right to claim payment of the Purchase Price, provided that the Purchaser acknowledges its indebtedness to the Seller of an amount equal to the Purchase Price, by way of a loan granted as at the date hereof by the Seller to the Purchaser*", with an equivalent provision in Article 3.2 whereby the Purchaser acknowledged its indebtedness by way of a loan granted by the Seller, stated (in Article 3.3) to be pursuant to a "Loan Agreement" dated 14 March 2017.

347. The Loan Agreement between Commodore Turkey and Global Green mirrors the language of Article 3. It also provides that "*The Purchaser will repay the loan or parts of the loan from profit of the company taken over by the seller. If in any fiscal year there is no profit after the creation of any reserves, the seller waives the repayment of the loan or parts of the loan.*" In other words, Commodore Turkey was not entitled to be repaid any part of the loan unless and until Global Green turned a profit.

[105] Day 6/84-89.

348. Ramzy's evidence was that the terms of the sale were "*briefly and broadly discussed*" between him and Ahmad, and Ahmad told him that the price was €703,000.

349. I find that these shares were effectively gifted to the sons, via their gifted shareholdings in Global Green.

Cardena and Marquee: Ahmad changes his mind about gifting them because of tax issues

350. On 22 March 2017 Ahmad and Joan met Ms Zweifel in Abu Dhabi. The clock was now ticking with respect to the critical 6 April 2017 date from a tax perspective. As regards Marquee, Ahmad's intention at this point remained as he had advised at the Yas Beach Club meeting as follows: "*9 Hyde Park Garden Mews shall be gifted to Ziad and 18 Hyde Park Square settled to a trust*". The note records that Ahmad "*is fully aware about the time critical element. It is important to settle the shares into the trust before 6 April 2017. Same approach applies for the gift. The decision itself needs to be taken by the client.*" Ahmad's actions accordingly still appeared to be tax driven and he was becoming concerned about the "tax critical" 6 April deadline.

351. On Cardena, however, Ahmad had changed his mind about the gift because "[*i*]*t would lead to a huge tax bill, approx. EUR 800,000. It has therefore been agreed to cancel his instruction to prepare deed of gift and ownership shall remain unchanged for the time being.*" This demonstrates that Ahmad's intention was not to transfer his assets away regardless of the tax position. I consider this to be contrary to the suggestion, therefore, that Ahmad was urgently transferring away his assets to defeat his creditor, the Bank. Moreover, in the face of that instruction, it is again unsurprising that Mr Escher and Ms Zweifel did not suspect anything nefarious was taking place when it came to the transaction involving Marquee.

352. A second meeting the next day (23 March 2017) was also attended by Mr Escher. Joan now informed Kendris that she might be a UK resident for tax purposes. This was contrary to Kendris' previous understanding, which had informed all of their earlier tax advice. If Joan were UK resident, that would have had significant tax consequences – in particular, Marquee shares in her hands might not have been excluded property for IHT purposes even before 5 April 2017. Ahmad accordingly changed his mind about gifting the Marquee shares as well.

353. The following passages from the accompanying Kendris file note for the meeting of 23 March 2017 are important:

> "*The new settlement was again discussed in depth and it was decided <u>not</u> to implement the gift of the shares in Marquee. It might be that an agreement needs to be prepared and it is key to liaise with our legal department to make sure that the client is still the owner of the shares. This will <u>allow Ahmed to settle a new trust</u>. [Redacted] It is the explicit wish that <u>Joan can benefit from the properties</u> and also provide us with guidance in regard to a potential sale, dealing with trust issues, etc. <u>The client would like to withdraw from these investments and give up control. Asset protection has priority</u>.*

> *Step plan, set up and transfer documents need to be prepared. A further meeting is planned to sign letter of engagement which will allow us to proceed with the reorganization.*
>
> *[Credit Suisse] will close the bank account with Marquee in due course. It is important to maintain a bank account and the client will therefore introduce us to one of his contacts in Beirut. He is banking in Abu Dhabi and Beirut[;] prefers however Beirut also for asset protection reasons*." (emphasis added)

354. It is apparent that Ahmad had changed his mind regarding the re-structuring of his assets yet again because of tax disadvantages, which again suggests that Ahmad's intention was not urgently to transfer his assets away from his creditors regardless of the tax position. Once again there is a reference to asset protection having priority. It is again unclear what was meant by that, but I consider that the most likely asset protection concern of Ahmad's in March 2017 still to have been a need to protect his assets from a claim from Sheikh Tahnoon or third parties at Shiekh Tahnoon's behest and/or political interference. That chimes with the second reference in this document to his preferring Beirut for asset protection reasons. This appears to have been a reference to avoiding Abu Dhabi where he was politically exposed.

355. One other possibility is that the first reference in the file note to "asset protection" might simply have been a reference to avoiding tax exposure, with the 6 April 2017 deadline now looming large. Ms Zweifel's evidence in respect of "asset protection" in the context of the March 2017 file note was as follows:

> 117:22 Q. So why was -- what was he meaning when he said his
> 23 priority was "asset protection"? Why would he need to
> 24 say that to you? Your function was to try and minimise
> 25 his tax liability. Why would he need to say that asset
> 118: 1 protection is his priority?
> 2 A. I mean protecting -- for me protecting assets can be --
> 3 is often used in relation to tax exposure, but that's
> 4 what I understand.
> 5 Q. Let's move on to the --
> 6 MR JUSTICE CALVER: It is being used here, isn't it, in the
> 7 context of giving up control? He wants to withdraw from
> 8 the investments and give up control. Asset protection
> 9 is his priority. That's consistent, isn't it, with
> 10 saying -- a month earlier saying, I don't want the tax
> 11 advice, asset protection is my priority. I want to give
> 12 the shares to Joan. It suggests that it's nothing to do

13 with tax, doesn't it?

14 A. In respect to the transfer of shares in Cardena?

15 MR PENNY: The transfer of shares -- the transfer of shares

16 in Marquee. He had told you that asset protection was

17 the reason he wanted to transfer the shares in Marquee.

18 That had nothing to do with tax minimisation, did it?

19 A. I just -- I just don't remember that I asked and in

20 particular this term, I don't remember that I asked what

21 he meant. I was -- yes, maybe -- I just don't remember

22 the details, but I -- I used the word, I mean, "asset

23 protection", in regard to taxes. It can also be real

24 estate planning in general.

Mr Escher also suggested in cross-examination that if Ahmad's purpose had been to protect the asset from the Bank as creditor, then: "*if it had been what you suggest, then Ahmad would certainly not have agreed to bring an unencumbered property*[106] *into the legal ownership of a Swiss trust company where every transaction under the Swiss Bankruptcy and Death [sic]*[107] *Enforcement Act can be set aside if the transaction was to the detriment -- to the negative impact of a creditor.*"

356. It cannot by any means be assumed that by the use of the phrase "asset protection purposes", Ahmad meant protecting the asset from a Category 1 claim of the Bank. Indeed, the Bank is unable to point to a single document in which Ahmad or anyone else expressly refers to any transfer being for the purpose of avoiding any claim which the Bank might make in the future against either Commodore UAE or Ahmad himself. Nor is there any suggestion in any of the documents that the Bank was thinking of bringing such a claim until very much later as Commodore UAE's financial position at this time was not a cause for concern.

357. On the contrary, the Bank continued to lend to Commodore UAE; and, crucially, the Bank itself recorded on 24 February 2018 that:

> "*Financed projects were progressing satisfactorily till Mr Ahmed El Husseini left the country [in April/May 2017]. Majority of the financed projects were in advanced stages of completion and the Project Liabilities had substantially reduced as compared to the limits granted at the time of original sanction.*"

I return to this important document below.

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[106] i.e. 18 HP.

[107] Swiss Bankruptcy and Debt Enforcement Act

358. On 23 March 2017 the Cardena Share Transfer Form was duly cancelled.

359. On 24 March 2017, Mr Collazo sent an updated organisational chart and "step plan" regarding the restructuring of Marquee to Ms Zweifel. This document broadly reflects the plan which was eventually executed, i.e. the gifting of approximately 36% of Marquee shares to Ziad and 64% to the trust, then liquidating Marquee afterwards with 9HP and 18HP distributed as liquidation dividends. There is no doubt that tax efficiency was a large part of the, if not the only, rationale for adopting this proposal. There was no mention at all of the Cardena Receivable even though the document records that "*Loan payable by Marquee needs to be dealt with*", which refers to Ahmad's loan to Marquee.

360. On the same day, Ahmad, Ms Zweifel, and Mr Escher had lunch at the Yas Beach Club. No note of this meeting was before the court.

361. Ahmad had what was described as a "*follow up meeting*" with Ms Zweifel on 25 March 2017. The Kendris file note of this meeting records that Ahmad signed the Letter of Engagement for the creation of the trust known as the Spring Blossom Trust, the Trust Deed, a Letter of Wishes, and a Declaration of Beneficial Ownership. The Letter of Wishes records Ahmad's wishes that Virtue "*consider any requests made by my wife Joan Eva Henry during my lifetime on any matter concerning the Trust*"; "*consider holding the Trust Funds for my wife Joan Eva Henry as a prime beneficiary during her lifetime*"; and to "*consider her wishes regarding the distribution or further holding on trust of the Trust Fund in case of her death.*"

362. Before the Letter of Wishes was signed, Ms Zweifel sent an email to Mr Collazo asking for his opinion on the Letter. Mr Collazo's view was that "*It looks like [Joan] has all the control over the Trust Fund and not [Ahmad]… I am on the opinion that during the Settlor lifetime he is the one sending that wishes and not her for controlling issues over the Trust unless he is not in good condition and his wife has to play a leading role*" [sic]. Ms Zweifel replied "*I know but it was his wish.*"

363. On either 3 or 4 April 2017, Ahmad, Joan, and Norton BVI executed documents to reverse the effect of the documents which had been executed to transfer the beneficial interest in Marquee to Joan on 5 February 2017. A Deed of Direction and Agreement stated that Norton BVI held the Marquee shares on trust for Ahmad rather than Joan. Ahmad's loan to Marquee was waived by a Deed of Waiver. Again, this does not suggest that Ahmad was busy ensuring that his assets could not be the subject of a claim by the Bank.

