Neutral Citation Number: **[2023] EWHC 1239 (Ch)**

Case No: CR-2017-003513

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane
London, EC4A 1NL

24/05/2023

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

(1) GREIG WILLIAM ALEXANDER MITCHELL
(2) KENNETH MELVIN KRYS
(JOINT LIQUIDATORS OF MBI INTERNATIONAL & PARTNERS INC (IN LIQUIDATION)) **Applicants**

- and –

(1) SHEIKH MOHAMED BIN ISSA AL JABER
(2) MASHAEL MOHAMED AL JABER
(3) AMJAD SALFITI
(4) JJW HOTELS & RESORTS UK HOLDINGS LIMITED
(5) JJW LIMITED (REGISTERED IN GUERNSEY) (IN LIQUIDATION) **Respondents**

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Mr J Curl KC and Mr J Colclough (instructed by **Clyde & Co LLP**) for the **Applicants**
Miss C Stanley KC and Mr J W Lee (instructed by **Mishcon de Reya**) for the **First, Second and Fourth Respondents**
Mr J Fennemore (on a direct access basis) for the **Fifth Respondent**

Hearing date: 17 March 2023

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date for hand-down is deemed to be 24 May 2023 at 10.30 am.

Mrs Justice Joanna Smith:

1. At a hearing on 17 March 2023, I heard argument on consequential matters arising from my substantive judgment in this matter ("**the Main Judgment**") handed down on 24 February 2023 ([2023] EWHC 364 (Ch)). The parties raised various arguments concerning costs and interest at the consequentials hearing. I dealt with the question of costs in a further judgment handed down before Easter ([2023] EWHC 676 (Ch)).

2. However, although interest was raised briefly in the skeleton arguments for the hearing and in oral submissions made by the parties at the hearing itself, on reflection I formed the view that the court had not received the assistance on the point that was required. The Liquidators' skeleton argument dealt with the point over five short paragraphs relying on only one authority. Entirely new arguments were raised orally at speed at the hearing and I found it difficult after the hearing to untangle the issues. In the circumstances I reluctantly concluded that further submissions were required and (following representations from all parties) I made directions for the exchange of further written skeletons dealing solely with the topic of interest.

3. Further to the agreed process of submitting skeleton arguments[1], the parties have expanded the submissions they made at the hearing and, in the case of the Liquidators, identified new and alternative ways of advancing those submissions. In circumstances where the parties were invited by me to make further submissions on the question of interest, I consider it to be in accordance with the overriding objective of dealing with cases justly to allow these new submissions to be made, notwithstanding complaint from the Sheikh that the Liquidators have moved the goal posts. This is particularly so where the sums at stake run to many millions of Euros.

4. I shall use the same definitions in this judgment that were used in the Main Judgment and I shall assume that readers of this judgment will have read, or will have access to, the Main Judgment. In summary, I ordered the Sheikh and the Fifth Respondents jointly and severally to pay equitable compensation to the Liquidators in the sum of €67,123,403.36.

INTEREST

5. The Prayer to the PoC seeks equitable compensation together with "interest compounded in equity or interest on such other basis as the court thinks just".

6. The Liquidators' primary case is that they are entitled to interest in equity on the judgment sum from 8 March 2016 onwards at the rate of 6.5% per annum compounded with yearly rests[2]. The rate of 6.5% is said to be appropriate in circumstances where that is the rate applied in *Watson v Kea Investments Ltd* [2019] EWCA Civ 1759 (in that case as a proxy for the rate of return that trustee investments would achieve). Although not raised at the hearing, the Liquidators now also propose (by way of alternative) that they are entitled in equity to (i) 5% compound interest (an argument

[1] The Liquidators filed written submissions on 6 April 2023, the Respondents filed their written submissions on 21 April 2023 and the Liquidators provided reply submissions on 28 April 2023.
[2] At the hearing the Liquidators proposed quarterly rests, but this was abandoned in their later written submissions.

advanced in two different ways against the Sheikh and the Fifth Respondent); or (ii) 5% simple interest (an argument referred to by the Liquidators as their "quaternary case").

7. At the hearing, it appeared to be common ground that section 35A of the Senior Courts Act 1981 ("**the 1981 Act**") does not apply to awards of equitable compensation and that it is the equitable jurisdiction of the court which is instead engaged in this case – at least the Liquidators did not suggest that they intended to argue to the contrary. However, in their further written submissions, the Liquidators now seek to advance a yet further alternative case that, if they are not entitled to interest in equity, they are nevertheless entitled to an award of simple interest at 3% over base rate pursuant to section 35A of the 1981 Act.

