Neutral Citation Number: [2020] EWCA Civ 1668

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

MRS JUSTICE ASPLIN
[2015] EWHC 2232 (Ch)

MR JUSTICE ARNOLD
[2019] EWHC 1260 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9/12/2020

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HENDERSON
and
LADY JUSTICE ROSE

Case No: A3/2019/2793 & 2795

Between:

ROBERT GRESHAM GRAY **Appellant**

- and –

GLOBAL ENERGY HORIZONS CORPORATION **Respondent**

Case No A3/2019/2681

Between:

GLOBAL ENERGY HORIZONS CORPORATION

Appellant

- and -

ROBERT GRESHAM GRAY

Respondent

- -
- -

Timothy Dutton QC, Edward Levey QC and Philip Ahlquist (instructed by **Enyo Law LLP**) for Robert Gray
Andrew de Mestre QC and James Knott (instructed by **Eversheds Sutherland**) for Global Energy Horizons Corporation

Hearing dates: 22, 23, 24, 25, 26 and 29 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Wednesday 9 December 2020 at 10:30am.

CONCLUDING OBSERVATIONS

Lord Justice David Richards, Lord Justice Henderson and Lady Justice Rose:

I. INTRODUCTION

1. This is the judgment of the court to which all members have contributed.

2. These appeals follow nine years of litigation, involving three trials and several very substantial interlocutory applications. Global Energy Horizons Corporation ('GEHC') issued proceedings in December 2010, claiming that the Appellant, Robert Gray, had, in breach of his fiduciary duties, received profits and benefits for which he was accountable to it. Following a 12-day trial on liability, Vos J held that Mr Gray owed fiduciary duties to GEHC and that he had placed himself in a position of conflict between his duties to GEHC and his personal interests, such that he was accountable for profits and benefits that he had already received and might receive in the future. There has been no appeal against the order of Vos J. He directed Mr Gray to give an account, pursuant to which Mr Gray swore three affidavits in which he denied the receipt of any profits or benefits.

3. GEHC challenged Mr Gray's account, which was the subject of a 21-day trial before Asplin J in 2015. Mr Gray was ordered to account for sums amounting to US$3 million and to some £1.67 million and for interests in businesses exploiting technology for use in the oil industry in the Russian Federation and in the rest of the world. She was unable on the evidence before her to determine the value of those interests and she directed a further hearing for that purpose. A 5-day valuation hearing took place before Arnold J in 2019. Arnold J found that these interests had no value. GEHC does not appeal against that finding.

4. The hearing of the appeals before us took six full days. The great majority of the issues arose on Mr Gray's appeal against Asplin J's order, for which permission was granted by Arnold J. The issues included extensive challenges to the judge's findings of fact and involved applications by Mr Gray to adduce new evidence. GEHC appealed against some parts of Arnold J's order.

5. These proceedings arise out of a project between two former friends and business partners, Brian de Clare and Mr Gray. GEHC was set up by Mr de Clare in order to exploit what he saw as a promising business venture, based on a new ultrasound technology which was said to increase oil production from depleting oil wells reaching the end of their life. Mr Gray joined the team at GEHC in 2004 and he and Mr de Clare worked together for a time, agreeing that they would benefit equally from any income generated by the business. They worked in particular on trying to get access to the relevant technology which was held by a company called Klamath Falls Inc ('Klamath Falls') and on seeking funding to invest in testing the technology with the aim ultimately of setting up a special purpose vehicle ('SPV') to acquire late life oil wells and using the technology to improve their production rates.

6. In December 2005 Mr Gray, a former banker specialising in oil and gas assets, was invited by Pieter Heerema, a billionaire entrepreneur, to take on the management of a substantial fund to invest in upstream oil and gas opportunities. Mr Heerema owns the Heerema group, whose business includes the fabrication, transportation and installation of offshore oil and gas production facilities. The companies through which the Heerema group became involved in ultrasound technology investments mostly

included the word "RegEnersys" in their name. There were a number of RegEnersys entities and for some purposes it is important to distinguish one RegEnersys company from the other. Where it is significant, we refer to the specific entity, but otherwise just to 'RegEnersys'.

7. The fund was in due course established as a limited partnership called RegEnersys LP and we shall refer to it as RegEnersys or the RegEnersys fund. At first it seemed that this was a happy coincidence and that Mr Gray would be able to use his involvement with this fund to provide the investment that was needed to enable GEHC to progress its plans. Mr de Clare also looked to Mr Gray to advocate with Mr Heerema on GEHC's behalf to ensure that GEHC would receive a share of whatever corporate entity was set up to exploit the technology, since that was the way in which Mr de Clare and the others on the GEHC deal team would be rewarded for their work if the project proved successful.

8. In parallel with the technology held by Klamath Falls, there were scientists in Russia, led by Professor Vladimir Abramov, also working on the same ideas and planning to exploit their technology both in the Russian Federation and in the rest of the world (the 'Russian Scientists'). The RegEnersys fund which Mr Gray was managing supported the Russian Scientists, and ultimately the Klamath Falls technology and the work of the Russian Scientists were brought together in a company called Petrosound Limited ('Petrosound') through a complex series of transactions in which Mr Gray was closely involved. When the interests in Petrosound were distributed in 2013, GEHC did not receive an interest in any aspect of the business and was not entitled to any share in revenues generated by the technology going forward. Instead, GEHC claimed, Mr Gray wrongly exploited the opportunity on behalf of Mr Heerema and himself and took an indirect share personally in the vehicles set up to exploit the technology.

9. GEHC's proceedings issued in December 2010 alleged that Mr Gray had owed fiduciary duties to GEHC and that he had acted in breach of those duties and benefited personally from the opportunity presented by the ultrasound technology for his own benefit and to the exclusion of GEHC. Mr Gray contested every element of the claim. He denied that he had ever owed fiduciary duties to GEHC. If he had owed any such duties, he denied that he had acted in breach of them. Alternatively, he contended that in some respects GEHC had known about his work for Mr Heerema and had consented to that work. He also denied that he had obtained any benefit from the exploitation of the opportunities for which he was liable to account to GEHC. He said that the Klamath Falls technology, even combined with the work of the Russian Scientists, had proved unsuccessful in the field. Far from making any money from it, both he and the RegEnersys fund had suffered substantial financial losses and had nothing to show for their investment of time and money.

10. The trial on liability took place before Vos J in November and December 2012. He handed down judgment on 21 December 2012: see [2012] EWHC 3703 (Ch). We refer to that judgment as 'the Liability Judgment' and a reference to, for example, paragraph 25 in that judgment will be to '[Vos/25]'. Vos J held that Mr Gray had owed fiduciary duties to GEHC from 2005 to 2013, that he had acted in breach of those duties and that, save in respect of one aspect of Mr Gray's conduct, GEHC had not given its informed consent to Mr Gray taking a personal interest in the exploitation of the ultrasound technology.

11. Vos J made two orders following the Liability Judgment. The order made on 17 January 2013 declared that Mr Gray had acted in breach of his fiduciary duty to GEHC and that GEHC was entitled to an account by Mr Gray of all monies and benefits he had received as a result of his breaches ('the Vos Order'). In a further order made on 11 April 2013, Vos J directed Mr Gray to serve and file an affidavit setting out a full explanation of the arrangements giving rise to the monies and benefits received by him. There was no appeal against either of the orders arising from the Liability Judgment but the precise nature and scope of the breaches Vos J found that Mr Gray had committed and hence the scope of the Vos Order and of the account to be carried out are important for some of the issues raised in these appeals.

12. Mr Gray responded to the Vos Order by producing three affidavits in May, July and August 2013. GEHC did not accept that those affidavits gave a full and frank account of the benefits Mr Gray had received and they challenged that account. Directions were therefore given for a further hearing enquiring into the account ('the Enquiry Hearing').

13. One of the interlocutory matters that was dealt with between the handing down of the Liability Judgment and the Enquiry Hearing was an application by GEHC in mid-2014 for third party disclosure against an entity called Venture Investments & Yield Management LLP ('VIYM'). In the course of 2012, VIYM had acted on behalf of a client in making an investment in the technology being developed by the Russian Scientists. In return, VIYM had been given a percentage share in Sonoplus Limited ('Sonoplus'), the operating subsidiary of Petrosound, which by that time was intended to carry on the ultrasound technology business. VIYM was ordered to provide documents relating to the viability of the technology and the corporate structures involved in its exploitation. A large number of documents were disclosed by VIYM to GEHC and then by GEHC to Mr Gray in December 2014 and January 2015 ('the VIYM disclosure'). Some of those documents were included in the trial bundles for the Enquiry Hearing but by no means all of them.

14. The Enquiry Hearing to determine the assets for which Mr Gray was liable to account to GEHC took place before Asplin J over 21 days in April and May 2015. She handed down judgment on 28 July 2015 ('the Enquiry Judgment'): see [2015] EWHC 2232 (Ch). We refer to paragraphs in that judgment as, for example '[Asplin/25]'. In the Enquiry Judgment, Asplin J addressed the question of what assets Mr Gray owned arising from his involvement with the ultrasound technology; the extent to which those assets had a sufficient connection to his breaches of fiduciary duty to justify requiring him to account for them; and the value for which he should be required to account. She held that he must account for a portion of the fees which he had been paid to manage the RegEnersys fund between 2006 and 2012 and for sums he had received when an arbitration in Chile between Klamath Falls and RegEnersys was settled in February 2012.

15. More controversially, Asplin J held that Mr Gray had actual or potential indirect beneficial interests in shareholdings in the companies set up by the Russian Scientists to exploit the ultrasound technology. She held that there were three beneficial interests for which Mr Gray was liable to account. Two of these related to shareholdings in Petrosound, which had been set up to exploit the technology within the Russian Federation. We refer to the exploitation of the technology within the

Russian Federation as the 'Russian business'[1] and to Mr Gray's beneficial interests in that business as the 'Russian Business Assets'. The third was a beneficial interest in the exploitation of the ultrasound technology in the rest of the world outside the Russian Federation. We refer to the exploitation of the technology outside the Russian Federation as the 'ROW business' and to Mr Gray's interest in that as the 'ROW Business Asset'. We refer to his three interests together as the 'Business Assets'.

16. Asplin J made two orders to give effect to her findings in the Enquiry Judgment. The first was made on hand down of the judgment ('the July 2015 Order'). The second was made on 16 January 2016 ('the January 2016 Order') after further computations of the amounts due had been carried out. The sum that she ordered Mr Gray to pay in respect of his fees and the Klamath Falls settlement award was about £3.6 million.

17. As regards the value of the Business Assets, Asplin J heard expert evidence about the viability of the technology and the valuation of those assets but was not able on the evidence before her to arrive at a conclusion as to value. She therefore gave directions for further expert evidence to be served and for a further hearing. For various reasons it took much longer for the valuation stage of the proceedings to take place than was envisaged at the time the directions were given. One matter that arose in that interim period is relevant to these appeals. On 3 October 2016 Mr Gray brought an application to set aside the Enquiry Judgment pursuant to CPR r 3.1(7) ('the Set Aside Application'). He argued that the judgment should be set aside because of procedural irregularities arising from the VIYM disclosure. The Set Aside Application was, however, withdrawn by Mr Gray in May 2017 and the merits of it were not determined.

18. The hearing to establish the value of the Business Assets took place over four days in May 2019 before Arnold J ('the Valuation Hearing'), Asplin J having been appointed to this court in the interim. He handed down his judgment on 21 May 2019 ('the Valuation Judgment'): see [2019] EWHC 1260 (Ch). We refer to paragraphs in the Valuation Judgment as, for example, '[Arnold/25]'. By the time of the Valuation Hearing, further evidence had emerged about the entities involved in the exploitation of the ultrasound technology. In particular it emerged that although at the time of the Enquiry Hearing it had been thought that there would be two separate corporate entities, one exploiting the technology in Russia and one exploiting it in the rest of the world, in fact Sonoplus was used for all that work. Arnold J held that the value of the Business Assets was nil. There is no appeal by GEHC against that finding.

19. After the handing down of the Valuation Judgment, GEHC elected to have the Business Assets transferred to it although they had been held to have no value. There was a further hearing before Arnold J on 3 and 4 October 2019 to deal with consequential matters[2]. In a ruling on 3 October 2019 ('the October 2019 Ruling'), Arnold J dismissed GEHC's application for an order that Mr Gray transfer the Business Assets and refused to grant GEHC any further relief in respect of the Business Assets. He also dealt with various costs matters, determining that there should be no order as to costs in relation to the Enquiry stage of the proceedings or in

[1] The term Russian business is used in this narrative although it included business in some other former Soviet states beyond the Russian Federation.

[2] Arnold J was appointed to the Court of Appeal after he handed down the Valuation Judgment but before the further hearing in October 2019. For consistency, we refer to him as Arnold J throughout this judgment.

respect of the Set Aside Application. Arnold J's rulings of 3 and 4 October 2019 on these various consequential matters were then given effect to by his order of 4 October 2019 ('the Arnold Order').

20. Mr Gray appeals against various parts of Asplin J's July 2015 and January 2016 Orders. Broadly, he contends that Asplin J was wrong to include the management fees and the Klamath Falls settlement money within the scope of the account either because they were not, he submits, sufficiently connected to his breaches of duty or because they were assets deriving from Mr Gray's acquisition of shares in Klamath Falls to which GEHC had given its informed consent. In the alternative with regard to those assets, Mr Gray criticises the way that the amount for which he was liable to account was calculated, including Asplin J's refusal to grant him an equitable allowance for his work on the project over the years. As regards the Business Assets, Mr Gray mounts a challenge to the factual findings made by Asplin J which led her to reject his contention that he did not hold any such interests. He relies on documents that were included in the VIYM disclosure but which were not before the court at the Enquiry Hearing and which he says show that her factual findings cannot be sustained. He asserts in the alternative that even if we are not satisfied that Asplin J's findings of fact were wrong, there were such serious procedural irregularities in the way that the case was conducted before Asplin J, and in the decision Asplin J took to hive off the valuation exercise to a later hearing, that we should set aside her orders.

21. GEHC for its part appeals against the Arnold Order in so far as it rejected GEHC's application for the transfer of the Business Assets by Mr Gray and other relief. It also challenges Arnold J's decision not to award it the costs of the Enquiry stage of the proceedings or the Set Aside Application.

22. We heard the appeals over six days. Mr Gray was represented by Mr Timothy Dutton QC, Mr Edward Levey QC and Mr Philip Ahlquist. GEHC was represented by Mr Andrew de Mestre QC and Mr James Knott. We are grateful to counsel and their teams for the extensive written and oral submissions that we received.

II. THE FACTS IN MORE DETAIL

23. The following narrative is drawn from the findings set out in the Liability Judgment, the Enquiry Judgment and the Valuation Judgment. The facts have been simplified for ease of exposition. In particular, when we refer to a person or a company 'owning' something or 'paying' or 'being paid' something, we refer to the commercial reality of the situation although the actual owners or contractual counterparties may have been corporate or partnership entities controlled by that person, either directly or indirectly.

(a) From the start of the project to June 2007

24. The technology at the heart of this case was invented and developed by Mr Zolezzi and the Russian Scientists. The technology applies ultrasound stimulation to the wellbore area of an oil well to reduce wellbore damage and restore or enhance production in low-performing or late-life wells. Mr Zolezzi had established Klamath Falls, which held US patents in ultrasound technology. The other shares in Klamath Falls were held by a Chilean billionaire, Juan Hurtado. Mr de Clare's involvement

started for our purposes in December 2003 when Mr Zolezzi suggested that Mr de Clare meet Mr Hurtado to discuss the commercialisation of the ultrasound technology.

25. Mr de Clare had known Mr Gray for many years and they renewed their acquaintance by a chance meeting in January 2004. At that time Mr Gray was planning his retirement from Deutsche Bank. Mr de Clare assembled a team of people to work with him on various projects under the auspices of GEHC. In the latter part of 2004, Mr de Clare began to develop what became known as the Acquisition Strategy. The concept behind the Acquisition Strategy was to set up a corporate vehicle which would acquire underperforming oil wells and use the ultrasound technology in them so as vastly to increase their remaining production. Mr Gray became a member of the deal team that Mr de Clare put together within GEHC to take forward the Acquisition Strategy and it was agreed that they would both get the same share, 22% each, of any profits generated by the venture.

26. In March 2005 Mr Gray and Mr de Clare produced GEHC's Acquisition Strategy document to send to Mr Zolezzi. It proposed that an SPV would be formed, owned jointly by Klamath Falls, GEHC and an oil exploration company. The SPV would acquire mature and depleted oil and gas wells, funded by raising $10 billion comprising $2 billion equity and $8 billion debt. The equity would be provided by as yet unidentified hedge funds and the debt finance by major banks with which Mr de Clare and Mr Gray had connections from their former careers. GEHC's role would be to provide advisory services to the Acquisition SPV by sorting out financing, sourcing investors, finding purchasers for the oil and securing potential buyers for the eventual sale of assets.

27. The two men worked with other colleagues on this project during the course of 2005, attending meetings and trying to interest banks in investing in the project. In January 2005 Mr Gray introduced both the technology and the Acquisition Strategy on GEHC's behalf to a US oil and gas exploration company, El Paso Exploration and Production Company ('El Paso'). El Paso in conjunction with the US Department of Energy undertook testing of the ultrasound technology on its oil wells in Utah during 2005. In November 2005 draft results came through from the field showing that oil recovery in the fields increased by up to 600% – a spectacular result.

28. In December 2005 three different events occurred together. First, Mr Gray's shareholding in GEHC was formalised. Mr Gray acquired 31.33% of the shares in GEHC in return for his investment of $260,000 and he entered into a shareholders' agreement with the other shareholders: [Vos/86 and 298]. Secondly, Mr Zolezzi said that he wanted to raise $20 million by selling some of his shares in Klamath Falls. He appointed GEHC to act for him in finding a buyer and negotiating the terms of that sale. Thirdly and perhaps most significantly, Mr Heerema invited Mr Gray to manage the RegEnersys fund, in which Mr Heerema expected to invest some $500 million to hold energy-related private equity investments.

29. Mr de Clare and Mr Gray were keen to interest Mr Heerema in using some of the RegEnersys fund to invest in the Acquisition Strategy. In January 2006, Mr Gray met Mr Heerema in the Netherlands and gave him a presentation about the Acquisition Strategy. Mr Heerema was reported to be enthusiastic about the idea of forming a group which would comprise an oil company to manage the assets (perhaps El Paso), the RegEnersys fund under Mr Gray's direction to provide equity and management,

GEHC to provide structuring and management and Klamath Falls to provide a licence for the technology. A key question therefore for the GEHC team was the size of the interest GEHC would have in the ultimate Acquisition Strategy vehicle as reward for its structuring and advisory role. The additional factor in the mix was Mr Zolezzi's wish to sell part of his shareholding in Klamath Falls. It was possible that the Heerema group would be interested in acquiring that shareholding.

30. Meanwhile Mr Gray was discussing his remuneration package for managing the RegEnersys fund with Mr Nicolaas Pronk who was the chief financial officer of the Heerema group. Mr Gray provided his services to the fund through his own service entity called ReVysion LP ('ReVysion'). On 17 March 2006, Mr Pronk sent Mr Gray an email setting out his remuneration proposal with which Mr Gray agreed ('the 17 March 2006 email'). The email referred to Mr Gray receiving 20% of the ordinary shares of the fund and mentioned a 2% management fee. The 17 March 2006 email also referred to the discussions between Mr Gray and Mr Pronk as to how the interests in the SPV to carry forward the Acquisition Strategy would be shared between the Heerema group, the oil exploration company and GEHC. Initial discussions referred to GEHC receiving a 'carried interest' of 20% and the oil company and Heerema receiving 40% each in return for providing the funding on a 50:50 basis. The parties understood the reference to a 'carried interest' as being an interest in the equity that was given to a partner who did not invest with money but who gave advice or provided other services, the percentage interest remaining constant even if more equity was issued by the company in future. Discussions continued during mid 2006 with the sticking points being the cooperation of Mr Hurtado and the ability of Mr Zolezzi to procure a technology licence to be granted by Klamath Falls to the Acquisition Strategy SPV. Mr de Clare was also becoming concerned that GEHC was putting in a great deal of work on the project without having any firm agreement as to its future stake in the Acquisition Strategy SPV. He worried that once all the building blocks were in place, GEHC might have outlived its usefulness and be shut out of the deal by the other partners it had brought to the table. Mr de Clare was relying on Mr Gray to protect and advance GEHC's interest.

31. In August 2006 the key person at El Paso with whom Mr Gray had been negotiating left the company. It was not clear whether El Paso would still be interested in being involved and if so whether it would still acknowledge the role that GEHC had played so far in putting the deal together.

32. By September 2006 it was clear that Mr Heerema was interested in buying Mr Zolezzi's shareholding in Klamath Falls. The approach was made to Mr Zolezzi by Mr Gray, acting as adviser to the RegEnersys fund. On 11 September 2006, Mr de Clare emailed Mr Gray about Mr Zolezzi's plans to sell a 10% stake to Mr Heerema. He suggested a conference call between them with Mr Gray acting for Mr Heerema and Mr de Clare acting for Mr Zolezzi. In this email, therefore, Mr de Clare acknowledged that in the discussions about the sale of Mr Zolezzi's shares in Klamath Falls to Mr Heerema, GEHC would be acting for Mr Zolezzi and Mr Gray would be acting on the opposite side for Mr Heerema.

33. On 22 September 2006, Mr Gray sent Mr Heerema and Mr Pronk a draft term sheet for their intended acquisition of 10% of Klamath Falls from Mr Zolezzi for $20 million. This included a condition providing for the approval by RegEnersys of the commercial plans of Klamath Falls and in particular that RegEnersys would be a party

to any negotiations taking place with regard to the sale or licensing of the ultrasound technology and would need to approve any agreement resulting from such negotiations. This in turn required the agreement of Mr Hurtado.

34. On 6 December 2006 Mr de Clare wrote to Mr Gray in advance of a meeting between Mr Heerema, Mr Zolezzi and Mr Hurtado in which Mr Gray would be participating. Mr de Clare reminded Mr Gray that he (Mr Gray) would be the only one at the meeting "looking after the [GEHC] corner" and saying Mr Gray should not forget his colleagues at GEHC and the fact that their carried interest in the acquisition SPV was how they expected to be rewarded for three years' work on the project.

35. In a key email also on 6 December 2006 Mr Gray replied to Mr de Clare making it clear, he later asserted, that henceforward he would be acting solely in the best interests of himself and Mr Heerema and not acting to promote a carried interest for GEHC in the future acquisition vehicle. In that email Mr Gray said that GEHC's contribution had been limited because its connection with Mr Zolezzi proved to be of little value and indeed had caused significant problems in putting the deal together. He told Mr de Clare to 'forget the acquisition strategy and 20% carries etc". He reminded Mr de Clare that it was he, Mr Gray, who had introduced El Paso and put his own reputation with his connection there on the line and that had not worked out. He told Mr de Clare that the forthcoming meeting between Mr Heerema, Mr Hurtado and Mr Zolezzi in December 2006 would go ahead but that he would be there representing Mr Heerema's and his own interests: 'I can do no other'.

36. Mr de Clare responded, unsurprisingly urging Mr Gray not to break up a good partnership:

> "GEHC is the key element to the acquisition strategy. You, myself and many others played a major role in helping this to happen over the years. You were my partner in GEHC for the period and you still are. You and I (plus the others in GEHC) as part of GEHC have an absolute right to a meaningful part of the Acquisition Vehicle. This work has been performed by GEHC over the long 4 years and it was the principal goal to hold a carried interest in such a vehicle as the PARAMOUNT method of monetisation for GEHC.
>
> You have been working on this as a principal partner in GEHC and you cannot walk off with intellectual property, work and rights to another company and ignore GEHC as GEHC has been the ONLY continuity in this whole project from the beginning."

37. Mr de Clare thus stressed to Mr Gray that the expectation had always been that GEHC would ultimately have a carried interest in the acquisition vehicle. He acknowledged the importance of the role that Mr Gray had played first in bringing El Paso to the deal and then in bringing the RegEnersys fund. But whatever the ultimate deal was, it could not be done without GEHC's carried interest. Mr Gray's work in this, Mr de Clare said, "was always for GEHC" and he and the other members of the GEHC team "all worked together as one team to deliver through thick and thin".

38. The meeting with Mr Hurtado, Mr Zolezzi, Mr Gray and Mr Heerema took place in London on 11 December 2006. In January 2007 Mr Gray told Mr de Clare that there appeared still to be a long way to go before terms acceptable to all parties could be agreed. Mr Gray thought the problem was still in large part that Mr Zolezzi had an unrealistic view of his own position and bargaining power.

39. In February 2007 the arrangements between Mr Gray and Mr Heerema establishing the RegEnersys fund and settling Mr Gray's role in managing the fund were finalised. The precise terms of his remuneration package are important for some of the grounds of appeal. In brief they were as follows:

    i) the fund was set up as a partnership called RegEnersys LP in which Mr Gray was a limited partner subscribing 20% of the capital of the partnership (for which he paid $625);

    ii) the other limited partner was also a Heerema group entity called RegEnersys Inc which committed to lending $250 million to the partnership. It would also subscribe 80% of the capital of the partnership (a sum of $2,500);

    iii) the general partner was another Heerema entity, RegEnersys (Bermuda) Limited, which was entitled to a share of 2% pa of RegEnersys Inc's $250 million commitment, that is $5 million per year; and

    iv) returns would be applied 20% to Mr Gray and the balance to the Heerema group after payment of (i) all expenses and liabilities; (ii) $5 million a year; and (iii) a preferred return to RegEnersys Inc of 6% of funds invested (effectively interest on RegEnersys Inc's loan).

40. RegEnersys (Bermuda) entered into an advisory agreement with Mr Gray's entity ReVysion under which Mr Gray was appointed to be the investment adviser of the fund and would receive the 2% pa share that RegEnersys (Bermuda) received from the fund. The upshot of this was that Mr Gray was to receive both the 2% share of the committed funds as a management fee each year plus a 20% share of the amount by which the annual income and capital growth of the fund exceeded an amount equal to 6% of the loans made to the fund by RegEnersys Inc.

41. In March 2007 Mr de Clare wrote to Mr Gray acknowledging that Mr Gray as the manager of the Heerema fund was now in a position to devise some arrangement between GEHC and RegEnersys going forward. He said:

> "we will need to tie up the carried interest that GEHC has earned over the last two years and also determine if there is a role for GEHC in RegEnersys (If you recall we had talked about you and I on the board and GEHC's role as an adviser).
>
> Let me know what your thoughts are as we must get the old business put to bed quickly so as we can both work together to get the new deals in!"

42. On 5 March 2007 Mr Gray replied to Mr de Clare pouring cold water on the idea of GEHC's entitlement to a carried interest for the work that it had done. In that email he

described RegEnersys as "a funding vehicle controlled by [Mr Heerema] and I get rewarded through a deferred return". This was the first time that Mr de Clare was told that Mr Gray's remuneration package for managing the RegEnersys fund involved Mr Gray participating in the profits that it earned from the Acquisition Strategy (rather than only participating in the profits if GEHC in which he was a shareholder were given an interest).

43. On 6 June 2007 an important milestone was finally reached; the conclusion of the transaction between Mr Zolezzi and RegEnersys. The following documents were executed:

i) RegEnersys Inc entered into a share purchase agreement with Mr Zolezzi to buy a 10% shareholding in Klamath Falls for $7.5 million.

ii) RegEnersys Inc also entered into a subscription agreement with Klamath Falls to acquire a further, larger tranche of shares for $13.9 million.

iii) RegEnersys Inc and Klamath Falls entered into a non-exclusive licence in respect of the ultrasound technology ('the Licence Agreement').

iv) RegEnersys Inc, Klamath Falls and other shareholders in Klamath Falls entered into an agreement to cooperate towards the testing and commercialisation of the technology ('the Cooperation Agreement').

44. There was no agreement as part of that transaction that GEHC would have a stake. Mr de Clare, however, did not give up hope. On 27 June 2007 he emailed Mr Gray congratulating him in getting the deal over the line saying:

> "That was something I had looked forward to doing for more than four years of hard labour and costs. … In going forward, we need to get the problem of the carried interest resolved."

45. Mr Gray at that stage was also keen to settle what he regarded as "a dark cloud hovering over an important and long-standing friendship." But he warned that Mr de Clare had "an unrealistic timewarp mindset" and that their respective perceptions of what GEHC was going to get out of this were far apart. He reminded Mr de Clare that there was no legal foundation for any such entitlement but he acknowledged "a moral obligation in recognition of your years of involvement in our friendship". He warned that no one was getting a carried interest in the acquisition vehicle and he downplayed GEHC's role in the deal because neither GEHC nor Mr Zolezzi had been able to deliver any of the underlying commercial aspects.

46. In the event, GEHC never received any share of the ultrasound business or any payment for its work other than a modest fee from Mr Zolezzi for its role in negotiating the sale of his shareholding in Klamath Falls.

(b) The liability phase of the proceedings

(i) The Liability Judgment

47. Those were the facts on which Vos J based the Liability Judgment following the Liability Hearing in November and December 2012.

48. Vos J dealt with the existence of a fiduciary duty owed by Mr Gray to GEHC during six different relevant periods. First, looking at all the circumstances from December 2005 when Mr Gray's involvement with Mr de Clare and GEHC started until December 2005 when Mr Gray agreed to manage the RegEnersys fund, Vos J held that GEHC was reasonably entitled to expect that Mr Gray would not use his position in a way that was adverse to its interests: [Vos/440].

49. Vos J described the period in December 2005 and early 2006 when Mr Gray had informed Mr de Clare that he would be managing the RegEnersys fund, as marking "a crucial watershed": [Vos/449]. There was undoubtedly a potential conflict between Mr Heerema's interests and GEHC's interests as soon as Mr Heerema came on the scene, whether or not this was immediately recognised by the protagonists. Vos J had no doubt that, despite Mr Gray's revelation to Mr de Clare that he would in the future act for Mr Heerema in relation to his fund, Mr Gray continued to act for GEHC when he introduced Mr Heerema to GEHC in relation to the Acquisition Strategy: [Vos/459]. He held further that by this stage Mr Gray had an *actual* conflict of interest because of the opposing interests of his two principals. It was in Mr Heerema's interests for Mr Gray to negotiate for the RegEnersys fund to receive the maximum share in an eventual acquisition vehicle. That was in conflict with GEHC's interests in maximising its carried interest in that same vehicle. This was the case by the end of the initial January 2006 meetings once Mr Heerema had expressed serious interest in making an investment. However, by this stage there was no actual conflict between Mr Gray's *personal* interests and those of GEHC since his method of remuneration had not yet been determined.

50. The third period was from March 2006 after Mr Gray agreed to the remuneration proposal in the 17 March 2006 email from Mr Pronk referring to Mr Gray having the 2% management fee and a 20% share of the profits of the fund. This proposed arrangement gave rise to three problems: [Vos/462]

> "Mr Gray would be motivated to reduce GEHC's interest so as (i) to increase Mr Heerema's share and therefore (ii) to increase Mr Gray's own return on his intended 20% shareholding. The third problem is that Mr Gray was secretly taking a personal interest in a business opportunity belonging to GEHC."

51. Thereafter Mr Gray had not only the actual conflict between his duties to Mr Heerema and GEHC but also an actual conflict between his personal interests and his duties to GEHC.

52. The fourth period started in September 2006 when Mr de Clare acknowledged in particular in his email of 11 September 2006 that Mr Gray would be acting for Mr Heerema once negotiations over the sale and purchase of Mr Zolezzi's shares got properly under way. Vos J summarised Mr de Clare's evidence on this point as being that in September 2006 he only understood that Mr Gray was acting for Mr Heerema in the ongoing negotiation with GEHC in relation to the proposed sale by Mr Zolezzi of shares in Klamath Falls. Mr de Clare said that he never understood that Mr Gray was acting against GEHC's interests in relation to the Acquisition Strategy or the grant of a licence for the technology - he always understood Mr Gray still to be promoting GEHC's carried interest in the acquisition vehicle. Vos J broadly accepted that evidence:

> "465. In my judgment, Mr de Clare's change in understanding began with the 11th September 2006 email and proceeded gradually through his 24th November 2006 email until the exchanges of early December 2006 finally brought it home to him that Mr Gray was saying that he would be protecting Mr Heerema's position across the board. Even then, as I have found above, Mr de Clare was looking at the problem through rose tinted spectacles and still thought — or perhaps more accurately — hoped that Mr Gray would continue to advance GEHC's claim to a carried interest."

53. Vos J said that it was clear that by this stage GEHC still knew very little about the precise relationship between Mr Gray and Mr Heerema and certainly did not know the nature of Mr Gray's intended remuneration. He held that GEHC still had a legitimate expectation that Mr Gray would owe it a duty of loyalty.

54. The fifth period was after December 2006 when Mr Gray had made it clear in his email to Mr de Clare that he would only be acting in Mr Heerema's interests and in his own interests: 'I can do no other'. Vos J found that Mr Gray had been careful to avoid telling Mr de Clare that he would be obtaining an interest in the profits to be made by RegEnersys if it became the Acquisition Strategy SPV. He held that Mr de Clare and GEHC continued to be entitled legitimately to expect that Mr Gray would be promoting GEHC's interest in receiving a carried interest in the Acquisition Strategy: [Vos/470]. Mr Gray therefore continued to owe fiduciary duties to GEHC even after the events of December 2006, subject to the question of whether GEHC had given its fully informed consent to his conduct.

55. The sixth and final period considered was the period after Mr Gray sent his email in March 2007 disclosing that his remuneration package for managing the RegEnersys fund included a "deferred return". Vos J held at [Vos/479] that the communication was not sufficient to affect Mr Gray's fiduciary duties by constituting a resignation from or termination of those duties.

56. Vos J addressed the issue whether GEHC had a business opportunity which it was actively pursuing in relation to the exploitation of the ultrasound technology. He held it had: [Vos/480]

> "The possibility of contracting with Klamath Falls for a licence to the ultrasound technology was a business opportunity that was being actively pursued by GEHC at all material times, even after the December 2006 emails. By that time, GEHC may not have had much hope of obtaining a carried or any interest in the acquisition SPV, but its only hope at that stage was to rely, as it did, on Mr Gray's better nature to promote its interests as best he could with Mr Heerema."

57. Vos J held that Mr Gray had been in breach of those fiduciary duties during each of the stages he had previously discussed, after he informed Mr de Clare that he would be managing Mr Heerema's fund.

58. Vos J summarised the breaches that he had found to be established at [Vos/512]:

i) From January 2006, when Mr Gray began to further Mr Heerema's interests in the Acquisition Strategy and in the ultrasound technology, Mr Gray was acting in breach of his duty of good faith to GEHC and had an actual conflict of interest.

ii) From 17 March 2006, Mr Gray put himself in a position where his duties to GEHC conflicted or might possibly conflict with his personal interests in relation to the Acquisition Strategy and the ultrasound technology, because Mr Gray was to be paid a share of Mr Heerema's profits from the SPV.

iii) When Mr Gray finally obtained his interest in the profits from RegEnersys in 2007, he had taken advantage of a maturing business opportunity belonging to GEHC in breach of the no profit rule.

59. Vos J then noted at [Vos/513] that he did not understand that GEHC claimed any relief in respect of the first finding, namely in respect of Mr Gray's breach of fiduciary duty by furthering Mr Heerema's interest after January 2006. He took this from the Re-amended Particulars of Claim which focused on the profits and benefits received by Mr Gray arising out of the commercialisation of the ultrasound technology. The declarations that he proposed making at [Vos/518] therefore related only to Mr Gray's actions after 17 March 2006 when his duties to GEHC conflicted with his personal interests in relation to the ultrasound technology.

(ii) The Vos Order

60. A hearing to deal with consequential matters following hand down was held before Vos J on 17 January 2013. He made an order that Mr Gray should pay GEHC's costs on the standard basis. The Vos Order was made on 17 January 2013 and declared that:

> "Mr Gray acted in breach of his fiduciary duty to GEHC and is liable to account to GEHC in equity for all monies and benefits received by him directly or indirectly arising out of Mr Gray's actions in:-
>
> a) putting himself in a position from 17 March 2006 onwards where his duties to GEHC conflicted or might possibly conflict with his personal interests in relation to the Acquisition Strategy and the ultrasound technology; and
>
> b) taking advantage of a maturing business opportunity of GEHC, namely the opportunity to participate in the Acquisition Strategy and to obtain rights in the ultrasound technology, in breach of the no profit rule."

61. The order further declared that:

> "GEHC is entitled to an account of all sums due and orders for transfer and/or payment to GEHC in respect of monies and benefits received or receivable by Mr Gray directly or indirectly as a result of the said breaches of fiduciary duty,

> including his indirect personal interest in RegEnersys Investment I Ltd, but not including any amounts received in respect of the purchase of an interest in Klamath Falls Inc."

62. Vos J ordered that Mr Gray was liable to transfer to GEHC any assets which it was determined that Mr Gray held on constructive trust for GEHC.

(c) Picking up the narrative for the Enquiry phase

63. In her Enquiry Judgment, Asplin J picked up the narrative of events where Vos J had left off. Since her task was to find out more precisely what benefits Mr Gray had received, she also went into more detail as regards the route by which and the corporate structure through which Mr Gray held his 20% interest in the RegEnersys fund in line with the remuneration proposals he had agreed with Mr Pronk in the 17 March 2006 email and as regards the involvement of the Russian Scientists in the development of the ultrasound technology.

(i) Mr Gray's share of the Acquisition Strategy SPV

64. As we have already described, part of Mr Gray's remuneration package for managing the RegEnersys fund was to be a 20% share of profits earned after repayment of expenses, payment of a fixed sum of US$5m per annum and the top slice of 6% was taken off in respect of the loans made to the fund entity by RegEnersys Inc. The fund was set up in February 2007 as a limited partnership called RegEnersys LP in which Mr Gray took a 20% share. The way the fund worked going forward was that RegEnersys LP had a number of wholly-owned subsidiaries, each of which was an SPV formed to exploit one particular investment which the fund decided to make. The investment in ultrasound technology was carried out through a wholly-owned subsidiary of RegEnersys LP which was called RegEnersys Investment I Limited ('RegEnersys I').

65. To recap, RegEnersys Inc had been one of the two other partners with Mr Gray in RegEnersys LP and had provided the money from the Heerema group for the investment fund that Mr Gray had been engaged to manage. As a result of the 6 June 2007 transactions, RegEnersys Inc acquired from Mr Zolezzi a 10% shareholding in Klamath Falls and entered into the non-exclusive Licence Agreement and the Cooperation Agreement. Shortly after, on 3 August 2007, RegEnersys Inc assigned the benefit of the Licence Agreement and the Cooperation Agreement to RegEnersys I but continued to hold the 10% shareholding in Klamath Falls itself. In February 2011 RegEnersys Inc changed its name to Celloteck Holding Inc but we shall anticipate that change and refer to it generally from here on as 'Celloteck' in order to distinguish it from RegEnersys I where necessary. It is important to keep in mind that Celloteck was the entity which loaned the money to the fund and which took an 80% interest in the project and held shares in Klamath Falls and that RegEnersys I was the entity, wholly owned by the RegEnersys fund, that was organising the exploitation of the ultrasound technology and was the party to the Cooperation Agreement and Licence Agreement with Klamath Falls.

66. From early 2009 RegEnersys started funding the work of the Russian Scientists and by the end of December 2009 about $952,000 had been transferred. The expectation

was that in return for this funding, RegEnersys would receive new equity in any vehicle set up to conduct operations in Russia.