364. On 4 April 2017, the Spring Blossom Trust was established by a deed executed by Ahmad as settlor and Virtue as trustee. Joan and the sons were the beneficiaries. Clause 3.2 states that "*this Trust is established under and shall be governed in all respects by the law of the British Virgin Islands*".

365. On the same day, Ms Zweifel signed an internal Kendris Client ID Update Form, which estimated Ahmad's overall wealth at between CHF 50-100 million. In cross-examination, she could not say how she came to make that estimate – her evidence is that she had not seen any audited accounts or similar documents in order to arrive at her estimate; however that was clearly her understanding and I find that she would have had no reason to believe that Ahmad was in any financial trouble.

366. On 5 April 2017, Ahmad executed a Deed of Direction which directed Norton BVI to hold 34.69% of the beneficial interest in Marquee shares for Ziad, with the remaining 65.31% held for Virtue as the trustee of the Spring Blossom Trust. In the event that Marquee was liquidated, Norton BVI was to hold 9HP for Ziad and 18HP for Virtue. Virtue accepted 5.8779 shares in Marquee (at US$1 per share) as an addition to the Spring Blossom Trust. This was just before the 6 April 2017 deadline.

367. On 19 April 2017, Ziad and Virtue sent a letter to Norton BVI recording their understanding of Ahmad's instructions as to the ownership of the Marquee shares and directing Norton BVI to transfer the shares to them in the relevant proportions "*with the intention that the nomineeship will terminate on the completion of the transfer*". The next day, Norton BVI executed two documents both called a "Declaration of Trust", which declared that Norton BVI held 5.8779 shares in Marquee for Virtue, 3.1221 shares in Marquee for Ziad, and undertook to transfer to them any dividend received.

The Cardena Receivable and Virtue's alleged liability

368. There is no reference to the Cardena Receivable (an asset of Marquee) in any of the documents concerning the Spring Blossom Trust. There is therefore a dispute between the Bank and Virtue as to whether Virtue also held 65.31% of the Cardena Receivable on trust for Joan, which remained an asset of Marquee at this time.

369. The Bank alleges that the Cardena Receivable was forgotten about at this time and only belatedly waived (if ever waived) in 2019. Virtue's case is that the Cardena Receivable was waived by a resolution passed at a Marquee board meeting on 9 April 2017 with Mr Escher and Ms Zweifel as the only attendees. This is said to be evidenced by a document entitled "Minutes of a Meeting of the Board of Directors held at Zurich, Switzerland" purportedly signed on 9 April 2017 and dated by stamp. The document states that "*these minutes have been issued and signed on the date and place above written.*" It is now common ground that this document was not in fact created or signed on 9 April 2017, but rather signed on 31 January 2019 and stamped with a back-dating of 9 April 2017. Mr Escher and Ms Zweifel, however, maintain that a resolution to waive the Cardena Receivable was indeed passed on 9 April 2017.

370. In cross-examination, Mr Escher denied that the Cardena Receivable was overlooked. His evidence[108] was that he believed that this meeting was conducted on 9 April 2017 (which was a Sunday) by telephone with Ms Zweifel and the resolution was passed, but in cross-examination he could not "*unequivocally confirm*" that they had such a call on that date. His diary entry for this date is blank apart from a reference to a late flight. There are no contemporaneous documents or notes evidencing this meeting or any resolution passed at this meeting. Mr Escher denied having falsely stamped the date on the Minutes or having issued instructions to do so; according to him, instructions to staff could only have come from Ms Zweifel or Mr Collazo. He referred to "notes" or "step plans" as possible documentary evidence, but no such document has been produced.

[108] Day 4/119-140; Day 5/6-25.

371. Ms Zweifel's evidence[109] was that she could not remember when she discussed the Cardena Receivable with Mr Escher, but maintained that it must have been dealt with at the time because waiving the loan was necessary before Marquee could be liquidated. She agreed that the Cardena Receivable was not waived as of 5 April 2017, and she (understandably) had no recollection of any telephone conversation or meeting with Mr Escher on 9 April 2017, nor did she remember her conversation with Mr Ferris on 30 January 2019. She also denied backdating the Minutes herself or being aware that they would be backdated.

372. If the purported resolution was passed on 9 April 2017, then it would only be known to Mr Escher and Ms Zweifel. Other Kendris employees would have had no knowledge of the matter, particularly given the lack of documentation. The instruction to prepare the Minutes in 2019 and stamp the date as 9 April 2017, therefore, could only have come from either Mr Escher or Ms Zweifel. In addition, given that the plan at this stage was to liquidate Marquee (albeit the liquidation would in fact occur only in 2019), it is puzzling that there is no reference to the Cardena Receivable at all in the contemporaneous documents. The "step plan" prepared by Kendris for the restructuring of Marquee omits the Cardena Receivable. I conclude that the logical explanation is that Kendris simply forgot about its existence at this time, which explains the confusion of other Kendris employees when they reviewed the documentation later down the line.

373. As to that, on 13 July 2017 Mr Collazo emailed Ms Boss about the liquidation of Marquee "*as it has no assets any longer*", but he had noticed that "*there is still an outstanding loan that was not repaid*", i.e. the Cardena Receivable, and asked her to "*advise how to proceed from the accounting side*." The Kendris job card (which recorded work done in relation to Marquee) on the same day for Mr Collazo, Ms Zuberbuhler, and Ms Boss stated "*Disc with bod re handling loan waiver vs dividend*". Mr Escher's evidence is that "*bod*" meant board of directors, being he and Ms Zweifel, but he could not confirm that he had such a discussion, nor does the job card contain any entries for him or Ms Zweifel on 13 July 2017. In any event, nothing appears to have been done.

374. However, ultimately I do not consider that any of this matters. The Bank contends in paragraph 86 of its closing submissions that "*as at January 2019 immediately before the backdated resolution, Marquee did have a valuable asset worth €1.62m, that was owned as to c. 65% by Virtue as trustee for the SB Trust and could have been used to satisfy any judgment against Virtue herein had Marquee not been dissolved in 2019 on the basis that it had no assets*". I consider that the evidence does not support the Bank's case. As Virtue submitted, there is no document which evidences an intention on Ahmad's part that the Cardena Receivable would be gifted to Virtue (as to 65.31%) and Ziad (as to the remainder); on the contrary, the contemporaneous documents demonstrate that Ahmad's intention was to gift only 18HP to the Trust.

375. However, since I conclude that Virtue has no liability to the Bank the debate about the Cardena Receivable is irrelevant. The reason that Virtue has no liability to the Bank is because the Bank has failed to establish that the s.423(3) purpose test is satisfied in respect of the Marquee transaction, whether that be the arrangements entered into between 5 February 2017 and 5 April 2017 or, as I consider to be the relevant

[109] Day 5/128-141

transaction for s.423 purposes, just those arrangements entered into on 5 April 2017 after Ahmad had changed his mind. The transaction(s) took place just before the 6 April 2017 tax deadline. I have found as a fact that at that time there is insufficient evidence to suggest that Commodore UAE was in financial trouble; indeed the evidence suggests that it was financially sound and Ahmad had no reason to fear a claim from the Bank on his personal guarantee, whether that be under the Commodore Guarantee or the Tadamun Guarantee. In any event, it is not open to the Bank to advance a case at trial to the effect that Commodore UAE was in financial difficulty at this time, not having pleaded it.

376. Accordingly, Virtue was not on notice that at least one of Ahmad's purposes in effecting the 5 April 2017 transfers (referred to in paragraph 366 above) was the Alleged Purpose. It follows that Virtue did not act improperly in procuring the transactions to take place, nor did it act in bad faith, as the Bank pleads in paragraphs 142A and 148C of its PoC (and in its Reply at paragraphs 4, 6.2 and 7.2). I accept Ms Scott KC's submission, in the light of the evidence of Ms Zweifel and Mr Escher set out above, that so far as Virtue was aware, the 5 April transfers were only effected by Ahmad for legitimate tax and estate planning reasons, particularly in the light of the change to the UK's IHT regime which took effect from 6 April 2017, and they had no reason to think otherwise. They were not aware of any money concerns that Ahmad may have had; indeed, they considered him to be an extremely wealthy man.

377. It follows that Virtue was indeed an "*innocent third party recipient*" of Virtue's Marquee Interest, 18HP and the 18HP Proceeds, which assets it distributed to Joan and Alex in good faith and without notice of the Alleged Purpose (which Ahmad did not have). Nor, I find, did Virtue have notice of the underlying claims alleged against Ahmad.

378. In the circumstances and despite the helpful and attractive way in which the issue was argued by Ms Hargreaves for Virtue and Mr. Wilmot-Smith for the Bank, it is unnecessary for me to go on to consider the dispute between the parties concerning section 97 of the BVI Trustee Act Chapter 303.

Mistar

379. The next stage of the restructuring of Ahmad's assets was the incorporation of Mistar on 5 May 2017. The Minutes of the Constituent General Assembly of Mistar on 5 May 2017 list the founders as Mr Sakhr El Hachem, Mr Chahid El Hachem ("**Chahid**"), and Mr Nahy El Hachem. Chahid was known to the sons and Joan as Ahmad's lawyer and a member of Hachem Law Firm. Mr Nahy (or Nahi) El Hachem also acted as Ahmad's lawyer in other matters. The directors and shareholders were Ahmad (20 shares), Alex (490 shares), and Ziad (490 shares). Mr Jihad Anouti was appointed as Mistar's auditor.

380. At 10am on the same day, the first meeting of the Mistar Board took place and was attended by Ahmad, Alex, and Ziad. Alex was appointed Chairman, Ziad was appointed Assistant General Manager with the powers of the Chairman, and Sakhr El Hachem was appointed as legal counsel. In cross-examination, Alex said that he set up Mistar

alone without Ahmad's involvement[110]. Ziad gave evidence that Ahmad was only "technically" involved because Lebanese law required a third shareholder[111].

