Neutral Citation Number: [2019] EWHC 1407 (Comm)

Case No: CL-2012-000478

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERT COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 12th June 2019

Before :

PATRICIA ROBERTSON QC
(sitting as a Deputy High Court Judge)

- -

Between :

JSC VTB BANK
(a company incorporated in Russia)

Claimant

- and -

(1) PAVEL VALERJEVICH SKURIKHIN
(2) PIKEVILLE INVESTMENTS LLP
(3) PERCHWELL HOLDINGS LLP

Defendants

- and -

(1) ZENO ALOIS MEIER
(2) BEAT LERCH
(3) CROWN CAPITAL HOLDINGS LIMITED
(4) THE BERENGER FOUNDATION
(5) ACCREDA TRUSTEES LIMITED

Respondents

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- -

Tim Penny QC and Tim Matthewson (instructed by **PCB Litigation LLP**) for the **Claimant**
David Lord QC and Sebastian Kokelaar (instructed by **Withers LLP**) for the **Fourth Respondent**
The Defendants and the First to Third Respondents did not appear and were not represented

Hearing dates: 23-25 January 2019, 12 March 2019

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JUDGMENT

Patricia Robertson QC (sitting as a Deputy High Court Judge) :

(A) Introduction

1. The Fourth Respondent ("***Berenger***") applies by Application Notice dated 12 July 2018 to discharge the order of Mr Christopher Butcher QC (sitting as a deputy Judge of the High Court) dated 21 July 2015 ("the Receivership Order") whereby receivers by way of equitable execution were appointed over the membership shares and interests in the Second Defendant ("Pikeville"), an English limited liability partnership which owns three properties in Italy that were originally acquired for some 18 million Euro. The Claimant ("***VTB***") hopes, through that mechanism, to effect sales of those Italian properties, against the proceeds of which it can then seek to enforce the judgments it has obtained against the First Defendant, Mr Skurikhin, which remain unsatisfied.

2. The Discharge Application was heard for three days in January 2019, extended from the original estimate of two days to allow time for cross examination of two witnesses, but it did not prove possible to complete the hearing in that time, given the number of issues raised on either side, and it was necessary to sit for a fourth day in March 2019 to allow time for oral argument on the remaining issue (relating to s.53(1)(c) of the Law of Property Act 1925). The application bundle now comprises some 14 files and 5 files of authorities. Extensive expert evidence has been filed on issues of Liechtenstein law and Nevis law and submissions have also been made on issues of New Brunswick law (albeit without any expert evidence). No point has been left unexplored. I do not propose to deal expressly with every single matter that has been debated before

me, and which I have considered, but rather to focus on the principal factors which have contributed to my decision.

3. In broad summary, what I have to decide is whether it is now open to Berenger to seek to discharge the Receivership Order on grounds that were available to it at the time of the application in 2015 (issue 1); if so, whether those grounds are well-founded (issue 2); if not, whether the Receivership Order should nevertheless be set aside on the basis there has been a relevant change of circumstance since the Receivership Order was made (issue 3); and finally, whether all of Berenger's arguments for setting aside the Receivership Order (which depend on the proposition that the relevant assets were, at the material times, held in trust for Berenger) can be side-stepped because the beneficial interest was never validly transferred away from Mr Skurikhin to Berenger in the first place (issue 4). Each of those broad issues involves numerous sub-issues.

(B) Background facts

4. The protagonists to this application have been VTB and Berenger. Mr Skurikhin (who, since VTB obtained its judgments against him, has declined to come to this jurisdiction after being sentenced to prison for contempt of Court) has not appeared or been represented. However, as will appear, one of the central issues between the parties is whether the underlying reality here is that Mr Skurikhin always was, and still is, pulling the strings behind the scenes, such that Berenger's application represents just the most recent twist in the lengthy tale of his attempts to avoid meeting his liabilities to VTB (well-documented in previous judgments), or whether Berenger was, and is, acting independently of

Mr Skurikhin, in a perfectly proper endeavour to protect the other beneficiaries of the trust from the consequences of Mr Skurikhin's bankruptcy in Russia.

5. That being so, it is relevant briefly to summarise the wider background of the litigation between VTB and Mr Skurikhin, before turning to the facts that are specific to Berenger's application. I gratefully borrow from, and where necessary expand upon, the account of the factual background that was set out by Mr Andrew Henshaw QC, sitting as a Deputy High Court judge, in disposing of VTB's application against Berenger for security for costs: *JSC VTB Bank v Skurikhin and others* [2018] EWHC 3072 (Comm).

(1) The parties and VTB's claims against Mr Skurikhin

6. VTB is the second largest bank in Russia, and its majority shareholder is the Russian state. The First Defendant ("***Mr Skurikhin***") is a Russian individual resident and domiciled in Russia, who was the Chairman of the SAHO group of companies, which carried on business in the agricultural sector in Russia.

7. In December 2008, VTB re-financed loans in roubles to the SAHO group of companies in an amount equivalent to around £42 million, and Mr Skurikhin provided personal guarantees for the loans. The SAHO group companies defaulted on the loans, and demands were served on Mr Skurikhin in respect of his personal guarantees. The demands were not complied with and proceedings were issued against Mr Skurikhin in the Russian courts, leading to VTB obtaining a number of Russian judgments against him.

8. The Second Defendant ("***Pikeville***") is an English registered limited liability partnership, and is the registered owner of three Italian properties. One has until recently been used as a holiday home by Mr Skurikhin and his family, rent free, another is used by Mrs Skurikhin's business and the third is an empty plot that was intended to be redeveloped as a villa for the family's use. Pikeville purchased those properties for, in total, some 18 million euros using monies loaned to it by Miccros Group Ltd ("***Miccros***") a BVI company owned as to 55% by Berenger and as to 45% by the Eastbridge Settlement (through a company called Taurus Limited of which Mr Meier and Mr Lerch are the shareholders). As a result, in Pikeville's books the value of the properties is counter-balanced by the debt owed to Miccros. I note that Miccros paid Pikeville and Perchwell's costs of the hearing before Burton J, referred to below. VTB's position is that that loan is a sham, Miccros being controlled and ultimately owned by Mr Skurikhin. I do not have to decide that point, which is in issue in proceedings between VTB and Miccros in the BVI, but the fact that there is a live issue about it means I treat with caution the assertions that each of Mr Meier and Dr Schurti made in oral evidence that the membership interests in Pikeville have no real value.

9. Pikeville's registered members are currently the First Respondent ("***Mr Meier***"), the Second Respondent ("***Mr Lerch***"), and the Third Respondent ("***Crown***"). Crown is a company incorporated in Hong Kong owned and controlled by Mr Meier and Mr Lerch. It is common ground that until 10 June 2005 the beneficial owner of the membership interests in Pikeville was Mr Skurikhin. I shall have to deal in more detail below with the sequence of events in between these two dates, but for the present it is sufficient to note that by the

most recent of a number of declarations of trust, on 19 January 2010, Crown, Mr Meier and Mr Lerch each executed a declaration of trust pursuant to which they declared that they held the membership shares and interests in Pikeville on trust for the Fourth Respondent, Berenger. Berenger is a foundation incorporated under the laws of the Principality of Liechtenstein.

10. Whether Berenger ever in fact became the ultimate beneficial owner of Pikeville is in dispute, in the context of issue 4, which I shall come to later on in this judgment. However, issues 1-3 proceeded on the footing that the membership interests in Pikeville were, indeed, held on trust for Berenger at the material times and that Berenger, in turn, then held that, and certain other assets, on the trusts that were defined in its Statutes and Regulations, described below.

11. VTB sued Mr Skurikhin in England and Wales on the basis of the Russian judgments after having obtained a domestic freezing order in England against Mr Skurikhin and worldwide freezing orders against both Pikeville and Perchwell (the latter being another English LLP, of which Mr Meier and Mr Lerch are again the members, through which interests in a number of companies in the SAHO group are ultimately held). VTB's contention was from the outset (and still is) that Mr Skurikhin either has a right to call for the assets of Berenger (including the membership interests in Pikeville and Perchwell) to be transferred to him, or has *de facto* control of those assets, and that, on that basis, he is to be treated the owner in equity of those assets such that the judgments VTB has obtained against Mr Skurikhin are enforceable against them.

12. It is worth emphasising that Mr Skurikhin appeared and was represented at the hearing before Burton J on the return date for those freezing orders, in late

November and December 2012, and that Pikeville and Perchwell had their own representation at that hearing. Prior to that hearing, Gloster J had ordered Mr Skurikhin to give disclosure, describing Pikeville and Perchwell as having been 'extremely coy' about disclosure of the identity of their ultimate controlling party or parties: *JSC VTB Bank v Skurikhin* [2012] EWHC 3116 (Comm); [2012] 11 WLUK 239, at [27(vi)]. The disclosure ordered included by Gloster J the foundation deed, trust deed, bye-laws and regulations of Berenger and any letters of wishes and mandates (at [29]). As Christopher Butcher QC noted in his judgment (*JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm) at [10]) many of those disclosure requirements have never been complied with. At the time of the hearings before Gloster J and before Burton J, Mr Meier was not only a member of Pikeville (responding by way of witness statement on its behalf to the order for disclosure and provision of information made against it by Hamblen J) but he was also a member of the Board of Berenger and (as I shall come to address) Mr Skurikhin's trusted adviser. It is a reasonable inference that the basis on which it was being contended by VTB that Mr Skurikhin had control over Berenger must therefore have been well known to him and, through him, to Berenger, albeit at that stage Berenger itself was not a party to the proceedings.

13. The Regulations of Berenger were not before Burton J. because they had not been disclosed, despite Gloster J's order and despite the fact that (as we now know, the Regulations having been disclosed for the purposes of this application) the Regulations in force at the relevant time acknowledged that Mr Skurikhin, unlike the other discretionary beneficiaries, had the right to call for information.

14. Burton J concluded on the basis of the evidence before him (which included Mr Skurikhin's assertion that he was "only" a discretionary beneficiary) that VTB had "much the better of the argument" that Mr Skurikhin had control over Berenger and/or could call for the assets, such as to be the owner in equity of those assets, and on that basis continued the freezing orders against the Non-Cause-of-Action-Defendants ("NCADs"), Pikeville and Perchwell: *JSC VTB Bank v Skurikhin* [2012] EWHC 3916 (Comm); [2013] 2 All ER (comm) 418; [2012] 12 WLUK 59, at [34].

15. Burton J referred to the passage at [33] in the judgment of Sir John Chadwick P in *Algosaibi v Saad Investments Co Ltd* (CICA 1 of 2010), a Cayman authority which was cited by Gloster J at [58] as correctly articulating the test now applied in this jurisdiction for when the Court will grant a freezing injunction against a non-cause of action defendant: "The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD) - say, because the NCAD can be expected to act in accordance with the wishes or directions of the CAD (whether or not it could be compelled to do so) - is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant. But, as it seems to me, the existence of substantial control is not, of itself, enough to meet the first of the two requirements just mentioned. It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose;

or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD."

16. Burton J noted that there were "two ways in which the court can be satisfied that there is good reason to grant an order. The second of these is that there is 'some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD'. It is quite plain that, on the provisional findings of fact that I have been able to make on the evidence before me, if those facts remained the same when it came to enforcement, then the appointment of an equitable receiver would indeed fill the bill in that regard."

17. No one suggests that the judgment of Burton J gave rise to any form of issue estoppel. Berenger was not a party and what was decided was merely that VTB's position as to the beneficial ownership of Pikeville was arguable, leaving that issue for later determination. However, what is significant is that the possibility of a receiver by way of equitable execution being subsequently appointed, on the basis that the Court at a later stage would be asked to reach a decision on the issue of Mr Skurikhin's beneficial ownership of Pikeville and Perchwell, was squarely identified at that early stage, in the context of an application at which Pikeville was represented and Mr Meier was submitting evidence on its behalf. It was not a point which came as a bolt from the blue when VTB issued its application in 2014.

18. VTB was granted summary judgment in respect of sixteen Russian judgments (in amounts equivalent to approximately £7.6 million) by order of Simon J dated 7 March 2014, and in respect of a further nine Russian judgments (in amounts equivalent to approximately £5.8 million) by order of Blair J dated 14

November 2014. Mr Skurikhin has not satisfied these judgments or related costs orders.

19. On 12 June 2014, VTB applied for and obtained a worldwide freezing order against Mr Skurikhin (the "***WFO***"), the previous order against Mr Skurikhin personally having been domestic only. The WFO required Mr Skurikhin to make worldwide asset disclosure, but he failed to comply with that order. On 10 July 2014, Mr Skurikhin failed to attend court or to produce documentation under CPR Part 71 as had been ordered by Males J. VTB accordingly issued a committal application against Mr Skurikhin.

20. On 31 October 2014 Flaux J sentenced Mr Skurikhin to 16 months' imprisonment (with 4 months suspended) for contempt of court, saying: "…it is appropriate to impose a sentence of immediate imprisonment on Mr Skurikhin in relation to his failure to comply with the disclosure obligations in the freezing order, not least because those are matters in relation to which the freezing injunction is intended to be by way of assistance to the Bank in enforcing judgments already obtained and the only explanation for a deliberate breach of the obligation to disclose assets must be a deliberate attempt to thwart the Bank in enforcing its judgments and therefore is a particularly serious case of a contemnor in effect cocking a snook at this court." (*JSC VTB Bank v Skurikhin* [2014] EWHC 4613 (Comm); [2014] 10 WLUK 956, at [15]). The Claimant says Mr Skurikhin has not come into the country since then, so the committal orders have not been enforced against him and he remains in contempt of court.

21. On 16 December 2014, VTB issued an application to enforce its judgments against Mr Skurikhin by seeking the appointment of receivers by way of

equitable execution over the limited liability partnership interests in Pikeville (the "***Receivership Application*** ").

(2) Berenger and the Olympic trust

22. On 12 January 2005 (several years before Mr Skurikhin signed the personal guarantees on which VTB's claims were founded) Berenger was formed by WalPart Trust, a trust company, which is defined in the foundation documents as "the Founder". As the evidence now establishes (although Mr Skurikhin was not frank about this at the time of the hearing before Burton J) Mr Skurikhin was its economic founder and Walpart Trust established Berenger on Mr Meier's instructions, Mr Meier in turn acting on Mr Skurikhin's instructions.

23. The board of Berenger originally consisted of four individuals: Dr Andreas Schurti (a Liechtenstein attorney), Mr Urs Hanselmann (a Liechtenstein accountant and licensed trustee), Mr Meier and Mr Lerch. Mr Meier and Mr Lerch control Accreda Management AG ("***Accreda***"), a provider of fiduciary and corporate services to businesses and individuals.

24. Mr Meier and Mr Lerch resigned as members of Berenger's board on 13 March 2012, whilst Dr Schurti and Mr Hanselmann are the remaining members of the board. Berenger's position is that Mr Meier has, however, continued to assist the board in the management of the foundation's affairs and assets. VTB's position is that Mr Skurikhin exercises his control over Berenger by passing his instructions through Mr Meier.

25. Article 3 of the statutes of Berenger ("***the Statutes***") provides that the purpose of the foundation is "to cover the costs of upbringing and education,

advancement and support with regard to the general livelihood of one or more specific families as well as the pursuit of similar objectives" and that "the foundation may also provide such benefits to natural or juristic persons, institutions and suchlike" but that "the foundation pursues no commercial activity". (The latter constraint is a necessary feature of a foundation under Liechtenstein law and the evidence was that Mr Skurikhin's commercial activities were placed into a separate trust known as the Eastbridge Settlement.) The stated purpose of the Foundation is relevant to a debate between the experts that I will need to address in the context of issue 3.

26. Article 4 (headed "Regulations") provides that: "the beneficiaries and the extent of their benefits shall be specified in regulations, which shall be issued by the Founder of the foundation. Other bodies (e.g. the Board of Directors of the foundation) or third parties, who need not be involved in the foundation, may be appointed therein to determine in the form of regulations the beneficiaries and the extent of their benefits". I shall come in a moment to what the regulations have provided in that respect.

27. Article 5 (headed "Distributions") provides that:

> "The Board of Directors shall decide upon the level and nature of allocations to beneficiaries of the foundation within the scope of the regulations. The beneficiaries of the foundation shall have a legal claim only to the extent provided for in the regulations.
>
> Beneficiaries may not be deprived of their beneficial interest under the foundation by their creditors by means of proceedings for protective relief, execution or bankruptcy (Art. 567 PGR)"

28. The reference to Art. 567 PGR is to a provision of Liechtenstein law which protects against enforcement action by creditors the assets of a beneficiary who has an enforceable claim on the assets held by the foundation (i.e. a beneficiary

whose interest is not merely that of a discretionary beneficiary). Berenger's position is that the function of Article 5 of the Statutes is to extend that same protection to discretionary beneficiaries, although on Berenger's own case that is otiose, since discretionary beneficiaries have no claim on the assets held by the foundation against which a creditor would be entitled to enforce in any event. I shall have to consider that provision and Article 5 of the Statutes in the context of issue 2.

29. Under Article 11, the board has power to alter the statutes and to dissolve the foundation at any time, whereupon they are to decide what is to become of the assets, in accordance with the regulations.

30. On 12 January 2005 Walpart Trust, as the Founder, issued regulations pursuant to Article 1 of which there were appointed as beneficiaries Mr Skurikhin, his descendants, and trusts, foundations and the like whose beneficiaries include one or more classes of beneficiaries of the Berenger foundation ("***the Original Regulations***"). By section 3 of the Original Regulations, the Founder transferred, within the meaning of Article 4 of the Statutes, the right to modify the Original Regulations to the board (or council) of the foundation. Whilst expressed to be discretionary, under section 2 of the Original Regulations it was provided that the Council would normally make distributions only to Mr Skurikhin during his lifetime.

31. On 2 February 2005 the Olympic Settlement ("***Olympic***") was established, as further described below. On 16 February 2005 Berenger's board replaced the Original Regulations of Berenger with a new set of regulations ("***the February 2005 Regulations***"), which named Mr Skurikhin and, after his demise, his

family members, as discretionary beneficiaries of the foundation as to 20% of its assets and the trustee of Olympic (Accreda Trustees Limited) as discretionary beneficiary as to 80%. Thus, Olympic has been, since Berenger's adoption of the February 2005 Regulations, the intended principal beneficiary of Berenger. However, that 80%/20% split is qualified, in that section 1 of the February 2005 Regulations also states that the Board has "full discretion" as to distributions and that the "apportionment of 80%:20% is a long term guideline only".

32. The February 2005 Regulations of Berenger acknowledge Mr Skurikhin as having a special status amongst the beneficiaries, in that section 4 provides that beneficiaries other than Mr Skurikhin are not to have the right to receive any information about the Foundation's assets and income and section 8 provides that the Board of Directors is to have the right to amend, replace or revoke these Regulations at any time during the lifetime of Mr Skurikhin but after his demise they are only entitled to modify the Regulations in a manner that does not substantially depart from the February 2005 regulations.

33. The Olympic Settlement (" ***Olympic*** ") is a discretionary trust established under the laws of the island of Nevis. It was established by Mr Meier acting on Mr Skurikhin's instructions. Mr Meier and Mr Lerch are the directors of Accreda Trustees Limited, the trustee of Olympic.

34. By Article 6 of the Olympic trust deed the trust property is held on trust for such members of the specified class (defined in Schedule 1 as including such persons as they may nominate but also any company the Trustee may form in the exercise of their powers) as at the discretion of the Trustee the Trustee "shall from time to time by any deeds revocable or irrevocable appoint". Article 2

allows the Trustee to nominate additions to the specified class. Article 12 contains a power to declare that any of the persons or members of a class named or specified "who are would or might but for this Clause be or become a Beneficiary" is to be wholly or partially excluded from future benefit, or "shall cease to be Beneficiary" or shall be an "Excluded Person" and that any such declaration may be irrevocable or revocable and "shall have effect from the date specified in the said declaration". That power is subject to a proviso that it may not be exercised to derogate from any interest to which a beneficiary has become "indefeasibly entitled".

35. On 2 February 2005, and by a further resolution on 14 May 2007, the trustee of Olympic exercised its power under the trust deed to nominate thirteen individuals as beneficiaries of the settlement, including Mr Skurikhin, in defined percentages. The identities of the other 12 beneficiaries have not been disclosed, and nor has the percentage relating to Mr Skurikhin been identified, but it is common ground that the other discretionary beneficiaries were members of his family and friends.

36. Also on 2 February 2005, the trustee of Olympic passed a resolution that "a beneficiary cannot be designated as such" if any one or more of the specified points apply, including "in the event of a bankruptcy or lawsuit against him for an amount greater than USD100,000". Another of the scenarios listed in the resolution is where sentenced for an offence carrying a minimum prison sentence of a year, specifying that the "ban becomes irrevocable" in the case of a legally valid sentence but the person can become a beneficiary again in the event of an acquittal. This wording has been the subject of debate between the

experts in the context of issue 3, as to whether it suggests that the "default" is that where any of the listed points apply the ban is irrevocable. The same minutes which record that resolution also record Mr Skurikhin's intent that the Trustee establish the Olympic Settlement and his wish "that his family and friends should be beneficiaries, whereas he may or may not be a beneficiary himself".

37. I will come in due course, under issue 4, to a debate as to whether the beneficial interest in the membership interests in Pikeville was ever effectively transferred from Mr Skurikhin to Berenger. Subject to that, the assets within Berenger are the beneficial interest in Pikeville, which owns the Italian properties, and a 55% share in Miccros, the other 45% being held on trust by separate trust established under Nevis law, called the Eastbridge Settlement, of which Accreda Trustees Ltd is the trustee.

(3) The Receivership Application

38. At a directions hearing on 6 February 2015, Leggatt J gave VTB permission to join Mr Meier, Mr Lerch, Crown and Berenger as Respondents to the Receivership Application, and granted permission to serve Berenger out of the jurisdiction. The Receivership Application was served on Berenger in Liechtenstein on 10 April 2015 through the court's foreign process section. Thus, service was effected on Berenger some 3 months before the date of the hearing, albeit Berenger did not know the date of the hearing until this was confirmed some two weeks beforehand.

39. The evidence in support of the application made clear that "VTB contends that Mr Skurikhin is or should be regarded by the English Court as being the

beneficial owner of the membership interests in [Pikeville] and/or that he has the power to control the membership interests in [Pikeville], and that as such VTB should be permitted to enforce its judgments against Mr Skurikhin… against those membership interests". It was also made clear that the purpose of the application was to enable the Receivers, once appointed, to take steps to sell the underlying assets (in the case of Pikeville, the Italian properties) and the draft order contained powers directed to that end. VTB relied in support of the application on a report from an expert in Liechtenstein law, Dr Heinz Frommelt, which concluded that it was likely that there was a " mandate agreement " between Mr Skurikhin (as the economic founder of Berenger) and the members of Berenger's board pursuant to which Mr Skurikhin had the right to direct the members of the board to exercise their powers under the Statutes in a particular way, including by directing them to transfer Berenger's assets into his name.

40. Berenger did not file any evidence in opposition to the Receivership Application, nor did it attend the hearing on 13 July 2015, despite admittedly being on notice of that hearing. Berenger asserts that it was unable to respond to the Receivership Application at the time or to participate in the hearing because it lacked the funds to instruct solicitors and counsel in England. It is said that Berenger has now been able to make the Discharge Application only because a beneficiary of Olympic has made the necessary funds available to it. That, of course, as VTB points out, begs the question why that beneficiary (who, it has been confirmed, was a beneficiary at the time of the receivership application) did not fund Berenger's costs to enable it to be represented at that hearing and advance, then, the evidence and arguments that have been advanced

before me. Mr Meier, Mr Lerch, Pikeville and Crown likewise did not respond to the application or attend.

41. The Receivership Application was heard by Christopher Butcher QC (as he then was), sitting as a Deputy High Court Judge. In his judgment dated 21 July 2015, the Deputy Judge found as follows (*JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm); [2015] 7 WLUK 651):

    (i) The authorities establish that a receiver by way of equitable execution may be appointed over whatever may be considered in equity as the assets of the judgment debtor, and in that context property subject to a trust or analogous foreign arrangement would be regarded in equity as the assets of the judgment debtor if he has the legal right to call for those assets to be transferred to him or to his order, or if he has *de facto* control over the trust assets (at [38]-[45]).

    (ii) It was more likely than not that Mr Skurikhin had either the right to call for the assets of the Berenger Foundation to be transferred to him, or de facto control of those assets (at [48]). The factors pointing to that conclusion included the manner in which assets of Pikeville were used for the sole benefit of Mr Skurikhin and his wife and the coyness of the members of Pikeville in revealing the ultimate controlling party of the LLP, which supported an inference that it was Mr Skurikhin who exercised ultimate control. The Deputy Judge also relied, in this respect, on the views of the Liechtenstein law expert that Mr Skurikihin "is in

de facto control as a mandatory and its economic founder". On that basis, the membership interests in Pikeville should be considered in equity to be Mr Skurikhin's assets. It was therefore open to the court to appoint a receiver by way of equitable execution over them (at [49]).

(iii) It was just and convenient for equitable receivers to be appointed (at [52]-[57]). The judge therefore appointed Mr Rubin and Mr Katz as receivers (the "***Receivers***") by way of equitable execution over the membership interests in Pikeville.

42. Berenger highlights the fact that, as noted above, one of the matters which the judge said had led him to that conclusion was:

> "The evidence of Dr Frommelt, part of which I have quoted above. In my judgment it is significant that an experienced Liechtenstein lawyer draws the conclusions: (a) that Mr Skurikhin or his agent is the mandatory to a mandate agreement with the board of directors / foundation council of the Berenger Foundation; (b) that Mr Skurikhin is likely to be able to instruct the board to transfer at least significant parts of the Berenger Foundation's interests in Pikeville into his own name; (c) that the reason why Mr Skurikhin and his family benefit from the Berenger Foundation is because he is in de facto control as a mandatory and its economic founder." (§ 49(6)).”