67. However, in early 2010 Mr Heerema decided that he was going to cap the level of the RegEnersys fund and he would not put any more money under management with Mr Gray. By that time several investments other than the investments in ultrasound technology had been made and some of them had been successful. The capping of the fund led to a change in Mr Gray's remuneration as set out in an email from Mr Gray to Mr Pronk on 7 April 2010. The main changes were that:

    i) the previous 80:20 split of returns in excess of the carrying value of the investments as between Celloteck and Mr Gray was changed to a 50:50 split;

    ii) the hurdle rate of 6% would not apply after 1 January 2010;

    iii) Mr Gray's annual management fee of 2% of the committed funds would be replaced by a one-off payment of $10 million.

68. This was later reflected in a restructuring of the entities controlling the RegEnersys fund which took place at the end of December 2010. Broadly, RegEnersys LP was replaced by RegEnersys (UK) LP as the owner of RegEnersys I. As a result of the changes to Mr Gray's remuneration package, his interest increased from the 20% he had held in RegEnersys LP to a 51% share in RegEnersys (UK) LP. Celloteck's interest was correspondingly reduced from the 80% share it had held in RegEnersys LP to a 49% share in RegEnersys (UK) LP.

69. Despite the capping of the fund, Mr Heerema and Mr Pronk still intended to use the existing funds to make further payments to the Russian Scientists and expected that the funding they were providing through RegEnersys to the Russian Scientists' work would be reflected by RegEnersys I being given a majority share in any future Russian entity. Mr Gray also decided to send some of his own personal funds to the Russian Scientists to help pay their overheads and to finance programmes testing the technology. In March 2010 Mr Gray met the Russian Scientists in Moscow. The proposal at that stage was that he would personally invest $1.5 million in return for equity in a future Russian vehicle. In June 2010 Mr Gray made two payments, each of $250,000, to the Russian Scientists from his own funds.

70. Discussions about the parties' respective shares in any future Russian entities took place over the first half of 2010. In October 2010 Mr Gray met the Russian Scientists in Stuttgart. Mr Gray sent an email dated 25 October 2010 to Mr Han Smits who worked for Mr Heerema asking him to send a further $250,000 to the Russian Scientists for "our share" in the Russian operation which would be 30% of the Russian business and a majority of any ROW business. One of the key issues before Asplin J was described at [Asplin/26] as whether:

> "by no later than 25 October 2010, Mr Gray had come to a clear agreement, arrangement or understanding with the Russian Scientists as to the terms of the interest RegEnersys was to have in the Russian operation …."

71. As we describe later, she went on to hold that he had come to such an agreement not only in respect of the Russian business but in respect of the exploitation of the technology in the rest of the world. We refer to this agreement as 'the 2010 agreement'.

(ii) The Klamath Falls arbitration

72. On 17 June 2009 RegEnersys commenced arbitration proceedings against Klamath Falls in Santiago, Chile on the basis of alleged misrepresentations made by Mr Zolezzi to RegEnersys during the negotiations of the transaction concluded in June 2007 and alleged breaches of the Cooperation Agreement and the Licence Agreement. The Klamath Falls arbitration continued during 2011 and 2012. On 9 August 2011 the arbitrator issued a partial award stating that (i) Klamath Falls had failed to transfer the technology to RegEnersys as it was required to do under the agreements; and (ii) Klamath Falls had represented that it owned and controlled the know-how necessary to make and use the tools required to apply the ultrasound technology to oil wells and had licensed those rights to RegEnersys. The arbitrator dismissed the remaining claims brought in the arbitration and directed that there be a further hearing.

73. However, on 2 February 2012 RegEnersys entered into a settlement agreement with Klamath Falls under which RegEnersys took control of Klamath Falls ('the Klamath Falls Settlement'). The result of the settlement as ultimately implemented was that:

    i) Klamath Falls paid $5.1 million to RegEnersys I and Celloteck. The money was in fact credited to Mr Gray's account held by the Heerema accounting department.

    ii) $2.1 million of that $5.1 million was used to buy other shares in Klamath Falls and the remaining $3 million was drawn down by Mr Gray and used to buy shareholdings in unrelated companies.

    iii) All the shares in Klamath Falls previously owned by Mr Zolezzi and Mr Hurtado were transferred to a company called Chiloquin Manana Investments I Limited ('Chiloquin') which was an indirect subsidiary of RegEnersys (UK) LP, the partnership in which Mr Gray by then held a 51% share with Celloteck holding the remaining 49%. The remaining shares in Klamath Falls were acquired by Chiloquin in September 2012.

(iii) The creation of Petrosound and events of 2012 and 2013

74. At the start of 2012, the Russian private equity firm VIYM and two of its executives, Sergey Volchenkov and Vyacheslav Ivanov ('the VIYM Executives'), arrived on the scene and undertook a due diligence exercise into the prospects of the Russian business. From then on, they were included in the discussions about what shares the parties would receive in the Russian business and the ROW business. At that time it was thought that the ROW business would be run through a separate entity which was referred to as 'Opco'. The name 'Opco' was used in the contemporaneous documents and during these proceedings as shorthand for the ROW business exploiting the technology developed by the Russian Scientists in contrast to the exploitation of that technology within the Russian Federation.

75. On 29 May 2012 the Russian Scientists incorporated Petrosound in the Seychelles. In July 2012, Sonoplus was incorporated in Cyprus as a subsidiary of Petrosound and as the entity intended to carry on the Russian business. Sonoplus issued 25.1% of its shares to VIYM and Petrosound retained the remaining 74.9% of Sonoplus.

76. In August 2012 there was another significant transaction which gave rise to an important issue at the Enquiry Hearing. By a transaction on 17 August 2012, RegEnersys (UK) LP sold Chiloquin and RegEnersys I to Celloteck ('the 2012 SPA'). The price was $3 million. It was Mr Gray's case at the Enquiry Hearing that he had thereby divested himself of any interest in the entities involved in the ultrasound technology. He said that the purpose of the transfer was to pay off some of the debt of $65 million that RegEnersys (UK) Ltd owed to Celloteck. It was GEHC's case that the 2012 SPA was accompanied by a secret agreement between Mr Gray and the Heerema group whereby Celloteck agreed to hold its apparently entire interest in Klamath Falls and any future participation in the ultrasound technology via RegEnersys I and Chiloquin on the same basis as the interests had been held by RegEnersys (UK) LP, that is to say, 51% for Mr Gray and 49% for the Heerema group. We refer to this as 'the secret agreement'.

77. During the course of 2013 there were further detailed discussions which aimed at combining in one entity the Klamath Falls technology with the technology developed by the Russian Scientists and parcelling out among the participants in the venture both the interests in Petrosound and the interests in whatever entity would end up as Opco. These discussions led to an agreement dated 13 November 2013 between Celloteck and Petrosound. Under that agreement:

    i) Celloteck took a 15% shareholding in Petrosound through its subsidiary Chiloquin in exchange for the transfer to Petrosound of all the patents held by it and its subsidiaries in the ultrasound technology.

    ii) Petrosound's 74.9% subsidiary Sonoplus would acquire shares in a company called Petrosound International Ltd.

    iii) Other shares in Petrosound International Ltd would be issued by the company by way of equity financing.

    iv) Celloteck would provide Sonoplus with the equipment it needed to operate the ultrasound technology.

78. A few days later, on 22 November 2013 an additional 15% of the issued shares in Petrosound were registered in the names of the VIYM Executives, 7.5% each. GEHC's case was that these shares were held for Celloteck.

79. After those events in November, therefore, the intellectual property rights formerly owned by Klamath Falls were combined in Petrosound with the rights of the Russian Scientists. GEHC's case was that Celloteck owned 30% of Petrosound, comprising the 15% shareholding registered in its name and the 15% shareholding registered in the names of the VIYM Executives.

(d) The Enquiry Hearing and the Enquiry Judgment

80. That was the point in the narrative at which Asplin J considered the issues in the Enquiry Hearing. Asplin J recorded at [Asplin/56] that shortly after the start of the trial Mr Gray was taken to hospital. He was unable to give evidence during the trial although he was able to give instructions to his legal team. He did not apply for an adjournment of the trial and the judge allowed his affidavits and witness statements made in the enquiry to be served under hearsay notices. She concluded, however, that she could attach very little weight to his written evidence unless it was corroborated by contemporaneous documentation or other credible testimony.

81. Turning to the principles to be adopted in ordering the account, Asplin J noted that Vos J had held that Mr Gray was in breach of both the "no conflict" rule and the "no profit" rule: [Asplin/128]. It was not in dispute that such breaches gave rise to the imposition of a constructive trust over any profit or benefit obtained in breach of duty coupled with a liability to account to the principal for that profit or benefit. Asplin J approached the enquiry into Mr Gray's account in four stages:

    i) the first stage was to determine what assets owned by Mr Gray were potentially within the scope of the account;

    ii) the second stage was to consider whether there was a sufficient link between the assets and Mr Gray's breaches of fiduciary duty to make those assets subject to the duty to account;

    iii) the third stage was to consider what expenses should be deducted from the gross value of the assets in order to arrive at Mr Gray's net profits and whether an equitable allowance should be granted to reflect Mr Gray's skill and work in making the net profit;

    iv) the final stage was to determine the value to be ascribed to the asset where it was possible to do so on the basis of the evidence before her.

(i) The management fees 2006 – 2009 and the consultancy fee for 2010

82. Asplin J held that Mr Gray received management fees to the value of $20.5 million for the years 2006 to 2009 for his work for the RegEnersys fund. Deducting the relevant expenses she arrived at a net profit expressed in sterling of £9,457,797: [Asplin/188]. She held further that there was a link between the management fees and Mr Gray's breaches of fiduciary duty but not to the whole amount of the fees. The fees were paid for Mr Gray's work on the whole of the fund, only part of which was actually invested in ultrasound technology assets. She therefore held that the account should be limited to a percentage of the net profit (that is, of £9,457,797), that percentage reflecting the amount of the fund that was invested in ultrasound technology assets expressed as a percentage of the aggregate of all investments made by the fund plus a notional amount of $100 million to represent the work done on investment opportunities which did not in the end result in any actual investment: [Asplin/205].

83. Asplin J held that the $10 million consultancy fee paid to Mr Gray following the amendment of his remuneration package once the RegEnersys fund had been capped in 2010 fell to be treated in the same way as the earlier annual management fees: [Asplin/190]. She held that expenses should be deducted from that fee to arrive at the

net profit but only expenses incurred up to October 2012 which was the date on which the last portion of the $10 million had been drawn down by Mr Gray: [Asplin/210]. She held that the $10 million consultancy fee was connected to Mr Gray's breaches of fiduciary duty in the same way as the earlier management fees. The same apportionment to find the part of the net fee that represented the part of the fund invested in ultrasound technology should be carried out as for the management fees.

(ii) The sums paid under the Klamath Falls Settlement

84. $5.1 million was paid by Klamath Falls to Celloteck under the Klamath Falls Settlement. Asplin J held that this was given to Mr Gray to use for his own purposes. To the extent that $2.1 million was used to purchase an interest in Klamath Falls, the judge considered that it would be double counting to treat the entire $5.1 million as an asset of Mr Gray: [Asplin/184]. She accordingly held him liable to account for $3 million, having held that the receipt of the Klamath Falls Settlement funds was linked to Mr Gray's breaches of fiduciary duty: [Asplin/196]

> "because the litigation from which the settlement derived involved the affirmation of RegEnersys I's rights as the owner of the interest in the Klamath Falls technology, RegEnersys I being the special purpose vehicle used to pursue the opportunities in relation to the ultrasound technology and the Acquisition Strategy of which Mr Gray wrongfully took advantage."

(iii) The Russian Business Assets: Chiloquin's 15% holding of shares in Petrosound

85. Whether or not Mr Gray held a 51% interest in the 15% of shares in Petrosound held by Chiloquin, the subsidiary of Celloteck, depended on whether the purported divestment by Mr Gray of his 51% interest in RegEnersys (UK) LP when that entity was transferred to Celloteck by the 2012 SPA was genuine or whether in fact there had been the alleged secret agreement that Celloteck should continue to hold 51% of its assets for him, including as a result of the 13 November 2013 transaction, 51% of its 15% share of Petrosound.

86. Asplin J held that there had been such a secret agreement negating the apparent effect of the 2012 SPA transaction. The secret agreement maintained the status quo so that Celloteck would continue to hold 51% of its interest in Klamath Falls, or any interest it subsequently received in the vehicles exploiting the Russian Scientists' work, beneficially for Mr Gray. That meant that when in November 2013 Celloteck sold its interests in Klamath Falls to the Russian Scientists in return for an interest in Petrosound, Mr Gray had a 51% share in that interest in Petrosound held by Celloteck.

(iv) The Russian Business Assets: the VIYM Executives' 15% share of Petrosound

87. Whether or not Celloteck, and hence Mr Gray, also held a beneficial interest in the shareholdings allotted to the two VIYM Executives depended not only on the finding that the secret agreement had been made but also on whether the 2010 agreement to which we have earlier referred was made. Asplin J found that it had been made and that it was implemented both by the direct issue of a 15% shareholding in Petrosound to Celloteck through Chiloquin and by the issue of the further 15% shareholding to

the VIYM Executives as nominees for Celloteck. By these means, Celloteck received the 30% interest in the Russian business envisaged by the 2010 agreement. She rejected the suggestion that Professor Abramov had reneged on this understanding and had refused to allot more than the 15% issued directly to Chiloquin.

(v) The ROW Business Asset: 51% of Opco

88. Whether or not Mr Gray held any interest in the exploitation of the ultrasound technology in the rest of the world depended on both the existence of the 2010 agreement providing for the RegEnersys fund to receive 51% of the international business as well as 30% of the domestic business and also on whether Mr Gray's 51% interest in whatever the fund received had survived the 2012 SPA as a result of the secret agreement.

89. Asplin J held that the 2010 agreement was not only in respect of the 30% of what ultimately became Petrosound but also as to 51% of the ROW business: [Asplin/179 - 183]. She held that it was clear that it was intended that a 51% interest in any ROW business which might be commenced after these proceedings was to be held for RegEnersys and hence in part for Mr Gray. That finding, combined with her finding about the secret agreement, led to the conclusion that he had a 51% interest through Celloteck in 51% of the ROW business.

(vi) Valuation of the Business Assets

90. Asplin J went on to consider the value of Mr Gray's Russian Business Assets and the ROW Business Asset. She described the expert evidence of Dr Stephen Becker on behalf of GEHC and of Mr Gervase MacGregor on behalf of Mr Gray as to the state of development of the ultrasound technology and its value. They had produced a total of six valuation reports between them and two joint statements. Their conclusions differed widely. She noted that Dr Becker had based his report on the technology being like "a car ready to run down the road" whereas she considered that the present state of the technology was "semi-experimental". Dr Becker's conclusions were therefore based upon a false premise both as to the present status of the technology and the realities in which it had to operate: [Asplin/251]. She was also not satisfied that Mr MacGregor's approach was correct. He had concluded that the technology had no value at all. This, she held, failed to take into account the realities of the situation which included the fact that recent contracts had been entered into as well as a joint venture and that technical papers had been published by the Russian Scientists amongst others asserting that the technology created a viable process. She was unable to arrive at a valuation for the Business Assets and she directed that further expert evidence be filed based on her findings of fact and her findings as to viability and that the issue of valuation be determined at a further hearing.

(vii) Equitable allowance

91. Asplin J also considered the question of whether an equitable allowance should be made in respect of the skill and labour expended by Mr Gray in earning the profits and benefits that she found he had received. She noted that Mr Gray sought an allowance of £1 million per annum. She declined to make such an allowance, first because she had found that Mr Gray had failed to account properly or at all in respect of the benefits he had received from his breaches of fiduciary duty, and secondly

because there was insufficient evidence before her to calculate an appropriate allowance: [Asplin/213].

(e) Asplin J's orders

92. Following the hand down of the Enquiry Judgment, Asplin J made the July 2015 Order and the January 2016 Order which together declared and directed as follows (so far as relevant for the purposes of these appeals):

    i) Mr Gray would satisfy his liability to account to GEHC in respect of the Klamath Falls Settlement by paying £1,930,950 (para 1(a));

    ii) he would satisfy his liability to account to GEHC for the management fees in respect of the period 2006 to 2009 by paying £980,525.79 (para 1(b));

    iii) he would satisfy his liability to account to GEHC for the consultancy fee of $10 million by paying £692,841 (para 1(c));

    iv) he was liable to account to GEHC for 51% of 15% of the issued shares in Petrosound held for Mr Gray through Chiloquin (para 1(d));

    v) he was liable to account to GEHC for 51% of 15% of the issued shares in Petrosound held for Mr Gray by Professor Abramov or the VIYM Executives (para 1(e));

    vi) he was liable to account to GEHC for a 51% interest in 51% of Petrosound's international ultrasound technology business (also referred to as Opco) (para 1(f)).

93. Paragraph 3 of the July 2015 Order provided:

> "To the extent that Mr Gray retains any of the assets referred to in paragraphs 1(c) to 1(f) above *in specie*, or the traceable proceeds thereof, GEHC is entitled to an order or orders requiring Mr Gray to transfer to GEHC (at GEHC's election) either the asset itself (or its traceable proceeds) or (including in the event that Mr Gray no longer retains the relevant asset or its traceable proceeds) a sum of money representing its value, along with equitable interest …"

94. Asplin J reserved the costs of the Enquiry phase to be considered at the further hearing to deal with the valuation of the Business Assets. She also gave detailed directions for further evidence to be filed for the Valuation Hearing and extended time to appeal against the Enquiry Judgment until the Valuation Hearing had taken place.

(f) The Valuation Hearing and the Valuation Judgment

95. The Valuation Hearing took place before Arnold J over five days in May 2019 and he handed down the Valuation Judgment on 21 May 2019. The purpose of the hearing was to decide the value of the Business Assets, namely:

i) the beneficial interests Mr Gray held in shares in Petrosound being his 51% interest through Celloteck in the 15% of shares that Celloteck's subsidiary Chiloquin held in Petrosound and his 51% interest through Celloteck in the 15% of shares that the VIYM Executives held in Petrosound for the benefit of Celloteck; and

ii) The beneficial interest that Mr Gray held through his 51% share in Celloteck in the 51% of the ROW business to which Celloteck was entitled.

96. Arnold J noted that it was common ground that the Business Assets were to be valued as at 28 July 2015 ('the Valuation Date'), and that they were to be valued at the prices which would have been agreed between a willing buyer and a willing seller in the light of the information reasonably available to them as at that date: [Arnold/55 & 56]. Arnold J also noted that as a result of the orders made after the Enquiry Judgment, a considerable quantity of documentary evidence had become available, in particular as to the operational performance and financial position of the relevant entities; those documents had not been available at the time of the Enquiry Hearing. There was also some evidence which had been available at that time but which had not been referred to during that Hearing.

97. So far as the Russian Business Assets were concerned, Arnold J found that as at the Valuation Date, Petrosound was a holding company with no trading business. Its only material asset was its 74.9% shareholding in Sonoplus. The other 25.1% of Sonoplus was owned by VIYM,[3] VIYM having invested $3 million by way of capital and having loaned up to $3.8 million to Sonoplus. The terms of the Sonoplus shareholders agreement between VIYM and Petrosound gave VIYM substantial control over the company including an effective veto of all board decisions. Further, Arnold J found that under the terms of that agreement, Petrosound was not entitled to any income from Sonoplus or its subsidiaries until the VIYM loans had been repaid in full, and that Petrosound's shareholding in Sonoplus was partially pledged (22% out of its holding of 74.9%) as security for repayment of those loans: [Arnold/78].

98. Sonoplus carried on its operational business in the Russian Federation through subsidiaries. The vast majority of Sonoplus' assets were the substantial inter-company debts owed to it by those subsidiaries. Arnold J held that as at the Valuation Date, there was no evidence that those subsidiaries would be able to repay those debts since they were not trading profitably and showed no signs of trading profitably in the future: [Arnold/81]. The evidence from the financial statements was corroborated by contemporaneous emails and by evidence showing that far fewer oil wells had been treated using the ultrasound technology than had originally been contemplated in 2012. He found that Mr Gray's 51% share of the 30% interest in Petrosound had no value.

99. So far as the exploitation of the ultrasound technology in the rest of the world was concerned, Sonoplus was attempting to exploit this by granting licences of the relevant patents and other intellectual property rights. Arnold J noted therefore at [Arnold/62] that "In one respect, the picture revealed by the documentary evidence is

[3] In fact it became apparent that VIYM was acting on behalf of a client referred to as Langosta but we shall refer to the investor and the shareholder as VIYM. VIYM in fact invested through a nominee called VERLYS Nominees Ltd.

inconsistent with the findings of Asplin J concerning Petrosound's international business." He explained that Asplin J had found that Petrosound International Ltd had been envisaged as Opco, the corporate vehicle for the ROW business, but following its dissolution shortly before the Enquiry Hearing, it could be replaced with a different Opco. On the evidence before Arnold J, it was clear that there was no separate Opco and any ROW business was simply carried on by Sonoplus alongside the Russian business. This created a conundrum because if the ROW business in fact had any value that would already be reflected in the value of the Russian Business Assets, namely the 30% of Petrosound shares in which Mr Gray held a 51% interest. It was not clear how one would then deal with the additional percentage interest that Mr Gray was declared by the July 2015 Order to hold in the international part of the business. In the event, Arnold J stated that he did not have to resolve that conundrum since he held that the value of this licensing business and hence of any interest held by Mr Gray in the ROW business was also nil.

(g) The Valuation Consequentials Rulings and the Arnold Order

100. Several months then elapsed between the handing down of the Valuation Judgment and the hearing to deal with consequential matters arising from that Judgment. On 23 September 2019 GEHC by its solicitors elected pursuant to paragraph 3 of the July 2015 Order to require Mr Gray to transfer the Business Assets to GEHC. GEHC applied for an order that Mr Gray transfer to it his interests in the issued shares in Petrosound and in the ROW business and further that Mr Gray:

> "take all steps available to him to require Chiloquin or any third party or parties that now hold such shares or all property, rights, interests, or claims representing such shares for the defendant to transfer such shares or all property, rights, interests or claims representing such shares to [GEHC]."

101. Arnold J held that GEHC was not entitled to the orders which it sought. According to paragraph 3 of Asplin J's July 2015 Order, GEHC was only entitled to an order requiring Mr Gray to transfer the assets in question "to the extent that Mr Gray retains any of the assets … *in specie*." He noted that no evidence had been put forward by GEHC that Mr Gray did still retain any of the Business Assets *in specie*. On the balance of probabilities, he held, Mr Gray did not retain any of them and so was not in a position to comply with any order for the transfer of those assets. There were various other practical reasons why he declined to make the order sought, not least that Petrosound had been struck off the register of companies in the Seychelles on 18 July 2018. Any order for the transfer of the Business Assets would, he said, "be quite simply unenforceable" as against Professor Abramov and the VIYM Executives and there was no prospect of any order ever being complied with.

102. Arnold J also dealt in the 3 October 2019 Ruling with two sets of costs. The first set was the costs of the Enquiry Hearing before Asplin J since she had reserved those costs in the July 2015 Order. He held that the overall result was that neither party could be said to have been successful at that Hearing. The right order was that each side should bear its own costs. The second set was the costs of the Set Aside Application launched by Mr Gray in October 2016 and withdrawn in May 2017. Arnold J held that the underlying merits of the application had yet to be determined. He therefore ordered that each side should bear its own costs of that application too.

In a further ruling on 4 October 2019, Arnold J dealt with Mr Gray's application for permission to appeal against the orders of Asplin J. He granted permission. He also granted permission to GEHC to appeal against his costs order in relation to the Set Aside Application. Arnold J's rulings of 3 and 4 October on these various consequential matters were then given effect to by the Arnold Order of 4 October 2019. By an order dated 20 December 2019, Patten LJ granted GEHC further permission to appeal against the refusal to order the transfer of the Business Assets and the costs order in respect of the Enquiry Hearing. He directed that GEHC's and Mr Gray's appeals be heard together. Mr Gray has issued a Respondent's notice in GEHC's appeal seeking to uphold Arnold J's decision to refuse to order the transfer of the Business Assets and his decisions on the costs of the Enquiry Hearing and the Set Aside Application.

(h) Mr Gray's Applications D and E and the hearing of the appeals

103. On 28 April 2020, Mr Gray issued two applications in his appeals. The first was an application to amend Ground 1 and Ground 3 of his appeal, and for permission to rely on Ground 4 if, as GEHC contended, permission had not been granted by Arnold J ('Application D'). Mr Gray's second application ('Application E') was to rely on a supplemental skeleton argument and on additional documents that were among those included in the VIYM disclosure but not put before the court at the Enquiry Hearing. Application E was in addition to an application that Mr Gray had included in his Notice of Appeal for several other documents from the VIYM disclosure to be admitted in the appeals. Directions were given that the ancillary application in Mr Gray's notice of appeal and both Application D and Application E, all of which are opposed by GEHC, be heard at the same time as the substantive appeals. We did not deal with the ancillary application or Applications D and E separately but we heard full argument on them and our rulings on them are contained in this judgment.

104. It became apparent by the third day of the hearing listed for five days before us that it would not be possible, even sitting for an extra sixth day, to cover all the grounds of appeal. We therefore directed that GEHC's grounds relating to the costs of the Enquiry Hearing and of the Set Aside Application would be dealt with at a later date since the outcome of those grounds may be affected by our decisions on Mr Gray's appeal and the other grounds of GEHC's appeal.

(i) The Grounds of Appeal in summary

105. Mr Gray's appeal contains nine Grounds of Appeal though some contain more than one limb and some were pursued with more vigour than others. In summary they are as follows:

i) Grounds 1 and 2 challenge Asplin J's conclusion that there existed a sufficient connection between, on the one hand, Mr Gray's breaches of fiduciary duty and, on the other hand, the indirect interests he was found to have in Petrosound and in the ROW business, and the management and consultancy fees received by him, to make him accountable for those assets and benefits.

ii) Ground 3 takes issue with the amount of expenses deducted from the consultancy fee of $10 million to arrive at the net profit for which Mr Gray was liable to account.

iii) Ground 4 concerns amounts for which Mr Gray says he should have been given credit in respect of the Business Assets (but only if he was ordered to transfer those assets to GEHC) and in respect of payments made by him personally (but only if the consultancy fee of $10 million is removed from the account).

iv) Ground 5 asserts that Asplin J erred in refusing to deduct an equitable allowance for the work Mr Gray undertook in respect of ultrasound technology between 2006 and 2012.

v) Ground 6 challenges Asplin J's findings of fact on the critical issues of the existence of the 2010 agreement and the secret agreement. In the alternative, Ground 9 relies on similar matters to assert that the findings should be set aside on grounds of procedural irregularity.

vi) Ground 7 challenges Asplin J's decision that the interest that Mr Gray held in Petrosound shares through the VIYM Executives and his interest in the ROW business were sufficiently certain to form the basis of a properly enforceable declaration or order for transfer. The interests are not assets known to the law or equity.

vii) Ground 8 asserts that Asplin J erred in finding that Celloteck had acquired any interest in the ROW business because such a finding contradicted her earlier finding that the ROW business was going to be self-funding rather than seeking equity funding.

106. GEHC's appeal consists of seven grounds all of which relate to the Arnold Order although only four of them were dealt with at the hearing before us. We give details of those grounds when dealing with them later in this judgment.

III. GROUND 1

(a) Introduction

107. Ground 1 is essentially concerned with the scope of Mr Gray's liability to account, and whether the necessary link exists between his breaches of fiduciary duty and three of the assets for which he was found liable to account by Asplin J. The assets in question are those listed in sub-paragraphs 1(a), (d) and (e) of the July 2015 Order, that is to say:

(a) $3 million of the $5.1 million paid by Klamath Falls to Celloteck under the Klamath Falls Settlement in February 2012;

(d) 51% of 15% of the issued shares in Petrosound held for Mr Gray through Chiloquin; and

(e) 51% of 15% of the issued shares in Petrosound held for Mr Gray by Professor Abramov or by either or both of the VIYM Executives.

Assets (d) and (e) together comprise what we have called the Russian Business Assets. For the purposes of Ground 1, it must be assumed that Asplin J was right to find that the Russian Business Assets were received directly or indirectly by Mr Gray,

although those findings are of course challenged in other grounds of appeal (Grounds 6, 7 and 9).

108. There is no longer any dispute that Mr Gray is to be treated as having received the $5.1 million paid to Celloteck under the Klamath Falls Settlement, even though Celloteck (formerly RegEnersys Inc) was at all times a Heerema entity [Asplin/11]. In this respect, Asplin J made important findings at [Asplin/184] which have not been challenged on appeal:

> "An internal ledger produced by Heerema Group and kept by Mr Smits in the Geneva office shows that this sum was received by Mr Gray into ReVysion's current account with the Heerema Group and was subsequently used personally by Mr Gray for his own purposes. It is said on behalf of Mr Gray that the ledger amounts only to a rough tally and Mr Pronk stated in cross examination that too much had been paid to Mr Gray and subsequently it had been rolled up into a loan to him from the Heerema Group. He did not mention this in his witness statement and there is no documentary evidence before the court to support the alleged roll up into a loan. As a result, I am unable to accept that evidence. It seems to me that the terms of the ledger are clear and that the $5.1m received in settlement of the Chilean arbitration were used by Mr Gray for his own purposes. However, to the extent that $2.1m of it was used to purchase an interest in Klamath Falls, it seems to me that it may be double counting to treat the entire $5.1m as an asset in or formerly in Mr Gray's hands."

109. The need to avoid double counting therefore explains why Mr Gray was required to account for only $3 million of the $5.1 million. The other $2.1 million was used by him to buy the remaining shares in Klamath Falls held by the Hurtado family, prior to the transfer of the controlling stake in Klamath Falls to Chiloquin in which Mr Gray had a 51% interest: see [Asplin/94] and [Arnold/37].

110. The nub of Ground 1, as originally formulated in Mr Gray's grounds of appeal, is that the above assets for which he was found liable to account:

> "are not connected to his breach of fiduciary duty but instead result from the Klamath Falls settlement and the RegEnersys shareholding in Klamath Falls to which GEHC consented, and fall outside the scope of the account as ordered by Vos J… In particular, the indirect interests in Petrosound and the share of the Klamath Falls settlement fall, on Asplin J's own findings of fact, outside the scope of the account."

Accordingly, it is said that "Asplin J was wrong to make Mr Gray account for such assets."

111. We will begin by considering this ground of appeal in its original form. We will then consider Mr Gray's application for permission to amend Ground 1 in Application D. The application is opposed, so we will need to deal with the question whether

permission to amend should be granted as well as with the substance of the proposed amendments if permission is granted.

(b) The scope of the account ordered by Vos J

112. Paragraph 1 of the Vos Order contained a declaration that Mr Gray had acted in breach of his fiduciary duty to GEHC and was liable to account to GEHC in equity:

> "for all monies and benefits received by him directly or indirectly arising out of Mr Gray's actions in: -
>
> (1) putting himself in a position from 17 March 2006 onwards where his duties to GEHC conflicted or might possibly conflict with his personal interests in relation to the Acquisition Strategy and the ultrasound technology; and
>
> (2) taking advantage of a maturing business opportunity of GEHC, namely the opportunity to participate in the Acquisition Strategy and to obtain rights in the ultrasound technology, in breach of the no profit rule."

113. Paragraph 2 of the Vos Order then ordered that:

> "GEHC is entitled to an account of all sums due and orders for transfer and/or payment to GEHC in respect of monies and benefits received or receivable by Mr Gray directly or indirectly as a result of the said breaches of fiduciary duty, including his indirect personal interest in RegEnersys Investment I Limited, but not including any amounts received in respect of the purchase of an interest in Klamath Falls Inc."

114. Accordingly, the account directed by Vos J expressly excluded from its ambit "any amounts received in respect of the purchase of an interest in Klamath Falls Inc." The meaning of those words of exclusion, which we will call "the Klamath Falls exclusion", is one of the key issues which arise under Ground 1. In particular, it is necessary to decide whether the words "the purchase of an interest" refer only to the purchase of shares in Klamath Falls under the transactions entered into on 6 June 2007, or whether they should be construed as including benefits derived from the purchase of intellectual property rights owned by Klamath Falls, or (more generally) from the Acquisition Strategy.

115. In order to answer this question of construction, it is necessary to examine the reasons given in the Liability Judgment for the Klamath Falls exclusion. The first point to note is that the wording of the exclusion reflected verbatim the conclusion stated by Vos J at [Vos/518(ii)]. The second point to note, which counsel for Mr Gray confirmed in response to a question from us, is that there was no substantive discussion of the scope of the Klamath Falls exclusion at the hearing on consequential matters which took place before Vos J on 17 January 2013. The intended scope of the exclusion must therefore be collected from the judge's reasoning in the main body of the Liability Judgment.

116. It is not controversial that, in general terms, the purpose of the Klamath Falls exclusion was to reflect the consent given by Mr de Clare to Mr Gray's acting for Mr Heerema in the negotiations that took place between Mr Heerema and Mr Zolezzi for the purchase by Mr Heerema of Mr Zolezzi's 10% interest in Klamath Falls, which culminated in the transactions executed on 6 June 2007. We cannot in this judgment reproduce the full history of the negotiations which is traced in great detail in the Liability Judgment, to which reference must be made by anybody who wishes to understand every twist and turn in the story. For present purposes, we can begin with the important email sent by Mr de Clare to Mr Gray on 11 September 2006, which Vos J described as follows [Vos/138]:

> "On 11 September 2006, Mr de Clare emailed Mr Gray about Mr Zolezzi's plans to monetise 10% of Klamath Falls by selling to Mr Heerema. Mr de Clare said Mr Zolezzi had discussed with Mr Hurtado an approach from Mr Heerema through Mr Gray (acting as advisor to Mr Heerema's fund) and GEHC acting as advisor to Mr Zolezzi, and suggesting a conference call with Mr Gray acting for Mr Heerema and Mr de Clare acting for Mr Zolezzi."

Counsel then appearing for Mr Gray (Mr Stephen Atherton QC) relied on this email as making clear for the first time that Mr de Clare understood that Mr Gray would be acting for Mr Heerema on the other side of the negotiations from Mr de Clare and GEHC acting for Mr Zolezzi: see [Vos/502].

117. After recording this submission, Vos J continued:

> "503. In my judgment, however, Mr de Clare was only consenting to Mr Gray acting in that capacity to the exclusion of GEHC's interests in respect of the narrow area of the existing debate concerning the share sale. That was partly why the temperature rose so rapidly when the possibility of a term referring to access to the technology was inserted in the draft Co-operation Agreement, and when Mr Gray referred to needing "*front end access to the tools*" on 13 November 2006. Mr de Clare may indeed have been naive in drawing this fine distinction between the Alfredo mandate and the Acquisition Strategy, but he undoubtedly did so. Mr Gray may have been commercially correct in arguing as he did in late November and early December 2006 that the linkage was inevitable, but he did not make that clear to Mr de Clare before the emails culminating in those on 6 December 2006.
>
> 504. GEHC cannot be taken to have given its fully informed consent to Mr Gray forsaking his duty to protect GEHC's interests in relation to the Acquisition Strategy, when that was not even mentioned in the 11 September 2006 email. Mr de Clare did not understand, in any sense, that his email could be taken as consent to the loss of Mr Gray's promotion of GEHC's interests in relation to the Acquisition Strategy and the AWS [*Acoustic Well Stimulation, or ultrasound*] technology."

118. It is clear, in our judgment, from this passage that Vos J found that the consent given by Mr de Clare to Mr Gray's acting on the other side of the negotiations was confined to "the narrow area of the existing debate concerning the share sale". That is what Vos J meant by his reference to "the Alfredo mandate", which he had defined at the start of his judgment [Vos/2(iii)] as a project whereby Mr Zolezzi "asked GEHC to assist in arranging the sale of some of his minority shareholding in Klamath Falls… which owned the AWS technology." By contrast, the "Acquisition Strategy" was defined [Vos/2(ii)] in terms of the underlying commercial objective of using ultrasound technology to increase production from mature and underperforming oil wells. Mr Gray may well have been correct to view the share sale and the Acquisition Strategy as inextricably linked, but Vos J was satisfied that this was not how Mr de Clare saw things, and the consent which he gave to Mr Gray was correspondingly circumscribed.

119. The limited nature of the consent which Vos J found Mr de Clare to have given is reinforced by the judge's discussion of the question whether Mr de Clare gave any further consent in December 2006. Vos J answered this question in the negative, saying at [Vos/507]:

> "Overall, looking at all the factual circumstances in December 2006, it does not seem to me that it can fairly be said that GEHC was consenting to Mr Gray's breaches of the fiduciary duties he owed to GEHC. Specifically, Mr de Clare cannot be said to have consented to Mr Gray taking a personal interest in the acquisition vehicle, which was precisely what the Acquisition Strategy had set out to achieve for GEHC. GEHC never gave any consent, let alone fully informed consent, to Mr Gray taking a personal interest in the maturing business opportunity that belonged to GEHC, namely the chance of obtaining a licence in the AWS technology from Klamath Falls and a share of the profits that would thereby be derived."

120. Similarly, after recording that Mr Atherton "placed great reliance" on authorities showing it is not always necessary for a fiduciary to disclose the level of remuneration that he will receive, provided it is clear that he will be remunerated, and it can be assumed that he will be remunerated on normal commercial terms, Vos J said at [Vos/509]:

> "In my judgment, these authorities take Mr Gray nowhere. Mr de Clare never consented to his taking a personal interest of any kind in the acquisition SPV or in the ultrasound technology, as opposed to the shares in Klamath Falls to be acquired from Mr Zolezzi."

121. Consistently with all the passages we have quoted, Vos J's conclusion at [Vos/511] was that:

> "GEHC only gave its fully informed consent to (i) Mr Gray acting for Mr Heerema in the negotiation for the purchase of Mr Zolezzi's shares, and (ii) Mr Gray taking a personal interest in the purchase of those shares. Otherwise, GEHC gave Mr

> Gray no fully informed consent to act in breach of his continuing fiduciary duties to GEHC."

122. In the light of these clear and unequivocal findings of fact, we have no doubt that the narrow construction of the Klamath Falls exclusion contended for by GEHC is correct, and that the words "in respect of the purchase of an interest in Klamath Falls Inc" should be read as referring only to the purchase of a 10% shareholding in that company from Mr Zolezzi.

(c) What are the profits for which a defaulting fiduciary is liable to account?

123. It was common ground at the Enquiry Hearing that there needs to be "some causal link between the asset obtained and the breach of fiduciary duty": see [Asplin/132]. After referring to authority (the decision of this court in *Murad v Al Saraj* [2005] EWCA Civ 959, [2005] W.T.L.R 1573; the decision of the High Court of Australia in *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544; and the decision of Lewison J (as he then was) in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch)), Asplin J summed up the nature of the relevant test in the following way [Asplin/136-137]:

> "136. As I have already mentioned, I consider the question as to whether the whole or part of an asset is within the account to be part of the determination of whether sufficient causal link is established. As Arden LJ in the *Murad* case makes clear, the defaulting fiduciary is only liable to account in respect of profits made within the scope of his duty which conflicted with his personal interest. The same is true here in relation to the assets and opportunities arising as a result of Mr Gray's breaches of duty. Thereafter, to the extent that an asset in relation to which there is sufficient causal link has become mixed with other assets without such a connection, it seems to me that the long accepted principles in relation to mixed funds apply.
>
> 137. Mr Cavender [*counsel then appearing for Mr Gray*] then includes what for him is a fifth stage in the test to be applied. He says that it is necessary then to consider whether the causal linkage is too remote. By this he means that at some stage "some causal connection" will become insufficient to require the fiduciary to account. He too relies upon the *Murad* case. I agree that logically when determining whether there is "some causal connection" there will be a point at which that connection fails or is insufficient. However, in my judgment, I do not consider that the imposition of the further concept of remoteness with all of its overtones assists matters. "Some causal connection" is just what it says. It is for the court to decide whether in the relevant circumstances the connection is sufficient."