381. On 8 May 2017, Mistar was registered in Beirut and its certificate of registration was issued on Alex's request.

382. On 31 July 2017 Mistar approved a resolution such that Ramzy received 249 shares from Alex, Mo received 249 shares from Ziad, and Chahid received 1 share each from Alex and Ziad. Mo and Ramzy were appointed as directors of Mistar. Each of the sons accordingly now held 249 shares in Mistar and Chahid held 4 shares.

Ahmad and Sheikh Tahnoon visit Germany: Ahmad loses control of Commodore UAE

383. On or around 9 May 2017, Ahmad and Sheikh Tahnoon travelled together to Hamburg, Germany. This was an important event. Ahmad's Hamburg dentist, Dr Matthias Müller, has now confirmed that both Ahmad and Tahnoon visited his clinic on 9 May 2017. This timing of this visit is also consistent with Ahmad's issuance on 11 May of a notarised power of attorney in relation to Mo's Berlin flat.

384. In Ahmad's first (interlocutory) witness statement in these proceedings he stated[112] that, in the course of this trip to Hamburg, Sheikh Tahnoon had proposed that he himself should take over the Commodore Group. Consistently with this, in May 2017 he unlawfully revoked Ahmad's power of attorney making it impossible for him to continue to manage Commodore UAE and Sheikh Tahnoon consequently gained control of the company. Ahmad decided not to return to the UAE at the end of the trip to Germany for what he has described as "semi political" reasons. Over the following months, the other members of the El-Husseiny family in turn abruptly left the UAE, after deciding or being warned that it was no longer safe to remain there. Mo, for example, left in August 2017 even though his wife was 8 months pregnant, because he thought that the safety of his family was at risk in the UAE[113].

385. Consistently with this evidence and the timing, it can now be seen that Commodore UAE began to default on its obligations at *the end of May 2017*: a Bank document from 28 February 2018 records the earliest overdue payment from Commodore UAE as being from 31 May 2017.

386. Certainly it is the case that by the time Ahmad left the UAE the Commodore group began to experience troubled times and this view was shared by the Bank. The Bank's documents state that Ahmad's management "*ceased to exist*"[114] after he left the country in 2017 and that work was "*on hold or stopped*" or "*cancelled*"[115]. On 26 July 2017, Tadamun's trade licence was allowed to expire. And beginning in August 2017, the companies' third-party performance guarantees, issued by the Bank at the request of

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[110] Day 9/152-153.

[111] Day 9/118-119.

[112] Paragraphs 49-51.

[113] See paragraph 71 of his 5th witness statement.

[114] Internal Bank Credit Report of 1 November 2017.

[115] Tadamun and Commodore UAE Excess over limits reports.

Tadamun and Commodore UAE, first started to be invoked: the earliest appears to be 9 August 2017 (claim by Al Jaber Building LLC).

387. Perhaps most significantly, an internal Bank document, being the Project Status Report for the Commodore group and Tadamun dated 24 February 2018 which was sent to the Bank's Executive Board, stated that:

> "*• Borrowing Relationship with IB since October 1985 (over 31 years).*
>
> *• Till recently, the group enjoyed an excellent market reputation and classified as 'Special Category' Contractor*
>
> *• Since inception of the relationship, the Bank's Strategy has been to mainly grant project specific limits for projects awarded by reputed Employers/Main Contractors and where the scope of work was related to the Main Business of the Company.*
>
> *• Some of the major projects completed and handed over by the M/S. Commodore Contracting include the Commercial Building for Shk. Tahnoon Bin Saeed Al Nahyan (CV: AED 52M), Al Nahel Palace Project (CV: AED 37M) amongst several others.*
>
> *• Between 2009 and 2013 M/S. Commodore Contracting did not make any new requests for facilities and all existing financed projects were 100% completed. The relationship was revived in 2014 by financing only the MEP Division for M/S. Commodore Contracting whereas projects financed for M/S. Al Tadamun were related to Installation of Aluminum and Glass Works.*
>
> *• Till 2016 the conduct of the account and progress on the financed projects was entirely satisfactory. Liabilities related to the financed projects were reduced/settled in line with the project progress and related guarantees were promptly returned and cancelled.*
>
> *• Total exposure on the group peaked at AED 234M in 2015 and now stands reduced to the current outstanding level of AED 109M.*
>
> *Financed projects were progressing satisfactorily till Mr Ahmed El Husseini left the country. Majority of the financed projects were in advanced stages of completion and the Project Liabilities had substantially reduced as compared to the limits granted at the time of original sanction.*
>
> *All the above projects under Bank's financing were related to MEP works and were 90-100% completed.*

> *• The company was in discussions with the project owners for release of project funds. However, no funds were released since the last quarter of 2017.*
>
> *In Jan'17, IB (through Beirut Branch) had also granted a Term Loan USD 6,000K (AED 22M) in the Personal Account of Mr. Ahmad Husseini in Beirut. This loan was secured by a first degree mortgage on Plot 3486 at Ras Beirut for USD 6,000K (100% Security Coverage).*
>
> *• Proceeds of this BTL were transferred to the account of M/S. Commodore Contracting Co. LLC to settle the group liabilities and improve its liquidity position (staff salaries, project payments etc.)*
>
> *• This loan was to be repaid in 12 months but was prepaid and closed within 6 months (through takeover by another Bank).*"
>
> (emphasis added)

388. This is the Bank's own internal document and I consider it to be an important and reliable document (applying the approach in ***Simetra Global*** (supra)). It paints a picture of Commodore UAE being a thriving company until Ahmad left the country after falling out with Sheikh Tahnoon, after which in August 2017 third parties began to call upon the Bank guarantees given in favour of Commodore UAE[116]. Before this happened, according to this internal Bank document Ahmad certainly had no reason to fear a call on his personal guarantees.

389. Since Ahmad had asset protection concerns from as early as 2012 in relation to Sheikh Tahnoon's majority shareholding in Commodore UAE, and from at the latest December 2016 in relation to Sheikh Tahnoon's ultimate control of Federal Co., it is very likely that by this stage – May 2017 – his concerns in this respect would have greatly increased, to put it mildly.

390. Consistently with this, a Debt Review Form for Tadamun dated 27 August 2017 also gave the reason for "deterioration of the account/relationship" as "*Mr Ahmad left the country in April 2017*" (in fact it was, it seems, May 2017). The documents show that in the view of the Bank's employees at this time, the reason why Commodore UAE and Tadamun defaulted on their debts was because Ahmad was no longer in the UAE to manage them. The evidence of Ramzy and Mo, consistently with Ahmad's interlocutory witness statement, was that the assets of Commodore UAE were then stripped by Sheikh Tahnoon.

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[116] This note also records that "*In the case of Dragone Theatre Project with M/S. Al Habtoor Leighton (S. No. 4) Mr. Ahmed El Husseini approached the Main Contractor to release AED 6.5M directly through another Bank without obtaining the approval of [the Bank]*. Mr Delehanty submitted that this was evidence that Ahmad had attempted to divert money paid by Commodore UAE's counterparty away from the Bank and to another bank without the Bank's approval, which is an indicator that Commodore UAE was having difficulties meeting its liabilities to other banks. That, however, is mere speculation and I do not accept it.

391. It follows that in considering what Ahmad's purpose was in transferring assets to his family members, it must be kept in mind that it was only from May 2017 onwards that Ahmad left the country, fell out with Sheikh Tahnoon and lost effective control of Commodore UAE and Tadamun (and indeed the group as a whole), which companies thereafter first began to default on their facilities with the Bank from May 2017 (as indeed the Bank has pleaded from the outset in paragraph 23 of its PoC), although it appears that the position only became serious at the end of 2017 when project funds stopped being released to Commodore UAE.

Events after Ahmad leaves the UAE

392. On 11 May 2017, when he was in Germany with Sheikh Tahnoon, Ahmad issued a notarised power of attorney for Joan to act on his behalf in relation to Mo's Berlin property.

393. On 12 May 2017, Mr Collazo, with Ms Zweifel in copy, emailed Baccata to request (in relation to Marquee) "*A full Company Search document/ Certificate of Good standing/ Where applicable a Certificate of Incumbency showing the beneficial ownership*". Baccata responded a few hours later referring to a telephone conversation with Mr Collazo and provided the Company Search document, noting that the Certificate of Good Standing could take approximately three days to obtain. A few minutes later, Ms Zweifel replied to Mr Collazo stating that "*Ahmed called again. The registration is urgent he said and he would like to have it registered before end of May. He also asked me about the fees involved. Can you ask the lawyer please.*"

394. Ahmad's need for urgent action concerning the transfer of the Marquee shares cannot have been for tax reasons. By this stage, changes to the taxation of non-UK domiciled individuals and non-UK resident trusts had already been introduced, becoming effective from 6 April 2017. I infer that it is more likely to have been precipitated by the falling out with Sheikh Tahnoon and Ahmad's leaving the country. At the very least, that inference is at least as likely as any other.

The Medstar/Mistar transfer

395. On 17 May 2017, 12 days after Mistar was first incorporated (with the directors and shareholders being Ahmad (20 shares), Alex (490 shares), and Ziad (490 shares)), Ahmad tried to transfer US$15 million from Medstar's[117] Byblos account to Mistar's First National Bank ("**FNB**") account, but the transfer failed. The sons all gave evidence, which I accept, that they had no idea that Ahmad intended to transfer the US$15 million to Mistar. In particular, Mo gave evidence before this court (and stated in paragraph 60 of his witness statement) that he was informed by Ahmad "*shortly after the proceedings began*" that the failed transfer "*was a mistake and that Medstar itself called to cancel it*." The money had never been intended to go to Mistar. He stated that Ahmad told him that the funds were meant to be (and eventually were) transferred to another account in Medstar's name, and $7.1 million or $7.2 million went to the Bank to pay off a mortgage for Ahmad or another type of charge. Ahmad's evidence in his examination of 2 March 2022 in the Canadian proceedings was that the transfer occurred "*by mistake*" by "*the accountants*".

[117] Medstar being owned by Ahmad.

