Neutral Citation Number: [2023] EWHC 2670 (Ch)

Claim No: BL-2020-000294

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF**
**ENGLAND AND WALES BUSINESS LIST (ChD)**

Rolls Building
Fetter Lane
London, EC4A 1NL

26th October 2023

**Before** :

**MR NICHOLAS THOMPSELL**
**sitting as a Deputy Judge of the High Court**

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**Between :**

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| **TRAFALGAR MULTI ASSET TRADING COMPANY LIMITED (IN LIQUIDATION)** | **Claimant** |
| **- and -** | |
| **(1) JAMES DAVID HADLEY** | **Defendants** |
| **(2) THOMAS WILLIAM GORDON BIGGAR** | |
| **(3) STUART NEIL CHAPMAN-CLARK** | |
| **(4) ANDREW CHRISTOPHER JONES** | |
| **(5) TITAN CAPITAL PARTNERS LIMITED** | |
| **(6) CGROWTH CAPITAL BOND LIMITED** | |
| **(7) WILLIAM MACFARLAND WRIGHT III** | |
| **(8) PINNACLE BROKERS LIMITED (IN LIQUIDATION)** | |
| **(9) MARK LLOYD** | |
| **(10) VIVERE FORTI INTERNATIONAL FOUNDATION** | |
| **(11) KIRSTY LOUISE PLATT** | |
| **(12) PLATINUM PYRAMID LIMITED (IN LIQUIDATION)** | |
| **(13) BENTLEY JARRARD THWAITE** | |

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**Mr Justin Higgo KC** and **Ms Belinda McRae**
(instructed by **Kingsley Napley LLP**) appeared for the Claimant
**Mr William Wright** appeared for himself and on behalf of CGrowth Capital Bond Ltd
Hearing date: 5 September 2023

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# JUDGMENT

Trafalgar Multi Asset Trading Company Limited v Hadley Rasul and ors

**Mr Nicholas Thompsell:**

## 1. INTRODUCTION

1. This is the second judgment dealing with consequential matters arising from the main judgment in this matter (the "**Liability Judgment**"). The Liability Judgment is reported as *Trafalgar Multi Asset Trading Co. Ltd v Hadley and ors* [2023] EWHC 1184 (Ch) and was handed down on 19 May 2023. This came after a four-week trial dealing with the question of liability in this matter. Full details of the claim were given in the Liability Judgment. I will not repeat them here. I will use in this judgment terms that I defined in the Liability Judgment.

2. In the Liability Judgment I found for the Claimant in relation to:

    i) its claims against Mr Hadley, Mr Chapman-Clark, Pinnacle and Mr Lloyd, in relation to what I described as the Original Conspiracy;

    ii) its claims against Mr Hadley, in relation to bribery and conspiracy in relation to Trafalgar's investment in the CGrowth transactions;

    iii) its claim against CGrowth based on vicarious liability for bribery, dishonest assistance and unconscionable receipt and its claim for a declaration that the CGrowth bond purchase contracts are void for Mr Hadley's want of actual or apparent authority;

    iv) its claims against Mr Hadley for breaches of fiduciary duty; and

    v) its claims against Mr Chapman-Clark, Mr Lloyd, Pinnacle, Mr Thwaite and PPL for dishonest assistance and for unconscionable receipt.

3. However, I found against the Claimant in relation to:

    i) its claims against Mr Jones and Titan in relation to any unlawful means conspiracy (including what I described as the Original Conspiracy);

    ii) its conspiracy claim against Mr Wright and its claims against him of injury by unlawful means, dishonest assistance, and unconscionable receipt.

4. In my first judgment dealing with consequentials matters dated 20 July 2023 (reported as *Trafalgar Multi Asset Trading Co. Ltd v Hadley and ors* [2023] EWHC 1867 (Ch)) I dealt with:

    i) Mr Hadley's application for leave to appeal and his application for a stay of execution – I denied both applications;

    ii) quantification issues relating to the Claimant's claim;

    iii) the Claimant's claim for costs, except that the question whether the Claimant should be entitled to compound interest on pre-judgment damages was reserved;

    iv) Mr Jones' claim for costs; and

v) directions for hearing Mr Wright's application for costs and the matter reserved regarding compounding of interest as soon as possible.

5. This judgment deals with the matters considered at a further hearing on 5th September 2023 dealing with three matters remaining outstanding:

i) Mr Wright's application for a payment on account of costs;

ii) Trafalgar's application for Mr Wright to be made jointly liable with CGrowth for CGrowth's liability to costs; and

iii) Trafalgar's application for interest to be calculated on the basis of compound, rather than simple interest.

## 2. PAPERS RECEIVED

6. Ahead of this hearing:

i) the Claimant provided a full skeleton argument, supported by a witness statement, a draft order, a bundle for the hearing and an authorities bundle dealing with the matters described above, and

ii) Mr Wright provided a witness statement (his Sixth Witness Statement) in support of his application for costs on account with supporting evidence; he had also previously provided a witness statement (his Fifth Witness Statement) supported by a schedule of costs on form N260.

7. Unfortunately, owing to a mix-up, whilst I had had a good opportunity to review the Claimant's skeleton argument and bundle of authorities, I received the full hearing bundle only very shortly before the commencement of the hearing. This point was to some extent mitigated by my following Mr Higgo's helpful suggestion that I take a short adjournment to read at least the key witness statements.