8. The Respondents accept that the court has an equitable jurisdiction to award interest, but they argue that in equity "interest is never awarded by way of punishment" (per Lord Denning MR in *Wallersteiner v Moir (No.2)* [1975] 1 QB 373 at 388C) and that its primary purpose is therefore to compensate a beneficiary for loss, or to require a fiduciary to disgorge a profit; in other words that it has a compensatory or restitutionary function, depending on the claim made.

9. The Respondents contend, in the first instance, that there is no principled basis on which an award of interest in equity may be made in this case (whether simple or compound interest) as there is no compensatory or restitutionary function to perform. Alternatively, they submit that if interest is to be awarded in equity there is no justification for an award of 6.5%, or 5%, compound interest.

10. As for the Liquidators' new case in respect of the 1981 Act, the Respondents continue to maintain (as they did at the hearing) that section 35A of the 1981 Act does not extend to claims for equitable compensation, but that, in any event, the principles to be applied in awarding interest under the 1981 Act are the same principles that apply to the award of interest in equity (i.e. interest under the 1981 Act is designed to compensate for a loss suffered). If the 1981 Act applies, the Respondents therefore contend that there is no principled basis for an award of interest in any event.

11. Against the background of that brief summary of the battle lines, the key issues for resolution in this judgment are:

    i) Whether interest should be awarded in equity;

    ii) If interest is to be awarded in equity

        a) over what period should it be awarded;

        b) at what rate should it be awarded; and

        c) is there any justification for an award of compound interest.

12. For reasons which will become clear, there is no need for me to consider the Liquidators' new alternative case that interest should be awarded under the 1981 Act. However, I must begin by addressing the Liquidators' attempts to rely upon fresh evidence in support of some of their submissions.

13. During the course of the hearing, Miss Stanley KC, for the MBI Respondents, submitted that the Liquidators had failed to plead a case[3], or to adduce evidence, in support of the proposition that the Company was entitled to a compensatory award of interest. In response, Mr Curl KC, on behalf of the Liquidators, submitted that interest has continued to run on the creditor claims in the Liquidation, that costs and expenses have been incurred in the Liquidation and, furthermore that although he had no direct evidence as to the BVI law position, the court should have regard to the entitlement under English insolvency law to statutory interest. He went on to submit that if I was minded not to award interest based on Miss Stanley's submissions, then he would wish to be given the opportunity to submit fresh evidence.

14. Upon the court liaising with the parties over the need for further submissions on the question of interest, the Liquidators did not indicate that they intended to serve fresh evidence and nor did they make any application to do so. However, upon service of their written submissions on 6 April 2023, they served a new witness statement from Mr Mitchell addressing (i) the value of the creditor claims in the Liquidation; (ii) the entitlement of creditors under BVI law to interest; (iii) the costs and expenses incurred in the Liquidation; and (iv) the statutory waterfall in the BVI for the distribution of realisations. This was subsequently followed on 27 April 2023 by a further witness statement from Mr Mitchell amending his evidence as to the creditor claims that have been submitted in the liquidation estate. In addition, the Liquidators served a letter from their expert, Mr Fay KC, dated 5 April 2023, dealing with the statutory entitlement of creditors to interest on a claim made in a liquidation.

15. No formal application was made to rely upon this fresh evidence, but in his written submissions, Mr Curl invites the court to consider it in connection only with the Liquidators' quaternary case which depends upon consideration of what the Company would have done with the money that could have been generated from a sale of the 891K Shares, submitting that the evidence supports the proposition that the Liquidators would have paid the costs and expenses of the Liquidation and the debts (plus interest) owing to the Company's creditors.

16. Perhaps unsurprisingly, the Respondents strongly oppose the introduction of the new evidence. Indeed the MBI Respondents say in their written submissions that if an application were belatedly to be made to rely upon such evidence they would wish to have the opportunity to make yet further submissions about it.

17. Beyond what was said at the oral hearing (which was not followed up), the Liquidators provided no warning as to the service of new evidence and have made no formal application to the court for permission to rely upon it. There is no permission from the court pursuant to CPR 35.4(1) for reliance upon the letter from Mr Fay and there has been no attempt to seek such permission. Whilst I appreciate that it may be common for parties to put any material on which they rely as to interest before the court at the consequentials stage (see *Glenn v Watson* [2018] EWHC 2483 per Nugee J at [17]), this material was not even intimated in advance of the consequentials hearing. It is only because I have required further written submissions that the Liquidators have had the opportunity to obtain such evidence.