124. Before us, both sides were content to accept the passage we have just quoted as an adequate statement of the relevant principles, but (although we heard no argument on

the point) we must record our view that it is not appropriate to use the language of causation in this context: see further [128] below. We were also referred to the *Ultraframe* case, where Lewison J formulated the governing principles in "fashioning the account" in the following way, at [1588]:

> "(i) The fundamental rule is that a fiduciary must not make an unauthorised profit out of his fiduciary position;
>
> (ii) The fashioning of an account should not be allowed to operate as the unjust enrichment of the claimant;
>
> (iii) The profits for which an account is ordered must bear a reasonable relationship to the breach of duty proved;
>
> (iv) It is important to establish exactly what has been acquired;
>
> (v) Subject to that, the fashioning of the account depends on the facts. In some cases it will be appropriate to order an account limited in time; or limited to profits derived from particular assets or particular customers; or to order an account of all the profits of a business subject to all just allowances for the fiduciary's skill, labour and assumption of business risk. In some cases it may be appropriate to order the making of a payment representing the capital value of the advantage in question, either in place of or in addition to an account of profits."

125. While that is a typically helpful summary, we would sound a note of caution in relation to Lewison J's second principle (unjust enrichment). It appears to derive from the passage in *Warman v Dwyer* cited by Lewison J at [1582], where the High Court of Australia pointed out that:

> "In the case of a business, it may well be inappropriate and inequitable to compel the errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of the principal's goodwill over an indefinite period of time. In such a case, it may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances… This is not to say that the liability of a fiduciary to account should be governed by the doctrine of unjust enrichment, though that doctrine may well have a useful part to play; it is simply to say that the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff."

126. The point we wish to emphasise is that the basic equitable rule is indeed a stringent one which requires an errant fiduciary to account to his principal for all unauthorised profits falling within the scope of his fiduciary duty. The rule is intended to have a deterrent effect, and to ensure that no defaulting fiduciary can make a profit from his

breach of duty. It does not matter if the result is to confer a benefit on the principal which the principal would otherwise have been unable to reap. As it is put by the editors of *Snell's Equity,* 34th edition (2020) (as updated in the First cumulative Supplement), at paragraph 20-037:

> "Relief given by way of an account of profits is measured by the gain made by the wrongdoer irrespective of whether the claimant has suffered a corresponding loss. On the taking of the account, the object is "to determine as accurately as possible the true measure of the profit or benefit obtained" [*a reference to Warman, loc.cit, at 588*]. Typically, the court must determine the sums impermissibly received and deduct any allowable expenses. An account of profits therefore proceeds on a different principle from reparative compensatory damages or equitable compensation."

127. It follows, in our view, that the doctrine of unjust enrichment has, at best, only a subsidiary role to play in limiting the liability of a fiduciary to account. We are here concerned with the obligation of a defaulting fiduciary to account for unauthorised profits, not with compensation for an equitable wrong, and still less with an independent cause of action in restitution to reverse an unjust enrichment of the defendant at the expense of the claimant: compare the illuminating observations of Sir Jack Beatson (with whom Simler and Irwin LJJ agreed) in *F M Capital Partners Ltd v Marino and Others* [2020] EWCA Civ 245, [2020] 3 WLR 109 at [49] to [55]. Furthermore, in relation to Ground 1, we are anyway in "the realm of specific assets", where the question is simply whether there is a sufficient link between the assets received by the defaulting fiduciary and his breach of duty.

128. We now return to the question whether Asplin J was right to use the language of causation in this context. In our respectful opinion, she was wrong to do so, although we emphasise that we have not heard argument on the question, and it appears to have been common ground before her that the relevant test could appropriately be framed in terms of causation. The important point, in our judgment, is that the liability of a defaulting fiduciary to account for unauthorised profits is a strict one, which has always been jealously enforced by courts of equity. There needs to be some link or nexus between the breach of duty proved and the profits for which an account is ordered, such that there is a "reasonable relationship" between them (as Lewison J said in the *Ultraframe* case). But the link or nexus does not need to be of a causal character. It will normally be sufficient if the profit arose within the scope of the defaulting fiduciary's conduct in breach of duty. As Morritt LJ said, in *United Pan Europe Communications NV v Deutsche Bank AG* [2000] 2. B. C. L. C. 461 at [47]:

> "If there is a fiduciary duty of loyalty and if the conduct complained of falls within the scope of that fiduciary duty… then I see no justification for any further requirement that the profit shall have been obtained by the fiduciary "by virtue of his position". Such a condition suggests an element of causation which neither principle nor the authorities require."

This passage was cited with approval by Arden LJ in the *Murad* case at [57]. See too the concurring judgment of Jonathan Parker LJ at [96] and [112].

(d) The Klamath Falls Settlement

129. To recap, on 6 June 2007 Celloteck not only acquired a 10% shareholding in Klamath Falls, but also entered into the non-exclusive Licence Agreement with Klamath Falls in respect of the ultrasound technology, as well as the Cooperation Agreement under which the parties agreed to cooperate and work towards the testing and commercialisation of the technology: see [Asplin/12]. On 3 August 2007, Celloteck's interest in the two agreements was assigned to RegEnersys I: ibid.

130. In May 2008, RegEnersys I entered into an agreement with El Paso to test the ultrasound technology on twelve of its oil wells located in Utah. The testing continued for about one year, with very promising results: [Asplin/13]. Meanwhile, however, relations between RegEnersys I, Mr Zolezzi and Mr Hurtado began to sour, and in June 2009 Celloteck and RegEnersys I started arbitration proceedings in Chile against Klamath Falls, Mr Zolezzi and others, alleging (among many other matters) breaches of the Licence Agreement and the Cooperation Agreement: [Asplin/15]. A sole arbitrator, Mr Henri Alvarez QC, was appointed, and in due course a five day hearing took place before him in Santiago, Chile, in November 2010. We were shown his lengthy Partial Award dated 9 August 2011 ("the Partial Award"), which does not appear to have been the subject of specific submissions at the Enquiry or Valuation Hearings, but was referred to by Vos J in the Liability Judgment at [Vos/210].

131. It is apparent from the Partial Award that the remedies and relief claimed by Celloteck and RegEnersys I in the arbitration were very wide-ranging, and extended to all of the "Transaction Agreements" relating to Celloteck's shareholding in Klamath Falls (consisting of a Subscription Agreement, a Share Purchase Agreement and an Amended Restated Shareholders Agreement, as well as the Licence Agreement, the Cooperation Agreement and a Confidentiality Agreement). The Partial Award did not distinguish between the involvement of Celloteck (then called RegEnersys Inc) and RegEnersys I in those transactions, referring to them collectively as "RegEnersys". The relief sought included declarations that the Klamath Respondents and the Zolezzi Respondents had fraudulently induced RegEnersys to enter into the Transaction Agreements, or alternatively a declaration that the Transaction Agreements had been entered into under a mutual mistake, with the consequence (on either basis) that the Transaction Agreements should be rescinded, together with orders for repayment of the sums invested with interest, and punitive damages for fraud. In the alternative, various breaches of contract were alleged, including (as we have said) breaches of the Licence and Cooperation Agreements.

132. The outcome of the Partial Award, summarised in paragraph 549, was that all of the claims and counterclaims were dismissed, with the exception of the contractual claims relating to alleged breaches of sections 8.1 and 2.1 of the Licence Agreement and sections 3.1 and 4.1 of the Cooperation Agreement, and the assessment of any damages in relation thereto, which were deferred to a subsequent award, together with the parties' respective claims for costs. It follows that all of the claims brought by Celloteck in its capacity as a shareholder in Klamath Falls were dismissed, and the only surviving claims related to the contractual rights of RegEnersys I under the Licence and Cooperation Agreements. The breaches of contract which the arbitrator found to be established related to the failure of Klamath Falls to disclose all of the intellectual property which it had represented and warranted it owned on 6 June 2007. The reason why the arbitration had to be adjourned before a final award could be

made was that fuller disclosure and submissions were needed in relation to the so-called Related Intellectual Property of which Klamath Falls had failed to make full disclosure (see paragraphs 475 and 476 of the Partial Award).

133. In the event, the further hearing in the arbitration never took place, because the Klamath Falls Settlement was entered into on 2 February 2012. The parties to the settlement agreement were Celloteck and RegEnersys I (collectively defined as "RegEnersys", as in the Partial Award) (1) and Klamath Falls Inc (2). The agreement recited that RegEnersys had asserted claims against Klamath Falls in the arbitration proceedings, "some of which claims were dismissed and some of which claims have been held over for further proceedings pursuant to the Partial Award". Further recitals referred to Klamath Falls' counterclaims, which had been dismissed pursuant to the Partial Award; stated that the parties "deny any and all liability to each other"; and stated the desire of the parties "to settle and resolve any and all claims between them without the expense and distraction of further legal proceedings". Clause 1 then provided for payment of the settlement consideration of not less than $5.1 million "to RegEnersys" with immediate effect. Clause 2 provided for the withdrawal by the parties of all the claims asserted against each other in the arbitration. By clause 3, RegEnersys gave an irrevocable and unconditional release to Klamath Falls, framed in the widest terms, from all claims and liabilities, known or unknown, which RegEnersys had:

> "arising out of any matters, causes, acts, conduct, claims, or events from the beginning of the world to this date, including but not limited to the claims of breach of contract, fraud, and mutual mistake asserted by RegEnersys in the Arbitration Proceedings, excepting only the rights and obligations created in connection with this Agreement and the enforcement thereof."

Clause 4 contained a release in similar terms given by Klamath Falls. Clause 5 stated that there was no admission of liability on either side. Clause 6 provided, among other matters, that the agreement was to be governed by New York law, and that it contained "the complete and exclusive statement of the terms of the agreement between the parties". The agreement was signed by Mr Gray on behalf of Celloteck, Mr Adam Kantor, a colleague of Mr Gray, on behalf of RegEnersys I and Mr Hurtado on behalf of Klamath Falls.

134. On behalf of Mr Gray, Mr Ahlquist pointed out that the releases in clauses 3 and 4 expressly included the claims asserted in the arbitration which had been the subject of the Partial Award, including the claims brought by Celloteck in its capacity as a shareholder in Klamath Falls. That is true, but we would attach no particular significance to this feature of the agreement. The releases were framed in comprehensive terms, no doubt in order to cover all eventualities, but it remained the position as between the parties that all of Celloteck's shareholder claims had been dismissed by the Partial Award, which was final save in respect of the contractual issues which had been adjourned. The commercial substance of the settlement must therefore have related to the extant contractual claims under the Licence and Cooperation Agreements, and the bulk (if not the entirety) of the $5.1 million consideration paid by Klamath Falls must have been attributable to the settlement of

those extant claims. The shareholder claims had already been finally disposed of, pursuant to the arbitration machinery chosen by the parties.

(e) Mr Gray's liability to account for asset 1(a): the $3 million derived from the Klamath Falls Settlement

135. Asplin J found that there was a sufficient link between Mr Gray's receipt of $3 million derived from the Klamath Falls Settlement and his breaches of fiduciary duty, for the reasons which she briefly gave in [Asplin/196]:

> "Further in my judgment, the receipt of $5.1m paid by Klamath Falls in the settlement of the arbitration was causally linked to Mr Gray's breaches of fiduciary duty because the litigation from which the settlement derived involved the affirmation of RegEnersys I's rights as the owner of the interest in the Klamath Falls technology, RegEnersys I being the special purpose vehicle used to pursue the opportunities in relation to the ultrasound technology and the Acquisition Strategy of which Mr Gray wrongfully took advantage."

136. Asplin J's reasoning in this paragraph is rather compressed, but in the light of the relevant factors which we have discussed at greater length in this judgment, we consider that her conclusion was one which it was clearly open to her to reach.

137. We can dispose rapidly of an initial point. Mr Gray submits that Asplin J's reference to RegEnersys I in this paragraph must have been a mistake, because the only RegEnersys entity which owned an interest in the Klamath Falls technology at the relevant time was Celloteck (then called RegEnersys Inc). Celloteck's ownership of 10% of the shares in Klamath Falls gave it the ownership of an "interest" in the technology, whereas RegEnersys I had no more than the benefit of a non-exclusive contractual licence to exploit the technology, and of other contractual obligations contained in the Cooperation Agreement. Those contractual rights, says Mr Gray, cannot properly be described as giving rise to the ownership of an interest in the technology, so Asplin J must have intended to refer to Celloteck.

138. We are unable to accept this submission. It is clear to us, not least from the final sentence of [Asplin/196], that the judge intended to refer specifically to RegEnersys I in line with the procedure she had said she would adopt in [Asplin/11] of referring to all RegEnersys entities as "RegEnersys" only, unless it was material to refer to a specific RegEnersys entity. The presumption must therefore be that Asplin J's reference to RegEnersys I was deliberate, which then prompts the question whether the contractual rights of RegEnersys I under the Licence and Cooperation Agreements could properly be described as the ownership of an interest in the Klamath Falls technology. In our view, there is no difficulty of either language or substance in so describing the commercial rights enjoyed by RegEnersys I under those two agreements. The rights were commercially valuable, and were capable of assignment. Furthermore, section 2.1 of the Licence Agreement (conveniently quoted in the Partial Award at paragraph 460) expressly gave RegEnersys I the "right to grant sub licences to Affiliates". To describe these rights as ownership of an interest in the Klamath Falls technology seems to us an entirely normal use of language. It cannot begin to

ground an inference that Asplin J was intending to refer to Celloteck's ownership of a shareholding in Klamath Falls.

139. If further confirmation were needed that this is the correct interpretation of Asplin J's language, it is provided by the fact that, as we have explained, Celloteck's shareholder claims in the arbitration were all dismissed, leaving only the contractual claims of RegEnersys I as still extant when the Klamath Falls Settlement was entered into. In a very real sense, therefore, the settlement did involve the affirmation of the contractual rights of RegEnersys I under the Licence and Cooperation Agreements, because Klamath Falls agreed to pay $5.1 million at a time when those were the only remaining claims which could still be pursued in the arbitration. Accordingly, we conclude that there was a clear link between the receipt of the $5.1 million (which, we repeat, the judge found to be a receipt by Mr Gray personally) and the contractual rights in the Klamath Falls technology owned by RegEnersys I.

140. The final step in the analysis is that the receipt of the $5.1 million, to the extent that it was not used by Mr Gray to purchase shares in Klamath Falls, clearly fell outside the scope of the Klamath Falls exclusion in paragraph 2 of the Vos Order. As we have explained, the exclusion must be narrowly construed as referring only to amounts received by Mr Gray in respect of the purchase of a 10% shareholding in Klamath Falls, because that is the only conflict of interest to which Mr de Clare gave GEHC's fully informed consent.

(f) Mr Gray's liability to account for assets 1(d) and (e): the Russian Business Assets

141. Asplin J's reasons for finding the necessary link between Mr Gray's breaches of duty and his receipt of the Russian Business Assets are to be found in (Asplin/193-195], from which it is sufficient to quote the following:

> "193. … In my judgment, quite clearly, both the interest in the Russian business and any international roll out is intimately concerned with the ultrasound technology and the Acquisition Strategy and accordingly, has a causal connection to the breaches of fiduciary duty. The opportunity of which Mr Gray availed himself in breach of duty can be traced first into Mr Gray's initial interest in RegEnersys I, when owned by RegEnersys LP from August 2007. After 31 December 2010, it became his 51% interest in RegEnersys I, when owned by RegEnersys UK. He succeeded in using this to obtain a 51% interest in Chiloquin's interest in Klamath Falls in February 2012, and then in turning both into a beneficial stake in Celloteck or Chiloquin by secret agreement with Mr Pronk in 2012 – which beneficial stake gave him his interest in Petrosound Ltd in 2013.
>
> …
>
> 195. I agree with Mr Fraser that Mr Gray's interest in Petrosound through Chiloquin would not have happened had Mr Gray not taken advantage of GEHC's maturing business opportunity because: (i) Mr Gray would not have been

> introduced to the ultrasound technology and the Russian Scientists, or the opportunity of reaching agreement with them to take an interest in the Russian operations; and (ii) Mr Gray would not have obtained an interest in, and later been able to take control of the Klamath Falls technology which (as the evidence showed) was seen by everyone involved as one of the keys to being able to commercialise the technology and agree a structure with the Russian Scientists for that commercialisation. It seems to me that the licence in respect of the Klamath Falls technology was a manifestation of the opportunity obtained in breach of fiduciary duty and there is no reason to seek to freeze the opportunity at that juncture. Such a conclusion is inconsistent with the acceptance throughout that the Russian Scientists were the key to the technology and my findings as to the nature of that technology."

142. As we have already emphasised, this ground of appeal is predicated on the assumption that Asplin J was correct to find that the Russian Business Assets were in fact received by Mr Gray. Making that necessary assumption, it seems to us that the judge was again clearly entitled to find a sufficient connection with Mr Gray's breaches of fiduciary duty.

143. In view of the conclusions we have reached in relation to Mr Gray's receipt of the $5.1 million, we can state our conclusions in relation to the Russian Business Assets briefly. They too were derived, not from the shareholding of Celloteck in Klamath Falls, but rather from the business opportunity in respect of the ultrasound technology to which Mr Gray was introduced and to which GEHC (through Mr de Clare) had not given its informed consent. There is no appeal against Asplin J's findings of fact in [Asplin/193], quoted above, which explain how that opportunity can be traced into Mr Gray's indirect interests in Petrosound. That alone in our view establishes the existence of a sufficient link between Mr Gray's breaches of duty and his receipt of the Russian Business Assets. In common with the $5.1 million, the receipt of those assets by Mr Gray clearly falls outside the scope of the Klamath Falls exclusion in the Vos Order. Furthermore, the fact that there may have been other contributory reasons for Mr Gray's receipt of these assets is immaterial. He received them in the course of the unauthorised conduct which constituted his breach of fiduciary duty, and in the absence of informed consent he is liable to account for them under the strict rule which equity applies to defaulting fiduciaries.

(g) GEHC's preliminary point: should Mr Gray be permitted to argue Ground 1 at all?

144. We have so far addressed the unamended Ground 1 on its merits. Our conclusion, subject to the proposed amendments which we have yet to consider, is that Mr Gray's appeal on Ground 1 should be dismissed, for the reasons which we have given. For completeness, however, we should add that GEHC took a preliminary point that Mr Gray should not be permitted to argue Ground 1 at all, because (it is said) he did not run the argument at the Enquiry Hearing, but rather accepted that the relevant assets were (or at least might be) within the scope of the account.

145. In view of the conclusion which we have reached, we do not propose to deal with this preliminary objection at any length. We were referred to passages in Mr Gray's

closing submissions before Asplin J which, if read in isolation, do appear to provide some support for the submission that no separate point was taken before the judge that the assets fell outside the scope of the Vos Order, if it were once found that they were either received or should have been received by Mr Gray. We would be reluctant, however, to prevent Mr Gray from relying upon Ground 1 on the strength of those passages, which need to be read in the full context of the arguments that were then being advanced on each side. It would not be profitable to embark upon an examination of those arguments at this stage, particularly as GEHC accepts that Mr Gray did argue causation (or, as we would prefer to call it, the question of linkage) as a separate issue. Nor, in our view, is it helpful to draw a sharp distinction between that issue and the issue of the scope of the account, because there is a considerable degree of overlap between them. Although Ground 1 is headed "Failure to have regard to the scope of the liability to account", the arguments relied upon by Mr Gray in support of the ground are in truth mainly arguments about linkage, with the exception of the question of construction of the Klamath Falls exclusion.

146. Finally, and in any event, we would if necessary have been willing to grant Mr Gray permission to rely on Ground 1, because GEHC has had ample notice of it, and essentially it raises issues of law and principle in relation to the judge's treatment of the question of linkage on the basis of her findings of fact. GEHC does not suggest that it is prejudiced by having to meet the arguments, and although we have rejected them, we consider that they clearly merited our consideration.

(h) Mr Gray's application to amend Ground 1

147. We now come to Mr Gray's application to amend Ground 1, which forms part of his Application D. The proposed amendments are twofold:

(1) First, Mr Gray wishes to amend the existing wording of the ground in relation to the scope of the account ordered by Vos J, so as to state that the assets in question "result in *whole or in part* from the RegEnersys shareholding in Klamath Falls to which GEHC consented", instead of the existing wording which says that they "result from *the Klamath Falls settlement and* the RegEnersys shareholding in Klamath Falls to which GEHC consented".

(2) Secondly, Mr Gray wishes to add an alternative contention in this form:

> "Alternatively, in so far as Asplin J found that either asset was causally connected to the licence held by RegEnersys in respect of ultrasound technology and not also connected to the RegEnersys shareholding, that finding was inconsistent with the terms of the settlement agreement and was wrong."

148. The purpose of the proposed amendments, as explained in Mr Gray's skeleton argument in support of the application to amend, is to meet the possibility of our accepting (as we have) GEHC's submissions as to what Asplin J meant when she referred at [Asplin/196] to "RegEnersys I's rights as owner of the interest in the Klamath Falls technology". On the footing that, contrary to Mr Gray's primary submission which we have rejected, those words were not meant to refer to Celloteck's shareholding in Klamath Falls, but rather referred only to RegEnersys I's rights as licensee, then Mr Gray now wishes to argue (a) that it was not open to Asplin

J to reach such a conclusion on the evidence before her, and (b) the correct approach, had Asplin J considered there to be a connection between the contractual claims of RegEnersys I and Celloteck's receipt of the settlement monies, would have been to apportion the receipt as accurately as possible between the two companies. The addition of the words "in whole or in part" to Ground 1 is intended to pave the way for an apportionment argument, while the alternative contention added to the ground attacks the judge's finding of fact that Mr Gray's receipt of the relevant assets was connected only to the licence held by RegEnersys I.

149. It is convenient to take first the attack on Asplin J's finding of fact in [Asplin/196], on the assumption that (as we have held) it was directed only to the contractual rights of RegEnersys I under the Licence and Cooperation Agreements. The proposed amendment avers that such a finding was inconsistent with the terms of the Klamath Falls Settlement, but in our view there is no inconsistency. To the contrary, as we have explained, the finding was fully in accord with the terms of the settlement, bearing in mind that the only live issues (apart from costs) after the Partial Award were contractual issues relating to the agreements. Furthermore, there was no direct connection between those rights vested in RegEnersys I and Celloteck's shareholding in Klamath Falls, and it was only the latter which fell within the narrow scope of the Klamath Falls exclusion. Asplin J must have had the exclusion well in mind because she had expressly referred to it shortly before in [Asplin/194]. We therefore see no real possibility of a successful attack on Asplin J's finding if it is given the interpretation which we would place upon it. At most, it might be said that there was also an indirect connection between the receipt of the $5.1 million and Celloteck's shareholding, but that would not invalidate Asplin J's approach or her conclusion, because the main operative link would still have been with the licence and other contractual rights held by RegEnersys I, all of which clearly fell outside the scope of the Klamath Falls exclusion.

150. Turning to the proposed apportionment argument, this is opposed by GEHC on the basis that it is an attempt to introduce an entirely new case which was not run by Mr Gray at trial. Mr Gray now puts forward two possible models of apportionment which he says would have been open to Asplin J on the documentary evidence before her. He submits that she should have adopted one or the other of them, or something similar. The first model would apportion the whole of the funds received under the Klamath Falls Settlement to Celloteck, on the footing that Celloteck acquired its 10% shareholding in Klamath Falls for a total consideration of approximately $21 million, whereas no monetary consideration was given by RegEnersys I when the Licence and Cooperation Agreements were later assigned to it. The second model would apportion the settlement monies between the shareholding and RegEnersys I's non-exclusive licence in proportion to their respective values at the time of the settlement. It is suggested that a reasonable approach would be to apportion 80% to the shareholding and 20% to the licence.

151. Since no argument of this nature was ever addressed to Asplin J, GEHC submits that it is now far too late for this court to undertake such an exercise for the first time. If Mr Gray had sought to advance this argument at trial, GEHC says it is likely that it would have conducted its case on the evidence differently, whether through cross-examination of witnesses (such as Mr Kantor, who was heavily involved in the arbitration) or by obtaining different evidence, including further valuation evidence.

152. In our view, there is real force in GEHC's objection. Quite apart from the very late stage at which the proposed amendment was introduced, only two months before the hearing of Mr Gray's appeal from a judgment delivered as long ago as July 2015, we consider that GEHC might well have run its case differently at trial if it knew it had to face an argument of this nature. On well-established principles, it would normally be wrong to grant permission to amend in such circumstances: see, for example, the review of the relevant authorities by Snowden J (with whom Peter Jackson and Longmore LJJ agreed) in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146, at [21] to [28].

153. We therefore refuse permission to Mr Gray to make either of the proposed amendments to Ground 1. In relation to the challenge to Asplin J's findings of fact, the amended contention would have no reasonable prospect of success. In relation to the proposed apportionment argument, it has been left far too late and, in any event, could not be run without unfairness to GEHC, which might well have conducted its case differently had it been a live issue at the Enquiry Hearing.

(i) Overall conclusion on Ground 1

154. For all these reasons, we conclude that Mr Gray's appeal on Ground 1 must be dismissed.

IV. GROUND 2

(a) Introduction

155. Like Ground 1, Ground 2 is concerned with the existence of a sufficient link between assets received by Mr Gray for which he has been found liable to account and his breaches of fiduciary duty. The assets in question are the management and consultancy fees referred to in paragraphs 1(b) and (c) of the July 2015 Order, which Asplin J found and declared had been received by Mr Gray to the extent specified in those paragraphs "directly or indirectly as a result of the breaches of fiduciary duty set out in the [Vos Order]".

156. Under paragraph 1(b) of the July 2015 Order, Mr Gray was ordered to account to GEHC for "£980,525.79 in respect of management fees paid to Mr Gray in respect of the period 2006 to 2009". Under paragraph 1(c), he was ordered to account for "such portion of management fees paid to Mr Gray in respect of the period 2010 to October 2012 as has some causal link to his breaches of duty, to be determined using the formula expressed in paragraph 210 of the Judgment." This portion was then agreed by the parties to amount to £692,841, as reflected in the January 2016 Order which was made by consent.

157. Ground 2 avers that:

> "There was no causal connection, and/or no sufficient other connection, between Mr Gray's breach of fiduciary duty and the management and consultancy fees for which he was found liable to account. Asplin J was wrong to find that there was a causal or any relevant connection to Mr Gray's breach of fiduciary duty."

158. As we have explained under Ground 1, there was no dispute at the Enquiry Hearing about the nature of the link which had to be established. Nor is it now alleged that Asplin J misdirected herself in relation to the relevant test, although (as we have explained) we would prefer not to use the language of causation in this context. Accordingly, Mr Gray's challenge under Ground 2 faces the obvious initial difficulty that it seeks to overturn an evaluative conclusion of fact by the trial judge, of a kind with which an appellate court should not normally interfere.

(b) The relevant fees

159. Reference should be made to our account of the facts for a general description of the fees with which Ground 2 is concerned, and the circumstances in which they were agreed between Mr Gray and Mr Heerema. In summary, the fees relate to two distinct and consecutive periods. The first period runs from March 2006, when Mr Gray agreed his remuneration package with Mr Heerema, until the end of 2009. The second period began in 2010, after Mr Heerema had placed a cap on the RegEnersys fund. This led to a renegotiation of Mr Gray's remuneration for managing the fund, and his entitlement to an annual fee of 2% of the committed funds was replaced by a single consultancy fee of $10 million. This was spread over three years for tax reasons and was fully drawn down by October 2012.

160. In a little more detail, during the first period (2006 to 2009) Mr Gray, through his corporate vehicle (ReVysion), was entitled to an annual fee of 2% of the funds committed by or on behalf of Mr Heerema to the RegEnersys fund (initially $250 million, later increased by stages to $500 million). The amount of that fee was calculated as a straight percentage of the committed funds, regardless of whether or how they were actually invested. Thus it began as an annual fee of $5 million, and increased to an annual fee of $10 million when the amount of the committed funds had doubled. In addition, Mr Gray was in principle entitled, in his personal capacity, to a profit share of 20% based on his 20% participation in the limited partnership which owned the RegEnersys fund, but his share of profits would only become payable after payment of all expenses and liabilities, payment of a further annual sum of $5 million, and a preferred return to RegEnersys Inc of 6% of funds invested: see [Vos/191]. In practice, this threshold was never reached, so Mr Gray never received any equity return on his investment in the fund (with the possible exception of a sum of €3.5 million paid to him in 2009 as a "performance uplift" following the successful disposition of the fund's investment in a North Sea gas field). Asplin J found, however, that this sum should be treated as part of his management fee for 2009: see [Asplin/187]).

161. As to the second period, the agreed lump sum fee of $10 million was equivalent to one year's management fee after the committed funds had been increased to $500 million. This made commercial sense, because the fund was effectively in run off after Mr Heerema's decision to impose a cap on further investments. Asplin J found that the $10 million consultancy fee "should be treated in the same way as the remainder of the management fees": [Asplin/190]. In reaching this conclusion, against which there is no appeal, Asplin J accepted the evidence of Mr Pronk and Mr Heerema that "the fee was agreed in relation to Mr Gray's continuing his work on the ultrasound technology as well as other investments remaining in the fund", and rejected the evidence of Mr Gray's accountant (Mr Ward) that the fee was paid under a separate consultancy agreement: ibid.

(c) The judge's conclusions on "causation"

162. Asplin J discussed the issue of "causation" in relation to the management fees at [Asplin/197 to 211]. She prefaced her discussion, at [197], by saying that she found "the causal link to the entirety of the management fees from 2006 until 2009 and the "consultancy fee" from 2010 to 2012 more difficult". After summarising the rival submissions on the issue, she concluded that the necessary link was established, but only to part, not the entirety, of the fees. As she said, at [Asplin/202 and 203]:

> "Despite the fact that the management fees were dependant upon the amount of committed capital rather than the value of the investments themselves, it seems to me that based upon Mr Heerema and Mr Pronk's evidence in relation to Mr Gray's duties which included advice in relation to investing in the ultrasound technology, that there is a clear connection between those fees whether before or after 2010 and the breaches of duty in relation to the ultrasound technology and the Acquisition Strategy, at least in part.
>
> I have come to the conclusion that only part of the management fees to 2009 has some causal connection despite the fact that it is not possible to determine how much time or effort was spent on one investment rather than another."

163. The judge then considered the submissions on how that "part" of the management fees to 2009 should be calculated, saying at [205]:

> "It seems to me that some causal connection to the breaches of fiduciary duty can only extend to that part of the net management fee which bears the same relationship to the fund as a whole as the percentage of ultrasound invested funds and investment opportunities… over the relevant period."

She held that the calculation should be based on the full net amount of the fees for the first period, which she had found to amount, in sterling terms, to £9,457,797: see [Asplin/188].

164. Asplin J then held that a similar exercise had to be performed in relation to the $10 million "consultancy fee" for the second period. Having reviewed the expert evidence, she stated the methodology to be followed at [Asplin/210]:

> "As I have already mentioned, I consider that the same approach should be taken as with the management fee before 2010 and therefore, the fee must be apportioned in a way which relates to the ultrasound technology. The causal connection can only extend to that part of the net fee which bears the same relationship to the fund as a whole as the percentage of ultrasound invested funds and investment opportunities including 90% of the figure in respect of the Klamath Falls shareholding over the relevant period. As it is not in dispute that all of the fee was drawn down by October 2012, it seems to

> me that the relevant period both in terms of investments and expenses to be deducted, should cease at that stage. In order to determine what part of the fees are subject to some causal connection, once again, it will be necessary to recalculate the figures."

165. Various aspects of the judge's reasoning in these paragraphs are challenged in subsequent grounds of appeal, but at this stage the important point to note is that the judge found the necessary link to be clearly established, not in relation to the fees as a whole, but rather in relation to a part of the fees which reflected (in broad terms) the extent to which the RegEnersys fund was invested from time to time in ultrasound investments. Asplin J also expressly held that those investment opportunities should include 90% of the sums which related to the Klamath Falls shareholding. It was the application of this methodology which led to the sums for which Mr Gray was ordered to account in paragraphs 1(b) and (c) of the July 2015 Order, as supplemented by the January 2016 Order.

(d) Mr Gray's submissions

166. Mr Gray submits that Asplin J was wrong to find the necessary connection to be established, for three main reasons. First, the remuneration package agreed with Mr Gray in 2006 was concluded regardless of whether or not the RegEnersys fund invested in ultrasound technology, and before any such investment was undertaken. Mr Heerema asked Mr Gray to manage the funds before he even knew about the ultrasound technology or Mr Gray's involvement in it. Secondly, Vos J made no order for Mr Gray to account for the management and consultancy fees, and his findings as to Mr Gray's breaches of duty do not extend to Mr Gray's conduct in managing the fund. Indeed, Vos J found that Mr de Clare always knew and understood that Mr Gray would be remunerated for doing so, although he did not know the details. Thirdly, in reaching her conclusion, Asplin J failed to take proper account of the abandonment by GEHC of a substantial part of its claim before the Enquiry Hearing.

167. GEHC's original case had been that the RegEnersys fund was itself the SPV set up in order to exploit the ultrasound technology and/or the Acquisition Strategy, and that Mr Gray's equity share in the fund was contingent upon his introducing the ultrasound technology to the Heerema Group. The consequence of that would be that all of the investments made by the fund were subject to Mr Gray's obligation to account for breach of fiduciary duty. That case, however, was abandoned on 20 March 2015 in a letter from GEHC's then solicitors to Mr Gray's then solicitors. Once GEHC had abandoned its argument that Mr Gray's role in the fund, which was the source of his entitlement to the fees, arose through his breach of fiduciary duty, there was no longer any proper basis (so it is said) for finding the fees and the breaches of fiduciary duty to be connected. In particular, it does not follow from the fact that Mr Gray's work included advising on all of the investments that were in fact made (including ultrasound-related investments) that the management fees or any part of them were received as a result of Mr Gray's breaches of fiduciary duty.

168. In oral argument, Mr Ahlquist concentrated most of his submissions on the second of the contentions which we have just outlined, so it will be convenient to consider it first.

(e) Do the fees fall within the scope of the Vos Order?

169. It is undoubtedly true that there is no express reference to the management or consultancy fees paid to Mr Gray in respect of the RegEnersys fund in the Vos Order. However, the declaration in paragraph 1(1) of the Vos Order is framed in very broad terms, as follows:

> "1. Mr Gray acted in breach of his fiduciary duties to GEHC and is liable to account to GEHC in equity for all monies and benefits received by him directly or indirectly arising out of Mr Gray's actions in: -
>
> (1) putting himself in a position from 17 March 2006 onwards where his duties to GEHC conflicted or might possibly conflict with his personal interests in relation to the Acquisition Strategy and the ultrasound technology;…"

This declaration was therefore founded on Mr Gray's conduct in placing himself in a position of actual or potential conflict of interest, in breach of his fiduciary duty to GEHC, from 17 March 2006 onwards. He is liable to account to GEHC for all monies and benefits which he has received, directly or indirectly, as a consequence of those actions. The equitable principle here engaged is the obligation on a fiduciary not to place himself in a position of actual or potential conflict of interest when he owes an unqualified duty of loyalty to his principal. This obligation is quite separate from, and often anterior to, the operation of the so-called "no profit rule", which is reflected in paragraph 1(2) of the Vos Order, and involved Mr Gray taking advantage of GEHC's "maturing business opportunity… to participate in the Acquisition Strategy and to obtain rights in the ultrasound technology".

170. It is clear from the Liability Judgment that Mr Gray had already placed himself in a position of actual or potential conflict of interest with GEHC when he agreed his remuneration terms with Mr Heerema in March 2006. Vos J analysed the position at that date in an important passage which we need to set out in full:

> "461. Mr Snowden [*counsel for GEHC*] submitted, as I have said, that Mr Gray first obtained a personal interest in Mr Heerema's fund and, therefore, in the Acquisition Strategy when he agreed to the remuneration proposal in Mr Pronk's 17th March 2006 email. Mr Atherton [*counsel for Mr Gray*] submitted that in March 2006 no deal had yet been done, and there was no certainty that there would be any investment by Mr Heerema in the Acquisition Strategy at that stage. Moreover, he argued that Mr de Clare must have realised that Mr Gray would be remunerated in some way for managing Mr Heerema's funds, and what was agreed was no more than a standard kind of fee and remuneration for such activities.
>
> 462. It is true that no investment had been committed by Mr Heerema on 17th March 2006, and it is also true that the same email seemed to accept GEHC's 20% carried interest. But, the email also makes clear that, if an investment were made by Mr

> Heerema in the Acquisition Strategy, Mr Gray would have 20% of the ordinary shares and a 2% management fee, and would make a co-investment of USD 1 million or 20% alongside Mr Heerema's fund. This proposed arrangement gave rise to three problems. Mr Gray would be motivated to reduce GEHC's interest so as to (i) increase Mr Heerema's share and therefore (ii) to increase Mr Gray's own return on his intended 20% shareholding. The third problem is that Mr Gray was secretly taking a personal interest in a business opportunity belonging to GEHC. These problems may go more towards the question of breach to which I shall turn in due course.
>
> 463. As regards, the existence of duties, it seems to me that only one thing in the 17th March 2006 email can have changed the existence and the nature of the duties that Mr Gray owed to GEHC. That is the fact that, up to 17th March 2006, Mr Gray's conflict between his personal interests and his duty was a potential one, since he could have been remunerated otherwise than by a direct share of Mr Heerema's profits. After 17th March 2006, there was an actual conflict between his personal interests and his duty to GEHC, for the same reasons as there was an actual conflict between his duty to Mr Heerema and his duty to GEHC from January 2006."

171. It seems to us to follow from this analysis that the remuneration arrangements made in March 2006, including the 2% annual management fee, gave rise to an immediate actual conflict between Mr Gray's personal interests and his duty to GEHC. The three problems identified by Vos J in [462] were then unavoidably engaged, and a duty to account might in principle arise as soon as any investments were made by the fund pursuant to the Acquisition Strategy. Furthermore, we think it would be a misreading of this passage in the judgment of Vos J to confine the duty to account to any profit share which might ultimately be obtained by Mr Gray from his 20% equity interest in the fund. On the contrary, we see no reason why an appropriate proportion of the annual management fee should not also have become subject to the liability to account, once investments were actually made pursuant to the Acquisition Strategy, and once time and resources were devoted by Mr Gray and his staff to considering the making of such investments. The remuneration package formed a single, indivisible whole, and Mr Gray was (as we have said) in a position of actual conflict of interest, on Vos J's findings, from 17 March 2006 onwards. Accordingly, any aspect of his remuneration which was derived, directly or indirectly, from the inclusion of ultrasound-related investments in the fund was in our view potentially within the scope of his liability to account from that date onwards, and falls squarely within the terms of paragraph 1(1) of the Vos Order.

172. We are not deflected from this conclusion by a subsequent passage in the Liability Judgment where, at [512], Vos J described one of the breaches that he found to have been established in these terms:

> "(ii) From 17th March 2006, Mr Gray put himself in a position where his duties to GEHC conflicted or might possibly conflict with his personal interests in relation to the Acquisition

> Strategy and the ultrasound technology, because Mr Gray was to be paid a share of Mr Heerema's profits from the acquisition vehicle."