8. After the hearing Mr Wright provided me, within the timeframe I had requested some papers relating to the ownership of CGrowth and slightly outside that period some further papers confirming CGrowth's bondholders and the ownership of Powder River. The Claimant's legal team were given, and took, an opportunity to comment on this documentation before I finalised this judgment.

## 3. REPRESENTATION AT THE HEARING

9. At this hearing:

i) the Claimant was represented by Mr Higgo and Ms McRae;

ii) Mr Wright appeared remotely to represent himself and, to represent CGrowth as its director;

iii) none of the other Defendants was represented.

10. No party had made an application for an adjournment of the hearing, and I saw no reason not to proceed with it.

## 4. MR WRIGHT'S APPLICATION FOR COSTS ON ACCOUNT

11. Under CPR rule 44.2 (8) where the Court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

12. Mr Higgo put up various arguments as to why there was a "good reason" not to order a payment on account. In brief, the main arguments may be summarised as follows:

    i) Whilst Mr Wright had produced some evidence of payments being made to solicitors Rahman Ravelli, it remained unclear the extent to which the advice provided by that firm was for the benefit of CGrowth or for Mr Wright's benefit, and it appeared that (contrary to Mr Wright's original case) much of the money paid to that firm had come from two companies in which Mr Wright had an interest, Take Flight Equities Inc and Keystone Financial Management Inc ("**Keystone**") rather than Mr Wright.

    ii) Mr Wright had included a claim for the time he had spent undertaking work as a litigant in person at a rate of £150 per hour. Whilst he had provided some evidence in support of this, the Claimant did not consider this evidence to be sufficient to prove that he had lost earnings to this extent. The Claimant argued that in the absence of such proof under CPR rule 46.5(4) (b) the Court should apply the Court's standard rate of £19 per hour.

    iii) The Claimant considered that Mr Wright's claim for hours spent was inadequately evidenced and appeared to the Claimant to be inflated. Furthermore, it took no account of the fact that Mr Wright, even if he had not been a defendant himself, would have been in court to represent the interests of CGrowth.

    iv) Mr Wright's claims for travel and subsistence had not been duly substantiated.

    v) Mr Wright had not been consistent in the information he provided about his claims and the Claimant invited the Court therefore not to place any credence on such claims.

13. In response to these matters, Mr Wright argued that, at best, any of these criticisms went to the quantum of the amount that should be paid on account of costs. They should not displace the principle that there should be a payment on account of costs.

14. I agreed with Mr Wright's point on this matter: It was obvious that Mr Wright, acting as a litigant in person would have spent substantial time on this matter and would have had significant expenses in travelling from the USA to attend court hearings.

15. However, the criticisms made by the Claimant should not be ignored in fixing the amount of a payment on account. I accept the point made on behalf of the Claimant that the Claimant would have real difficulty in recovering any costs from Mr Wright if there were to be an overpayment of costs on account.

16. In particular, it seemed to me that:

    i) It was not safe to rely on the invoices from Rahman Ravelli without a better understanding of what these invoices were for and who had paid them. It seemed from the schedule of payments that many of the payments had been made by CGrowth rather than by Mr Wright and that, where Mr Wright had made payments himself, this was during the period where the matters to be determined related to the application for summary judgment on the bribery claim and the subsequent appeal relating to that matter, where Mr Wright was not a party and so work in relation to those matters could not have been for his benefit. I do not say that the question whether CGrowth or Mr Wright paid a particular invoice is determinative of whose cost this was – it is possible that one or the other of the parties could exercise a right of contribution against the other which should be taken into account. However, on my present understanding of the evidence produced, I agreed with the Claimant that it was unclear how far Mr Wright could demonstrate that he had paid, or was liable for, any particular item of costs pursuant to these invoices.

    ii) The correct rate for Mr Wright to claim for his own time was a matter that would need to be established when costs are being assessed. I express no opinion on the sufficiency of the evidence that Mr Wright has produced to demonstrate that a rate of £150 per hour would be appropriate, but merely note that he has not yet established this, and it would not be safe to calculate payment on account on the assumption that he would establish it.

    iii) Mr Wright's time in attending to this matter would need to be apportioned between time he spent in his capacity as a director for CGrowth and time he spent representing himself. This again would need to be determined when costs are assessed, but it seemed to me that in principle, he should not be claiming costs where he was acting solely on behalf of CGrowth (i.e. at or in preparation for any hearing in relation to Trafalgar's applications for summary judgment of the bribery claim). In principle, where he was preparing for or was attending a hearing where both he and CGrowth were defendants some way would need to be found to apportion his time between these two capacities. This may be argued further when costs are determined, (and might, for example, depend on whether he was receiving any payment from CGrowth (or its parent company) by way of salary or director's remuneration that covered him while he was attending) but it seemed to me that the likely principle was that in the absence of any other argument one would assume that his time should be apportioned 50-50 between these two roles.

    iv) Whilst it was clear that Mr Wright would have had significant expenses in travelling from the USA to attend court hearings, it was the Claimant's position that the figure claimed would need to be better evidenced. Mr

Wright apparently had based the figure on his credit card statements and one might expect these, if not the original invoices for travel and subsistence to be before the Court. Again, there may be a question as to whether these were costs which Mr Wright expended in making his own defence, or whether they were expended in making a defence on behalf of CGrowth, or on behalf of both such defendants.

17. Having regard to all these points, I determined that it was appropriate to scale back substantially Mr Wright's claim for costs on account. I awarded these at £15,000. This was less than an existing costs liability that Mr Wright had to the Claimant. The amount should be set off against that liability with effect from the date of the hearing.

