Neutral Citation Number: [2019] EWHC 1452 (Comm)

Claim No CL-2018-000228

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

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL
Date: 10/06/2019

Before :

THE HONOURABLE MR JUSTICE BRYAN

- -

Between :

THE LIBYAN INVESTMENT AUTHORITY

Claimant

-and-

~~**(1) JP MORGAN CHASE & CO**~~
(2) J.P. MORGAN MARKETS LIMITED
(3) WALID MOHAMED ALI AL-GIAHMI
(4) LANDS COMPANY LIMITED

Defendants

- -

Roger Masefield QC, **Craig Morrison** and **Samuel Ritchie**
(instructed by **Enyo Law LLP**) for the **Claimant**
Alan Gourgey QC, **Adam Kramer and Anna Littler**
(instructed by **PCB Litigation LLP**) for the **Third Defendant**
Michael Holmes (instructed by **Stewarts Law LLP)**
for the **Fourth Defendant**

Hearing dates: 7, 8 and 9 May 2019

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Approved Judgment

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

MR JUSTICE BRYAN:

A. INTRODUCTION

A.1. The parties and their applications

1. The applications before me relate to an order made by Teare J on 12 June 2018 in which he granted the Claimant, the Libyan Investment Authority (the "LIA"), on a without notice application, on paper, permission to serve the Third Defendant Mr Walid Mohamed Ali Al-Giahmi ("Mr Giahmi") and the Fourth Defendant, Lands Company Limited ("Lands") out of the jurisdiction with the Claim Form and, as sought by the LIA, also made an order for alternative service in relation to Mr Giahmi.

2. Mr Giahmi and Lands each challenge jurisdiction, applying to set aside service of these proceedings against them on the basis that the claims of the LIA against each of them stand no real prospect of success as they are time-barred under English law, and on the basis that service should in any event be set aside as there has been what is said to be a very serious failure on the part of the LIA to comply with its obligation of full and frank disclosure on the without notice paper application for permission to serve out before Teare J including in failing to identify, still less address, the limitation issues that arise. Mr Giahmi and Lands also apply to strike out certain of the claims against them (for money had and received and in fraud) on the basis that they disclose no reasonable cause of action being, it is said, claims that have no legal foundation as a matter of English law. They also submit that there was an associated failure to comply with the duty of full and frank disclosure in that regard.

3. Mr Giahmi also alleges that the claims against him are an abuse of process on the basis that such claims ought to have been brought at the same time as those in an earlier action of the LIA against him (the SocGen Proceedings as defined below) engaging the principle in *Henderson v. Henderson* or otherwise amounting to an abuse of process, and/or that they arise out of the same facts as the claims against him that were discontinued in the SocGen Proceedings, so as to require permission of the court under CPR 38.7 with the result that the proceedings stand no real prospect of success on the jurisdictional challenge and/or should in any event be struck out.

4. Finally, if the above applications are not successful, Mr Giahmi and Lands seek to stay the proceedings pending the outcome of applications by one of the alleged Chairmen of the LIA, Dr Mahmoud, to discharge the Receiverships under which these proceedings (and others) have been conducted ("the Discharge Applications"). Mr Giahmi asserts that there is a "real prospect" that Dr Mahmoud would, if successful, then discontinue the proceedings against him. In such circumstances it is said that the Court should stay these proceedings pending the outcome of the Discharge Applications in the exercise of the Court's case management powers, in furtherance of the overriding objective, and so as to save costs being incurred, and court resources utilised, in circumstances where the action may not proceed.

A.2. Overview of the LIA's claims in the Proceedings and LIA's associated knowledge

5. The LIA brings claims against JP Morgan Markets Limited ("JP Morgan"), Mr Giahmi and Lands in relation to a US$200 million derivative transaction concluded between the LIA and Bear Stearns International Limited (**"**Bear Stearns Trade**"**) in November 2007 (**"**the Bear Stearns Trade"). JP Morgan Markets Limited is the same entity as Bear Stearns, having been renamed after JP Morgan Chase & Co acquired the Bear Stearns group of companies in 2008.

6. The LIA contends, in summary, that the Bear Stearns Trade was procured by a fraudulent and corrupt scheme between Bear Stearns and Mr Giahmi. The alleged key elements of the scheme were that Bear Stearns would pay Mr Giahmi a commission of US$6 million, in exchange for which Mr Giahmi would exercise corrupt influence over LIA officers and employees to ensure that the LIA entered into the Bear Stearns Trade. The LIA alleges (but Mr Giahmi strongly denies) that Mr Giahmi was a close associate of the former Gaddafi family and regime and was known as the 'right hand' of Saif al-Islam Gaddafi, Colonel Gaddafi's son, and was therefore well placed to carry out this scheme. Mr Giahmi's fees were routed via Lands, a Cayman company which the LIA says was (and is) under his control.

7. The LIA claims Mr Giahmi did in fact ensure that the LIA entered into the Bear Stearns Trade via the alleged bribery and/or intimidation of a Mr Hatim Gheriani (then head of the LIA's alternative investment team) and a Mr Mustafa Zarti (then the LIA's deputy executive director), such that both breached their fiduciary duties to the LIA. It is asserted that a Mr Layas, then the executive director of the LIA, may also have been suborned.

8. It is said by the LIA that despite these proceedings being at an early stage, with disclosure not yet given, the LIA has been able to infer the existence of Mr Giahmi's corrupt scheme with Bear Stearns from numerous pieces of evidence. These include the concealment of Mr Giahmi's involvement from the LIA (despite him purportedly acting as an "*introducer*" to the LIA), the false description of Lands' role in term sheets provided to the LIA (which said that *"Lands Ltd"* provided "*structuring*" services), the execution of sham documentation between Mr Giahmi and Bear Stearns which similarly misdescribed his role, and the size of the sums paid to Mr Giahmi (which were out of all proportion to any legitimate 'introductory' services he is said to have provided).

9. The LIA also infers Mr Giahmi's corrupt involvement in the Bear Stearns Trade from certain specific acts of bribery and intimidation, which it says the LIA became aware of during previous proceedings brought by the LIA against Société Générale SA ("SocGen"), Mr Giahmi and others ("the SocGen Proceedings"). In the SocGen Proceedings the LIA alleged fraud in relation to US$ 2.1 billion of different transactions entered into between 2007 and 2010 ("SocGen Disputed Trades"). The LIA's case was that Mr Giahmi was paid US$ 58 million in relation to these transactions, via a Panamanian company known as **"**Leinada**"**. It is said that in the course of the SocGen Proceedings it emerged (partly from Mr Giahmi's financial disclosure and partly from disclosure by the SocGen Defendants) that Mr Giahmi had engaged in numerous corrupt acts in relation to LIA officers and employees, including paying bribes in 2006 (to Mr Gheriani's father) and 2007 (to a person known as Person Z, whose identity is presently confidential). It is said he also engaged in acts of intimidation in relation to both Mr Gheriani and Mr Zarti in late 2007, which were revealed by telephone recordings of conversations with SocGen employees.