It is true that the focus, in this brief summary, was on Mr Gray's entitlement to be paid a share of profits, but this was clearly not intended by the judge to be an exhaustive statement of the profits for which Mr Gray might ultimately be liable to account as a result of the conflict of interest which Vos J had identified. The issue which Vos J was considering, in this penultimate section of his lengthy judgment, was whether GEHC needed to show that it had suffered loss in order to move on to the next stage of the split trial, i.e. the Enquiry Hearing. For that limited purpose, it was enough for Vos J to summarise his main conclusions on liability. He was fully aware that he was in no position to rule definitively on all the profits for which Mr Gray might be liable to account, assuming liability in principle to have been established. As Vos J said, at [516]:

> "I have not been provided with the documentation or evidence necessary to determine what profits Mr Gray may or may not have made by taking advantage of the opportunity he did. I know, of course, that he denies that he made any such profit, and that he has adduced some evidence to show that he has not. But I have only seen one side of the story. I cannot, therefore, find that GEHC has no real chance of establishing that it is entitled to recover some material profits once the necessary account is taken. Mr Atherton also seeks to limit the relief that GEHC can obtain by foreclosing the argument about what benefits Mr Gray may or may not have received from his exploitation of GEHC's maturing business opportunity in relation to the Acquisition Strategy and the ultrasound technology. I do not think that would be appropriate in the absence of clear and undisputed evidence as to what precisely Mr Gray has received or is likely in the future to receive. There may be a whole host of arguments on both sides that I cannot now predict and have not yet been adumbrated."

173. To conclude, therefore, we consider that on a fair reading of the Liability Judgment as a whole there is no support for Mr Gray's submission that the fees paid to Mr Gray for his management of the RegEnersys fund, both before and after 2009, are excluded in their entirety from the liability to account under the Vos Order. Our conclusion is reinforced by a further point. If Vos J had intended to exclude the fees in their entirety from the scope of his order, one would expect him to have said so expressly, and to have included in the order an exclusion analogous to the Klamath Falls exclusion which we have considered under Ground 1.

(f) Mr Gray's other arguments

174. We can now deal more briefly with the two remaining arguments advanced by Mr Gray in support of Ground 2.

175. The first argument was that the management fees until 2009 bore no relation to Mr Gray's breaches of duty, because they represented a simple percentage of the

committed funds. We agree with Mr de Mestre that there is nothing in this point. The fact that the fee was calculated on this basis does not, in itself, answer the question whether some part of the fee may be referable to Mr Gray's breach of duty. As the Liability Judgment makes clear, Mr Gray was in a position of actual conflict of interest from the date when his remuneration was first agreed. The fees which he then received were in principle capable of relating to his breach of duty once the RegEnersys fund included ultrasound-related investments, or the making of such investments was under active consideration, because the making and review of such investments embodied the very conflict of interest which Vos J had identified. That was sufficient to establish the necessary link, and in our view Asplin J was clearly entitled to evaluate the evidence on this point and reach the conclusion that she did.

176. Similar considerations also provide the answer to Mr Gray's final argument, which was based on the abandonment by GEHC of the wider case that it originally sought to run before the Enquiry Hearing. The fact that an ambitious claim to the entirety of the investments in the RegEnersys fund was wisely abandoned has no logical impact on the narrower claim which was advanced at the Enquiry Hearing and accepted (with modifications) by Asplin J.

(g) Conclusion on Ground 2

177. For these reasons, we would also dismiss Mr Gray's appeal on Ground 2.

V. GROUNDS 3A.1 AND 3A.2

178. Grounds 3A.1 and 3A.2 proceed on the footing that (as we have held) Ground 2 fails. They seek to raise two separate arguments about the computation of the fee for which Mr Gray is liable to account. Ground 3A.1 concerns the deduction of allowable expenses from the renegotiated single consultancy fee of $10 million agreed between Mr Heerema and Mr Gray in 2010 when the RegEnersys fund was capped. Ground 3A.2 concerns one aspect of the formula used by Asplin J to calculate the appropriate percentage of the annual management fees paid to ReVysion between 2006 and 2009 for which Mr Gray should be held accountable.

179. Mr Gray does not have permission to pursue either of these grounds. They replace the original Ground 3, which related only to the $10 million consultancy fee, and which contended that Asplin J was wrong to calculate the profit received by Mr Gray in respect of that amount by reference to the gross fees received by ReVysion without taking account of ReVysion's associated expenses in earning them (as the judge had correctly done in calculating the net management fees received by Mr Gray for the earlier period). GEHC's response to Ground 3, in its respondent's skeleton argument dated 18 December 2019, made it clear that the ground, as originally formulated, had been founded on a misconception. The methodology laid down by the judge for calculating the portion of the $10 million for which Mr Gray was liable to account did indeed provide for the deduction of expenses properly incurred in earning the fee, with the exception of money spent on or in relation to the present litigation which Mr Gray's own expert, Mr MacGregor, had rightly excluded from the calculation on the basis that such expenditure should not be treated as part of the costs incurred by Mr Gray in advising on and managing the RegEnersys fund.

180. In those circumstances, Mr Gray abandoned his original Ground 3 and belatedly sought permission, by Application D, to replace it with Grounds 3A.1 and 3A.2. This application is opposed by GEHC, on the basis that the new grounds are too late and ought not to be permitted. As to Ground 3A.1, GEHC submits that the application should have been made within a short period after Mr Gray had received GEHC's respondent's skeleton argument, and should not have been left for the period of nearly four and a half months between 18 December 2019 and 28 April 2020 when Application D was issued. That objection applies with even greater force, it is said, to Ground 3A.2, because (unlike the original Ground 3) it does not relate to the $10 million consultancy fee at all, but to the earlier annual management fees. There is nothing in the evidence in support of the application to explain why this ground was not included in the original grounds of appeal, or why no attempt was made to introduce it by way of amendment before the end of April 2020.

181. There is considerable force in these objections, but on balance we consider that permission should be granted to Mr Gray to rely on these two new grounds. They raise two short points of principle, which can clearly be addressed on the basis of the evidence and arguments adduced at the Enquiry Hearing. As will become clear, we consider that the merits of each ground are sufficiently strong to pass the threshold for the grant of permission to amend; and although the application to amend should have been made earlier than it was, it is not suggested that there is any real unfairness to GEHC in having to deal with the new grounds. Each of them raises a short point, which could be, and was, treated with reasonable brevity on each side in both written and oral submissions. Subject to issues of costs, which we will have to address in due course, we think it would be disproportionate to refuse Mr Gray permission to advance these arguments.

182. We will therefore now consider the two grounds on their merits.

(a) Ground 3A.1

183. The short point which lies at the heart of Ground 3A.1 is the cut off point in October 2012 which Asplin J imposed for the deduction of expenses referable to the $10 million consultancy fee. We have already set out the relevant paragraph in her judgment ([Asplin/210]) in the context of Ground 2, but for convenience we will repeat the crucial sentence:

> "As it is not in dispute that all of the fee was drawn down by October 2012, it seems to me that the relevant period both in terms of investments and expenses to be deducted, should cease at that stage."

The relevance of October 2012 is that this was the date by which the $10 million had been drawn down in full. It is common ground that the timing of the drawdown of the $10 million was left for Mr Gray to determine to suit his own convenience, and that it was taken by him over three years for tax reasons: see [Asplin/190]. In that paragraph (as we have already noted) the judge accepted the evidence of Mr Pronk and Mr Heerema that "the fee was agreed in relation to Mr Gray's continuing his work on the ultrasound technology as well as other investments remaining in the fund" and rejected the evidence of Mr Ward that it was paid under a separate consultancy agreement. It was this finding that grounded the judge's conclusion, which is not

appealed, that the $10 million "should be treated in the same way as the remainder of the management fees".

184. The difficulty, however, is that Asplin J nowhere explains why, or on what basis, the cut off date for the deduction of associated expenditure should coincide with the date on which the drawdown of the fee was completed. The fee was in principle capable of being paid in advance. Indeed, Mr Gray could have demanded payment of the entire $10 million in 2010, and on the judge's findings it was only for tax reasons that he chose to spread the receipt over three years. But if the work which he was paid to perform in return for the fee continued thereafter, there is no logical reason why relevant expenditure incurred by Mr Gray in relation to that work should not have continued to be deductible in ascertaining his net profit. The judge appears to have treated it as axiomatic that the date of final drawdown should also have marked the end of the period of permissible deductions. With respect to the judge, however, we consider that this approach was mistaken. The correct approach, in principle, would have been to ascertain the full period over which the work referable to the consultancy fee was performed, both before and after October 2012, and to permit the deduction of expenditure properly referable to that work by the application of generally accepted accountancy principles. If there was a particular reason why the deductibility of expenditure should cease on the same date as the fee was finally drawn down in full, the judge needed to articulate what that reason was, and to explain why it should override normal principles of commercial accounting. But she did not do so, and her reasoning on the issue does not really extend beyond the single sentence which we have quoted from [Asplin/210].

185. At this point, we need to say a little more about the rather confusing evidence before the judge on the legal basis of the consultancy fee. It clearly formed part of the renegotiated terms agreed between Mr Gray and Mr Heerema following the latter's decision, apparently finalised in February 2010, to cap the RegEnersys fund and place it in run off. The general nature of the new arrangement was recorded in an email from Mr Gray to Mr Pronk on 7 April 2010. As the judge recorded, at [Asplin/76]:

> "In fact, the structure of the fund going forwards was set out in an email from Mr Gray to Mr Pronk of 7 April 2010, the form of which had been approved by Mr Pronk in advance. The email recorded amongst other things:
>
> "Further to our discussions with Pieter Heerema and his meeting with me on February 16th, my understanding is that the format of RegEnersys as an investment vehicle of the Heerema family office will change.
>
> …
>
> PHH [*i.e Mr Heerema*] wishes to relinquish day to day control. You will continue to manage and monitor the RegEnersys fund activities along with Revysion.
>
> The current 80/20 split of returns in excess of the carrying value of the investments as per the 2009 balance sheet will be changed to a 50/50 split.

> …
>
> Capital released from agreed liquidation of selected fund assets or incoming funds from other investors will be shared 50/50. Heerema's 50% share of these incoming cash flows will be deducted from the current carrying value of the investments.
>
> As from January 1, 2010 the hurdle interest rate (6%) will not be applicable anymore.
>
> ReVysion will be entitled to the USD 10 million 2010 management fee as provided in the original agreements.
>
> …"

186. As Rose LJ pointed out in the course of argument, the general effect of these new arrangements was to incentivise Mr Gray, by providing him with an increased share in profits derived from investments in the RegEnersys fund, while reducing his remuneration for managing the fund to the single sum of $10 million, which would otherwise have been payable to him as the annual management fee for 2010. This was the fee which was then spread over 3 years for tax purposes.

187. We were shown, as was Asplin J, a written agreement apparently concluded at some time in 2011 (the date is left blank, although the year is given) between a Heerema company called Heerema Holding Construction Panama Inc ("HHC") and ReVysion. It was signed by Mr Pronk on behalf of HHC and by Mr Gray on behalf of ReVysion. Under the terms of this agreement, ReVysion undertook to supply to HHC "such strategic and advisory consultancy services as may be reasonably required and directed by the Board of [*HHC*] from time to time", and to procure that Mr Gray should provide those services to HHC, in return for a payment of $8.65 million "which may be invoiced by [*ReVysion*] at any time according to [*ReVysion's*] wishes and not on a time basis." It was further provided that Mr Gray and ReVysion should not be entitled to reimbursement for any expenses or other costs of any nature, which mirrored the position under the previous arrangements in place between 2006 and 2009. The term of the agreement was 36 months from the Effective Date, defined on the first page as "the date of this Agreement as set out above", or (if earlier) the expiry of at least three months' written notice of termination given by either party to the other, or such other termination date as they might otherwise agree in writing.

188. Since the date of the agreement was left blank, there clearly remains a real doubt whether it ever came into force. The judge did not resolve this doubt, nor, on behalf of Mr Gray, did Mr Ahlquist ask us to do so. But we think we can safely conclude, on the basis of the judge's findings, that an agreement in these or similar terms must have been made between a Heerema entity and Mr Gray in relation to the $10 million consultancy fee, because it is common ground that payment of the fee was spread over three years for tax reasons, and there is no suggestion that the spreading of the fee in this way was a sham. Thus, even though the essential nature of the fee was the same as that of the annual fee payable before 2010, it was payable in respect of a three year period which began at some point in 2011, and also related back to work which had already been done by Mr Gray in 2010. We note in this connection that it was common ground before the judge that the stated consideration of $8.65 million in the

written agreement reflected the fact that $1.35 million had already been drawn down by Mr Gray from the full consultancy fee of $10 million.

189. Importantly, this was also the basis upon which the consultancy fee was treated in the accounts of ReVysion. Those accounts were not included in our bundles, but we were told that there is no dispute that Mr MacGregor correctly reflected the content of the accounts in the relevant passage of his first report dated 6 February 2015. In paragraph 5.25 of that report, Mr MacGregor recorded his understanding, from Mr Ward's third witness statement, "that the $10 million consultancy fee was included in the financial statements of ReVysion in the years ended 31 March 2011 to 2014". In other words, the receipt was spread over the four financial years for which ReVysion drew up its accounts from 1 April 2010 to 31 March 2014.

190. Mr MacGregor went on to state, in paragraph 5.26:

> "As in relation to the management fees received, the expenses of ReVysion should, in my opinion, be deducted from the $10 million consultancy fee, in arriving at the net benefit received by [*Mr Gray*]."

Mr MacGregor then reviewed the relevant expenses, and explained why in his view legal expenses should be excluded. In sterling terms, he concluded that net expenses of £6,440,498 fell to be deducted, over the full four year period, from the consultancy fee of £6,696,653, leaving a positive balance of £256,155. (Mr MacGregor also considered that an allowance should be made for Mr Gray's time and skill in the sum of £4 million, a point to which we will need to return under Ground 5 below).

191. When Asplin J decided that October 2012 should be the cut off date for deductions, Mr MacGregor was directed to recalculate the net amount of the 2010 consultancy fee. He did this in a further report dated 18 September 2015, concluding that the relevant expenses incurred in the period from 1 April 2012 to 10 October 2012 were £2,479,612, and when this figure was added to the expenses for the years ended 31 March 2011 and 2012, the net income from the $10 million consultancy fee was £1,575,678.

192. In our view, there is no principled basis for the cut-off date for expenses adopted by Asplin J, and the appropriate methodology is that adopted by Mr MacGregor in his first report, in the sense that the net amount of the consultancy fee should be calculated by deducting associated expenditure as shown in the accounts of ReVysion down to 31 March 2014, but excluding any deduction in respect of legal expenditure on the current litigation. Mr Ahlquist does not submit that any deduction should be made for expenditure after 31 March 2014. It is also now common ground that the calculations in Mr MacGregor's first report failed to allow for the exclusion of a further sum of $714,799 for legal expenses: see [Asplin/209].

193. Although we received some submissions on the figures, we do not consider that we have sufficient material to translate Mr Gray's success on this question of principle into a revised figure for the net amount of the consultancy fee. We hope, however, that the parties will now be able to agree the amount of the net consultancy fee in the light of our decision on the issue of principle. The amount for which Mr Gray is liable to account will then be ascertained by applying to that net figure the appropriate

percentage which relates to the ultrasound technology. That percentage falls to be ascertained by application of the formula in [Asplin/210], and as we understand it was agreed for the purposes of the post-2010 calculation to be 39.88% (rounded to 2 decimal places): see Mr MacGregor's report of 18 September 2015 at paragraphs 2.19 to 2.21. We do not understand it to be suggested that this percentage is affected by Ground 3A.2, to which we now turn.

(b) Ground 3A.2

194. We have already described the approach which Asplin J adopted in ascertaining the proportion of the management fees to 2009 which had the necessary connection to Mr Gray's breaches of duty. She dealt with this issue at [Asplin/203 to 205] and referred to a schedule which Mr Gray's then leading counsel, Mr Cavender, had appended to his closing submissions ("Schedule A"). To recapitulate, the critical part of [Asplin/205] reads as follows:

> "It seems to me that some causal connection to the breaches of fiduciary duty can only extend to that part of the net management fee which bears the same relationship to the fund as a whole as the percentage of ultrasound invested funds and investment opportunities including 90% of the sums included in relation to the Klamath Falls shareholding, in Mr Cavender's Schedule A, over the relevant period. The 10% reduction is to reflect the fact that some of the fee related to managing the Klamath Falls shares rather than the licence. The calculation should be based on the full £9,457,797."

195. We can begin by clearing away some points which are no longer in issue. First, it is now agreed that the calculation should be based on the full amount of the actual management fees received by Mr Gray between 2006 and 2009, after deduction of expenses. This net figure amounted to £9,457,797. Secondly, it is agreed that Asplin J's reference to "the fund as a whole" in the passage from [205] which we have quoted should be read as a reference to the full amount of the net fees, or in other words the same amount of £9,457,797. That is the fund which needs to be apportioned. Thirdly, it is also now agreed that the numerator of the apportionment fraction to be applied to the net fees received in each year comprises (a) the amount of ultrasound-related investments comprised in the RegEnersys fund during the year (based on the amount invested rather that its fluctuating value from time to time) plus (b) 90% of the investments relating to the Klamath Falls shareholding, as shown on Schedule A (although without the 10% deduction).

196. The single issue which now divides the parties concerns the denominator of the apportionment fraction. In general, it was in the interests of Mr Gray to argue that the denominator (or Amount B as it was conveniently called) should be as large as possible, thereby reducing the amount of the proportion of the fees for which he would be liable to account. Conversely, it was in the interests of GEHC to argue for the smallest possible Amount B, because that would maximise the amount for which Mr Gray had to account. Three options were canvassed before the judge, and two of them are reflected in Schedule A (which, as we have said, was submitted on behalf of Mr Gray). Mr Gray's primary case was that Amount B should be taken as the full amount of the committed funds under management during each year, whether or not

those funds had been invested. The obvious point in favour of this option was the fact that the annual management fee itself was calculated by reference to the amount of committed funds, regardless of their state of investment. At the other extreme, GEHC contended that Amount B should be taken as comprising the total sums actually invested by the RegEnersys fund, ignoring any funds which had been committed but not yet invested in any projects. The main argument for this approach was that it concentrated on the investments actually made as a result of Mr Gray's management of the fund. It was, however, open to the objection that it took no account of the work which had to be done in evaluating and choosing between possible investments, which forms a substantial part of the work of any active fund manager. Accordingly, the intermediate option, and Mr Gray's fall-back position, was that Amount B should comprise the funds actually invested but with the addition of a notional amount to reflect the work done by Mr Gray and ReVysion in considering potential investment opportunities, even though they might ultimately be rejected. This notional amount was shown on Schedule A as an inevitably arbitrary amount of $100 million. In his oral closing submissions to Asplin J, Mr Cavender described this figure as "just a stab in the dark" or "an educated guess".

197. Asplin J decided on the middle option, and treated Amount B as comprising the funds actually invested plus a notional amount of $100 million to represent investment opportunities not taken. The relevant words in [Asplin/205], although this may not be immediately apparent from the judge's rather compressed language, are "ultrasound invested funds and investment opportunities … in Mr Cavender's Schedule A, over the relevant period." The resulting calculations are then helpfully set out in a table which formed part of GEHC's skeleton argument for the hearing on consequential matters in July 2015. The apportionment percentages for the four relevant years were: zero for 2006 (because no ultrasound-related investments had yet been made, nor had the 10% shareholding in Klamath Falls been acquired); 9.7% in 2007; 16.3% in 2008; and 15.5% in 2009. These figures yielded a mean percentage of 10.367% (to three decimal places) which, applied to the total net management fee of £9,457,797, produced the judgment sum of £980,526. By contrast, if Amount B had been taken as the total committed funds, the mean percentage would have been 4.3% and the sum for which Mr Gray was obliged to account would have been £400,525. It follows that approximately £580,000 (before interest) turns on this issue.

198. Mr Ahlquist submitted for Mr Gray that Asplin J had erred in principle by adopting the intermediate option for Amount B, and she ought to have accepted Mr Gray's primary submission that Amount B should be the committed funds. He emphasises that the exercise upon which the court was engaged is not a discretionary one, but rather goes to the correct ascertainment of the amount for which Mr Gray is liable to account for his breaches of duty. The only amount that can rationally be taken for Amount B, submits Mr Ahlquist, is the committed funds, because they provided the measure of the annual management fees themselves. Although he put the argument in a number of slightly different ways during his oral submissions, this was in substance the single point to which he returned on each occasion. Because that was the contractual basis on which the fees were paid, it should also be used in calculating the apportionment percentage. He was also inclined to accept that, if Asplin J could not be shown to have erred in principle in choosing the middle option, then the use of an indicative sum to represent investment opportunities was probably the best that could be done in the circumstances. This was in our view a realistic concession, bearing in

mind that the intermediate solution adopted by the judge had been put forward by Mr Gray's own counsel, albeit not as his primary submission.

199. On behalf of GEHC, Mr de Mestre argued that no question of law or principle was involved, and the judge had come to an evaluative conclusion, in the light of all the evidence before her, with which this court should not interfere. He said Mr Gray's argument was based on the fallacy that the degree of connection must be capable of ascertainment by the application of a rigid formula, whereas there is no actual legal principle which dictates how the calculation should be performed or whether committed funds should be the denominator figure. The court is looking for the appropriate degree of connection in the light of the evidence before the court. It is not searching for a single magic formula which will produce the right result. Mr de Mestre also emphasised that the intermediate solution adopted by the judge did involve a substantial recognition of Mr Gray's point that allowance should be made for work done by him and ReVysion on investment opportunities which never materialised.

200. We agree with Mr de Mestre. In our judgment, no question of legal principle is involved, and the judge cannot fairly be criticised for proceeding as she did. In an ideal world, she might have explained her process of reasoning rather more fully, but the language of [Asplin/205] shows that she rightly recognised the evaluative nature of the exercise she had to perform. She thought that the 34% allocation produced by GEHC's arguments would be "too broad a brush", whereas the "minimal percentages" produced by Mr Gray's primary argument were "too meagre". Accordingly, an intermediate position should be adopted; and the obvious candidate for that was the fall-back argument advanced by Mr Gray himself. This also reasonably reflects the amount of work undertaken by Mr Gray in each year; although his fee was calculated *by reference to* the amount of committed funds, it was paid *in return for* the work he actually undertook. We remind ourselves that the judge had the advantage, denied to us, of hearing all the evidence and arguments deployed over the course of a five week trial. Her conclusions on this issue may have been briefly expressed, but we remain unpersuaded that they reveal any error of law or principle.

201. We would therefore dismiss this ground of appeal.

VI. GROUND 4

202. As originally formulated, Ground 4 was a general complaint that Asplin J had failed to consider the total sums invested by Mr Gray in the ultrasound technology, and had wrongly held Mr Gray liable to account for the gross sums received by him and/or RegEnersys rather than the net profits or other benefits received by Mr Gray from the investment. As we have already explained, this general complaint was to some extent based on the same misapprehension as underlay the original Ground 3. Asplin J was well aware of the distinction between a gross receipt and a net profit, and it is not plausible to suppose that she lost sight of it when determining the amount for which Mr Gray was liable to account. Instead, by the date of the hearing before us, Ground 4 had dwindled into two miscellaneous and unconnected points, on which very little time was spent by either side in oral argument. We can be equally brief in our treatment of them, because neither of them is now a live issue.

203. The first point concerns an agreed schedule of payments made to the Russian Scientists by Mr Gray's entity, ReVysion. The total amount of these payments was $447,000. In fact, as Mr Ahlquist was able to demonstrate, this was an arithmetical error for $697,000. Nothing turns on this, however, because Mr Ahlquist was content to accept that the payments had been taken into account as deductions from the $10 million consultancy fee agreed with Mr Gray in 2010. Accordingly, the point would only be a live one if Mr Gray had succeeded on Ground 2, with the consequence that the $10 million fee fell outside his liability to account altogether. In those circumstances, the question would have arisen whether the payments made by Mr Gray to the Russian Scientists should be taken into account in some other, and if so what, manner. As it is, however, we will dismiss Mr Gray's appeal on Ground 2, so the question does not arise.

204. The second point relates to the total sum of $28 million invested by RegEnersys in ultrasound technology. There was no suggestion that any part of this investment should have been treated as a deduction in computing the net fees received as profit by Mr Gray. Mr Dutton expressly confirmed as much in response to a question from us during oral argument. The contention was, rather, that account should be taken, in some fashion, of this investment if GEHC were to succeed in its appeal against the refusal by Arnold J to order a transfer of assets *in specie* by Mr Gray to GEHC. Quite how such account would or should be taken remains wholly obscure to us, and was not explored in argument. But the question remains purely academic, because (as we shall in due course explain) GEHC's appeal will be dismissed on this issue.

205. Since neither of the points raised under Ground 4 needs to be determined, it is also unnecessary for us to rule on the question whether Mr Gray should be permitted to advance them at all, on the basis that they are new points which were not argued below. The question does not arise, so we prefer to leave it open.

206. For these short reasons, we would dismiss Ground 4.

VII. GROUND 5

(a) Introduction

207. Ground 5 says that:

> "Asplin J was wrong to refuse to grant Mr Gray any allowance for the work he undertook in respect of the ultrasound technology between 2006 and 2012."

Accordingly, the issue raised by Ground 5 is whether Asplin J erred in refusing to grant Mr Gray an equitable allowance for the work which he performed over the period of approximately seven years between 2006 and 2012 in procuring the receipts of money and other benefits in respect of which he is liable to account to GEHC.

208. Asplin J dealt with this issue comparatively briefly, at [Asplin/212 and 213]. She reasoned as follows:

> "212. It is not disputed that it is possible to make an equitable allowance in respect of the skill and labour of the fiduciary in

> earning the particular profit and in this case, Mr Gray seeks £1m per annum which Mr Ward says would be what one would have to pay a Chief Executive Officer. It is also accepted that the provision of such an allowance is exceptional: *Guinness plc v Saunders* [1990] 2 AC 663. In cross examination it became clear that Mr Ward had no particular expertise in determining the level of remuneration of such a person and had merely taken a multiple of the highest salary paid at ReVysion. He stated however, that he had some knowledge of clients in the field. It is also not in dispute that Mr Gray did not in fact pay himself a salary.
>
> 213. Overall, given the way in which the litigation has proceeded and the fact that I have found that Mr Gray has failed to account properly or at all in respect of his benefit from his breaches of fiduciary duty, I do not consider it appropriate to grant an allowance. Even if I had, in my judgment, there is insufficient evidence before the court upon which to do so with sufficient certainty. Mr Ward's rule of thumb is not an appropriate basis for doing justice. In this regard, also I take into account the fact that [in] Mr Gray was not in fact awarded a salary in relation to RegEnersys but was remunerated by means of a share of profits and the fact that I have found his account to be false."

209. As Asplin J correctly observed, the jurisdiction to make an equitable allowance of this nature in favour of a defaulting fiduciary is now well established, but it should be exercised only in exceptional circumstances. The reference to "exceptional circumstances" comes from the speech of Lord Templeman in *Guinness plc v Saunders*, with which Lords Keith of Kinkel, Brandon of Oakbrook and Griffiths agreed; Lord Goff of Chieveley delivered a concurring speech. Lord Templeman said this, at 693-4:

> "In support of a claim for an equitable allowance, reference was made to the decision of Wilberforce J. in *Phipps v Boardman* [1964] 1 WLR 993. His decision was upheld by the Court of Appeal [1965] Ch. 992 and ultimately by this House under the name of *Boardman v Phipps* [1967] 2 A.C. 46. In that case a trust estate included a minority holding in a private company which fell on lean times. The trustees declined to attempt to acquire a controlling interest in the company in order to improve its performance. The solicitor to the trust [*Mr Boardman*] and one of the beneficiaries, with the knowledge and approval of the trustees, purchased the controlling interest from outside shareholders for themselves with the help of information about the shareholders acquired by the solicitor in the course of acting for the trust. The company's position was improved and the shares bought by the solicitor and the purchasing beneficiary were ultimately sold at a profit. A complaining beneficiary was held to be entitled to a share of

> the profits on the resale on the grounds that the solicitor and the purchasing beneficiary were assisted in the original purchase by the information derived from the trust. The purchase of a controlling interest might have turned out badly and in that case the solicitor and the purchasing beneficiary would have made irrecoverable personal losses. In these circumstances it is not surprising that Wilberforce J decided that in calculating the undeserved profit which accrued to the trust estate there should be deducted a generous allowance for the work and trouble of the solicitor and purchasing beneficiary in acquiring the controlling shares and restoring the company to prosperity. *Phipps v Boardman* decides that in exceptional circumstances a court of equity may award remuneration to the trustee."

210. *Boardman v Phipps* was therefore a case in which the full rigour of the equitable rules on breach of fiduciary duty might well be regarded as operating harshly, and the profit which thereby accrued to the trust estate was "undeserved". Indeed, the House of Lords had been split three to two on the question of whether there was a breach of fiduciary duty at all. One of those in the majority, Lord Cohen, emphasised at 104 that the integrity of the appellants (i.e. Mr Boardman and the purchasing beneficiary) was not in doubt:

> "They acted with complete honesty throughout and the respondent is a fortunate man in that the rigour of equity enables him to participate in the profits which have accrued as a result of the action taken by the appellants in March, 1959, in purchasing the shares at their own risk."

Those circumstances had fully justified the trial judge, Wilberforce J, in ordering an allowance to be made to the appellants in respect of their work and skill in obtaining the shares and the resulting profits "on a liberal scale".

211. In his concurring speech in *Guinness plc v Saunders*, Lord Goff provided an illuminating analysis of the policy which underlies the strict rule of equity which requires a defaulting fiduciary to account for a profit made in a situation of conflict of interest: see [1990] 2 AC 663 at 700-702. Before coming to that, we note that Lord Goff also clearly agreed with the other members of the court that the discretion to make an equitable allowance should be exercised sparingly. As he said, at 700D (with our emphasis):

> "Plainly, it would be inconsistent with this long-established principle to award remuneration in such circumstances as of right on the basis of a quantum meruit claim. But the principle *does not altogether exclude the possibility* that an equitable allowance might be made in respect of services rendered. That such an allowance may be made to a trustee for work performed by him for the benefit of the trust, even though he was not in the circumstances entitled to remuneration under the terms of the trust deed, is now well established."

212. After referring to the facts of *Boardman v Phipps*, and the view of Wilberforce J that "it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it", Lord Goff continued, at 701C:

> "Ex hypothesi, such an allowance was not in the circumstances authorised by the terms of the trust deed; furthermore it was held that there had not been full and proper disclosure by the two defendants to the successful plaintiff beneficiary. The inequity was found in the simple proposition that the beneficiaries were taking the profit although, if Mr. Boardman (the solicitor) had not done the work, they would have had to employ an expert to do the work for them in order to earn that profit.
>
> The decision has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided in the trust deed. Strictly speaking, it is irreconcilable with the rule as so stated. It seems to me therefore that it can only be reconciled with it to the extent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule. And, as I see it, such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees."

213. Lord Goff's statement of the policy underlying the rule was formulated in relation to trustees, but it is common ground that the same policy applies, mutatis mutandis, to the breaches of fiduciary duty by Mr Gray with which we are concerned.

214. We were also referred to the decision of this court in *O'Sullivan v Management Agency Limited* [1985] QB 428, where the question of an allowance arose in the context of agreements made by a young musician with his manager which were set aside on grounds of restraint of trade and undue influence. It was held that the defendants should account for their profits, but credit should be given to them for their skill and labour in promoting the plaintiff and making a significant contribution to his success. The defendants were accordingly entitled to a reasonable remuneration including a small profit element, but one that was considerably less than they would have received if the plaintiff had obtained independent advice before entering into the relevant agreements. It was in that context that the court had to consider what orders should be made, as a matter of practical justice between the parties, when the agreements were set aside, and whether an allowance should be made to the defendants by analogy with the equitable principles applicable to the retention of benefits by fiduciaries.

215. As Fox LJ observed, at 467B:

> "The rules of equity against the retention of benefits by fiduciaries have been applied with severity."

He then referred to *Boardman v Phipps*, and quoted from the judgment of Lord Denning MR in the Court of Appeal which included this passage ([1965] Ch. 992 at 1020):

> "The claim for repayment cannot, however, be allowed to extend further than the justice of the case demands. If the defendant has done valuable work in making the profit, then the court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of any dishonesty or bad faith, or surreptitious dealing, he might not be allowed any remuneration or reward."

216. Fox LJ then referred to the observations of Lord Cohen and Lord Hodson in the House of Lords, agreeing with Wilberforce J that the allowance should be made on a "liberal scale", and continued, at 467H:

> "These latter observations (and those of Lord Denning MR and the judgment of Wilberforce J at first instance) accept the existence of a power in the court to make an allowance to the fiduciary. And I think it is clearly necessary that such a power should exist. Substantial injustice may result without it. A hard and fast rule that the beneficiary can demand the whole profit without an allowance for the work without which it could not have been created is unduly severe. Nor do I think that the principle is only applicable in cases where the personal conduct of the fiduciary cannot be criticised. I think the justice of the individual case must be considered on the facts of that case. Accordingly, where there has been dishonesty or surreptitious dealing or other improper conduct then, as indicated by Lord Denning MR, it might be appropriate to refuse relief; but that will depend upon the circumstances."

217. To similar effect, Dunn LJ said, at 458G:

> "Although equity looks at the advantage gained by the wrongdoer rather than the loss to the victim, the cases show that in assessing the advantage gained the court will look at the whole situation in the round."

(b) The claim for an equitable allowance as presented to Asplin J

218. With the benefit of this guidance from the case law, we must now examine how Mr Gray's claim for an equitable allowance was presented to Asplin J. His pleaded case included unquantified contentions that he should be granted an allowance on an asset by asset basis, in the event that he was found liable to account for those assets. In our view that was in principle the correct approach. Strictly speaking, the question needed to be considered separately in relation to each receipt of an asset or profit for which Mr Gray was held liable to account. Thus, for example, the very extensive work done by him and his team in relation to the Klamath Falls arbitration should be reflected in a deduction from the $5.1 million received by Mr Gray under the Klamath Falls Settlement, if the court considered that an equitable allowance should be made to Mr

Gray in respect of that work. Similarly, work done by Mr Gray in maintaining and fostering links with the Russian Scientists would in principle give rise to an allowance to be set against Mr Gray's receipt of the Russian Business Assets, again assuming in Mr Gray's favour that the court considered it appropriate to award him an allowance in respect of that work.

219. In practice, however, a different approach was adopted at the Enquiry Hearing. This no doubt reflected the fact that Mr Gray denied that he was liable to account for any of the assets or profits claimed by GEHC, whereas he had unquestionably been in receipt (through ReVysion) of substantial fees for his management of the RegEnersys fund between 2006 and 2012. In relation to those fees, it was anyway necessary to compute the expenses that should properly be deducted from them in arriving at the net profit received by Mr Gray. The question of an equitable allowance could therefore conveniently be dealt with, throughout the relevant period, by means of a further allowance reflecting the value of Mr Gray's services as (in effect) the chief executive officer ("CEO") of ReVysion. We note in this connection that it is agreed Mr Gray did not pay himself a salary: see [Asplin/212]. In this way, it was presumably thought that a further deduction from the net fee income of amounts equivalent to a suitable annual salary for Mr Gray could serve as an appropriate proxy for the grant to him of an equitable allowance.

220. At any rate, whether or not that was the thinking, this was the approach adopted by Mr MacGregor in his expert evidence on behalf of Mr Gray. In paragraph 5.21 of his first report, Mr MacGregor said this:

> "Mr Ward notes that the expenses of ReVysion do not include any remuneration for the defendant… Thus, in order to arrive at the true net income received by the Defendant from the Heerema Group, one also needs to deduct an amount to take account of what ReVysion would have been expected to pay for a chief executive of the experience and calibre of the defendant. Mr Ward suggests that such a remuneration package would be in the region of £1 million annually, which is also similar to his [*i.e. Mr Gray's*] remuneration package when he worked at Bankers Trust and then Deutsche Bank from 1998 onwards. On the basis of the evidence available to me, particularly the Defendant's salary at his previous employer, I agree this is a reasonable basis for estimating an allowance for the Defendant's personal skill, expertise and contribution to the business."

Mr MacGregor then applied this methodology to the management fees for the four calendar years from 2006 to 2009 inclusive, deducting an allowance for Mr Gray's time and skill of £4 million, as well as net expenses, before arriving at the net benefit received by him from the management fees during that period.

221. Mr MacGregor then adopted the same approach in relation to the $10 million consultancy fee, which (as we have already explained) was included in the financial statements of ReVysion for the (financial) years ended 31 March 2011 to 2014. As Mr MacGregor explained, at paragraph 5.28, after computing the expenses that should be deducted from the consultancy fee over the four year period:

> "In addition… I consider that an allowance should be made for the Defendant's time and skill in advising on and managing the RegEnersys Fund. As the Defendant continued to advise and manage the fund for the years 2010, 2011, 2012 and 2013 and as the $10 million consultancy fee was drawn down by the Defendant over the four years ended 31 March 2014, I consider the amount that should be deducted is £4 million."

222. Accordingly, the total allowance sought by Mr Gray was £8 million, at a rate of £1 million per annum over the years 2007 to 2014 inclusive. Indeed, the effect of Mr MacGregor's methodology was to eliminate any benefit arising to Mr Gray from the $10 million consultancy fee, because after deduction of net expenses and the £4 million allowance the outcome of the calculation was a (negative) net cost suffered by Mr Gray of no less than £3,743,845.

223. In Mr Gray's written closing submissions at the Enquiry Hearing, the question of "just allowance" was dealt with comparatively briefly. The relevant legal principles were discussed at paragraphs 140 to 149, where it was correctly accepted that the grant of an allowance for the skill and efforts of a defaulting fiduciary is discretionary, and its exercise depends on all the circumstances. In paragraph 149, the point was also made that there is nothing discretionary about the deduction of expenses incurred in obtaining profits. The allowance for which Mr Gray contended then was dealt with at paragraphs 488 to 493. Reliance was placed on the submission that Mr Gray had "acted as effective CEO of ReVysion, working full-time for it since its inception", and that, prior to the establishment of ReVysion, Mr Gray "took steps to set up and manage what was to become RegEnersys from about April 2006".

224. The submissions continued:

> "491. As Mr Ward confirmed in his oral evidence, if ReVysion had brought in a professional CEO to undertake the management of the business which Mr Gray was carrying out, the cost to it would have been approximately £1,000,000 per annum. Mr Ward went on to explain in detail (a) the basis upon which it was appropriate to make such deduction; (b) the bases on which he assessed the appropriate level of compensation; and (c) the expertise and experience which allowed him to do so. The Defendant's valuation expert, Mr MacGregor, confirmed the appropriateness of such deduction and the amount.
>
> 492. The cost of retaining a professional CEO to undertake the management of the business from April 2006 until 31 March 2010 should therefore be set off against the Management Fee and Consultancy Fee which was paid to ReVysion in respect of its role as manager of and advisor to RegEnersys for the period from 2006 to 31 March 2010 and, following the 2010 Restructuring, after which ReVysion has acted as manager and advisor to RegEnersys UK. In the event, however, that for some reason this cost is not set off in this way, it is submitted that the Court should nevertheless exercise its equitable

> discretion and grant Mr Gray an allowance in this sum on account of his skill and efforts."

225. There was then a final contention, in paragraph 493, that if Mr Gray were found liable to account for any other money or benefit received by him as a result of his breaches of fiduciary duty, a just allowance should be made:

> "for the personal skill, expertise, labour and exertion of Mr Gray in generating any such benefit, with due regard for the fact that:
>
> (a) Mr Gray worked full-time as effective CEO of ReVysion;
>
> (b) Mr Gray did not receive a salary as effective CEO of ReVysion;
>
> (c) an appropriate salary for such a position is £1 million."

226. It can therefore be seen that, although a fall-back claim was made for an equitable allowance on an asset-by-asset basis, the evidential basis for any such claim was in practice confined to the matters relied upon in Mr MacGregor's analysis and Mr Ward's evidence.