18. I would like to make clear, however, that in awarding a payment on account of costs I am not predetermining any of the questions that have been raised by the Claimant in criticism of Mr Wright's costs claim. I have not scrutinised in detail the evidence for his costs claim or heard argument in sufficient detail to determine any of these matters. I have heard enough only to reach the conclusion that there are some credible challenges that could result in Mr Wright receiving substantially less than the full amount he is claiming by way of costs, and that I should take account of these challenges in determining an amount to be paid on account of costs.

19. Mr Wright, however, no doubt will have understood the criticisms of his evidence that the Claimant is making. He may wish to provide further evidence to substantiate his claim in costs when this comes to be assessed.

## 5. THE CLAIMANT'S APPLICATION FOR MR WRIGHT TO BE JOINTLY LIABLE FOR CGROWTH'S COSTS LIABILITY

### *Preliminary*

20. By an application notice dated 14 August 2023, the Claimant has asked the Court to make an order, by analogy to an order under Section 51 of the Senior Courts Act 1981, that Mr Wright be made jointly and severally liable to bear those parts of the Claimant's costs for which CGrowth has been held liable under the order that I made dated 6 July 2023.

21. Whilst the possibility of such an application had been trailed earlier, Mr Wright would have received this application only a few weeks prior to the hearing. Further, he would not have understood the Claimant's full case on this point until he received the Claimant's skeleton argument.

22. In view of this point, and having regard to the size of the potential liability involved, I gave Mr Wright an opportunity to say whether he was ready to answer this application. Mr Wright indicated that he would not be seeking legal advice on this question; that he considered that he understood the case against him; and, as a result, that he was as ready as he would ever be. I therefore proceeded to hear the application. However, given the relatively short time that Mr Wright had to understand the nature of the claim and to garner his evidence in defence, I erred on the side of generosity in allowing Mr Wright to produce further relevant

evidence after the hearing (whilst also giving the Claimant an opportunity to respond to this before I finalised my judgment).

***The relevant law***

23. Section 51(1) of the Senior Courts Act 1981 provides that "*the costs of and incidental to all proceedings … shall be in the discretion of the court*". Section 51(3) gives the Court "*full power to determine by whom and to what extent the costs are to be paid …*". In *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira) (No 2)* [1986] AC 965, the House of Lords held that these provisions empowered the Court to make an order for costs against a non-party.

24. Mr Higgo helpfully, and fairly, presented in his skeleton argument the cases which outline the considerations that the Court will take into account in determining whether somebody who is not the losing party but is the director and shareholder of a losing party, might be made responsible for the costs of a losing party. These principles have been very usefully distilled within the Court of Appeal's decision in *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret v Sanayi AS v Aytacli* [2021] EWCA Civ 1037; [2021] 4 WLR 101 ("***Goknur***").

25. Lord Justice Coulson's analysis at paragraphs 40-41 is particularly useful and I set these paragraphs out in full:

> "40 Without in any way suggesting that these authorities give rise to a sort of mandatory checklist applicable to a company director or shareholder against whom a section 51 order is sought, I consider that the relevant guidance can usefully be summarised in this way:
>
> (a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (*Gardiner*[1], *Dymocks*[2], *Threlfall*[3]).
>
> (b) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as "the real party to the litigation" (*Dymocks, Goodwood*[4], *Threlfall*).
>
> (c) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare (*Taylor v Pace*), section 51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free

[1] *Gardiner v FX Music Limited* (unreported) 27 March 2000, a decision of Geoffrey Vos QC, as he then was, sitting as a deputy judge of the Chancery Division. This is referred to in the commentary to the White Book 2021 at 46.2.3

[2] *Dymocks* Franchise *Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty Ltd, Third Party)* [2004] UKPC 39; [2004] 1 WLR 2807

[3] *Threlfall v ECD Insight Ltd (Costs) [2013] EWCA Civ 1444*; [2014] 2 Costs LO 129

[4] *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414; [2006]1 WLR 2723 w

litigation for his own purposes (*North West Holdings*[5]). Such an order does not impinge on the principle of limited liability (*Dymocks, Goodwood, Threlfall*).

(d) In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company's pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party (*Metalloy*[6]). But if the company's stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the "real party", and could justly be made the subject of a section 51 order (*North West Holdings, Dymocks, Goodwood*).

(e) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful indicia as to whether or not a section 51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case (*SystemCare*[7]).

(f) If the litigation was pursued or maintained for the benefit of the company, then commonsense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation (*Symphony, Gardiner, Goodwood, Threlfall*).

(g) Such impropriety or bad faith will need to be of a serious nature (*Gardiner, Threlfall*) and, I would suggest, would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.

41 Therefore, without being in any way prescriptive, the reality in practice is that, in order to persuade a court to make a non-party costs order against a controlling/funding director, the applicant will usually need to establish, either that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation, or that he or she was guilty of impropriety or bad faith. Without one or the other in a case involving a director, it will be very difficult to

[5] *In re North West Holdings plc (In Liquidation) (Costs)* [2001] EWCA Civ 67; [2002] BCC

[6] *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613

[7] *SystemCare (UK) Ltd v Service Design Technology Ltd* [2011] EWCA Civ 546; [2011] 4 Costs LR 666

> persuade the court that a section 51 order is just. Mr Benson identified no authority in which a section 51 order was made against the director of a company in the absence of either personal benefit or bad faith/impropriety. Conversely, there is no practice or principle that requires both individual benefit and bad faith/impropriety on the part of the director in order to justify a non-party costs order. Depending on the facts, as the authorities show, one or the other will often suffice."