[3] I did not understand this pleading point to be relied upon subsequently in written submissions, save in so far as the court was minded to have regard to the Liquidators' quaternary case.

18. In the circumstances of this case, I do not consider it to be consistent with the overriding objective to permit evidence to be introduced in this fashion and it is not fair to the Respondents to find themselves in a position where they have not had the opportunity properly to respond to a formal application and (if any such application had been granted) to submit any responsive evidence[4]. The court has no explanation whatever from the Liquidators as to why they have not seen fit to make a formal application for permission to rely upon the new evidence at this very late stage in the proceedings.

19. In their responsive written submissions, the Liquidators submit that the new evidence has been necessitated by submissions made for the first time by the Respondents at the consequentials hearing and they contend that since service of the new evidence on 6 April 2023 the Respondents have had ample time to deal with the points that have been made in that evidence. However, in my judgment, it was always incumbent upon the Liquidators to consider the evidence they might need to support their claim for interest and any such evidence should have been served well in advance of the consequentials hearing, together with any application required by the CPR for it to be relied upon. Given that the MBI Respondents have sought at every turn to resist the Liquidators' case, I reject the suggestion that the bare denial on the part of the MBI Respondents in their Defence to the Liquidators' claim for interest could (or should) have provided any comfort that there would be no need for such evidence.

20. Accordingly, I am not prepared to have regard to the new evidence in considering the Liquidators' claim for interest and the Liquidators' quaternary case, which I understand to be wholly dependent upon that evidence, fails. With one caveat, to which I shall return, I need say no more about it.

SHOULD INTEREST BE AWARDED IN EQUITY?

21. Whilst the court has a wide discretion to award interest under its equitable jurisdiction, it must exercise that discretion in accordance with settled equitable principles. I take as my starting point the identification of those principles by Lord Denning MR in *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388:

> "…in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position – who has misapplied the money and made use of it himself for his own benefit. The court:
>
> > "presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in these cases the court directs rests to be made" i.e. compound interest: see Burdick v Garrick, 5 Ch App 233, 242, per Lord Hatherley LC.
>
> The reason is because a person in a fiduciary position is not allowed to make a profit out of his trust: and, if he does, he is liable to account for that profit or interest in lieu thereof.

[4] Mr Fennemore made a point as to the circumstances in which interest is payable to creditors under BVI law in his written submissions, but I consider it to be unfair that he was left to do so in circumstances where no application has been made by the Liquidators to rely upon the new evidence and thus no opportunity provided to the Respondents to obtain their own responsive evidence.

> In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest".

22. In similar vein, Buckley LJ said this at 397:

> "It is well established in equity that a trustee who in breach of trust misapplies trust funds will be liable not only to replace the misapplied principal fund but to do so with interest from the date of the misapplication. This is on the notional ground that the money so applied was in fact the trustee's own money and that he has retained the misapplied trust money in his own hands and used it for his own purposes. Where a trustee has retained trust money in his own hands, he will be accountable for the profit which he has made or which he is assumed to have made from the use of the money. In *Attorney-General v Alford*, 4 De GM & G 843, 851, Lord Cranworth LC said:
>
> > "What the court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it".

23. In *Glenn v Watson* [2018] EWHC 2483 (Ch), a decision of Nugee J, subsequently upheld on appeal in *Watson v Kea Investments Ltd* [2019] EWCA Civ 1759, a decision to which I shall return in a moment, Nugee J referred at [21]-[22] with approval to the two theoretical justifications identified by counsel for awarding interest against a defaulting trustee. The first being "a means of stripping the trustee of profits made with the trust's money if for some reason it was too difficult, or the claimant did not want to elect, to find the actual profits". In other words the award of interest against a trustee was a convenient substitute for an account of actual profits in cases where the trustee had employed trust money in his business. Before turning to the second justification, Nugee J noted that "interest is not of course limited to cases where the trustee has made, or is assumed to have made, profits by the use of the trust money. It applies whatever the trustee has done with the money". Thus, the second justification for awarding interest was to compensate the beneficiaries for the return which should have been made on the money – the situation with which Nugee J was concerned in *Glenn v Watson*.