396. However, the evidence that the transfer was a "mistake" contradicts Ahmad's own evidence in his earlier witness statement of 21 January 2022 in these proceedings: "*There was a time when Medstar did try to make a transfer of US$15 million to Mistar. However, the banks involved rejected the transfer and so the transfer never completed. The reasons for that intended transfer are no longer important … [FNB] was unable to apply the funds to Mistar's account.*" This different account is also consistent with the message from FNB to BNY Mellon as stated on the SWIFT document: "*We authorise you to debit our account with yourselves value 170517 for USD 14,999,958 as we are unable to apply.*" It is also consistent with a letter sent by FNB's General Manager to Mistar on 21 January 2022 stating that "*the transfer was never completed as the funds were rejected by First National Bank*".

397. In view of Ahmad's inconsistent accounts as to the moving of funds from Federal via Medstar and on to Mistar, I consider that the letter from FNB likely reflects the true factual position.

398. The full text of the letter sent by FNB's General Manager to Mistar on 21 January 2022 is as follows:

> "*First National Bank S.A.L hereby confirms that there was no transfer of US$15 million, or any similar sum, from the account of Medstar Holding S.A.L at Byblos Bank S.A.L to the account of Mistar Investment Group Holding S.A.L at First National Bank on 17 May 2017, or at all. We understand that an attempt to initiate such a transfer to the account of Mistar Investment Group Holding S.A.L at First National Bank was made on or around 17 May 2017 but the transfer was never completed as the funds were rejected by First National Bank and were never received into the account of Mistar Investment Group Holding S.A.L at First National Bank.*"

The Bank does not accept that this letter is sufficient proof that the Medstar US$15 million was never paid to Mistar. The letter specifically denies that any such payment was made from Medstar's *Byblos Bank account* to Mistar's FNB account. Nothing is said about payments from Medstar's *FNB account* to Mistar's FNB account, although there may have been no reason for FNB's General Manager to mention that.

399. On 17 November 2022, Mr Anouti, Mistar's auditor, advised the company that the annual payment demanded from Lebanese companies by the government had increased to 50 million Lebanese pounds ("**LBP**"), which at this date was equivalent to roughly US$1,315. Mr Anouti recommended that "*Since the company is not carrying out any business, we suggest holding an extraordinary general assembly before the end of the year 2022 to liquidate the company*". Alex's evidence was that he acted on Mr Anouti's advice to liquidate Mistar. A resolution was passed to liquidate Mistar on 25 November 2022.

400. In paragraph 201 of the Bank's closing submissions it was suggested that Alex, Ramzy and Ziad deliberately put Mistar into liquidation in 2022 for the purpose of prejudicing the Bank's English 423 claim. I reject this submission which, as Mr Venkatesan said, amounts to an allegation of dishonesty or discreditable conduct which has not been pleaded. It was put to Alex (but not Ramzy or Ziad) when he gave evidence. I agree

that such a serious allegation must be pleaded and put to each of the witnesses in cross-examination if it is to be made: ***Revenue and Customs Commissioners v Dempster*** [2008] EWHC 63 (Ch) per Briggs J (as he was) at [26].

401. On 6 January 2023 Alex had a meeting with Mr Anouti and signed Mistar's financial statements and tax declarations for the years 2017 to 2021. Alex's evidence was that these documents were prepared by Mr Anouti as accountant and liquidator of Mistar, and Mr Anouti had Mistar's bank statements in his possession when doing so[118], yet Alex did not attempt to obtain the bank statements from him. When signing these documents Alex gave evidence that he did not read Mistar's bank statements[119]. I accept that evidence, as I found Alex to be an honest witness doing his best to recollect the relevant events.

402. Mistar's balance sheet for 2017 only shows its paid up share capital of LBP 30.15 million, which is about US$20,000. Its income statement does not show receipt of the Medstar US$15 million or any part thereof. The tax declarations for the other years are materially identical. There is no evidence that Mistar received any part of the Medstar US$15 million.

403. During his re-examination Mo waived privilege over a series of emails between him and FNB regarding the status of his FNB account. An email from FNB dated 21 February 2024 states that "*our records show that there was an account opened in 2017 in your name, but no transactions occurred on this account and it was closed by system.*" Mo relies upon this email to show that he did not receive any part of the Medstar US$15 million via his FNB account and there is no evidence that he received it via any non-FNB account.

404. On 2 June 2017, Medstar transferred US$15.2 million from its Byblos Bank account to its FNB account.

405. On 7 June 2017, Medstar transferred US$7.15 million of this sum from its FNB account to Ahmad's collateral deposit account with FNB to secure his indebtedness to FNB. The redacted bank statement of Ahmad's FNB account shows that the US$7.15 million remained in Ahmad's account as of 31 December 2017. The current location of that money is unknown.

406. The Bank's case, as pleaded in paragraph 168.3 of its PoC is that it is to be inferred that subsequent to the attempted Medstar–Mistar Transfer, "*the [$15m] (or part thereof) or monies in equivalent amount (or their value) were ultimately transferred (on date(s) currently unknown to the Claimant) by Medstar to the benefit of the Sons for no (or inadequate) consideration, whether by way of transfer(s) to Mistar, or otherwise*". It can be seen from the foregoing that there is, however, no documentary evidence to support this inference. Indeed, the documentary evidence is contrary to the Bank's pleaded case.

407. Accordingly, looking at matters in the round and in particular by reference to the contemporaneous documentary evidence, whilst the ultimate fate of the US$15m

[118] Day 9/174.

[119] Day 9/174.

Medstar monies is unknown, there is insufficient evidence to infer that the sons, individually or collectively, received any part of the $15m Medstar monies.

408. Nor do I consider that it is open to the Bank to draw any adverse inference to the effect that the court should infer that the $15m Medstar monies went to the sons because of Ahmad's alleged failure to disclose bank statements or attend court to give evidence. In the case of Mistar, such an inference would be inconsistent with its contemporaneous documents; and in the case of the sons, Mr Penny KC accepted in argument that he cannot say whether or when any part of the monies was transferred to one of the sons, nor how much. No specific inference can be drawn.

409. Indeed, the Bank's case at trial had not improved on its case which had been before Andrew Baker J for judgment on 13 May 2022 (where it only just survived the "serious issue to be tried" test) and then, subsequently, before Bryan J for judgment on 17 May 2024, at which the Bank's application to amend its Medstar/Mistar claim was refused. As Bryan J stated in his judgment at [141]-[145]:

> "*141. The Bank alleges that there was, on 17 May 2017, a failed attempt to transfer $15m from the Byblos Bank account of Medstar Holding SAL to the First National Bank account of Mistar Investment Group Holding SAL. The Bank says that Medstar was at the time owned and controlled by Ahmad and that Mistar was owned and controlled by Ds3-4 (see PoC at [8A]). FNB have in fact confirmed that there was no transfer of $15 million or any similar sum between the two accounts, whether on 17 May 2017 or at all.*
>
> *142. The Bank applied for leave to amend to plead an inference that Ahmad nevertheless had intended to, and at some point eventually did, transfer this money to D2-5 (but not Joan) in equal shares. The Bank's current Medstar claim is therefore that over one or more unspecified dates after 17 May 2017, $3.75m was transferred to each of Mo, D3, D4 and D5 or to companies in which each had a financial interest. Giving leave to amend on 13 May 2022, Andrew Baker J held, [101], that he was "just persuaded, on balance, to consider that there is a serious issue to be tried to that effect rather than pure speculation by the Bank". The current pleading therefore, only just cleared the (low) hurdle to advance even the present claim. The Defendants point out that the Bank initially failed to disclose documents produced to it by Ahmad in Canadian proceedings (that it was therefore aware of, as were its lawyers) and which it should have disclosed (as a matter of its disclosure obligations in the English action). It was forced to disclose them on 27 February 2024 after Joan and Mo issued an application for disclosure.*
>
> *143. These documents reveal that US$15,255,640 was transferred on 2 June 2017 from Medstar's Byblos Bank account to a different Medstar account with First National Bank; and that $7.15m of this was subsequently placed in a collateral deposit account in FNB in Ahmad's name – i.e. it would appear*

> *that the money was not sent by D1 to his sons, but apparently offered by Ahmad as collateral for his debts to FNB (which the Defendants say undermines the inference on which the whole Medstar claim depends, namely that Ahmad intended in May 2017 to transfer the money to the benefit of his sons, and acted on that intention thereafter).*
>
> *144. The proposed Medstar Amendments involve the Bank now seeking to amend the Medstar claim to plead new and different inferences namely (1) that Joan, not just the sons, was a recipient of the US$15m (see [168.3] and prayer 9D), and (2) that the $15m was applied by Ahmad almost a year later to the benefit of a different Lebanese company, Ras Beirut.*
>
> *145. As to (2), Ras Beirut purchased Lebanese property from Ahmad in March 2018 for $15 million; and the Bank now infers that it did so by application of the Medstar Transaction Monies (i.e. the $15m). Joan and Ds3, 4 and 5 are shareholders in Ras Beirut, but Mo is not. The Bank nevertheless seeks to infer firstly that an unspecified part of the Medstar Transaction Monies may have been routed to Ras Beirut via Mo; and that D3 may in fact hold half his shareholding in Ras Beirut on trust for Mo (draft PoC at [168A(h)]. This is all in circumstances where there is no documentary evidence for any such monies being routed via Mo, for D3 being the trustee of any trust, or for the application of any part of the $15 million to the benefit of Ras Beirut.*
>
> *146. As will appear below, and for good measure, the Bank has long had the documentation (in the Canadian proceedings) that it now seeks to rely on to advance its new pleas, and the Bank and its lawyers knew of such documentation. The reality is that it could have sought to amend to plead such a claim (if necessary applying to the Canadian courts for permission to do so, as it did in relation to other documentation) a very long time ago.*"

410. In the circumstances, the Bank has failed to prove its case in respect of the Medstar/Mistar transaction.

The Lebanese properties[120]

411. On 1 June 2017 the incorporation of ABR Immobiliere SAL ("**ABR Real Estate**") was registered in Lebanon. One of the shareholders was Elias Shahid Al Hashem, who was also the company's lawyer. In giving evidence, Mo appeared to recognise that name as Chahid, i.e. a member of Hachem Law Firm who regularly acted as Ahmad's lawyer[121].