26. *Goknur*, and the cases mentioned in it, refer to circumstances where a non-party (usually a director/shareholder of a party) may be made liable for a third-party costs order. Of course, Mr Wright is not a non-party. He is a defendant who has succeeded in his defence. Nevertheless, I accept that the reasoning in these cases is relevant to his position and to the way that I should exercise my very broad powers under CPR rule 44.2.

27. To put the matter even more shortly, the cases establish that:

    i) an order against a non-party is "exceptional" - although what is meant by "exceptional" has been given a gloss by the judgment delivered by Lord Brown of Eton-under-Heyward in *Dymocks:*

    > "… exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense."

    ii) The overarching test I need to consider in exercising the very broad discretion given to a trial judge under CPR rule 44.2, is whether it would be just, in all the circumstances, to make Mr Wright responsible (jointly and severally with CGrowth) for CGrowth's costs liability.

    iii) Whilst there is no list of factors which should be prescriptively followed, the Courts have found it helpful to consider the question of the justice of the case by considering in particular:

        a) whether the director/shareholder can fairly be described as the "real party to the litigation" (a point that has been described as the "touchstone" in relation to this point); control and funding are relevant to this point but what will probably matter most is whether the individual director is seeking to benefit personally;

        b) if the litigation is being maintained for the benefit of the named party (CGrowth in this case) then common sense dictates that the Claimant will need to show some other reason why it is just to make an order, such as impropriety or bad faith, in each case of a serious nature, and probably causative of the applicant unnecessarily incurring costs in the litigation.

***Relevance of Mr Wright's control and funding***

28. Turning first to the question of whether Mr Wright can be regarded as the real party to the litigation, it is relevant first to note that I consider that he should be regarded as having conduct of the litigation on behalf of CGrowth, acting as its director. Mr Wright explained that he did report back to the other directors on the litigation, but I do not think that he disagrees with the proposition that he had overall conduct of the matter.

29. Secondly, it seems by his own account, Mr Wright acknowledges that he assisted with the funding of this litigation on behalf of CGrowth. He says that he considered it his "fiduciary duty" both to cause CGrowth to resist the claim and to assist it in doing so through such funding. As far as I can tell this funding was provided through Mr Wright arranging the payment of CGrowth's legal costs by companies that he owns or by spending his own time working on the defence.

30. I do not think that English law would recognise a director's fiduciary duty as extending this far. Nevertheless, I am prepared to believe that Mr Wright may have felt a moral imperative to assist in defending a company in which he was the principal director.

31. The relevance of Mr Wright procuring funding is also somewhat lessened by the fact that Mr Wright was also a defendant in his own right. He appears to have considered himself to have had joint liability for the costs of the solicitors as a result of those solicitors also acting for him personally in relation to his own successful defence. If he anyway considered that he had some contractual liability to see that these costs were paid, it is more difficult to argue that in funding CGrowth's payment he must have been motivated to bring about CGrowth's defence for other ends.

32. Having regard to both these points I do not think it can be inferred directly from the mere fact that Mr Wright provided (or procured the provision of) financial support to CGrowth that he must have done so because it was in his own separate interest to see that CGrowth procured a defence.

***Was Mr Wright the sole beneficiary of CGrowth's defence?***

33. The questions whether a director had conduct of the matter, and whether he was funding a party are pertinent to the question whether that director should be seen as the "real party to the litigation". But these considerations are not necessarily conclusive by themselves. They may carry a great deal of weight by themselves where the director in question is the sole director and shareholder, so that the company in question can be seen as his creature, but they have much less weight in my view when the company in question has other significant stakeholders that might benefit from a successful defence.

34. On the basis of the information provided to the Court through Mary Young's 14th Witness Statement, and the attachments to it, it seems that CGrowth was wholly owned by CGrowth Capital Inc, a company which has or had a listing in the US (but not one of the major stock markets) and a wide range of shareholders. Mr Wright was a substantial shareholder in CGrowth Capital Inc, with an economic

interest in something like 22-23% of its Common Stock (although he held a type of share with enhanced voting rights).

35. From the information provided after the hearing by Mr Wright, it is clear that CGrowth Capital Inc. had hundreds of other shareholders. A great many of them had very small interests. It appears that Mr Wright (even when his holding is taken together with that of his own company, Keystone) was not the largest shareholder. According to the share registers produced (which I treat with caution as they have not been verified by any statement of truth) there were at least eight shareholders with more shares than Mr Wright (taking together shares held by him and those held by Keystone). The true economic ownership however may be complicated by differing share rights and it is therefore difficult to know the true position. Nevertheless, I think it is fair to assume that there were. to a substantial degree. shareholders other than Mr Wright who would have benefited from any benefit that CGrowth (and therefore CGrowth Capital Inc) would obtain through mounting a defence.

36. Mr Wright also was not the only director either of CGrowth or of CGrowth Capital Inc. Furthermore, it seems that CGrowth itself also had other important stakeholders including bondholders other than Trafalgar who held bonds denominated in various currencies with a total face value which Mr Wright stated to be around USD 4 million and which seems to be borne out by a bond holder register (also unverified) produced by Mr Wright.

37. It is difficult to conclude, just considering the basis of ownership, therefore, that CGrowth itself was not a "real party" to the litigation. CGrowth was not of its nature merely a vehicle for Mr Wright's interests, it is a company with a range of stakeholders.