10. SocGen ultimately settled the SocGen Proceedings with the LIA shortly before the start of trial in 2017. Mr Giahmi did not participate in the settlement agreement. By the settlement, the SocGen Defendants did not admit liability, but – in respect of the US$ 2.1 billion transactions – agreed to (a) pay the LIA over US$ 1 billion representing the losses sustained by the LIA on the SocGen Disputed Trades; (b) allow the LIA to retain the balance of the SocGen Disputed Trades, valued at a further US$ 1 billion; and (c) issue a public apology to the LIA. As part of this settlement the LIA agreed formally to discontinue its claim against Mr Giahmi, but SocGen paid Mr Giahmi's costs (albeit there was a short-fall between such payment and the costs actually incurred by Mr Giahmi with the result that Mr Giahmi had still incurred very substantial unrecovered costs in those proceedings).

11. Against this background the LIA considers that the evidence that came to light in the SocGen Proceedings supports the inference that Mr Giahmi also engaged in fraud in relation to the Bear Stearns Trade. It is said that this inference was further bolstered, after the JP Morgan Proceedings were issued, when SocGen admitted in a Deferred Prosecution Agreement concluded with the US Department of Justice that it had engaged Mr Giahmi on the false basis that he would provide "*introduction*" services, when SocGen in fact knew that Mr Giahmi would pay bribes to Libyan government officials (whom Mr Giahmi had caused to be hired by the LIA using threats and intimidation) to procure transactions for SocGen. I reiterate that such matters are strongly denied by Mr Giahmi.

12. It is said that there are clear similarities with Mr Giahmi's alleged *modus operandi* in relation to the Bear Stearns Trade. Indeed Mr Allen, in his first witness statement, on behalf of the LIA, in support of the application for permission to serve Mr Giahmi and Lands out of the jurisdiction that was before Teare J on the paper application, says that the LIA's claim in the JP Morgan Proceedings is based on *"a similar, if not near-identical, fraudulent and corrupt scheme identified in the SocGen Proceedings"* and that the *"factual basis for the LIA's fraud and bribery claims in the SocGen Proceedings demonstrate a strikingly similar modus operandi as the JP Morgan Proceedings."*

13. The fact of, and content of, the SocGen Proceedings, and the associated investments the subject matter of such proceedings, forms an important part of the backdrop to the JP Morgan Proceedings, and the application for permission to serve out. In this regard:–

    (1) There is a considerable similarity with what is pleaded against Mr Giahmi and Lands in the JP Morgan Proceedings and against Mr Giahmi and Leinada in the SocGen Proceedings, which it is common ground is of relevance when considering what the LIA considered it needed to know so as properly to be able to plead a claim in fraud.

    (2) The SocGen Proceedings were fully pleaded out, with disclosure, witness statements and experts' reports – those proceedings settling only on what would have been day two of a 13 week trial starting in May 2017 (that, coincidentally, would have been heard by Teare J). The issues arising in the JP Morgan Proceedings are accordingly to be set against the backdrop of the fact of, and what was known in, or by reason of, the SocGen Proceedings, as is the knowledge of those acting on behalf of the LIA.

(3) In this regard the LIA is represented by the same firm of solicitors (Enyo Law LLP), and counsel common to both the SocGen Proceedings and the JP Morgan proceedings.

(4) The relevant dates for the SocGen trades were 28 November 2007 (the "Permal Transaction"), 17 March 2008, 29 May 2008, 13 October 2008 and 9 July 2009. The Bear Stearns Trade was, in fact, earlier - 15 November 2007.

(5) The SocGen Proceedings Claim Form was issued on 7 March 2014 (more than 6 years after the Permal Transaction). The SocGen Proceedings claims were advanced by the LIA under English law although Mr Giahmi alleged that the law applicable to the claims against him was Libyan law (which was denied by the LIA). Mr Giahmi alleged that the claims were time-barred under Libyan law (under which claims are time-barred three years after the LIA was first aware of the claims) (paragraph 50 of his Defence) i.e. the applicable Libyan law provision related to the LIA's actual knowledge. However, Mr Giahmi pleaded at paragraph 51 of his Defence, *"Further or alternatively, and to the extent that the law of England and Wales applies (as is…alleged), the LIA's claims insofar as they concern the premium paid for the Permal transaction are time-barred by the Limitation Act 1980 or the doctrine of laches".* It is clear, and was accordingly clear since the SocGen Proceedings were pleaded out, that Mr Giahmi was asserting that a claim in respect of a transaction on 28 November 2007 was time-barred as a matter of English law which would amount to a complete defence, subject to the application of s.32 of the Limitation Act 1980.

(6) In the SocGen Proceedings the LIA expressly addressed Section 32 of the Limitation Act 1980 in Schedule 8 paragraph 210 and following of LIA's Skeleton for trial. As appears below, Section 32 of the Limitation Act 1980 postpones the period of limitation until the claimant has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it. It is clear, and was accordingly clear since the SocGen Proceedings were pleaded, that the LIA would need to rely upon Section 32 of the Limitation Act 1980 in relation to any claim concerning a note issued more than 6 years before the commencement of the proceedings, otherwise any claim would be time barred (Sections 2 and 5 of the Limitation Act 1980).

(7) The claims brought in the current proceedings (i.e. the JP Morgan Proceedings) against Mr Giahmi and Lands are again advanced (solely, at the present time) under English law. The date of the Bear Stearns Note was 15 November 2007. The Claim Form in the JP Morgan Proceedings was issued on 6 April 2018. Those claims are accordingly time barred, the proceedings having been commenced more than 6 years after 15 November 2007 (Sections 2 and 5 of the Limitation Act 1980), unless the LIA can bring itself within Section 32 of the Limitation Act 1980 (on which it bears the burden of proof).

14. However, as appears below, and as gives rise to the application for discharge on the basis of a failure to give full and frank disclosure, neither Mr Allen's first witness statement in support of the application for permission to serve out of the jurisdiction, nor the LIA's accompanying skeleton argument (the "Skeleton Argument"), identify that the claims against Mr Giahmi and Lands are prima facie time barred as a matter of English law

subject to any application of Section 32 of the Limitation Act 1980, which is not referred to in Allen 1 or in the accompanying Skeleton Argument.