412. On 7 June 2017 Ahmad entered into a preliminary sale contract for the sale of three Lebanese properties to ABR Real Estate (incorporated just 6 days earlier) for

[120] This transaction is not the subject of the Bank's section 423 claim.

[121] Day 7/52/17 – Day 7/54/2.

US$405,000. When questioned about this transaction in the Canadian proceedings, Ahmad said that "*when I came to Lebanon, mid 2017 I needed lots of money at that time when I came here, because I was in some financial difficulty.*" This was, he explained, directly as a result of Sheikh Tahnoon's actions (such that Ahmad's asset protection concerns in this respect were shown to be fully justified):

> "*That was... when I came to Lebanon, mid two thousand and seventeen (2017). I needed lots of money at that time when I came here, because I was in some financial difficulty. You know, I had thousands of employees, and when Sheikh Tahnoun took over the companies, lots of them -- I'm not talking thousands here, but lots of the employees, especially the white collar employees who worked for us for ten and fifteen and twenty years, Sheikh Tahnoun did -- when he took over and flipped the agreement upside down and took over the company and registered it in his name, he never paid them indemnities; he never paid them this, and I found it was obligation on me, for many reasons, that I had to compensate many of them. So that was the reason why I sold. I needed to sell at that time, otherwise it would have been all still with me if I not needed the money.*"

413. The three Lebanese properties were transferred by Ahmad to ABR Real Estate on 21 June 2017. This evidence, which I find to be truthful, is consistent with the Bank's own contemporaneous understanding of what was happening at the time: see paragraph 387 above.

Berlin property[122]

414. On 19 June 2017, a Deed of Transfer was executed between Joan, Mo and Ahmad (by a power of attorney) by which Ahmad renounced his usufructuary rights over Mo's Berlin property in favour of Joan and transferred his other right over the property to Joan, which consisted of a €4 million land charge. The Deed states that the transfers were "*carried out as part of the restructuring and distribution of assets arising from marriage.*"

415. Despite their travelling to Berlin in order to enter into this Deed, Mo and Joan suggested in evidence that the parties did not intend that the consequences of the transfer of these rights should have any legal effect. Mo's evidence was that the usufruct and land charge acted as a deterrent to his selling the Berlin property – it was not intended that Joan would have a life interest in the property or be entitled to the proceeds of its sale[123]. When the court pointed out that a usufruct alone would have sufficed to achieve that purpose, his unconvincing response was that it was "*a belt and braces approach*". Joan's evidence was that she "*didn't need a land charge*", she was not sure whether she or Mo was aware of the charge, and she "*found it ridiculous*"[124]. I do not accept this evidence of Mo and Joan. I also consider it unlikely that Joan and Mo were not aware of the land charge: Mo's own evidence is that "*Berlin notaries, I'm sure you are aware*

[122] This transaction is not the subject of the Bank's section 423 claim.

[123] Day 7/29-38.

[124] Day 8/148-149.

… you have to read it out line by line, which is not my favourite thing to do"[125], whereas in fact the Deed records that the parties had waived their right to have it read out: see Article 2.2. Accordingly I find that it is likely that they were aware of the legal consequences of this Deed.

416. On 25 October 2017, the German property registry for Mo's Berlin property was amended to reflect the changes made by the Deed of 19 June 2017.

417. After the transfer was completed, Joan's evidence was that she made an oral agreement with Mo on the same day that she would waive her usufructuary rights and the €4 million land charge in exchange for receipt of the rental income of the Berlin property for at least three years. This alleged oral agreement was not mentioned in her Defence in these proceedings. In cross-examination, she said for the first time that she and Mo had apparently signed a "*piece of paper*" to that effect in Beirut shortly afterwards[126] and that she could provide it. However, no such document was then produced by her. Mo's evidence was also that such an informal agreement was reached with Joan, but he made no mention of signing any document. Joan subsequently corrected her evidence and instead said that she wrote this agreement down in her diary, which is apparently in Beirut and has not been produced. I do not accept this evidence. Joan had not previously mentioned this alleged agreement, nor has she disclosed any such document or diary.

418. As to the purpose of the transfer of these rights by Ahmad to Joan, Joan stated that "*it was Ahmad who decided to change the conditions*", and the transfer was executed because they "*were splitting up*"[127] (they entered into a Divorce Agreement two months later). Her evidence is that all she wanted was the income from renting the Berlin property. Whether that be so or not, I reject the suggestion that all that Joan wanted was the right to the rental income of the property for three years as part of the divorce settlement, as it would have been totally unnecessary to go through the trouble of Ahmad executing a power of attorney and for Joan and Mo to travel to Berlin in order to transfer Ahmad's rights in the property to Joan. There would be no sense in doing so, in circumstances where Joan never intended to live in the Berlin property nor enforce the land charge.

419. Ultimately, the actual reason why Ahmad took the steps that he did in respect of the Berlin property remains unclear, but I do not need to resolve this issue because the Bank makes no section 423 claim in respect of the Berlin property. I also reject the suggestion that this transaction throws light on Ahmad's subjective purpose in carrying out the other transactions in respect of which the Bank *does* make a section 423 claim. Each transaction has to be considered on its own merits, and is crucially dependent upon the timeframe of the particular transaction.

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[125] Day 7/21-22.

[126] Day 9/23/7-19.

[127] Day 8/146-150; Day 9/30-31.

Montreal property[128]

420. Whilst they were in Berlin, Joan also signed a power of attorney, which would enable her Montreal attorney to provide her consent to Ahmad's sale of a commercial property which he owned in Montreal (the "**Montreal Property**"). On 19 April 2017 Ahmad had entered into a preliminary contract with a Canadian company for the sale of the Montreal Property for CAD 814,000.

421. The sale of the Montreal Property was completed on 22 June 2017.

422. On 11 July 2017 Ahmad transferred CAD 694,617.61 of the sale proceeds of the Montreal Property to Joan. Again, the reason why Ahmad undertook this transaction is unclear (and there was very little evidence concerning it) but I do not need to resolve this issue because the Bank makes no section 423 claim in respect of this property. Once again, I reject the suggestion that this transaction throws light on Ahmad's subjective purpose in carrying out the other transactions in respect of which the Bank *does* make a section 423 claim. Each transaction has to be considered on its own merits, in its own time frame.

9HP and 18HP

423. On 27 June 2017 Norton BVI resolved to direct Marquee to transfer 18HP to Virtue and 9HP to Ziad. The resolution was signed by Ms Zweifel and Mr Escher as directors of Virtue, among others. These transfers were executed by Marquee on the same day.

424. On 3 July 2017 title to 9HP was registered in favour of Ziad and title to 18HP was registered in favour of Virtue.

425. The Deed of Direction in respect of these properties had already been executed by Ahmad on 5 April 2017, just before the tax deadline (see paragraph 363 above) and before the falling out with Sheikh Tahnoon. In the circumstances, I do not consider that the Bank can draw the inference that Ahmad carried out this transaction to put these assets beyond the reach of the Bank as he feared a claim on his personal guarantees by reason of either (i) Commodore UAE's allegedly dire financial position at that time or (ii) Sheikh Tahnoon taking over Commodore UAE.

The Meribel property

426. On 24 July 2017 Ahmad engaged a real estate agent to sell his property in Meribel, France (the "**Meribel Property**") and on 14 November 2017, Ahmad entered into a preliminary contract for the sale of his Meribel Property.

427. On 9 January 2018 Ahmad sold the Meribel Property for €1.995m. Joan gave evidence that the proceeds of sale were paid to her Byblos Bank account in Lebanon because she had historically agreed with Ahmad (i.e. before the Divorce Agreement, referred to below, was entered into) that Meribel was hers and an apartment in Paris at 81 Quai d'Orsay (the "**Paris Property**") was his. Whilst it is true that the Meribel Property is not mentioned in the Divorce Agreement, Joan suggested that that was simply because

[128] This transaction is not the subject of the Bank's section 423 claim.

it was overlooked, as Ahmad had agreed that she should get it as part of the divorce settlement[129].

428. As I have already said, I found Joan generally to be an honest witness and I accept her evidence in this respect. It is consistent with the fact that shortly before the divorce there was a coordinated decision to sell both Meribel (24 July 2017[130]) and Ahmad's Paris flat (around 24 July 2017), which Joan said, consistently with the evidence given by Ahmad in Canada, was because they had agreed that Ahmad would receive the proceeds of the Paris flat and Joan would receive the proceeds of Meribel, which she considered to be hers, having designed and maintained the property (although ultimately in April 2018 Ahmad also paid to Joan the proceeds of sale of the Paris flat, which she said was to settle a debt owed to her[131]). That has the ring of truth to it.

429. Indeed as Mr Venkatesan convincingly pointed out, the alternative conclusion, that Ahmad would have put Meribel on the open market for some 4 months, sold it 6 months later and then paid away the proceeds to someone who by the time of sale he had divorced in order to defeat a possible claim from the Bank appears much less likely. Moreover, Ahmad retained other more valuable properties, making it even more unlikely that he would have adopted such a course. Nor is there any evidence (or pleaded case) to support a suggestion that Ahmad knew, in July 2017, that Commodore UAE was in serious financial trouble such that he feared a claim from the Bank on his personal guarantees (whether that be under the Commodore Guarantee or the Tadamun Guarantee). Indeed, the documentary evidence does not suggest that Commodore UAE *was* in serious financial trouble at that time. In short, there is insufficient documentary or witness evidence to support the Bank's case that Ahmad acted with the Alleged Purpose in respect of Meribel and I reject it.

The Divorce Agreement between Ahmad and Joan

430. A Divorce Agreement dated 26 August 2017 referred to assets which were to be transferred to Joan by Ahmad as a consequence of their contemplated divorce. According to Joan, this document was prepared by a Ms Cynthia Maalouf, a lawyer at Chahid Law Firm. It was signed by Joan and Ahmad and witnessed by Chahid himself. The relevant provisions are:

> "*4. Real Property*
>
> *a) The Wife is hereby granted full ownership of the real estate company Cardena Finance and Holdings Ltd incorporated in the British Virgin Islands. The Husband undertakes to sign any document that is necessary for the transfer of the ownership of the said company to the Wife or any person the wife designates. The Husband shall hand all the company's documents to the Wife*

[129] Day 8/154-159.