43. What is now contended is that this was factually incorrect, there being no such mandate.

44. The Receivership Order included the following provisions:

> § 1: The receivers are *"[u]ntil further Order of the Court"* appointed receivers by way of execution over the membership shares and interests (including all dividends, bonuses, rights and other privileges arising from them) in Pikeville registered in the name of the First, Second and Third Respondents;

> § 4: The receivers are to hold those assets, and any assets of Pikeville which come into their hands, *"to the Order of the Court"*;
>
> § 5: *"The Receivers shall have power… to preserve and realise the assets of* [Pikeville]*…"*;
>
> § 6: "*The Receivers shall, within a reasonable period of the receipt of monies pursuant to the taking of any steps provided for herein to apply to Court for directions as to what is to become of the said monies* ";
>
> § 7: "*Anyone served with or notified of this order may apply to Court at any time to vary or discharge this Order (or so much of it as affects that person), but they must first inform the Claimant's legal representatives. …"*;
>
> § 20: "*The Claimant, the First and Second Defendants, the Respondents, the Receivers and any other person affected by this Order shall have permission to apply.*"

45. Issue 1 before me is whether it is now open to Berenger to seek to discharge the Receivership Order on any grounds that were available to Berenger at the time of the hearing in 2015, but were not advanced then and are sought to be advanced now (whether relating to the issue of a mandate and/or Mr Skurikhin's control over Berenger, or the utility of the Receivership Order, or whether that Order should have been drawn in different terms). If so, then issue 2 requires me to reach a view on those matters on the basis of the evidence before me, which now goes substantially beyond the evidence Christopher Butcher QC had before him and includes disclosure given for the purpose of this application, witness statements and oral evidence from Mr Meier and Dr Schurti and a plethora of expert evidence on either side.

46. Since the date of the Receivership Order in mid-2015, the Receivers have taken steps to preserve the membership interests in Pikeville and to realise its assets, and in doing so have incurred significant expense. They were appointed as joint administrators of Pikeville by an order of Mann J dated 6 August 2015. The

steps they have taken to realise Pikeville's assets include the commencement of legal proceedings in Italy in relation to the three Italian properties, two of which were subject to tenancy agreements in favour of Mr Skurikhin or his wife, Mrs Skurikhina. As at November 2018, they had eventually succeeded in gaining possession of the Italian properties.

47. Separately, and subsequently, an order was made on VTB's application in the BVI in mid-2018 appointing a receiver in respect of Miccros (which is now, likewise, sought to be discharged, Mr Meier having put in evidence in support of that application, in respect of which Withers are also acting).

(4) Subsequent events in relation to Mr Skurikhin, Berenger and Olympic

48. On or about 16 March 2016, Mr Skurikhin was declared bankrupt by the Arbitrazh Court of the Novosibirsk Oblast. By a ruling of the same court dated 7 June 2017, the bankruptcy proceedings were concluded and Mr Skurikhin was discharged from his obligations to his creditors. VTB appealed against that decision to the Arbitrazh Court of the West Siberia region. The appeal was partially successful. By a ruling dated 18 December 2017, the appeal court confirmed the decision of the lower court to conclude the bankruptcy proceedings but set aside Mr Skurikhin's discharge. Mr Skurikhin's appeal against that decision was dismissed by the Supreme Court of the Russian Federation on 20 April 2018.

49. After it had become aware of Mr Skurikhin's bankruptcy, the board of Berenger passed a resolution irrevocably excluding Mr Skurikhin from the class of beneficiaries of the foundation. That resolution was dated 14 June 2017. New regulations were stated to have been issued on the same date, which provide that

the class of beneficiaries of the foundation shall consist of Accreda Trustees Ltd as trustee of Olympic. As I shall come to in more detail, VTB invites me to find that (contrary both to what appears on the face of the documents and to the oral evidence of Mr Meier and Dr Schurti) neither step was in fact taken until 17 August 2017 and that the resolution and regulations were then backdated to 14 June 2017. That is of some importance in assessing the overall credibility of the oral evidence each of them gave on issue 2 (i.e. the existence of a mandate or other control by Mr Skurikhin over Berenger), if and to the extent that that issue can properly be reopened.

50. Accreda Trustees Ltd, as trustee of Olympic, passed a resolution expressed to be dated 18 June 2017 and as confirming Mr Skurikhin's exclusion as a beneficiary by reason of his bankruptcy, pursuant to the resolution dated 2 February 2005 referred to in § 17 above. It was put to Mr Meier in cross-examination that this too had been back-dated and had in fact not been made until mid-August. In order to meet points taken by VTB's expert on Nevis law, the trustee of Olympic passed a further resolution irrevocably excluding Mr Skurikhin and referencing article 12 on 16 January 2019, expressed to be retrospective to 18 June 2017.

51. Issue 3 before me is whether Berenger can now rely on the exclusion of Mr Skurikhin as a material change of circumstances and if so whether the Receivership Order should be discharged on that basis, even if Berenger fails on issues 1 and/or 2. A host of sub-issues lurk within that broader point, as I shall come to explain.

(5) The Discharge Application

52. On 12 January 2018, Withers LLP (" **Withers** "), acting for Mr Skurikhin, sent a letter to Edwin Coe LLP (" **Edwin Coe** "), solicitors for the Receivers (and copied to PCB Litigation LLP (" **PCB** "), solicitors for VTB), contending that their client no longer had any beneficial interest in the assets of Berenger and that accordingly the basis upon which the Receivership Order was made had fallen away. The letter summarised recent events up to and including the decision of the Arbitrazh Court of the West Siberia region on 18 December 2017. At this stage Mr Skurikhin was, the letter said, preparing appeals to the Supreme Court of Russia and the Constitutional Court of Russia. The last two paragraphs of the letter stated:

> "As a result of the steps taken by the Financial Manager in the Russian bankruptcy our client no longer has any direct or indirect beneficial interest in any of the assets of the Berenger Foundation, including the membership interests in Pikeville. Accordingly, the basis upon which the receivership order was originally made has now fallen away, and … there is no good reason why your clients should remain in office as receivers and administrators. Pikeville should now be returned to the control of its officers for the benefit of its members.
>
> We consider that it is incumbent on your clients, as officers of the Court, to bring these highly material developments in the Russian bankruptcy proceedings to the attention of the Court, and to seek its directions. We should be grateful if you would confirm within 7 days of the date of this letter that your clients will make an application for directions, and that they will take no further action to realise any of the assets of Pikeville pending the outcome of that application."

53. On 5 February 2018, PCB wrote to Withers informing them of the WFO and of the committal order of Mr Justice Flaux. PCB asked Withers to explain the basis on which the court should hear Mr Skurikhin and the steps that he intended to take to remedy his contempt. No response was received to that letter.

54. On 1 June 2018, Withers (acting through the same individual solicitor) wrote again to Edwin Coe, this time on behalf of Berenger and Olympic, stating that Withers had been instructed to make an application on behalf of Berenger to discharge the Receivership Order. The letter requested the immediate cessation of enforcement action in Italy, where it appeared hearings had been listed for 4 June and 13 July 2018 in respect of properties owned by Pikeville. By a further letter on 15 June Withers clarified that, whilst they remain instructed for Mr Skurikhin, "there is currently no work being carried out for him". Implicit in that is that Withers are satisfied there is no conflict of interest between Mr Skurikhin and Berenger or Olympic. Withers explained that it was their position that the basis for the administration of Pikeville would fall away if the Receivership Order was discharged. It was also stated to be anticipated that Miccros would support the application. (In the event that has not transpired: rather, I was informed that a separate hearing was pending in the BVI in March 2019 at which an application would be made to discharge that receivership. I have not been informed of the conclusion of that hearing, if there has been a conclusion.)

55. Berenger on 12 July 2018 applied to discharge the appointment of the Receivers (" ***the Discharge Application*** ") on the basis that (in substance):

(i) the membership interests in Pikeville are not amenable to execution of the judgments obtained by VTB against Mr Skurikhin. Those interests belong beneficially to Berenger, and Mr Skurikhin does not have any interest in, or right to, the assets of Berenger. More particularly:

(a) the factual basis for the Deputy Judge's decision, namely that Mr Skurikhin controlled Berenger through a mandate agreement, was incorrect. Each of Mr Meier, Dr Schurti and Mr Hanselmann confirm in their witness statements that no such agreement has ever existed, and that Mr Skurikhin was only ever a discretionary beneficiary of the foundation; and

(b) Mr Skurikhin has in any event lost his status as a beneficiary of Berenger and Olympic since the making of the Receivership Order; and/or

(ii) the Receivership Order serves no useful purpose because, as a matter of Liechtenstein law, Berenger's assets are not amenable to execution by a creditor of a discretionary beneficiary, even if that beneficiary holds a mandate agreement.

56. As expressed in Part A of Berenger's application notice, the grounds for the application are that:

> "The membership shares and interests in the Second Defendant are held on bare trust for the Fourth Respondent by the First, Second and Third Respondents. Those membership interests are not amenable to execution of the judgments obtained by the Claimant against the First Defendant because the First Defendant does not have any right to, or interest in, the assets of the Fourth Defendant. Further, or alternatively, the appointment of the Receivers serves no useful purpose because there is no property which can be reached either at law or in equity."

57. Berenger's application was supported by witness statements from Mr Meier and the current members of Berenger's board (Dr Schurti and Mr Hanselmann). The exhibits to Mr Meier's evidence included the formal documents relating to the

constitution of Berenger, Olympic and Pikeville, including documents that had not previously been disclosed, such as the Regulations and resolutions, but no email exchanges or other records of any communications about the management of the foundation and its assets. Males J on 11 December 2018 ordered disclosure by each of Berenger, Mr Meier, Mr Lerch and Accreda inter alia of communications, and notes of meetings or telephone conversations with Mr Skurikhin, members of his family, or anyone acting on his or his family's behalf relating to (among other things) Berenger and Pikeville. Males J also ordered Mr Meier and Mr Schurti to attend the hearing of the discharge application, VTB having indicated that it wished to apply to cross-examine them on their evidence.

58. The evidence before me included the further disclosure produced in response to the order of Males J. I granted the application for cross-examination, which in truth (whilst not consenting) Mr Lord did not really resist, on the basis that allowing cross-examination was just and proportionate in the particular circumstances of this case, having regard to the disputed factual issues that arise in respect of issues 1, 2 and 3, which it seemed to me could not fairly be decided without the witnesses having a chance to address in oral evidence the inferences I was being invited to draw from the documents, and having regard to the overall context of the discharge application, which seeks to challenge VTB's ability to enforce substantial judgment debts against an individual who stands in contempt of Court. Much of the first day of the hearing was taken up with that oral evidence, with Mr Meier being more extensively cross-examined than Dr Schurti, whose evidence went into the morning of the second day of the hearing. Each of them gave their evidence in English (of which they had a good

command) but with an interpreter in attendance to offer assistance when required.

59. The parties each also relied on expert evidence on matters of Liechtenstein law and Nevis law, including as to the effectiveness of Mr Skurikhin's exclusion as a beneficiary of Berenger and Olympic, respectively. (Males J had given the parties permission to adduce expert evidence on this interlocutory application.) A number of reports were exchanged specifically for the purpose of this application, but I also had before me reports that had previously been put in evidence at earlier stages in this litigation, such that the expert evidence came to fill a lever arch file. It was not always easy to identify the exact areas of agreement and disagreement between the experts, without the opportunity for oral evidence and without the process that would have had to be followed for narrowing the expert issues had this been a full trial. That rather illustrates a need for active case management in advance of the hearing, where expert evidence is to be relied upon on a heavy interlocutory application. At my direction, some clarificatory evidence was exchanged whilst the matter was adjourned part-heard, addressing questions I had raised in the first three days of the hearing. Even so, it was necessary to exercise some caution in respect of points where the experts disagreed, in circumstances where their evidence had not been tested in cross-examination.

(C) Issue 1: can Berenger seek to discharge the Receivership Order on grounds that were available at the time of the hearing in 2015

(i) Issue 1

60. At the hearing of the receivership application before Christopher Butcher QC, VTB sought the appointment of receivers over the membership interests in Pikeville, on the basis that they were to be regarded as an asset of Mr Skurikhin's. VTB contended that this was the case, notwithstanding that the registered owners held those interests as nominees and trustees for the Berenger Foundation, on the basis that Mr Skurikhin is or should be regarded as the ultimate beneficial owner of those LLP membership interests. The Deputy Judge accepted VTB's submission that the membership interests would be regarded in equity as assets of the judgment debtor if Mr Skurikhin had the legal right to call for those assets to be transferred to him or to his order, or if he had de facto control of the trust assets in circumstances where no genuine discretion is exercised by the trustee over those assets. (I shall have more to say, in the context of issue 2, on whether there is any distinction between those two limbs on the facts of this case.)

61. The Deputy Judge reached findings of fact as follows:

> "47 Mr Penny submitted, and I accept, that at this stage of the proceedings this question has to be answered on the balance of probabilities.
>
> 48 On the material before me, I am satisfied that it is more likely than not that Mr Skurikhin does either have a right to call for the assets of the Berenger Foundation to be transferred to him, or has de facto control of those assets.
>
> […]
>
> 50 Given this conclusion, it follows that the membership interests in Pikeville, which the members themselves say are held as nominees for the Berenger Foundation, should be considered in equity to be Mr Skurikhin's assets, and thus that it is open to the court to appoint a receiver over them."

62. VTB submits that Berenger is estopped from reopening the issue of Mr Skurikhin's beneficial ownership of the membership interests in Pikeville, on the footing that that factual issue was thereby finally determined.

63. More broadly, VTB submits that it is an abuse of process for Berenger now to seek to discharge the Receivership Order on the basis of points that could and should have been raised at the hearing before Christopher Butcher QC.

64. Berenger submits that the Receivership Order, and the judgment on which it was based, did not decide any question finally. Berenger points to the fact that (as is common ground between the parties) a Receivership Order does not have proprietary effect. Berenger submits that the terms of the Order demonstrate that any findings were provisional and not final, relying in particular on paragraphs 1, 4, 7 and 20, the relevant parts of which are set out above. Berenger contends that it would be open to Berenger to wait until the Receivers return to Court for directions as to what is to be done with the sale proceeds of the Italian properties and take, then, all the points it seeks to take now. It argues that, by the same token, it remains open to it to take those points now.

65. As regards abuse of process, Berenger contends that it did not have the funds to procure representation at the hearing in 2015 and that if, as it submits, it could take these points at the conclusion of the Receivership it cannot be an abuse for it to do so now.

(ii) The legal principles applicable to Issue 1

66. Issue estoppel requires there to have been a final, as opposed to provisional, determination, on the merits, of the parties' substantive rights: *Carl Zeiss*

Stiftung v Rayner & Keeler Ltd [1970] 1 Ch 506 at 538:G-539:B. An interlocutory decision may have the necessary quality of finality to give rise to an issue estoppel: *Desert Sun Loan Corp v Hill* [1996] CLC 1132 at 1138-1140.

67. Issue estoppel is closely linked to abuse of process, in that it extends to points that could have been, but were not, raised. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160at [22], Lord Sumption stated the principles as follows:

> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings, or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

68. In *Johnson v Gore Wood* [2002] 2 AC 1, the parties were not the same, in that a director and majority shareholder in a company had settled earlier proceedings brought by the company, and the question was therefore whether he was debarred on the basis of abuse of process from subsequently bringing his personal claims, because both claims could in principle have been joined in the same proceedings had the director so wished. Lord Bingham articulated the approach to be taken to abuse of process in terms that make clear that it is not to be approached mechanistically (at 31):

> "…*Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is

> satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. **It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice." (Emphasis supplied.)

69. It can be an abuse of process for a party to seek to reargue an interlocutory application, even if the relevant decision lacked the finality required to give rise to an issue estoppel. An interlocutory order expressed as being until further order can only be reopened for good reason. *Chanel Ltd v Woolworth & Co* [1981] 1 WLR 485 at 492D and 492H-493A:

> "Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some

> significant change of circumstances or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

70. Examples of exceptional cases, where justice required that a party be given a second bite at the cherry, are *McCracken v CPS* [2011] EWCA Civ 1620, and *Woodhouse v Consignia* [2002] 1WLR 2558, which I shall return to below, since Berenger placed some reliance on those cases in support of their position.

(iii) Application to the facts

71. It is well-established that an order appointing a receiver by way of equitable execution is not a proprietary remedy, in that it operates "in personam", in respect of the rights of the parties, and not "in rem", so as to determine property rights against the world at large. It does not, for example, give VTB priority over other creditors with claims on the relevant assets. It is an interim order and inherently temporary, in that it will, for example, fall away if the judgment debt is discharged by other means: *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 at [51], [53] and [69].

72. However, that is distinct from the question of whether the findings of fact that were made by Christopher Butcher QC on the issue of Mr Skurikhin's beneficial ownership, in determining it to be appropriate to make the order in respect of these assets, are final in nature and binding as between the parties to the receivership application (of whom Berenger was one). Equally, it does not follow from the fact that the order was made on an interlocutory application that any findings made were only provisional rather than final.

73. It is necessary to consider, not just the terms of the Receivership Order, but the reasons for making it that were given in the judgment (which can explain, but

not contradict, the terms of the order: *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6 at [13]) and, more broadly, the general purpose and effect of an order appointing a receiver by way of equitable execution.

74. It is not necessary for the Court, when deciding whether to make such an order, to attempt to decide on hypothetical questions as to whether a foreign Court will or will not recognise the order at some future point. It is sufficient that there should be a "reasonable prospect" the order will be of practical utility: *Cruz City 1 Mauritius Holdings v Unitech Limited and others* [2014] EWHC 3131 (Comm) at [47]. That obviates pointless and inconclusive debate about difficulties that may or may not, as matters turn out, arise. Christopher Butcher QC referred to *Cruz* in the context of the utility of making the Receivership Order but expressly adopted a different threshold, that of balance of probability, on the question of whether the relevant assets were indeed, in equity, assets of the judgment debtor.

75. It seems to me clear that he was right to do so and that the findings of fact that Christopher Butcher QC made in respect of that issue were final and binding in nature, as between the parties to the Receivership Application.

76. I do not rule out the possibility (although I have not been directed to any case where this has been done) that the Court might, in an appropriate case, appoint a receiver in respect of an asset that was suspected, rather than proved, to be that of the judgment debtor, on a similar basis to granting a freezing order against a "*Chabra"* defendant (i.e. a good arguable case, or "good reason to suppose" that assets are held as nominee for the cause of action defendant). In *Derby & Co. Ltd. and Others v Weldon and Others (No. 6)* [1990] 1 W.L.R.

1139, receivers were appointed as a protective measure to prevent dissipation of the asset, in support of a freezing order before judgment. It does not appear that there was any issue as to ownership of the asset in question but in principle, had there been, one can see that a receivership order might be an effective means of preventing dissipation of an asset that might well turn out to belong to the cause-of-action defendant. However, any such order, made on a purely protective basis, would give the receivers only such powers as were consistent with holding the ring and preventing dissipation of the asset until the question of ownership was finally determined. It would not empower the receivers to sell property that might turn out to belong to a third party. It would contain a cross-undertaking in damages to guard against the possibility that the third party's rights to deal freely with what may turn out to be their own assets had been wrongly subjected to interference. That is, however, plainly not the basis on which this Receivership Order was sought or made.

77. VTB made its application, fairly and squarely, on the basis that it was asking for the issue of beneficial ownership to be determined and for Receivers not only to be appointed but to be given powers that would enable them to sell the membership interests or the underlying assets. Berenger was on notice that that was what was being sought. This was not simply a matter of preserving the assets pending a later determination of their true ownership, as in the case of a freezing order made against *Chabra* defendants. The order sought was in terms that it could not properly be made unless the Court was satisfied on the issue of ownership. The requirement that the receivers return to Court for directions as to how the proceeds of sale were to be disbursed (which reflects the fact that a Receivership Order does not give priority over other creditors) would be a

wholly inadequate remedy if the Italian properties did not in fact belong beneficially to Mr Skurikhin and had been wrongly sold from under the feet of their true beneficial owners.

78. The factual question as to whether the membership interests in Pikeville belonged in equity to Mr Skurikhin was, rightly, treated as determining whether there was jurisdiction to make a Receivership Order, in the terms sought, over those particular assets. The Deputy Judge, having reached his findings of fact, which he expressed to be made on a balance of probability, held that there was jurisdiction on the footing that a Receivership Order could properly be made over assets considered in equity as the assets of the judgment debtor, applying *Masri v Consolidated Contractors (UK) Ltd* [2009] QB 450 at [151]; *Tasarruf v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721 at [6]; and *Blight and Others v Brewster* [2012] EWHC 165 (Ch) at [66]. In doing so, the Deputy Judge specifically contrasted (at [47]-[52]) his own approach in arriving at this conclusion on a balance of probability with the "provisional" findings made by Burton J at the time the freezing order was made, when Burton J only needed to be satisfied there was a good arguable case that Mr Skurikhin was the beneficial owner of Pikeville in order to extend the freezing order to Pikeville as a *Chabra* defendant.

79. The terms of the Receivership Order are consistent with the question of beneficial ownership having been finally, and not merely provisionally, determined as between the parties to the application. There is no cross-undertaking in damages. The fact the Order was expressed as being until further order, and the existence of paragraphs giving express liberty to apply, including

to discharge the order, do not indicate the contrary but are readily explicable as being necessary to cater for the fact that the order might affect those who had not been a party to the application at all, and also that the parties to the application might well need to return to Court for all sorts of reasons that did not involve reopening the question of ownership (as, for example, the scenario contemplated in *Cruz* at [69]). The inclusion in an order of liberty to apply, including in order to discharge the Order, caters for a change of circumstances. It does not give carte-blanche to a party to reopen the question of jurisdiction to make the order by deploying evidence and arguments that could have been deployed at the original hearing: see *Chanel*. It follows that I do not accept Berenger's submission that it would, in principle, have been entitled to wait even longer and ask the Court to reopen the issue of beneficial ownership at an eventual directions hearing to determine what was to become of the proceeds of sale.

80. The same analysis applies to the arguments Berenger now advances as to whether the Receivership Order has no reasonable prospect of serving a practical purpose (contrary to what the Deputy Judge decided at [54]), or as to whether, if a Receivership Order was appropriate at all, it ought to have been made in different terms (a point that was not considered, as it had not been raised by Berenger and the disclosure and evidence on which it is now based had not then been deployed). All of Berenger's arguments (aside from those relating to issue 3) are based on matters that it was open to Berenger to advance at the hearing in 2015, and therefore the same principles apply.

81. I am not convinced that the threshold necessarily differs according to whether one treats the judgment and Receivership Order as giving rise to an issue estoppel (extending not just to points specifically decided but to points that were not, but could have been taken) and asks whether there are special circumstances that justify reopening the question of beneficial ownership, or whether one instead asks whether in all the circumstances it is an abuse of process for Berenger to raise these issues. To the extent that the latter approach may arguably be more generous to Berenger I adopt it.

82. Lack of funds is the sole justification that is advanced in evidence on behalf of Berenger for not having put forward in 2015 the arguments it now seeks to advance before me under the banner of issue 2 (as distinct from issue 3, which is based on subsequent events being a material change of circumstances).

83. The evidence in respect of lack of funds was unpersuasive. It was said that an unidentified beneficiary has now (spontaneously) come forward to fund not just this application but a parallel application by Berenger in the BVI to discharge the receivership there in respect of Miccros. No cogent explanation was given as to why that beneficiary did not come forward (indeed, was not approached) in 2015.

84. It was suggested by Mr Meier that Berenger did not have the contact details of the beneficiaries, in order to enquire whether any of them was willing to fund Berenger's representation in 2015 (but that was then contradicted by him saying that Dr Schurti did have the details of the beneficiaries on file for due diligence purposes). He suggested that there was sensitivity about asking them because "not all" of them knew they were beneficiaries. However, on Berenger's own

case, at least some of the beneficiaries were aware in 2015 that they were beneficiaries and it simply does not make sense that those individuals should not even be contacted (obtaining any necessary contact details from Mr Skurikhin, if not already known) to be told of the application and be asked whether they were willing and able to fund Berenger's defence of it, in order to protect their interests by preserving the assets from which distributions might in future be made to them. Even supposing that the individual who is now said to be funding this application did not know they were a beneficiary in 2015, it was a choice not to inform them of this and see whether they were willing to provide the funding they have now provided. Of course, it makes perfect sense that no such efforts were made in 2015 if in fact Mr Meier and Dr Schurti knew perfectly well that the only person who was intended to benefit from the trust was Mr Skurikhin.

85. Miccros closed its account and ceased to meet Accreda's bills, as Mr Lord told me, because of the freezing order. Mr Meier's evidence was that Accreda had not been paid since 2014, whilst still having to meet Berenger's invoices, and that he had had an "acrimonious" meeting with Mr Skurikhin in late 2015 to demand payment of his outstanding bills. He put this forward as evidence of the funding difficulties experienced, but it seems to me significant that Accreda was prepared to carry on providing services at all, in the absence of payment, and that it was Mr Skurikhin, and not any of the other beneficiaries, that he regarded as responsible for meeting Accreda's fees and for reimbursing what he had paid Berenger. That is consistent with the view I came to form of the relationship between Mr Meier and Mr Skurikhin as being one whereby Mr

Meier acts as one of Mr Skurikhin's closest advisers, intimately involved in his affairs.