15. Amongst the submissions set out in the 16 page Skeleton Argument was the submission that "*On the basis of the evidence as it currently stands, there is no basis on which it could be concluded that the claim against either Mr Giahmi or Lands Company is bound to fail"*, and that *"it is clear that, even at the very lowest, the claim against Mr Giahmi and Lands…has a reasonable prospect of success".*

16. Under Part III of the Skeleton Argument, headed "Miscellaneous matters", which only ran to 3 paragraphs, it was stated:

> "44. Both the application for service out of the jurisdiction and for alternative service have been made on an ex parte basis, subjecting the Claimant to the duty to make full and frank disclosure.
>
> 45. Mr Allen has dealt fully with those points that he considers may be taken against the Claimant by Mr Giahmi and Lands…in relation to service out at paragraph [83] and by Mr Giahmi in relation to alternative service at [92]. Further, this duty has informed Mr Allen's presentation of the evidence throughout his statement, and the (extensive) presentation of the relevant law in Parts I and II above.
>
> 46. At the time of filing this skeleton, the Claimant is not aware of any other facts or matters that it should draw to the court's attention".

17. No reference was made to the claims against Mr Giahmi being time barred subject to any application of Section 32 of the Limitation Act 1980, nor were the requirements of Section 32 and any case that the LIA had thereon, referred to, or addressed.

18. In fact all that Mr Allen stated in relation to limitation in his first witness statement (so far as a claim against Mr Giahmi or Lands is concerned) was as follows:-

    (1) At paragraph 66:

    > "The JP Morgan Proceedings were issued on 6 April 2018, in order to protect the LIA's position in relation to the expiry of a Libyan limitation period which it was apprehended might be argued as being applicable by Mr Giahmi. In particular, in the SocGen Proceedings, Mr Giahmi contended that the claims against him were matters of Libyan law (which was denied by the LIA) and subject to a three-year limitation period (which, in any event, the LIA contended had not expired by the time that the SocGen Proceedings were issued – as to which, see further below)." (emphasis added)

    The entire focus of this paragraph is Libyan law, nothing is said about English law or the fact that Mr Giahmi argued in the SocGen Proceedings that the Permal transaction was time barred under English law, or that the LIA relied, in response on Section 32 of the Limitation Act 1980.

    (2) At paragraph 83, as the last of 9 points:-

> "83. So far as the claims against Mr Giahmi and Lands Company are concerned, I remain sure of my belief that the claim has a reasonable prospect of success, even though I have considered the following matters which the Defendants may raise in their defences:
> …
> (i) The fact that the Disputed Trade was executed back in 2007, giving rise to possible limitation defences (whether under English law, or Libyan law). I do not believe that any credible limitation argument will be available to Mr Giahmi or Lands Company. In the SocGen Proceedings Mr Giahmi relied upon the Libyan law of limitation. Although I understand that the *prima facie* limitation period under Libyan law is 3 years, I also understand that this does not start to run until a party is aware of the identity of the actual wrongdoer. The LIA was not aware of Mr Giahmi's position behind Lands…or the true nature of the 'services' provided until after the issue of the SocGen Proceedings". (emphasis added)
>
> The first sentence does not address the prima facie time bar under English law and the need for the LIA to rely on Section 32 of the Limitation Act 1980. The second sentence is simply wrong and is said by Mr Giahmi and Lands to be positively misleading, and the final two sentences relate to Libyan law and actual knowledge, and not English law and what could have been discovered with reasonable diligence and when.

19. I address the application for discharge on the basis of a failure to give full and frank disclosure in relation to limitation, after first identifying the applicable legal principles in relation to limitation, and full and frank disclosure, and after considering whether the LIA has reasonable prospects of success having regard to limitation.

A. Real prospect of success

20. The LIA's original application for permission to serve the Claim Form outside of the jurisdiction was made under CPR 36.7 and paragraph 3.1(3) of Practice Direction 6B which provides:

> *"3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where – …*
> *(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –*
> *(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and*
> *(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim*."

21. Where this provision of the Practice Direction is relied upon to serve a defendant outside of the jurisdiction, the question for the court becomes does the claim against the foreign defendant have a real prospect of success. The test to be applied is well known, namely whether there is a serious issue to be tried, akin to the test for summary judgment under CPR Part 24.

22. In *Altimo Holdings v Kyrgyz Mobil Tel* [2012] 1 WLR 1804 (PC) Lord Collins held at [71] that:

> "the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success".

23. With respect to the way in which the test for summary judgment should be applied, the guidance of Floyd LJ in *TFL Management Services Ltd v Lloyds Bank Plc* [2013] EWCA Civ 1415 at paragraph [26] should be followed, where he cites with approval the words of Lewison J (as he then was) in *Easy Air Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch):

> "26. The judge referred to *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) as setting out the approach under CPR 3.4(2)(a) and 24.2. In that case Lewison J (as he was then) said:
>
> "… the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 1 All ER 91*;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472* at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550*;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case:

Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*.

27. Neither side sought to challenge these principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco v Wragg [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343* at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see *Partco* at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example *Hudson and others and HM Treasury and another [2003] EWCA Civ 1612*."

24. It therefore falls to consider whether the claims for which permission to serve out was granted stand a real prospect of success in light of the guidance set out above.

B. Limitation

25. The first issue to consider with respect to whether the LIA has a real prospect of success is that of limitation. Mr Giahmi and Lands submit that the LIA's case is time barred by virtue of being brought after the expiry of the limitation period, whereas the LIA contends that the claim can be brought by way of Section 32 of the Limitation Act 1980.

26. In order for the LIA to have shown a real prospect of success on its claim for the purposes of its without notice application for permission to serve out, it needed to demonstrate that it had a real prospect of availing itself of the extension to the usual 6 year limitation period, by meeting the test set out in Section 32 of the Limitation Act 1980.

B.1 Applicable Legal Principles

27. Section 32 of the Limitation Act 1980 provides that:

> "(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

28. A claimant wishing to avail itself of the extension of the limitation period under s.32 bears the burden of proving that it could not with reasonable diligence have discovered the concealed fraud more than 6 years before issuing its claim (*Paragon v Thakerar* [1999] 1 All ER 400 (CA) per Millett LJ at 418).