[130] "The parties acknowledge that the terms, prices and conditions of this sale were negotiated by CIS Immobilier to MERIBEL, holder of a mandate given by the SELLER under number 154 dated July 24, 2017".

[131] I address this further below.

> *and shall notify such transfer of ownership to all concerned persons and authorities upon the Wife's first request.*
>
> *b) The Wife is hereby granted 50% of the real estate companies in Canada [3043428 Canada Inc and 27592856 Quebec Inc] respectively registered under the numbers 1145883287 and 1140623688. The Husband undertakes to sign any document that is necessary for the transfer of 50% of ownership of the said companies to the Wife or any person the wife designates. The Husband shall notify such transfer of ownership to all concerned persons and authorities upon the Wife's first request.*
>
> *c) The Wife is hereby granted any real estate property the Husband owns directly or indirectly in the United Kingdom.*
>
> …
>
> *11. Entire Agreement*
>
> *The Agreement constitutes the entire agreement between the parties and contains all the agreements between the parties with respect to the subject matter hereof. This Agreement supersedes any and all other agreements, either oral or in writing between the parties hereto with respect to the subject matter hereof. No change or modification of this Agreement shall be valid unless in writing and signed by both parties.*"

431. The Divorce Agreement is a slightly puzzling document because (i) it only refers to three categories of property (ii) it is common ground that clause 4(c) has no effect since Ahmad did not at this point own any real estate property in the UK and (iii) it is also common ground that the transfer of shares in Cardena pursuant to Clause 4(a) was never implemented; legal ownership has never been transferred to Joan. The same is true of her 50% share of the Canadian real estate companies in Clause 4(b).

432. Had Ahmad wanted to use the excuse of the Divorce Agreement to transfer his assets away from the Bank it would have been a simple matter for him to simply list them in this document (such as the Meribel and Berlin properties and the proceeds of 18HP), but he did not do so. I accept Joan's evidence that although by clause 8(a) of the Divorce Agreement she acknowledges that she has no further claims against Ahmad in respect of the divorce, that agreement is not in fact a comprehensive record of her and Ahmad's agreement as to the division of the assets on divorce: see for example the transfer agreement for the Berlin property rights dated 19 June 2017 and which refers in paragraph 6 thereof to the fact that:

> "*The prominently agreed assignments of property rights on the Son's real property from the Father to the Mother are carried out as part of the restructuring and distribution of assets arising from marriage. Therefore, no quid pro quo, in particular a payment, is agreed on.*"

433. A translated Lebanese document entitled "Individual Civil Status Record" shows that Joan was divorced on 30 August 2017.

434. At trial, the Bank very belatedly attempted to challenge the authenticity of the Divorce Agreement and Ahmad and Joan's marital status, but in a separate reasoned ruling I refused to allow it to do so.

Final events after Sheikh Tahnoon's takeover of Commodore UAE

435. On 13 October 2017, Mo sent a curt email to Mr Raas, the CEO of Commodore Netherlands, noting the difficulties he had faced trying to meet Mr Raas and requesting a meeting on 23 October 2017.

436. On 19 October 2017, Sheikh Tahnoon became the sole shareholder of Commodore UAE.

437. On 23 October 2017, Mo held a meeting with Mr Raas in London.

438. On 26 October 2017, Mr Raas attempted to email Ziad (who was director of Commodore Netherlands) attaching documents which required Ziad's signature but was unsuccessful. The next day, he emailed Mo instead and requested that the message be passed on to Ziad.

439. On 30 October 2017, Ziad replied to Mo: "*As usual I have NOT been kept in the loop by Raas and due to current suspicions I suggest to hold off on his request until suspicions are cleared or verified!*" By this stage (if not before) it is clear that the sons were becoming suspicious of Mr Raas' behaviour.

440. On 31 October 2017 the Bank decided not to suspend interest on the Commodore UAE and Tadamun accounts, noting that they were now "*100% owned by Shaikh Tahnoon. A settlement plan of the liabilities is expected shortly*". The account classification remained "*01 Standard*". Mr Lilani explained that interest is "suspended" (i.e. interest accrues in a separate account) where an account is downgraded to "substandard" and recovery is considered difficult. It appears that the Bank's expectation at this time was that Sheikh Tahnoon would meet the companies' liabilities after taking over its running and accordingly even at this late stage it does not appear that the Bank anticipated making a claim on Ahmad's personal guarantees and accordingly there would have been no reason for Ahmad to anticipate one.

441. As at 3 December 2017, an internal Bank document shows that the Bank was preparing for a meeting with Sheikh Tahnoon "*to reach a settlement agreement on the pending facilities*". That meeting took place on 5 December 2017 at Federal's office in Abu Dhabi and was attended by Mr Ozcan as a representative of Commodore UAE, two Commodore UAE employees, and two Bank employees. Ahmad seems no longer to have been involved. According to the minutes of this meeting, the Bank's employees recommended to management that the Bank should consider approving a loan of AED 175-185 million secured by a labour camp and industrial premises owned by Commodore UAE in Al Mafraq, Abu Dhabi, with a combined value of AED 220 million. It is clear that Commodore UAE still had substantial assets against which to borrow at this time. Mr Lilani agreed that at this time, namely December 2017, the Bank

was still not contemplating legal action against Ahmad personally but was seeking to restructure the loan[132].

442. On 7 December 2017, Alex was elected as the chairman of Mistar, with Mo, Ziad, and Ramzy as assistant general managers. The sons each transferred 50 shares in Mistar to Joan, who thereby held 200 shares and also became a director. Each of the sons now held 199 shares each. It was also resolved that Alex could only exercise his powers as chairman jointly with Joan.

443. On 21 December 2017, Virtue sold 18HP for £8.25m.

444. On 7 January 2018 the Bank's senior management approved a loan for AED 200 million to Federal (in a "new relationship") secured by the two Commodore UAE properties mentioned during the meeting of 5 December 2017 (the labour camp and industrial premises owned by Commodore UAE in Al Mafraq, Abu Dhabi), irrevocable assignment of their rent proceeds, and a personal guarantee of Sheikh Tahnoon. About AED 104 million would be used to cover all of Commodore UAE's and Tadamun's direct and indirect liabilities to the Bank; the remainder could be used by Commodore UAE's new management "*to settle unpaid salaries and other expenses*". Again, this shows that Commodore UAE did have assets which could be used, and were used, to secure its borrowings.

445. On 14 February 2018, Virtue approved a distribution of US$4 million to Joan from the proceeds of 18HP. The transfers were executed on 20 February 2018 and paid to Joan's FNB account.

446. On 15 February 2018, Sheikh Tahnoon's representatives informed the Bank that the AED 200 million loan sanctioned by the Bank "*will not be disbursed*", that is the Bank's restructuring proposal was rejected. The Bank was "*[a]waiting their feedback on the settlement account outstanding.*"

447. On 23 February 2018, Chahid issued a legal opinion regarding the ownership of the Paris Property. The question put to him was "*what happens to the above-mentioned apartment under the laws governing [Ahmad's] marital status*"? His answer was:

> "*Given that Mr Ahmad El Husseini is married to Joan Eva Henry in accordance with Islamic law (Sharia) and is the owner of the apartment according to the title deed, it follows that Mr Ahmad El Husseini is the sole owner of the apartment according to the laws in force, in particular according to the Islamic law governing his marital status.*"

Chahid gave this surprising answer despite his having been a witness to the Divorce Agreement signed on 26 August 2017 and despite Ahmad and Joan's divorce on 30 August 2017. However, this was one of several unanswered questions in this case about which I do not have sufficient evidence to resolve, but which I do not consider that I need to resolve. There was no evidence before me as to the application or effect of Sharia law on the disposition of Ahmad's assets.

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[132] Day 3/119.

448. On the same day, Sheikh Tahnoon and Federal lodged a criminal complaint against Ahmad and the sons in Abu Dhabi. It appears, however, that no steps were taken by the UAE authorities to pursue it.

449. On 7 March 2018, Joan transferred US$250,000 from her FNB account to Alex.

450. On 25 March 2018, Sheikh Tahnoon applied to liquidate Commodore UAE.

451. On 27 March 2018, Joan withdrew US$750,000 in cash from her FNB account, which she stated was spent on house renovations and living expenses.

452. On 3 April 2018, Ahmad entered into a deed of sale to a third party in respect of the Paris Property. The sale price was €1.68 million.

453. On 9 April 2018, restrictions were registered on the titles of 9HP and 32HP in favour of Joan such that no disposition of those properties could be registered without her consent. Ramzy's evidence was that this was done in order to prevent him from selling the property (32HP), which was transferred to him on 12 May 2017. I accept his evidence.

454. On 10 April 2018, the proceeds of the Paris Property were paid into Ahmad's Cedrus Bank account in Lebanon. It is not entirely clear what happened to the proceeds thereafter. It appears that they were then paid into Joan's Cedrus Bank account. In cross-examination, Joan accepted that Ahmad paid her roughly US$2 million in 2018, but she said that these funds were paid over to her by way of a repayment of a loan of over US$3 million whereby she mortgaged a Dubai property in her name and lent the money to Ahmad. She thought that she had disclosed the relevant loan agreement to her solicitors, but they subsequently explained that they do not (and did not) hold any such loan agreement.

455. Following the conclusion of the oral evidence, Alex sent an email on 17 July 2024 to the other parties saying "*Please find attached the following documents for disclosure in these proceedings.*" He apparently received these documents from someone called Ayman Ostaz on 30 May 2024 and Alex disclosed them apparently in support of Joan's evidence that she mortgaged a Dubai property in order to lend Ahmad US$3m. The attachment is a two-page document originally in Arabic but translated into English. The first page is incomplete, and it begins "*2. A registered first-degree mortgage on the property located in plot number 437, Municipality number (588-367), Umm Suqeim, Dubai in favor of First Gulf Bank (mortgage value 15.34 million dirhams, owner Mrs. Joan Eva Henry).*" The second page is headed "*Judicial Department*" and goes on to list some documents related to the mortgaged property (such as the original title deed and property valuation report) and assignments of other rights unrelated to the mortgaged property in favour of First Gulf Bank. The second page may be incomplete as well, and there may be further pages beyond that.