86. I was left with the distinct impression that funds could be, and were, found on other occasions when it suited Mr Skurikhin's interests that they should, by one means or another, be found. It was, for example, evident that other legal advice had been obtained, and must have been funded from some source, on behalf of Crown in Hong Kong in 2014 and from Russian lawyers in respect of Mr Skurikhin's bankruptcy after March 2016. Berenger's accounts show €42,446 spent on administrative expenses in the year ended 31 December 2015 and €53,805 on administrative expenses (including legal fees) in the year ended 31 December 2016. Moreover, Accreda did provide £60,000 of funding for legal advice in respect of the receivership application, said to be through a Dubai affiliate. Mr Meier's evidence was that this was at the insistence of Dr Schurti and Mr Lerch because they were concerned about their own positions and that this was therefore to enable them to take advice in that respect. As he put it: "We protect our sub-contractors." Advice was taken from Payne Hicks Beach before the hearing, as well as some advice being taken afterwards. Dr Schurti said that he had regarded jurisdiction as the "more imminent" issue and that he had "concluded that an English judgment which is not enforceable cannot immediately cause the bankruptcy of Berenger". Whilst he said that he could not, on what remained of the funds that Accreda had at that point provided, meet Paynes Hicks Beach's cost estimate for the hearing, he also said that he came to the conclusion that "the best course of action is we stay out and wait and see." When asked whether Berenger could have funded an appeal his response was

that he had discussed that with Mr Meier but "He [Mr Meier] said they cannot because it is not – they have no interest in that."

87. Even if Berenger had not been able to afford representation at the hearing, the fact is that Dr Schurti, as a qualified Liechtenstein lawyer, also called to the New York Bar and with an excellent command of the English language, was well able to understand from the material served on Berenger that VTB was contending that Mr Skurikhin controlled Berenger and was in a position to call for its assets to be transferred to him. On Berenger's case, VTB was presenting the Court with an incorrect and incomplete version of the facts and, even if Dr Schurti did not feel able to make submissions himself about the issues of English law involved in a receivership application, he could certainly have taken steps to set out Berenger's position on the facts and to supply the Court with the documents now relied on as demonstrating the factual position, in particular the regulations of Berenger. Moreover, he was well able, given his own legal expertise, to at least identify the points of Liechtenstein law on which Berenger now relies.

88. The more probable explanation, on the evidence, is that a deliberate decision was taken not to engage with the evidence, and not to attend or be represented at the hearing, on the basis that to wait and see was the preferable strategy. Had Dr Schurti concluded otherwise, I infer he would have pressed Accreda for more funding, as he had when wanting assurance that he was not personally exposed. I found Mr Meier's evidence far from convincing in showing that funding for the hearing could not have been provided, if Mr Skurikhin had wished that it be provided. On Berenger's case, which is that other discretionary beneficiaries,

who were friends of his or members of his family, did have a real (albeit contingent) interest in preserving the possibility of a future distribution to themselves, it just does not make sense that none of them (including those who were aware they were beneficiaries) was even approached. My impression was that Mr Meier did not really make any efforts to identify a source for further funding, once Dr Schurti's requirement for some preliminary advice had been met, because there was at that time "no interest" in participating actively in the application.

89. In *Johnson v Gore Wood* the justification for not having brought forward the personal claims in the original action was not just lack of funds (which was clearly established on the evidence and arguably attributable to the defendant's negligence) but also that there were legitimate reasons for keeping the claims separate, namely that adding the personal claim would have complicated and delayed the progress of the company's claim, and that might have jeopardised the company's survival (at 31G-32 A). That is very far indeed from these facts. Even if I had taken a different view on the evidence as regards Berenger's alleged inability to fund representation, I would not have considered that factor, alone, sufficient to excuse its failure to attend the hearing or to engage at all with the issues that were before the Court on the application in 2015 until over three years later, after substantial expense has been incurred in respect of the receivership. These Courts see increasing numbers of unrepresented litigants, often considerably less well equipped than Dr Schurti to do without legal representation.

90. Mr Lord laid some emphasis on *Woodhouse v Consignia* [2002] 1WLR 2558 (at 2575G-H), where the Court of Appeal noted that the policy against allowing a second bite of the cherry "should be applied less strictly" in respect of successive pre-trial applications for the same relief than in the case of a final decision of the Court. That case was concerned with successive applications to lift the automatic stay under CPR PD51. There were strong considerations of justice in favour of considering the fresh application to lift the stay on its merits rather than, as had been done below, treating as decisive the fact that it was based on material that could have been brought forward before. In particular, the automatic stay had come into effect through the fault of the legal representatives rather than the claimant, there had been no hearing on the merits of the personal injury claim (and the Claimant would be shut out from access to justice if the stay was not lifted), and the failure to deploy, at the first application to lift the stay the material that was available but was only later deployed could, in the circumstances, be properly and proportionately reflected by suitable orders for costs. That is an example of the approach Lord Bingham articulated in *Johnson v Gore Wood*.

91. In contrast, here there has been a hearing on the substantive merits, which as I have found Berenger chose not to participate in, and a decision reached on the issue of beneficial ownership which was final in nature. Berenger had its opportunity to access justice. The policy against allowing a second bite of the cherry on the basis of material that could have been deployed before applies with full vigour here and there are no equivalent countervailing factors.

92. Berenger also placed particular emphasis on *McCracken v CPS* [2011] EWCA Civ 1620. The issue before the judge at first instance in that case was whether a house registered in the name of the parents was beneficially owned by the son, who had been convicted of fraud, rather than by his parents. The mother's evidence to that effect had already been disbelieved when she was a witness for the son in the criminal proceedings, but nonetheless the parents were entitled to have the issue determined in separate civil proceedings against them in the High Court, in which the Crown sought a declaration as to the son's ownership and appointment of an enforcement receiver under section 80 of the Criminal Justice Act 1988. The parents sought an adjournment to put in further evidence in support of their case, which was refused. In the course of giving judgment, HHJ Mackie had specifically said that in the event of the parents' claims being substantiated by further evidence they could apply for the receivership to be discharged. He then made an order in terms the Court of Appeal described as "ambiguous, indeed self-contradictory", in that it declared the son's beneficial ownership but also expressed the order as remaining in force until varied or discharged by further order of the Court. Unsurprisingly, given what had been said in the judgment, the parents understood this as permitting them to bring an application to discharge the order having obtained the further evidence they had unsuccessfully sought an adjournment to seek out.

93. Against that backdrop, it was held that the Judge before whom the mother's application to discharge the order subsequently came had been wrong to refuse to deal with the mother's application on its merits. CPR 69.10 (which provides that any party may apply for the receiver to be discharged on completion of his duties) was permissive rather than exhaustive of when such an application can

be made. The argument that it was inappropriate to give her a second bite of the cherry was vitiated by the internally contradictory terms of the order and "fairness dictates" that those ambiguities should operate in the mother's favour rather than against her. In effect, the mother had been misled by the Court and justice required that that be rectified. Neither issue estoppel nor abuse of process was referred to in terms in the judgment of the Court of Appeal but the decision, on those very particular facts, is consistent with there being either special circumstances that made it unjust to treat the previous decision as giving rise to an issue estoppel, or the view being taken that on those facts the discharge application was not an abuse of process.

94. The case does not in my view assist Berenger. There is no equivalent misleading of Berenger here. It is not suggested that the reason Berenger did not attend or obtain representation in 2015 was a belief on the part of Mr Meier or Dr Schurti that they would be able to run their arguments at a later date when the receivers went back to the Court for directions. That proposition is advanced by Mr Lord as a submission as to the (objective) legal effect of the Receivership Order (a submission which I have rejected) and not as being their evidence as to their subjective beliefs or motivations at the time.

95. Nor do I think it an answer that the Court might, as Mr Lord submitted, address the issue of any wasted costs in the context of a future application in the administration of Pikeville. He was at pains to emphasise that that question was not for me on this application. In any event, I do not think the hypothetical possibility that the receivers might in future be successful in recovering their costs from Berenger, pursuant to an order that has yet to be made, buys Berenger

the right to behave in a manner which is, all things considered, a clear example of abuse of process. I have already dealt with the fact that this case is not analogous to Woodhouse, where costs were a proportionate and adequate remedy, given the other potent factors in play. As was emphasised in *Johnson v Gore Wood*, the policy behind requiring parties to bring forward their case is not just based on the private interest of their opponent in finality but also the public interest in the finite resources of the Court not being called upon multiple times in respect of the same battle.

96. I accept Mr Penny's submission that a better analogy is to be found in *Masri No. 3* [1987] 1 QB 1028. Mrs Masri, having formed the view that the judge who was about to hear her application would be unsympathetic to her cause given the robust views he had previously expressed about her husband's evidence, decided not to pursue her application to set aside a freezing order in respect of a bank account which she claimed was beneficially hers, rather than her husband's, and the application was dismissed. The Court of Appeal upheld the decision of Leggatt J that the dismissal gave rise to an issue estoppel which precluded her from raising the issue of beneficial ownership when the judgment creditor subsequently came to seek a garnishee order over the bank account on the basis that it belonged to the husband. She had had her opportunity to argue the issue of beneficial ownership and had "decided in seeking her own advantage and convenience" not to do so at the hearing which had been listed for that purpose. Her Counsel's attempt to preserve her position by saying she did not concede the issue of ownership could not be allowed to alter the analysis as that would be to "permit the process of the Court to be abused by [Mrs Masri] for her own advantage". There were no exceptional circumstances that would

justify allowing her to raise subsequently the issue that should have been fought out at the original hearing.

(iv) Conclusions on issue 1

97. I conclude that it is an abuse of process for Berenger, having had its opportunity to argue against the making of the Receivership Order, to seek to discharge the order on the basis of evidence and arguments that could have been, but were not, deployed before Christopher Butcher QC at the hearing in 2015. Berenger is estopped from seeking to argue not just the issue of beneficial ownership and of the utility of the Receivership Order, on which specific findings were made, but also those issues that could have been but were not raised (in other words, all of the points on which Berenger now relies other than in respect of issue 3).

98. In fact, to glance ahead for a moment, whilst the reasoning set out above is enough to dispose of issue 1, the position seems to me to be *a fortiori* when one takes into account the evidence I have considered in respect of issues 2 and 3. For the reasons developed under issue 2, it appears to me likely that, ultimately, the reason the Receivership Application was not contested was that Mr Skurikhin's strategy at the time, implemented via instructions to Mr Meier who in turn told Dr Schurti how he should proceed, was to ignore the orders of the English Court and rely on the difficulties VTB would have in enforcement against assets held in a Liechtenstein foundation. Equally, for the reasons developed under issue 3, the change of stance whereby Berenger now seeks to discharge the Receivership Order appears likely to have been driven by Mr Skurikhin. Standing back and considering the evidence as a whole, I have formed the clear view that Mr Skurikhin is still (to use Flaux J's phrase, in

committing Mr Skurikhin for contempt of Court) "cocking a snook at the English Court". Since he has evidently taken some care to leave no direct trace of his own influence, it is necessarily a matter of drawing inferences from the available evidence, putting together the clues and tell-tale signs that are discussed below.

(D) Issue 2: if Berenger can seek to discharge the Receivership Order on grounds that were available at the time of the hearing in 2015, should the application be granted on any of those grounds

(i) Issue 2

99. I have considered carefully whether, given my conclusions on issue 1, it is nevertheless appropriate for me to go on to consider the points which I have held Berenger should not be entitled to raise. At first blush, to do so is anomalous and at odds with the whole purpose of the principles of res judicata and abuse of process. I have, with some hesitation, concluded that I should address these points for two reasons: first, I have heard oral evidence, considered a substantial volume of documentation and heard full argument and it might create difficulties in the event of an appeal on issue 1 if I had not expressed my findings on that material; second, the views I have formed from considering that material reinforce the conclusions I have otherwise reached on issue 1 and issue 3 and it is relevant for that to be explained. However, given the way in which this issue arises I have concentrated primarily on the question of control (which also bears on issues 1 and 3) and have sought to express my conclusions with (relative) brevity on the remaining points that arise under this heading.

100. Berenger raises the following issues in support of the proposition that the Receivership Order should not have been made, or at least not in the terms in which it was made:

(a) The issue of control and whether Mr Skurikhin is to be treated as the owner of the assets, in equity:

(i) The facts: Berenger contends that, as a matter of fact, there was no mandate and no *de facto* control by Mr Skurikhin over Berenger;

(ii) The law: Berenger submits that, as a matter of law, even if *de facto* control was established, that is an insufficient basis for the order and Mr Skurikhin could not call for the membership interests in Pikeville to be transferred to him, such as to make him the owner, in equity, of those assets;

(b) The terms of the Order:

(i) The wrong subject-matter: Berenger submits that the Order wrongly purports to be made over assets of a third party, namely the membership interests in Pikeville, which are held in trust for Berenger, rather than over any powers Mr Skurikhin may have pursuant to a mandate or otherwise to compel a distribution to himself;

(ii) The 80/20 split: under Berenger's regulations dated February 2005, 80% of Berenger's assets were held on trust for Olympic, and Berenger submits that the order, being based on Mr

Skurikhin's control of Berenger, should therefore have related only to the 20% of Berenger's assets held by Berenger, at that time, directly on trust for Mr Skurikhin.

(c) The utility of the Order:

(i) Article 5: Berenger argues that a direction to the Board of Berenger to make a distribution to Mr Skurikhin for the benefit of Mr Skurikhin's creditors would be contrary to Article 5 of the Statutes;

(ii) Enforceability in Liechtenstein: Berenger submits that the order has no utility in circumstances where the experts are agreed that the appointment of the receivers would not be recognised in Liechtenstein and that there is no other means to enforce in Liechtenstein, against the assets of Berenger, the judgments VTB has obtained in Russia and England against Mr Skurikhin.

101. VTB's riposte is, in summary, that:

(a) Control: VTB contends that there is a mandate or alternatively de facto control, in that no genuine discretion is exercised by the board, and VTB further submits that the latter is sufficient in law to establish that Mr Skurikhin is to be treated as the owner, in equity, of Berenger's assets;

(b) Terms: VTB submits that it follows that the relevant assets are not, in a relevant sense, assets of a third party and the order was correctly made over the membership interests in Pikeville; alternatively, if contrary to

VTB's primary case, that does not extend to the assets as a whole, it extends at least to 20%;

(c) Enforceability: VTB argues that there remains a reasonable prospect of the Receivership order serving a useful purpose, notwithstanding the difficulties of enforcement within Liechtenstein, about which the experts are agreed.

(ii) The legal principles applicable to issue 2

102. The question that needs to be determined is whether Mr Skurikhin has rights that are "tantamount" to ownership over the assets of the foundation, such that these are to be regarded as belonging to him, in equity, for the purposes of a receivership order: *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450 at [151]; *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721 at [59].

103. The significance of de facto control over assets is that, where it is demonstrated to exist, that then begs the question whether those who are submitting to that control do so because they recognise the right of the person exercising that control to dictate to them what should be done with those assets. Thus, proof of de facto control may justify drawing the inference that the person exercising de facto control is the ultimate beneficial owner of the assets (at least, in a broad sense of that term): *PJSC Vseukrainskyi Aktsionernyl Bank v Maksimov* [2013] EWHC 422 (Comm) per Popplewell J at [7]. Unless that inference can in all the circumstances properly be drawn, de facto control does not, in and of itself, warrant treating a third party's assets as belonging to a judgment debtor in equity and hence available to be enforced against. There may be other

explanations for the appearance of control which do not justify drawing the inference.

104. At the stage of seeking a freezing injunction over assets in the hands of a third party, the judgment debtor's de facto control over the assets will be relevant to the risk of dissipation but by itself that is not enough, since it is necessary to determine whether it is at least arguable that the inference of ownership, in equity, of the assets can also be drawn. That is the distinction that was drawn in *Algosaibi* at [43]. In the context of a Receivership Order, that question needs to be (or at least in this case it was) addressed on a balance of probability.

105. I appreciate that in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139 at [20] reference was made to the distinction between a legal right to give instructions and the fact a person in reality follows instructions, analogously to a shadow director, and concern was there expressed about the possibility that a person could make themselves "judgment proof merely setting up discretionary trusts or…a Liechtenstein Anstalt". However, that was in the context of a freezing order which was worded in terms broad enough to catch assets that were under the effective control of the defendant and where all that the Court needed to decide was whether to order disclosure so that the question of whether or not the threshold was met for enforcement against those assets could be determined. Lewison LJ expressly did not reach a firm conclusion on that point at that stage.

106. If there is de facto control only in the sense that there is a practical likelihood the recipient of an instruction will follow it, but no obligation on them to do so, then in my judgment that is insufficient for these purposes. Were it otherwise,

many a married person's assets would be liable to be enforced against to meet their spouse's liabilities – compliance with an instruction that is prompted by ties of affection, or the result of a calculation that it is in that person's own best interest to comply, or the product of an unfettered exercise of discretion, does not demonstrate that the giver of the instruction has rights tantamount in equity to ownership, as opposed to being the beneficiary (in the popular sense) of someone else's generosity.

107. A purely discretionary beneficiary of a trust under English law has no right to instruct the trustees as to what they are to do with the trust assets. Hence, a receiver cannot be appointed in terms that compel the trustees to exercise their discretion in favour of a discretionary beneficiary, as distinct from "funds of which the defendant himself had the right to control, or which he had the right to receive": *R v Judge of the County Court of Lincolnshire* (1887) 20 QBD 167. Likewise, in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139 at [13], it was recognised that a (mere) discretionary beneficiary under a trust does not have a proprietary interest in trust assets.

108. If, however, the judgment debtor has a right to call for assets, the Court can compel him to exercise that right or can appoint a receiver over it. In *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721 the means of control consisted in a right to revoke the trust at the judgment debtor's discretion. That rendered him the owner in equity of the assets and he was ordered to delegate the power of revocation to the receivers so that they could exercise it. In *Blight v Brewster* [2012] EWHC 165 (Ch) the judgment debtor could choose to give notice to withdraw funds from a

pension. The Court in that case considered the expense of a receivership would be disproportionate and took the simpler approach of ordering him to delegate to the Claimant's solicitors the power to elect to make a drawdown. The form of the order may vary according to circumstance but the underlying rationale is the same. That same rationale must apply where it is demonstrated that an individual has a right to instruct trustees to apply assets held within a trust (or a Liechtenstein foundation) in accordance with that individual's direction.

109. I accept Berenger's submission that de facto control is not enough unless it leads to the requisite inference. However, it is clear that Christopher Butcher QC did indeed draw that inference. He evidently accepted as well-founded on the evidence before him the view of VTB's expert that Mr Skurikhin was "in de facto control as a mandatory and [Berenger's] economic founder". In other words, he accepted that Mr Skurikhin was not in the position of a "mere" discretionary beneficiary, because the evidence of his de facto control showed that the trustees recognised that he had a right to issue directions which they would be obliged to follow. At all events, I now have before me evidence which was not before Christopher Butcher QC and the question for me (which I address with the reservations expressed above) is whether that evidence causes me to take any different view.

110. Also relevant to issue 2, is the principle that matters of foreign law are treated in English law as questions of fact for me to determine: *Bumper Development Corp v Commissioner of Police* [1991] 1 WLR 1362, 1369 (CA). There is nothing controversial about that principle, which was common ground. However, in my view it has consequences for an authority on which Berenger

placed some reliance, *Hamilton v Hamilton* [EWHC] 1132 (Ch). That case was addressing a different question to that with which I am concerned and depended on findings of fact, both as regards the operation of the foundation in question and the Liechtenstein law analysis. Those findings of fact were based on different evidence and in themselves are not binding on me. In any event, however, as I read that judgment it does not lead to the conclusion that a mandate would (if such were proved on the evidence before me) be an insufficient basis for a receivership order.

111. In *Hamilton v Hamilton* the issue Henderson J had to determine (at [28] and [33]) was whether a Liechtenstein foundation was a "sham" and had been established as part of a fraudulent scheme to evade tax, such that the assets that had been placed in the foundation fell into the founder's estate on his death and passed under his will. There was, admittedly, a written mandate which bound the board to act in accordance with the founder's instructions (at [51]). Henderson J declined to draw the inference that the intention in setting up the foundation had been to evade tax (at [91]). He then went on to consider the evidence relating to the founder's control over the foundation by way of the mandates and whether this rendered the foundation a "sham". Henderson J was not prepared to infer, without the allegation having been put to anyone from the foundation, that the board of the foundation were a mere nominee, always willing to comply with the founder's requests without giving independent thought to the matter (at [148]). The claimant's expert conceded that Liechtenstein law would recognise exceptions to the obligation to perform an instruction issued under the mandate if to do so was illegal or immoral. In light of that, Henderson J concluded that the board still had a real function to perform

in satisfying themselves that any instructions did not involve them in behaving illegally or immorally (at [155]). On that basis the "near certainty" that the founder's instructions would be acted on did not lead to the conclusion that both he and the foundation intended to treat him as the "beneficial owner" of those assets (at [156]). It could not be said that the foundation was a "sham", as English law understands that term, i.e. that it created legal rights and obligations which were different from those ostensibly created (at [195]). The assets therefore were not the property of the founder at the date of his death, so as to pass under his will.

112. Henderson J was there addressing a quite different question on different evidence. As he noted at [187] Liechtenstein law "does not recognise the distinction between legal and beneficial interests which is fundamental to the English law of trusts. It follows that so-called beneficiaries under a Liechtenstein foundation do not in any sense own the assets, but instead have legally enforceable rights to receive certain benefits… The end result may therefore look very similar to the beneficial ownership of the assets which [the founder] had before he transferred them to Rainbow. But it does not follow from this that [the founder] lacked the necessary intention to establish [the foundation] as a valid foundation". Before me, VTB does not contend that Berenger is a sham, whether under Liechtenstein law or under English law. Given that the experts are agreed that Liechtenstein law would not recognise that concept that is hardly surprising. VTB accepts that Berenger is a valid foundation under Liechtenstein law but contends that there is a mandate and that creates the necessary conditions for a Receivership Order to be appropriate.

113. For that purpose, it is not necessary to show that Mr Skurikhin is the "beneficial owner" in the full sense in which that term is used to describe a beneficiary under an English trust, i.e. as the present holder of a proprietary interest in the assets within the foundation. It is sufficient that he should have a right to direct the trustees as to what they are to do with the assets. Equity latches on to his ability to turn himself, or someone else he nominates, into the owner, in the full sense of that term, should he choose to do so. The term "tantamount to ownership" is used in *Tasarruf* in this broader, and looser, sense.

114. In *Hamilton v Hamilton*, Henderson J found that the assets were held for the founder's benefit and at his disposal (at [152]) subject only to an obligation to check that obeying an instruction would not be illegal or immoral (at [155]). The assets could therefore have been called on to meet a judgment debt owed by the founder and there would then have been no discretion to refuse. Had the question been whether a Receivership Order should be made, those facts would have justified the making of such an order. The fact the board might have to check that an instruction accorded with their powers is no different from, say, the pension fund in *Blight*, needing to check that the drawdown request is duly mandated in accordance with the terms governing the fund. On those findings, provided that the instruction met the agreed parameters (including the fact the foundation could not be instructed to do something which would be regarded as illegal or immoral under Liechtenstein law) it would be acted upon, as a matter of obligation, rather than out of good will. That is a right that could, had it been the issue in the case, have been fastened upon during the lifetime of the mandatory to compel a transfer of assets. As it was, he was dead, without such a transfer ever having taken place. The question of whether, in that scenario,

the arrangements he had put in place were a sham was rightly answered in the negative – those arrangements were exactly what they purported to be - but that does not answer the question with which I am confronted, which had it arisen during his lifetime would have been whether his right, if he chose, to transfer assets should result in those assets being accessible to enforcement. At all events, that judgment does not result in a ratio that is binding on me, faced as I am with different factual evidence, including as to the expert issues of Liechtenstein law.

115. As I analyse the principles, it is necessary for me to be satisfied that the evidence justifies me in drawing the inference that Mr Skurikhin not only exercises de facto control but does so as a mandatory, in that his right to have his instructions followed is recognised and acted upon. The experts are agreed that a mandate need not be in writing. It can be oral and identifying its presence may be a matter of drawing inferences from the manner in which the foundation operates and the decisions made.

116. However, I also heard oral evidence from each of Mr Meier and Dr Schurti, both of whom denied that the explanation for Berenger's past decisions was the existence of a mandate through which Mr Skurikhin was able to direct those decisions. In evaluating that evidence, I remind myself of what was said by Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) at [15]-[22] about the potential unreliability of witness evidence based on recollection, particularly as to past motivations and beliefs, influenced as it can be by the litigation process itself, and of the advice "to place little if any reliance at all on witnesses' recollections of what was said in meetings and

conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts" and to treat cross-examination as an opportunity "to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events".

117. There was no controversy over the principle that there should be a "reasonable prospect" that the Receivership Order will be of practical utility: *Cruz City*. The issue between the parties was whether that was made out on the facts before me. In that regard, I remind myself of the warning not to get entangled in hypotheticals.

(ii) Application to the facts

(a) The issue of control

118. It is important to the analysis on this issue to grasp that Liechtenstein law sees no contradiction in terms between a foundation being defined in its foundational documents as having only discretionary beneficiaries, and yet one of those beneficiaries having a mandate which allows them to control the decisions made by the foundation, including as to distributions to the beneficiaries. This is not regarded as making the foundation a "sham" and, indeed, it seems that Liechtenstein law does not really recognise that concept as applicable in the context of foundations. The existence of such a mandate has adverse tax consequences (precisely because it gives the mandatory a claim on the assets). The mandate need not be documented and might take the form of an understanding with the mandatory which is evidenced by the way the foundation

in practice behaves. As a result, in practical terms, the existence of a mandate may be inferred from evidence of the exercise of de facto control, if the conclusion reached is that the most probable explanation for the observed de facto control is that the foundation is obeying instructions from a mandatory. This may explain why Christopher Butcher QC expressed himself in the terms that he did.