29. The test of reasonable diligence was considered by the Court of Appeal in *Gresport Finance Ltd v Carlo Battalagia* [2018] EWCA Civ 540. In that case Henderson LJ endorsed at [41] the well-known dicta of Millett LJ in *Paragon Finance* where Millett LJ held at p. 418 that:

> "The question is not whether the plaintiffs should have discovered the fraud sooner, but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable limitation period is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

30. Henderson LJ acknowledged the point made by Neuberger LJ (as he then was) in *Law Society v Sephton* [2004] EWCA Civ 1627 at [116] that it is inherent in Section 32 that there must be an assumption that the claimant desires to discover whether or not fraud has been committed. It was held by Henderson LJ that the concept of "reasonable diligence" only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake, and that the naiveté and inexperience of a claimant are not factors which can properly influence whether they could with reasonable diligence have discovered the fraud (*Hussain v Mukhtar* [2016] EWHC 424 (QB) at [43]).

31. Henderson LJ emphasised that it was a question of fact in each case whether the claimant could not with reasonable diligence have discovered the fraud, concealment or mistake, and endorsed the statement by Webster J in *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 3 All ER 193 at 199, that:

> "...it is impossible to devise a meaning to put on those words [reasonable diligence] which can be generally applied in all contexts because, as it seems to me, the precise meaning to be given to them must vary with the particular context in which they are to be applied. In the context to which I have to apply them, in my judgment, I conclude that reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all, but that it means the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase".

32. The exercise of "reasonable diligence" may require investigatory measures to be taken by a claimant/applicant (including instituting legal proceedings to obtain disclosure). For example, in *Chodiev v Stein* [2015] EWHC 1428 (Comm) at [49] Burton J held that a claimant should have sought an order for disclosure out of the jurisdiction as part of its investigation.

33. For the fraud to be known or discoverable by a claimant under s.32 (such that time will start running against them), it is not necessary that the claimant knows or could have discovered each and every piece of evidence which it later decides to plead. See Sir Terence Etherton in *Arcadia Group Brands v Visa* [2015] EWCA Civ 883 at [49]:

> "*Johnson*, the *Mirror Group Newspaper* case and *The Kriti Palm* are clear authority, binding on this court, for the following principles applicable to section 32(1)(b) of the 1980 Act: (1) a "fact relevant to the plaintiff's right of action" within section 32(1)(b) is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient of the cause of action but which may provide a defence are not facts relevant to the claimant's right of action."

34. Therefore, the court must "*look for the gist of the cause of action that is asserted, to see if that was available to the claimant without knowledge of the concealed material"* (*AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)* [2007] 1 All ER (Comm) 667 per Buxton LJ at [453], quoted in *Arcadia* at [48]). At the point at which the claimant can plead the complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court.

35. For limitation purposes, a person is treated as always knowing something even though he or she has subsequently forgotten it (*Ezekiel v Lehrer* [2002] EWCA Civ 16 at [2]). For the purposes of Section 32, the necessary knowledge is knowledge of the fraud being alleged. It is not sufficient that the claimant knows of some unspecified deception or dishonesty (*Barnstaple Boat Club v Jones* [2007] EWCA 727, per Waller LJ at [34]).

36. In *Julien v Evolving Tecknologies* [2018] UKPC 2, the Privy Council recently considered the question of whose knowledge is to be attributed to a company in the context of a case concerning s. 14 of the Limitation Act 1997 of Trinidad and Tobago, which is materially identical to s. 32 of the English Limitation Act 1980. The Privy Council observed that there was a powerful argument to be made that time should not commence for limitation purposes as long as the wrongdoers remained in control of the corporate claimant. As the Privy Council put it at [61]–[62]:

> "Finally, there remains the large policy objection noted by the trial judge, namely that there is no obvious reason why time should run in favour of directors of a company who have committed a deliberate breach of duty, or deliberately concealed a breach of duty, for as long as they choose to retain control of the company as its Board. There is much to be said for adhering to the simple rule, based upon the separate personality of the company from even a sole shareholder, that shareholder knowledge of a breach of duty owed to the company by its directors, or the ability to discover the facts, is simply not to be attributed to the company at all, at least for as long as the allegedly delinquent directors retain control of it.
>
> The Board would have found it difficult to reach a clear determination of this important question, even if it had been necessary to do so...It is unnecessary for the attribution question to be finally decided. It would be better to leave that question to a case in which it would be determinative, and where it had been fully argued in the courts below."

37. The importance of establishing a solid foundation in evidence before pleading fraud was recently emphasised by the Court of Appeal in *Playboy Club v Banca Nazionale Del Lavoro* [2018] EWCA Civ 2025, at [46], where the Court of Appeal held:

> "The pleading of fraud or deceit is a serious step, with significance and reputational ramifications going well beyond the pleading of a claim in negligence. Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence. A party risks the loss of its fund of goodwill and confidence on the part of the court if it makes an allegation of fraud which the court regards as unjustified, and this may affect the court's reaction to other parts of its case. Moreover, as Birss J observed in *Property Alliance Group v Royal Bank of Scotland* [2015] EWHC 3272 (Ch) at [40], allegations of fraud 'can cause a major increase in the cost, complexity and temperature of an action'. For these reasons parties are well-advised, and indeed enjoined according to usual pleading principles, to be reticent before pleading fraud or deceit."

B.2 Limitation on the Facts

38. The claims brought by the LIA against Mr Giahmi in these proceedings are advanced under English law, and the LIA seeks the following remedies: (1) repayment of the Lands Company Payments, i.e. the fees paid by Bear Stearns to Lands, as money had and received; and/or on the grounds of knowing receipt; and/or dishonest assistance in breach

of fiduciary duties by officers of the LIA; (2) declaratory relief of a proprietary interest in proceeds of the Lands Company Payments; and (3) damages for fraud.

39. The facts which are said to give rise to the LIA's claims occurred in 2007, with the Bear Stearns Trade having been entered into in November 2007, some 11 years prior to the issue of the claim against Mr Giahmi in April 2018 in the present proceedings.

40. As a result, the LIA needs to demonstrate a real prospect of success in establishing that it (1) did not know of the relevant facts giving rise to its claim; and (2) that it could not with reasonable diligence have discovered the relevant facts prior to 6 April 2012.

41. The evidence put forward on behalf of the LIA by Mr Allen in his witness statement in support of the LIA's application for service out of the jurisdiction did not address that under English law the LIA must satisfy the test under Section 32 of the Limitation Act in order to be able to advance its claim. To this end, the LIA did not adduce any evidence that would satisfy the court that the LIA could not, when exercising reasonable diligence, have discovered the alleged fraud or relevant facts prior to 6 years before issuing the claim, such as to show that it had a real prospect of success with respect to its claims. Further, the initial application omitted to address the evidence arising from the SocGen Proceedings which demonstrates that the LIA was in possession of many of the relevant facts, nor did it address whether (as Mr Giahmi and Lands submit) the LIA could with reasonable diligence have discovered the remaining relevant facts prior to 6 years before the issue of the claim.