***Must Mr Wright have known that defending the claim was not in CGrowth's interest?***

38. The principal argument advanced by the Claimant as to why it is just to make a costs order against Mr Wright is that resisting Trafalgar's claim could not have been in the interests of CGrowth, and therefore must have been motivated and caused by some separate interest of Mr Wright. If resisting the claim was not in CGrowth's interests, and Mr Wright was nevertheless causing it to pursue a defence, the Court should infer that he was doing so in his own interests and should be regarded as the real party to the litigation.

39. In this regard, Mr Higgo referred me to the case of *Threlfall* (which, as we have seen, was extensively referred to in *Goknur).* Here the Court of Appeal overturned a first-instance decision that had refused an order that the second defendant, who was a director of the first defendant, should be jointly and severally liable for the costs of the action. The Court of Appeal explained that such an order was not tantamount to piercing the corporate veil. Lewison LJ said:

> "in deciding whether or not to make such an order, the court is not fettered by the legal realities. It is entitled to look to the economic realities. It is in this sense that many of the cases pose the question whether the non-party is 'the real party' in the case."

40. The Claimant's key argument is that there was no commercial benefit to CGrowth defending the claim. The Claimant accepts that CGrowth's long-standing position had been that CGrowth was entitled to set off any interest owed to Trafalgar under the CGrowth bond contracts that had been issued in return for non-cash consideration against the unpaid amounts allegedly due from Trafalgar under those contracts. But the Claimant argues that, even if one assumes that CGrowth had an entitlement to set off interest, as CGrowth claimed in its defence, money was due to Trafalgar (the minimum sum of £9.55 million as at 14 February 2022, as Ms Young explained in her evidence before the summary judgment hearing).

41. The Claimant argues further that CGrowth has never identified a commercial reason for defending the claim, indicating before trial that it was only doing so because of the nature of the claims brought by Trafalgar in fraud and conspiracy.

42. I note in passing that one might turn this round and ask, if it is clear CGrowth would have done better by admitting the claim, than accepting responsibility to repay the bonds, why Trafalgar pursued the claim at all and did not just affirm the bonds and exercise its break to claim repayment of them.

43. It is clearly the case that, if CGrowth had succeeded completely in its defence, it would follow that would still be responsible to meet its obligations in respect of the bonds it had issued, including interest on those bonds.

44. However, it is important to note that if CGrowth had not defended itself against Trafalgar's claims, these included claims that:

    i) CGrowth (and Mr Wright) entered into the CGrowth Bond transactions dishonestly, in order to assist Mr Hadley to conceal his frauds; and

    ii) in order to injure Trafalgar's commercial interests joined Mr Hadley's conspiracy to injure Trafalgar by unlawful means, or alternatively conspired with Mr Hadley, PPL and Mr Thwaite to injure Trafalgar's interest by unlawful means.

45. It would have been natural for CGrowth to wish to defend these claims if it did not consider them to be true.

46. The Claimant claimed that the consequence of this that CGrowth (and Mr Wright) were liable in the "minimum amount" of £6,252,281.30, (calculated as the sum of £5,460,000.90 plus interest at the point of the claim) (see paragraphs 181.7 and 182.6 of the original and all amended versions of the Claimant's Particulars of Claim). This sum was reflected in paragraph 36 of the prayer for relief found at the conclusion of the Particulars of Claim which set out as one of the alternative forms of relief that the Court might grant:

> "… a declaration that CGrowth is liable to account to Trafalgar as a constructive trustee for dishonest assistance in the breaches of fiduciary duty by Mr Hadley and/or Mr Biggar pleaded herein and pay equitable compensation in the minimum amount of

> £6,252,281.30 or such further sum as is found to be due upon the taking of an account."

47. Logically, if CGrowth had accepted liability on this basis it would have been jointly responsible for the entirety of the Claimant's losses (finally assessed at around £14.4 million) rather than the "minimum amount" mentioned here and might also be jointly and severally liable for the whole of the Claimant's costs. Whilst this minimum amount might be taken as an indication of the figure at which Trafalgar would settle, had CGrowth accepted this claim, this was not certain.

48. Also, I accept that CGrowth considered that it would have had some kind of counterclaim against Trafalgar on the grounds that Trafalgar had breached its obligations in relation to the provision of the consideration that it had agreed to provide in relation to non-cash consideration for the bonds.

49. The Court can only speculate as to how matters would have turned out if CGrowth had accepted Trafalgar's claim before trial and whether CGrowth would have been in a better or worse position than the position it would have achieved had it been successful in this litigation. This remains uncertain even now and was doubly uncertain when Mr Wright and (to the extent they were involved) the other directors of CGrowth, were considering their duties as directors and determining that CGrowth should defend the case.

50. In view of such uncertainty, I do not accept that the Claimant has established that Mr Wright (and the other directors) must necessarily have perceived that there was no commercial benefit to CGrowth in defending the claim.

51. I accept Mr Wright's contention that CGrowth, right until the end of proceedings, considered that it had a reasonable chance of being successful in its defence. In the end the Claimant failed against CGrowth in relation to its contention that CGrowth was part of the "Overarching Conspiracy" claimed by Trafalgar. The Claimant succeeded against CGrowth only on the basis of CGrowth's vicarious liability for the actions of its agent, PPL in bribing Mr Hadley by entering into an Introducer Agreement with him from which he would benefit personally. The Claimant also succeeded in relation to the various equitable remedies it sought on the basis that CGrowth should be fixed with the knowledge and intentions of its agent in relation to this matter. The facts surrounding this Introducer Agreement emerged only towards the trial, and up to then it was not unreasonable for CGrowth (and Mr Wright) to believe that it might win on all points.