119. There was a considerable measure of agreement between the experts as regards the way in which a mandate operates as a matter of Liechtenstein law. Dr Lorenz, in the report on which VTB relied before Burton J, explained that members of the board of a foundation may enter into a mandate with the founder or principal beneficiary which then permits the principal to direct all decisions of the board, most importantly the decision to make distributions. Further detail has been provided in reports from Dr Frommelt, instructed by VTB, and Mr Kaiser, instructed by Berenger.

120. It is agreed that it is lawful under Liechtenstein law for there to be a mandate, that a mandate may be oral, that it has adverse tax consequences (which, indeed, may make it more likely that its existence will be undocumented) and that any instruction issued under the mandate may not conflict with the statutes and the regulations of the foundation or with mandatory statutory provisions but that, provided there is no such conflict, an instruction issued by the mandatory to the governing body of the foundation is legally binding on the individual members and must be followed.

121. Although at one point in his report (in the context of addressing whether Mr Skurikhin could be validly excluded) Mr Kaiser said that a mandate does not

give a discretionary beneficiary an "actionable claim", that was to a degree contradicted by his evidence, with which Dr Frommelt agreed, that the existence of a mandate has adverse tax consequences. Mr Kaiser went on to give, in support of the latter point, examples of such decisions in the Austrian and German Courts. I understand Mr Kaiser to be saying that a mandate does not give a mandatory an "actionable claim" on the assets themselves in the Liechtenstein Courts, i.e. a claim "in rem". That appears to be at odds with Dr Lorenz's evidence about this (before Burton J) which was that a mandate "would permit the principal to direct all decisions of the board, most importantly the decision to make distributions. If the principal of such a contract is a beneficiary or may be nominated a beneficiary, the court would treat that person as owning a proprietary interest in the foundation." I do not think I need resolve that, however, since the experts appear to agree that a mandate does create a legally binding obligation "in personam" on the board members to follow the instructions of the mandatory and that the existence of that right has resulted in the assets being treated as property of the mandatory for tax purposes. It is that power of direction which is relevant to the English law analysis as to whether a receiver can be appointed.

122. Dr Frommelt noted (and Mr Kaiser did not appear to disagree) that, under a mandate, control may be maintained not directly but through a nominee, such as Mr Meier or Mr Lerch, who in turn follows instructions from their principal.

123. It also appeared to be agreed that a mandatory does not need themselves to be a beneficiary but that a mandatory could not order the board to make a distribution to someone who is excluded as a beneficiary, since such an instruction would

then conflict with the foundational documents. That is relevant to issue 3, below. An area of controversy between the experts, which I shall come to later, related to whether an instruction to distribute to Mr Skurikhin would conflict with Article 5 of the statutes, and/or with the 80/20 split which is expressed in the 16 February 2005 regulations as a "long-term guideline", and whether such an instruction could therefore not be followed by the board.

124. Dr Frommelt went further, in expressing views about the inferences to be drawn from the documentary evidence as to the factual issue of whether a mandate exists in this case. This was expressed as drawing on his experience of Liechtenstein foundations. Up to a point, it may be helpful to have the touchstone of an expert's wider experience of how the operation of this particular foundation measures up against what is typically seen in other foundations (and Christopher Butcher QC accepted as much). However, in my view Dr Frommelt's successive reports have tended, progressively, to descend too far into the arena of questions of fact that are fundamentally for me, and not for the experts. It is unfortunate that he also forgot to disclose sooner his own past involvement in acting for VTB in related criminal proceedings in 2015 and 2016 because it risks creating an impression that he may have an insufficient appreciation of the duty of an expert, in our litigation process, to remain independent of the parties. In light of this I have approached his opinions, on those areas where the experts disagree, with a degree of caution.

125. The key controversy is, however, one of fact as to whether a mandate existed and is a question for me, rather than the experts. Mr Meier denied that a mandate existed or had ever existed. Dr Schurti was significantly more cautious in how

he expressed himself, saying that Berenger had never received any instruction from Mr Skurikhin and that: "I'm not a custodian of Mr Meier and I don't know what he does, but I know that I have no agreement with anyone to follow instructions." Mr Lord emphasised in his submissions for Berenger that they are each professionals: Dr Schurti a Liechtenstein qualified lawyer, Mr Meier the manager of a company providing fiduciary services based in Switzerland, and submitted that their denials of a mandate should be accepted as credible. Nevertheless, I have to evaluate the evidence given by Mr Meier and Dr Schurti on that issue against the wider evidential picture.

126. In Mr Meier's oral evidence there were some moments of genuine confusion and crossing of wires due to the difference of language (much as his understanding of English is evidently very good) but there were also occasions when, as I judged, Mr Meier found it convenient not to follow, or to resort to quibbling, or to counter a question with a question, when pressed on matters he was uncomfortable about (as, for example, when he was pressed about what efforts he had made to get funding for Berenger's legal representation or to establish how his own fees were going to be met). He grew increasingly impatient and terse when pressed with discrepancies between his oral evidence and the documents, for which he did not provide convincing answers.

127. Dr Schurti (who both understood and expressed himself with a high degree of fluency in English) expressed himself in very precise terms and was very careful to emphasise the limits of his own knowledge, as compared with that of Mr Meier, being keen to stress that anything to do with financial matters was Mr Meier's territory and that he'd had almost no contact with Mr Skurikhin himself.

Although his evidence was delivered with great confidence, even perhaps at times a touch of arrogance, he again did not, in my judgment, satisfactorily account for the significant discrepancies between that narrative and the documentary record.

128. After careful consideration of their written and oral evidence, tested against the documentary record, I have concluded that I cannot accept their evidence on this issue. Cumulatively, there are too many counter-indications pointing the other way. Some of these, individually, might be explained away but, taken as a whole, they cannot. The single explanation that best fits and explains all of the evidence, taken in the round, is that there is indeed a mandate, whereby Mr Meier acts as intermediary in delivering Mr Skurikhin's instructions and these are followed (and are still being followed). The fact that Mr Skurikhin acts through Mr Meier, rather than issuing instructions directly to Berenger, provides an element of plausible deniability, enabling Dr Schurti to disavow knowledge of what arrangements may exist between Mr Meier and Mr Skurikhin and maintain the fiction that Berenger makes its own decisions independently. Nevertheless, the evidence, taken as a whole, contradicts rather than supports the assertion that Berenger acts independently, as opposed to seeking and then following the instructions of Mr Meier, and hence of Mr Skurikhin.

129. Mr Meier is a central figure in this matter:

(a) He and Mr Lerch manage and are beneficial owners of Accreda. Mr Meier explained that his relationship with Mr Skurikhin dates back to, approximately, 2000. That is the date of the written fiduciary agreement between Mr Skurikhin and Accreda Vaduz for management services,

initially in respect of Miccros and then, after the formation of Pikeville, also in respect of Pikeville. The delivery of those services was, as Mr Meier explained, outsourced to Accreda from the outset, and it seems from what he said in oral evidence that in 2009 he "found a solution to take over the mandate to Zurich". It is evident that over time his role came to extend beyond Miccros and Pikeville. Mr Meier explained that the "Berenger/Pikeville matters" were handled by Mr Meier, with Mr Lerch's involvement limited to serving as an alternative point of contact in his absence, pursuant to their general practice of deputising for one another on their respective client mandates.

(b) In 2002, he formed Pikeville as a vehicle for holding assets on trust for Mr Skurikhin. Together with Mr Lerch, Mr Meier controls Pikeville, either through companies he and Mr Lerch control or, for a while, as members of Pikeville individually. The structure under which the Italian properties were acquired by Pikeville included, said to be for tax reasons, the grant of a life interest in the Italian properties to Mr Meier as a nominee for Pikeville. Mr Meier and Mr Lerch signed the successive declarations of trust in respect of Pikeville, acting on Mr Skurikhin's instructions.

(c) As noted above, Mr Meier's responsibilities included providing management and administration services in respect of Miccros, which is owned as to 55% by Berenger and as to 45% by the Eastbridge Settlement, through a company called Taurus Limited of which Mr Meier and Mr Lerch are the shareholders. (There are manuscript notes

of Mr Meier's amongst the disclosure, showing the rationale for the structures adopted, which explain that the Eastbridge Settlement was intended to hold Mr Skurikhin's business interests, Berenger being precluded as a Liechtenstein foundation from pursuing commercial activity.) Miccros provided the loans to Pikeville which were used to acquire the Italian properties and, until its bank account was closed following the imposition of the freezing order, funded Berenger's costs.

(d) Mr Meier was responsible for putting in place the arrangements establishing Berenger and Olympic, again on Mr Skurikhin's instructions. A company that Mr Meier and Mr Lerch control acts as trustee of Olympic (Accreda Trustees). He was originally also on the board of Berenger, as was Mr Lerch, until they stood aside for reasons related to a change in Swiss law. Mr Meier, although no longer a member of the board of Berenger is still said by Dr Schurti to assist the board in the management of Berenger's affairs and assets. That assistance includes having been given authority to act as Berenger's representative in instructing Withers in relation to this application. Moreover, when Mr Meier and Mr Lerch stood down from Berenger's board, Berenger's bank account at UBS was closed and the balance transferred to Accreda. Therefore, since 2012, Accreda has held Berenger's purse strings (such that, for example, Berenger could only fund legal advice for the purpose of the Receivership application to the extent that Accreda provided funds).

(e) As more particularly described below: the documents show Mr Meier meeting with, communicating with, and advising Mr Skurikhin, referred to as his "client", on wider business interests of Mr Skurikhin's, as well as matters connected with the trusts; Mr Meier provided a witness statement on behalf of Pikeville in response to the order for disclosure and provision of information made against it by Hamblen J; more recently, he was involved in exchanges with Russian lawyers and the Russian bankruptcy administrator in respect of efforts to end the bankruptcy proceedings (said by him to have been initiated by an unidentified beneficiary); he has provided evidence in support of the present application by Berenger and it emerged that he has been given authority by Berenger to instruct Withers in respect of this litigation and the litigation concerning Miccros.

130. By comparison with Mr Meier, Dr Schurti's involvement is limited in scope:

(a) Mr Meier explained that Dr Schurti's involvement is necessary because Liechtenstein law requires that structures established there have a local director. Walpart, operated by Dr Schurti, with Dr Walch and Mr Hanselmann, fulfils that function, providing services to Accreda's clients where the latter require a Liechtenstein structure, as in the case of Berenger.

(b) Whilst Dr Schurti and Mr Hanselmann are the remaining members of Berenger's board, following the departures of Mr Meier and Mr Lerch in 2012, Dr Schurti's evidence was that this required little of them in terms of decision-making as there were no distributions and "there was

nothing really to do", other than get a short annual report on the underlying assets; that he met Mr Skurikhin only once (for due diligence compliance purposes); that he was not in touch with and had never met the other discretionary beneficiaries; that he looked to Accreda and Mr Meier as "so to speak, the group treasurer" to carry out the accounting for the whole group of entities in which Berenger had an interest and to tell him whether any funds were available in any of the underlying entities; and that the fact Mr Meier knew the details, and he did not, made it appropriate for Mr Meier to be authorised to give Withers instructions in respect of Berenger's application to discharge the Receivership Order (by way of a very short letter giving him general and unqualified authority for the purpose of the "ongoing litigation concerning Pikeville and Miccros").

(c) Mr Meier said that the whole Berenger structure was "fundamentally passive" and that the day to day running of Pikeville was left to him. The documents show Mr Meier dealing with, for example, the payment of utility bills on behalf of Mr Skurikhin and his family, in respect of their residence in the Italian properties owned by Pikeville.

131. Mr Hanselmann's role appears to be purely formal. His name appears on the very few formal resolutions made by the Board but he is otherwise seemingly absent from the documentary record, taking no part in the exchanges between Dr Schurti and Mr Meier. His evidence took the form of a short witness statement exhibiting and adopting by way of compendious cross reference the relevant paragraphs of Dr Schurti's witness statement, which included Dr

Schurti's denial of a mandate. It appears that he simply followed Dr Schurti's lead on matters relating to Berenger. The question, however, is whether Dr Schurti was in turn being led by Mr Meier.

132. Dr Schurti formed Berenger on Mr Meier's instructions and accepts that the board had in the past "had regard to the wishes of Mr Skurikhin (as communicated to us by Mr Meier)". He denied that the board considered itself bound to follow those wishes. However, (as is further discussed below) he was unable to identify any convincing example of the board demonstrating its independence; the documents show him consulting Mr Meier at key junctures and following his lead; and there is a striking absence of the sort of records one might expect to see if the board was engaged in truly independent decision-making, as opposed to acting in accordance with instructions delivered from time to time via Mr Meier (in circumstances where, contrary to his suggestion that this was because no decisions were needed, there plainly have been a number of important decisions required and taken). There is also an absence of any communications with other discretionary beneficiaries, or anyone communicating "wishes" to the board on their behalf, in the way that (on Mr Schurti's account) Mr Meier did on behalf of Mr Skurikhin.

133. The regulations of Berenger were drafted in terms that would be consistent with Mr Skurikhin having a mandate that operates outside the formal foundational documents but consistently with those documents. In contrast to all the other beneficiaries, Mr Skurikhin does have the right to receive information about the Foundation's assets and income (section 4). Section 8 provides that the Board of Directors is to have the right to amend, replace or revoke these Regulations

at any time during the lifetime of Mr Skurikhin but after his demise they are only entitled to modify the Regulations in a manner that does not substantially depart from the February 2005 regulations. That distinction makes sense on the footing that during his lifetime Mr Skurikhin can control and direct any changes to the Regulations, by way of his mandate, but he wants to be sure no one can make significant changes after his death.

134. Furthermore, the existence of a mandate provides the obvious explanation for why the final sentence of Article 5 was included in the Regulations. That provides that "Beneficiaries may not be deprived of their beneficial interest under the foundation by their creditors by means of proceedings for protective relief, execution or bankruptcy (Art. 567 PGR)". Berenger's expert, Mr Kaiser, speculated that the function of Article 5 of the Statutes is to extend that same protection to discretionary beneficiaries as applies to non-discretionary beneficiaries under that provision of Liechtenstein law. That suggestion was not supported by any evidence that that was in fact the thinking behind the inclusion of the article and it does not make sense. A discretionary beneficiary does not need the protection of Art. 567 PGR, which is a provision of Liechtenstein law which protects against enforcement action being taken against the assets of the foundation by creditors of a beneficiary who has an enforceable claim on the assets held by the foundation. It was common ground that a discretionary beneficiary would, per se, have no claim on the assets of Berenger, so the supposed protection is otiose (assuming for the moment that the rights of third-party creditors could in principle be affected by a provision in Berenger's articles, as opposed to an article of Liechtenstein law, which would seem doubtful). On the other hand, the presence of this provision makes sense if Mr

Skurikhin had a mandate, because the existence of that mandate could expose Berenger to claims by his creditors and the invocation of Art. 567 PGR would then be apt.

135. Those are examples of points that could, in principle, in themselves have alternative explanations but which fit well together with the other available evidence pointing to there being a mandate.

136. Whilst Mr Meier is now keen to downplay his relationship with Mr Skurikhin, presenting it as a matter of some three meetings a year, the last of which was said to have been in 2015, and equivocating about whether he still regarded Mr Skuirkhin as his client after Berenger was formed, the picture that emerges above is that Mr Meier has been for many years a trusted counsellor to Mr Skurikhin, intimately involved in the complex structures that were established, with his advice, and into which Mr Skurikhin's personal and business assets were transferred. For example, Mr Meier's evidence was that when Pikeville was first established it held assets on trust for Mr Skurikhin, although that trust had never been declared in writing, and that at a later stage he acted on an oral instruction from Mr Skurikhin to declare a trust in favour of Berenger. That example bespeaks the considerable level of trust and confidence reposed in Mr Meier by Mr Skurikhin. The very limited email communications that have been disclosed include some friendly exchanges (such as Mr Skurikhin sending birthday greetings to Mr Meier). Whilst I do not suggest they were on intimate social terms, these exchanges are consistent with this being a long-standing relationship with a valued and trusted adviser.

137. On Mr Meier's own evidence, only a small proportion of the communication that passed between Mr Skurikhin and Mr Meier has left a documentary trace, since Mr Skurikhin "appreciated the way that we handled the relationship in person face-to-face or over the telephone". It is noteworthy that the manuscript notes recording their meetings end in 2012, when proceedings were commenced against Mr Skurikhin, even though on Mr Meier's evidence meetings continued until at least 2015. In cross examination he sought, unconvincingly, to change his account suggesting that there had not been meetings between 2012 and 2015. Mr Meier describes a policy of shredding working notes and records of telephone meetings and says that Accreda's clients appreciate his approach "for reasons of confidentiality". It seems clear that Mr Skurikhin and Mr Meier took care to leave as little documentary trace as possible of their communications and decision-making, in particular after this litigation commenced.

138. Mr Meier consistently referred to Mr Skurikhin as his client (in German, "Kunde") in his own manuscript notes of their meetings, including after the date Berenger was formed. It is clear that, in reality, he regarded him in that light throughout. His curious reluctance to admit that obvious fact was because he appreciated that might be a step towards the conclusion that his communications with Dr Schurti were to be characterised as passing on instructions from his client to Berenger.

139. It is significant that it was to Mr Skurikhin that Mr Meier looked for payment of the outstanding invoices for Accreda's services (including reimbursing Accreda for having met Berenger's bills), after those were no longer being met out of revenue from Miccros, after the latter's bank account was closed

following the freezing order. Hence, the meeting he had with Mr Skurikhin in 2015, which he says was to demand payment and described in his oral evidence as "not very friendly". In oral evidence, he made the suggestion that he looked to Mr Skurikhin for payment because he was "the source of problems we have". That answer came across as improvised on the spot to deflect the suggestion that this showed he continued to treat Mr Skurikhin as his client. On his own account, he was asking Mr Skurikhin to meet Accreda's costs in general, not just those referable to this litigation. His answers when pressed further as to whether he had been reimbursed and, if not, whether he had sought payment, struck me as evasive, countering Mr Penny's questions by demanding "Who we should ask?". Whilst Accreda being left unpaid for substantial amounts of work could well be expected to have introduced some tension into the relationship, what is remarkable is that he was prepared to carry on working, and meeting Berenger's costs, for a considerable number of years, seemingly, without being paid. That is hardly the behaviour one would expect from an adviser in an ordinary arms-length client relationship.

140. The reality is that Mr Meier has been and continues to be Mr Skurikhin's right hand man, in respect of the latter's financial affairs. His best chance of getting his bills paid is, doubtless, aligned with his client's interests, namely getting the Receivership Order discharged and, as a next step on the back of that, seeking to get Pikeville released from the freezing order.

141. Far from demonstrating that Berenger acted independently of Mr Skurikhin, the available evidence suggests that Mr Meier controlled Berenger's actions and did so in the interests of, and it is to be inferred at the behest of, Mr Skurikhin.

Looking back over the history of this litigation, there is a pattern of behaviour on the part of Mr Meier and Berenger that seems more consistent with seeking to further Mr Skurikhin's interests and advancing his strategy in respect of his dispute with VTB, than with them acting independently of him, suggesting that he was and is calling the shots, through instructions to Mr Meier and, through him, to Berenger. The best explanation that can account for each twist and turn in the narrative is that he is recognised as the only beneficiary whose interests they are obliged to protect, and whose wishes should command, because he is the mandatory and the true beneficial owner of the assets, with anyone else's interest being merely contingent and dependent on Mr Skurikhin's wishes:

(a) Mr Skurikhin's stance in the early stages of this litigation was to seek to conceal the fact he was the economic settlor of Berenger, lie about not knowing who the other discretionary beneficiaries were, and fail to comply with orders to give proper disclosure or to attend for cross-examination on his assets (Judgment of Burton J at [10]; Judgment of Flaux J at [8]). He was pinning his hopes on maintaining secrecy, so that VTB could not seek to untangle the true effect of the complex arrangements he had put in place. His chosen strategy of obfuscation, and refusal to engage with the orders of the Court, would have been undermined if Pikeville, Mr Meier or Berenger had blown his cover.

(b) The Regulations of Berenger (which would have revealed Mr Skurikhin's special status, as compared with other beneficiaries: see paragraphs 30, 32 and 133-134 above) were not before Burton J or Christopher Butcher QC because, despite Gloster J having ordered

disclosure against Mr Skurikhin, they had not been disclosed. In correspondence with Wedlake Bell in November 2012, Dr Schurti noted that the order was not addressed to Berenger or enforceable in Liechtenstein and declined to answer the questions posed, on the basis that Liechtenstein secrecy rules precluded him from providing information without a waiver and that in the context of a foundation he could not provide information to someone who was not a sole beneficiary where doing so could be detrimental to other beneficiaries. That stance was adopted even though Berenger's regulations, as can now be seen, gave Mr Skurikhin a right to information. Although he claimed in cross-examination not to know whether Mr Meier was handling the London litigation for Mr Skurikhin, he copied his letter to Wedlake Bell to Mr Meier at Accreda. Berenger did not, at that time, or at the time of the Receivership Application, opt to protect the interests of other beneficiaries by putting forward the arguments it now advances or by excluding Mr Skurikhin.

(c) Pikeville had been, as Gloster J put it, "extremely coy" in its 2010 audited financial statements (signed by Mr Meier) about the identity of its ultimate beneficial owner, pushing this to the point that its auditors qualified its accounts. Burton J noted (at [9]) that Mr Meier had submitted evidence for Pikeville, in response to the order of Hamblen J that Pikeville disclose its assets and disclose who exercised ultimate beneficial control over Pikeville, answering a series of questions about the identity of Berenger's board and its discretionary beneficiaries and whether any of the latter was able to control the decisions of the board

by repeating that "Pikeville/Perchwell oppose this request and do not have the documentation/information".

(d) That degree of sensitivity is more readily explicable if the concern was to keep under wraps the fact that Mr Skurikhin was the real ultimate beneficiary of Berenger, and hence of Pikeville, by reason of the mandate. Otherwise why not provide then, immediately and straightforwardly, the evidence to demonstrate that he was merely a discretionary beneficiary with no form of control over Berenger (the position the Court is now, very belatedly, being asked to accept as true). Each of Mr Meier and Dr Schurti had the opportunity to evidence that then (and indeed Pikeville was represented at the hearing before Burton J) but they did not. The inference I draw is that the approach adopted was that which suited Mr Skurikhin's strategy at that time.

(e) Mr Skurikhin being the mandatory, recognised as such, and hence the true ultimate beneficial owner of the assets within Berenger, would also be consistent with the fact that Mr Skurikhin was described as the "beneficial owner" in the form Mr Meier submitted to UBS for Berenger's account in 2005 and also in forms he submitted for Miccros's account and an associated credit card in 2003, 2006 and 2008. These, notably, as Mr Ractliff (VTB's solicitor) explained in his witness statements, did not emerge from any disclosure given by Pikeville or Berenger (for example in response to the Hamblen J order, or exhibited to Mr Meier's first witness statement in support of this application). They were put in evidence by VTB in response to the discharge

application. The form relating to Berenger was obtained from the authorities in Liechtenstein, VTB having obtained permission from the Court in Liechtenstein to inspect documents that had been seized from Berenger and Walpart for the purpose of a criminal prosecution (subsequently not pursued). The forms relating to Miccros were obtained from the receiver of Miccros.

(f) Mr Meier sought to distract from the content of the UBS forms by questioning how the form relating to Berenger had been obtained and then asserting that, despite the fact they plainly describe Mr Skurikhin as the beneficial owner, this was not what they meant. He claimed to have been advised by UBS to insert Mr Skurikhin's name there because he was the economic settlor. Having regard to the purpose of the forms, namely ensuring UBS's compliance with the requirement that it know who the true ultimate beneficial owner of the funds was, that explanation does not appear to make sense and I did not find it to be credible. It is more probable that the UBS forms say exactly what they mean and mean what they say. They show that Mr Meier considered Mr Skurikhin the ultimate beneficial owner of the assets that were placed into Berenger, both before and after the date on which Berenger was formed.

(g) Also significant is the fact that after Mr Meier and Mr Lerch stood down from the board of Berenger in 2012, Mr Lerch was authorised to access Berenger's bank account with UBS. In September 2014, Dr Schurti acted on an instruction from Mr Meier to close Berenger's bank account with UBS and transfer the remaining balance to Accreda Partners AG.

Thus, financial control of Berenger was retained by Mr Meier even after he left the board (and, as I infer, through him, Mr Skurikhin) and Berenger was dependent on Mr Meier's willingness to fund any necessary expenses (as, for example, legal fees in respect of the Receivership Application). It would also seem from what Mr Meier said in oral evidence that UBS (who had, as noted above, been told Mr Skurikhin was the beneficial owner) had asked for the closure of Berenger's and Miccros's accounts. This was after freezing orders had been made against Mr Skurikhin, as described earlier in this judgment. Noone, it seems, ever sought to correct what UBS had previously been told about beneficial ownership.

(h) Mr Meier's evidence was that he had advised Mr Skurikhin before he set up Berenger that they could not do things by halves and he would need to relinquish control of the assets. In oral evidence he elaborated on this saying he had told Mr Skurikhin that he could not have "the small bread and the coin" (or, as we would put it in English, the penny and the bun). I note, however, that given that Liechtenstein law does allow mandates, this consequence did not in fact necessarily follow from setting up Berenger. This was a matter of choice, rather than a foregone conclusion from establishing the foundation. There is no documentary evidence corroborating Mr Meier's evidence that any such exchanges with Mr Skurikhin took place, or showing him, when a member of Berenger's board, refusing to act on an instruction from Mr Skurikhin. Whilst there are, as detailed below, some letters from Berenger articulating the position that Mr Skurikhin is merely a discretionary beneficiary with no

interest in the assets, these are all written after these proceedings have commenced and are in the context of protecting those assets against claims (and hence accorded with Mr Skurikhin's interests).