42. I now turn to address whether the LIA has demonstrated that it has a reasonable prospect of success with respect to the issue of limitation on the evidence presented to the court. The LIA's claim against Mr Giahmi in these proceedings is brought on a near identical basis to the claims advanced against him in the SocGen Proceedings. However, in the original SocGen Particulars of Claim, the LIA advanced the equivalent claims on the basis of fewer facts, thereby demonstrating that it was unnecessary to have knowledge of *all* of the equivalent facts which the LIA pleads in the present claim relating to the Bear Stearns Trade in order to raise the inference of fraud or wrongdoing.

43. This can be seen from the manner in which the claims were pleaded in the respective proceedings. In the original SocGen Proceedings, the claims were advanced against Mr Giahmi, and others, in the following terms in the SocGen Particulars of Claim:

> *"(1) The opaque and inconsistent description of the services provided by Leinada, and the scale of its supposed remuneration.*
>
> *(2) The fact that Leinada was a Panamanian company, without an established pedigree, and with no discernible expertise in advising on or structuring financial derivative transaction and that all of its directors, save for Mr Giahmi, were nominees.*

(3) The fact that there is no evidence of which the LIA is aware of Leinada providing any legitimate services in relation to any of the Disputed Trades.

(4) The fact that the SocGen Defendants had no need of the services allegedly provided by Leinada, but could themselves have structured and devised an appropriate investment solution for the LIA without the involvement of Leinada.

(5) The fact that Leinada was ultimately owned and controlled by Mr Giahmi, an individual who:

(i) had no discernible expertise in advising or structuring financial derivative transactions; and/or

(ii) had connections both with the Gaddafi family and with representatives of the LIA, which he was in a position to exploit.

(6) The fact that the Leinada Payments were only to be paid on a "success fee" basis, with success defined as the LIA's purported execution of each of the Disputed Trades.

(7) The notorious fact that corruption pervaded both government and business activities in Libya, both prior to and throughout the period of time when the Disputed Trades were being executed."

44. The respective facts which form the basis for the claims advanced against Mr Giahmi in the service out application which raise an inference that neither Lands nor Mr Giahmi provided legitimate services to Bear Stearns, and that the Lands Company Payments were fraudulent and corrupt are as follows:

"23.1 The lack of information about the "structuring" services (and/or any other services) allegedly provided by Lands/Mr Giahmi;

23.2 The lack of evidence that Lands or Mr Giahmi provided legitimate services;

23.3 The fact that Lands is a "shell company" incorporated in the Cayman Islands "a low disclosure jurisdiction" with no known employees on its payroll and no known business premises;

23.4 The fact that Bear Stearns had no need of the "structuring" services allegedly provided;

23.5 The lack of disclosure as to the scale of fees paid to Lands;

23.6 The fact that Lands was ultimately owned and/or controlled by Mr Giahmi who (a) did not have expertise in advising on or structuring financial derivative transactions and/or (b) had connections with the Gaddafi family, regime and LIA representatives which he was in a position to exploit;

23.7 The failure to disclose that Mr Giahmi was involved in the transaction;

23.8 The fact that Mr Giahmi had already taken steps to corrupt LIA officers and/or employees by the payment of bribes (specifying the two alleged bribes in relation to payments made to Mr Gheriani's father and Person Z); and

23.9 The fact that Mr Giahmi was in a position to make credible threats to representatives of the LIA (referring specifically to the two alleged incidents of intimidation of (1) Mr Gheriani and (2) Mr Zarti).

45. Mr Giahmi and Lands submit that as a result of having pleaded similar facts in order to establish the inference of fraud and wrongdoing against Mr Giahmi and others in the SocGen Proceedings, the LIA cannot now say that it lacked sufficient knowledge to plead its claims against Mr Giahmi with respect to the Bear Stearns Trade in light of the knowledge which it had when it advanced claims in the SocGen Proceedings. That is to say that the LIA had knowledge of the following alleged facts as relevant to the Bear Stearns Trade: (1) that fees had been paid to Lands in connection with the Bear Stearns Trade; (2) that Lands had not been an established provider of services in the banking and finance industry with particular experience or expertise; (3) a lack of evidence of legitimate services provided by Lands to Bear Stearns; (4) Bear Stearns having no need to engage Lands to provide structuring services; (5) Lands was ultimately owned and controlled by Mr Giahmi; and (6) the prevalence of corruption in Libyan businesses at the time.

46. Importantly, in March 2014 at the time of bringing its claim in the SocGen Proceedings alleging fraud against Mr Giahmi, the LIA did not plead any specific instances of bribery or intimidation. These allegations were added by amendment following disclosure from Mr Giahmi and SocGen. Mr Giahmi and Lands submit that this serves to demonstrate that, although such matters were pleaded in support of the inferences of fraud and wrongdoing in the LIA's Particulars of Claim with respect to the Bear Stearns claim, the particular facts of bribery and intimidation are not necessary in order to plead the causes of action brought against Mr Giahmi in the current proceedings, all of which were advanced in the SocGen Proceedings without specific pleas of bribery being advanced. The law, as set out above, requires that for the purposes of limitation the claimant should not wait to have discovered each and every fact which it wishes to rely upon in establishing that fraud has occurred, and instead time begins to run at an earlier stage when sufficient facts become available.

47. Further evidence was adduced in the course of the set aside application that the LIA was concerned prior to April 2012 about the possibility that its investment transactions had been effected by corruption, especially with respect to transactions in which fees had been paid to third parties and intermediaries.

48. In late 2007 and early 2008, the LIA's Board of Directors was concerned that the use of intermediaries in transactions entered into by the LIA could give rise to corruption or bribery, and in June 2008 Mr Baruni, who had been hired as a consultant for the LIA and became a member of its Advisory Board in 2008, and who gave evidence for the LIA in the SocGen Proceedings, voiced his concerns about intermediaries being used in LIA deals. Mr Baruni was of the view that the use of third parties in LIA transactions was unnecessary and gave rise to concerns with respect to corruption.

49. In 2010, under its then CEO Mr Rais, the LIA commenced investigations into, amongst others, its alternative investments which included the Bear Stearns Trade. According to Mr Rais (who gave evidence for LIA in the SocGen Proceedings), he had been retained by the LIA in October 2009 at the request of the Governor of the Central Bank of Libya and a member of the LIA's Board of Trustees because of concerns about the LIA's investments, in particular, the conduct of the LIA's existing management. As a result, Mr Rais engaged Mr Baruni and Dr Khan to investigate these investments made by the LIA.