227. The relevant passage in Mr Ward's first witness statement stated his belief that the cost to ReVysion of paying "market compensation if it had brought in a professional CEO to undertake the management of the business which Mr Gray was carrying out" would have been in the region of £1 million annually including bonus and benefits. Mr Ward was cross-examined on this evidence, and Asplin J was unimpressed by it: see her comments in [Asplin/212 and 213], quoted above.

(c) Did Asplin J misdirect herself on the law?

228. In oral argument, Mr Dutton (who argued this part of the case for Mr Gray) submitted that Asplin J misunderstood the relationship between the deduction of expenses in the calculation of profit, on the one hand, and the making of an equitable allowance to Mr Gray, on the other hand, wrongly taking the view that both were discretionary, or even that they were alternatives. The consequence was, it was said, that her whole approach to the making of an equitable allowance in [Asplin/212 and 213] was vitiated by her misapprehension and could not stand. This argument was unheralded in Mr Gray's skeleton argument, but we will consider it on its merits. Mr Dutton relied on three passages in the judgment to provide support for the submission.

229. The first passage is in [Asplin/130] where the judge said:

> "It is not in dispute that the court may allow the deduction of expenses incurred by the fiduciary in achieving an unauthorised profit or grant the fiduciary an equitable allowance in respect of the skill and effort in obtaining the profit. Both are in the discretion of the Court: *Condliffe and Another v Sheingold* [2007] EWCA Civ 1043; [2008] L.L.R. 44 at [23] per Arden LJ and *Murad v Al Saraj* [2005] EWCA Civ 959 per Arden LJ."

230. The difficulty with this passage is that, while purporting to record common ground, it wrongly stated that the deduction of expenses incurred in the making of an unauthorised profit is a matter for the discretion of the court, rather than a necessary step in the ascertainment of the profit. The words "may allow" and "in the discretion of the court" seem to leave no room for ambiguity on this point. Furthermore, Mr Dutton submitted, the word "or" could be read as suggesting that the judge regarded the deduction of expenses and the grant of an equitable allowance as alternatives. We can say at once that we regard the latter suggestion as implausible. We are satisfied that Asplin J did not intend the word "or" to be read in a strictly disjunctive sense. However, the first point appears to us to be well taken, and neither of the authorities cited by Asplin J provides any support for the proposition that the deduction of expenses in computing an unauthorised profit is in any way discretionary. The expenses must of course have been properly incurred, and must be properly attributable to the gross receipt, so there is scope for some exercise of judgment and there may be areas of potential disagreement in performing the exercise. But that is quite different from saying it is in the discretion of the court.

231. The second passage is at [Asplin/144] where the judge said, with reference to the multi-staged test propounded by Mr Cavender on behalf of Mr Gray:

> "There is no dispute as to the final stage of the test. It is that the court has a discretion to apply an equitable allowance both as to disbursements and the skill and effort of the defaulting fiduciary."

This passage appears to repeat the error in [Asplin/130], and also to suggest that the allowance of disbursements itself forms part of the process of making an equitable allowance. As before, the judge was purporting to record common ground. As before, she said unambiguously that "the court has a discretion" which extends both to the allowance of disbursements and to the making of an equitable allowance for the skill and effort of the fiduciary.

232. The third passage relied on by Mr Dutton is [Asplin/192], where the judge said:

> "A further question arises as to whether any costs or allowance should be taken into account. I shall return to that below, having considered the question of causation."

In our view this passage does not take matters much further, although the judge again appears to equate the deduction of costs with the making of an equitable allowance. It is also relevant to note that, after discussing the question of causation at [Asplin/193 to 211], the judge then continued with the question of an equitable allowance at [Asplin/212 and 213] under the heading "Allowance for skill and labour?"

233. In our view, Asplin J was clearly in error in the first and second of the passages we have quoted, where she apparently considered it to be common ground that the deduction of expenses in ascertaining the profit made by a defaulting fiduciary was a matter of discretion for the court. Nevertheless, we do not consider that it vitiated her consideration of the question of equitable allowance in [Asplin/212 and 213]. We think the passages should instead be regarded as minor and immaterial slips made by the judge in the course of a very long and complex judgment.

234. A number of factors lead us to this conclusion. In the first place, in the parts of the judgment which deal with the fees received by Mr Gray, there is nothing to suggest that Asplin J regarded the deduction of proper expenses as anything other than a necessary step in ascertaining the amount for which Mr Gray was liable to account. This was the approach adopted by Mr MacGregor in his expert evidence, which in substance the judge accepted (subject to issues of causation, the correction of certain errors, and her rejection of the equitable allowance claimed). Secondly, it is apparent from numerous passages in the judgment that Asplin J was fully aware of the distinction between a gross receipt and a net profit for which a defaulting fiduciary might be liable to account. Thirdly, in both the offending passages the judge directed herself, entirely correctly, that the making of an equitable allowance was discretionary. Fourthly, in the paragraphs where she deals with the making of an equitable allowance, we can find no hint of any confusion about the legal principles to be applied, or of contamination by her prior discussion of the issue of causation. Finally, there are some contributory factors which may help to explain why Asplin J failed to notice her slip. She thought she was merely recording common ground, so may have failed to notice her error for that reason. And the way in which Mr MacGregor dealt with the equitable allowance in his report, by treating it as a further deduction from the net profit, might have tended to blur the conceptual distinction between such an allowance and the deduction of expenses properly incurred in computing the net profit.

(d) Asplin J's reasons for refusing an equitable allowance

235. It is apparent from [Asplin/213] that there were essentially two reasons why Asplin J declined to grant Mr Gray an equitable allowance on the basis claimed by him and advanced on his behalf at the Enquiry Hearing. First, she did not consider it an appropriate case for the grant of any allowance at all, given the way in which the litigation had proceeded, and Mr Gray's failure "to account properly or at all in respect of his benefit from his fiduciary duty". Secondly, even if she had considered it appropriate to make an allowance, she had insufficient evidence to quantify an appropriate amount. She rejected Mr Ward's evidence as a "rule of thumb" which failed to provide "an appropriate basis for doing justice".

236. We will begin with the judge's first reason, because Mr Gray needs to overturn it before any question of quantification can arise. Since we have rejected the submission that Asplin J's approach was vitiated by a material error of law, and since the question is admittedly one for the discretion of the trial judge, the difficulties in Mr Gray's path are formidable. After a five week trial, during which Mr Gray's witnesses, including Mr Ward, had given evidence and been cross-examined at length, the judge had rejected his case on most of the issues in dispute. In particular, she had rejected his case that he had disposed of the entirety of his interest in RegEnersys to Celloteck in August 2012 and found it to be false. She also found, contrary to his denials, that he had reached the secret agreement with the Russian Scientists and others to retain a beneficial interest in the ultrasound technology. These were central planks in Mr Gray's case that he had provided a full and truthful account of matters in his affidavit and other evidence, but to a very significant extent the judge found that account to be false.

237. It is true that the Russian Business Assets were later found to be valueless, but that is beside the point: Mr Gray took his stand on the proposition that he had severed all his

links with ultrasound technology and investment by entering into the 2012 SPA, but was disbelieved. Furthermore, the judge found that there were two payments of £50,000 each to the Russian Scientists which he had failed to disclose. The relevant point is not that these payments were particularly large in amount or number, but rather that they had been made by an indirect route which Mr Gray must have hoped would enable them to remain undetected. Add to this the serious adverse findings about Mr Gray's credibility in the Liability Judgment against which there has been no appeal, and in respect of which Mr Dutton rightly said that Mr Gray will have to live with them for the rest of his life. Against that background, it is in our judgment impossible to say that Asplin J erred in refusing to grant Mr Gray an equitable allowance. The facts in our view fall well short of the kind of exceptional circumstances in which an allowance may be justified. In terms of the underlying policy identified by Lord Goff in *Guinness plc v Saunders*, we think that the grant of an allowance in this case could indeed have the effect of encouraging a fiduciary such as Mr Gray to put himself in a position where his interests conflict with his duty to his principal. A review of all the circumstances, including Mr Gray's conduct of the litigation, provides ample support for the judge's conclusion, and in our view her exercise of discretion in declining to grant an allowance cannot be faulted.

238. The position might be different, or at least might require careful reconsideration, if Mr Gray's appeal on other grounds had achieved a substantial measure of success, but that is not the case. As will appear, the only grounds on which we propose to allow his appeal are Grounds 3A.1 and 7.2. The former of those grounds concerns a relatively minor part of the overall picture, and it goes only to the computation of the net profit for which Mr Gray is liable to account in respect of the $10 million consultancy fee. Similarly, Ground 7.2 raises a narrow issue about the legal characterisation of the ROW Business Asset. The reasoning of Asplin J on Ground 5 is rather compressed; but in the absence of any demonstrable error of law or principle in her approach, there is no basis for this court to interfere.

239. In the light of our conclusion on this issue, it is unnecessary for us to go on to consider Asplin J's second reason for refusing to make an allowance. We would merely observe that she cannot in our view be criticised for confining her attention to the claim for an allowance as it was actually presented to her and argued at trial. Mr Dutton seemed at times to suggest in his oral submissions that the judge was under an obligation to consider the question, if necessary of her own motion, regardless of how it was argued before her, and that this court too should, if necessary, adopt a similar approach. If that is what Mr Dutton intended to submit, we do not agree with him. A claim for an equitable allowance should in principle be pleaded and supported by evidence in the usual way. The fact that it is a form of equitable relief does not authorise or require the court to embark on a roving commission to achieve a just result, nor does it mean that a judge can fairly be criticised for not proactively seeking alternatives to the allowance claimed if the judge considers it excessive or wrong in principle. There may occasionally be cases in which it is appropriate for a judge to take the initiative in that way, but we do not consider the present case to be one of that character. Asplin J was in our view fully entitled not to go beyond the case for an allowance which was presented to her at trial.

(e) Conclusion on Ground 5

240. For all these reasons, we would also dismiss Mr Gray's appeal on Ground 5.

VIII. GROUNDS 6 AND 9

(a) Introduction

241. By these grounds, Mr Gray challenges findings of fact made by Asplin J which are central to GEHC's case and to the orders made by her. Very briefly, two findings are in particular challenged. The first is that the 2010 agreement was reached in October 2010 with the Russian Scientists that RegEnersys would receive a 30% interest in the Russian business and a 51% interest in the ROW business. As will be seen, there is an issue as to whether Asplin J found that a binding agreement, as opposed to an arrangement or understanding, had been made. There is also an issue as to whether in any event it is open to Mr Gray, on the grounds of appeal for which he has permission, to challenge this finding. The second finding is that, notwithstanding the terms of the 2012 SPA entered into on 17 August 2012 whereby RegEnersys sold its wholly-owned subsidiary Chiloquin to Celloteck, a secret agreement was made between Mr Gray and Mr Pronk on behalf of the Heerema group whereby Mr Gray would continue to be entitled to a 51% interest in any investment in the ultrasound technology. On this basis, GEHC claimed, and Asplin J found, that Mr Gray was entitled to the Russian Business Assets namely 51% of what was found to be Celloteck's 30% interest in Petrosound and the ROW Business Asset, namely 51% of Celloteck's 51% interest in Opco.

242. We will address below the nature and detail of the challenges advanced under Grounds 6 and 9. Before doing so, we will summarise the bases on which Asplin J made her findings on these crucial issues. As these Grounds are concerned exclusively with the judgment of Asplin J, we do not use the format [Asplin/xx] but simply use the paragraph number.

(i) The Enquiry Judgment

243. Asplin J structured the Enquiry Judgment in the following way as regards her findings of fact. The central facts were summarised at [5] to [55]. She set out her assessment of the witnesses at [56] to [70], followed by a detailed account of the issues in dispute and the evidence relevant to them at [71] to [127]. Finally, she set out her findings relevant to Grounds 6 and 9 at [155] to [183], although some findings were made at convenient points in the earlier parts of the judgment.

244. Dealing first with the 2010 agreement, Asplin J concluded at [175] that, taking all the evidence into consideration, it was more likely than not that an agreement for a 51% interest in the ROW business was reached in 2010. At [172] she said that there was a "considerable amount of evidence that in 2010 it was understood that in return for the investment already made RegEnersys would have a 30% stake in the Russian business". At [172] to [174], she referred to (i) an email of 7 December 2010 in which Graham Knight, a colleague of Mr Gray working for ReVysion, told Mr Gray that he had made a request to the Russian lawyers for share certificates for 30% of the shares to be issued in the name of RegEnersys; (ii) the cross-examination of Mr Knight and Mr Pronk in which they accepted that there was an agreement, understanding or arrangement as to the 30%; (iii) emails at around this time from Professor Abramov suggesting that he intended to honour "the arrangement which had been finalised" (Asplin J specifically rejected oral evidence given by Professor Abramov to contrary effect); and (iv) many documents that referred to RegEnersys' stake in the Russian

business. These included a document known as the Feasibility Study produced in December 2010 and translated in 2011 (she specifically rejected Mr Knight's evidence that he was unaware of the contents, preferring the evidence in this respect of Mr Kantor), a draft licence agreement prepared for Sonovita (a subsidiary of Sonoplus) by Mr Knight and emailed to Mr Kantor on 17 May 2011, and emails from Mr Knight to Mr Ward in July 2011.

245. Asplin J also placed some weight on the numerous sums paid to the Russian Scientists from July 2010 to March 2012, consistent with an agreement for an interest in the Russian business. She was fortified in her conclusion by the form of VIYM's internal documentation in 2012. As to that, she said that it appeared that VIYM "had no doubt as to the nature and extent of the Gray/RegEnersys interest in Petrosound and the international operation and made their investment on that basis". She specifically rejected Professor Abramov's evidence that he did not tell VIYM that he had an agreement with Mr Gray, for the reasons she gave at [175].

246. Additionally, Asplin J placed reliance on the steps taken after the beginning of 2011, and after GEHC had commenced these proceedings in December 2010, to keep communications secret. She said at [176]:

> "Further, after the beginning of 2011, all but a single email between RegEnersys/Mr Gray and the Russian Scientists took place on private email addresses. As I have already said, I do not accept that the step was taken as a result of concerns about hacking and industrial espionage. In addition, in 2012, Mr Kantor set up his "Bill Barrett" email address used for correspondence with the Russian Scientists which he did not disclose until its existence had been revealed in disclosure from VIYM provided in November 2014. The account was closed in 2013 and Mr Kantor accepted that he knew that in doing so the emails would be deleted. It seems to me that such conduct from which I draw an adverse inference, was designed once again to shield the existence, nature and extent of the RegEnersys/Gray interest in Petrosound Ltd from detection."

247. Asplin J addressed the agreed interest of 51% in any ROW business in more detail at [179] to [183]. She referred at [180] to "numerous documents evidencing the 51% agreement" and gave five examples dating from the period from September 2012 to May 2013. At [181]-[182], she referred to evidence given by Mr Knight that, after being approached for disclosure in October 2013, he decided that "it was not advisable to proceed with the roll out of the international company while the current proceedings…were progressing", and she referred also to evidence of work done by Mr Knight on the international business in late 2013 and early 2014.

248. As regards the secret agreement to preserve RegEnersys' interest in the Russian and ROW business, notwithstanding the 2012 SPA**,** Asplin J discussed the evidence and set out her findings at [97] to [112] and at [155] to [171]. The acquisition of a majority interest in Klamath Falls under the Klamath Falls Settlement opened the way to combining the US patents with the work of the Russian Scientists.

249. The effect of the 2012 SPA, taken at face value, was that Mr Gray lost his interest, held through his participation in RegEnersys, in the ultrasound technology, prompting the important question for present purposes of why Mr Gray should have wished to do so. Mr Gray's case was that the purpose of the 2012 SPA was to pay the arbitration settlement funds of $5.1 million to Celloteck in partial repayment of Celloteck's investment in or loan to RegEnersys of $65 million. Asplin J rejected this explanation. She said at [158]:

> "Furthermore, it seems to me that Mr Pronk's response later on 30 April 2012 that he would be happy to think of another solution but not a Heerema entity is inconsistent with the explanation that the August 2012 transaction was always intended to enable the debt owed by RegEnersys to be reduced. Mr Pronk's explanation in cross examination was incoherent and I was unable to follow it. I also take into account in this regard the fact that there is no contemporaneous documentary evidence of any kind either seeking repayment of any part of the $65m on the part of the Heerema Group or a desire to do so on behalf of Mr Gray. I also consider it relevant that there was no obligation to repay the loan directly. It was to be repaid over time from a percentage of any monies realised on the sale of assets. In this regard, I also take account of the fact that Mr Heerema was unable to explain how the figure of $65m had been arrived at and that Mr Pronk was unable to point to a document recording Mr Gray's alleged desire to pay back the loan or to give particulars of when such a desire was made clear and gave untruthful evidence in relation to the use of the remainder of the Chilean arbitration settlement monies. Overall, therefore, I am unable to accept Mr Pronk's evidence and Mr Gray's case that the August 2012 transaction was driven by debt reduction."

250. This was clearly a very important finding. If Mr Gray was truly divesting himself of all interest in the ultrasound technology, there had to be a genuine commercial reason for doing so. Asplin J rejected the only explanation advanced by Mr Gray. He did not suggest there was any other reason for it, leaving as the only rational explanation that he was not in truth divesting himself of his interest, but was instead arranging matters so that he could say in his witness statement for the Liability Hearing that he had no interest in the technology. He signed his witness statement on 12 August 2012, on the same day as, but following, execution of the 2012 SPA.

251. This was by no means the only basis for Asplin J's conclusion. She relied on a number of other factors for her finding that the secret agreement had been made.

252. Before referring in more detail to those factors, it is necessary to state briefly the relevant chronology.

253. As already mentioned, Chiloquin, a wholly owned subsidiary of RegEnersys, acquired a majority stake in Klamath Falls and therefore control of the US patents, under the terms of the settlement of the Klamath Falls arbitration. By mid-March 2012, consideration was being given to a restructuring which would combine the US patents

with the business being conducted by the Russian Scientists, with Celloteck as the vehicle to hold RegEnersys' interests. On 13 March 2012, Mr Kantor emailed Mr Gray's accountant, Mr Ward, to say, "I think it would be optimal if Celloteck Holdings Inc were the vehicle that ended up with all of the equity holdings…My key question here is to confirm that Rob/ReVysion etc has absolutely no ownership or connection to this vehicle…".

254. From April 2012, Mr Gray and his associates circulated a number of emails regarding the proposed restructuring. This would involve the incorporation of a "Holdco" for the Russian business, in which Celloteck would have a 30% interest, and an "Opco" for the ROW business, in which Celloteck would hold a 51% interest.

255. On 20 April 2012, Mr Kantor sent to Mr Gray what he described as "critical documents relating to the Klamath restructure" and a summary of the proposed transaction, saying that he expected that Mr Gray would discuss them with Mr Pronk at an anticipated meeting over the following weekend. These documents included a second version of a sale and purchase agreement and a loan reduction agreement and a comfort letter for VIYM "to be signed this weekend to give to the Russians".

256. On 21 April 2012, Mr Gray attended Mrs Pronk's birthday party in Geneva. As to this, Asplin J said at [99]:

> "It is alleged that the secret proposal to put Chiloquin (and therefore, Klamath Falls) together with RegEnersys I into Celloteck and that Celloteck would take a 30% stake in the "HoldCo" of a joint venture business with the Russian Scientists and set up a "rest of the World company" in which Celloteck would hold 51% of the equity, was discussed on this occasion. Mr Pronk denied such a discussion took place that weekend but did accept that it had been discussed and that he had probably discussed and approved Celloteck taking over Klamath Falls before a draft of the SPA was sent to Mr Smits by Mr Kantor on 27 April."

257. On 22 April 2012, Mr Kantor and Mr Gray met in the evening in Moscow before going on a hunting trip with Professor Abramov. Mr Kantor gave evidence that by then Mr Pronk had agreed to the strategy and documentation which Mr Kantor had sent to Mr Gray and that the strategy would go forward.

258. On 27 April 2012, Mr Kantor sent the draft sale and purchase agreement and other documents to Mr Smits, of the Heerema group. In evidence, which the judge accepted, Mr Kantor said "What seemed quite obvious was that Mr Gray told me that the deal was done, or at least approved".

259. On 30 April 2012, Mr Smits confirmed to Mr Gray and Mr Kantor that Mr Pronk would sign the documents, but later that day Mr Pronk emailed Mr Gray to say "Celloteck is a 100% Heerema entity. This company cannot get control over KF. Happy to think about another solution but not a Heerema entity. Especially not since we are migrating holding to the Netherlands for fiscal purpose. Can we discuss?" Mr Gray replied "Hi Nico, of course. Just want equity remote from me." On 2 May 2012,

Mr Pronk asked an executive in the Heerema office whether Celloteck could be sold to a third party.

260. On 3 May 2012, Mr Ward sent an email to a lawyer in Panama, requesting advice on setting up a discretionary trust with a Panama company as its sole asset. On 7 May 2012, Mr Ward sent an email to Mr Gray, with the subject heading "question over setting up a Trust", saying "…I think easier to retain as a panama mirroring celloteck inc which presumably a trust could purchase from heerema for written down value".

261. On 8 May 2012, Mr Gray sent an email to Mr Pronk in which he referred to Mr de Clare's "insanity", to which Mr Pronk replied on the following day, "I have had several discussions on Celloteck. It seems feasible but not easy. Perhaps we should call about this later".

262. On 19 July 2012, Mr Gray emailed his then lawyer "We REALLY need the Celloteck agreement and before I[n] sign my WS…".

263. On 6 August 2012, Ms Deeney, Mr Gray's personal assistant in London, emailed her counterpart in Mr Pronk's office in Geneva to say that she was sending a private and confidential fax from Mr Gray to Mr Pronk and asking her to make sure it was handed to Mr Pronk immediately. She later emailed to check whether it had arrived and to say that it should not be emailed to Mr Pronk but put in an envelope and left for him on his return to the office.

264. On 17 August 2012, the 2012 SPA was executed. On the same day, but after execution of the SPA, Mr Gray signed his witness statement in which he stated that he had no interest in the ultrasound technology.

265. Turning to factors arising from that course of events, Asplin J first placed weight on Mr Gray's email sent on 30 April 2012, in which he said, "Just want equity remote from me". Asplin J rejected the explanation that this meant that Mr Gray wanted to divest himself of the equity. She said at [159]:

> "I also place weight upon Mr Gray's email of 30 April 2012 in which he stated that he just wanted the equity "remote from me." This comment was not addressed by Mr Gray in witness statements or affidavits. Nor for that matter is there any reference to debt reduction. Paragraph 111(d) of Mr Gray's Further Information of 22 October 2014 implies that the phrase "remote from me" was intended to mean that he "wanted out." However, in my judgment, given the ordinary meaning of the phrase coupled with the use of the word "remote" in the subsequent emails to Mr Ward of 25 September 2012, in a context in which Mr Gray was seeking to disguise his investment in Stratum Energy, and which Mr Gray merely stated that he could not recall, and in the light of the fact that Mr Ward's evidence was that Mr Gray was familiar with the use of trusts, nominees and deeds of beneficial interest which is not surprising given his profession, on the balance of probabilities, I consider that it is more likely than not that the email provides an insight into Mr Gray's intention to hide his

> interest in the ultrasound technology by means of his secret agreement with Mr Pronk and the 2012 SPA and loan agreement."

266. Secondly, she relied on the enquiries made by Mr Ward in May 2012 about setting up a trust in Panama to hold the shares in a Panamanian company. These were consistent with proposals to move Celloteck, a Panamanian company, out of the Heerema group. She rejected Mr Ward's explanation that, in making these enquiries, he was investigating possibilities to reduce ReVysion's high secretarial expenses. She also rejected Mr Gray's denial that he had asked Mr Ward to make these enquiries, in the light of an email to him on 3 May 2012 in which Mr Ward said "Rob, Haven't forgotten and chased the Panamanian agent who looks after the Heerema accounts tonight" and Mr Ward's own oral evidence that Mr Gray had asked him to find out "if we could use a Panamanian entity". She found "wholly unconvincing" Mr Ward's evidence, even when faced with his email of 7 May 2012, that his enquiry did not concern Celloteck.

267. In the light of this evidence as regards these enquiries in Panama, Asplin J said at [164]:

> "Taking this untruthful evidence together, it seems to me that on the balance of probabilities, it is more likely than not that the untruthful evidence was an attempt by Mr Gray to conceal the reason for the enquiry. I accept Mr Fraser's submission that the attempt to conceal the reason supports the conclusion that it was indeed part of a plan to try to get around the problem raised by Mr Pronk about ownership of Klamath Falls, with a view to transferring Celloteck to a trust in which Mr Gray would have an interest and is indicative of Mr Gray having retained an interest in the ultrasound business."

268. Thirdly, Asplin J rejected Mr Pronk's evidence about his email of 9 May 2012 to Mr Gray. Mr Pronk suggested that he was referring to discussions with Gregory Elias who was Heerema's company agent in Curacao. However, Asplin J accepted Mr Elias' evidence that the subject was first raised with him in October 2012. Mr Pronk said in evidence that he did not know what he meant by "feasible but not easy" but stated that "We had to find a way of doing it". As to this, Asplin J said at [165]:

> "On the balance of probabilities, it seems to me that in the context of Mr Gray's "keep the equity remote from me" email and the agreement reached between Mr Pronk and Mr Gray before the Belarus trip, the task in hand was to create a suitable structure in which Mr Gray could retain a secret interest which was difficult to trace back to him. This conclusion is further supported by Mr Gray's email to his solicitor of 19 July 2012 in which he states that the 2012 SPA is needed before he is able to sign his witness statement."

269. Fourth, Asplin J relied on the "confidential" fax sent for Mr Pronk's sole attention on 6 August 2012. She said at [167]:

> "In relation to the fax, it appears to be the only occasion on which fax communication was used between Messrs Gray and Pronk. It has not been produced and none of Mrs Deeney, Mr Pronk and Mr Kantor were able to assist as to what it might have contained. It is not mentioned in Mr Gray's evidence. However, in cross examination in relation to his email in response to Mr Kantor's email to Han Smits in the Geneva office of 6 September 2012, in which he stated: "Really don't know what this is Rob. Why he sends this to Han?????????", Mr Pronk accepted that he did not want anyone else dealing with the Celloteck matter in his office. On this basis, I consider that it is appropriate to infer that the fax related to an agreement to keep Mr Gray's interests in Celloteck and the ultrasound technology "remote" but that Mr Gray had not divested himself of them and that accordingly, Mr Pronk was concerned that no one but himself should deal with the Celloteck matter."

270. Fifth, and now moving to events after the 2012 SPA was executed, the judge relied on the continuing involvement of Mr Gray and RegEnersys in the technology. For example, she said at [108]:

> "108. Despite having executed the Sale and Purchase Agreement on 17 August 2012, Mr Gray travelled with Mr Kantor to Russia on 19 August. Mr Kantor suggested that it remained important to have Mr Gray's presence because of his gravitas and that he continued to tell the Russians that Heerema was involved in the project. No mention was made of Mr Gray allegedly having sold out. Mr Kantor also accepted that in August he had discussed the terms upon which VIYM would invest and take up its shares in Sonoplus. He said that he did so as a friend of Professor Abramov. In September he discussed the form of a subscription agreement and the proposed licence agreement between Klamath Falls and Sonovita in relation to the US patents. Given Mr Kantor's detailed involvement in the ultrasound business on behalf of Mr Gray, and his subsequent involvement in the proposed licence agreement, I am unable to accept his evidence that his involvement in relation to the terms of the VIYM investment was merely as a friend."

(ii) The detailed grounds

271. Grounds 6 and 9 represent, as Mr Dutton submitted, a serious challenge both to the findings made by Asplin J as regards Mr Gray's continuing interests in the ultrasound technology and to the procedure by which she reached those findings. The findings themselves are challenged under Ground 6, while the procedure is the subject of Ground 9. It was submitted that success under Ground 6 would result in the findings being held to be wrong, leading to the dismissal of GEHC's claims as regards Mr Gray's alleged continuing interests. Alternatively, if Ground 9 succeeded, the judge's findings would be held to be unsafe. While that would normally lead to a retrial, Mr Dutton submitted that in the circumstances of this case, where Arnold J has held those

interests have no value and that finding is not appealed by GEHC, the appropriate course would simply be to set aside Asplin J's findings.

272. The challenges made under Ground 6, as they were argued before us, were as follows:

i) Asplin J failed properly to address the serious allegations of conspiracy to create false evidence and to give dishonest oral evidence. She failed to bear in mind the improbability of such a conspiracy and to apply authoritative guidance as to the need for cogent evidence to establish allegations of serious misconduct. She also failed to address evidence on which Mr Gray relied. (Ground 6.1).

ii) Asplin J misdirected herself in relation to adverse inferences which led or contributed to her rejection of Mr Gray's account of the 2012 SPA and his denial of any secret agreement. For example, she wrongly drew adverse inferences from Mr Gray's failure to address certain allegations in his evidence where those allegations had been made following service of his written evidence and where he was prevented from attending court to give oral evidence due to ill health. She made cumulative inferences which were speculative and not properly founded in the evidence (Ground 6.3).

iii) Asplin J was misled, by unsupportable submissions by GEHC and by its failure to disclose relevant documentary evidence to the court and to its expert witnesses, into making findings which were not available on the evidence which was, or should have been, before the court (Ground 6.4).

273. It is also asserted under Ground 6 that:

i) Asplin J failed to have regard to relevant evidence, the specific example provided being Mr Gray's shareholding in GEHC. In short, no account had been taken of the fact that Mr Gray would benefit, through his shareholding in GEHC, from any interest held by GEHC in the Russian or ROW business (Ground 6.2).

ii) Asplin J made findings that were plainly wrong (Ground 6.5).

274. The specific point raised by Ground 6.2 was not pursued before us. Given that Mr Gray's interest in RegEnersys, as found by the judge, was substantially larger than the interest he would have enjoyed through his shareholding in GEHC, it was not an obviously persuasive point. Insofar as Ground 6.2 is a general challenge to Asplin J's findings, it does not add to the other grounds. Likewise, Ground 6.5 is a sweep-up ground that does not add to the specific challenges raised by the other paragraphs of Ground 6.

275. Each of the sub-paragraphs under Ground 9 allege procedural irregularities of sufficient gravity to render the findings of fact unsafe. They are as follows:

i) Asplin J made improper adverse inferences against Mr Gray which led to her finding that he had a continuing secret interest comprising the Russian and ROW Business Assets (Ground 9.1).

ii) GEHC misrepresented the documentary evidence to the court (Ground 9.2).

iii) GEHC had caused the suppression of relevant documents from the court by not providing them to its expert (Ground 9.3).

iv) As a consequence of the above, Asplin J made an order of her own motion for the valuation of the assets found by her to be held on trust by Mr Gray for GEHC to be determined at a further hearing while nonetheless giving judgment on issues for which the valuation of those assets was relevant evidence (Ground 9.4).

v) As a consequence of Asplin J adopting the above approach, the High Court has given two inconsistent judgments in the same account of profits, it being common ground by the time of the Valuation Hearing that the evidence relevant to valuation could not be reconciled with Asplin J's findings of fact. Specifically, this related to the ownership of the ROW Business Asset. Asplin J held that, through RegEnersys, Mr Gray was entitled to a 51% interest in the ROW business, but it was common ground before Arnold J that that business was carried on by one or more subsidiaries of Petrosound. Asplin J found, or assumed, that OpCo was a separate company established for that purpose, which was not the case. It would be a serious procedural irregularity if both judgments were allowed to stand (Ground 9.5).

276. There are substantial overlaps between Grounds 6 and 9. We therefore address these grounds in the following way:

i) Ground 6.1 stands alone and is addressed as such.

ii) Grounds 6.3 and 9.1 are addressed together.

iii) Ground 6.4 is addressed with Grounds 9.2 and 9.3.

iv) Ground 9.4 is addressed separately.

v) Ground 9.5 is addressed later with Grounds 7.2 and 8.

(iii) Asplin J's finding as to the 2010 agreement

277. It is of very considerable importance to identify precisely the finding made by Asplin J as regards the 2010 agreement.

278. Mr Dutton submitted that Asplin J found that in October 2010 a *legally enforceable* agreement was made between RegEnersys and the Russian Scientists, under which the former would receive 30% of the company established to carry on the Russian business and 51% of the ROW business. He submitted that it was GEHC's case before Asplin J that it had to prove that the 2010 agreement was a binding agreement

in order to maintain its claim to the 15% shareholding issued to Mr Volchenkov and Mr Ivanov as well as to an interest in the ROW business.

279. It is clear to us that this does not accurately state either Asplin J's finding or GEHC's case before her. At [26], she said "GEHC contends therefore, that by no later than 25 October 2010, Mr Gray had come to a clear agreement, arrangement or understanding with the Russian Scientists as to the terms of the interest RegEnersys was to have in the Russian operation and that a formal written agreement had not been executed as a result of the ongoing arbitration in Chile". This accurately reflects GEHC's case. In its Part 18 Response, GEHC repeatedly alleged that RegEnersys had reached "an arrangement or understanding" in October 2010, but did not once use the term "agreement", still less "contract" or "binding agreement". Mr Dutton referred us to the oral closing submissions for GEHC, but again it seems clear to us that a binding agreement was not being alleged. In the passage to which we were referred, counsel said as regards the claim to the 15% shareholding "realistically, we have to agree that it depends on establishing the agreement, understanding, however you like, in October 2010". It needed to be a "firm agreement"; there was "a settled approach". A firm agreement or understanding is not the same as a contract and, as appears from the judge's summary of GEHC's case at [26], it is clear that she did not understand a contract or binding agreement to be alleged.

280. We pressed Mr de Mestre on this issue in the course of his oral submissions, and it is fair to say that he was not always clear about it. Ultimately, his position was that the judge had held there had been a contract made in October 2010 but, even if there was not, a non-binding agreement or arrangement was sufficient for GEHC's purposes. We consider that Mr de Mestre was wrong in his submission that the judge had found, or intended to find, a binding agreement.

281. Asplin J referred to an "agreement" in various places in her judgment but clearly not, in our judgment, as meaning a binding agreement. At [172], for example, when dealing with the claim to the 15% shareholding in Petrosound, she said, "[t]here is a considerable amount of evidence that in 2010 it was understood that in return for the investment already made RegEnersys would have a 30% stake in the Russian business". She further said that in cross-examination, Mr Knight and Mr Pronk accepted there was "an agreement/understanding or arrangement as to the 30%" and that Professor Abramov's emails suggested that "he intended to honour the arrangement which had been finalised".

282. Contrary to Mr Dutton's submissions, it was not necessary to GEHC's claims to the 15% shareholding in Petrosound in the names of Mr Volchenkov and Mr Ivanov or to a 51% interest in the ROW business that the 2010 agreement should have been a binding contract. That would be necessary only if GEHC had to show that RegEnersys (and, indirectly, Mr Gray) or Celloteck had a proprietary interest as at the date of the 2012 SPA, such interest deriving from a specifically enforceable contract. That was not necessary and it was enough for GEHC's claim that Celloteck (and, through it, Mr Gray by virtue of the secret agreement) subsequently acquired an interest in Petrosound or the ROW business. GEHC's claim against Mr Gray is based on the opportunity to invest in the ultrasound technology and business which became available to him as a result of his involvement in GEHC and of which he took advantage through his participation in RegEnersys. GEHC needed no more than that to succeed in its claim to Mr Gray's 51% interest in the 15% shareholding in

Petrosound issued to Celloteck. The same is true of Mr Gray's interest in the 15% shareholding in Petrosound issued to the VIYM Executives, once it is established that they held the shares as nominees for Celloteck. However, as GEHC's counsel acknowledged in the passage cited above, the claim that those shares were held for Celloteck would, in practice, be established only if there were a firm understanding, arrangement or agreement reached in October 2010. The agreement or arrangement did not, however, need to be legally binding.

(iv) Is it open to Mr Gray to challenge the finding as to the 2010 agreement?

283. A preliminary objection was made by GEHC to any challenge by Mr Gray to Asplin J's finding that the 2010 agreement was made. It submitted that no mention of such a challenge is made in the grounds of appeal. The overarching ground set out in Ground 6 is that the judge was "wrong to find that the Defendant had any *ongoing* interest in the ultrasound technology, or that he had concealed any such interest" (emphasis added). The challenge to the finding of an *ongoing* interest showed that Ground 6 was aimed at the finding of the secret agreement, as borne out by the relevant section of Mr Gray's skeleton argument. Indeed, paragraph 66 begins "[i]n respect of this ground of appeal Mr Gray challenges the crucial findings of fact made by Asplin J at the Enquiry Trial that he had dishonestly concealed an ongoing interest in the ultrasound technology". Mr de Mestre submitted that the following lengthy section of the skeleton argument is, consistently with that opening paragraph and the terms of Ground 6, directed to the finding of a secret agreement. By contrast, there is no reference in the skeleton argument to [175] of the Enquiry Judgment where Asplin J sets out her finding as to the 2010 agreement.

284. GEHC understood that there was no challenge to the finding as to the 2010 agreement, and it said so at paragraph 136 of its skeleton argument served on 18 December 2019. Mr Gray's solicitors did not take issue with it. Mr de Mestre submitted that it was not until the end of April 2020, when GEHC was sent Mr Gray's applications and supplemental skeleton argument, that a challenge was made to this finding.

285. Mr Dutton submitted that the position was clear from Mr Gray's original skeleton at paragraph 84.10(b), where it is said that "as at late May 2013, the question of whether RegEnersys would take a 30% share in Petrosound or a share in any international business was not settled", and paragraph 84.11 which refers to a document said to corroborate this.

286. We consider that GEHC's objection is well-founded. The place to identify a challenge to a key finding of fact is in the grounds of appeal, which are clearly limited to the secret agreement. That challenge was neither expressly nor implicitly linked to the finding of the 2010 agreement. It was entirely coherent to challenge just the finding of the secret agreement. Given the centrality of the finding of the 2010 agreement, one would expect it to be separately and fully addressed, instead of a brief mention in a sub-paragraph of a skeleton argument. In fact, paragraph 84.10(b) is a small part of the reasons leading up to the conclusion at paragraph 85 that "[o]nce it is clear that there was no secret agreement in 2012 and that the Russian businesses failed, the key elements of Mr Gray's evidence are vindicated".

287. In advancing its objection, GEHC stressed that, because it did not understand that the finding of the 2010 agreement was challenged, a large volume of evidence that went to that issue and on which the judge had relied was not included in the appeal bundle.

288. We are clear that Mr Gray did not raise this issue in his grounds of appeal and in his original skeleton, and that he did not have permission to appeal on this issue. We have heard full argument on it, so we will proceed on the basis that there is an application for permission to appeal on this point before us, and we will give our decision on that application having considered the parties' substantive submissions.

(v) The approach on appeal to challenges to findings of fact

289. The restricted circumstances in which an appellate court will consider interfering with findings of fact made at first instance, particularly where the judge has heard oral evidence, are well established. Reference may, for example, be made to *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477, especially at [1] – [4] per Lord Reed and *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114] – [116] per Lewison LJ. For present purposes, it is sufficient to cite from Lord Reed's judgment in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [67]:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

290. Mr Dutton accepted these restrictions but submitted that the challenges to Asplin J's findings under Ground 6 fell well within the parameters set by these authorities.

(b) Ground 6.1

291. Under this Ground, both a general and very specific challenges are made to Asplin J's findings.

(i) Inherent improbabilities

292. The general challenge was based on what Mr Dutton called the cogency principle, to be derived, he submitted, from the speech of Lord Nicholls in *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

293. In *Re H*, Lord Nicholls said at p.586:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is

> established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury…this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

294. This passage does not propound a principle or a rule of law. In *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, Lord Hoffmann, referring to this passage, said at [15]: "Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, *to whatever extent appropriate* [words from Lord Nicholls' speech which Lord Hoffmann emphasised], to inherent probabilities…It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred." Lady Hale made the same point at [70]: "The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies." In *S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678, Lady Hale, giving the judgment of the court, said at [13] that the court in *Re B* had rejected "the nostrum, 'the more serious the allegation, the more cogent the evidence needed to prove it'".