(i) Mr Meier sought to suggest that an example of his refusing Mr Skurikhin was to be found in his exchanges with Mr Skurikhin in 2008, documented in his manuscript notes, about Mr Skurikhin wishing to establish a Swiss bank for Russian depositors and integrate that into the Berenger structure. He said he "rejected" that idea. What the notes show, however, is Mr Skurikhin seeking Mr Meier's "opinion" and that Mr Meier "dissuaded" him (language consistent with Mr Meier's role being that of a trusted adviser). Later notes show Mr Meier continuing to meet the "client" to discuss the bank project, after that date. As a Liechtenstein foundation, Berenger could not pursue commercial activities. The fact that Mr Skurikhin appears to have accepted Mr Meier's advice not to seek to integrate the bank project into Berenger (something which Liechtenstein law did not permit) does not demonstrate that Mr Meier was in a position to, or did, overrule Mr Skurikhin on anything that Berenger was as a matter of law permitted to do. What the exchanges do also show is Mr Skurikhin turning to Mr Meier for advice across his broader interests, including but not limited to those that could be held in Berenger (such as the Italian properties).

(j) I note that some years later, in 2011, Mr Meier's notes record a meeting with Mr Skurikhin when the latter "wanted to bring the income into Berenger" from "his film" about Rasputin. The note ends (like many of

these notes) "No decisions", which implies that decisions could in principle have been taken at these meetings. Equally, if one looks back to notes for a meeting in 2006 one finds Mr Skurikhin seeking advice from Mr Meier about an offer for part of the SAHO group's business, wanting to know "how it would work if the activities of the Trust/Foundation were to be kept", recording that various scenarios were discussed but "Nothing decided". That shows Mr Meier keeping track of whether any decisions were or were not arrived at during meetings with the individual he plainly regarded, and often referred to as his client, i.e. decisions made by Mr Skurikhin, including on matters on the face of it relating to the affairs of Berenger. That is to be contrasted with the lack of any documentation showing decision-making by the board of Berenger, other than the formal decisions establishing its regulations at the outset, approval of annual financial statements and the eventual exclusion of Mr Skurikhin (which I deal with below).

(k) The exchange whereby Mr Meier instructed Dr Schurti to close the UBS account is one example of a wider pattern whereby Dr Schurti looked to Mr Meier to tell him what to do and sent him draft letters for his approval or worked from drafts that Mr Meier produced. The exchanges relating to the Receivership application and Mr Skurikhin's exclusion are other examples of this. Dr Schurti sought to account for Mr Meier's involvement as being that of Group Treasurer, to whom Dr Schurti turned for information about financial matters. Accreda administers the assets and Dr Schurti himself knows little about them, as emails from him raising questions for the purposes of the financial statements

demonstrate. However, Accreda apparently does this work without there being (so Mr Meier said in oral evidence) any management agreement between Accreda and Berenger, and payment passes from Accreda to Berenger rather than the other way round. The clear overall impression is that it was Mr Meier who was in the driving seat, not Dr Schurti. The inference I draw from the evidence taken as a whole is that the reason for Mr Meier's continuing role over the years since he stepped down from Berenger's board, including his role in respect of giving instructions with regard to this litigation, is as the channel for Mr Skurikhin's instructions.

(l) Dr Schurti's reaction to the Receivership Application was to consult Mr Meier as to what he should do. That seems to me the clear import of his manuscript note, scribbled on the email of 1 July 2015 informing him of the date of the hearing ("wie weiter?"), and the email to the same effect that was sent to Mr Meier the same day. Whether translated as "How to proceed?" or as "What's next?" this was plainly a request for instructions. The discussions that evidently followed were not recorded. Although Dr Schurti said at one point in his evidence that "we were looking desperately for money" his and Mr Meier's evidence as to what was actually done did not in fact suggest any serious endeavour to find funding beyond that which Accreda had supplied. The real reason for the decision not to contest the Receivership Order, as I infer, was not the impossibility of finding funding but Mr Skurikhin's judgment that his interests were better served, at that stage, by continuing his policy of non-engagement, gambling on the difficulties of enforcing in

Liechtenstein, and therefore that there was no need to ensure that representation for Berenger was funded, beyond such funds as necessarily had to be found to meet Dr Schurti and Mr Lerch's insistence that they be enabled to take advice on their own positions. As I have said, Dr Schurti's explanation for not appealing the Receivership Order was that he understood from Mr Meier that "they have no interest in that". I conclude that the strategy of not engaging with the receivership application was not arrived at independently by Dr Schurti but followed Mr Meier's lead, which in turn, I infer, must have reflected the instructions that Mr Skurikhin (whom, as I have said, Mr Meier regarded as his client) gave to Mr Meier.

(m) It stretches credibility that funding has now, as if by magic, been found not just for this application but also for the application being made by Miccros to lift that receivership order, purportedly from an unnamed beneficiary who did not know he or she was such in 2015 but knows that now. The obvious explanation is that now that the pincers appear to be closing in on the Italian properties, which are made use of by Mr Skurikhin and his family, he has decided it is in his interests that Berenger should now, belatedly, engage in a bid to deflect enforcement against those properties. If the approach, throughout, had been independent of Mr Skurikhin and motivated by protecting the contingent interests of the other discretionary beneficiaries it would have made far better sense for Berenger to have nipped the whole receivership in the bud, by setting out straightforwardly at the time of the original application (even if just by letter) what is now claimed to be the true

factual position and the key points of Liechtenstein law relied upon. The u-turn in strategy, including Mr Skurikhin's own exclusion, reflects a change in Mr Skurikhin's battle plans in the ongoing saga of his dispute with VTB.

(n) Before addressing Mr Skurikhin's exclusion, I should consider in some detail some earlier exchanges, in 2016, relating to the Russian bankruptcy. Dr Schurti initially wrote to Accreda (it would seem in response to a request that does not seem to be documented) a letter maintaining that Mr Skurikhin was merely a discretionary beneficiary with no rights that could be attached by creditors. (That stance, which is of course Berenger's position on this application, was also articulated in some letters addressed "to whom, it may concern" in 2015, which similarly post-date the freezing orders.) In sending that letter to Mr Meier, Dr Schurti referred to the fact Berenger was a discretionary foundation and said he could not turn it into one in which beneficiary claims were "negotiated". Dr Schurti pointed to this exchange as illustrating his independence. This, and the exclusion of Mr Skurikhin, were in fact the only concrete examples of that he identified. However, what is instructive is how the matter subsequently developed.

(o) It might have been hoped that holding to the line that Mr Skurikhin had no rights would protect the assets held within Berenger from the bankruptcy in Russia. However, the financial manager appointed in Russia evidently did not accept that answer and continued to press for a valuation of what Mr Skurikhin himself (significantly) described as his

"rights" in Berenger. Dr Schurti produced a draft letter, which he sent to Mr Meier, asking him to say whether he was in agreement with it, which reiterated that the foundation was discretionary but valued Mr Skurikhin's interest, if all the assets were to be distributed, at 50,000 Euro. The figure of 50,000 Euro derived from a draft supplied to Dr Schurti by Mr Meier. However, Mr Meier's draft had also stated that Mr Skurikhin's interest was only 20% of this figure, which Dr Schurti had omitted to say, and Mr Meier duly corrected Berenger's letter to give the figure of 10,000 Euro on that basis, reminding Dr Schurti of this. I find it telling that Dr Schurti, precise as he is, had forgotten about the 20%. This supposed error on his part may in fact betray the fact that he (rightly) perceived Mr Skurikhin as substantively the only beneficiary.

(p) He and Mr Meier were each challenged in cross-examination about the basis for attaching such a low valuation to the assets. The figure of 50,000 Euro (making Mr Skurikhin's 20% share 10,000) seems to have been plucked from the air by Mr Meier. There is no suggestion it was based on any sort of independent valuation. Dr Schurti asserted that his real view was that this valuation was "inflated" and the assets were worth nothing. He did not express that view at the time, however. He and Mr Meier were seemingly content to put that valuation forward to the financial manager (albeit together with a legal opinion from Dr Schurti's firm reiterating that Berenger was a discretionary foundation and that Mr Skurikhin in fact had no rights) in a bid to end the bankruptcy proceedings in Russia.

(q) Thereafter, a sale of Mr Skurikhin's interest was effected, to an individual who was a contact of Mr Meier's based in Dubai (who has since died). Mr Meier sought to distance himself from this. He claimed he had merely provided contact details for the Dubai-based purchaser and that this was all the idea of other (unidentified) beneficiaries who had "mistaken perceptions" about what the bankruptcy meant for them and were keen to protect the interests of beneficiaries other than Mr Skurikhin from being adversely affected by paying monies to the financial manager to buy out Mt Skurikhin's interest. He claimed to have made it clear to them that Mr Skurikhin had no such interest and that they would not recover from the Foundation anything they might pay the financial manager. Not a shred of documentation was produced evidencing any of that (or, indeed, any exchanges at all with the unidentified beneficiaries said to have funded legal fees, or otherwise showing any engagement on the part of Mr Meier or Berenger with any other beneficiary). Notwithstanding his claimed views, on his own evidence he supplied a "symbolic" valuation and a front man as a suitable nominee for the purposes of this deal. I did not find his attempt to distance himself from this strategy to be credible.

(r) Viewing this story as a whole, it is consistent with seeking to protect Mr Skurikhin's interests, first, by denying he had any "rights" (an assertion which suited Mr Skurikhin's interests, in that context) and then, as that was not proving effective in deterring the financial manager, by orchestrating a sale of those "rights" at a nominal value specified by Mr Meier to a stooge who was produced by Mr Meier for the occasion.

Thus, a narrative that was relied on as supposedly showing the independence of Berenger from Mr Skurikhin does not demonstrate any such thing but is equally explicable in terms of acquiescence by Berenger in a strategy being followed, orchestrated by Mr Meier, that was designed to protect Mr Skurikhin's interests in the particular circumstances.

(s) Given the involvement Mr Meier had evidently had in 2016, in supplying material to the financial manager and the Russian lawyers who were advising in connection with the bankruptcy proceedings, he must have been aware from at least September 2016, if not earlier, that Mr Skurikhin had been made bankrupt by the Russian Court. Challenged to explain why that did not lead to Mr Skurikhin's exclusion from Olympic at that stage (given that the rationale that has subsequently been advanced for that exclusion relates to the bankruptcy) he claimed unconvincingly that, because he did not then have a copy of the relevant Court decisions, it was "not relevant". Had he wanted to see the decisions he could no doubt have asked the Russian lawyers for them.

(t) As at mid-2017 it might have seemed that the threat from the Russian bankruptcy had receded, in that on 31 May 2017 an order was obtained from the Russian Court discharging Mr Skurikhin from further liability. That decision appears to have been published on 7 June 2017 and Mr Meier claimed that he got a copy of a translation of it from a (different) unidentified beneficiary on 13 June 2017 and told Dr Schurti about it the same day. This was supposedly then the prompt for Mr Meier to dash

to Dubai for a meeting with Mr Lerch on 16 June 2017 at which they resolved to exclude Mr Skurikhin, and for the board of Berenger to pass a similar resolution the following day, each expressly referencing the bankruptcy as the reason.

(u) There is no other documentary trace of the supposed exclusions having taken place at this point in the chronological record in mid-June, apart from the two resolutions themselves and the revised regulations, which VTB argues were each backdated. Each of Mr Meier and Dr Schurti denied that the resolutions were backdated, insisting they had been made on the dates they bore. (It was, I think, accepted that the regulations were not amended until later.) The evidence about this is of some significance for their general credibility and in throwing light on the real motivation behind the exclusions.

(v) As I have already said, it is not credible that Mr Meier had still doubted the fact of the bankruptcy until he saw a copy of the decision of 31 May 2017. He must already have known about it. It therefore makes no sense that he would react in this way to the decision of 31 May 2017, given he had not treated the declaration of bankruptcy itself as a reason to take that step and the position as at mid-June, as the judgment in question showed, was that the threat of detrimental consequences from the bankruptcy had apparently been removed by the discharge.

(w) A copy of the decision of 31 May 2017 was not emailed to Dr Schurti until 12 July 2017. Mr Meier sought unconvincingly to account for this glitch in the chronology by claiming he had posted a copy of the decision

to Dr Schurti earlier, which had somehow gone astray, such that he then had to email it. On their own evidence, therefore, Dr Schurti had not seen the decision of the Russian Court as at the date Berenger purportedly excluded Mr Skurikhin.

(x) Dr Schurti's evidence was that he heard about the bankruptcy from Mr Meier when they spoke on the phone at this point in mid-June. That again is improbable, given he had been involved in the earlier attempts to end the bankruptcy proceedings by providing a valuation for Mr Skurikhin's interest. He claimed that because of the harm that the bankruptcy was causing Berenger he then decided to say, "we exclude this guy…I want to get rid of this guy once and forever" and that this was his initiative. This overly dismissive language about the individual he knew to be the settlor struck a markedly false note and was an exaggerated attempt to demonstrate distance from Mr Skurikhin. Nor is it credible that Dr Schurti, precise lawyer that he is, would cause Berenger to take the step of excluding Mr Skurikhin on 17 June 2017 on the basis of no more than Mr Meier's summary in a phonecall of the 31 May 2017 decision, without having seen the decision itself, and seemingly without even knowing about the discharge.

(y) On 22 June 2017 Mr Meier (in a letter he said was drafted by his solicitors) wrote to the Russian financial manager in connection with seeking guidance from the Russian Court as to whether he could lawfully transfer his rights in the Italian properties (under the usufruct) to the joint administrators of Pikeville, without anywhere mentioning either the

decision of the Russian Court discharging Mr Skurikhin or the fact that Mr Skurikhin had supposedly been excluded as a beneficiary by then. This suggested he did not get the relevant decision of the Russian Court until after this letter (which is also consistent with a copy of the decision not being emailed to Dr Schurti until 12 July 2017) and that no such steps had yet been taken in respect of Mr Skurikhin. He sought to account for these omissions first by suggesting he trusted to his solicitors about what should and should not go in the letter and then that he did not yet have the Russian judgment "officially" and then that he was not sure he would have told the solicitors about the exclusions. I did not find any of this credible.

(z) Each of Mr Meier and Dr Schurti continued to refer to Mr Skurikhin as a beneficiary after the date of his supposed exclusion. On 20 July 2017 Mr Meier emailed Dr Schurti chasing him as to whether he had been able to prepare a draft of the letter they had discussed the previous week "to the beneficiary" (the German uses the singular, as Mr Meier confirmed in evidence). In response to that request, Dr Schurti then prepared a draft letter addressed to Mr Skurikhin. Dr Schurti asked Mr Meier to notify him of his wishes regarding changes to the draft letter. Both the covering letter to Mr Meier and the attached draft sent on 7 August 2017, referred to Mr Skurikhin as being a beneficiary ("you are one of the beneficiaries of our foundation"). I do not find it credible that Dr Schurti would have expressed himself in these terms by mistake, if Berenger had indeed resolved to exclude Mr Skurikhin as a beneficiary the previous month.

(aa) The draft letter does not inform Mr Skurikhin that he has been excluded (as one might expect, if Mr Skurikhin's exclusion had indeed taken place by that date, and had done so without his prior knowledge and consent).

(bb) Instead, the draft letter of 7 August 2017 refers to these proceedings in London and the "serious difficulties, disadvantages and losses" that are said to have resulted, telling Mr Skurikhin that as he is bankrupt he should arrange for the lifting of the orders of the High Court, failing which Berenger will have to start proceedings against him. The focus is on the harm the Receivership Order and Worldwide Freezing Order is causing. At this point in the file there is a manuscript note, translated as: "Amend regulations -> June 2017 -> Pavel excluded for ever." This would appear to be Dr Schurti's manuscript note of a discussion with Mr Meier at some point between 7 and 17 August 2017 (much as Dr Schurti denied this). That note is then followed by a revised version of the letter dated 17 August 2017, in which the opening sentence has been corrected to read "because you were one of the beneficiaries…", which Dr Schurti sends to Mr Meier saying it is being sent to the beneficiary "as promised". On the same date Dr Schurti sent Mr Meier revised regulations of Berenger, from which all of the previous references to Mr Skurikhin had been excised, purportedly dated June 2017.

(cc) Dr Schurti took issue with whether the position of this manuscript note in the file could be relied on as evidencing when this conversation occurred in the chronology. Whilst I accept that the process of scanning documents for disclosure could in principle have caused changes to the

order of the file, the fact is that the material discussed above (including the change in wording between the draft letter and the version as sent) supports the conclusion that it was only at some point between 7 and 17 August 2017 that a conversation between Mr Meier and Dr Schurti first took place about excluding Mr Skurikhin, resulting in this note.

(dd) I should add that a further manuscript note dated 12 July 2017 was disclosed in the course of the hearing, which by oversight had not previously been disclosed. (I accept this was without fault, in that Dr Schurti did include it in the material sent to Withers but its significance was not recognised.) This note includes a passage to similar effect as the draft letter of 7 August 2017 but saying in terms that Mr Skurikhin should take steps to lift the freezing order on the basis of his bankruptcy, ending (in translation) "otherwise threaten with legal steps -> for him Withers". The threat of legal action against Mr Skurikhin seems to have been window dressing designed to create an appearance of independence, since a genuinely adversarial position as between Berenger and Olympic on the one hand and Mr Skurikhin on the other is hardly consistent with the two of them apparently discussing and agreeing on who was to represent Mr Skurikhin for these purposes. Realistically, this is not Mr Meier suddenly, after many years' service as Mr Skurikhin's adviser, going rogue and attacking Mr Skurikhin. It is Mr Meier passing on and Dr Schurti implementing the latest strategy for protecting Mr Skurikhin's interests.

(ee) Initially, as the 12 July 2017 note had envisaged, Mr Skurikhin did instruct Withers to pursue on his behalf the application to lift the Receivership Order (presumably as a first step towards lifting the Freezing Order over Pikeville and Perchwell, if the discharge application succeeded). They wrote to VTB's solicitors on 12 January 2018, relying inter alia on the "sale" of Mr Skurikhin's interest by the financial manager (referred to above) as supporting the proposition that any interest he had was "identified, realised and distributed in the course of the Russian bankruptcy proceedings". The argument that Mr Skurikhin had been excluded was not deployed at that stage. However, when the obvious difficulty was pointed out that he would need to purge his contempt, Berenger and Olympic took over and Withers switched seamlessly to representing them (saying that they remain instructed for Mr Skurikhin but that "there is currently no work being carried out for him"). Withers must have satisfied themselves there was no conflict of interest. Withers wrote to the joint administrators of Pikeville on 1 June 2018, this time on behalf of Berenger and Olympic, indicating their intention to set aside the receivership Order on the basis that Mr Skurikhin did not control the foundation and had been irrevocably excluded from both Berenger and Olympic "as a result of his recent bankruptcy in Russia".

(ff) I conclude that the two resolutions, and the revised regulations, were indeed backdated, as VTB submits. The evidence each of Mr Meier and Dr Schurti gave about the supposed conversation they had in mid-June about the decision of the Russian Court and about that having been what

prompted each of them to take steps to exclude Mr Skurikhin was, I am afraid, a lie. They did not each react, spontaneously and independently, to news of his bankruptcy, with a view to protecting other beneficiaries from the effects of that bankruptcy. The initiative to exclude Mr Skurikhin comes from Mr Meier, in August, and relates directly to a bid to get the Receivership Order and Freezing Order lifted, that being the objective referred to in the draft letter of 7 August 2017 which was the subject of their discussion at that time. It may also be that they were by then aware that VTB had on 10 July 2017 appealed the decision discharging Mr Skurikhin, since the self-same strategy of asserting that Mr Skurikhin no longer has any form of interest also serves the objective of ending the bankruptcy proceedings. The purpose of the backdating appears to have been to bolster the false claim that the motivation is to protect other beneficiaries. I cannot be certain quite why the mid-June date was chosen, although it is possible that backdating the resolutions to a point in time when Mr Skurikhin had been discharged in the Russian bankruptcy was designed to avoid possible arguments there about whether this step had been taken to defraud creditors. At all events, the fact of the back-dating, which each of them vehemently denied, seriously undermines the credibility of their evidence more generally, including as to this being a step that was taken independently of Mr Skurikhin's direction.

(gg) It is, frankly, bizarre that there is no recorded communication of any kind either to, or from, Mr Skurikhin in respect of his exclusion from either Berenger or Olympic. Some sort of communication of that news (leave

aside issues of right and entitlement) would be a basic courtesy towards the person who was known to both of them (on their own case) to be the economic founder, and who on any view had specific rights, above and beyond those of other discretionary beneficiaries, that were enshrined in the regulations of Berenger (see paragraphs 30, 32 and 133-134 above). I conclude that Mr Skurikhin did not need a letter telling him about his exclusion because he already knew, this being part and parcel of a calculated stratagem implemented by Mr Meier on Mr Skurikhin's behalf as a last line of defence, with a view to preserving the Italian properties from being sold to meet the debt to VTB and creating the conditions for applying to lift the freezing order over the assets held in trust.

(hh) The unsatisfactory nature of the evidence which each of Mr Meier and Dr Schurti gave about Mr Skurikhin's exclusion then in turn reflects back on and undermines the credibility of their denials of the existence of a mandate.

142. Thus, I conclude that Mr Skurikhin has throughout had, and has never relinquished, control as a mandatory (if contrary to my findings on issue 1, that question can be reopened).

(b) The 20% split

143. Berenger fell back on taking issue with whether (if a Receivership Order was in principle appropriate) it ought to have been made in respect of the right to call for the assets, rather than directly over the membership interests in Pikeville, and only in respect of 20% of the assets in Berenger, on the basis that is the

share envisaged in the February 2005 regulations. It was argued that an order in those terms would not have permitted the appointment of administrators over Pikeville. I reject these arguments.

144. Olympic is merely a discretionary beneficiary, not a mandatory. It was common ground that a discretionary beneficiary has no right to a share in the assets. The 80/20 split applies to the assets within Berenger as a whole, not to Pikeville (which is just one of those assets) in isolation. Berenger has not, in fact, demonstrated, for example, by up-to-date, independently audited accounts or valuations (the only exhibited financial statements being both out of date and unaudited) that the value of Pikeville exceeds 20% of the total assets. More fundamentally, that split was expressed in the February 2005 regulations merely as a long-term objective, with the express caveat that it did not constrain the Board's full discretion. If, as I have found, Mr Skurikhin was a mandatory, then he had the right to instruct the Board to adopt a different objective, and distribute 100% of Berenger's assets to himself, without there being any inconsistency with the express terms of the regulations, which expressly preserve the Board's full discretion to depart from that guideline. Olympic would have had no vested rights that are infringed, even by the complete exclusion of other discretionary beneficiaries.

145. There was therefore no error in the Receivership Order being made in the terms that it was, in circumstances where Mr Skurikhin did have the right to call for the whole of the assets in Pikeville. In those circumstances, appointing receivers over the membership rights, so that administrators could in turn be appointed, was the most practical and direct means of ensuring the intended

utility of the receivership. I deal below, under issue 3, with the effect of Mr Skurikhin's subsequent exclusions.

(c) The utility of the Receivership Order

146. Next, Berenger sought to argue that the Receivership Order should be discharged because there was no reasonable prospect of it serving a useful purpose. The basis for this was Article 5 of Berenger's Foundation deed (which provides that "Beneficiaries may not be deprived of their beneficial interest in the foundation by their creditors by means of proceedings for protective relief, execution or bankruptcy (Art. 567 PGR).") and, more broadly, the obstacles to any form of enforcement of the judgments or Receivership Order in Liechtenstein.

147. Mr Kaiser, giving expert evidence on Liechtenstein law for Berenger, addressed the position on the footing that that Art 567 PGR did not itself in terms apply, because (on Berenger's case) all of the beneficiaries, including Mr Skurikhin, were merely discretionary beneficiaries with no claims on the assets. In his view, Article 5 would nevertheless bind the Board, so as to preclude the Board of Berenger from making a distribution to Mr Skurikhin at the direction of and for the benefit of his creditors.

148. Mr Frommelt suggested that it would be an abuse of right for the board of Berenger to rely on Article 5 as precluding a distribution to Mr Skurikhin, as a matter of Liechtenstein law, on the basis it was undertaken to frustrate the claims of creditors. This was mentioned, rather in passing, at paragraph 3.9.2 of his first report, and repeated in the clarificatory report served ahead of the fourth day of the hearing. Mr Kaiser in his clarificatory report in response takes

issue with the suggestion. I do not think I have enough information about the analysis on this issue under Liechtenstein law to form a view either way.

149. I accept that the Liechtenstein Courts would not make an order directing the Board of Berenger to make a distribution to Mr Skurikhin on VTB's application, but that is not what is in issue. The existence of Mr Skurikhin's right to direct the board as a mandatory gave this Court jurisdiction, as a matter of English law, to make the order that has been made. That order having been made, there will in fact be no distribution made by the board of Berenger. There are and will be no proceedings in the Courts of Liechtenstein to force the Board of Berenger to take any step, whether by making a distribution or otherwise. The relevant steps have been and will be taken here, by the appointment of Receivers and of the Joint Administrators, and in Italy, by way of possession proceedings over the Italian properties. Article 5 has, and can have, no bearing on those matters, as opposed to the issue of what claims may and may not be brought or recognised in proceedings in the Lichtenstein Courts.

150. Whilst the experts are agreed about the difficulties of enforcement in Lichtenstein, the immediate practical issue to which the Receivership is directed is that of achieving sales of real property located in Italy, and the Italian Courts can be expected to recognise the orders and judgments of this Court. In those circumstances I do not accept that the Receivership Order has no practical utility or will be fruitless. Indeed, I would echo here the point made by Males J in dismissing similar arguments in *Cruz* (at [65]), namely that it is hard to believe that Berenger would have considered it worthwhile to devote resources to this application if it were really the case that the Receivership Order makes no

difference. It seems to me that it remains the case, hypotheticals notwithstanding, that the Receivership Order has a "reasonable prospect" of achieving a useful purpose in making assets available that may then, if the Court so directs, be applied towards the judgment debt.