52. It seems to me far more likely than not that Mr Wright and the other directors of CGrowth would have perceived that CGrowth had a defence with reasonable prospects of success and that it would have been natural for them to wish to pursue that defence. Having regard to the points made above, I do not think that it is safe to conclude that they must have calculated that CGrowth would be better off accepting Trafalgar's claims.

***Was Mr Wright rather than CGrowth the "real party"?***

53. It is difficult to see then in what sense CGrowth could not be regarded as the "real party" in respect of its defence.

54. In my view, the contention that Mr Wright was pursuing this claim for his own ends rather than in the interests of CGrowth cannot be inferred merely on the basis of the Claimant's assessment of CGrowth's position had it succeeded on all accounts in the litigation but still had liability to repay the bonds.

55. The Claimant has, however, described two ways in which Mr Wright stood to benefit from CGrowth succeeding in its case, so as to back their argument that Mr Wright was the true beneficiary of a successful defence by CGrowth.

56. The first was that Mr Wright indirectly had a significant shareholding in CGrowth Capital Inc. which wholly owns CGrowth. This is understood to be something like a 23% interest.

57. There is no logic in saying that this interest makes Mr Wright, rather than CGrowth, the real party behind CGrowth's defence. If it was not in the interests of CGrowth to defend the claim, then it would equally be illogical for Mr Wright to fund and defend the claim on the basis of an indirect 23% economic interest in CGrowth's equity (which anyway stood behind other stakeholders such as the other bondholders).

58. The second point advanced is that Mr Wright is the President, Director and CEO of Powder River Resources ("**Powder River**"). This is understood to have been another wholly-owned subsidiary of CGrowth Capital Inc. during most of the period of the litigation. At trial, Mr Wright had described Powder River as representing 90% of the balance sheet value of CGrowth Capital Inc. It appears that in December 2022 there was a corporate reorganisation which had the result that the shareholders in CGrowth Capital Inc. became direct shareholders in Powder River with similar percentage shareholdings (except that some shares were issued to CGrowth, said to be by way of further security). Both the Claimant and Mr Wright considered this not to be particularly relevant to the analysis. I agree.

59. CGrowth's bonds are secured against Powder River. The Claimant makes the point that Mr Wright would have appreciated that Powder River is (and has always been) likely to find its loans called in and security enforced against it should there be the enforcement of a judgment against CGrowth. Mr Wright, as a significant shareholder in CGrowth Capital Inc. would obviously have wished to avoid or at least delay a forced sale of such a material asset. Accordingly, it can be safely inferred that it was Mr Wright's interest in Powder River and CGrowth Capital Inc. that he was trying to protect by funding and controlling CGrowth's defence.

60. I was hoping that the Court would obtain more information about the security arrangements, but this has not been forthcoming. However, it does not seem to be disputed that CGrowth holds security over the assets of Powder River.

61. Mr Higgo suggested during the hearing that Powder River was receiving the benefit of free money and, it was his indirect interest in Powder River that made Mr Wright the true beneficiary of the defence. But Powder River was not receiving free money. My understanding is that it remains responsible for repaying interest on whatever loans it received from CGrowth. At some point it will need to repay the loan it has had from CGrowth and interest on that loan.

62. Powder River is not therefore obtaining a direct economic advantage over and above the bargain it made with CGrowth - the benefit of a 10-year loan from CGrowth (with breaks) at a high level of interest.

63. It is true that Powder River has obtained the benefit of more time to repay its loans than it would have had if Trafalgar had affirmed the bonds and exercised its break. In that case CGrowth presumably would have the right to exercise a matching break clause under its loan agreement with Powder River (and the other CGrowth Underlying Borrowers).

64. I do not know (as I do not have a copy of the loan agreement) whether CGrowth had a right to exercise a break independently of an early termination by a bondholder. However, if it did have such a right, then CGrowth's decision not to settle with Trafalgar, but instead to fight this case, has similarly benefited Powder River by giving it more time to pay (whilst still accruing an interest liability).

65. The benefit of having more time to pay could only be regarded as a substantial benefit to Powder River if Powder River would have been unable to meet its obligations if its loan was called in early, but Powder River expected to be able to meet its obligations if the loan continued for the full original 10-year period. If this were so, then CGrowth also must be seen as benefitting from the extra time, since it was in its interests to obtain repayment from Powder River - without it CGrowth would itself become insolvent and be unable to meet its obligations to Trafalgar and to the other bondholders. CGrowth's position was, and remains, mitigated by the security CGrowth holds, but it must have been in CGrowth's interests to be able to obtain repayment without the messy and uncertain business of enforcing security overseas.

66. Mr Wright, through his 22-23% holding in CGrowth Capital Inc. (and it seems after the corporate reorganisation that took place in December 2022, subsequently through a holding in Powder River itself through his company Keystone) would have had an interest in the survival of Powder River. Nevertheless, I think it is questionable whether his interest was any greater than that of CGrowth. CGrowth's own solvency was linked to the ability of Powder River to pay its debts when they became due. CGrowth would need to be repaid its loans with 10% interest before any shareholders received a return from Powder River. According to Mr Wright, preferred shareholders would also need to be repaid before the shares held by Keystone would receive the benefit of a sale of Powder River's assets,

67. Having regard to CGrowth's own interest in Powder River's survival, I do not see that a consideration of the position of Powder River is persuasive to demonstrate that Mr Wright, rather than CGrowth, should be regarded as the true beneficiary

of CGrowth's defence so as to displace my view that CGrowth was the true beneficiary of the defence.