295. Mr Dutton submitted that, in light of the allegations made by GEHC involving a widespread conspiracy to deceive GEHC and to mislead the court, Asplin J was required to proceed with real caution and to stand back and consider the inherent improbability of these allegations. Mr Dutton submitted that, although the judge cited the passage from Lord Nicholls' speech in *Re H* and acknowledged it to be an important point, she did so in a different context and she failed subsequently to apply it to the central findings. She did not specifically address the question of inherent improbability. Furthermore, were Asplin J to have had the principle firmly in mind, she would have addressed a number of documents, such as email communications, that were before her and explained why she was discounting them. She did not do so.

296. As Mr de Mestre submitted, inherent improbabilities do not exist in the abstract. In examining the evidence on a particular allegation, the court is looking at the detail of that evidence, the explanations that may be given and, sometimes, the absence of explanations, and a large number of factors will often come into play. Of course, the judge must always have firmly in mind where the burden of proof lies and the standard of proof. The judge will have in mind the question whether, given the gravity of any particular allegation, it is really likely to have happened. However, we firmly reject the suggestion that there should be a separate consideration of the inherent improbabilities, unconnected with the detail of the evidence. Nor do we think it necessary for a judge specifically to address inherent improbabilities, provided the evidence has been considered with care and with the seriousness of the allegations in mind.

297. There are no grounds at all for suggesting that Asplin J did not analyse the evidence with care. On the contrary, it is clear on even the briefest reading of her judgment that she did so with great care. Nor is there any basis for thinking that she did not have the seriousness of the allegations well in mind. Any challenge to her findings must be grounded in her treatment, or absence of treatment, of particular evidence. It is to those challenges that we now turn.

(ii) Specific challenge: documents alleged to be window-dressing

298. By way of specific challenge, Mr Dutton submitted that Asplin J failed to deal with certain documents which undermined GEHC's case that the 2010 agreement had been made. Witnesses called by Mr Gray were cross-examined on the basis that these documents were window-dressing, concocted to bolster Mr Gray's case that no such agreement had been made. The documents were significant because they appeared to show after October 2010 an open discussion taking place about Celloteck's future participation in the venture without acknowledging any existing commitment on either side. Mr Dutton informed us that they had been described as window-dressing no less than 24 times in GEHC's written closing submissions but, save in one instance, Asplin J made no findings at all about these documents. In circumstances where, in Mr Dutton submission, GEHC's case could not succeed if the documents were genuine, rather than window-dressing, the judge's failure to deal with this issue fatally undermined her finding that the 2010 agreement had been made, which accordingly could not stand.

299. The one document which Asplin J found to be window-dressing was much earlier than the others. It was a lengthy email, dated 31 January 2011, from Mr Kantor to Mr Gray, purporting to be a summary of the then current situation as regards the business in Russia. Asplin J dealt with it at [85]. This particular finding is not challenged but it stood in stark contrast, Mr Dutton submitted, to the lack of any findings as regards later documents alleged by GEHC to be window-dressing.

300. The later documents, about 14 in number, all date from the period between December 2012 and September 2013. They are for the most part emails between Mr Kantor and Mr Pronk and they are said to demonstrate that terms had not by then been agreed or arranged between the Russian Scientists and RegEnersys (or, since August 2012, Celloteck) for participation in the Russian or ROW business. They were therefore fundamentally inconsistent with the alleged 2010 agreement.

301. These documents were referred to, without elaboration, in a footnote to Mr Gray's supplemental skeleton argument, but in his oral submissions Mr Dutton focused on two documents.

302. The first document was an email dated 27 March 2013 from Mr Kantor to Mr Pronk, to which Mr Kantor attached "an update document outlining the current state of discussions with the Russians". The first paragraph of the attachment stated:

> "Talks have continued with the Russians to determine if there is a structure in which we can merge the Klamath Falls IP with their business in Russia. To date there has been discussion around a bifurcated structure where Celloteck would control international operations and the Russian Organization (RO)

> would control operations within the Former Soviet Union in exchange for an assignment of the Klamath IP. However, as discussions have progressed, it has become increasingly apparent that there will be a material price tag attached to Celloteck participation. While this was not clear in the initial discussions, I believe now that that the RO will not complete a deal unless both the IP is contributed and funding in the area of $3-5MM is committed (either as equity or as a shareholder loan)"

303. Mr Kantor further stated in the attachment that "I believe this funding requirement has come about because of the poor financial situation the RO is in. Their contracts in Russia have been slow to develop, and they are in difficult financial straits". In the third paragraph, he stated that the existing arrangement with the Russian Scientists involved Celloteck having a minority stake in a subsidiary, with no right in the core business and "subject to dilution or even clawback if the Russian Scientists did not perform". Mr Kantor continued: "Given the current financial and equity situation of the company, I cannot recommend that Celloteck commit to funding the business or to participating in any subsidiary equity position. The business as a whole is too unstable today to put funding into (even solely at international level), and taking a minority equity position in the RO would likely put us in conflict with the existing Investors". It goes on to discuss approaches to realising or exploiting the Klamath Falls patents.

304. Asplin J referred at [115] to Mr Kantor's email and attachment, mistakenly eliding its contents with a separate email dated 21 May 2013 in which Mr Kantor informed Mr Pronk about an offer of about $5 million made by Mr Knight for the patents and equipment held by Celloteck. She recorded the submission by GEHC that "this was all window-dressing".

305. The second document was an email dated 9 September 2013 from Mr Kantor to Mr Pronk, which began: "Thanks for the nudge, I have meant to get an update down on paper for a while now". In the next three paragraphs, he gave some details of attempts to market the technology which he described as slow going. In the fourth paragraph, he said that Mr Knight had stayed in touch, continuing to express a desire to purchase the Klamath Falls patents, but Mr Kantor was doubtful that he would be able to raise any funding. In the last full paragraph, Mr Kantor wrote:

> "Separately, it may be time to see what sort of deal we can put together with the Russians. I don't think there is much of a market for Klamath IP alone (I have had our patent agent talk with IP purchasers), and industrial buyers want operational capacity before they are willing to spend cash. Of course, for us to discuss that we have to imply a relationship with the Russians that we don't have, and I believe this has been the best strategy as we have been sounding out the market. However, I think we may have exhausted our flexibility, and it may be prudent to focus on locking down some sort of interest in the Russian technology while our IP and equipment still has some value. Hopefully we will soon get a better sense of what a deal would look like given what we can put on the table (i.e.

> the IP and equipment but no cash or deployment opportunity), and I will revert back with that information."

306. Mr Dutton is right to submit that these two documents are inconsistent with the existence of a settled agreement or arrangement as to the equity participation of RegEnersys, or Celloteck, in either the Russian or the ROW business. The remaining documents, to which we were not specifically taken, are, so far as relevant, difficult to square with a contract on equity participation, but they are not inconsistent with a non-binding agreement or arrangement.

307. With one exception, all these documents are between Mr Pronk and Mr Kantor and not with the Russian Scientists. The effect of Mr Kantor's action in closing his "Bill Barrett" email account was, as he knew, to delete all correspondence with the Russian Scientists. The most important emails were not therefore before the court. The only email to or from the Russian Scientists from this period in evidence was dated 25 February 2013 from Anna Abramova, the daughter of Professor Abramov, attaching a draft memorandum of understanding for a joint venture ("RoWCo") to exploit the technology "currently under development by" Celloteck (described as Partner 1) and Petrosound/Sonoplus (Partner 2) outside the former Soviet Union. The draft terms under the heading 'Structure' included provisions which were consistent with the 2010 agreement:

> "The basic principle of ownership of RoWCo is the following: 51% will be owned by Partner 1 and 49% will be owned by Partner 2. The parties agrred [*sic*] that they will do best affords [*sic*] to save this basic principle but there might be some frictions from it": and
>
> "Partner 1 will take a 30% stake in [PetroSound] along with the Russian Inventors, which will entitle them to [1] board seat and certain management rights in the main Russian entity [SonoPlus]".

308. Asplin J reached her conclusion that the 2010 agreement had been made on the basis of the large volume of evidence to which we have earlier referred. Save for the suggested cogency principle, it is not submitted that this evidence did not provide a proper basis for the judge's finding nor, in our judgment, could it be submitted.

309. Asplin J also relied on her findings as to the circumstances in which, in November 2013, 15% of the equity of Petrosound was issued to Celloteck and a further 15% was issued to Mr Ivanov and Mr Volchenkov. It is right to set those out in full:

> "120. The first occasion upon which the 15% holding rather than 30% had been mentioned was an email on 4 October 2013 from Mr Knight to Mr Kantor attaching a letter from his company, Chateaufine Ltd, essentially reflecting the terms Mr Kantor had proposed in September but with the equity stake for Celloteck reduced to 15%. There are no documents which shed light on the change.

121. As I have already mentioned, in cross examination, Mr Knight accepted that he believed that a 30% shareholding in the Russian Scientists' company had been agreed in mid 2010. However, he said that in fact, he had agreed the shareholding at a lunch with Mr Kantor in London in early October 2013 and having agreed upon 30%, he telephoned Professor Abramov and was very surprised and angry when the Professor informed him for the first time that shares had already been allotted to Messrs Ivanov and Volchenkov. In fact, Mr Knight said that Professor Abramov had said that a total of 20% had been allotted to the two VIYM executives and that a further loan facility of $1m was being made available from VIYM. However, Mr Knight says that during his telephone conversation the Professor suggested offering only 10% of the shares to Celloteck and as a result he hung up on him. He went on to explain that in a further conversation later that evening, the Professor agreed to 15% instead of 30% for Celloteck. In fact, the 30% shareholding had been canvassed in email correspondence between Mr Kantor and Professor Abramov in September 2013 and Mr Knight accepted that he had been in Moscow the previous week and had had a relatively lengthy meeting at which the 30% had been hammered out.

122. The written evidence of both Mr Knight and Mr Kantor in relation to the shareholding was different and Professor Abramov did not mention the alleged telephone conversation at all. In their witness statements, both Messrs Knight and Kantor referred to Messrs Volchenkov and Ivanov receiving 7.5% each. Mr Knight also stated in writing that the Professor had eventually been persuaded to offer Celloteck 15% whereas in cross examination he said that the negotiation had all taken place in one afternoon/evening and that it was the Professor who had called him twice. Further, the Professor's oral evidence was that he agreed the 15% for Volchenkov/Ivanov on 18 October 2013, some two weeks after the alleged conversation at the restaurant, and appeared to dismiss any discussion of the matter with Mr Knight. As I have already mentioned, the Professor's evidence was that Celloteck deserved no more than 15% and he could do as he liked because the business was his.

123. I found Mr Knight's evidence in this regard to be unsatisfactory. He made no complaint it would seem and none is recorded of the reduction to 15%. Further, I find his explanation of the discovery at the restaurant wholly implausible and on the balance of probabilities, untrue given that he was in Moscow the previous week. The only contemporaneous document is an email of 4 October which records the 15% share but makes no reference to the alleged telephone call and the discovery of 15% having been allotted

> elsewhere. Accordingly, I am unable to accept it. It also seems to me that had the reduction from 30% come about in the way it was described, there would be a large number of email complaints on behalf of RegEnersys/Heerema and possibly the involvement of lawyers. There is also no explanation of why if Messrs Volchenkov and Ivanov were holding 15% of the shareholding on behalf of VIYM, it is said that their employment was terminated. Mr Knight was also unable to explain why he had been provided with Mr Volchenkov's private email address in November 2013.
>
> 124. In addition, it was Mr Knight's evidence in cross examination that despite having sought a shareholding as part of his severance package from ReVysion in August 2011 and been refused it in a conversation he had had with Mr Ward, he spoke to Professor Abramov who subsequently decided that he would like to give Mr Knight 3.5% of the shares in Petrosound Ltd. Professor Abramov on the other hand, stated in cross examination that his estimation of Mr Knight's ability in relation to the oil and gas business was extremely low, that he viewed him as Mr Gray's driver and that his relationship with Mr Knight had been destroyed. Save to say that the company was his to do with as he pleased, he did not explain why, therefore, he had allotted shares to Mr Knight and had allotted only 15% of the shares in Petrosound to Celloteck. He did state that he had reached an agreement with Messrs Volchenkov and Ivanov "for one year and $750,000". He added that they had returned the 15% shareholding allotted to them to him. The Professor also denied any connection between Petrosound International Ltd and Petrosound. I found his evidence in this regard to be wholly unconvincing and I am unable to accept it."

310. At [177], Asplin J referred back to these findings, saying that she found the evidence of Mr Kantor and Mr Knight as to the alleged reduction in Celloteck's shareholding from 30% to 15% to be "highly implausible".

311. In our judgment, the challenge to the finding that the 2010 agreement was made in October 2010 and implemented in November 2013 on the basis of a few internal documents passing between Mr Kantor and Mr Pronk is a classic case of "island hopping", whereas Asplin J based her findings on "the whole sea of evidence presented" to her, to adopt the phrases used by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* at [114]. Against that sea of evidence, as set out by the judge, it is idle to suppose that these few internal documents could undermine the judge's solidly based findings. It is a rare case where every scrap of evidence can be neatly fitted into the judge's overall findings. As Lewison LJ said at [115]:

> "It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties

> and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury."

312. The overwhelming weight of the evidence, particularly in the periods leading up to October 2010 and up to November 2013, strongly support Asplin J's finding of the existence of the 2010 agreement. Having referred in her judgment to some of the documents in 2013 on which Mr Gray relies, it is clear that the judge had those documents in mind when she made her finding. We can see no basis on which this court could or should interfere with it. Nor does her treatment of the evidence as a whole show any failure to stand back and consider carefully whether the serious case of false evidence made against Mr Gray and some of his witnesses was made out.

(c) Ground 6.3

(i) Introduction

313. Underlying Ground 6.3 is the very unfortunate fact that Mr Gray was unable to give oral evidence at the Enquiry Hearing. This impeded the presentation by both parties of their respective cases and posed a problem for the judge. Such difficulties are of course not unique. It is sometimes the case that proceedings involving serious allegations are brought against parties unable to give evidence in person, by reason of death, incapacity or other inability. In some cases, this can be met by an adjournment to enable the party in question to give evidence, but Mr Gray's representatives expressly did not seek an adjournment and, as we understand it, Mr Gray was in a position to give instructions. As his written closing submissions explained:

> "While, unfortunately, the Court has not had the opportunity to hear the oral evidence of Mr Gray (whose evidence GEHC does not accept in any case), it is sufficiently equipped to deal with the issues. It has had the benefit of eight factual witnesses and six experts together with vast documentation in order to consider GEHC's claim."

314. The particular challenges under Ground 6.3 relate to adverse inferences drawn by Asplin J and to findings made by her on issues where, it is said, Mr Gray did not have the opportunity of dealing with the issue, thus rendering the finding unfair.

(ii) Adverse inferences

315. Dealing, first, with adverse inferences, it is submitted for Mr Gray that Asplin J adopted an incorrect and unprincipled approach to the drawing of inferences. This was not a case where a party or witness has of their own volition declined to give oral evidence. Accordingly, an adverse inference could not be drawn simply from the fact that Mr Gray did not give oral evidence on matters within his knowledge and on which he could be expected to give evidence: *R v IRC ex parte TC Coombs & Co* [1991] 2 AC 283 at 300 per Lord Lowry, *Prest v Petrodel Resources Ltd* [2013]

UKSC 34, [2013] 2 AC 415 at [44] per Lord Sumption. In any event, as Lord Sumption there said, "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".

316. Mr Dutton's submissions on adverse inferences centred on those drawn by the judge in the context of the difficult issue of the weight to be attached to Mr Gray's untested written evidence. Asplin J dealt with this at [57] – [59] which we think it important to set out in full:

> "57. The weight to be given to that evidence untested by cross examination, is a matter to be determined. In this regard, I take account of the fact that in the Liability trial, Vos J (as he then was) found him to be "*largely unreliable*", at times "*deliberately lying*" and "*cynically giving misleading evidence*" and stated that he was "*certain . . that he told deliberate untruths in several areas*." Cooke J's conclusions were similar in *Gray v Smith, JMPC Sales Ltd and Edwards* [2013] EWHC 4136. I also take account of the fact that various payments made to the Russian Scientist by indirect means in 2011 were not referred to by Mr Gray in his written evidence for the purposes of the Account. Once the payments became known, Mr Gray sought to explain them in his fifth witness statement stating that they were made through third parties because he was away at the time. In fact, Ms Deeney accepted that Mr Gray was not away at the time and that in any event, she directed the making of the payments and copied Mr Gray in. In fact, she stated that she had power of attorney over the account in question.
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> 58. In the circumstances, I attach very little weight to Mr Gray's written evidence unless it is corroborated by contemporaneous documentation or other credible testimony.
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> 59. Further, it is of particular note that barely any emails have been disclosed passing between Mr Gray and the Russian Scientists after the end of 2010 or between Mr Gray and Messrs Pronk and/or Heerema concerning the ultrasound technology. Further, only a limited number of documents passing between Mr Kantor and the Russian Scientists on an email address in the name of "Bill Barrett" were made available as a result of disclosure from VIYM. The attachments to the Feasibility Study of February 2011 and perhaps most markedly, the confidential fax sent to Mr Pronk by Ms Deeney on Mr Gray's behalf in August 2012, have not been disclosed. When these matters are taken together with the unreliability of Mr Gray's evidence in the past, the use of undisclosed email accounts and indirect means of transferring monies to the Russian Scientists with unexplained references, it seems to me that it is proper to infer that documents may well have been withheld from the Enquiry which are not helpful to Mr Gray's case."

317. Mr Dutton accepted that the judge was entitled to take into account, as she did at [57], the serious criticisms made by Vos J of Mr Gray as a witness at the Liability Hearing, being criticisms expressed in the same case and between the same parties. He submitted that she was wrong to take into account similar criticisms of Mr Gray made by Cooke J in the unrelated case of *Gray v JMPC Sales Ltd* [2013] EWHC 4136, as it offended against the principle established in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. While we think that Asplin J was probably wrong in this respect, just as Cooke J himself had probably been wrong to take account of Vos J's criticisms, Mr Dutton accepted that this was of no real assistance to him, in view of the proper reliance on the criticisms made by Vos J.

(iii) Adverse inference: payments to Russian Scientists

318. Mr Dutton took issue with the rest of [57] where the judge relied on Mr Gray's failure to refer in his written evidence for the account (i.e. his affidavits) to payments made by indirect means to the Russian Scientists in 2011. Mr Dutton pointed out that the judge did not mention that Mr Gray had referred in his first affidavit to all the other payments made to the Russian Scientists and to the fact that in his fifth witness statement he had explained the position as regards the indirect payments. In the written closing submissions for Mr Gray, an explanation was given that the two payments may well have been made by Mr Gray personally because he was concerned that ReVysion, which was regulated by the Financial Conduct Authority, should not be making payments to Russian-owned companies. Mr Dutton submitted that, where Mr Gray had not been available for cross-examination, the judge should have addressed the explanation given in the closing submissions.

319. The difficulty for Mr Gray in this challenge is that it simply does not meet the point that Asplin J was making. It was the failure of Mr Gray to refer to these particular payments in his affidavits and the untruthful reason given by Mr Gray for making the payments indirectly, once they were pointed out by GEHC, that the judge took into account in assessing the weight to be attached to Mr Gray's evidence. The fact of an alternative possible explanation put forward in counsel's closing submissions is irrelevant in this context.

(iv) Adverse inference: withheld documents

320. At [59], Asplin J referred to documents that were not in evidence but would or might be expected to be available. She inferred that "documents may well have been withheld from the Enquiry which are not helpful to Mr Gray's case". This inference is challenged both as a general proposition and as regards each of the documents, or categories of documents, to which the judge referred in this paragraph.

321. Before going to the particular documents, Mr Dutton submitted that the judge had failed to refer to the following matters. First, Mr Gray had given disclosure of 339,000 documents and some of his witnesses had also given disclosure. Secondly, he had dealt "at enormous length" in his three affidavits and his fifth witness statement with "a vast array of allegations against him". Thirdly, he had not been cross-examined on any of the allegations about missing documents. Fourth, the judge made no allowance for the volume of material that Mr Gray had to grapple with in relation

to the allegations against him. Mr Dutton submitted that each of these matters was relevant to whether documents had been suppressed and the failure to have regard to them demonstrated an inadequate approach towards the serious allegations being advanced by GEHC against him. When it came to adverse inferences, the proper and conservative approach was to draw inferences only when there was a proper basis for the inference in the facts and where there was a genuine evidential gap which had not been explained, particularly where the judge was being asked both to discount the contemporaneous evidence before her and to make adverse inferences as to the content and significance of documents that were not before her.

(v) Withheld documents: the confidential fax

322. The missing document on which the judge placed the most emphasis in [59] was the confidential fax sent by Ms Deeney on behalf of Mr Gray to Mr Pronk on 6 August 2012. We have earlier set out the circumstances of this fax. At [107], the judge recorded Mr Pronk's evidence that he had no recollection of the fax and had not found it. At [167], the judge concluded that it was "appropriate to infer that the fax related to an agreement to keep Mr Gray's interests in Celloteck and the ultrasound technology "remote" but that Mr Gray had not divested himself of them".

323. Mr Dutton submitted to us that this finding was a cumulative process of inference drawing, where inferences were drawn from inferences, leading to a result that was speculation. The judge had dealt with it at [167]. She relied in part on the fact that the fax could not be found, according to Mr Pronk's evidence, and on his lack of recollection of it. That, Mr Dutton submitted, could not found a conclusion that the fax was relevant to any issue in the case, still less that it contained or referred to a secret agreement. Nor could the lack of any mention of the fax in Mr Gray's evidence found that conclusion; that pre-supposes the conclusion, because it could be relevant only if the fax in fact related to the issues in the case. Unlike the "equity remote" email to which we come below, the fax had not been referred to in GEHC's Part 18 response or in other documents from GEHC to which Mr Gray responded in his witness statements.

324. The judge also relied on Mr Pronk's oral evidence as regards an email he sent to Mr Gray on 11 September 2012, in which he wrote "Really don't know what this is Rob. Why send this to Han??????????". This followed an email, about Celloteck and the transfer to it of Chiloquin and RegEnersys, sent on 6 September 2012 by Mr Kantor to Mr Smits. The judge recorded at [167] Mr Pronk's acceptance in cross examination that he did not want anyone else in his office dealing with the Celloteck matter. Mr Dutton criticised this as inaccurate. He referred to the transcript of Mr Pronk's evidence where he said in cross-examination that he told his staff as regards Celloteck, "Deal this with me first". Mr Dutton emphasised the word "first". The evidence was not that no-one else in the office was to deal with the Celloteck matter at all, only that it was to be referred to him first. The judge was therefore wrong to accept GEHC's submission that Mr Pronk was effectively keeping the true nature of Celloteck's interest a secret even from those in his office. It was not a finding open to the judge on the evidence. Why, Mr Dutton asked, should this be kept secret from Mr Smits who was closely involved in the acquisition of Chiloquin by Celloteck, and why indeed should Mr Pronk and the Heerema group do all this for Mr Gray?

325. Overall, Mr Dutton submitted, there was no proper basis from which to draw the inference that the missing fax in any way evidenced the secret agreement.

326. What Mr Dutton did not deal with in his submissions on this were the implications of the opening sentence of [167]: "it appears to be the only occasion on which fax communication was used between Messrs Gray and Pronk". The circumstances in which the fax was sent, as shown by the faxes from Ms Deeney which immediately preceded and followed it, and the very fact that it was sent by fax and not by email, show that it was both very important and highly confidential, intended for Mr Pronk's eyes only. The timing of the fax, less than two weeks before the 2012 SPA was signed and before Mr Gray was due to provide his witness statement for the Liability Hearing, was significant. Given the unique character of the fax and its evident importance, it is surprising that at least Mr Pronk, and perhaps Mr Kantor, gave evidence that they had no recollection of it. In our judgment, Asplin J was entitled to draw from these circumstances the inference that, as she said, the fax *related to* a secret agreement to conceal Mr Gray's continuing interests in the ultrasound technology. We also accept Mr de Mestre's submission that she was entitled to treat Mr Pronk's evidence as showing that he, and not others in his office, were to deal with Celloteck matters. The fact that Mr Smits was dealing with the 2012 SPA does not mean that Mr Pronk wished him to be involved in a secret agreement with Mr Gray.

(vi) Withheld documents: attachment to the Feasibility Study

327. The other missing document to which the judge drew attention at [59] was an attachment "to the Feasibility Study of February 2011". As the judge noted at [31] the feasibility study had been prepared by the Russian Scientists in or about December 2010 and Mr Knight arranged for it to be translated in March 2011. She referred to it as containing "numerous statements that describe RegEnersys as a principal investor and part of the Heerema Group which had made a loan and would represent the Russian Scientists' interests outside Russia which mirrored those in the comfort letter provided by Mr Knight in October 2010". The principal significance of the feasibility study is that the Russian Scientists were accepting and asserting RegEnersys' participation in the Russian company. The relevant attachment was appendix 7, described as an "agreement with the potential UK investor, RegEnersys".

328. Mr Dutton submitted, first, that it is an assumption by the judge that Mr Knight received the attachment and that he arranged for its translation. Further, the judgment contains no analysis of whether Mr Gray had the attachment and so could disclose it. Secondly, he submitted that there was no evidential lacuna to be filled as a consequence of the disclosure of the feasibility study without this attachment. There was no basis for an adverse inference to be drawn from the absence of the attachment and for relying on it as a reason to discount Mr Gray's written evidence.

329. We do not accept this submission. The judge disbelieved Mr Knight's evidence that he had not read the feasibility study but had read only a summary. As, contrary to his evidence, he did read the feasibility study, he would have seen the reference to the attached agreement and, as it was said to be an agreement with RegEnersys, it would be extraordinary if he did not have the attachment translated and read it. It would likewise be very surprising if Mr Knight did not provide the attachment to Mr Gray.

We consider that the judge was entitled to conclude that the attachment had been withheld from disclosure in these proceedings.

(vii) Withheld documents: emails after 2010

330. The other additional matter relied on by the judge for her inference at [59] that unhelpful documents may well have been withheld from the Enquiry Hearing was that barely any emails were disclosed between Mr Gray and the Russian Scientists after the end of 2010 or between Mr Gray and Messrs Pronk and/or Heerema concerning the ultrasound technology. The significance of the end of 2010 was that GEHC served the claim form in these proceedings in December 2010.

331. Mr Dutton submitted that the explanation was that there was less going on with the Russian Scientists, particularly while RegEnersys was engaged in the Chilean arbitration. This submission ignores the detailed consideration of, and findings about, the absence of disclosed emails and the use of private email addresses at [84] – [93] and at [176] (quoted above). There is no basis for interfering with these findings.

(viii) Withheld documents: conclusion

332. We are satisfied that the judge was fully entitled to reach her conclusions on all the matters referred to at [59]. We are also satisfied that the judge was entitled to rely on those matters to reach her conclusion that documents unhelpful to Mr Gray's case may well have been withheld. We accept that this to an extent involves reliance on inferences to draw an overall inference by way of conclusion, but we are unable to see anything wrong in principle or on the facts of this case in this approach.

333. It should be emphasised that the effect of Asplin J's assessment of Mr Gray's evidence was not to establish GEHC's case, but only to say that very little weight would be placed on his written evidence without corroboration. The judge's findings were based on her assessment of all the evidence before her, including the oral evidence of the witnesses called by Mr Gray. The assessment of the weight to be given to untested evidence where the witness cannot give evidence, as opposed to being unwilling to do so, is a difficult task for a judge. While it will usually carry less weight than oral evidence, it is a strong thing to say that very little weight will be attached to it, if not corroborated, but we are satisfied that the judge was entitled to take that course in reliance on the matters to which she referred at [57] and [59].

(ix) Failure to address issues

334. As regards issues that Mr Gray had not addressed in his evidence, Mr Dutton focused on two matters. The first was the conspiracy among Mr Gray and some of his witnesses to present a false case and the second was the meaning and effect of an email sent by him on 30 April 2012.

(x) Failure to address the alleged conspiracy

335. Perhaps the most serious part of the case that Mr Gray says that he was unable to answer was the allegation of a conspiracy involving himself and a number of his witnesses to hide his interest in the ultrasound technology through false documents and evidence.

336. Mr Gray swore his three affidavits of account as required by the order of Vos J before the allegation of a secret agreement was first made. This was, however, inevitable. As the accounting party, Mr Gray was first required to provide his account and it was then for GEHC to challenge it, to the extent it thought fit. This was done by GEHC on 17 July 2014 in a Part 18 response, which over seven pages at paragraphs 10.15 to 10.20 contained a detailed statement of GEHC's case on the secret agreement. Mr Gray had the opportunity of responding to these allegations and he did so in his fifth witness statement dated 28 November 2014 at paragraph 59.

337. Mr Gray's inability to give oral evidence denied him the opportunity of rebutting the allegation in person at the hearing, but that could not be avoided, except by an adjournment which, as we have said, Mr Gray expressly did not seek, preferring the hearing to proceed with the documentary evidence and the oral evidence of his witnesses. We are satisfied that the case against Mr Gray, including collusion between himself and some of his witnesses, was properly put. The judge said at [68]:

> "68. I should mention that Mr Cavender submitted that Mr Fraser's case amounted to there having been a conspiracy between Messrs Gray, Knight, Kantor, Pronk and Heerema, if not also Mr Ward and Professor Abramov and that Mr Fraser had not put this to them and as a result, was not able to close his case upon such a basis. It seems to me that Mr Fraser put to each of the witnesses the entirety of his case on behalf of GEHC and that there can be no legitimate complaint in that regard. Each witness was made fully aware of the extent to which it was alleged that he together with others was seeking to shield Mr Gray's alleged interest in the various shareholdings."

(xi) Failure to address the email dated 30 April 2012

338. Turning to Mr Gray's email of 30 April 2012, we have earlier set out its text and referred to its context. We have also quoted the judge's analysis of it at [159] of her judgment.

339. Mr Dutton's submissions were in summary as follows. The phrase "just want equity remote from me" was explicable on the basis that Mr Gray simply wanted no part of Celloteck nor anything involving an interest in Klamath Falls. The language was capable of supporting his evidence, and that of other witnesses, that he had no interest after the 2012 SPA was made, although Mr Dutton accepted that it was capable of bearing a different meaning. Mr Gray's use of "remote" in other contexts, on which the judge relied, did not dictate its meaning in this email. As the judge acknowledged at [159], Mr Gray had stated his case as regards this email in the further information he provided in October 2014. He said that it meant that he "wanted out" and Mr Dutton submitted that the judge was wrong to criticise the absence of any further comment on it in his witness statements. It was not incumbent on him to comment on every document in his written evidence; that was a matter for cross-examination. Moreover, the judge had wrongly said that there was no reference in his written evidence to debt reduction as a reason for the 2012 SPA**,** misled in this respect by GEHC's closing submissions. He had in fact referred to it several times in his first affidavit, before any allegation of retaining a secret interest had been made.

340. Although Mr Dutton submitted that the judge's view of this email is an inference, we accept Mr de Mestre's submission that it is a finding as to what Mr Gray meant by it. It appears to us that the finding was well open to the judge on the evidence, including the timing and context of the email. Given the obvious importance of the email, as made clear in GEHC's further information, the judge was entitled to have regard to the minimal comment on it in Mr Gray's witness statement. We think also that Mr de Mestre is right to say that the judge's comment "[n]or for that matter is there any reference to debt reduction" refers to the email, not to Mr Gray's written evidence. GEHC's closing submissions had in fact made reference to Mr Gray's written evidence on debt reduction as a reason for the 2012 SPA and had addressed this explanation in detail.

341. We see no basis for criticising the judge's finding as regards this email.

(xii) Conclusion on Ground 6.3

342. We see no real substance in any of the points taken under Ground 6.3 and conclude that they provide no basis for interfering with the judge's findings.

(d) Grounds 6.4 and 9.2 - 9.3

(i) Introduction

343. The challenges under these grounds first require Mr Gray to persuade this court to admit evidence that was not put before Asplin J.

344. Mr Gray's original application, included in his appellant's notice, was for permission to admit some nine documents. By Application E issued on 28 April 2020 and formally served on 13 May 2020, Mr Gray sought permission to admit over 500 pages of further documents, which included in some cases the original Russian document and an English translation. Subsequently, Mr Gray substantially reduced the scale of this second application and permission was sought to admit a further 23 pages of documents.

345. The admission of new evidence on an appeal is governed by CPR 52.21(2)(b), providing that, unless the appeal court orders otherwise, it will not receive evidence which was not before the court below.

(ii) Mr Gray's preliminary submissions

346. It was first submitted for Mr Gray that the documents in issue were not "new evidence" because, although not before Asplin J, they were in evidence before Arnold J at the Valuation Hearing, which should be treated as a continuation of the Enquiry. Asplin J did not direct a formal split trial or a new enquiry but directed only a further hearing, before her if available, to deal with the issue of value, on which she found there to be insufficient evidence at the Enquiry Hearing. We do not consider there to be any substance in this point. Asplin J gave judgment following the Enquiry Hearing, finally determining all issues before her other than valuation. The relevant documents were not before her and, therefore, on an appeal from the July 2015 Order, they are new evidence. They were not before Arnold J for any purpose connected with the issues determined by Asplin J.

347. Secondly, Mr Gray submitted that the evidence should be admitted because Arnold J's judgment is, as is common ground, inconsistent with Asplin J's judgment as regards the ROW Business Asset. This is a new development since Asplin J's judgment and the evidence, much of which was before Arnold J, will assist this court in resolving the inconsistency. We also reject this submission. The evidence which Mr Gray asks to be admitted on this appeal against Asplin J's order does not relate to the issue on which there is inconsistency, namely whether (as Arnold J found) the ROW business was conducted through Sonoplus, owned by Petrosound and VIYM, or whether (as Asplin J found) it would be conducted through a separate corporate structure in which Celloteck would have a 51% interest. In all other respects, Arnold J's judgment is confined to the valuation issue, which Asplin J did not decide.

(iii) The principal grounds

348. The principal grounds on which Mr Gray sought permission to admit the new evidence were essentially twofold. First, it was submitted that the documents were not before Asplin J because, in breach of their duty to the court, GEHC's then solicitors had failed to provide them to their expert witnesses on the viability of the technology and on the value of Mr Gray's interests and, further, the solicitors had allowed submissions to be made which were falsified by the documents. Secondly, and in any event, the documents should be admitted as new evidence in accordance with the criteria applied by an appeal court, which usually involves satisfying the tests laid down by this court in *Ladd v Marshall* [1954] 1 WLR 1489.

349. We find it convenient to begin with the second of these grounds.

(iv) Ladd v Marshall

350. Although the court's discretion to admit new evidence is not restricted to cases where "special grounds" can be shown, as was the case before the introduction of the Civil Procedure Rules, the three criteria comprised in the test stated in *Ladd v Marshall* remain matters which the court must consider in the exercise of its discretion: *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 at 2325. It is "powerful persuasive authority" (*Sharab v Al-Saud* [2009] EWCA Civ 353, [2009] 2 Lloyd's Rep 160 at [52]) and, while the criteria are no longer primary rules, they "effectively occupy the whole field of relevant considerations to which the court must have regard" (*Terluk v Berezovsky* [2011] EWCA Civ 1534 at [32]).

351. The criteria in *Ladd v Marshall* are that (i) the evidence could not have been obtained with reasonable diligence for use at the trial, (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and (iii) the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

352. There was substantial argument before us on the first and second criteria.

(v) Could Mr Gray have obtained the evidence with reasonable diligence?

353. As regards the application of the first criterion, it is necessary to summarise the steps by which the relevant documents became available.

354. All the documents were provided as part of the disclosure made by VIYM pursuant to an order made on 27 August 2014, on an application by GEHC. It was considered likely that VIYM would have relevant documents because it invested in the business by taking a 25.1% equity interest in, and agreeing to make loans to, Sonoplus following a due diligence exercise in early 2012. VIYM gave disclosure by list to GEHC on 28 November 2014 and provided copies of the documents to GEHC in two tranches, 21 lever arch files on 2 December 2014 and a further seven lever arch files on 15 December 2014. They contained over 1,000 documents. The majority of the documents were in Russian and had not been translated. They were accompanied by two schedules which listed the documents with brief descriptions in English by reference to the 23 categories of disclosure required by the order. Mr Dutton described the schedules as providing a route map through the documents.

355. Once confidentiality undertakings required by VIYM had been agreed, Rosenblatt (GEHC's then solicitors) supplied the documents to MFB, the solicitors then acting for Mr Gray, on 16 January 2015. Rosenblatt's covering letter stated that they were also enclosing the schedules "which are in effect indices". The partner at MFB who dealt with this at the time has given evidence that the schedules were not received, but MFB did not ask for them, notwithstanding the reference in Rosenblatt's letter.

356. With the help of a Russian-speaking paralegal engaged for the purpose, Rosenblatt carried out a rapid review of the Russian documents, focusing primarily on those which appeared to be relevant to Mr Gray's interest in the ultrasound technology and its value, and identified those which they wished to have professionally translated. On 23 March 2015, they provided MFB with hard copies of those documents, including English translations, from the VIYM disclosure which they were including in the trial bundle for the Enquiry Hearing. These documents, which were in addition to the chronological run of other documents in the extensive trial bundle, occupied five lever arch files and represented about one fifth of the documents disclosed by VIYM.

357. MFB reviewed the English language documents in the VIYM disclosure but did not translate or review the documents in Russian. MFB considered that it was not practically possible to do so in the limited time available before the Enquiry Hearing which was fixed to begin on 16 April 2015. No application was made for an adjournment of the hearing, nor were any comments made on the VIYM documents included by GEHC in the trial bundles. A review of the documents with the assistance of a Russian speaker was not undertaken until 2016.

358. In our judgment, Mr Gray cannot satisfy the first criterion in *Ladd v Marshall*. This is an unusual case, in that his solicitors were supplied with all the documents some three months before the start of the Enquiry Hearing. The question is therefore whether with due diligence they could have identified the relevant documents in time for use at the hearing. The only difficulty in doing so was that they were in Russian. Although this presented a challenge, it was by no means insuperable, as demonstrated by the steps taken by Rosenblatt on behalf of GEHC. While we appreciate that the burden of preparing for the Enquiry Hearing was considerable, so it was also for GEHC, and we see no good reason why Mr Gray could not have taken similar steps to identify relevant documents in the VIYM disclosure. Moreover, Rosenblatt clearly informed MFB of the existence of the two English language schedules which Mr Gray says would have made the task easier, but that was overlooked and they were not requested when, it appears, the schedules were not received by MFB. If, in truth, Mr Gray's

legal team were unable to investigate the documents before the start of the Enquiry Hearing, an application should have been made for a short but sufficient adjournment.

359. The first criterion in *Ladd v Marshall* plays a very important part in achieving finality in litigation. If a party fails to deploy relevant evidence at a trial as a result of its own lack of proper diligence, it must bear the consequence that it cannot, save perhaps in exceptional circumstances where the interests of justice demand it, rely on that evidence to re-open the proceedings, resulting in delay and a waste of resources for the other party and for the courts.

360. Insofar as the application is made simply on the basis that Mr Gray wishes to admit new evidence, we refuse the application on this ground.

361. In normal circumstances, that would be the end of the matter and nothing more would need to be said about the admission of the new evidence. However, as we have said, Mr Gray seeks to introduce the documents on alternative bases, and we have heard extensive argument on the impact of the documents on the judge's findings. We shall therefore consider whether the documents meet the second criterion in *Ladd v Marshall*, and it is convenient to do so before dealing directly with the alternative grounds on which Mr Gray relies for their admission before us.