456. It is unclear whether this supports Joan's account or not. But this is again one of several unanswered questions in this case which I do not have sufficient evidence to resolve, but which I do not need to resolve.

The collapse of the Commodore UAE Group ; distributions of cash by Virtue

457. At some point in May 2018, as Mr Penny KC put it, "*the sons discover[ed] that there had been what appears to have been a major fraud at Commodore Netherlands and Commodore Belgium*"[133]. It is not entirely clear who was to blame for this, in particular whether it was Sheikh Tahnoon or his associates (in particular Mr Raas and Mr Ozcan), but it certainly was not Ahmad who by this stage was not involved in running Commodore Netherlands. On 8 May 2018, Mr Raas emailed Ziad regarding "*the negative equity position of [Commodore Netherlands]*" with "*reasonable doubt on the continuity position of the company*", together with a proposal to liquidate Commodore Netherlands. This email was met with evident shock from the sons, who discussed appointing lawyers to investigate the situation.

458. On 15 May 2018, Mr Raas resigned as director of Commodore Netherlands, and, as is common ground, Commodore UAE was put into liquidation by Sheikh Tahnoon on 16 May 2018

459. On 7 June 2018, Ramzy replaced Ahmad as a director of Global Green.

460. On 19 June 2018, Doha Bank filed a claim at the Abu Dhabi Court of First Instance against Commodore UAE in the sum of AED 152 million.

461. On 1 July 2018, Ramzy became the director of Commodore Netherlands.

462. On 5 August 2018, the Bank issued proceedings in the Abu Dhabi Court of First Instance against Tadamun under its facility agreement, Ahmad under his personal guarantees for Tadamun's debts, and Commodore Offshore Lebanon under its guarantees.

463. On 13 August 2018, the Bank issued proceedings in the Abu Dhabi Court of First Instance against Commodore UAE under its facility agreement, Ahmad under his personal guarantees for the Commodore UAE's debts, and Commodore Offshore Lebanon under its guarantees.

464. On 15 October 2018, Virtue approved a distribution of US$4 million to Joan, which was transferred to her on 18 October 2018.

465. On 12 November 2018 Virtue distributed US$2,335 and CHF37,140 from the Spring Blossom Trust to Alex.

466. On 5 March 2019 Virtue distributed US$500,000 from the Spring Blossom Trust to Joan.

467. On 13 March 2019 Doha Bank obtained a judgment from the Abu Dhabi Court of First Instance against Commodore UAE for the sum of AED 152,459,073.23 plus interest. The judgment stated that Commodore UAE "*was associated with the Plaintiff Bank through banking facilities contracts in exchange for a number of guarantees, including personal and institutional guarantees, bills of exchange and waiver letters. Accordingly, it obtained a number of facilities. The Defendant failed to fulfil its*

[133] Day1/33:5-7

obligations under the Project Contract, which led to the beneficiaries of these bonds and guarantees to disburse the amount. The Defendant failed to make the payment and it became indebted of a sum of AED 152,459,073.23 as of 31/03/2018."

468. On 3 April 2019 Sheikh Tahnoon applied to liquidate Tadamun.

469. On 12 June 2019 Virtue distributed US$512,323.65 from the Spring Blossom Trust to Joan.

470. On 30 September 2019 a special resolution of Marquee was passed for its summary winding up and dissolution. Marquee was dissolved on 4 October 2019.

471. On 4 October 2019 Commodore Netherlands and Commodore Belgium initiated legal proceedings to question individuals, including Mr Raas, over alleged tortious wrongdoing concerning the attempted transferring away (to other companies, allegedly ultimately controlled by Sheikh Tahnoon) of certain major Commodore Netherlands and Belgium contracts such as the Bassinko and Maradi projects from April 2017 onwards, after Ahmad lost control of the Commodore group. This resulted in a claim being brought by Commodore Netherlands against Mr Raas, Mr Ozcan and Sheikh Tahnoon amongst others before the District Court of the Hague in 2022 and a judgment of the court on 10 July 2024. It appears that default judgment was entered against Sheikh Tahnoon. However, the parties barely addressed the court with respect to this judgment and accordingly I do not propose to say anything more about it.

472. On 13 October 2019 Tadamun was placed into liquidation.

473. On 8 June 2020 Doha Bank issued a summons in the Court of First Instance in Baabda, Lebanon, referring to the fact that Ahmad personally guaranteed the debts of Commodore UAE up to AED 757 million and the bank sought to recover AED 150 million plus interest from him.

474. The present proceedings commenced in July 2021. Mo was served on 12 July 2021. On 19 July 2021 he made an open offer to the Bank to retransfer his shares in Global Green to Ahmad. The Bank indicated on 28 July 2021 that it was amenable to this offer, but Ahmad's solicitors did not want him to receive the shares. However, after the failure of Ahmad's jurisdictional challenge, he agreed to receive the shares.

475. On 1 August 2022 Mo made a further offer to the Bank to retransfer both the shares in Global Green to Ahmad and the shares in Mistar to Ziad in return for the Bank discontinuing the claim against him. The Bank did not accept this offer.

476. On 29 September 2022 Mo gave the Bank seven days' notice that he would be transferring the Global Green shares to Ahmad and the Mistar shares to Ziad.

477. On 7 October 2022 Mo sold all his shares in Mistar to Ziad.

478. On 11 October 2022 Mo issued a stock transfer form for the transfer of the Global Green shares to Ahmad.

479. On 13 January 2023 the Bank obtained default judgment against Ahmad in England for £19,658,565.47.

480. In May or June 2023, Mo's evidence was that he sold the Berlin property for around €2.2 million and that none of the sale proceeds went to Joan. He said that he used the money for litigation expenses. I have no reason to doubt this evidence.

Conclusion[134]

481. In the light of the foregoing, my conclusions may be summarised as follows.

482. I find that Virtue has no liability to the Bank: see paragraphs 375-378 above.

483. I find that the Bank has failed to prove any of its claims against the Defendants and its claims are accordingly dismissed against each of them.

484. So far as the Bank's Category 1 claim concerning Commodore UAE is concerned, the Bank has failed to plead a case that (i) Commodore UAE was experiencing severe financial difficulties, or indeed any financial difficulties in late 2016 and into 2017 (or otherwise) which led to its failure to discharge its liabilities under the Commodore UAE Facility and (ii) that Ahmad knew of those financial difficulties at that time. It was accordingly not open to the Bank to advance that case at this trial.

485. Accordingly, so far as the Bank's Category 1 claim concerning Commodore UAE is concerned, the Bank is confined to its case that by May 2017 Commodore UAE had failed to discharge its liabilities under the Commodore UAE Facility (paragraph 23 of the PoC) and that Ahmad did not make any payment to the Claimant under the Commodore Guarantee in respect of the debts owed by Commodore UAE to the Claimant (paragraph 24 of the PoC).

486. On the evidence, the Bank has in any event failed to prove its case that Commodore UAE was balance sheet insolvent or otherwise in serious financial trouble by reason of its illiquidity in 2016 or early 2017 or that Ahmad knew that. I find as a fact on the evidence that Commodore UAE's projects, which were financed by the Bank, were progressing satisfactorily with most of the projects in advanced stages of completion, until Ahmad left the country around May 2017. It was only sometime in late 2017/early 2018 that Commodore UAE's financial position appears to have deteriorated by reason of the fact that project funds stopped being released to it such that Commodore was exposed on its facilities with the Bank (and Ahmad on his personal guarantees). Even then, the Bank has failed to prove that Ahmad knew that.

487. It follows that the Bank's case that the court should draw an inference that Ahmad had the Alleged Purpose in respect of the relevant transactions because of the potential claim of the Bank arising out of Commodore UAE's alleged financial difficulties fails.

488. The Bank's suggested adverse inference to the effect that had Ahmad disclosed further documents or given evidence concerning Commodore UAE's financial position or the financial position of the Commodore group as a whole in 2016/2017, then that would

[134] The parties each drafted Flow of Issues documents at the Court's request. However, they were regrettably unable to agree on the wording of the same and to seek to answer the various versions of them would become unnecessarily complicated.

have shown an entirely different picture, namely a company in financial distress, is untenable. There is no reasonable basis for such a hypothesis on the evidence.

489. The Bank's Category 1 case concerning Tadamun (paragraph 17 of the PoC) also fails in view of the fact (i) that the Bank is not entitled to advance the case that Commodore UAE was experiencing serious financial difficulties across the second half of 2016 and through to August 2017 and (ii) the Bank has failed in any event to establish on the evidence that that was so. It follows that the Bank's case that the court should draw an inference that Ahmad had the Alleged Purpose in respect of the relevant transactions because of the potential claim of the Bank arising out of Tadamun's financial difficulties is unsustainable as Tadamun benefited from the support of a financially sound Commodore UAE.

490. The Bank's Category 2 Claims are unsustainable (see paragraphs 103 - 114 above) and are accordingly dismissed.

491. It is not open to the Bank, on its pleaded case, to advance the case that from late 2016 Ahmad was concerned that Sheikh Tahnoon, or third parties at his behest, might bring a claim against him and as a result Ahmad entered into the relevant transactions with the Alleged Purpose. At the PTR Bryan J refused the Bank permission to advance that case.

492. So far as the individual transactions are concerned, I also conclude as follows.

Commodore Netherlands and UK Shares

493. The relevant transaction was the transfer of the Commodore Netherlands shares from the ultimate beneficial ownership of Ahmad to that of Mo, Alex, Ziad and Ramzy. That took place by way of three sub-transfers as follows:

(i) The transfer of the Global Green shares to Medstar (which Ahmad resolved to do in September 2016); and

(ii) The transfer of the shares in Global Green by Medstar to Mo, Alex, Ziad and Ramzy on 28 February 2017. They each received 25 shares; and

(iii) The transfer of the Commodore Netherlands shares from Commodore Turkey to Global Green (which Ahmad resolved to do in September 2016, but which was effected on 31 March 2017).