50. In 2010 the LIA also engaged KPMG to produce a report on the LIA's investments, which was finalised in late April 2010. One of the report's urgent recommendations was in relation to the alternative investments (which included the Bear Stearns Trade). The report suggested that the LIA should, within a 0 to 3 month timeframe, seek to conduct a forensic examination of all of its relevant positions to determine whether there were grounds for pursuing its counterparties, i.e. third parties and intermediaries.

51. The evidence indicates that Mr Rais, during the course of the LIA's investigations in and around 2010, found Mr Layas, Mr Zarti and Mr Gheriani to be uncooperative; and further that he suspected misconduct by the LIA's management; and that he considered that certain transactions involving Mr Layas, Mr Zarti and Mr Gheriani may have been effected by corruption.

52. It therefore appears that prior to April 2012 the LIA considered that the involvement of third party intermediaries in the transactions which it was investigating, including the Bear Stearns Trade, had potentially been effected by fraud and/or corruption.

53. On the evidence before the court, Bear Stearns /JP Morgan presented an obvious source of possible information with respect to Mr Giahmi's alleged involvement with Lands. In the first instance the LIA could have communicated with Bear Stearns/JP Morgan to inquire about Mr Giahmi's involvement with Lands, its services, its fees and its various agents. This is supported by the fact that the term sheet invited further enquiries in relation to precisely these matters. Yet it appears on the evidence that the LIA did not make enquiries of Bear Stearns/JP Morgan despite its initial concerns in 2008 to 2013 that its investments with intermediaries were potentially effected by corruption. It also lay with the LIA to seek Norwich Pharmacal or other similar relief against Bear Stearns/JP Morgan on the basis of the evidence which was already in the LIA's possession in order to ascertain Mr Giahmi's involvement at an earlier stage, as could credibly be required of the LIA in the course of acting with reasonable diligence to uncover the suspect fraud.

54. With respect to why the LIA did not, in acting with reasonable diligence, seek the relevant information in the course of its investigations it was submitted on behalf of the LIA that such requests would have been futile given the confidentiality obligations that were in place between Lands/Bear Stearns. On the basis of the evidence, it appears that there was no such impediment with respect to the confidentiality obligations on Bear Stearns to an extent that would prevent the relevant information being communicated, or, if such a request were denied, that the LIA would have been prevented from taking further steps. The confidentiality agreement in place between Bear Stearns and Lands was an agreement that company information regarding Lands' structure, as part of a wider trusts structure, and its ultimate beneficial owner, required by Bear Stearns for KYC/compliance purposes, was to be kept confidential from third parties, unless and until

Lands provided consent. However, the requirement to keep these matters confidential is unlikely to have affected Bear Stearns' ability to disclose the relevant information to the LIA if requested, with respect to the nature of Lands' involvement in the Bear Sterns Trade, including the Lands and Bear Stearns agreement; and with respect to the fact that Mr Giahmi was providing services on behalf of Lands; along with information pertaining to the level of Lands' remuneration in relation to the Bear Stearns Transaction. Had this information been requested and the request denied on the basis of confidentiality, further steps could have then been explored.

55. Further, a fair comparison cannot be drawn with the confidentiality obligations in the agreements between Leinada and SocGen in which SocGen was under an obligation not to disclose the subject matter of the agreement to third parties. As for whether Bear Stearns/JP Morgan would have been willing to disclose the relevant information to the LIA, there appears to be no sustainable basis for the LIA's claim that it would have been stone-walled (relying upon the purported stone-walling by SocGen when the LIA attempted to obtain information about Leinada to which the confidentiality obligations applied). The lack of any efforts made on the part of the LIA to obtain this information in respect to Mr Giahmi's involvement is not consistent with the exercise of reasonable diligence.

56. With respect to Mr Giahmi's relationship of agency with Bear Stearns, information had been provided to Mr Rais, then CEO of the LIA, by employees of the LIA in 2009/2010 while he was carrying out his investigations at the LIA. According to Mr Rais, two LIA employees had explained that they saw Mr Giahmi at the LIA offices having meetings with Mr Gheriani and Mr Zarti. Around the same time, Mr Rais became aware of allegations of corruption made against Mr Giahmi, Mr Layas, Mr Zarti and Mr Gheriani from Ms Maysoon Tughar in 2008, although he claimed to have forgotten these allegations. In considering these facts in the round, they support the argument that the LIA should have, in exercising reasonable diligence, made enquiries to ascertain Mr Giahmi's position in relation to Bear Stearns at an earlier stage in light of the fact that Mr Giahmi's involvement had become known prior to 2011.

57. In light of the fact that the LIA had concerns of corruption regarding its investments, and taking account of the concerns raised during Mr Rais's investigation and that of KPMG which recommended that the LIA carry out an immediate investigation into its investments to determine grounds for pursuing third parties, it appears that the LIA failed to exercise reasonable diligence with a view to uncovering any wrongdoing. In this regard, Mr Rais, on behalf of the LIA, also chose not to adopt KPMG's recommendations to carry out an immediate investigation into the investments in 2010. This is despite the fact that Mr Rais recommended to the LIA's Board of Directors in October 2010 that further investigations were needed as he suspected misconduct of the LIA's management, yet no such investigations were pursued.

58. The LIA advanced the argument that it would have been unable to discover information with respect to Mr Giahmi acting as an intermediary in transactions between Libyan institutions and Western businesses, and more specifically that they would not have been able to uncover any connections between Mr Giahmi, Lands and the LIA. However, it appears on the evidence that such information would have been discoverable as third parties interested in the LIA and the broader politics of Libya more generally from 2008

onwards and, in any event, prior to April 2012, had been able to uncover this information, in relation to which the LIA would have been better placed to uncover.

59. In 2008 a consultancy corporation named MEC International Limited authored a report entitled Project Morris in which allegations of corruption were made against Mr Giahmi, Mr Zarti and Mr Gheriani in relation to commission payments regarding the LIA's transactions. Further the report noted that Mr Giahmi operated through a Cayman-based company named Lands Company (Cayman) Limited. If a consultancy company was able to source this information, the LIA when exercising reasonable diligence should have been able to do so. It was submitted on behalf of Mr Giahmi and Lands that given the nature of the allegations made in Project Morris, it is plausible that the information contained in the report may actually have come from sources within the LIA itself. In correspondence between instructing solicitors on behalf of the LIA and Mr Giahmi, the LIA's solicitors when requested refused to confirm that the source material for the report was not from anyone within the LIA or from publicly available sources. In either of these instances the information would be such that the LIA could likely have become aware of it if exercising reasonable diligence.