24. On appeal in *Watson v Kea Investments Ltd,* McCombe LJ set out (and subsequently accepted) the three bases advanced by counsel on which a trustee in default (or a constructive trustee) was liable to pay interest on sums of which a trust had been wrongfully deprived (at [41]), later described by him as "three categories of liability":

> "So the three different bases are: you've had my money. Let's say you just failed to invest it. Well, you have to pay, by way of interest, what it would have made if you had invested it.

> "Secondly, you've had my money and you've used it in your business. I don't want to spend the time working out exactly what you've made in your business so I'm going to take 5%.
>
> "Thirdly, you've taken the money by fraud. You've kept it. I've no idea what you did with it. But I can elect for 5%, the higher rate, because you're a fraudster and you've had my money and kept it. I don't even have to go into what you've done with it."

25. At [47], McCombe LJ observed that "in cases of this type, the underlying equitable principles are just as important as precedent, and possibly more so".

26. In their written submissions, the Liquidators have referred to counsel's three propositions in *Kea* as "the First, Second and Third Ground" for an award of equitable interest, albeit that (at least in their original written submissions) they appear to have treated these three grounds as jurisdictional gateways for an award of *compound* interest.

27. The Respondents, on the other hand, have treated the three "Grounds" in *Kea* as identifying the circumstances in which the court may exercise its discretion to award interest in equity *at all*. In their submission, this threshold question must be determined first, before any question of compound interest can arise. Furthermore, the Respondents contend that these three grounds can be distilled into two principled bases for making awards of interest in equity (essentially following those identified in *Wallersteiner*). The first basis is compensatory in character[5], designed to reflect the value of lost investment returns or increased expenditure on commercial borrowing as a result of the deprivation of the relevant assets. Here the critical exercise for the court is to assess "the general characteristics of the claimant entitled to the equitable remedy" and award interest at a suitable proxy rate (see *Watson v Kea Investments* at [72]). The second basis is restitutionary in character[6] and is designed to provide a substitute for the need to undertake an account of profits. It operates to deprive the defendant of profits which it is assumed to have made from the relevant funds. In other words, the Respondents contend that in deciding whether to exercise its discretion, the court must be satisfied that an award of interest is necessary to compensate for loss or to effect a restitution.

28. In my judgment the Respondents are correct in their interpretation of *Kea.* The three grounds advanced by counsel are expressly said by McCombe LJ to be "bases on which a trustee in default (or a constructive trustee) was liable to pay interest on sums of which a trust had been wrongfully deprived". There is no analysis of compound interest at this point in the judgment[7]. Indeed I agree with Miss Stanley that counsel's three "Grounds" were almost certainly designed to explain the rationale in the cases for

[5] This is the First Ground identified by counsel and approved by the court in *Kea.*

[6] The Second and Third Grounds identified by counsel and approved by the court in *Kea* are variations on this same restitutionary basis (albeit that the Third Ground involves a claim of dishonesty): the underlying presumption is that the defendant has profited from its use of the funds/fraudulent misappropriation of the funds and should pay interest so as to avoid the need to calculate the full extent of that profit. The interest is a proxy for giving up the profit and, as such, is designed to preclude the possibility of unjust enrichment of the defendant.

[7] As is clear from the first instance judgment at [11], the defendant in *Kea* had conceded that the court should make an award of compound interest – the only question for the Court of Appeal in *Kea* was the rate at which interest should be awarded.

awards of particular rates of interest against defaulting trustees and knowing recipients, the rate chosen in respect of the First Ground should reflect a compensatory function, while the 5% rate chosen in respect of the Second and Third Grounds is purely intended as a proxy for the unauthorised profit. Further, I agree that for the purposes of the threshold question, I am concerned with whether there is any justification to award interest designed either (i) to compensate the Company; or (ii) as a substitute for an account of profits.

The Liquidators' Primary Case

29. The Liquidators' primary case is that they are entitled to recover interest pursuant to the First Ground, i.e. the compensatory basis. They submit that, as a starting point, the court must "consider the class of persons who share the same 'general characteristics' as the Company". Here, the Liquidators contend that the Company was part of a Group "operating in the commercial, property, finance, hospitality and food industries" (Main Judgment at [25]) and that it is properly to be regarded as an investment vehicle owing to the fact that it was the Sheikh's case that the 891K Shares were held for the purposes of a proposed IPO and intended "to generate returns". The Liquidators submit that the court should disregard the fact of the Company's Liquidation as "to do otherwise would be to reward the Sheikh, the Company's controlling mind and the person primarily responsible for its financial affairs, for the Company's insolvent winding up". It is suggested that I should adopt the approach taken by the court in *Van Zuylen v Whiston-Dew* [2021] EWHC 2219 (Ch), where the deputy Judge accepted (at [315]) that it was inappropriate to take a claimant's "personal preferences as to investment" into account. From this starting point, the Liquidators contend that compound interest should be awarded on a compensatory basis at 6.5% (the rate used by the court in both *Kea* and *Van Zuylen*).