494. As set out in the judgment above, I find that Mo, Alex, Ziad and Ramzy did not provide any consideration for these shares, and that Ahmad gifted them to his sons.

495. However, the Bank has failed to establish that Ahmad had the Alleged Purpose in respect of this transaction as a whole or as to its individual elements or sub-transactions. The transaction(s) took place over the period September 2016 to March 2017. I have found as a fact that during that period Commodore UAE was financially sound and Ahmad had no reason to fear a claim from the Bank on his personal guarantees whether that be under the Commodore Guarantee or the Tadamun Guarantee. In any event, it is not open to the Bank to advance a case at trial to the effect that Commodore UAE was in financial difficulty during this period, not having pleaded it.

496. Indeed the Bank's own case in the draft amendments for which it was refused permission was that:

> "*… by at the latest the beginning of 2017, Alexander and Ziad had become concerned that Mr. Ozcan was not acting in Ahmad's interests in relation to the Commodore Netherlands business, and that generally he was courting Sheikh Tahnoon's favour. It is to be inferred that they shared these concerns with Ahmad, Mohammed and Ramzy before the date on which the shares in [Global Green] were transferred to the sons.*"

497. The Bank thereby rightly recognised that the transaction(s) may have been carried out, instead, for this type of asset protection purpose (to shield the assets from Sheikh Tahnoon and Ozcan). Indeed, I consider it just as likely that Ahmad carried out the transaction(s) as part of his restructuring of his assets before 5 April 2017, by way of succession planning. Ultimately, the choice between these various subjective possibilities is a matter of conjecture. The Bank has failed to prove its case.

32HP

498. I find that the Bank has failed to establish that Ahmad had the Alleged Purpose in respect of the transfer of 32HP to Ramzy: see paragraphs 257-267 above. The Bank has failed to prove its case.

Meribel property

499. I find that the Bank has failed to establish that Ahmad had the Alleged Purpose in respect of the transfer of the Meribel Sale Proceeds to Joan: see paragraphs 426-429 above.

Marquee Shares/9HP/18HP

500. It is clear and I find as a fact that Ahmad had always wanted to transfer the shares in Marquee to Joan and he decided in November 2016 to gift 9HP and 18HP to Ziad and Ramzy (with Joan having use of 9HP in her lifetime). His concern at that time related to tax issues.

501. In January 2017 he wanted to transfer the shares in Marquee to Joan as soon as possible for asset protection purposes. I find as a fact that this was not because he knew or believed Commodore UAE to be in financial trouble (which it was not). Whilst it is not clear what asset protection purpose Ahmad had in mind at this stage (as indeed Ms Zweifel said at the time), I find that it is likely to have been related to his concerns about Sheikh Tahnoon holding 51% of the company and the need to protect his assets from a claim from Sheikh Tahnoon or third parties at Sheikh Tahnoon's behest.

502. On 5 February 2017, Ahmad intended and purported to transfer the beneficial interest in the Marquee Shares to Joan, and directed Norton to hold the Marquee Shares on trust for Joan (whilst retaining control over the Marquee Shares via the terms of the Fiduciary Agreement dated 5 February 2017 between Joan and Norton, which authorised him to give instructions to Norton in respect of the Marquee Shares).

503. However, on 23 March 2017 Ahmad decided not to implement the gift of shares in Marquee to Joan because of tax disadvantages. He accordingly took steps to unwind the relevant transactions on 3 or 4 April 2017. This does not suggest that Ahmad was busy ensuring his assets could not be the subject of a claim by the Bank.

504. Instead, I find that for tax reasons, on 5 April 2017, Ahmad executed a Deed of Direction which directed Norton BVI to hold 34.69% of the beneficial interest in Marquee shares for Ziad, with the remaining 65.31% held for Virtue as the trustee of the Spring Blossom Trust. In the event that Marquee was liquidated, Norton BVI was to hold 9HP for Ziad and 18HP for Virtue. Virtue accepted 5.8779 shares in Marquee (at US$1 per share) as an addition to the Spring Blossom Trust. This was just before the 6 April 2017 deadline.

505. I consider the relevant transaction for the purposes of section 423 to be the arrangements set out in the preceding paragraph. The arrangements which Ahmad purported to enter into prior to that date (it is unclear whether they were legally concluded or not) were superseded by the arrangements of 5 April 2017.

506. Once again, the Bank has failed to establish that Ahmad had the Alleged Purpose in respect of this transaction as a whole or as to its individual elements or sub-transactions.

507. In these circumstances, whilst it is not necessary for me to decide the point, I consider that the more likely asset protection concern of Ahmad's in March 2017 to have been a need to protect his assets from a claim from Sheikh Tahnoon or third parties at Sheikh Tahnoon's behest, although as Ms Zweifel and Mr Escher stated in evidence, it may simply have been a reference to minimising tax. That would explain why Ahmad referred to "giving up control", as if he had retained control over the shares they might have remained a part of his estate for IHT purposes.

508. It follows that it is not necessary for me to decide any of the other sub-issues which arise in respect of the Marquee shares.

Medstar/Mistar transaction

509. So far as this transaction is concerned, I answer the question posed as follows:

Did any or all of Mo, Alex, Ziad and/or Ramzy receive 25% of the Medstar $15m or the benefit thereof?

Answer: No. See paragraphs 395-410 above.

510. Had the answer to question 2 been "Yes", I would in any event have found that the Bank had failed to establish that Ahmad had the Alleged Purpose in respect of this transaction. In the light of my factual findings as to Commodore UAE's financial position at the time of these events in May/June 2017, the Bank would have failed to establish that this transfer was made for the purpose of putting this asset beyond the reach of the Bank as creditor in respect of Ahmad's personal guarantees (whether that be the Commodore Guarantee or the Tadamun Guarantee).

511. Any further questions do not arise.

ANNEX

The Bank's case concerning the Marquee transaction is contained in paragraphs 147 and 148 of its PoC. The court invited the Bank at trial to clarify precisely what it was contending was/were the relevant transaction(s). This led to the Bank producing on day 9 of the trial a document in which it stated as follows:

The Bank's primary case

1. The relevant 'transaction' for the purposes of s.423 of the 1986 Act is as follows: between 5 February 2017 and 5 April 2017, Ahmad entered into the following arrangements with Norton (as legal owner of the Marquee Shares), Joan, Virtue and Ziad:

(a) *On 5 February 2017, Ahmad transferred or intended and purported to transfer the beneficial interest in the Marquee Shares to Joan, and directed Norton to hold the Marquee Shares on trust for Joan (the "5 February Direction") (whilst retaining control over the Marquee Shares via the terms of the Fiduciary Agreement dated 5 February 2017 between Joan and Norton which authorised him to give instructions to Norton in respect of the Marquee Shares);*

(b) *Thereafter, in light of advice received from Kendris on and prior to 23 March 2017, in order to make the transfer under which he divested or intended and purported to divest himself of his interest in the Marquee Shares more tax efficient (but still acting with the Alleged Purpose), Ahmad took the following steps;*

(c) *On 3 April 2017, by a Deed of Direction and Agreement between Ahmad, Joan and Norton, the parties acknowledged that they were unclear whether the 5 February Direction was legally effective, the 5 February Direction was withdrawn and Norton was directed to hold the Marquee Shares on trust for Ahmad and agreed to do so;*

(d) *On 5 April 2017, Ahmad made arrangements with Norton (as legal owner of the Marquee Shares), Virtue, Ziad and Joan, as follows:*

(i) Ahmad made a gift of 5.8779 of the Marquee Shares (the "Virtue Shares") (alternatively the beneficial interest in the Virtue Shares), to Virtue as trustee of the SB Trust, the beneficiaries of which were Joan and the Sons (and in respect of which Ahmad provided Virtue with a letter of wishes dated 25 March 2017 which requested that (a) Virtue consider any requests made by Joan during her lifetime, and (b) Virtue consider holding the trust funds for Joan as a prime beneficiary), and directed Norton to hold the Virtue Shares on behalf of Virtue, and

(ii) Ahmad made a gift of 3.1221 the Marquee Shares (the "Ziad Shares") (alternatively the beneficial interest in the Ziad Shares) to Ziad, and directed Norton to hold the Ziad Shares on behalf of Ziad,

(iii) On terms (as set out in the Deed of Direction dated 5 April 2017) that, in advance of the liquidation of Marquee, 18HP should be transferred to Virtue upon the trusts of the SB Trust and 9HP should be transferred to Ziad,

(iv) And:

I. Norton declared that it would hold the Marquee Shares in the manner set out above, and

II. Virtue resolved on 5 April 2017 to accept the Virtue Shares as an addition to the SB Trust.

The Bank's alternative case

2. Alternatively, if contrary to the Bank's primary case, the transaction is not that set out in paragraph 1 above, the 'transaction' for the purposes of s.423 of the 1986 Act is as follows: on 5 April 2017, Ahmad entered into arrangements with Norton (as legal owner of the Marquee Shares), Virtue, Ziad and Joan, by which:

(a) *Ahmad made a gift of the Virtue Shares (alternatively the beneficial interest in the Virtue Shares), to Virtue as trustee of the SB Trust, the beneficiaries of which were Joan and the Sons (and in respect of which Ahmad provided Virtue with a letter of wishes dated 25 March 2017 which requested that (a) Virtue consider any requests made by Joan during her lifetime, and (b) Virtue consider holding the trust funds for Joan as a prime beneficiary), and directed Norton to hold the Virtue Shares on behalf of Virtue, and*

(b) *Ahmad made a gift of the "Ziad Shares" (alternatively the beneficial interest in the Ziad Shares) to Ziad, and directed Norton to hold the Ziad Shares on behalf of Ziad,*

(c) *On terms (as set out in the Deed of Direction dated 5 April 2017) that, in advance of the liquidation of Marquee, 18HP should be transferred to Virtue upon the trusts of the SB Trust and 9HP should be transferred to Ziad,*

(d) *And:*

(i) Norton declared that it would hold the Marquee Shares in the manner set out above, and

(ii) *Virtue resolved on 5 April 2017 to accept the Virtue Shares as an addition to the SB Trust."*