60. Further, in 2011 information in relation to Mr Giahmi was discovered by an English university student named Peter Cole who was writing his MPhil thesis. The thesis included information that Mr Giahmi and Mr Zarti were involved in brokering the LIA's deals. As the information was discoverable by a graduate student, the likelihood is that if the LIA had exercised reasonable diligence in its investigations it would have been alerted to the same, or similar, information with which to formulate its claims.

61. I now turn to consider the specific facts on which the LIA bases its inference of a fraudulent scheme and in particular whether these were known to it, or could have been known to it had it used reasonable diligence to discover the same, on or before 6 April 2012. These "building blocks" for the plea of fraud are pleaded at paragraph 27 of Amended Particulars of Claim, and are as follows:-

    (1) The lack of information about "structuring" services (the term used in the Bear Stearns term sheet for the services being provided by Lands) provided to Bear Stearns;

    (2) The fact that there is no evidence of which the LIA is aware that Lands or Mr Giahmi provided any legitimate service in relation to the Bear Stearns Notes;

    (3) The fact that Lands is a shell company incorporated in the Cayman Islands with no known employees and no business premises;

    (4) The fact that as a well-known investment bank, Bear Stearns had no need for "structuring" services in relation to the Bear Stearns Notes, but could themselves have structured an appropriate investment for the LIA;

    (5) The failure to disclose to the LIA the scale of the fees which were paid to Lands;

(6) The fact that Lands was ultimately owned and/or controlled by Mr Giahmi who (a) had no expertise in advising on or structuring financial derivative transactions; and (b) had connections with the Gaddafi regime;

(7) The failure to disclose the involvement of Mr Giahmi;

(8) The fact that Mr Giahmi had already taken steps to bribe the officers of the LIA prior to the conclusion of the Bear Stearns Notes; and

(9) Mr Giahmi's connections with the Gaddafi family and regime, meant that he was in a credible position to make threats.

62. Those facts represent all the facts on which the LIA relies for its claims against Mr Giahmi and Lands based on the fraudulent scheme. But Lands points out that the LIA did not consider that all of those facts are necessary in order to infer the alleged fraudulent scheme given what the LIA pleaded in the original Particulars of Claim in the SocGen Proceedings, which were served by the LIA on 26 March 2014 ("the SocGen Particulars"). In the SocGen Proceedings, the LIA pursued the same relief against SocGen, Mr Giahmi and Leinada Inc, a Panamanian company owned by Mr Giahmi that received commission or fees in relation to the disputed transactions with SocGen and its associated companies, save that there was no claim for dishonest assistance made against Mr Giahmi or Leinada. It is clear that much of the text of the Particulars of Claim in the current proceedings is cut and pasted from the SocGen Particulars. This is hardly surprising given the similarity of the allegations.

63. However, when the SocGen Particulars were served, the LIA did not know of the bribes said to have been paid by Mr Giahmi. Instead, they inferred the same form of fraudulent scheme from seven facts set out at paragraph 38. Sub-paragraphs 38(1) to (5) are materially the same as subparagraphs 27(1) to (6) in the Amended Particulars of Claim in these proceedings, save that Leinada is pleaded in place of Lands. In place of the particulars set out in sub-paragraphs 27(7) to (9) of the Amended Particulars of Claim, the SocGen Particulars rely upon the following facts:

(1) The fact that the Leinada payments were only to be paid on the successful completion of the transaction (paragraph 38(6)); and

(1) The notorious fact that corruption pervaded both government and business activities in Libya, both prior to and throughout the period of time when the SocGen transactions were being executed (paragraph 38(7)).

64. Thus, on its own case as set out in the SocGen Proceedings, the most that the LIA was required to know in relation to the alleged fraudulent scheme associated with the Bear Stearns Notes was the facts pleaded in the SocGen Particulars as they applied to Lands (instead of Leinada), at least so far as related to Lands. Obviously in order to bring a claim against Mr Giahmi, Mr Giahmi's role needed to be known. In the event, during the hearing before me, it was in relation to this that much of the LIA's submissions were directed.

65. I address below each of the "building-blocks", and whether they were either known to the LIA, or could have been known to the LIA had it used reasonable diligence to discover the same, on or before 6 April 2012. In this regard the LIA produced a table addressing actual knowledge that it had (the "LIA Table"), whilst Mr Giahmi and Lands produced a document as to the knowledge they said that the LIA could have acquired had it used reasonable diligence (the "Reasonable Diligence Document").

Fees having been paid to Lands in connection with the Bear Stearns Transaction (see para 25(1) of Mr Giahmi's skeleton, SocGen POC para 38(1), JPM POC para 27(5)).

66. The Bear Stearns Transaction Term Sheet expressly provided:- "Fees will be paid to Lands Ltd in connection with the structuring of these notes. Further details are available upon request."

67. It is accordingly apparent on the face of the Bear Stearns Transaction Term Sheet that fees would be paid to Lands. This document had been available to the LIA since November 2007 when the transaction was entered into (as is apparent from it having been an annexure to a document signed by Mr Layas), and it was reviewed as part of the 2010 investigations into the LIA's transactions (see paragraph 63 of Riem 1).

68. If further information was needed in terms of the amount of the fees or to clarify the name and identity of Lands Ltd, the Bear Stearns Transaction Term Sheet expressly contemplated that further details were available on request from Bear Stearns, and so the same was discoverable with reasonable diligence. It cannot be credibly suggested that JP Morgan would not have supplied such information in the context of a $200m trade and an existing commercial relationship that pre-dated its acquisition of Bear Stearns. JP Morgan's attitude to the disclosure of information generally is addressed in more detail below in the context of the provision of information concerning Mr Giahmi.

Lands not being an established provider of services in the banking and finance industry with particular experience or expertise (see para 25(2) of Mr Giahmi's skeleton, SocGen POC para 38(2), cf JP Morgan POC para 27(3).

69. The fact that Lands was not a recognised company with an established pedigree and/or a company with known expertise in advising on or structuring financial derivative transactions would have been known to and easily discoverable by a professional international banker such as Mr Baruni (as to which see Baruni 6, paragraphs 7-12, and Mr Baruni's response to the discovery of the Leinada payments within the SocGen final term sheet (Baruni 6, paragraphs 130-131)). Mr Baruni had reviewed the Bear Stearns Final Transaction Term Sheet by April 2010. In fact during the course of his oral submissions Mr Masefield accepted that, as in the case of Leinada, the LIA would have had actual knowledge that Lands was not an established provider of services in the banking and finance industry with particular experience or expertise.