30. I reject the Liquidators' primary case, essentially for the following reasons:

    i) The relevant general characteristics of the fund in *Kea* were that it was a vehicle for the investment of trust monies and the evidence available to the court as to the investment returns available generally to trusts with the same general characteristics was described by Nugee J at [17] as "objective and high quality". Equally in *Van Zuylen* the general attributes of the fund in question were similar to those in *Kea*. Hence the court in each case made an award which reflected the loss of investment returns that a fund with the general characteristics of the relevant claimant might have made.

    ii) In the present case, however, the Company was in liquidation long before the misappropriation of the 891K Shares and, as a company in liquidation, it was not an investment vehicle and it had long since given up the ambition to generate returns from the IPO. Accordingly I reject the Liquidators' submission that the 'general characteristics' of the Company to which I should have regard are that it was an investment vehicle intended to generate returns. The 'general characteristics' of the company bear no relation to the trust fund with which the court was concerned in *Kea*.

    iii) I agree with the Respondents that, in considering the entitlement to interest pursuant to the First Ground, it would be wholly unrealistic to ignore the fact that the Company has been in Liquidation at all material times. As Mr Fennemore, on

behalf of the Fifth Respondent, submits, this is the "core characteristic" of the Company to which the court should have regard in seeking to determine whether there is any justification to make an award based on lost investment opportunities or increased borrowing costs. As a company in liquidation, the Company was neither in a position actively to invest so as to generate returns (in respect of which it has been deprived) and nor was it borrowing to carry on a business such that it can be said that its costs of so doing have increased as a result of the deprivation of the 891K Shares. To my mind its circumstances plainly do not fit within either of those conventional parameters and I have no basis for supposing that a company in liquidation could have made a 6.5% per annum return since 2016.

iv) None of the parties has been able to find an authority in which the court has awarded equitable interest on the compensatory basis in favour of a company in liquidation referable to the notional cost of borrowing or the return expected by investment or saving in respect of a breach which takes place after liquidation. I do not consider that the view taken by the court in *Van Zuylen* (to the effect that the court should have regard to an appropriate proxy for the claimant rather than conducting a detailed investigation into what the claimant would itself have done had it had use of the relevant funds) takes the Liquidators any further. This approach was consistent with the approach taken in *Kea*; it does not justify the adoption of an artificial and unrealistic proxy on the facts of the present case.

v) In their reply submissions, the Liquidators nevertheless maintain the submission that the fact of the Company's liquidation is irrelevant, pointing specifically to *Hotel Portfolio II v Ruhan* [2022] EWHC 1695 (Comm) and inviting me to follow the approach taken by Foxton J in that case (in particular at [42]). However, although it is true that Foxton J there made an observation about the position of companies which have ceased to trade being the same as that of companies which are still deploying their funds in business activities, he was not concerned with the question of whether the threshold for an award of equitable interest had been crossed and nor was he concerned (as the Liquidators themselves accept in their original written submissions) with the award of equitable interest on the First Ground, namely the compensatory basis. Further and in any event the company in that case was not in liquidation at the time of the breach of duty. I do not consider that anything Foxton J said in *Hotel Portfolio* was intended to address the approach the court should take to the compensatory basis for an award of equitable interest.

31. I indicated earlier that there was a caveat to my decision that there was no more to be said on the Liquidators' "quaternary" case. That case was premised on an alternative argument under the First Ground, namely the proposition that the proper approach for the court would be to consider precisely what the Company would have done with the money it could have generated from the 891K Shares had they not been transferred away. The Liquidators sought to rely upon specific evidence as to the Company's circumstances for the purposes of this argument. I have not permitted reliance upon that evidence and so the point goes nowhere. However, I should add that I am not convinced that evidence of the specific circumstances of the Company would have been appropriate to make out a claim to interest under the First Ground in any event. Whether it would instead have been possible to identify a realistic proxy for the loss

that might be suffered by an insolvent company by reason of it being deprived of valuable shares is a point that has not been raised by the Liquidators and thus a point I need not explore for the purposes of this judgment.