(iv) Conclusions on issue 2

151. I therefore reject Berenger's application to discharge the Receivership Order on any of the grounds that could have been, but were not, advanced in 2015 against the making of that order, if and to the extent that it is open to Berenger to advance those arguments now, contrary to my conclusion on issue 1. That leaves Berenger's argument based on change of circumstances.

(E) Issue 3: should the Receivership Order be discharged on the grounds that there has been a material change of circumstances

(i) Issue 3:

152. Berenger submits that even if it is barred from raising the issues addressed above, or is allowed to raise them but is unsuccessful, nevertheless the Receivership Order should now be set aside because there has been a material change of circumstances since the Order was made, namely the fact that each of Berenger and Olympic has now irrevocably excluded Mr Skurikhin as a discretionary beneficiary. It is submitted that the effect of that exclusion is that, even if Mr Skurikhin is a mandatory, he could not direct the trustees to make a distribution to someone who is no longer a beneficiary: "Accordingly, the question of control has become irrelevant."

153. VTB counters this with an array of arguments:

(a) Effectiveness of exclusion: VTB puts in issue the lawfulness and effectiveness of the exclusions from Berenger and Olympic as a matter of Liechtenstein and Nevis law, respectively; and

(b) Conspiracy: more fundamentally, VTB submits that the exclusion has been orchestrated in collusion with Mr Skurikhin, in order to remove assets that belonged in equity to Mr Skurikhin from the scope of the freezing order, as in effect the latest manifestation of Mr Skurikhin's ability to control Berenger (and Olympic) in his own interests;

(c) Own motion: VTB submits that Berenger cannot rely on a matter it has brought about itself as a material change of circumstances;

(d) Control unaffected: VTB submits that if Mr Skurikhin does have control (Berenger either being barred from contending otherwise, or having lost that battle) then his ability to cause Berenger to direct assets where he instructs, even if not directly to himself, remains sufficient to justify the Receivership Order.

154. I accept Berenger's case on (a) but do not regard that as determinative of issue 3. I address (b) and (c) by reference to whether the circumstances of the exclusions are such as to make it an abuse of process for Berenger to seek to rely upon them, as further explained below. That may be so in circumstances that fall short of a conspiracy (and, in any event, I am conscious that this is not an application to commit anyone for breaching the freezing order, or a claim against Berenger for damages). In any event, even if that were not the case, I accept VTB's submission on (d).

(ii) The legal principles applicable to issue 3:

155. It was common ground that Berenger could, in principle, apply to discharge the Receivership Order on the basis of a material change in circumstances that had occurred since the order was made and which therefore could not have been relied on before Christopher Butcher QC. That is consistent with the terms of the Receivership Order, being expressed to be until further order, and including a liberty to apply.

156. I do not propose to consider the authorities relied on by VTB for the proposition that Berenger might be exposed to some form of tortious liability if found to have conspired to breach the freezing order (*JSC BTA Bank v Ablyazov (No 14)* [2018] 2 WLR 1125; *Marex Financial v Sevilla* [2017] EWHC 918). It is unnecessary, in my view, to determine for the purposes of this application whether such tortious liability might arise. I am not concerned with whether damages can be recovered against Berenger. If the motivation for the exclusions was to assist in a breach of the freezing order, I do not need those authorities for the proposition that they could not then be relied upon as a material change of circumstances, so as to permit an application to discharge the Receivership Order, as that would be the plainest abuse of the Court's process.

157. I do, however, consider *Thevarajah v Riordan* [2016] 1 WLR 76 to be relevant. Mr Lord took me to that case as an authority in favour of the proposition that Berenger could rely on a change of circumstances that it had brought about itself. In fact, it points if anything the other way and supports Mr Penny's submission that Berenger cannot rely on the exclusions as a material change of circumstances.

158. In *Thevarajah* it was held by the Supreme Court that a party who was subject to a debarring order for failing to comply with an unless order could not rely on his own subsequent compliance with the unless order as a material change of circumstances allowing him to make a second application for relief from sanctions. By refusing the first application for relief from sanction the Court had already determined that it was too late for compliance and therefore to grant the second application on the basis of belated compliance alone would be inconsistent with that decision. Lord Neuberger went on, however, to give (at [22]) possible examples of other facts that might potentially constitute a material change of circumstances if combined with belated compliance:

> "If, say, the "unless" order required a person or company to pay a sum of money, and the court subsequently refused relief from sanctions when the money remained unpaid, the payment of the money thereafter might be capable of constituting a material change of circumstances, provided that it was accompanied by other facts. For instance, if the late payment was explained by the individual having inherited a sum of money subsequent to the hearing of the first application which enabled him to pay; or if the company had gone into liquidation since the hearing of the first application and, unlike the directors, the liquidator was now able to raise money."

159. It is, I think, significant that each of those examples involved elements that were not within the control of the party relying on them as a change of circumstance (the inheritance since the date of the hearing, a change of control whereby the liquidators took over the company and were able to raise funds).

160. Lord Neuberger did not use the language of issue estoppel or abuse of process but it seems to me that *Thevarajah* can properly be explained in those terms. As is evident from [24], Lord Neuberger considered that the applicant was debarred from seeking to reopen issues such as the seriousness of the default,

which had already been determined on the first application: in effect, the applicant was barred by an issue estoppel. However, it would also have been possible to explain the outcome in the broader terms of abuse of process. This would then explain the significance of the examples chosen by Lord Neuberger to illustrate his counter-factual case. Where a subsequent development, outside the party's control, makes belated compliance with the unless order possible, there may be no abuse of process in then relying on that compliance as a relevant material change. Where however, a party simply chooses not to comply and then, later on, chooses to comply, it is likely (absent exceptional facts) to be an abuse of process for them to seek to rely on their own belated decision to comply as a material change justifying the reopening of their unsuccessful application for relief from sanction.

161. Authority aside, it seems to me that it may, in principle, amount to an abuse of process for a party to seek to reopen an interlocutory order on the basis of treating as a material change of circumstances a development that is wholly within that party's own control. *Ex hypothesi*, if the matter is within that party's control, it is a change they could have chosen to effect before the order was first made. Otherwise, a party could test its position on one set of facts, and then, if unsuccessful, subject the other party to a series of further interlocutory hearings to see whether it can arrive at a more favourable result on variants on those facts, all of which were within its own power to bring about at the outset, had it so chosen. It cannot be right that a party can freely move the goalposts around in that way, to award itself the opportunity for a rematch. Rather, (to mix metaphors) having, as it were, made its bed, by choosing on which set of facts to have the first battle, the party must usually then lie in it.

162. Given that, for the reasons developed briefly below, I take the view the exclusions were effective under Liechtenstein and Nevis law, I propose to approach issue 3 by considering: (i) whether, in all the circumstances, it would be an abuse of process for Berenger to rely on the exclusions as a material change of circumstances; and (ii) whether, in any event, Berenger is correct in its submission that the exclusions have fundamentally undermined the justification for the Receivership Order.

(iii) Application to the facts

163. There has been a considerable amount of to-ing and fro-ing between the experts on the validity of the exclusions. I do not propose to go into each exchange in detail. Some aspects of the debate descended into construing the terms of resolutions, which is arguably more a matter for me than for expert evidence in any event. Equally, whether Mr Skurikhin's exclusion from Berenger was not an independent decision of the foundation but, in reality, a manifestation of Mr Skurikhin's control, is a question for me rather than for the experts.

164. VTB at one point submitted, tacitly recognising that Berenger had the better of the argument on a number of the expert issues, that it was sufficient to defeat the discharge application if VTB's experts had raised arguable points the other way, even if I did not accept those points as more likely than not to be well founded. That submission was fundamentally at odds with VTB's primary submission on issue 1. If it was right for the Court to apply the balance of probability in ruling on the receivership application in 2015, then it must also be right for me to apply that standard to issue 3, in deciding whether the Order should be discharged on grounds which Berenger is not precluded by that earlier

decision from arguing. (To be fair to Mr Penny, he was not the only one who sought to have his cake and eat it in that regard: Mr Lord also sought to suggest that whilst I should find for Berenger on issue 1, his own points on the discharge application were, nonetheless, "once and for all" in nature.)

165. By the last exchanges of expert evidence, ahead of the fourth day of the hearing, some common ground had emerged, in that the experts were agreed that:

(a) a discretionary beneficiary can be validly excluded, without cause, from a Liechtenstein foundation, as long as that does not change the purpose of the foundation;

(b) Olympic had validly excluded Mr Skurikhin by the second resolution, on 16 January 2019;

(c) Once excluded from Berenger, even if Mr Skurikhin did have a mandate, Berenger could not act on an instruction from him to make a distribution to a person who was no longer a beneficiary.

166. The main issues were:

(a) Whether Mr Skurikhin's irrevocable exclusion from Berenger was invalid because it constituted a change of purpose;

(b) Whether the first resolution excluding Mr Skurikhin from Olympic was defectively worded;

(c) Whether the second resolution excluding Mr Skurikhin from Olympic (which the experts are agreed was affective) took effect retrospectively and was irrevocable.

167. Change of purpose: I reject the argument raised by VTB's Liechtenstein law expert, Dr Frommelt, that Mr Skurikhin's exclusion was a change of purpose because it excludes Mr Skurikhin and his descendants. VTB submitted that because Berenger could not control a future change of beneficiary by Olympic, Olympic being made the sole beneficiary of Berenger should be seen as a departure from the original purpose of providing for Mr Skurikhin and his descendants. Mr Kaiser is right, in my view, to point to the fact that the purpose of Berenger has always been defined as including "benefits to natural or juristic persons, institutions and suchlike". That explains why the change in 2005 whereby Olympic became beneficiary was not itself an illegitimate change of purpose.

168. In a real sense, the true purpose of Berenger and Olympic is to obscure the question of who benefits from the underlying assets. Berenger was designed from the outset to allow the interposition of further intermediate layers between the foundation and its ultimate beneficiaries. At the time Olympic was being established a resolution recorded Mr Skurikhin's wish as being that his friends and family should be beneficiaries whereas he "may or may not be" a beneficiary himself. The current beneficiaries of Olympic, on the face of it, are members of Mr Skurikhin's family and friends (now that Mr Skurikhin has been excluded) but the class of permissible beneficiaries likewise includes corporate entities. A corporate entity could, for example, perfectly well be used to channel benefits to Mr Skurikhin without that being evident on the face of things. The whole argument about change of purpose is in any event artificial given the view I have taken about Mr Skurikhin's continuing control.

169. The first exclusion from Olympic: at most, the criticism that can be made about the June 2017 resolution excluding Mr Skurikhin is that the wording of the resolution itself failed to make clear that it was irrevocable and that one cannot securely deduce that conclusion from construing the February 2005 resolution, to which it refers. I do not accept Mr Kelsick's other points about it, which struck me as having something of an air of desperation about them. The power to exclude arises under Article 12, which clearly extends to those who are already beneficiaries, and the fact this was not referenced in the February 2005 resolution does not mean that "designate" in that resolution is to be taken as having some narrower meaning that cuts down the express powers in the deed. Moreover, I accept Mr Hare's points as to why the resolution of 18 June 2017 cannot be said to have been made under an operative mistake. It is in any event unnecessary to deal with this aspect in any greater detail given the view I take on the next sub-issue.

170. The second exclusion from Olympic: Mr Kelsick asserts that the January resolution "cannot be absolutely effective insofar as it purports to be retrospective in effect". However, the express terms of the deed permit the trustees to exclude a beneficiary by a resolution which "shall have effect from the date specified in the said declaration". Mr Kelsick's point in not conceding that the exclusion is "absolutely effective" is that there is a proviso, namely that the resolution cannot derogate from any interest to which Mr Skurikhin is indefeasibly entitled. He does not further elaborate as to whether Mr Skurikhin comes within that proviso or on what basis. Whilst I follow the point that had a distribution already been made to Mr Skurikhin that would be unaffected, there is no evidence of that. Mr Kelsick also takes the view that the trustee could in

principle in future vary its decision to make the exclusion irrevocable. Mr Lord emphasised that it was common ground between the experts that Mr Skurikhin could not "do it himself". It seems to me that, as matters stand, Mr Skurikhin has been irrevocably and retrospectively excluded as a matter of Nevis law. The possibility that he may nevertheless still have power to benefit in future, including (if Mr Kelsick is right) because the trustees might yet reverse their own earlier decision once the dangers posed by the bankruptcy in Russia and by this litigation have passed, is a question of fact relating to the view I take on the wider issue of his control of the trusts, which I address below.

171. I turn to the question of whether, on the basis that the exclusions of Mr Skurikhin were effective as a matter of Liechtenstein and Nevis law, respectively, nevertheless Berenger may not rely upon them as a material change of circumstances for the purpose of this application, and/or they do not undermine the basis for the Receivership order.

172. VTB, it is fair to say, did not advance its argument by reference to authority or the doctrine of abuse of process, presenting the proposition that a party cannot rely on a matter it has brought about itself as a material change of circumstances as something of a self-evident truth.

173. Mr Lord advanced in argument the example of a defendant whose assets are the subject of a receivership who is then made bankrupt on his own petition and, after receiving his discharge, applies to discharge the receivership order on the grounds he is no longer liable for the judgment debt. That, Mr Lord submitted, would be an unobjectionable example of a defendant being able to rely on their own act as a material change of circumstance. Mr Lord's submission was that

unless VTB made good the proposition that the exclusions were the product of a conspiracy to breach the freezing order, Berenger was entitled to rely upon them.

174. It seems to me that the answer to Mr Lord's example is, first, that the receivership was always subject to the rights of other creditors, and therefore the risk of a subsequent supervening bankruptcy was always something to which the party who obtained the appointment of receivers was exposed, and, second, the bankruptcy of the judgment debtor and whether he should be discharged would itself be subject to the control of the Court. Mr Lord's example is therefore more analogous to Lord Neuberger's examples of subsequent developments that are not wholly within the control of the party seeking to rely upon them, than it is to the facts with which we are concerned. It does not have the quality of an abuse.

175. Berenger's position on the expert evidence, which I accept, is that it could validly have excluded Mr Skurikhin without relying upon his bankruptcy as a reason. Had a different view been taken of the most favourable strategy to adopt at the time of the receivership application in 2015, it would have been open to Berenger and Olympic to resolve on the exclusions at that time, and put that evidence before the English Court in support of the proposition that the Receivership Order should not be made. No doubt they preferred to wait and see. However, the fact is that if, as Berenger claims, the motivation was to protect other beneficiaries, it was within Berenger and Olympic's power to take that step then, for that purpose, and it has been their choice to delay until now.

176. Assuming that the exclusions were the initiative of Dr Schurti and Mr Meier, not acting in collusion with Mr Skurikhin, and were undertaken to protect other beneficiaries, as they claim, then the position is that Berenger (and Mr Meier, in respect of Olympic) chose not to exclude Mr Skurikhin or otherwise to contest the making of the order at that time but instead stood by whilst the Receivership Order was made, looked on for three years whilst the receivers incurred expense in seeking to realise the assets, and then when they got close to success, excluded Mr Skurikhin and sought to rely on that exclusion to lift the Receivership Order. That in itself, it seems to me, has something of the quality of an abuse of process.

177. However, the true position, as I find, is worse than that. The starting point here is that prior to the exclusions Mr Skurikhin had control in such a way that the assets of Berenger and of Olympic were exposed to enforcement. That is the starting point either because Berenger is barred from contending otherwise or because I have found against Berenger on issue 2. The exclusion of Mr Skurikhin was, as I find, undertaken to further Mr Skurikhin's interests in defending the assets within Berenger and Olympic from VTB's attempts to recover its judgment debts through the bankruptcy proceedings in Russia and through these proceedings, to remove the assets within the trusts from the scope of the bankruptcy and to protect the Italian properties from the receivers' efforts to realise those assets. It was most probably a step taken at his instigation (acting through Mr Meier) or at the least with his knowledge and approval. Far from being a hostile move towards Mr Skurikhin, its purpose was to serve his interests by throwing obstacles in the way of enforcement and, ultimately, to pave the way not only for discharging the Receivership Order but also for

removing Pikeville and other assets held within Berenger and Olympic from the scope of the worldwide freezing order. I have set out my reasons for so finding under issue 2 above, because the narrative relating to the exclusion is most conveniently addressed as part of the continuum of behaviour illustrating Mr Skurikhin's control over Berenger as mandatory (and Mr Meier's role in carrying out his instructions and transmitting them to Dr Schurti).

178. In those circumstances, it is a clear abuse of process for Berenger to rely upon the exclusions as a material change of circumstances.

179. In any event, and so far as relevant, I do not accept that this change undermines the basis upon which the Receivership Order was made. Again, I approach this on the basis that Mr Skurikhin has a right of control (because Berenger is precluded from contending otherwise, or because I have so found). The issue is whether, although he is still a mandatory, the fact that he is now no longer himself named as a beneficiary removes the basis for the order. I accept that the trustees could not properly make a distribution directly to Mr Skurikhin himself, on his direction, in circumstances where he is no longer a beneficiary. However, his ability to direct that assets be distributed to any other beneficiary that he may choose (and, conversely, to prohibit any distribution that does not accord with his wishes) is undiminished.

180. The effect of Mr Skurikhin's exclusion from Berenger is that all of the assets are currently held by Berenger on trust for Olympic, which in practice puts them under the control of Mr Meier (who, as I have found, is his trusted adviser and acts on his instructions), through Accreda Trustees. There is no bar to a distribution being made, via Olympic, to a new corporate entity established for

that purpose, which the trustees have power to include amongst the class of beneficiaries of Olympic. Equally, Berenger can be instructed under the mandate to add a new "juristic person or institution" as a beneficiary. Mr Skurikhin has shown himself adept at using complex structures which have the effect of obscuring the beneficial ownership of assets and would have no difficulty at all in ensuring that he could still access the assets if he chose to do so. More straightforwardly, distributions can be made to another family member who is a named beneficiary, Mr Skurikhin having agreed with that other beneficiary that they will take the assets as his nominee and pass them on as and when instructed and distributions can be withheld from any beneficiary who is not willing to accept a transfer on those terms. In those circumstances, I am not prepared to find that the basis for the Receivership Order has been destroyed by the exclusions (if, contrary to what is set out above, the exclusions can be relied upon in support of this application).

(iv) Conclusions on issue 3:

181. Whilst effective under their respective governing laws, Mr Skurikhin's exclusions as a beneficiary of Berenger and of Olympic have been brought about in circumstances which make reliance upon them in support of an application to discharge the Receivership Order an abuse of process. On that basis, I accept VTB's submission that they are not a matter upon which Berenger can rely as a material change of circumstances.

182. In any event, they do not diminish Mr Skurikhin's ability to direct that assets be distributed to nominees who are to hold on his behalf and apply those assets in accordance with his instructions and to his own benefit (including by making

an onward transfer to him), even if the assets can no longer be distributed directly from Berenger or Olympic to himself. The exclusions therefore do not undermine the basis for the Receivership Order.

(F) VTB's application to stay payment of Berenger's costs of the security application

183. Whilst this matter was adjourned part heard (pending exchange of clarificatory expert evidence on some points bearing on issues 2 and 3 that had arisen in the course of the hearing and the listing of a fourth day in order to address issue 4) an application was made to me on paper seeking on behalf of VTB a stay of execution in respect of the costs ordered by Andrew Henshaw QC, sitting as a Deputy High Court Judge, to be paid to Berenger following his dismissal of VTB's application for security for costs. VTB's submission was that there had been a material change of circumstances since that costs order had been made, namely that the cross-examination before me of Mr Meier and Dr Schurti on the documents that had been disclosed since the security for costs application showed that they had given untruthful evidence. It was argued that if I had formed initial views that the conduct of Berenger and its witnesses might well amount to an abuse of process that would be a material change of circumstance justifying a stay of execution so that there could be a set off between those costs and any costs I ordered in VTB's favour. However, I took the clear view that it was not open to me to take this course, whatever my conclusions (which in any event remained provisional until I gave judgment).

184. VTB's primary argument on the security for costs application was that Berenger was to be regarded as being in the position of a claimant, a proposition the

Deputy Judge rejected, finding that there was therefore no jurisdiction to order security under CPR 25.12. VTB had, however, developed a fall-back position to the effect that the Court could order security under CPR 3.1, on the grounds of abuse of process. In dismissing the security for costs application the Deputy Judge had said of this submission (*JSC VTB Bank v Skurikhin* [2018] EWHC 3072 (Comm), at [82]): "I do not read Clarke LJ's conclusions in *Ali* as supporting VTB's submission that a mere suspicion of abuse is sufficient basis for an order for security for costs: a proposition which VTB also says follows from the point that the test for a security for costs order under CPR 3.1 must be wider than the test for striking out on the grounds of abuse of process. Rather, it is in my view necessary to show that the party concerned (here, Berenger, as distinct from Mr Skurikhin) can be shown either to be regularly flouting proper court procedures, or otherwise to be demonstrating a want of good faith i.e. a lack of will to litigate a genuine claim, defence or appeal as economically and expeditiously as reasonably possible in accordance with the overriding objective." On the evidence before him that might be suspected, but had not been shown, and he declined to order security.

185. That judgment having been handed down, VTB then, in its submissions on costs, urged on the Deputy Judge the fact that it would not be known until the discharge application was determined whether VTB might, after all, succeed in establishing abuse of process on the evidence that would by then be before me (it being acknowledged by the Deputy Judge that this would be more extensive than had been available to him). The Deputy Judge nevertheless expressly declined to reserve the costs to me or to defer the time for payment until after my judgment, on the basis that VTB had failed on its application, which had to

be determined on the evidence before him, saying: "The possibility that it might subsequently be held, following the hearing of the Discharge Application itself, that VTB would with hindsight have had good grounds on which to obtain an order for security is not, in my view, a reason for postponing the determination of the costs arising from the security application." (*JSC VTB Bank v Skurikhin* [2019] EWHC 69 (Comm) at [10]). He ordered the costs to be paid on a timetable that it was recognised would likely mean they had to be paid before judgment had been given on the discharge application.

186. VTB cannot in my judgment rely on evidential developments in the course of the hearing of the discharge application, or the emergence of additional arguments in light of that new evidence, as being a change of circumstance justifying me in reopening that decision. Those possibilities were expressly contemplated by the Deputy Judge, and rejected, as reasons to defer VTB's liability to pay the costs arising from its unsuccessful application for security. It is somewhat ironic that VTB, whose stance on issue 1 is to emphasise the need for finality on interlocutory decisions, has sought to reopen this costs order on grounds that, in effect, had already been argued and rejected.

(G) Issue 4: was the beneficial interest in the membership interests in Pikeville never validly transferred to Berenger?

(i) Issue 4

187. All of Berenger's arguments for setting aside the Receivership Order depend on the proposition that the membership interests in Pikeville, which in turn owns the Italian Properties, were at the material times, held in trust for Berenger. VTB seeks to outflank Berenger's position on issues 1-3 by demonstrating that

that proposition is, in fact, incorrect because the beneficial interest was never validly transferred away from Mr Skurikhin to Berenger in the first place (issue 4). This involves, first, determining whether English law applies and, second, whether, if so, the effect of section 53(1)(c) of the Law of Property Act 1925 is that the beneficial interest was not effectively transferred away from Mr Skurikhin. If Mr Skurikhin retained the beneficial interest in Pikeville all along then on any view the Receivership Order is justified and the arguments about his ability to control Berenger, and so forth, would fall away.

188. Issue 4 arises in the following way:

(a) Pikeville was incorporated as an English LLP in 2002. Initially the members were two companies registered in Georgia, USA, and owned and controlled by Mr Meier and Mr Lerch, Oxnard LLC and Oxnard Management LLC ("**the Georgian companies**").

(b) Oxnard Ltd and Oxnard Management Limited (special purpose vehicles incorporated for the purpose in New Brunswick) were substituted as members at the beginning of 2004. Those companies ("**the New Brunswick companies**") were also owned and controlled by Mr Meier and Mr Lerch.

(c) It is common ground that until 10 June 2005 the beneficial owner of the membership interests in Pikeville was Mr Skurikhin, the trustees being initially the Georgian companies and then the New Brunswick companies. Berenger was then established in early 2005 pursuant to Mr Skurikhin's instructions. Mr Skurikhin orally instructed Mr Meier that the membership interests in Pikeville were to be held on trust for

Berenger. On 10 June 2005, Oxnard Limited and Oxnard Management Limited each made declarations of trust declaring themselves to hold the membership interests as nominee and trustee for Berenger. Those declarations are signed on behalf of those two companies, but are not signed by Mr Skurikhin.

(d) Finally, in January 2008, there was a further change of membership whereby Mr Meier and Mr Lerch became members of Pikeville in place of the two New Brunswick companies. They then issued fresh declarations of trust in favour of Berenger. In a yet further change, Crown, a Hong Kong Company controlled by Mr Meier and Mr Lerch became a member, with a majority share of the membership interest, in 2010, and each of Mr Meier, Mr Lerch and Crown issued declarations of trust in favour of Berenger at that time.

189. VTB contends that the declarations of trust in favour of Berenger in 2005 were void for non-compliance with section 53(1)(c) of the Law of Property Act 1925, because they are dispositions of Mr Skurikhin's equitable interest which he, as the person disposing of the same, has not signed.

190. VTB bases its argument on disclosure obtained from Berenger in July 2018, namely the declarations made by the members of Pikeville as to the trusts on which they hold the membership interests, taken in combination with confirmation from Berenger by way of correspondence in November 2018 that prior to the 2005 declarations Mr Skurikhin was the equitable owner of Pikeville. In other words, this issue is based on evidence that has only become available to VTB since the hearing before Christopher Butcher QC in 2015.