(vi) Would the documents probably have had an important influence on the result of the case?

362. The issue at this stage is whether it is probable that any of the documents, taken individually or in combination with other documents, would have had an important (though not necessarily decisive) influence on the result of the case. This involves, as Mr de Mestre submitted, a comparison of the documents with the judge's findings.

363. The documents in question are principally concerned with the viability of the ultrasound technology and with the value to be attributed to Mr Gray's Business Assets, which in turn depends on the value of the underlying Russian and ROW business. It is submitted for Mr Gray that these documents would have had an important influence, in two different respects. First, they would have affected Asplin J's rejection at [125] – [127] of certain evidence given by Professor Abramov, which in turn would have had an important influence on the judge's rejection of his evidence as to the 2010 agreement and the secret agreement. Secondly, they would have had an important influence on the judge's conclusions as to the viability of the technology and the value of the Business Assets, although she was unable on the evidence before her to determine their value. In turn, this would have had an important influence on her finding of the existence of the secret agreement. If there was no value in the Business Assets, it would cast serious doubt on the allegation of a secret agreement enabling Mr Gray to maintain them.

364. In addition, a small number of documents are not concerned with viability or value but relate to the finding of the 2010 agreement.

(vii) Documents relevant to the rejection of Professor Abramov's evidence

365. As regards Professor Abramov's evidence, the relevant finding is at [125] – [127]:

> "125. During 2014 numerous well treatments have been carried out. On 4 September 2014, Mr Ildyakov sent the results of 19 ultrasound treatments carried out between 25 January and 31 August 2014 to Mr Knight. The results show an increase in production and do not contain any reference to damage caused by jet pumps. Furthermore on 10 November 2014, Professor Abramov's daughter, Anna, sent answers to questions to Mr Knight, included in which was a reference to negotiations with a company called Weatherford. Further, in the case of Samatlorneftegaz, 40 wells were to be treated between April and December 2014, 36 of which were completed by the end of November. In the case of RN-Nizhnevartovsk, 20 wells were treated between April and December 2014, 18 of which had been treated by the end of November when the Professor signed his witness statement. He made no reference to any problems with the contracts. However, in cross examination, he stated that the contracts were "not going smoothly" and in re-examination stated that a jet pump used in conjunction with the treatment had destroyed "three fields" by which it was assumed he meant wells. He also attributed difficulties and a move purely to geological consultancy upon the collapse of the rouble. He neither made reference to any equipment difficulties in his witness statement nor to the alleged effects of the exchange rate which in fact, was much the same when he gave evidence to how it had been when he signed his witness statement.
>
> 126. The Professor also stated that the 42mm tool was no longer used. However, as pointed out in the written closing on behalf of GEHC, the most recently published academic paper, "Development of ultrasonic equipment and technology for well stimulation and enhanced oil recovery" in the Journal of Petroleum Science and Engineering 125 (2015) refers to both the 42mm and the 102mm tools.
>
> 127. Given his written evidence, the Professor's demeanour in cross examination, the content of his academic paper written in 2015 and the lack of a further deterioration in the exchange rate for the rouble since the Professor's witness statement was signed, I am unable to accept his evidence in this regard in cross examination."

366. Mr Gray identifies three documents which were not before Asplin J as evidencing problems with contracts in 2014 and a funding crisis in 2014, and therefore as bearing on this finding. The first is an exchange of emails on 5 August 2014 from Aleksandr Ildyakov, the director general of CUT-Service LLC ('CUT-Service') (a subsidiary of Sonoplus) to Alexander Voronkov at VIYM. Mr Ildyakov asked why there was such a large difference between the budget figure of "5 million" for July and the result of "1.1 million, incl. no inflow of Samatlorneftegaz" ('SNG'). Mr Voronkov replied that the reduction "of the revenue part in SNG against the budget can be explained by: 1.

the gap of the production program by the fault of the Customer. 2. the transfer of some volumes on August 2014 due to poor performance of wells after UST [ultrasound treatment] by co-contractor of "SNG" OJSC". Mr Voronkov continued that meetings had been held with the director general of SNG and the order was given to conduct at least 15 USTs. The co-contractor had been suspended and CUT-Service would carry out the "sonochemical treatments". SNG's final decision would be taken based on the results of the treatments carried out by CUT-Service.

367. The second document, on which Mr Dutton placed greater stress, is an email sent on 6 August 2014 by Mr Ildyakov to Mr Voronkov, forwarding without comment an email dated 21 July 2014 from Mr Ildyakov to Mr Volchenkov at VIYM. In the forwarded email, Mr Ildyakov wrote that the Viatech group was experiencing "significant problems with business financing: late payment of wages to employees, taxes, leasing payments, overdue accounts payable to suppliers and contractors". Further details are given, in particular that CUT-Service started ultrasonic treatments under a contract with Rosneft in June 2014 but the contract provided for payment in 60-90 days, meaning that payment would not start until September 2014. The email ended with a request for loans totalling $400,000 to pay liabilities. Arnold J specifically took account of this email as corroboration of the evidence from the financial statements of CUT-Service for 2014 and 2015, which were not in the VIYM disclosure or otherwise available to GEHC at the Enquiry Hearing, that CUT-Service was not trading profitably in those years: see [Arnold/85].

368. The third document is a cash flow analysis for the eight months up to September 2014. Mr Dutton focused on the line for income from SNG, which was zero for each month up to and including August 2014 and 681,372.50 roubles for September 2014. That equated to the price for two treatments under the contract with SNG. Mr Dutton contrasted this with Asplin J's finding in [125] that "in the case of Samatlorneftegaz, 40 wells were to be treated between April and December 2014, 36 of which were completed by the end of November". This was based on a schedule to the contract with SNG which referred to the treatment of four or five wells each month between April and December 2014. The email dated 21 July 2014 established that the treatments had started in June not April 2014. There is an error in what the judge said, stemming from an understandable misreading of GEHC's closing submissions on this point. The figure of 36 wells to the end of November 2014 was not the number of SNG wells treated to the end of November 2014, but the figure appearing in the contract schedule. There was no evidence of the number of SNG wells in fact treated in 2014 or up to the end of November.

369. Mr Dutton submitted that the cash flow analysis demonstrated a serious problem with the SNG contract, thus supporting Professor Abramov's evidence rejected by Asplin J. It may, however, be noted that Mr Gray did not put it before Arnold J, although of course by then he knew of its existence and contents.

370. Taking the three documents together, they demonstrate that there was a delay in the start of the treatment of wells under the SNG contract, from April to June 2014, which may have been the fault of SNG (see the email of 5 August 2014), but that in August 2014 SNG ordered 15 treatments. Given that the payment terms were 60-90 days, payments could not be expected until September 2014 and the cashflow analysis shows that payment was made in September for two treatments. The email of 21 July 2014 shows that this delay caused cashflow problems, necessitating a loan. None of

these documents nor, as far as we know, any other documents show how many of the SNG well treatments were in fact carried out. The cashflow analysis simply showed payment received, not well treatments. Mr Dutton relied on the fact that the cashflow analysis showed zero receipts from SNG for October to December 2014 as establishing that no further payments were made under the contract in 2014. This is, however, a bad point. The analysis shows zero for each revenue line from all sources for those months. The reason is that the document is not a cash flow forecast but an analysis showing cashflow up to September 2014, as the heading "Reporting period: 8 months 2014" makes clear.

371. The question is whether these documents would probably have had an important influence on findings made by Asplin J at [125] – [127] which are adverse to the credibility of Professor Abramov. In our judgment, they would not do so. Professor Abramov made his witness statement for the Enquiry Hearing in November 2014, so one would expect the performance of the SNG and other contracts in 2014 to be very much in his mind. However, he made no reference to any problems with the contracts. His evidence that they were not running smoothly was given for the first time in cross-examination. When asked in re-examination to explain the reasons, he attributed it to the action of a jet pump destroying three "fields" (by which it is assumed he meant wells) and to the collapse of the rouble. He made no reference to problems with the SNG or other specific contracts, even though he was giving evidence in April or May 2015 when again such matters could be expected to be in his mind.

372. These matters were considered by the judge, as were other pertinent points including evidence of other treatments (which is not challenged by Mr Gray) and Professor Abramov's demeanour in cross-examination. In the light of all these matters, she concluded that she was unable to accept his evidence in this regard. We see no real basis for thinking that her assessment of his evidence would have been different if these documents had been in the trial bundles.

373. More important still, Asplin J's rejection of Professor Abramov's evidence on the critical issues of the October 2010 agreement and the secret agreement was based on a wide variety of factors. We see no basis at all for considering that these documents would have made any difference to that assessment.

(viii) Documents relevant to viability

374. The next group of documents concern the issues of the viability of the ultrasound technology and the values of the Business Assets, each of which was the subject of expert evidence. The value of the Assets would depend on perceptions of viability as at any chosen valuation date.

375. Asplin J considered the question of viability in detail at [214] – [232]. GEHC's expert agreed in cross-examination that "this is an experimental technology which needs more work on it to properly understand it and for it to begin to be applied commercially". The judge held at [230] that "the technology is not fully ready to roll out commercially without more", taking into account not only the above-quoted evidence of GEHC's expert but also "the reality of the joint venture with the Government of Tatarstan which appears to have commenced in 2014 and a handful of contracts in 2014 which were on a fee basis, loss making and some of which stipulated that fees were payable 'if successful'". In the light of the contracts, she was

unable to accept the evidence of Mr Gray's expert that the technology would likely be considered by commercial organisations to be "mere snake oil". She said that "the technology already has some application, on a semi-experimental basis demonstrated for example, by the joint venture in Tatarstan, albeit that it has not been fully tried and tested, but that full and widespread commercialization would require further focused testing": [231]. These conclusions were binding for the purposes of the Valuation Hearing before Arnold J: see [Arnold/51].

376. Asplin J's findings as to viability are not expressly challenged by Mr Gray in the grounds of appeal. They are the subject of submissions in Mr Gray's principal skeleton argument under Ground 6.4 (the judge was "misled by the Claimant's submissions such that she made findings of fact which cannot be supported on the evidence which was and/or ought to have been before the Court"). Paragraph 84.5 of the skeleton argument refers to technical viability, saying that the success or failure of treatments was an issue of primary importance. It goes on to state that it had added importance because the judge was invited to reject Professor Abramov's evidence as regards problems with well treatments. She did reject that evidence at [125] – [127] and we have already rejected the challenge to that finding for the reasons given above.

377. Mr Dutton referred to a set of 14 well reports from OJSC Orenburgneft, a subsidiary of Rosneft, dealing with 13 treatments carried out in 2013, only some of which were in the trial bundle. Three reports, which were not in the bundle, showed unsuccessful tests. Reference was also made to a letter from the same subsidiary responding to a letter dated 2 October 2013 from CUT-Service which refers to the "operations on 3 wells, carried out in June-July 2013" and stating that "this work remains unpaid for because of the absence of any positive effect". This presumably refers to the same three unsuccessful treatments as the well reports. Permission is sought to admit these documents in evidence before us. It is submitted that, together with the email dated 5 August 2014 referred to above, they show that Asplin J's statement at [249] that "the reports of testing available to the court are for the most part positive" was wrong.

378. In considering whether there was or might be value in the Business Assets, Asplin J is also criticised for taking into account at [249] "that a joint venture is underway in Tatarstan in which oil sharing appears to be operative and that there was nothing to suggest that the treatments carried out in 2014 were not effective". The challenge as regards the treatments in 2014 goes back to the documents already discussed in relation to Professor Abramov's evidence. As regards the joint venture in Tatarstan, it is submitted that its activities were, at best, far less developed than Asplin J appears to have assumed. Mr Gray complains that the judge was not referred to the witness statement of Andrey Yakunin, a partner in VIYM, made in English on 4 December 2014 pursuant to the third party disclosure order. Mr Yakunin explained that, although a joint venture agreement (dated 21 March 2014) between a subsidiary of Sonoplus and a Tatarstan state company provided for investment by the latter of 99 million roubles (about $2.4 million), no investment had been made by the date of the affidavit and in consequence no revenue had been received. His affidavit is not new evidence; it was included in the trial bundle. Neither side referred Asplin J to it, although Mr Gray's team did refer to a separate witness statement from VIYM in the same part of the trial bundle. Professor Abramov gave evidence that trials on wells in Tatarstan would start at the end of May 2015. It is difficult to see that Mr Gray can gain any assistance from this point about the Tatarstan joint venture.

379. We find it impossible to see that Asplin J's conclusion that the technology was still semi-experimental would have been influenced to any material extent by reference to the two documents concerning the three failed well tests, out of 14 tests, in 2013 or by reference to Mr Yakunin's evidence.

(ix) Documents relevant to value

380. We turn therefore to the documents relating to valuation of the Russian and ROW business and hence of the Business Assets. Mr Gray's principal skeleton argument does not refer to any such documents beyond those which we have already addressed. In his witness statement in support of the first application to admit new evidence, Mr Elliss (a partner in Mr Gray's solicitors) also referred to "hundreds of pages of spreadsheets and official tax filings containing detailed information on the subsidiaries of Petrosound from 2012 to 2014". Although Mr Dutton very briefly mentioned these documents to emphasise a submission that there are many documents in the VIYM disclosure which should have been given to the experts, they are not the subject of the applications to admit new evidence. We are not therefore able to assess the impact, if any, that these "hundreds of pages" might have had on Asplin J's findings. Mr Dutton indicated to us that permission was sought to admit what were, from Mr Gray's point of view, the most important documents.

381. In his first witness statement, Mr Elliss drew attention to the revision of the opinion of GEHC's valuation expert once he had seen the VIYM documents. In his report for the Enquiry Hearing, the expert relied, but on a reduced basis, on assumptions as to the development of the business made in a feasibility study prepared in October 2010. The VIYM documents showed that the assumptions had not been realised in the period up to and including 2014. Likewise, the actual number of well treatments was far lower than contemplated when VIYM invested in Sonoplus in 2012. In this respect, the further application to adduce new evidence (Application E) includes a spreadsheet from late May 2013 summarising the volume of well treatments performed by CUT-Service at that date. It noted that, while the financing model required 140 treatments in the first half of 2013, 36 had been scheduled and 9 had been completed. Permission is also sought to admit spreadsheets containing operating forecasts and budgets for 2013 to 2015. They show, in particular, that the capital costs of manufacturing ultrasound tools were very much higher than those assumed by GEHC's valuation expert.

382. There can be no doubt that the totality of the VIYM documents were relevant to valuation. On the basis of those documents and other evidence obtained from third parties in preparation for the Valuation Hearing, GEHC's expert reduced the value he placed on Mr Gray's interest from some $60 million in his report for the Enquiry Hearing to $18 million in his report for the Valuation Hearing. More tellingly, Arnold J found that Mr Gray's interests had no value as at 28 July 2015, whereas Asplin J had proceeded on the basis that they probably had a value but was unable to determine it on the evidence before her.

383. The question is whether that has any relevance, given that Asplin J made no finding on valuation. No purpose would be served by admitting evidence just for the purpose of undermining GEHC's expert valuation evidence, when Asplin J made no finding on value and the issue was decided by Arnold J.

384. Mr Dutton submitted that, if the full VIYM disclosure had been before Asplin J she would be likely to have found, as Arnold J did, that Mr Gray's interests had no value and that would in turn have had an important, indeed decisive, influence on the judge's finding of a secret agreement to maintain those interests. Shortly put, the points are (i) why would Mr Gray have wanted to maintain secretly interests in valueless assets, (ii) why would Mr Pronk have agreed to Mr Gray secretly maintaining those interests, and (iii) why would Mr Pronk and other witnesses have conspired to present a false case to the court?

385. This submission faces the difficulty that the secret agreement, as found by Asplin J, was in 2012, prior to the execution of the 2012 SPA in August. The steps which the judge found to have been taken to implement it, principally the issue of shares in Petrosound to Mr Volchenkov and Mr Ivanov of VIYM as nominees for Celloteck, took place in November 2013. Moreover, Mr Gray made his witness statement for the Liability Hearing, denying any interest in the technology, in August 2012. The evidence which Mr Gray applies to admit does not relate to the value or the perceived value of the Russian or ROW business in 2012 and has very little, if any, bearing on value at that time. Nor does the evidence have a significant effect on the perception of value in 2013. Arnold J's analysis, and the expert evidence before him, was directed to value in July 2015. Asplin J's finding of the secret agreement was based on a large number of factors, including her assessment of the witnesses who gave oral evidence. We can see no basis on which it could be said that the new evidence would have any material influence, still less an important influence, on her finding.

386. It may be noted that the available evidence suggests that the Russian and ROW business was perceived as valuable in 2012 and beyond. VIYM invested $3 million for a 25.1% share of the equity of Sonoplus in 2012, and between January 2013 and April 2014 it made loans totalling $3.45 million to Sonoplus. In the course of 2012, RegEnersys acquired a controlling stake in Klamath Falls, which held the US patents, for $2.1 million, and in September Celloteck acquired the remaining shares. Mr Gray's own closing submissions to Asplin J at para 189 underlined his efforts up to and including 2012 to obtain an interest in the technology and the similar efforts of Mr Kantor and Mr Knight after the 2012 SPA.

(x) Documents relevant to the 2010 agreement

387. The final group of documents which Mr Gray applies to be admitted as new evidence relate more directly to the 2010 agreement.

388. At [53], Asplin J referred to a proposal put forward by Mr Knight to Mr Volchenkov of VIYM in an email dated 28 May 2014 for a company to be owned by Sonoplus (49%), "new investors" (49%) and his own company (2%). In the same paragraph and at [116], the judge referred to an email sent on the same day by Mr Volchenkov to the Russian Scientists, forwarding Mr Knight's proposal and saying "We need to think…I would propose admitting him [Mr Knight] instead of Rob's 30% ☺, so that Sonoplus had 51%. In addition, what's going on with Azerbaijan: 49/51% - international affairs were split with Rob, CIS and the world…This should be discussed and the issue should be raised with the Board of Directors with a presentation made.". "Rob" was a reference to Mr Gray, but the judge accepted that it was never envisaged that he personally, rather than the RegEnersys fund, was to be the investor. At [170] and [180], the judge relied on this email, among other evidence, as supporting her finding

of the 2010 agreement under which RegEnersys was to receive a 30% interest in the Russian business and a 51% interest in the ROW business.

389. Six minutes after that email ('the smiley face email'), Mr Volchenkov sent a further email to Mr Ivanov, also of VIYM, describing Mr Knight's offer as "optimal" and saying that the board should discuss it. That email was in the VIYM disclosure but not included in the trial bundle. The omission was significant, it was submitted, for two reasons. First, GEHC had argued that the smiley face showed that any idea of replacing "Rob's 30%" was a joke because they all knew that they were committed to giving 'Rob' 30% and could not simply shift his share to Mr Knight. This construction of the smiley face email was not sustainable when read with the later email. Secondly, the later email showed that as late as May 2013, the question whether GEHC would take a 30% interest in the Russian business and a 51% interest in the ROW business had not been settled, thus undermining the finding of the 2010 agreement.

390. We do not find either of these submissions convincing. As to the first, whatever the submissions of the parties on the significance of the smiley face email, they played no part in the judge's reasoning. She does not refer to it as having any significance and relies on the email only because of its references to the 30% and 51% interests. As to the second submission, it is one of a number of documents and other items of evidence on which the judge relied for her finding of the 2010 agreement, and Mr Gray's continuing involvement after the 2012 SPA. Its references to "Rob's" interests are consistent with that agreement. If the judge had found that the 2010 agreement was an enforceable contract, the later email might have had more significance, but even then it must be remembered that it was an internal email within VIYM which was not a party to the 2010 agreement.

391. Mr Gray also sought permission to admit an undated internal VIYM document which Mr Dutton submitted, without contradiction, must have been prepared in June 2013. It is headed "Marketing Activities of "Viatech" Group of Companies Outside of Russia". It starts "Currently we do not consider it reasonable to continue cooperation with the "Heerema" company on the transference to it of shares in "Viatech" LLC". It refers also to Mr Knight's efforts to find investors and states that he has found three investors willing to finance international activities and that he had offered to buy out patents from the Heerema company. Mr Knight had also suggested an allocation of shares in the company operating outside the former Soviet Union, of Sonoplus 49%, new investor 49% and Mr Knight 2%. The document goes on to recommend how to proceed in dealing with Mr Knight.

392. The significance of this document, Mr Dutton submitted, was that it was inconsistent with the judge's finding that RegEnersys had entered into a binding agreement, giving them the legal right to the 30% and 51% interests. As that was not the judge's finding, this submission does not carry force. In any event, it is of limited significance. The document clearly refers to an existing arrangement with the Heerema group (to which, as we have said, VIYM was not a party) and suggests that it should be replaced. On the basis of a wide range of evidence, the judge concluded that the arrangement remained in place. VIYM's suggestion in this internal document did not proceed.

393. Having considered these documents in detail, we are satisfied that neither individually nor cumulatively do they meet the requirements of the second criterion in *Ladd v Marshall*.

394. That being so, we would not permit any of the documents to be admitted on this appeal, even if Mr Gray could establish the alternative grounds on which he seeks permission to admit them, which we now address.

(xi) Alleged breach of duty to disclose documents

395. The alternative grounds are those set out in Grounds 9.2 and 9.3, that there were real procedural irregularities, including:

> "9.2 Misrepresentations of the documentary evidence by the Claimant (by misleading statements being made to the court by the Claimant that such documents did not exist, and by mischaracterising such documents as were before the court which supported the absence of an interest of Mr Gray, as being "window dressing" by Mr Gray, when they were (a) known by GEHC to be relevant and authentic and (b) were third party documents;
>
> 9.3 the suppression of relevant documents from the court by not providing them to the Claimant's expert (contrary to the Claimant's duties under CPR Part 35, CPR 1.3, and *The Ikarian Reefer* [1993] FSR 563) or to the court."

396. Having heard full argument, and in view of the serious criticism levelled at Rosenblatt, the solicitors acting for GEHC before and during the Enquiry Hearing, we think it right to say something about these alternative grounds.

397. The language in which those grounds are expressed, and the terms of the witness statements made by Mr Gray's solicitor in support of his applications for permission to admit the new evidence, might suggest that allegations of deliberate misconduct were being made against GEHC or its solicitors. However, it was made clear that Mr Gray is not alleging the conduct of GEHC or its solicitors was either dishonest or reckless. In other words, there was no deliberate attempt to mislead the court. What is said is that GEHC's solicitors chose not to supply the relevant documents to their experts and, in the case of documents which were said to undermine submissions made by GEHC, to the court. It is said that Rosenblatt's reasons were that they considered the documents to be either irrelevant or obvious fakes. It is alleged that Rosenblatt acted unreasonably in taking those views and therefore acted in breach of their duties to the court in not providing the documents to the experts or the court, as appropriate.

398. There is no dispute that duties are owed to the court by parties and their legal representatives, both to provide relevant documents to expert witnesses called by them and not to mislead the court in submissions on the law or facts. As to the latter, see *Meek v Fleming* [1961] 2 QB 366. As regards the former, paragraph 20 of the *Guidance for the Instruction of Experts to Give Evidence in Civil Claims 2014* issued by the Civil Justice Council (see Civil Procedure 2020 CPR35EG) provides that those

"instructing experts should ensure that they give clear instructions (and also attach relevant documents), including the following:…(d)…those documents which form part of disclosure…that are relevant to the advice and report". This duty was authoritatively stated by the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, [2016] 1 WLR 597 at [57]: "The legal team also should disclose to the expert all of the relevant factual material which they intend should contribute to the expert's evidence in addition to his or her own pre-existing knowledge. That should include not only material which supports their client's case but also material, of which they are aware, that points in the other direction, viz the court's concerns about one-sided information in *R v Gilfoyle*."

399. Mr Dutton submitted that these duties may be breached negligently as well as deliberately or recklessly and that, if they are, the documents which should have been but were not disclosed to the expert or the court may be admitted in evidence on an appeal, even though the appellant does not satisfy the first criterion in *Ladd v Marshall*. Mr Dutton took us to no authorities on these submissions, although he mentioned *Vernon v Bosley* [1996] EWCA Civ 1217, [1999] QB 18 which provides some support for the first submission. Relying on the Supreme Court's decision in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450 and on *Meek v Fleming*, Mr de Mestre took issue with the second of these propositions, and perhaps with the first, and submitted that the first criterion in *Ladd v Marshall* would in general only be overridden in the case of a deliberate or reckless breach of duty.

400. The issues raised by these submissions are by no means straightforward. Mr de Mestre can gain some support from the judgment of Denning LJ in *Tombling v Universal Bulb Co Ltd* [1951] WN 247, cited in *Meek v Fleming*, on the first submission, although it must be set against *Vernon v Bosley*. It does not appear to us that *Takher v Gracefield Developments Ltd* is of much assistance, as it concerned the circumstances in which an unsuccessful party can apply to set aside a judgment obtained by fraud, in which case it is no bar that the relevant evidence could have been obtained by the exercise of due diligence. In such a case, as the majority judgment of Lord Sumption makes clear, an unsuccessful party has a cause of action to set aside the judgment. It was not concerned with the admission of new evidence on an appeal from the original order. As regards the statements of Denning LJ, there have been considerable developments since 1951 in the standards to be expected from parties and their lawyers. The result is not, however, that Mr Dutton's submissions are necessarily to be accepted. Can a party rely on the negligence of the other party in complying with its duties to the court to overcome the effect of its own lack of diligence in not obtaining the relevant documents or (in this case) reviewing those documents which were already in its possession? In addition, would the effect of non-disclosure by one party to its expert be restricted to its effect on the expert's evidence, or would it go further and provide a route for the admission of the relevant documents for all purposes, notwithstanding the other party's inability to satisfy the *Ladd v Marshall* criteria?

401. In view of our conclusions on the effect of the relevant documents in this case and on other issues, we do not consider that this is an appropriate appeal in which to attempt a decision on these issues of law.

402. By way of preliminary objection to Grounds 9.2 and 9.3, GEHC submitted that, in view of the Set Aside Application, it was an abuse of process for him to rely on these

Grounds. Although logically coming first, we have found it convenient to address other aspects of these Grounds before returning to this submission.

403. Although, as noted above, the initial application in the Appellant's Notice for permission to admit new evidence was restricted to a small number of documents, the witness statement in support (Elliss (1)) exhibited, referred extensively to and relied on the very detailed witness statement of Joanna Bruce, a partner in Mr Gray's then solicitors MFB. That witness statement ('the Bruce WS') had been lodged in support of the Set Aside Application in October 2016. The witness statement in support of the subsequent Application E seeking permission to admit a larger number of documents (Elliss (4)) also relied on the Bruce WS. Both of Mr Elliss' witness statements contain a good deal of argument, which was expanded in the skeleton argument and supplemental skeleton argument, as well as of course in detailed oral submissions. The result is unwieldy and, not only making our task in grappling with this part of the case difficult but also exposing the limitations of dealing with these issues on an appeal with no prior ruling.

(xii) Rosenblatt's knowledge of the documents

404. All the documents in issue were in Russian when disclosed by VIYM. As an essential first step in making good his allegations of breach of duty by Rosenblatt, Mr Gray must establish that Rosenblatt understood enough about the contents of those documents, either as a result of an informal translation by the bi-lingual paralegal or as a result of a formal translation, for it to be said, if it was the case, that they ought to have disclosed them to the experts or the court.

405. Mr Dutton relied on two documents to establish Rosenblatt's knowledge of the documents. They are a letter dated 9 January 2017 written by Mr Nimmo, the responsible partner in Rosenblatt, to Asplin J in the context of the Set Aside Application and an earlier email dated 4 October 2016, enclosed with that letter, from Mr Nimmo to Bird & Bird immediately after the issue of the Set Aside Application. Bird & Bird had taken over from Rosenblatt in acting for GEHC after the Enquiry Hearing. Mr Dutton submitted that these showed that Mr Nimmo accepted that he did read relevant documents but did not provide them to Dr Becker, GEHC's valuation expert, or to the court because he regarded them as transparent fakes or as irrelevant to the issues in the case. Mr Gray's case is that Mr Nimmo was not only wrong in those views but was in breach of duty in taking those views and, on that basis, not providing the documents to Dr Becker or the court.

406. As requested by Mr Dutton, we have read these communications from Rosenblatt with care and, with two exceptions, we are unable to agree that they establish that Mr Nimmo (or anyone else at Rosenblatt) read the documents or knew of their contents.

407. The email dated 4 October 2016 appears to be Mr Nimmo's immediate reaction to Mr Gray's Set Aside Application challenging the order following the Enquiry Judgment. All the comments made on documents to which the Set Aside Application referred are prefaced with the following: "My own view is that the application is wholly without merit. If I were advising, I would make some or all of the following points". None of what follows, including those parts in paragraph 8(b) to which Mr Dutton particularly referred, demonstrates that Mr Nimmo read the documents when considering the

VIYM disclosure in preparation for the Enquiry Hearing, as opposed to being comments made in October 2016 on the basis of his extensive knowledge of the case.

408. In his letter dated 9 January 2017 to Asplin J, Mr Nimmo first summarised the procedure Rosenblatt adopted in reviewing the VIYM disclosure. He said that the Russian-speaking paralegal "went through the Russian documents with me in a very short space of time (as I recall no more than a few days)". Only those Russian documents which were drawn to Mr Nimmo's attention in those few days and appeared relevant to the existence or value of Mr Gray's interest in the ultrasound technology were professionally translated. The letter went on to say that:

> "…where documents were not translated, including the documents which Mr Gray has recently translated and on which he now wishes to rely, these were never read by me. Contrary to what is now said at paragraph 58 of the 23 December letter, I only recall conducting one pass of the Russian disclosure with our temporary paralegal. Any Russian documents not translated in those first couple of days were not reviewed again or referred to ever again. Accordingly, in almost all cases, the reason I did not put these documents to the Court is that I was never aware of their detail, or in almost all cases of their existence. As I shall explain, the handful of those documents which I dimly recall being drawn to my attention, I did not consider relevant."

409. The letter goes on to refer to the "400 pages of financial documents" to which the Bruce WS referred, including spreadsheets and tax returns for Russian companies. Mr Nimmo continued "having now read these documents, I do not consider the materials to which Mr Gray now refers…are relevant to Dr Becker's valuation, or to the Court's assessment as to the commercial value of Mr Gray's interest in the Ultrasound Technology." In similar vein, later in the letter, Mr Nimmo said "my view is that the documents on which Mr Gray now seeks to rely do not have the probative value which he claims…I consider Mr Gray's submission of these long held documents to be misleadingly selective and irrelevant" for reasons he then gave.

410. Mr Dutton placed some emphasis on what Mr Nimmo wrote at paragraph 8 on page 6 of the letter:

> "Further, and as I explained to Bird & Bird, and explain further below, I did not consider that the evidence on which Mr Gray now wishes to rely appeared on its face to [be] relevant. In my view, from the summary of these documents in Ms Bruce's statements, financial statements and/or tax returns for Viatech and Sonovita and cashflow information for Viatech would not be relevant to the value of Mr Gray's interest, since neither of these were operating companies deploying the technology…Furthermore, and in any event, financial information for 2012 would not have assisted Dr Becker when valuing a developing technology as of May 2015, particularly when that technology was still being tested and developed throughout 2014/15 and where Dr Becker's valuation was

> premised upon anticipated revenues based on the small tool's test results, a spreadsheet for which (covering all of the small tool results in limited detail, but none of the big tool results) was provided to the experts and the Court after we had discovered it in a secret and hidden page to an excel spreadsheet."

411. Viewed in isolation, this might possibly be read as referring to the approach taken in 2015 to these documents, but in the context of the whole letter, particularly what Mr Nimmo had already said about the 400 pages of financial information, we consider that it more obviously reads as referring to the view being taken by Mr Nimmo following the issue of the Set Aside Application. This is made clear, we think, by what is said on page 7: "we did not have translated and did not therefore read the documents to which Mr Gray refers"; and on page 7: "I do not recall seeing these 400 pages prior to the Enquiry Hearing. I have been told today by Bird & Bird that they were not translated, which will explain why I do not remember reading them". He goes on: "My view of them now is nevertheless as follows" and stated those views in six numbered paragraphs.

412. The only documents which Mr Nimmo accepts that he saw are a capital expenses schedule and the email dated 6 August 2014 from Mr Ildyakov to Mr Voronkov, forwarding Mr Ildyakov's email of 21 July 2014 to Mr Volchenkov headed "Request for further funding", to which we have earlier referred in some detail. Mr Nimmo recalled that the paralegal had mentioned this document to him. He noted that it was dated after GEHC had on 4 July 2014 issued its application against VIYM for a third party disclosure order and explained that he had not included this email in the trial bundle:

> "As I recall, there were however only a couple of isolated emails with Mr Voronkov to this effect, and with no context and no confirmation as to whether the funding issues were resolved. My recollection is that in circumstances where much of the email correspondence which had been disclosed by VIYM was transparently fake, and where no financial projections or internal VIYM investment reports had been disclosed, I did not consider this email would have assisted the Court in assessing the value of Mr Gray's interest in the Technology."

413. Mr Dutton submitted that there must have been a more detailed review of the Russian documents than the three or four days spent with the paralegal, as explained by Mr Nimmo in this letter. The basis for this submission was that Mr Nimmo was able to say in paragraph 7(b) on page 5 of the letter that there were large numbers of documents missing from the VIYM disclosure which one would have expected to be included. He thus asks us to infer that Mr Nimmo gave an incomplete account of his review of the documents in 2015. This is not an inference which we can make on the evidence available to us.

414. The submissions made in support of Mr Gray's case, and in particular the suggested inference of a more detailed review of the Russian documents than Mr Nimmo described, clearly illustrate the difficulties presented by the way that Mr Gray has

chosen to pursue these challenges to the conduct of Rosenblatt. It is one thing for this court to proceed on admitted or found facts or to reach factual conclusions which are in practical terms inescapable. It is quite another to be invited to make findings of breaches of a solicitor's duty to the court where basic facts are in dispute, where there has been no hearing of the challenge before a court at first instance which would be well-equipped to make the necessary findings of fact and where this court is ill-equipped to make such findings. These difficulties are magnified in a case such as the present where the facts of the case are complex, with a mass of documentary, oral and expert evidence, providing the context in which challenges of this sort can properly be determined.

415. We hold that Mr Gray has failed to establish that Rosenblatt was aware of the documents on which he relies. It is not, and cannot be, suggested that Rosenblatt was in breach of duty in not identifying them in their review of the documents in their untranslated form. It follows that Mr Gray cannot succeed in establishing any breach of duty to the court.

416. If Mr Gray wished to pursue a challenge to the Enquiry Judgment on the basis of these documents, the appropriate procedural course was to issue an application to the trial judge to set aside her order, as indeed he did. He presented his full case on that application and a substantial amount of evidence was filed by both parties. Moreover, Mr Nimmo offered to give oral evidence, although for legitimate reasons which he explained at the time, he was not able or willing to provide a witness statement. Mr Gray withdrew the Set Aside Application, so it was not determined whether there had been any breach of duty by Rosenblatt or not. That application and the effect of its withdrawal on Mr Gray's right now to raise this ground of appeal is considered below.

(xiii) Abuse of process

417. This brings us back to GEHC's submission that the applications to admit the new evidence before us and to argue that Rosenblatt acted in breach of duty constitute an abuse of the process of the court.

418. We must briefly explain the background. After Mr Gray's legal team examined and translated the Russian language documents in the VIYM disclosure in the course of 2016, he issued the Set Aside Application on 3 October 2016, seeking an order pursuant to CPR 3.1(7) to vary Asplin J's order dated 28 July 2015. The effect of the variations would be to value Mr Gray's interests in Petrosound and Opco at zero and to revoke the directions for a valuation hearing. The grounds for this application essentially mirrored those now contained in Grounds 9.2 and 9.3.

419. The application was supported by the very detailed Bruce WS, running to 35 pages and with an exhibit of over 1400 pages, including hundreds of pages of documents from the VIYM disclosure which, it was said, should have been put by GEHC before the court and/or provided to their expert witnesses. Asplin J gave directions at a case management conference in October 2016 for the hearing of the application, including a timetable for further evidence. Pursuant to the directions, a witness statement was made by Sophie Eyre, a partner in Bird & Bird, who, as mentioned earlier, had taken over from Rosenblatt as GEHC's solicitors following the Enquiry Hearing. It ran to

32 pages and, among other things, addressed the particular allegations made by Mr Gray.

420. In December 2016, Mr Gray's solicitors made allegations of dishonest or reckless misconduct on the part of Rosenblatt and threatened to issue further applications, including an application to strike out the entirety of GEHC's claim. Following a directions hearing in January 2017 and further correspondence, these allegations and the threats of further applications were withdrawn towards the end of February 2017.

421. At a further directions hearing on 10 April 2017, Asplin J ordered that, instead of being heard at the same hearing as the valuation as had previously been intended, the Set Aside Application should be heard first at a separate two-day hearing in October 2017. There were practical, case management reasons for taking this course. The Set Aside Application was ready for hearing, whereas the judge had made third party disclosure orders relating to valuation, with the result that the valuation issues would not be ready for hearing for some considerable time. The application was estimated for two days, rather than the five days estimated for the valuation hearing. Success by Mr Gray on the Set Aside Application would obviate the need for the valuation hearing. Despite Asplin J's order that it be listed for October 2017, those representing Mr Gray refused to take steps to have it listed, leading GEHC's solicitors to write on 28 April 2017 that they would do so.

422. By a letter dated 3 May 2017, Mr Gray's solicitors notified GEHC's solicitors that the Set Aside Application was being withdrawn. The reason given was that, with further evidence becoming available on valuation, a separate hearing of the Set Aside Application "will have limited practical utility". The letter ended that the withdrawal was "prompted by a pragmatic assessment of the effect of the changed circumstances". Mr Gray's position remained that the court was materially misled at the Enquiry Hearing and, they said, "he will be relying on all of the evidence supplied in relation to the Set-aside Application at the Valuation hearing and in relation to the costs of the hearing".

423. While it was said that Mr Gray would seek to rely on the evidence supplied on the Set Aside Application for the valuation, there was no suggestion of any attempt to keep alive the claim that the relevant findings should be set aside on grounds of non-disclosure to the court or experts, to be pursued either at the Valuation Hearing or on a subsequent appeal. The only fair reading of the letter was that this challenge to Asplin J's findings was at an end.

424. So far as we are aware, the issues raised by the Set Aside Application were not raised again by Mr Gray until September 2019 when he sought permission from Arnold J to appeal against Asplin J's July 2015 Order made after the Enquiry Hearing.

425. In *SCF Finance Co Ltd v Masri (No 3)* [1987] QB 1028, a freezing order had been made against the first defendant's wife on the basis of a seriously arguable claim that money standing to the credit of her bank account was the property of the first defendant. The wife applied to discharge the freezing order, claiming that it was beneficially her money, but the application was adjourned to await the outcome of the claim against her husband. After judgment was entered against the husband for about $910,000, the wife's application was listed for hearing. At the hearing, her counsel informed the judge that she had decided not to proceed with the application, but that

she did not concede that the money belonged to her husband. On that basis, the application was dismissed without any ruling on its merits.