The Liquidators' Secondary and Tertiary Case

32. By way of alternative to their primary case, the Liquidators contend that they are entitled to recover interest under either the Second or Third Grounds identified in *Kea* – i.e. the restitutionary basis. The Second Ground is said to apply to the Fifth Respondent and also to the Sheikh by reason of his liability for interest being co-extensive with the liability of JJW Guernsey[8]; the Third Ground, involving fraud, is said to apply only to the Sheikh. The Liquidators submit that the Sheikh is the Company's fiduciary and that the court has held that the Fifth Respondent is accountable as if it were a fiduciary. In such circumstances, they say that the court will presume that the fiduciary has made a profit.

33. The Respondents contend that it would not be appropriate for the court to make any presumption of profit in this case, essentially because the court has found that the Sheikh did not retain the 891K Shares and that, whilst the Fifth Respondent held those shares for some 15 months, they were subsequently transferred to another company and soon thereafter (on the Respondents' evidence) they became worthless (see the Main Judgment at [574]). The shares were never converted into liquid funds. Accordingly they say that this is not a case in which the Liquidators and the court have "no idea" what was done with the 891K Shares (see the Third Ground); there is evidence to indicate that no profit was made on the shares.

34. I should add that at this threshold stage, it is not suggested that the mere fact that I am concerned with shares and not money precludes me from making an award of equitable interest and indeed the judgment of the privy council in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 at [186] supports the proposition that there is power to make such an award in a case involving not only cash, but also shares and loans.

35. I am not persuaded by the Respondents' submissions. It is clear from *Wallersteiner*, that, as Buckley LJ said at 397 "Where a trustee has retained trust money in his own hands, he will be accountable for the profit which he has made or which he is assumed to have made from the use of the money". In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, the House of Lords considered the circumstances in which compound interest may be awarded and in so doing Lord Browne-Wilkinson referred (at page 702) to the general observations of Lord Brandon in *President of India v La Pintada Compania Navigacion SA* [1985] AC 104 at 116 as to the entitlement to interest in equity:

> "Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and

[8] The Liquidators contend that where the Sheikh used a corporate vehicle in the form of the Fifth Respondent (of which he was the controlling mind) as the vehicle for misappropriation of the 891K Shares, his liability must be coextensive with that of the Fifth Respondent – it relates to the same misappropriation and the same loss.

> retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position…"

36. In this case I have held that the 891K Shares were transferred away from the Company to the Fifth Respondent by the Sheikh acting dishonestly (see for example [456] and [570(iii)] of the Main Judgment). There is no evidence as to why the Sheikh wished to transfer the Shares to the Fifth Respondent or (more importantly) what benefits he expected to obtain by so doing. I agree with the Liquidators that the Sheikh's liability in this regard must be viewed as being co-extensive with the Fifth Respondent's liability owing to his role as its controlling mind and the fact that the transfer involved the same act of misappropriation and the same loss. There is no evidence as to whether the Sheikh and/or the Fifth Respondent derived a profit from the transfer of the Shares. The fact that they may later have become worthless does not appear to me to neutralise the potential for a profit to be made by reason of the fact that the Sheikh and the Fifth Respondent had access to them in the context of their commercial activities.

37. Absent clear evidence that there was no advantage to the transfer away of the 891K Shares, the court is entitled to presume a beneficial use of the 891K Shares and that a profit was made. Given the lengths to which he went to cover his tracks in relation to the transfer of the 891K Shares (see [210]-[250] and [451]-[454] of the Main Judgment), it is difficult to believe that the Sheikh did not consider that transfer likely to be both advantageous and profitable in connection with his business; it is equally difficult to believe that neither he nor the Fifth Respondent got any benefit out of it.

38. It is not open to a fiduciary (such as the Sheikh) or a party liable to account as if it were a fiduciary (such as the Fifth Respondent) to purport to put the wronged party to proof of the existence of such a profit. There is nothing penal about an award of interest in such circumstances. In my judgment justice, combined with the application of traditional equitable principles, demands an award of interest in this case.

RATE AND PERIOD

39. Where an order is made for interest on the restitutionary basis, the court will adopt a rate which approximates to the profit that the fiduciary can be assumed to have made. Historically the practice in cases of this sort appears to have been to adopt a fixed rate of 4% or 5% per annum (see the explanation in *Glenn v Watson* at [20]), apparently on the basis that the return available on typical trustee investments was a realistic proxy for that assumed profit.