There is therefore no inconsistency in VTB seeking to raise now an argument that VTB did not deploy before Christopher Butcher QC. In any event, VTB need only rely upon this issue if its submissions on issue 1 fail (contrary to what I have found).

191. Berenger's response on issue 4 is that:

(a) the proper law of the 2005 declarations is New Brunswick law, rather than English law;

(b) the equivalent provision under New Brunswick law has been repealed, such that it does not apply in this case;

(c) alternatively, if English law applies, then Mr Skurikhin was estopped from recalling or purporting to recall the beneficial interests arising in favour of Berenger; and

(d) in any event the further declarations made in 2008 and 2010 are effective because any previous trust in favour of Mr Skurikhin disappeared when the membership of the New Brunswick companies was terminated, leaving Mr Meier and Mr Lerch (and later, Crown) free to execute new trusts in favour of Berenger over their own membership rights (section 53(1)(c) not applying to the creation of a trust, as opposed to the disposition of an already subsisting equitable interest).

192. VTB's submissions on issue 4 quite often revisited VTB's points about Mr Skurikhin's control over the trusts and the membership interests in Pikeville. However, VTB only need resort to issue 4 if I am wrong in the findings I have made on issues 1 to 3. I think it more appropriate to approach issue 4 as a free-

standing issue which does not in any way depend on the conclusions reached on the subject of Mr Skurikhin's control.

(ii) The proper law applicable to issue 4

193. VTB's case on issue 4 depends on the proposition that English law applies. In addressing the question of proper law it is important to be clear that our focus has now shifted and, whereas hitherto we have been concerned with the trusts of which Berenger and Olympic are respectively trustees, we are now focussed on the trust over the membership interests in Pikeville, whose trustees have been, in succession, the Georgian companies, the New Brunswick companies and then Mr Meier and Mr Lerch, latterly joined by Crown.

194. Initially it was common ground that the question as to what is the proper law governing the validity of the declarations made by the members of Pikeville was to be answered by reference to the Hague Convention. By the time issue 4 came to be dealt with, on the fourth day of the hearing, however, VTB had shifted its ground somewhat and had raised as a preliminary question whether the issue was to be characterised, not as a trust law issue, governed by the Hague Convention, but instead as relating to equitable ownership of the LLP membership interests, and hence governed by the law of the place where the LLP was incorporated (by analogy to the principle that the lex situs of shares is where the company is incorporated or the shares are registered: *Macmillan Inc v Bishopsgate Investment Trust plc* [1996] BCC 453, at 467E, 473A, 484E-G).

195. It is, of course, correct that the first of the three stages of the inquiry as to governing law (as was identified by Staughton LJ in *Macmillan*) is to characterise the issue before the court, the second stage is to select the rule of

conflict of laws which lays down a connecting factor for the issue in question and the third stage is to identify the system of law which is tied by the connecting factor found in stage 2 to the issue characterised in stage 1: *Macmillan* at 455D-F.

196. If the issue is characterised as relating to the property in the membership interests in Pikeville LLP, then that leads straightforwardly to the conclusion that it is governed by the lex situs of that property, namely English law as the jurisdiction of incorporation of the LLP (in the same way that the issue as to who had the better claim to the shares in *Macmillan* was governed by the law of the jurisdiction where the company that had issued the shares was incorporated). If, instead, the issue is correctly to be characterised as relating to a trust then the process of determining the governing law is a more nuanced one, depending on the application of the Hague Convention on the Law Applicable to Trusts, incorporated into English law by the Recognition of Trusts Act 1987.

197. The Hague Convention does not apply to preliminary issues relating to the validity of acts by which assets are transferred to the trustee (Article 4). However, here, on any view, the relevant assets (the membership interests) had been validly transferred to the trustees who held legal title to those assets as at 2005, i.e. the New Brunswick companies. The issue I am concerned with does not relate to the transfer of the assets to the trustee but whether or not the beneficial interest in those assets was then validly transferred from Mr Skurikhin to Berenger in 2005.

198. Articles 6, 7 and 8 of the Hague Convention provide as follows:

"Article 6

A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to—

(a) the place of administration of the trust designated by the settlor;

(b) the situs of the assets of the trust;

(c) the place of residence or business of the trustee;

(d) the objects of the trust and the places where they are to be fulfilled.

Article 8

The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects and the administration of the trust."

199. As between the two approaches to characterising the issue, it seems to me that the better view is that this is a trust law issue governed by the Hague Convention, or at least I will give Berenger the benefit of the doubt on that point.

200. *Macmillan* related to shares that had been transferred by a trustee in breach of trust to a bona fide purchaser for value, in whose name the shares had been

registered. The issue was characterised as a question of priority of ownership and who had the better title to the shares, as between the beneficiary and the bona fide purchaser to whom they had been transferred (at 468 and 478). Amongst the reasons for treating the lex situs as applicable to the question of title was the fact that the remedies in such a case might include rectification of the company's share register, which the Court which had jurisdiction over the company could order (at 481). In characterising the issue as one of title to property, Auld LJ distinguished this situation from cases where there was a pre-existing relationship between claimant and defendant, such as a fiduciary relationship (at 471). Likewise in *Re Harvard Securities* [1998] BCC 567 what was in issue was not an express trust but whether (on the principles relating to appropriation of goods to a sales contract) the purchase by a stockbroker of shares as nominee for clients gave rise to a trust, in circumstances where the shares were unascertained, or whether the shares formed part of the assets of the stockbroker on the latter's insolvency.

201. In *Akers v Samba Financial Group* [2017] AC 424, as in *Macmillan,* shares had been transferred to the defendant, who was assumed to have been a bona fide purchaser without notice, in breach of an express trust governed by Cayman Islands law and the issue was whether that had effected a transfer of the beneficial interest in the property which was void under the Insolvency Act 1986. The lex situs of the shares was Saudi Arabia, which does not recognise trusts. Whilst the transmission of property rights in the shares was a matter for Saudi Arabian law as the lex situs, that did not affect the fact that the trustee remained subject to personal obligations governed by Cayman Islands law which the Courts would enforce (at [19]-[22], [85], [91]).

202. On our facts, the issue is which of two parties, Mr Skurikhin or Berenger, the trustees are obliged to recognise as the beneficiary of a trust over the membership interests in Pikeville. Whilst the situs of the assets comes into the analysis, as I shall come to, the issue is more naturally to be characterised as a question of trust law, falling within the Hague Convention, than as an issue of title to property. For example, whether the trustees have power to distribute to Berenger, or to Mr Skurikhin, will turn on the answer to the question and distribution of trust assets is one of the matters specifically listed under Article 8 as governed by the law determined in accordance with articles 6 or 7. The concept of beneficial ownership and the steps necessary to transfer that ownership are specific to trust law, rather than being rules applicable to any disposition of property: see in this respect Dicey & Morris on the Conflict of Laws (15th edn), at 29-013.

203. As this is not a case where there was an express choice of law, we are concerned with whether a choice of law is to be implied under article 6, or whether there is a jurisdiction which is most closely connected under article 7.

204. On VTB's case, the proper law is English law regardless of whether one approaches the question by way of the lex situs of the membership interests, which is VTB's primary case, or by applying articles 6 and 7 of the Hague Convention, whereas Berenger submits that the Hague Convention applies and that it leads to a different result than would be arrived at by considering the lex situs of the asset.

205. The potential connecting factors under article 7 include the place of administration of the assets (Switzerland), the situs of the assets (England,

where Pikeville is incorporated), the place of residence or business of the trustee (New Brunswick, where the companies who were trustees in 2005 were incorporated) and the object of the trusts (which under the June 2005 declarations of trust was expressed to be Berenger, a Liechtenstein corporation).

206. Of these factors, Mr Penny submits that the situs of the assets is, on the facts of this matter, the most significant connecting factor, pointing by analogy to *Georgeous Beauty Limited v Liu* [2014] EWHC 2952 (Ch) at [302-314], where a declaration of trust written in English in respect of shares in a UK LLP (as is the case here) was held to imply a choice of English law, even though the trustee was incorporated in the Seychelles and the place of administration was Taiwan. Mr Lord argues that the applicable law is the law of New Brunswick, because a deliberate choice of New Brunswick law is to be implied from the fact that Mr Skurikhin chose to incorporate the New Brunswick companies as special purpose vehicles for the purpose of acting as trustees. Interestingly, neither party argued for the place of administration of the trust, or the object of the trust, as the closest connecting factor.

207. In general, where an SPV is established specifically to hold the trust assets this will support the inference that the place of incorporation of the trust company is to govern: *Att. Gen. v Jewish Colonization Association* [1901] 1 KB 123. However, a noteworthy feature of the factual background is that the identity of the trustees has changed multiple times since a trust over the membership interests in Pikeville was first established in favour of Mr Skurikhin in 2002. The trustees were originally companies registered in Georgia, which were succeeded by the New Brunswick companies and then latterly by Mr Meier, Mr

Lerch (both resident in Switzerland) and Crown (a Hong Kong registered company). In those circumstances it is difficult to see the changes in the trustee as implying shifting intentions over time as to what law is to govern the trust (or series of trusts), or as indicating a meaningful connection with the law of any of the multiple jurisdictions associated with the trustees.

208. By comparison, the more significant connection, and the more convincing basis for any implied intention, is to be found in the fact that, throughout these changes, the corporate vehicle to which the beneficial interests attach, which was established to hold the Italian properties as the underlying assets within the trust, has remained Pikeville LLP. The situs of that asset does not change (that being England on the principles discussed above) and it therefore provides a fixed point. As Mr Penny also points out, the declarations, throughout, have been in English and have used the same terminology. The use of English language, in and of itself, might be as consistent with the law of Georgia, or New Brunswick, as with English law, but the absence of any adaptation in the terminology points against the change of trustee indicating an intention to adopt a different governing law for the trust. Furthermore, the declarations of trust contain undertakings in respect of dealings with the membership interests in Pikeville and attendance and voting at meetings, which are matters of the internal management of Pikeville themselves governed by English law, providing a further point of connection to English law.

209. The one constant in this shifting picture, therefore, is Pikeville and the language and terminology of the declarations is consistent with English law being intended to govern the trust (or series of trusts). One therefore circles back via

the Hague Convention to the conclusion that, on these facts, it is the fact that Pikeville is a UK registered LLP which implies a choice of English law (Article 6), or provides the closest connection (Article 7), and the governing law is English law.

(iii) The legal principles relevant to issue 4 under English law: section 53(1)(c) and leading cases that have applied that section

210. Section 53(1)(c) of the Law of Property Act 1925 provides as follows: "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

211. Section 53(2) lays down the caveat that: "This section does not affect the creation or operation of resulting, implied or constructive trusts."

212. A declaration of trust in personal property can be made orally, whereas the disposition of an equitable interest in an existing trust has to be in writing (not merely evidenced in writing) and either signed by the person making the disposition or their authorised agent. It appears that the reason for the requirement is so that there is no room for doubt as to the identity of the beneficiaries to whom the trustees owe their duties. As Lord Upjohn put it in *Vandervell v IRC* [1967] 2 AC 291 at 311: "the object of the section, as was the object of the old Statute of Frauds, is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees to ascertain who are in truth his beneficiaries." One can see that trustees would be exposed if beneficiaries could dispose of their beneficial interest by notifying the trustee orally of that change and then later

renege, leaving the trustee without ready means of proof that the trustee had paid out to the correct beneficiary.

213. Mr Penny's submission is that it follows from section 53(1)(c), as interpreted and applied by the House of Lords in *Grey v Inland Revenue Commissioners* [1960] AC 1, that Mr Skurikhin's oral direction to the New Brunswick companies to hold the membership interests in Pikeville on trust for Berenger was wholly ineffective and void and that the beneficial interest remained with Mr Skurikhin throughout. As Mr Lord mildly observed, the point is an important one because, if well founded, it means that Mr Skurikhin on any view had and has a beneficial interest in respect of Pikeville on which the receivership can properly fasten and the fact he has been excluded from Berenger and Olympic is irrelevant, since neither of them acquired any beneficial interest in Pikeville.

214. In *Grey v Inland Revenue Commissioners* [1960] AC 1 the House of Lords upheld the majority in the Court of Appeal in holding that an oral direction by a beneficial owner of shares to his trustees to hold the shares on different trusts was a "disposition" within the meaning of section 53(1)(c). Furthermore, the language used was to the effect that a purported disposition of an equitable interest which fails to comply with the formality requirements of section 53(1)(c), is not merely unenforceable but "wholly ineffective" and "void": *Grey v Inland Revenue Commissioners* [1960] AC 1 at 12 per Viscount Simonds, 15 per Lord Radcliffe; *Grey v Inland Revenue Commissioners* [1958] Ch. 690 at 719 and 721 per Morris LJ and 723 per Ormerod LJ. That language is consistent with the fact that section 53(1)(c) is expressed as mandatory ("must") and as

requiring the disposition to be "in" (not merely be evidenced in) writing. In that respect, it is to be contrasted with section 53(1)(b) which is expressed as an evidential requirement and which it is long-established, in cases that considered the equivalent provision under the Statute of Frauds, merely renders a transaction unenforceable, rather than void: *Gardner v Rowe* (1825) Sim. & St. 346; affirmed (1827-1828) 5 Russ 258; *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA). I take the language used in *Grey* to be deliberate and I reject Berenger's submission that non-compliance with section 53(1)(c) merely renders a disposition unenforceable and not void.

215. Berenger accepted that the effect of the decision of the House of Lords in *Grey v Inland Revenue Commissioners* [1960] AC 1 was that the oral direction to the New Brunswick companies to hold on trust for Berenger did not comply with s53(1)(c) and was not effective to make Berenger the beneficiary (albeit Berenger argued that the effect was to make the oral disposition unenforceable rather than void). However, Berenger argued that the subsequent written declarations of trust by the New Brunswick companies in favour of Berenger did operate to prevent Mr Skurikhin from recalling or revoking the beneficial interest. That argument turned primarily on the interpretation of some passages in the dissenting judgment of Lord Evershed MR in the Court of Appeal in *Grey*. In order to understand the point, and why that passage may be authoritative despite the fact it comes from a dissenting judgment, it is necessary first to remind ourselves in some detail what the issue was in *Grey* and how it was analysed by successive courts, during its passage up to the House of Lords.

216. The facts of *Grey* were as follows: Mr Hunter had made six settlements in favour of his existing and after-born grandchildren. On 1 February 1955, he transferred 18,000 shares in a company to the trustees of the settlements, to hold as his nominees. On 18 February 1955, Mr Hunter orally and irrevocably directed the trustees to henceforth hold the shares on the trusts of the six settlements in favour of his grandchildren. On 25 March 1955, the trustees executed six declarations of trust. Mr Hunter, although not expressed to be a party, executed each of them. The declarations of trust recited Mr Hunter's oral direction of 18 February 1955, the acceptance by the trustees of the trusts reposed in them by the oral direction and that the giving of the direction and its nature were testified to by the execution by Hunter of the deed. The operative part of the deed declared that the trustees were holding the shares on the trusts of the settlements.

217. The Revenue sought to charge ad valorem stamp duty on the written declarations executed on 25 March 1955, on the basis that each of them was an instrument liable to ad valorem stamp duty under section 74 of the Finance (1909-10) Act, 1910, as a: "conveyance or transfer operating as a voluntary disposition inter vivos". The trustees argued that the equitable interest in the 18,000 shares passed from Mr Hunter pursuant to the oral direction on 18 February 1955, and that no property passed by the declarations of trust on 25 March 1955, so that each instrument was no more than a record under seal of what had taken place, and was not itself a conveyance or transfer operating as a voluntary disposition inter vivos. The Revenue countered this argument by relying on section 53(1)(c) of the Law of Property Act 1925, arguing that Mr Hunter had purported to assign his beneficial interest in the shares by the oral direction, and that this assignment was void because it failed to comply with the

requirements of the section. The trustees conceded that if that was right, the subsequent declarations of trust on 25 March 1955 did operate to pass the equitable interest, so that they would be liable to ad valorem stamp duty.

218. The trustees succeeded at first instance. Upjohn J (at 380-382) started from the proposition that the word "disposition" in s53(1)(c) of the Law of Property Act 1925, although "a word of wide import" must have been directed to assignments, since it replaced section 9 of the Statute of Frauds, which had required any grant or assignment of a trust to be in writing and signed by the party granting or assigning. He reasoned that there were three ways that a donor could transfer his equitable interest: (1) by an assignment, which involved a direct transfer of the equitable interest from donor to donee (which required writing); (2) by the donor declaring himself a trustee of the equitable interest vested in him (which could be done orally); or (3) by giving a direction to the trustees to hold on trust for the new beneficiary. The issue as he saw it was whether that third method, which had been adopted in Hunter's case, was more analogous to an assignment or to declaring a new trust. He held it to be the equivalent of declaring a new trust, on the basis that it did not involve the direct transfer from donor to donee that characterised an assignment and that the legal effect of directing the trustees to hold for the new beneficiary was indistinguishable from declaring a new trust, because the donor "disappears from the picture".

219. The Revenue appealed successfully to the Court of Appeal where a majority (consisting of Morris and Ormerod LJJ) held that the term "disposition" in section 53(1)(c) was not to be equated with assignment under the Statute of

Frauds but should be construed widely, and that the oral direction given on 18 February, though not operating as an assignment of Mr Hunter's beneficial interest, was nevertheless a purported disposition, not because it purported to transfer Mr Hunter's subsisting beneficial interest to the new beneficiaries (as in an assignment) but because its effect was to terminate his interest and in that sense "get rid of" and effect a "disposition" of that beneficial interest (at 721 and 723). Accordingly, the oral direction fell within the scope of s53(1)(c) and was ineffective to pass the beneficial interest. The third member of the Court of Appeal, Lord Evershed MR, dissented essentially for the reasons given by Upjohn J at first instance. Like Upjohn J, Lord Evershed was troubled by whether a direction to the trustees to hold for a new beneficiary could be convincingly distinguished from a declaration of a new trust over the (already separated) beneficial interest and as to why that should require writing when an oral declaration of trust otherwise would not (at 715).

220. In his dissenting judgment, Lord Evershed MR referred to the fact that it had been necessary for the Court of Appeal to consider whether the trustees were right to have made the concession that, if nothing passed by virtue of the oral declarations on 18 February 1955, the declarations of trust on 25 March 1955 did operate to pass the beneficial interest, so were liable to ad valorem stamp duty. He stated as follows at 706-707:

> "*If the instruments in question alone constitute or alone effectively declare the trusts upon which the several shares are now held (as it is of the essence of the Crown's argument that they do), then it is not in doubt that they fall within the ambit of section 74. Mr. Pennycuick, for the named trustees in the instruments (respondents in this court), so concedes; and it is in the obvious interest of the trustees and their beneficiaries that he should do so. We were concerned during the argument to be*

> *satisfied that the court could safely and properly accept the result of the concession; for it seemed that, on one view of the case (if the trustees' argument were not acceptable) then the final effect of the transaction before us (including the instruments in question) might be merely negative, so that no effective trusts had been constituted at all. For reasons which it will be more convenient to state after the facts have been set forth, we were so satisfied….*
>
> *It will be convenient to dispose of the doubt, earlier mentioned, whether the court ought to act upon Mr. Pennycuick's concession if it rejected his main argument. The operative part of each of the declarations of trust witnessed that the trustees acknowledged and declared that they had been since the preceding February 18 " and are now " holding the shares upon the specified trusts. The directions given on February 18, 1955, and their intention had been recited; and Mr. Hunter "testified" to the giving of the direction and his intention by executing the instruments: in the circumstances* ***I am satisfied that if*** **[contrary to the issue on which Lord Evershed dissented]** ***the directions were, for want of writing, ineffective on February 18, Mr. Hunter could not after March 25 recall or purport to revoke the beneficial interests arising under the trusts*** *upon which, on that later date, the trustees declared, in his presence, that they held the shares. Whatever might be or have been the effect (if any) of the trustees' acknowledgment or declaration that they had so held the shares since the preceding February 18, it clearly follows, in my judgment, that (on the hypothesis that the oral directions on February 18 had no legal effect)* ***the instruments of March 25, 1955, must have effectively established or constituted the relevant trusts and therefore must, as Mr. Pennycuick conceded, be conveyances or transfers operating as voluntary dispositions inter vivos within the terms of section 74*** *of the Finance (1909-10) Act, 1910, aided by the definition provisions of sections 54 and 62 (and particularly the latter) of the Stamp Act, 1891."* (emphasis supplied)

221. Neither of the other members of the Court of Appeal explained why they thought the trustees' concession had been correctly made. Morris LJ described the written declarations of trust as having been "made operative and effective by the parties thereto" and on that basis held they were subject to ad valorem duty (at 721) and Ormerod LJ simply said that the written declaration of trust

was liable to be stamped with no explanation as to why it had effected a disposition. The fact that both s74 of the Finance (1909-10) Act 1910 and s53(1)(c) of the Law of Property Act 1925 both use the word "disposition", but in different contexts, complicates the problem of puzzling out the steps in the reasoning that were left unexpressed. For the trustees to be liable to stamp duty under s74 of the Finance (1909-10) Act 1910 it was sufficient that the declarations were a disposition of property. It does, however, seem fair to assume that, if either of the other members of the Court had thought that Lord Evershed's explanation of the Court's reasons for accepting the trustees' concession did not capture their own reasoning as to why the written declarations were valid and effective, notwithstanding the terms of s53(1)(c) of the Law of Property Act 1925, they would have said so rather than expressing themselves so elliptically.

222. The House of Lords dismissed an appeal by the trustees, holding (at 15-16) that the word "disposition" in s53(1)(c) should be given its natural, broad meaning and on that basis an oral direction whereby Mr Hunter's beneficial interest became vested in others was a disposition, regardless of whether it could also be classified as an assignment (a question which did not need to be answered on the broad view the House of Lords took of the meaning of disposition). Their Lordships did not reconsider the correctness of the concession by the trustees.

223. For the purposes of the present case, the critical issue is, as Mr Penny submits, why the Court of Appeal was able to accept the trustees' concession that if nothing passed by virtue of the oral declarations on 18 February 1955, the declarations of trust on 25 March 1955 did operate to pass the equitable interest.

224. VTB's submission is that the Court of Appeal accepted the concession because the declarations of trust of 25 March 1955 complied with the requirements of section 53(1)(c). They were executed not only by the trustees, but also by Mr Hunter. VTB submits that that was crucial to the analysis that the written declarations satisfied s53(1)(c) and distinguishes the situation in Hunter from the facts before me, since Mr Skurikhin did not sign any of the declarations in respect of Pikeville.

225. Berenger argues that the Court of Appeal did not conclude that the 25 March 1955 declarations of trust complied with section 53(1)(c). They were expressed as declaring a trust and not as effecting any disposition by Mr Hunter of his beneficial interest in the shares. The only disposition that was made by the declarations was a disposition by the trustees, in declaring a trust in favour of the grandchildren. The significance of Mr Hunter's signature was as testifying to his earlier oral direction. Berenger suggests that the true reasoning of the Court of Appeal is that once the trustees executed the declarations of trust on 25 March, Mr Hunter was prevented from denying the trusts that had thereby been set up ("established or constituted") on his own direction. The precise legal mechanism that prevented Mr Hunter revoking the trusts was not elucidated by Lord Evershed but Berenger have proposed a number of candidates, mostly variants on estoppel.

226. Berenger seeks to draw support for that interpretation from the decision of the Court of Appeal in *Re Vandervell's Trusts (No. 2)* [1974] 1 Ch 269. Mr Vandervell sought to gift shares to the Royal College of Surgeons on the basis that, once the charity had had the benefit of dividends up to a certain amount,

his trustees would be able to exercise an option and recover the shares, on trusts yet to be defined. That generous impulse, on the principle that no good deed goes unpunished, landed Mr Vandervell in a morass of litigation.

227. Prior to the decision of the Court of Appeal in *Re Vandervell's Trusts (No. 2)*, the matter had already been up to the House of Lords in *Vandervell v IRC* [1967] 2 AC 291. Lord Upjohn, whose decision at first instance had been overturned in *Grey*, was by now in the House of Lords, where their Lordships unanimously rejected the Revenue's argument that, because of the operation of s53(1)(c), Mr Vandervell had failed to divest himself of his beneficial interest in shares he had gifted to the Royal College of Surgeons in 1958. *Grey* and *Oughtred* were distinguished on the basis that those situations were caught by s53(1)(c) because they each involved a disposition of the equitable interest within an existing trust, whereas in *Vandervell* the legal title as well as beneficial interest had been returned to Mr Vandervell at the point in time when he purported to gift the shares in question (the relevant shares having been released back to him by the bank that had previously held them as trustee) and that section did not bite on a transfer of the legal title to the shares which carried with it the beneficial interest (at 311 and 330). That was, however, a pyrrhic victory for Mr Vandervell because it was also held by a majority that an option to repurchase the shares was held on trusts that were as yet undefined, and hence that the beneficial interest in that option was meantime held on resulting trust for him, as donor, such that he had not absolutely divested himself of all interest in the shares and he was liable to be taxed on the dividends that had been declared on the shares.

228. In 1961, in order to rid Mr Vandervell of the tax disadvantages that, by then, it was feared (but as yet not determined by any Court) might ensue from the existence of the option, the trustees (with Mr Vandervell's knowledge and agreement) exercised the option and declared themselves to hold the shares on trust for the settlement created by Mr Vandervell for his children. That then set the stage for *Re Vandervell's Trusts (No. 2)*. The Revenue still did not accept that the exercise by the trustees of the option had ended Mr Vandervell's liability to tax on the dividends, until a yet further deed was executed in 1965 expressly transferring any interest he had in the shares or dividends to the settlement. As regards the period between 1961 and 1965 the Revenue continued to pursue Mr Vandervell's estate (he by then having died) for tax on the dividends and that then led to an issue between the estate and the trustees as to whether or not the resulting trust in favour of Mr Vandervell had survived the exercise of the option, such that he remained beneficially entitled and liable for tax on the dividends received by the trustees during that period. That issue came before the Court of Appeal, on appeal from Megarry J who had found for the trustees. The point was taken on behalf of the trustees that there was no written instrument executed by Mr Vandervell disposing of his beneficial interest in favour of the beneficiaries of the settlement. It was argued that section 53(1)(c) came into play, with the result that his beneficial interest under the resulting trust had not moved from him to the beneficiaries of the settlement. The Court of Appeal rejected that argument and unanimously allowed the estate's appeal.