426. On an application by the plaintiff for a garnishee order in respect of the bank account, the court held that the wife was prevented by an issue estoppel from contending that it was her money, and a garnishee order absolute was made. On the wife's appeal, this court upheld the judge's ruling. The wife was "to be treated as a litigant who, for her own reasons, decided not to pursue an application which was ready for trial and which in consequence was dismissed" (p.1045F). The order dismissing the application gave rise to an issue estoppel, even though there was no hearing or ruling on its merits. Ralph Gibson LJ said at p.1048B and E:

> "If a party puts forward a positive case, as the basis of asking the court to make the order which that party seeks, and then at trial declines to proceed and accepts that the claim must be dismissed, then that party must, in our view, save in exceptional circumstances, lose the right to raise again that case against the other party to those proceedings…The court is applying principles which are intended to "treat an issue as laid to rest" (per Brightman LJ in *Khan v Golechha International Ltd* [1980] 1 WLR 1482, 1490G), where it would be unfair and unjust between the parties to treat it otherwise; and in particular, the court is concerned to prevent abuse of the court's procedure by any party. At the time at which the court had directed trial of the issue, the second defendant decided in seeking her own advantage and convenience, not to proceed with her application."

427. The only difference between that case and the present case is that, in *Masri*, there was a formal order of the court dismissing the wife's application, thus creating an issue estoppel. Mr Dutton submitted that the absence in the present case of *res judicata* prevented the application of the abuse of process doctrine. We do not accept that. Where there is no hearing or ruling on the merits, it is difficult to see more than a technical distinction between the withdrawal with an order dismissing the application and a withdrawal without such an order. That a principle designed to achieve a just result for the parties and a proper application of the court's resources should turn on such a distinction is to defeat the purpose of the abuse of process doctrine. In considering its application in the context of a failure to advance a particular claim in earlier proceedings, Lord Bingham said in *Johnson v Gore Wood & Co* [2000] UKHL 65, [2002] 2 AC 1 at 31 that it is "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

428. In *Takhar v Gracefield Developments Ltd*, Lord Sumption said at [62]: "Where *res judicata* is a rule of substantive law, abuse of process is a concept which informs the exercise of the court's procedural powers. These are part of the wider jurisdiction of the court to protect its processes from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion."

429. This approach was applied by Nugee J in *Holyoake v Candy* [2016] EWHC 3065 (Ch), correctly in our view, to a second application for security for costs, after the first application had been withdrawn. The only order made on the first application was one reciting that the application had been withdrawn and providing that the costs of the application be costs in the case. As it happens, on the facts of the case, the judge held that the second application was not an abuse of the court's process. Mr Dutton submitted that, while the approach taken by Nugee J may be applicable to sequential interlocutory applications, it could not apply in this case where an interlocutory application was withdrawn specifically on the basis that Mr Gray maintained his position and that it would be a matter for an appeal in due course. In fact, the letter withdrawing the application did not reserve the issue for an appeal but, even if it had, we are unable to see any good reason why it should make any difference.

430. Mr Dutton made a number of other submissions against a finding that the applications to this court were an abuse of process. First, the argument was raised only when Mr Gray made his second application in April this year. We see no reason why that should debar GEHC from taking the point. Secondly, Mr Gray was given permission to appeal on Grounds 9.3 and 9.4. That cannot possibly be an answer. The grant of permission to appeal does no more than that: it does not inhibit the approach or course that the full court may take on the hearing the appeal. Thirdly, there was good reason for Mr Gray to withdraw the Set Aside Application. The reason given at the time was that it had "limited practical utility", in the light of the directions given by Asplin J. In our view, there is no reason why he should be permitted to revive this challenge, having abandoned it at a time when it was ready for hearing and Asplin J had given directions for it to be heard in October 2017.

431. As Lord Bingham stressed in *Johnson v Gore Wood*, the application of the abuse of process doctrine is highly fact-sensitive. There are no, or very few, hard and fast rules dictating that a particular application is or is not an abuse of process. The circumstances of the Set Aside Application at the time it was withdrawn, and the context of the present case as a whole, lead us to hold that it is an abuse of process for Mr Gray to seek on this appeal to raise the challenges previously brought in the Set Aside Application.

(xiv) Was there any breach of duty?

432. It is unnecessary to deal in detail with the allegations of breach of duty in respect of the individual documents. It would also be largely inappropriate to do so. Even if it were assumed that Rosenblatt had in fact read the relevant documents but in good faith decided that they were either irrelevant or obvious fakes, the question whether the failure to put a particular document to an expert or to the court was so unreasonable as to amount to a breach of duty would require a careful assessment not only of the document itself but of the whole context of the issues, the evidence then available and the large number of other documents. The intense focus on a very few documents, largely divorced from this context, is another example of the island hopping deprecated by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd*.

433. There are just two documents to which we should refer. First, as regards the email of 6 August 2014, we have already made clear our view as to its limited significance and we have not been in a position to examine the reasonableness of Rosenblatt's view at the time that it was an obvious fake. Mr Dutton submitted that it can never be right for

a solicitor not to supply a document to an expert on that basis, but we are inclined to regard that as too absolute a position. It all depends on the circumstances, which we (unlike the Chancery Division on the Set Aside Application) are not, as we have said, in a position to examine.

434. Secondly, Rosenblatt were criticised in trenchant terms for allowing counsel to submit in their written closing submissions, when dealing with the evidence first given by Professor Abramov in cross-examination that the contracts were not going smoothly in 2014, that there was not "a single document which records or evidences any problems with the commercial contracts in 2014" when the email of 6 August 2014, and a couple of other documents, showed delays in a contract. We are bound to say that this smacks of nit-picking. Counsel were dealing with the two particular reasons advanced by Professor Abramov in re-examination for his view that the contracts were not going smoothly, neither of which were related to the subject of these documents. It was one sentence in written submissions running to 346 pages, and it played no discernible part in the judge's reasoning.

435. For all these reasons, we reject Grounds 9.2 and 9.3, as well as Ground 6.4.

(e) Ground 9.4

436. By this Ground, Mr Gray challenges Asplin J's decision to give judgment on all the issues raised at the Enquiry Hearing with the exception of the valuation of Mr Gray's Business Assets which she directed to be heard at a separate hearing. Instead, she should have delayed judgment on all issues until she had conducted the valuation hearing. Mr Gray submits that this was a procedural irregularity because the valuation itself was relevant to those other issues, in particular whether there was the secret agreement.

437. There are, of course, cases where the issues are so connected and where findings on some issues have a material bearing on other issues, such as to make it impractical or unjust to give judgment on only some issues. In our view, this is not one of those cases. The issue for the Valuation Hearing was the value of Mr Gray's interests in 2015. While the perception of the prospects for, and the value of, the technology in the period 2010-2013 might well be relevant to the findings to be made as to the 2010 agreement and the secret agreement, the value in 2015 or even in 2014 was not relevant to those issues. We are not persuaded by the argument that findings as to the value in 2015 could have had a material effect on Asplin J's assessment of the evidence of Mr Gray's witnesses in denying the existence of the secret agreement.

438. We therefore reject Ground 9.4.

(f) Conclusions on Grounds 6 and 9

439. For the reasons given above, we reject the entirety of Grounds 6 and 9.1 to 9.4. We also refuse permission to appeal against Asplin J's finding as regards the 2010 agreement.

IX. GROUNDS 7, 8 and 9.5: THE ORDERS RELATING TO THE BUSINESS ASSETS

440. Ground 7 of Mr Gray's appeal challenges the propriety of two paragraphs of the July 2015 Order made by Asplin J in relation to the Business Assets, submitting that they lack legal certainty. Ground 7.1 asserts that the declaration at paragraph 1(e) that Mr Gray must account to GEHC for "51% of 15% of the issued shares in PetroSound held for Mr Gray by Professor Vladimir Abramov or Mr Sergey Volchenkov and/or Mr Vyacheslav Ivanov" is too uncertain. Ground 7.2 asserts that paragraph 1(f) declaring that he must account for "a 51% interest in 51% of PetroSound's international ultrasound technology business (also referred to as Opco)" must be set aside because it does not refer to a species of property known to law or equity.

441. Grounds 8 and 9.5 also criticise the Enquiry Judgment and the July 15 Order in relation to the ROW business, asserting that there were internal inconsistencies in that judgment and also between the Enquiry Judgment and the Valuation Judgment. It is convenient to deal with those two grounds together with Ground 7.2.

(a) Ground 7.1: the interest in the VIYM Executives' 15% in Petrosound

442. Mr Gray criticises the declaration relating to the VIYM Executives' holding as being too uncertain because it was incumbent on Asplin J, he submits, to decide which of the three men named was the nominee holding the interest 'for Mr Gray' (that phrase being shorthand for holding the interest on behalf of Celloteck when Mr Gray was found to have retained his 51% interest in the assets transferred to Celloteck despite the 2012 SPA). If the judge was not in a position to decide which of the men held the interest for Mr Gray, then she had failed to determine all the issues she needed to decide in order to dispose of the claim.

443. We do not see any merit in this challenge. There is no question but that the declaration identifies an asset which is proprietary in nature. It is a beneficial interest held in the shares of a corporate entity. It is also clear that the Russian Business Assets were included in the Vos Order which stated that GEHC "is entitled to … orders for transfer … in respect of benefits received or receivable by Mr Gray directly or indirectly as a result of the said breaches of fiduciary duty, including his indirect personal interest in RegEnersys Investment I Limited". Mr Gray's indirect interest in the VIYM Executives' shareholding was a benefit received indirectly as a result of his interest in RegEnersys I because of the following series of events, as found by Asplin J:

i) Mr Gray was initially given a 20% interest in return for a capital subscription of $625 on becoming a limited partner in RegEnersys LP formed on 16 February 2007.

ii) That interest was increased to a 51% interest in RegEnersys LP when Mr Gray's remuneration package for managing the RegEnersys fund was revised in April 2010, following Mr Heerema's decision to cap the fund.

iii) That 51% interest in RegEnersys LP was later converted to a 51% interest in RegEnersys (UK) LP when the fund was restructured in December 2010.

iv) RegEnersys LP and then (after the December 2010 restructuring) RegEnersys (UK) LP owned RegEnersys I, and Chiloquin was an indirect subsidiary of RegEnersys I.

v) Chiloquin held all the shares in Klamath Falls after the transactions following the settlement of the Klamath Falls arbitration in 2012.

vi) Although RegEnersys (UK) Ltd then sold RegEnersys I and Chiloquin to Celloteck under the 2012 SPA, Asplin J found that by the secret agreement, Mr Gray maintained his 51% indirect interest in RegEnersys I and that interest was thereafter held on his behalf by Celloteck.

vii) Those shares in Klamath Falls were then swapped in November 2013 for shares in Petrosound when all the patents held by Chiloquin were transferred to Petrosound.

viii) The interest acquired by Celloteck in Petrosound in return for the transfer to Petrosound of the Chiloquin/Klamath Falls patents was not only the 15% interest in Petrosound issued to Celloteck but also the 15% interest in Petrosound issued to the VIYM Executives. This second tranche of 15% was the fulfilment of the 2010 agreement with the Russian Scientists according to which that the RegEnersys fund would receive 30% of the Russian business arising from the exploitation of the ultrasound technology.

444. The existence of Mr Gray's interest in the shares held by the VIYM Executives depended therefore on both of the hotly contested issues at the Enquiry Hearing, namely the existence of the 2010 agreement that the RegEnersys fund would receive 30% of the Russian business and the existence of the secret agreement in August 2012 that Mr Gray retained his interest despite the purported sale by RegEnersys (UK) LP of RegEnersys I and Chiloquin to Celloteck. Since we have decided that those findings of fact must stand, there is no justification for interfering with the July 2015 Order on this score.

445. We do not accept that Asplin J was required to identify with precision the nominee who held the interest on behalf of Mr Gray, either as at 13 November 2013 or as at the date of the July 2015 Order. Although the terms of the Order express that nomineeship as a series of alternatives, the findings in the judgment are clear that the VIYM Executives were allotted 7.5% each. That was the evidence of Mr Knight, Mr Kantor and Professor Abramov recorded at [Asplin/122]. The judge mentioned Professor Abramov's evidence that the VIYM Executives had returned the allotted shares to him: [Asplin/124]. She rejected that evidence as wholly unconvincing, but it no doubt explains why Professor Abramov is included in the wording of the July 2015 Order as a possible holder of the interest.

446. An order that a defaulting fiduciary should transfer a beneficial interest he holds in an identified asset is an appropriate order for a judge to make following an enquiry into the fiduciary's account. The enforcement of fiduciary duties by the court would be seriously impeded if the judge could only make such an order if it were possible at that point to identify precisely who held the legal title to the asset. There are many cases in which the assets of a fiduciary are held through a complex network of corporate or trust vehicles. This may be the case even if there is no intention to conceal or obfuscate ownership. As long as the beneficial interest in an asset is capable of identification, the legal ownership of it is a matter that can be considered at the next stage of valuing or ordering the transfer of the asset. The order following the enquiry will, as here, give directions for any further proceedings needed, including

where appropriate for the fiduciary to explain what has happened to the assets identified by the account between the date of their acquisition and the present day. That is the point at which to identify the current holder of the legal interest if that is necessary to ensure that the claimant achieves his remedy and the proceedings are finally brought to a close.

447. We therefore hold that Asplin J did not err in her formulation of paragraph 1(e) of the July 2015 Order in relation to Mr Gray's interest in the shares in Petrosound allotted to the VIYM Executives and/or Professor Abramov.

(b) Grounds 7.2, 8 and 9.5: the ROW Business Asset

448. The first point to reiterate is, as we have explained above, Asplin J did not find that a legally binding agreement had been made in October 2010, entitling RegEnersys as a matter of enforceable right to any interest in either the Russian or the ROW business. She found that an arrangement or understanding had been reached that RegEnersys would receive a 30% interest in the Russian business and a 51% share "in an international roll out of the technology outside Russia" ([Asplin/179]). As at the date of the trial before her, the Russian business was being carried on by Petrosound and, as she found, RegEnersys had received its 30% interest through the 15% shareholding issued to it and through the 15% shareholding issued to Mr Volchenkov and Mr Ivanov. The position was very different as regards the ROW business. On the evidence before Asplin J, it had yet to start, certainly as a business separate from Petrosound and its subsidiaries. Although it had been contemplated that it might be carried on by Petrosound International Limited, a company incorporated in England in October 2013 by Mr Knight for this purpose, that company never traded and it was dissolved shortly before the trial: see [Asplin/118]. There was no evidence of any other corporate entity that had yet been identified to replace it.

449. The position at the date of the trial therefore, as found by Asplin J, was that "it is intended that a 51% interest in any international business which may be commenced after these proceedings is to be held for RegEnersys/Mr Gray": [Asplin/183]. In some of the documents in evidence the term "Opco" had been used to denote the entity through which the ROW business would be conducted. The same term was used by the valuation experts, and in places by the judge, for the same purpose. However, it was never suggested that "Opco" in fact existed at the date of the trial. Asplin J made the position clear at [Asplin/255] where she referred to "the potential interest in an Opco".

450. The position, as it appears from Asplin J's judgment, may be summarised in this way. There was an arrangement, but not a legally binding agreement, that RegEnersys was to receive a 51% interest in any ROW business that might in the future be commenced. In practice this was likely to mean a 51% shareholding in any company through which such business was conducted. By reason of his 51% interest in RegEnersys and the secret agreement made in 2012, Mr Gray would himself have a 51% interest in any such interest of RegEnersys in a future ROW business.

451. This was, to an extent, reflected in the July 2015 Order. It was declared in paragraph 1, so far as relevant, that Mr Gray "received the following assets directly or indirectly as a result of the breaches of duty set out in the Order of Mr Justice Vos dated 17 January 2013 and is liable to account to the Claimant ("GEHC") in respect

thereof:…(f) a 51% interest in 51% of Petrosound's international ultrasound technology business (also referred to as Opco)". On its own, that suggests that RegEnersys had already received a 51% interest in a company carrying on the ROW business, which would clearly not reflect Asplin J's findings. However, it was declared in paragraph 2 that "[u]pon receipt of the assets referred to in paragraph 1 above Mr Gray held them (*or to the extent that he receives then* [sic] *in the future will hold them*) on constructive trust for the benefit of GEHC" (emphasis added). While the emphasised words could be read as a qualification to paragraph 1(f), that is not carried through to the rest of the Order.

452. Paragraph 3 of the Order provided that "[t]o the extent that Mr Gray retains any of the assets referred to in paragraphs 1(c) to 1(f) above *in specie*, or the traceable proceeds thereof, GEHC is entitled to an order or orders requiring Mr Gray to transfer to GEHC (at GEHC's election) either the asset itself (or its traceable proceeds) or…a sum of money representing its value…any such election to be made by GEHC by no later than the date of the hearing referred to in paragraph 20 below".

453. The hearing referred to in paragraph 20 was the hearing to deal with consequential matters following the hand down of judgment on the valuation issues. It was anticipated that the trial of the valuation issues would take place before Asplin J within a matter of months. Paragraph 15 of the Order provided for the hearing "to determine the value of the assets referred to in paragraphs 1(d), 1(e) and 1(f)" and paragraph 16 gave permission for the parties to file expert evidence on the value to be attributed to (among others) "the interest referred to in paragraph 1(f) above, on the basis of the findings made in the Judgment", particularly her findings as to the viability of the technology and her conclusions in respect of the valuation evidence that had been before her.

454. As it seems to us, paragraphs 3 and 15 were at odds with the findings made by Asplin J in her judgment. She had found that RegEnersys had at most an expectation of an interest in the ROW business under the 2010 agreement, that no interest had in fact as yet been acquired by RegEnersys in any entity carrying on a ROW business and that there was as yet no entity separately carrying on that business. Subject to submissions advanced by GEHC that RegEnersys had acquired an opportunity which was capable of valuation, which we consider below, RegEnersys had not acquired any asset in respect of the ROW business which could be held on trust for GEHC or which could be valued.

455. As appears from his judgment, Arnold J was alive to these difficulties. Moreover, the additional, extensive evidence available at the Valuation Hearing demonstrated that the ROW business was in any event not being carried on in a separate entity but formed part of the business of Sonoplus and its subsidiaries. Nonetheless, he was required by the terms of the July 2015 Order to value the "asset" referred to in paragraph 1(f). This was the conundrum to which he referred in [Arnold/144]:

> "My conclusion is as follows. I am required to value a 51% interest in 51% of Petrosound's international business. Although Asplin J found that it had been intended that the international business would be carried on by [Petrosound International Ltd], she also found that it could take a different form. Although an operating company was envisaged, there is

> nothing in her judgment to exclude the adoption of a different business model. It is now known that, as at the Valuation Date, Petrosound's international business was being carried on by its subsidiary Sonoplus and took the form of a licensing business. Accordingly, I must value that business. The fact that it can now be seen that Petrosound's international business was subsumed within Petrosound (which is why Dr Becker included a value for OpCo in his valuation of Petrosound) is a conundrum for the Court of Appeal to attempt to resolve if need be. It is not my function to value the opportunity to carry on an operational business, even if that is legally possible, because that is not what the order dated 28 July 2015 requires. Moreover, as will appear, that was not the approach which Dr Becker adopted. Finally, I consider that the reality principle means that Sonoplus must be taken as it was on the Valuation Date, namely a company which was carrying on both the Russian business and the international business and whose financial position was as described above."

456. We would add that, in one respect, we do not agree with Arnold J's understanding of the findings made by Asplin J. At [Arnold/141], he said that, as he understood it, Asplin J "found that Sonoplus owned 49% of OpCo, leaving 51% which Mr Gray had a 51% interest in". As we have said, we read Asplin J as finding, on the evidence before her, that there was as yet no Opco and that RegEnersys had not yet acquired any interest in any entity carrying on the ROW business.

457. In these circumstances, it is clear to us that there was no interest in any ROW business to which paragraphs 1(f), 3 or 15 of the July 2015 Order could apply. Mr de Mestre submitted to us that they referred to the contractual rights which RegEnersys acquired under the October 2010 agreement but, as we have explained, that agreement was not a contract but an arrangement and RegEnersys acquired no enforceable rights under it.

458. GEHC's alternative case was that the paragraphs were to be understood as applying to a 51% interest in an opportunity to acquire a 51% stake in the ROW business. GEHC argues that, even if the ROW business was never established as a separate corporate entity, it was still a maturing business opportunity and an opportunity is, it says, itself a form of property known to equity. GEHC cites as authority for this the statement of Lawrence Collins J in *CMS Dolphin Ltd v Simonet* [2001] EWHC 415 (Ch), [2002] BCC 600:

> "96. In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property. In the case of the director he becomes a constructive trustee of the fruit of his abuse of the company's property, which he has acquired in

> circumstances where he knowingly had a conflict of interest, and exploited it by resigning from the company."

459. We do not agree that that case is authority for the ability of the court to order the transfer of a business opportunity by the fiduciary to the beneficiary. In *CMS Dolphin* the remedy that the claimant was seeking and that it ultimately obtained was not the transfer back to it of 'the opportunity' but an account of the profits which the defaulting fiduciary and his new company had made from exploiting the opportunity. The judge in that case did not decide that the opportunity was truly a form of property in the sense that the opportunity itself, rather than the profits derived from it, could be the subject of an order for transfer. GEHC also drew our attention to the description of a business opportunity as "an intangible asset" by Arden LJ in *Lindsley v Woodfull* [2004] 2 BCLC 131, [26]. Again, that may be a helpful description when explaining why it is that the fiduciary is liable to account for profits arising from the exploitation of the opportunity. It does not mean that it is possible to order the transfer of the opportunity itself, still less a percentage of the opportunity, as opposed to profits derived from it.

460. In *National Provincial Bank v Ainsworth* [1965] AC 1175, Lord Wilberforce described the attributes of property at pp.1247-1248:

> "Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability."

461. By contrast, an opportunity is neither a right nor an interest, but simply a description of circumstances which, if exploited, may enable a profit to be made.

462. It follows that, in our judgment, paragraph 1(f) of the July 2015 Order, and paragraphs 3 and 15 so far as they relate to paragraph 1(f), cannot stand and must be discharged.

463. We therefore allow Mr Gray's appeal under Ground 7.2 ("[t]he interest Asplin J declared Mr Gray to have in OpCo is not an asset known to the law and cannot properly be the subject of a trust"). It follows that we dismiss GEHC's appeal against the Arnold Order as it related to the relief granted under paragraph 1(f) of the July 2015 Order. It therefore becomes unnecessary to consider further Ground 9.5 which relied on the inconsistency as regards the ROW business between the July 2015 Order and the findings made by Arnold J.

464. Ground 8 relied on documents post-dating the secret agreement in 2012 to challenge, on factual grounds, what was said to be a finding by Asplin J that Mr Gray held an interest in the ROW business. Again, we need not consider this further. We have explained why we do not consider that Asplin J made any such finding in her judgment. The problem lay with the terms of her Order as it related to the ROW Business Asset, which we have addressed above.

X. GEHC'S APPEAL

465. In their Appellants' Notice GEHC seek an order that in respect of each of the Business Assets, Mr Gray transfer to GEHC that asset or all property, rights, interests or claims representing such asset. For the reasons given when considering Ground 7.2 of Mr Gray's appeal, this is not in any event possible as regards the ROW Business Asset.

466. Arnold J gave a number of reasons for declining to order that or any other relief in relation to the Business Assets. The first reason was that, on his reading of paragraph 3 of the July 2015 Order, GEHC was only entitled to an order requiring Mr Gray to transfer the assets to the extent that he retained any of the assets *in specie*. GEHC had provided no evidence to show that Mr Gray had retained any of the Business Assets *in specie*. Arnold J concluded on the balance of probabilities from the evidence before him that Mr Gray had not retained them.

467. GEHC submits in Grounds 1 and 2 of their appeal that Arnold J was wrong to construe the July 2015 Order as requiring GEHC to prove that Mr Gray still owned the Business Assets as a condition precedent to the ordering their transfer. The judge did not, they say, raise this possible reading of the July 2015 Order with the parties at the hearing and did not give GEHC a fair opportunity to address him on whether that construction was right.

468. We agree that if Arnold J had imposed that burden on GEHC that would not have been the correct approach. The current whereabouts of any beneficial interest held by a defaulting fiduciary are within the knowledge of the fiduciary not of the claimant. It would be wrong to require a claimant to establish this before obtaining an order for the transfer of a beneficial interest. However, Arnold J did not need to find that there was any such requirement in order to justify declining further relief. The remainder of his ruling explained why, regardless of whether Mr Gray still retained the Business Assets, no further relief should be granted in respect of those assets. That was the appropriate focus of his ruling.

469. Ground 3 of GEHC's appeal complains that the finding made by the judge that Mr Gray had not retained the Business Assets was inconsistent with the findings made by Asplin J, bearing in mind that Mr Gray had never put forward evidence that he had disposed of them. They submit that the precise nature of the interests Mr Gray received and the terms of the shareholder agreement governing the potential for any revenue from those interests were no basis for denying GEHC any remedy. We disagree. The order that GEHC sought transferring to it the shares in Petrosound or 'OpCo' went beyond the findings as to the benefits Mr Gray had received. He had not received an interest in the shares themselves but only a 51% interest in the assets transferred to Celloteck which held the 15% shares in Petrosound through Chiloquin and a further beneficial interest in the VIYM Executives' 15% share. An order that Mr Gray transfer the shares or 51% of the shares would give GEHC more than its entitlement. Further, Celloteck's own entitlement to any monies from its interests in the Petrosound shares was very speculative. Arnold J had described in the Valuation Judgment the terms of the shareholders agreement between VIYM and Petrosound, the two shareholders in Sonoplus. Petrosound was not entitled to any income from Sonoplus or its subsidiaries until the loans made to the business by VIYM's client had been repaid in full. Petrosound's shareholding in Sonoplus was partially pledged as security for those loans: [Arnold/79]. In our judgment these findings amply justified

Arnold J's decision that it was not appropriate to make any order for transfer in respect of these assets.

470. GEHC also complains that Arnold J relied on facts that were inconsistent with Asplin J's findings that Mr Gray had received the Business Assets when the Valuation stage was supposed to be conducted on the basis of the facts set out in the Enquiry Judgment. We reject this criticism. Once proceedings reach the stage of formulating relief, it is essential that the judge's discretion is exercised on the basis of the facts as they appear at the time when that order is to be made, not on the basis of findings that have since been shown to be inaccurate or incomplete. Both sides had acquired documents after the Enquiry Judgment pursuant to disclosure orders made by Asplin J during the course of 2016. The picture had not remained static between the Enquiry Hearing and the Valuation Hearing. It was common ground at the Valuation Hearing that Petrosound had been dissolved. There was no evidence that GEHC was entitled or had evinced any intention to apply to reinstate it. The poor financial state of the Russian business as described in the Valuation Judgment fully justified Arnold J's conclusion that there was no need to consider further whether, for example, the business had been transferred before the company's dissolution to another entity in which Celloteck might have been given an interest. If the ROW Business Asset had been relevant, which it is not for the reasons given above, his finding that the licensing business had generated no value and showed no signs of doing so in the future removed the need for any detailed exploration of how possible remedies might have been structured and enforced if the ROW business had proved successful.

471. We therefore reject Grounds 1, 2 and 3 of GEHC's appeal.

472. Ground 4 of GEHC's appeal criticises Arnold J for taking into account what it says are irrelevant matters, in particular that any order made would be almost impossible for GEHC to enforce. GEHC argues that the Judge's perception of the potential difficulties facing it were no reason to deny GEHC the opportunity to make the attempt. He should instead have acceded to GEHC's application for ancillary orders that would assist it as much as possible.

473. We consider that Arnold J was right to take into account the overwhelming obstacles facing any attempt to enforce any transfer order when exercising his discretion to refuse relief. Mr Levey drew our attention to the terms of the orders that GEHC sought then and is seeking now in respect of each of the Business Assets. It seeks an order that Mr Gray take all necessary steps available to him to require Professor Abramov or the VIYM Executives or any third parties to transfer their shares to GEHC and further that Mr Gray serve an affidavit providing a full account of how those interests were held by him or what had become of them and the steps he had taken to satisfy those obligations.

474. We agree with Mr Levey that there is a real risk, given the history of this dispute, that those ancillary orders will be used in an oppressive manner against Mr Gray. Since the value of Business Assets has been held to be nil, Arnold J was right to decline to open up a yet further stage in this expensive and protracted litigation. We can find no fault with Arnold J's decision not to award further relief and we dismiss Ground 4 of GEHC's appeal.

475. In the light of the reasons given, we therefore dismiss all those grounds of GEHC's appeal that were considered at the hearing before us.

XI. SUMMARY, OUTSTANDING GROUNDS OF APPEAL AND CONCLUDING OBSERVATIONS

(a) Summary of conclusions on the Grounds of Appeal

476. We can summarise the conclusions we have arrived at as follows.

477. **Ground 1**: Mr Gray's challenge in Ground 1 in its unamended form is dismissed. We hold that the $3 million he received from the Klamath Falls Settlement and the Russian Business Assets were included in the scope of the account ordered by Vos J. They were not carved out by the Klamath Falls exclusion since that exclusion refers only to assets arising from the purchase of Mr Zolezzi's shareholding in Klamath Falls: see [118] – [122] above. Further, there was a sufficient link between those assets and Mr Gray's breaches of fiduciary duty to establish a liability to account: see [136] – [140] in respect of the Klamath Falls Settlement money and [143] in respect of the Russian Business Assets. We refuse Mr Gray's application for permission to amend Ground 1: [152] – [153].

478. **Ground 2**: Ground 2 challenges the finding that Mr Gray is liable to account for a proportion of the consultancy fees he received for managing the RegEnersys fund. We reject this ground and conclude that Asplin J was right to conclude that the fees were included: see [171] – [176].

479. **Grounds 3A.1 and 3A.2**. We grant permission to Mr Gray to rely on these new grounds: [181]. We allow the appeal on Ground 3A.1 holding that Asplin J was wrong to limit the expenses to be deducted referable to the $10 million consultancy fee to those expenses incurred before October 2012. The correct approach, in principle, would have been to ascertain the full period over which the work referable to the consultancy fee was performed, both before and after October 2012, and to permit the deduction of expenditure properly referable to that work by the application of generally accepted accountancy principles: [192] – [193] . We dismiss Ground 3A.2 and hold that Asplin J was entitled to use the amount of the RegEnersys fund that had been actually invested plus an additional amount of $100 million to reflect work done in considering potential investments when calculating the percentage of the consultancy fees for which Mr Gray was liable to account: [200].

480. **Ground 4**. The two issues argued in respect of Ground 4 do not need to be resolved in light of our findings on other grounds: [203] and [204].

481. **Ground 5**. Ground 5 challenges Asplin J's refusal to make an equitable allowance to reflect the work carried out by Mr Gray in earning the sums for which he has been held liable to account. We hold that the judge was in error in stating that it was common ground that the deduction of expenses in ascertaining the profit made by a defaulting fiduciary was a matter of discretion for the court. Nevertheless, we do not consider that it vitiated her consideration of the question of equitable allowance and we dismiss this ground. The judge was entitled [233] – [239] to decide not to make such an award in this case.

482. **Grounds 6 and 9**. In respect of these grounds we hold that Asplin J did not find that the 2010 agreement was a legally binding agreement between RegEnersys and the Russian Scientists that the former would receive 30% of the company established to carry on the Russian business and 51% of the ROW business: [277] – [282]. Mr Gray did not raise the issue of the existence of the 2010 agreement in his grounds of appeal and did not have permission to raise it: [288]. In any event we find that the challenge is not well founded. Asplin J did not err in failing to consider as a separate issue what Mr Gray says was the inherent implausibility of the case being put by GEHC: [297]. Her finding as to the existence of the 2010 agreement is not vitiated by a failure to address certain documents said to undermine GEHC's case: [311] – [312]. We reject the submission that Asplin J adopted an incorrect or unprincipled approach to the drawing of adverse inferences from (a) Mr Gray's failure to deal in his evidence with payments made indirectly to the Russian Scientists: [319], or (b) her conclusion that certain documents had been withheld from the court by Mr Gray: [320] – [333]. We further reject the submission that Asplin J failed to address the seriousness of the allegations made by GEHC that Mr Gray had conspired with other witnesses to hide his interest in the ultrasound technology through false documents and evidence, particularly in relation to the 2012 SPA and the secret agreement: [340].

483. We address Mr Gray's applications to admit new evidence in the course of our consideration of Grounds 6 and 9. We hold that the documents sought to be adduced to challenge the findings in the Enquiry Judgment are new evidence even if they were available at the Valuation phase of the proceedings: [346]. We find that the new evidence does not meet the test for admission in *Ladd v Marshall* because Mr Gray could with reasonable diligence have identified the relevant documents from the VIYM disclosure in time for the Enquiry Hearing: [358]. We find, further, that the documents would not have had an influence on the result of the case because (a) they would not have led to the acceptance of Professor Abramov's evidence: [371] – [373], (b) they would not have affected Asplin J's view of the viability of the technology: [379]; (c) they could not have caused Asplin J to conclude at the end of the Enquiry Hearing that the Business Assets had no value and so alter her view as to the credibility of Mr Gray's evidence: [383] – [385]; and (d) they did not undermine Asplin J's finding as to the existence of the 2010 agreement: [390] – [392]. As to Grounds 9.2 and 9.3 alleging serious procedural irregularities arising from GEHC's conduct in the course of the Enquiry Hearing, we hold that Rosenblatt (acting for GEHC) was not in breach of its duties to the court: [415] and [432] – [434]. We also hold that it is an abuse of the process of the court for Mr Gray to seek, by these grounds, to raise the issues that he had previously raised in the Set Aside Application which he withdrew before it was determined: [431].

484. As regards the challenge in Ground 9.4 to Asplin J's decision to direct that the issue of valuation of Mr Gray's Business Assets be heard at a separate hearing, we hold this did not amount to a procedural irregularity: [437].

485. **Grounds 7, 8 and 9.5**. By Ground 7.1, Mr Gray argues that the declaration included in the July 2015 Order relating to the VIYM Executives' shareholding in Petrosound is too uncertain and it was incumbent on Asplin J to identify whether the shares were held by Professor Abramov or Mr Volchenkov or Mr Ivanov. We see no merit in this ground and we dismiss it: [445] – [447]. However, we agree with Mr Gray that the opportunity to benefit from the ROW business was not a form of property that can be

subject to an order for transfer and that, in light of the information that was available at the Valuation Hearing, paragraph 1(f) of the July 2015 Order cannot stand and must be discharged: [457] – [463]. Grounds 8 and 9.5 do not need to be resolved, given our conclusions on Ground 7 and on the GEHC appeal.

486. **GEHC's appeal**. GEHC appeals against the decision of Arnold J to decline to grant further relief requiring Mr Gray to transfer the Business Assets to it. We dismiss these grounds of appeal and hold that Arnold J was right to refuse to order any further relief having regard to his finding that the assets had no value and that any order would be almost impossible to enforce: [468] – [474].

(b) The outstanding grounds of appeal

487. As we stated earlier, there are further grounds in the appeal brought by GEHC relating to costs that it was not possible or convenient to consider in the course of the hearing before us. These are as follows.

i) Ground 5 challenges, in the event that any of Grounds 1 – 4 of GEHC's appeal succeeds, Arnold J's decision that there should be no order as to costs of the Enquiry phase. Since we have dismissed Grounds 1 – 4 of GEHC's appeal, this Ground does not arise for decision.

ii) Ground 6 also challenges the decision that there be no order as to costs of the Enquiry phase even if the other grounds of its appeal are dismissed. GEHC raises four points: (a) Arnold J wrongly took into account or placed too much weight on the nil valuation of the assets; (b) Arnold J was wrong not to award GEHC its costs of the Enquiry phase whilst awarding Mr Gray the costs of the Valuation phase because that decision effectively deprived GEHC of the majority of its damages; (c) Arnold J was wrong to decide that GEHC had 'lost heavily' at the Enquiry phase when it had achieved an order for damages in its favour of £3.6 million; and (d) Arnold J did not attach proper weight to the poor conduct of Mr Gray throughout the Enquiry phase.

iii) Ground 7 asserts that Arnold J was wrong not to order Mr Gray to pay GEHC's costs of the withdrawn Set Aside Application.

488. Also outstanding is Mr Gray's Respondent's notice in the GEHC appeal in which he asks that the court revisit the question of costs of the Enquiry Hearing if he succeeds in any of the Grounds of his appeal.

489. We invite the parties to draw up an order reflecting our conclusions on the Grounds of Appeal disposed of in this judgment and proposing directions for the speedy consideration of the outstanding Grounds of Appeal on costs.

(c) Concluding observations

490. This appeal vividly illustrates the need for caution when considering applications for permission to appeal findings of fact made by the trial judge, particularly in a case involving extensive written and oral evidence from many witnesses and a mass of documentary evidence.

491. Once permission to appeal is given, the appeal court is duty-bound to examine in detail the submissions of the parties, and the evidence on which they rely for challenging and upholding the judge's findings. As Mance LJ said in *Todd v Adam (trading as Trelawney Fishing Co)* [2002] EWCA Civ 509, [2002] Lloyd's Rep 293 at [129] (cited in *Datec Electronic Holdings Ltd v United Parcels Services Ltd* [2007] UKHL 23, [2007] 1 WLR 1235): "Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so…".

492. In deciding whether the finding is wrong, the appeal court will apply the principles and approach explained in the decisions of the Supreme Court and of this court over the last 10 years or so. We have earlier cited a passage from the judgment of Lord Reed in *Henderson v Foxworth Investments Ltd*. Just as those principles guide the appeal court in determining the appeal, so they must guide the first instance court or the appeal court in deciding whether to give permission to appeal findings of fact. In framing draft grounds of appeal, and in advancing submissions in favour of the grant of permission, the putative appellant must anchor their case to those principles and explain which of them is engaged, and why, as regards each challenge. To be fair to Mr Gray's legal team, that is precisely what they did when applying to Arnold J for permission to appeal against Asplin J's order.

493. This is vitally important, because an appeal against findings of fact in any case, but particularly in a factually complex case such as the present, will absorb a significant amount of the time and resources not only of the parties and their advisers but of the court. As we earlier mentioned, the hearing of the present appeal took six full days and the preparation of this judgment has absorbed a great deal of judicial time. After all that, we have firmly concluded that there was no real substance to the challenges made by Mr Gray to the findings of Asplin J under Grounds 6 and 9. The only exception arises from the inconsistency between the findings of Asplin J and Arnold J as to the ROW business and Opco, which gave rise to essentially legal issues as to the appropriate remedy. At least some of the Grounds other than 6 and 9 raised arguable points, and indeed Mr Gray has succeeded on a couple of them, but they principally raised issues of law and could have been completed in a hearing of two days at most. With the exception of the inconsistency just mentioned, we consider that this is one of those cases where permission to appeal should not have been given as regards Grounds 6 and 9.

494. It is very unfortunate that in this case the application for permission to appeal against Asplin J's order was heard, not by the trial judge shortly after she had delivered judgment, but by a different judge over four years after judgment had been given. Arnold J was, of course, familiar with the case having dealt with the valuation issue, but there was no need for him to be familiar with the detail of the evidence that had been before Asplin J, save as regards viability and valuation.

495. It was all the more unfortunate that the draft Grounds of Appeal, a 40-page skeleton argument in support of the application for permission to appeal and an 18-page witness statement by Mr Gray's solicitor, containing additional detailed argument and with an exhibit of over 60 pages, was not served on GEHC's solicitors until three working days before the hearing fixed to deal with consequential matters, notwithstanding that Arnold J had with commendable speed given judgment over four months earlier, only eight days after the conclusion of the Valuation Hearing. Against

that background, leading counsel then appearing for GEHC (who had not appeared at the trial before Asplin J) understandably sought an adjournment so as to be able to make fully informed submissions. That application was refused and Arnold J heard Mr Gray's application without the benefit of such submissions. We are far from convinced that permission would have been given on much of Grounds 6 and 9 if the opportunity for those submissions had been taken. While on many matters, including generally issues of law, there may be little that the successful party can say in opposition to an application for permission to appeal, we do not share the view that the same applies where detailed findings of fact in a complex case are challenged, and that goes as much for applications to this court as to the court below.