40. In *Wallersteiner*, the court departed from that traditional approach. Nugee J recorded the outcome in Wallersteiner in the following terms at [26]-[27] of his judgment in *Glenn v Watson*:

> 26….In *Wallersteiner* the Court of Appeal had previously given judgment in default of defence against Dr Wallersteiner for breaches of his duty as director…, and one of the matters argued on further application to the Court of Appeal was the question of interest. All 3 members of the Court held that equitable interest should be awarded on the ground that Dr Wallersteiner was to be presumed to have made a profit (per Lord Denning MR at 388C, Buckley LJ at 398E-F and Scarman LJ at 406F); Lord

> Denning would in addition have awarded it on the ground that "in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business" (at 388E), but Buckley LJ disagreed (at 398H) and Scarman LJ did not add anything on this point.
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> 27. So far as the rate of interest is concerned, the Court of Appeal awarded it at 1% above official bank rate or minimum lending rate. Lord Denning MR (at 388H) simply said that he thought that was the appropriate rate, without further explanation; Buckley LJ (at 399A) said:
>
> 'In earlier days, when interest rates were more stable than they are at present, the rate of interest used in such a case was 5 per cent. per annum. In the conditions of the present time I think it would be right to award interest at 1 per cent. per annum above the official bank rate or minimum lending rate in operation from time to time'."

41. As Mr Fennemore points out in his written submissions, the reason for adopting a rate linked to base rate, instead of using the historical fixed percentage, was that this meant that the rate would be reactive to the prevailing economic conditions (and concomitant interest rates) as they fluctuated throughout the relevant times. The rationale for the approach taken in *Wallersteiner* appears to have been that the use of the money was worth at least the equivalent of a commercial borrowing rate (see *Glenn v Watson* at [27]). In the absence of anything better, this was adopted as a proxy for the profit that Dr Wallersteiner was assumed to have made by reason of his wrongdoing.

42. The Liquidators seek a rate of 5%. However, at no stage have they sought to justify that rate beyond making reference to the three grounds on which a fiduciary is liable to pay interest in equity as identified by counsel in *Kea* at [41]; the Second and Third Grounds expressly identified a rate of 5%. However, I agree with the Respondents that counsel's submissions in that case were plainly intended to refer to the historic rate awarded in the old 19th century cases (see paragraphs [20] and [26] of *Glenn v Watson*). The Liquidators have not begun to address the question of why a rate of 5% would be an appropriate proxy for the profit that the Sheikh and the Fifth Respondent are to be assumed to have made in this case.

43. In the absence of any clear justification from the Liquidators for their rate of 5% and bearing in mind the fact that (as Nugee J observed at [54] in *Glenn v Watson*) "[t]he authorities are consistent that one should adopt a broad brush approach", I intend to award interest at the commercial rate of 1% above base. This appears to me to be consistent with the approach adopted in *Wallersteiner* and I do not understand the Respondents to suggest that this would be an inappropriate outcome in the event that I am minded to make an award of interest. It is the best I can do on the submissions I have received.

44. As for the period for which interest should run, the Fifth Respondent contends that as against it, interest should run only for the period in which the Fifth Respondent in fact held the 891K Shares. After it transferred those shares to MBI International Holdings on 23 June 2017 it says there can be no sensible suggestion that it profited from retaining the shares. I reject this submission as to the award of interest generally and repeat the reasoning above in respect of the principle of the award of equitable interest.

45. Interest against both the Sheikh and the Fifth Respondent will run from the date of the transfer until the date of judgment.

SHOULD THE COURT AWARD COMPOUND INTEREST?

46. The Liquidators seek an award of compound interest.

47. The principles to be applied by this court were articulated in *Westdeutsche* and succinctly summarised by Foxton J at [38] in *Hotel Portfolio*:

> "Courts of equity have jurisdiction to award compound interest where money has been obtained and retained by fraud (and, even in the absence of fraud, where a trustee or fiduciary defendant has withheld or misapplied trust money and/or improperly profited from the trust): *Westdeutsche v Islington LBC* [1996] AC 669; *Black v Davies* [2005] EWCA Civ 531…It has also been held that compound interest can be awarded on claims for equitable compensation: *Watson v Kea Investments Limited* [2019] 4 WLR 145.

48. I reject Miss Stanley's submission that this was not an accurate reflection of Lord Browne-Wilkinson's judgment at pages 701-702 in *Westdeutsche*.