68. As I consider that the Claimant has not persuaded me that the litigation was being maintained for reasons other than the benefit of CGrowth, the Claimant can succeed in this application only if the Claimant can show some other reason why it is just to make an order such as impropriety or bad faith.

69. I cannot see that there was any impropriety or bad faith in CGrowth maintaining its defence, or in Mr Wright procuring that CGrowth maintained its defence.

70. Taking all the matters discussed above into account, I do not, therefore, consider that this case is one of the exceptional cases where it would be just for me to use my discretion to make Mr Wright jointly responsible for CGrowth's costs liability to Trafalgar. I will therefore dismiss this application of the Claimant.

## 6. INTEREST ON THE CLAIMANT'S DAMAGES

71. At the first consequentials hearing I determined the principal sums due to the Claimant and allowed interest on these sums on the basis of simple interest.

72. As the Court had found that the Claimant is entitled to multiple remedies against the same Defendants, the Claimant was required to make certain elections as to the relief it wished to claim. The Claimant elected as follows:

    i) For a claim for damages for the Original Conspiracy against Mr Hadley, Mr Chapman-Clark, Pinnacle and Mr Lloyd (together the "**Original Conspirators**"), corresponding to paragraphs 618(ii), 621(i) and 624(i) in the Liability Judgment. It calculated the sums due based on losses from its investments in the Dolphin, Quantum, Titan, Momentum, Shawcross and CGrowth transactions adjusted to reflect recoveries to date.

    ii) For damages for bribery committed by Mr Hadley, PPL and Mr Thwaite, following the Court of Appeal's Order and the Court's further findings relating to bribery and for vicarious liability against CGrowth, corresponding to paragraphs 618(iii), 627, 631, and 632(v)(c) in the Liability Judgment.

73. Whilst the Claimant has elected to recover in respect of common law claims (unlawful means conspiracy and bribery), it is material that I had found that it was entitled to equitable compensation against certain Defendants for breach of fiduciary duty (in the case of Mr Hadley) and dishonest assistance/ knowing receipt (in the case of Mr Chapman-Clark, Mr Lloyd, Pinnacle and CGrowth).

74. The precise sums that Trafalgar claimed were supported by the calculations exhibited to the Court. These calculations were not challenged, and I accepted them. The calculations included interest calculated at the rate of 5.65% up to judgment and I agreed that this was an appropriate rate.

75. I also agreed to keep open the question whether interest should be compounded annually as there was no time during the day at the first consequentials hearing

for the Claimant to make its argument in this regard. Pending any further order of the Court, I ordered that pre-judgment interest (which I ordered should be regarded as applicable up to 29 June 2023) would be due calculated on the basis of simple interest.

76. The Claimant's calculations of costs due also included post-judgment interest fixed by statute at 8% (see section 17(1) Liability Judgments Act 1838; taken with article 2, Liability Judgment Debts (Rate of Interest) Order 1993). I agreed also at the last consequential hearing that this was appropriate.

77. The Claimant now invites the Court to modify that relief to order instead compound interest, applying the Court's equitable jurisdiction.

78. There are two relevant circumstances in which the equitable jurisdiction can be used to award compound interest in common law claims. These were described the dictum of Lord Brandon in *President of India v La Pintada Compania Navigacion SA* [1985] AC 104 ("***La Pintada***"), at [116B] as follows:

> "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 retained by fraud ["the **fraud limb**"], or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position ["the **fiduciary limb**"]."

79. The Court of Appeal in a very recent decision, *Granville Technology Group v LG Display [2023] EWCA Civ 980* ("***Granville"***) has clarified the basis and scope of the equitable jurisdiction, focusing on the fraud limb. This confirms three key points:

    i) The equitable jurisdiction to award compound interest has historically been regarded as restitutionary. Its rationale is to ensure that a fiduciary (or a fraudulent wrongdoer) does not benefit from his wrongdoing (see at [46] and [56]).

    ii) Lord Brandon's fraud limb in *La Pintada* was intended to apply to a case in which the fraud had resulted in the fraudster obtaining the claimant's money and retaining it for his own benefit, such that he should be treated as in a position equivalent to a fiduciary (see at [66]).

    iii) Accordingly, the equitable jurisdiction does not apply to every case of fraudulent conduct, or simply because the defendant behaved badly or fraudulently. Rather, (as stated at [65]) the application of the fraud limb turns on whether the defendant had:

    > "in hand a fund obtained from the claimant which he has, or is deemed to have, made use of for his own benefit".

80. I agree with the Claimant's assertion that Mr Hadley clearly falls within the "*fiduciary limb*" of ***La Pintada***. Mr Hadley owed the obligations of a fiduciary for the purposes of the bribery claim and generally, in dealing with Trafalgar's

funds (or assets derived from those funds) in the course of the Original Conspiracy, I have already found that he breached those duties in respect of each of the transactions entered into in pursuance of the Original Conspiracy.