229. Lord Denning MR based his conclusion primarily on the proposition that s53(1)(c) was not engaged. He held (at 321) that: "A resulting trust for the settlor is born and dies without any writing at all. It comes into existence

whenever there is a gap in the beneficial ownership. It ceases to exist whenever that gap is filled by someone becoming beneficially entitled. As soon as the gap is filled by the creation or declaration of a valid trust, the resulting trust comes to an end. In this case, before the option was exercised, there was a gap in the beneficial ownership. So there was a resulting trust for Mr. Vandervell. But, as soon as the option was exercised and the shares registered in the trustees' name, there was created a valid trust of the shares in favour of the children's settlement. Not being a trust of land, it could be created without any writing."

230. That analysis focussed on the fact that the resulting trust only arose to plug the gap that had ensued (as found in *Vandervell v IRC*) because the option was held by the trustees on trust without the object of that trust yet having been identified. It was crucial to that first limb of the decision that Mr Vandervell's beneficial interest arose under a resulting trust, rather than (as in *Grey*) his being a beneficiary of an express trust who was seeking to transfer his beneficial interest to a new beneficiary.

231. Lord Denning went on to consider the position if, contrary to his view, Mr Vandervell had retained an equitable interest in the shares after the exercise of the option. In that context, he held that Mr Vandervell would have been precluded from asserting against the beneficiaries under the settlement his rights under the resulting trust. He had arranged for the option to be exercised and for dividends thereafter to be paid to the trustees who had invested the money and treated it as part of the children's settlement. In those circumstances "He could not have been heard to say that he did not intend the children's trust to have it." (at 321).

232. Lawton LJ put estoppel at the forefront of his judgment. Mr Vandervell had known and intended that the trustees use money from the children's settlement to pay for the shares under the option and had they, having used funds from the settlement in that manner, then held the shares for anyone but the children they would have been in breach of trust. Lawton LJ inferred a declaration of trust in favour of the children by the trustees, once the shares were registered in the name of the trustees (although there was no evidence of any express declaration). Thereafter Mr Vandervell, knowing what had been done, had caused dividends to be declared on the shares. He "would not have been heard to deny the existence of a beneficial interest for the children which he had done his best to ensure they had". Lawton LJ went on to reject the argument based on s53(1)(c) on the same basis as Lord Denning, namely that the extinction of the resulting trust when the "gap" in beneficial ownership was closed (on his analysis, by the declaration of a new trust which he inferred the trustees to have made) was not a disposition of an equitable interest and nor was the creation of a new beneficial interest by the declaration of trust. Stephenson LJ expressed some doubts about the inferred declaration of trust but agreed in the result, without expressing any view on the subject of estoppel.

233. Importantly, the function of the estoppel, in both of the judgments that dealt with it, was to guard against the possibility that the resulting trust had not been extinguished but had survived the exercise of the option, such that Mr Vandervell remained liable to tax. In neither judgment was an estoppel being invoked to prevent a challenge to a disposition that had been found to fall squarely within s53(1)(c). The creation or operation of a resulting trust is expressly removed from the scope of s53(1)(c) by s53(2). Thus, to preclude

someone, by way of an estoppel, from asserting their rights under a resulting trust does not do violence to section 53(1)(c) in the same way as is the case where an estoppel is invoked to prevent a beneficiary from asserting their beneficial interest, after a disposition of that interest which is ineffective for non-compliance with s53(1)(c).

(iv) Conclusions on Grey and Vandervell

234. I have dealt with these cases in detail because they directly address s53(1)(c) and its effects. As I have said, I derive from *Grey* that non-compliance renders a purported disposition of an equitable interest void, not merely unenforceable between the parties. Furthermore, analysis of the judgment at first instance in *Grey*, and the basis on which that was departed from on appeal, shows that it is not open to me to treat an oral direction to trustees to hold for a different beneficiary as being the equivalent of declaring a new trust (which could be done orally), as otherwise Upjohn J would have been upheld on that alternative basis.

235. I have hesitated about what else one might safely derive from *Grey* of relevance to this case. A somewhat Delphic utterance, in a dissenting judgment, with reference to a point that was the subject of a concession, is a slender thread from which to hang the proposition that a non-compliant disposition that would otherwise be void can be rescued by resort to an estoppel. Lord Evershed does not even use that word, far less define what type of estoppel might be in play.

236. There is an alternative explanation in the fact that Mr Hunter had signed the declaration, albeit that was expressed to be by way of evidencing his earlier oral direction. (That element is signally lacking, on the facts with which I am

concerned.) On the facts in *Grey*, once the conclusion was reached that his earlier oral disposition was ineffective, Mr Hunter's signature on the declaration of trust may have served as authority, in writing, to the trustees to effect a disposition as his agents by declaring the trusts in favour of the grandchildren. That would then be a disposition by Mr Hunter, albeit effected through the trustee as his authorised agent, which was fully compliant with section 53(1)(c) and he could not have recalled a disposition made with his authority. That analysis would not involve any form of estoppel. Alternatively, although his signature was expressed as confirming the earlier oral disposition, once that oral disposition was found to be ineffective that signature may have been taken to have instead assumed the function of effecting a written disposition by Mr Hunter himself (in accordance with his avowed, and documented, intention to transfer his own beneficial interest), or at least may have been treated as precluding him from denying that that was the effect of his own signature on the document by which the trustees had declared the trust. That keeps any estoppel, if estoppel there was, within very narrow bounds, relating to the purpose of his signature on the document, in order to produce the result that there is a disposition by Mr Hunter that complies with s53(1)(c). On either of those approaches there was then a valid disposition by Mr Hunter under s53(1)(c), rendering him liable to tax. That allows any estoppel only very modest scope by comparison with relying on an estoppel to make up for the complete absence of any document making the disposition and bearing the signature of the person disposing of the beneficial interest, which is what Berenger seeks to do.

237. In short, I conclude that attempts at construing Lord Evershed's dicta in *Grey*, in and of themselves, provide insufficient support for the proposition for which Berenger contends, unless other authority or principle supports that interpretation. I further conclude that *Vandervell* does not provide the needed support. *Gray* was distinguished twice in the course of the different phases of the *Vandervell* saga, but each time on the basis of elements that are missing on the facts before me: Mr Skurikhin cannot claim that he disposed of the legal interest in a manner that carried with it the beneficial interest, and nor was he the beneficiary under a resulting trust. He falls four-square within the ambit of operation of section 53(1)(c), as an existing beneficiary under an express trust who is attempting to transfer his interest to another beneficiary, whilst the legal interest remains where it was. I therefore conclude that neither case, looked at in isolation, provides an answer and I must turn to general principle (as Berenger's fall-back submissions, indeed, anticipated).

(v) Whether Berenger can support its argument by reference to wider principles: equitable maxims, constructive trust, or estoppel

238. Berenger looked beyond *Grey* and *Vandervell* in search of wider principles that would lead to the result that Mr Skurikhin's disposition of his beneficial interest would be enforceable against him, despite the lack of any document bearing his signature and effecting that disposition.

239. Equitable maxims such as that "equity looks to the intent not the form" cannot, of themselves, circumvent mandatory statutory requirements as to formalities. Snell's Equity (33rd edn) gives the example at paragraph 5-014 of s2 of the Law of Property (Miscellaneous Provisions) Act 1989 as a provision that cannot be

side-stepped by invoking that maxim but the authors could as appositely have referred to s53(1)(c) of the LPA 1925.

240. *Pennington v Waine* [2002] 1 WLR 2075 was a case where a donor had made an apparently imperfect gift of shares, imperfect in the sense that the share transfer certificate had been signed but not delivered. It was held that, because on the facts it would have been unconscionable for the donor to recall the gift, the gift was complete in equity. Delivery was not necessary for there to have been a valid equitable assignment of the shares, the effect of which was that the donor held the shares on trust for the donee (a trust which Snell explains as a constructive trust: Snell's Equity (33rd edn) 24-008). Arden LJ specifically warned (at [69]) that: "Nothing in this judgment is intended to detract from the requirement that a donor should comply with any formalities required by the law to be complied with by him or her, such as, in the case of a gift of land, the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, or, in the case of a gift of a chattel, delivery of the chattel." There was no consideration of s53(1)(c) in *Pennington* since what was being gifted was the entire legal and beneficial interest in the shares. Arden LJ's reasoning, however, strongly suggests that the principle in *Pennington* would not extend to imposing a constructive trust on the donor where that would have the effect of circumventing the need for compliance with the formalities that are required under s53(1)(c) for a valid gift or other disposition of a beneficial interest under a subsisting trust.

241. Equally, the facts of this case are not within the established principle whereby a constructive trust will be imposed on the vendor where there has been an

agreement, supported by consideration, to sell property. That being so, I do not need to determine whether the Court of Appeal was right in the view that was taken in *Neville v Wilson* [1997] Ch 144 of the decision of the House of Lords in *Oughtred v Inland Revenue Commissioners* [1960] AC 206, as to whether a constructive trust imposed upon that principle will obviate the need for compliance with s53(1)(c), if the property in question happens to be a beneficial interest. Lord Denning, at least, seems to have doubted that (*Oughtred* at 233). However, all I need say is that those cases are not authority for imposing a constructive trust on Mr Skurikhin in favour of Berenger, which is in the position of a volunteer.

242. The principle in *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA) (whereby a constructive trust will be imposed to prevent a person to whom land is conveyed with the intention they take it as trustee from relying on the absence of a written declaration of trust to claim the land for themselves) is also not in my view applicable. First, that principle depends on the proposition that the absence of a written trust of land renders the trust unenforceable but not void. Second, the purpose of the constructive trust is to prevent the trustee fraudulently claiming to take the property for themselves. Non-compliance with s53(1)(c), however, renders the disposition void. The safeguard against fraud by the trustee on the facts I am concerned with here is that there is, nevertheless, an existing and documented trust in favour of Mr Skurikhin. All he need do is make the requisite written disposition in favour of Berenger. If his oral disposition is void for lack of writing (as I find it is) then *Rochefoucauld* does not provide a basis for imposing a constructive trust on the trustee in favour of a volunteer,

Berenger, in respect of a beneficial interest that Mr Skurikhin has failed to dispose of effectively.

243. I accept Mr Penny's submission that, outside specific sets of circumstances which have been recognised as giving rise to a constructive trust, English law does not recognise the concept of a remedial constructive trust, imposed wherever unconscionability might be thought to merit that intervention. In *Cobbe v Yeoman's Row Management* [2008] 1 WLR 1752 the House of Lords rejected the notion that a constructive trust can be imposed as "an indignant reaction" to unconscionable behaviour, insisting on a disciplined and principled approach that reasoned from the decided cases (Lord Scott, at [37]).

244. Furthermore, in that same case the House of Lords went on to consider proprietary estoppel. Lord Walker emphasised that proprietary estoppel is not a "joker or wild card to be used whenever the Court disapproves of the conduct of a litigant" (at [46]). Lord Scott stressed the need for "clarity as to what it is that the object of the estoppel is to be estopped from denying or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat." (at [28]).

245. In *Cobbe* the claimant failed at the first hurdle, because he knew perfectly well he had no form of proprietary interest, having incurred expenditure on the faith of an oral agreement that land would be sold to him. I can see, in contrast to the position in *Cobbe*, that there would be scope on the facts before me for a proprietary estoppel that operated to preclude Mr Skurikhin from asserting his beneficial interest against the trustees (the New Brunswick companies), so as to call in question the ability of the trustees to declare new trusts of that beneficial

interest in favour of Berenger, as they would have been entitled to do if the beneficial interest had been vested in the trustees. It seems to me that could in principle come within the recognised categories where proprietary estoppel has been applied, in that the trustees and Mr Skurikhin could be said to have operated under a "common expectation" as to the effect of Mr Skurikhin's oral direction to hold on different trusts (to apply the categories identified by Lord Walker at [48] and [63]).

246. I am more doubtful as to whether any proprietary estoppel can be said to operate as between Mr Skurikhin and Berenger but perhaps that could be found in Mr Skurikhin having acquiesced in Berenger's declaration of a trust over 80% of the beneficial interest (inter alia in Pikeville) in favour of Olympic, a step which was inconsistent with Mr Skurikhin's retention of the beneficial interest. VTB's submissions in this respect focussed on the absence of an "assurance" but rather ignored the possibility of a proprietary estoppel arising through acquiescence. Moreover, I am not persuaded by VTB's arguments that there was no detrimental reliance by Berenger because third parties have met Berenger's costs (and will do so in respect of this application). It seems to me that, if a proprietary estoppel was otherwise available to Berenger, the Court would be able to find the necessary detrimental reliance in the fact that Berenger has ordered its affairs for very many years on the footing that it is entitled to deal with the beneficial interest in the membership interests in Pikeville, including embarking on this discharge application (thereby exposing Berenger to the risk of being liable for VTB's costs, even if a third party has agreed to pay Berenger's bills).

247. I do not reach a concluded view on those matters because it seems to me as a matter of principle that a proprietary estoppel cannot be prayed in aid, in effect, to render enforceable a transfer of Mr Skurikhin's beneficial interest which is void for non-compliance with section 53(1)(c).

248. Lord Scott (with whom three of their Lordships agreed) expressed that as being his "present view" in *Cobbe* about the analogous question of whether a proprietary estoppel could render enforceable an oral agreement that was void under section 2 of the 1989 Act. He noted that whilst there is a carve out for resulting, implied or constructive trusts there is no exception for proprietary (or any) estoppel. The same is, of course, true of section 53(2) of the LPA 1925. Lord Walker (with whom Lord Brown agreed) did not think it necessary or appropriate to consider the point. Whilst Lord Scott's views are expressly obiter, they seem to me to accord with principle.

249. If it were otherwise then in very many, if not all, cases where a beneficiary has purported to pass his or her beneficial interest to another, without a written disposition, the necessary elements of an assurance or common expectation as to the beneficial interest having changed hands, and the parties conducting their affairs on the footing that that was so, will be found. If proprietary estoppel could be prayed in aid it seems to me little would in practice be left of s53(1)(c). If a proprietary estoppel fails for these reasons, then I cannot see that any other form of estoppel could fare any better.

250. To the contrary, in *Godden v Merthyr Tydfil Housing Association* [1997] EWCA Civ 274 the Court of Appeal robustly rejected the submission that an estoppel by convention could be relied upon to estop a party from asserting that

a contract rendered void by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 was indeed void by virtue of that section, applying a passage in Halsbury's Laws to the effect that "the doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid". That reasoning seems to me to apply with equal force to any form of estoppel whose result would be directly to contradict a statutory provision rendering the transaction in question void.

251. Whilst I note the criticisms of Lord Scott's obiter view of s2 of the LP(MP)A 1989 in Snell's Equity (33rd edn) at 12-045, it seems to me that in the context of s53(1)(c) of the LPA 1925, at least, recognition of proprietary estoppel would indeed, as that paragraph puts it, "stultify" or be inconsistent with the statutory scheme. Nor am I convinced by the argument advanced in "The Law of Proprietary Estoppel", Mcfarlane (OUP), at 6.131, which seeks to distinguish between representation based estoppel (which the author appears to accept cannot produce a result that contravenes s53(1)(c)) and acquiescence-based or promise-based proprietary estoppel, which he argues are not inconsistent with the section on the footing that they produce a liability on the part of the beneficiary to transfer the beneficial interest in question, but do not change the fact that unless and until transferred the trustees owe their duties to the original beneficiary. The cases he cites in support, *Neville* (considered above) and *Nelson v Greening & Sykes* [2007] EWCA Civ 1358, are in fact both cases of a constructive trust imposed in circumstances of a binding promise, made for consideration. The authorities cited do not appear to support the distinction sought to be drawn. In any event, if the trustees of the membership interests in Pikeville continue to owe their duties to Mr Skurikhin and not to Berenger, as

McFarlane suggests, and if the estoppel is permissible because it does not produce the result (directly contrary to s53(1)(c)) that Berenger is to be treated as the beneficiary of the trust, it is difficult to see how proprietary estoppel assists Berenger in the context of this discharge application.

252. I will admit to finding this answer to be counter-intuitive. Mr Skurikhin intended to transfer the beneficial interest to Berenger and believed he had done so and he, the trustees who hold the legal title to the membership interests in Pikeville, and Berenger have conducted themselves for many years on the basis that that was the case. Once, however, one finds that s53(1)(c) applied and was not complied with, I have not been able to conclude that there is any basis that is consistent with principle, authority and the purposes behind that section, that would result in Berenger having acquired that beneficial interest as a result of what was done in 2005. I am, however, wary of straining to avoid that counter-intuitive result, by allowing an estoppel to operate in a manner that does not seem to have been recognised in any previously decided case in this context. As I have explained, I do not think one can take the simplistic approach that *Grey* provides such authority, given the clear distinguishing factor of Mr Hunter's signature on the relevant declarations, which is lacking here.

(vi) The later changes of trustee and whether these provide a "short answer" to VTB's case on s53(1)(c)

253. Mr Lord relied on the changes of the trustees that took place in 2008 and, again, in 2010 as providing a "short answer" to VTB's case on s53(1)(c). His contention was that when the New Brunswick companies ceased to be members their membership interests and all rights and liabilities that attached to those

interests disappeared and hence any trust affecting those membership interests could not survive the cessation of membership. On that basis, he submits that Mr Meier and Mr Lerch were free to execute valid declarations of trust in favour of Berenger in 2008, their rights never having been impressed with a trust in favour of Mr Skurikhin. The same analysis would apply in 2010, when Crown became a member and fresh declarations were made.

254. I struggled initially to see how this argument took Mr Lord to any different conclusion than the conclusion already reached above. If the New Brunswick companies had continued to hold the beneficial interest for Mr Skurikhin until replaced as trustees, for the reasons developed above, then it seemed to me that that beneficial interest would not somehow magically disappear or merge in the legal title because of a change of trustee. On the contrary, the new trustees would take the legal title in their membership interests with notice of that beneficial interest (through Mr Meier and Mr Lerch, if not otherwise). The change of trustee would not, of itself, effect a change in the beneficial interests and the declarations of trust that each of them made suffer from the same difficulty, namely, that Mr Skurikhin has at no stage either returned his beneficial interest to the trustee or passed it to another beneficiary by means of a disposition in writing by him, or by an agent he has authorised in writing to make that disposition.

255. As I eventually understood it, Mr Lord's argument is that this is not to be viewed as a change of trustee under a pre-existing, and continuing, express trust, where the relevant legal title in membership interests has been transferred from one trustee to another but, rather, it is a wholly new trust over a new asset, namely

the membership interests of the new members, in which they hold both the legal title and the beneficial interest at the moment in time when those new membership interests come into existence.

256. Mr Lord's argument depends on the technical characteristics of a share in an LLP. Whilst a membership share in an LLP can in principle be assigned, the effect of s7(1) of the Limited Partnerships Act 2000 is that the assignee cannot participate in the management of the LLP. That is not what happened here. What happened here was not a transfer of the membership shares from the old members to the new but the termination of the old membership and the appointment of new members, with the requisite notices being sent to register that change. The membership share of a member is "the totality of the contractual or statutory rights and obligations of that member which attach to his membership": Whittaker and Machell, The Law of Limited Liability Partnership (4th edition) at 8-18. Warren J accepted that passage as a correct statement of the law in *Reinhard v Ondra LLP and others* [2015] EWHC 26 (Ch), saying: "It is not right to view a share in an LLP as something existing in abstract: it is a function of the contractual and statutory rights governing the relationship between the members amongst themselves and between the members and the LLP." Mr Lord's point is that termination of one membership and appointment of a new member brings into being a brand new bundle of rights and obligations.

257. It still seemed to me that the new trustees would not be bona fide purchasers for value without notice and that their membership interests would from inception be impressed with the pre-existing express trust, whatever that was, which on

the analysis above would mean that they took subject to the trust in favour of Mr Skurikhin. I also note in this respect section 6(4) of the Limited Liability Act 2000, which makes the LLP liable where any member (including a member who has ceased to be a member) is liable to a third party as a result of a wrongful act or omission in the course of the LLP's business.

258. However, having reflected further on this I conclude (although Mr Lord did not articulate his point in quite these terms in the course of argument) that the legal mechanism which, at the point in time when those new membership interests first incept, prevents the trustees (i.e. the new members) from taking the beneficial interest in that new asset for themselves, or from declaring new express trusts in terms that are inconsistent with their duties as trustees, must be a constructive trust (which itself operates outside s53(1)(c)). The principle in *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA) would in these circumstances, I think, properly apply to prevent the trustees claiming the asset for themselves (and if they did do so, section 6(4) would be engaged and would make the LLP liable). If one then asks what that constructive trust requires of the trustees, it would be wholly artificial to argue that it latches onto their conscience to require them to declare a trust for Mr Skurikhin, contrary to everything they know of his express direction to them to hold for Berenger. In those circumstances, they are free to declare a trust over the (freshly minted) membership interests in favour of Berenger, knowing as they do that that accords with Mr Skurikhin's oral direction in 2005. It would be perverse to treat them as conscience-bound to declare a trust in favour of Mr Skurikhin, contrary to his known wishes. Once they have declared that express trust in favour of Berenger, the constructive trust

has served its purpose and (like the resulting trust in *Vandervell No 2*) has been born and dies without any writing at all.

259. I was troubled, during the course of argument, by the fact that Mr Lord's solution seems to latch on to the fact that the immediate trust asset happens to be a membership interest in the LLP, so as to produce a different result from that which would be arrived at if the Italian properties themselves (which is, after all, where the real underlying value in the trust is to be found) had been held directly in trust and there had simply been a change of trustee within that existing trust (when I think the analysis would have been as I first outlined). In the end, though, I conclude that Mr Lord's argument is correct. Whilst it is technical in nature, it is a technical answer to a technical point and it answers that point on a basis which is very specific to the facts of this case, rather than by over-stretching some principle of potentially wider application.

260. I did not, at first blush, find this to be a short or straightforward answer but, having been a very long way round the houses indeed, I have belatedly come to the conclusion that it is legally sound and I accept it.

(vii) Conclusions on Berenger's submissions on New Brunswick law

261. I do not propose to deal with the position on the alternative footing that, contrary to what I have found, New Brunswick law applies as Berenger contends. I do not have any expert evidence before me as to the position under New Brunswick law. I have documentary material comprising relevant statutes, Law Reform Notes issued by the Office of the Attorney General, extracts from the Rules of Court, a textbook on the law of trusts in Canada and cases. It is evident from that material, and from the submissions on either side about it, that to arrive at

conclusions would not be straightforward and involves analysis of a number of issues.

262. I have considerable reservations as to whether that exercise travels beyond what the Court should undertake without the benefit of expert evidence, even if both parties were agreed upon that course, which is not the case: Dicey & Morris on the Conflict of Laws (15th edition) at 9-013 and 9-018. It would involve, among other things, considering: (a) how the Canadian Courts have interpreted, or would interpret, the references to "grant" and "assignment" in section 10 of their Statute of Frauds, in developing their own jurisprudence from the shared starting point of the equivalent provision in our Statute of Frauds (section 9) and English cases such as *Grey* which have considered that section, and in particular how they would answer the question which only Lord Radcliffe expressed a view about, without deciding, in the House of Lords in *Grey* (at 16), as to whether a direction by the beneficiary to a trustee to hold for a new beneficiary would be an assignment under that section; and (b) interpreting the transitional provision in the New Brunswick statute which repealed their Statute of Frauds (section 2 of the Act to Repeal the Statute of Frauds) which preserves the Statute of Frauds in proceedings commenced before 1 October 2014, and determining how that should apply in circumstances where the proceedings against Mr Skurikhin commenced before that date, albeit Berenger was only joined subsequently (and New Brunswick'ss own Rules of Court, unlike ours, do not provide for relation back).

263. There was something of a Mexican stand-off between the parties, with VTB submitting that the burden of proof on this issue is on Berenger and that it was

for Berenger to call expert evidence to prove its case and Berenger arguing the burden is on VTB to prove that New Brunswick law has a provision similar to section 53(1)(c). For what it is worth, on reflection I would take the view that the burden lay on Berenger to prove what it asserts and show not just that New Brunswick law applies, contrary to VTB's case, but that it leads to a different outcome from that which would flow from the application of English law, given that Berenger is invoking New Brunswick law by way of a defence to VTB's case on s53(1)(c). Moreover, given that Berenger has been on notice of the s53(1)(c) argument since January and this aspect of the matter was adjourned part-heard to a date in March to allow time for full argument, permission could have been sought to adduce expert evidence during that interval. Be that as it may, in circumstances where I have concluded New Brunswick law does not apply I do not propose to lengthen this judgment further by addressing the legal issues to which its application would theoretically give rise.

(viii) Conclusions on issue 4

264. For the reasons developed above, I find that issue 4 is governed by English law and I accept VTB's submission that the application of English law leads to the conclusion that Mr Skurikhin's membership interest was not transferred to Berenger in 2005. However, I also accept Berenger's submission that a valid trust was declared in favour of Berenger in 2008 and again in 2010, rendering the earlier failure to effect a valid transfer academic. Of course, given the view I have taken on issues 1-3, success on issue 4 is something of a pyrrhic victory for Berenger.

Conclusion

265. Berenger's application to discharge the Receivership Order is dismissed. I will hear Counsel as to the terms of the Order to be made, if not agreed.