49. On close analysis of their written submissions, the Respondents take differing positions on the question of whether interest should be compounded. The Fifth Respondent appears to accept that once the court has determined that interest is to be applied, then the rate awarded (at least for the period when it held the 891K Shares) should be "compounded annually" on the basis that this remains the standard "higher" commercial rate ordered where a defendant has made use of misapplied assets and is assumed to have made a profit (written submissions at [38] and [39]). In the Main Judgment at [519] I found that the Fifth Respondent, as recipient of the 891K Shares pursuant to the Void Transaction is liable to account as constructive trustee. The Fifth Respondent makes no attempt to suggest that it has not had use of the misapplied 891K Shares and nor does it suggest that there is no scope for an award of compound interest against it during the period it held the shares. In the circumstances there is no need for me to address the various authorities on which Miss Stanley relied in her written submissions on the question of whether compound interest can properly be awarded against knowing recipients and dishonest assistants.

50. In my judgment, the appropriate and just order against the Fifth Respondent is for equitable interest to be awarded at a rate of 1% above base compounded annually for the period in which it held the 891K Shares and must be assumed to have taken advantage of those shares in connection with its business. Thereafter, it must pay simple interest at 1% above base rate until judgment.

51. The Sheikh contends that the court's jurisdiction to award compound interest in equity is closely circumscribed by the categories identified by Lord Browne-Wilkinson in *Westdeutsche* and that the Sheikh does not fall within those categories. In particular, the Sheikh contends that he is neither a "profiting fiduciary", nor did he "obtain and retain" anything. Furthermore, the Sheikh points to the fact that the claim against him succeeded for breach of a fiduciary duty of stewardship and that "dishonesty formed no

part of the cause of action". In other words, this is not a case in which compound interest can properly be awarded by reason of "fraud".

52. I reject these submissions. I have already referred to the passage from the speech of Lord Brandon in *President of India* which was referred to with evident approval by Lord Browne-Wilkinson in *Westdeutsche.* It is clear from that passage that compound interest may be awarded, even in the absence of fraud, where a trustee or fiduciary defendant has withheld or misapplied trust money. Of course that trustee or fiduciary defendant must be, as Lord Browne-Wilkinson said, "accountable for the profits he made from his position". However, it is not necessary to establish that he has in fact made a profit (as is clear from the passages in *Wallersteiner* to which I have already referred). All the more so in a case involving fraud.

53. In this case, the Sheikh misapplied the 891K Shares, transferring them to the Fifth Respondent by signing the Share Transfer Forms in 2016. In so doing he became accountable to the Company and, as I have already said, the court may presume that he profited from his actions. This is sufficient to bring the jurisdiction to award compound interest into play.

54. At the hearing, Miss Stanley argued, by reference to paragraph [415] of the Main Judgment, that the court has found that the Sheikh did not improperly obtain and retain the 891K Shares. However, this paragraph concerned the position immediately after the Company went into Liquidation and before the wrongful transfer of those shares to the Fifth Respondent in 2016. I reject the suggestion that by reason of this finding, the jurisdiction to apply compound interest is not engaged. As the controlling mind of the Fifth Respondent (Main Judgment at [510]), I consider it to be unrealistic to suggest that the Sheikh is somehow in a separate (and more advantageous) position than the Fifth Respondent. The Fifth Respondent had use of the 891K Shares until they were transferred away to MBI International Holdings and, in my judgment, justice demands that the Sheikh is also treated as having had use of the 891K Shares and is also required to pay compound interest for the same period.

55. Further, although "dishonesty" or "fraud" was not alleged as a necessary feature of the causes of action pursued by the Liquidators against the Sheikh, I found (at [456] in the Main Judgment) that he signed the Share Transfer Forms in 2016 "and that he did not act honestly, or in good faith, in doing so and in causing the transfer of the 891K Shares (or purported transfer) to JJW Guernsey on 8 March 2016". Notwithstanding Miss Stanley's submissions to the contrary, this finding is, in my judgment, sufficient to attract the equitable jurisdiction to award compound interest.

56. In all the circumstances, I consider that the appropriate order against the Sheikh is for interest to be awarded at 1% above base rate compounded annually to the date on which the Fifth Respondent transferred away the 891K Shares.

57. Thereafter, as I have already intimated, I consider that justice demands that there be an award of simple interest against both the Sheikh and the Fifth Respondent at 1% above base rate until the date of judgment. This appears to me to be entirely consistent with well-established principles.

CONCLUSION

58. In light of the conclusions I have already reached, I do not need to decide whether the Liquidators are entitled to interest under the 1981 Act and I decline to do so.

59. I now invite the parties to prepare a draft order reflecting the decisions I have made in this judgment.