81. I agree also with the Claimant's assertion that each of Mr Chapman-Clark, Pinnacle, Mr Lloyd, CGrowth, PPL and Mr Thwaite (as well as Mr Hadley) fall within the "*fraud limb*" of ***La Pintada***. Each of them received and/or controlled Trafalgar's funds (or their traceable proceeds) and used them for their own benefit. This arises in two ways:

    i) ***Original Conspiracy:*** I found in the Liability Judgment that the members of the Original Conspiracy agreed to fundraise with the objective of obtaining pension investors' monies, directing them through Trafalgar; and then procuring that they be paid commissions from these funds, via alleged investee companies that could be relied upon to benefit them. As I stated at [600] of the Liability Judgment:

    > "The effect of the Original Conspiracy was to place pension investors' funds in the hands of Mr Hadley so he could disburse them in ways that would benefit the conspirators, including himself". Moreover, Mr Hadley's breaches of fiduciary duty and the relevant defendants' knowing receipt were one of the (many) pleaded unlawful means."

    ii) **Conspiracy to Bribe**: Each of Mr Hadley, PPL Mr Thwaite and CGrowth participated in a conspiracy to bribe Mr Hadley (see [600] of the Liability Judgment, in relation to the CGrowth transaction). Whilst CGrowth was not directly a conspirator, the Court found (see at [600] and 632(i)) that these conspirators procured that Trafalgar's funds, or their traceable proceeds, would be received by PPL (for CGrowth); that bribes be paid from those funds to Mr Hadley and Proactive; and that the CGrowth transactions be concluded – in each case for the (collective) benefit of all these parties including CGrowth.

82. The bribery defendants thus procured that funds were obtained from the Claimant which they have, or should be deemed to have, made use of for their (collective) benefit.

83. The restitutionary basis underlying the justification to pay compound interest was confirmed by *Granville*. It was succinctly described at [65]*:*

    > "On this basis it is clear that the equitable jurisdiction to award compound interest does not apply to any case of fraudulent conduct. Compound interest is not awarded just because the defendant has behaved badly, or even fraudulently, and its purpose is not to deter other people from engaging in dishonest conduct. The jurisdiction does not apply, for example, to a straightforward action in tort for damages for deceit, but depends upon the defendant having in hand a fund obtained from the claimant which he has, or is deemed to have, made use of for his own benefit."

84. At first glance, this creates a difficulty for the Claimant's case for compound interest. The difficulty is that different defendants obtained different benefits from the arrangements and, on its face, the restitutionary principle means that they should only be required to pay compound interest on the amounts that they received.

85. However, this objection falls away when one realises what has been found against the relevant defendants. Two conspiracies have been established: the Original Conspiracy and a conspiracy to bribe Mr Hadley in respect of the CGrowth transactions. Both conspiracies involved assistance in procuring Mr Hadley to commit breaches of trust.

86. In *Central Bank of Ecuador v Conticorp SA* ("***Conticorp***"), a Privy Council case referred by Males LJ at [65] in *Granville*), Lord Mance (at [185]) quoted with approval what he described as "*a recent penetrating judgment*" in *Novoship (UK) Ltd and others v Nikitin and others* [2014] EWCA Civ 908, [2015] 2 WLR 526 ("***Novoship***"). In that case, at [66-93] the Court of Appeal had held that both knowing recipients of trust property and dishonest assistants of breaches of duty by a fiduciary were liable in equity to account for unauthorised profits. The Court refused to distinguish between the liability in equity of the fiduciary and that of a knowing recipient or a dishonest assister. Referring to this, Lord Mance stated on behalf of the Board (that is the judges hearing the case for the Privy Council) that:

> "The Board considers that this is in principle correct, and that the same approach must govern the discretion to award compound interest. There is in this connection no satisfactory reason why those who dishonestly receive and retain, or procure or assist the fiduciary to misapply, the fiduciary assets should be in any different position from the fiduciary who actually misapplies the assets. This is perhaps particularly obvious in the case of those who have dishonestly procured or assisted the fiduciary to misapply the assets."

87. In our current case the members of the Original Conspiracy and the conspiracy to bribe Mr Hadley were each involved in, or in the case of CGrowth found responsible for involvement in, assisting Mr Hadley in a breach of trust. I have found joint and several liability among those involved in the Original Conspiracy for the entirety of Trafalgar's damage and joint and several liability among those involved in the conspiracy to bribe Mr Hadley for the total funds involved in the CGrowth conspiracy. In such cases of conspiracy, it is clear from *Conticorp* that I should make no distinction between these parties in relation to the question of responsibility to pay compound interest.

88. I therefore will grant the Claimant's application to amend the order already made so that the amounts due under paragraphs 1 and 2 of the order I made on 19 July 2023 shall be calculated to include compound rather than simple interest.

## 9. CONCLUSION

89. To summarise, I have dealt with the three matters that were put before me at this hearing as follows:

i) I have agreed that Mr Wright should get the benefit of a payment on account, but at a very substantially lower level than he was asking for, and for this to be set off against an existing unpaid cost liability Mr Wright owed to Trafalgar;

ii) I have refused the Claimant's application to make Mr Wright jointly liable in costs with CGrowth;

iii) I have accepted the Claimant's (uncontested) application to vary my original order to allow for interest to be compounded.

90. I will ask the Claimant to draw up an order reflecting these decisions. If possible, I would ask the Claimant to settle the order with Mr Wright (and with CGrowth). It would not, I think, be proportionate to ask the Claimant to agree it with any of the other defendants who have chosen not to appear.

91. This, I trust, disposes of all matters before me in relation to the Trafalgar litigation with the exception, or possible exception, of the following:

i) any application to appeal any of my decisions above;

ii) costs in respect of the second consequentials hearing; and

iii) the settling of the final terms of the order referred to above.

92. I hope that we could avoid a further hearing to deal with these matters. I would think it proportionate to deal with costs of this hearing through considering representations on paper. If there is any request for permission to appeal, I would propose also dealing with this on paper, but am open to the possibility of a hearing (probably either a hybrid or completely remote hearing) to deal with this if requested.