A lack of evidence of legitimate services provided to Bear Stearns by Lands (para 25(3) of Mr Giahmi's skeleton, SocGen POC para 38(3), JP Morgan POC para 27(2)).

70. The Bear Stearns Transaction Term Sheet does not contain any information to suggest that any legitimate services were being provided by Lands to Bear Stearns. The exercise

of reasonable diligence would lead to the LIA following this up with JP Morgan – that would have revealed (by no such services being identified) that (on the LIA's case) there was a "lack of evidence of legitimate services" – thus demonstrating the absence of any evidence to counter the other building blocks that were in place.

Bear Stearns having no apparent need to engage Lands to provide structuring services (para 25(4) of Mr Giahmi's skeleton, SocGen POC para 38(4) and JP Morgan POC para 27(4).

71. The involvement of Lands is known from the Bear Stearns Transaction Term Sheet. The expertise of Bear Stearns is common knowledge and accordingly this information would be apparent to anyone who recognised the expertise of Bear Stearns, and who did not recognise "Lands Ltd" as an established provider of structuring services to the banking industry (which would itself be readily apparent). Mr Baruni and Dr Khan would have had such knowledge, just as Mr Baruni knew that Leinada was not an established service provider in the SocGen proceedings (Baruni 6 at paragraph 128). Mr Masefield accepted in the course of his oral submissions that the LIA had actual knowledge of this.

The involvement of Mr Giahmi in the Bear Stearns Transaction (see para 25(5) of Mr Giahmi's skeleton, SocGen POC para 38(5) and JP Morgan POC para 27(6)).

72. It is Lands' and Mr Giahmi's case that the fact that Mr Giahmi was the natural person providing the introducing broker services would have been disclosed by JP Morgan upon enquiry by the LIA (for example, in 2010 when it was reviewing the Bear Stearns Transaction as part of its investigations), such enquiries being well within the scope of reasonable diligence.

73. However, this is very much disputed by the LIA who say that JP Morgan would not have cooperated and provided this (or indeed any other) information and would have "stonewalled". As addressed below the LIA's position does not bear analysis. However, there is, in any event, a short answer to this point. The involvement of Mr Giahmi was apparent from the face of the agreement with Lands, which refers to Lands company care of ATC Trustees, and then it was provided, "For the attention of Mr Walid Elgahmi" i.e. Mr Giahmi, so his involvement was apparent from the face of that document. I am satisfied that this agreement would have been provided to the LIA.

74. In any event the suggestion that JP Morgan would not have cooperated and provided information (including as to the involvement of Mr Giahmi) is just not credible. After Bear Stearns was taken over, JP Morgan became an obvious source of information with respect to accessing material which went to prove Mr Giahmi's involvement with the Bear Stearns Trade. It was submitted by counsel for the LIA that requesting information from JP Morgan would have been futile for three reasons: (1) that Mr Giahmi imposed confidentiality obligations on Bear Stearns / JP Morgan in order to conceal his involvement in the Bear Stearns Trade from the LIA; (2) that JP Morgan would have stone-walled the LIA as it allegedly had in the past; and (3) that individuals who were suspected of being co-conspirators in the Bear Sterns Trade would have prevented JP Morgan/Bear Stearns from releasing this information, and/or that these individuals had left and therefore JP Morgan would be unable to source the relevant information. These points were comprehensively rebutted by counsel for Mr Giahmi in reply.

75. These points do not bear examination, and there is no substance in the submission that the requisite information in relation to Mr Giahmi's involvement would not have been obtained from JP Morgan if reasonable diligence had been exercised. There were not any relevant confidentiality obligations upon Bear Stearns / JP Morgan. The Bear Stearns trade was a separate trade with a separate institution, and (in comparison to the position in relation to SocGen) there is nothing that would prevent disclosure of information pertaining to the Bear Stearns Trades and Mr Giahmi's involvement by JP Morgan. As Mr Gourgey put it, JP Morgan is a reputable bank, and it is not tenable to suggest that it would not respond to a request for information made by one of its customers, in relation to transactional matters, in light of the fact that the customer had invested US$ 200 million with the bank. Further, the requests that had been made of JP Morgan in around 2017-2018 to which JP Morgan had not responded were set against the backdrop of litigation. The situation which the LIA were in was completely different. It would have been requesting information about one of their transactions as a customer in circumstances where no litigation had been threatened.

76. The LIA seeks to rely on the fact that when enquiries were raised with SocGen in relation to Leinada, Mr Giahmi's in-house legal advisor, Mr Taylor, threatened SocGen with an injunction if they sought to disclose to the LIA the fact that Mr Giahmi was behind Leinada. The LIA claims that similar steps would have been taken by Mr Giahmi if the LIA had sought disclosure from Bear Steams/JP Morgan in 2010 as to who was behind Lands. However, Mr Giahmi's resistance to disclosure by SocGen to the LIA must be viewed in the context that there were confidentiality provisions in place. This is evident from the correspondence between Mr Giahmi's legal representatives and SocGen at the time.

77. In contrast, Bear Stearns was not subject to confidentiality obligations in relation to the involvement of Lands in the Bear Stearns Trade. The Lands Company Agreement with Bear Stearns contains no confidentiality obligations on Bear Stearns. The only confidentiality obligations are on Lands**.** Whilst Lands had originally proposed that the agreement include a confidentiality agreement, Bear Stearns responded with a re-drafted agreement in which the confidentiality term originally sought had been removed.

78. Instead, there was a confidentiality agreement between Lands and Bear Stearns in the form of a request by Peter Taylor and agreed by Mick Robinson of Bear Stearns to keep certain information provided by Lands to Bear Stearns confidential. However, this agreement, made by email in July 2007, relates to the specific company, trust and beneficial ownership information being requested from Lands by Bear Stearns for due diligence and compliance purposes. It does not relate to the subject matter of the agreement between Lands and Bear Stearns more generally, so as to include the services provided by Lands to Bear Stearns, the level of payment to Lands or the identity of the natural person providing those services to Bear Stearns on behalf of Lands.

79. In arguing that Bear Stearns / JP Morgan would not have responded to a request for information, reference was made to a US Department of Justice letter to the Swiss authorities which references an internal Bear Stearns note in which it was recorded that Bear Stearns executives were not to reveal Mr Giahmi's involvement in the transaction during meetings with the LIA unless LIA officials raised the matter first. However I consider that this point illustrates that Bear Stearns would have responded to such a

request if the matter was directly raised, which the LIA was invited to do by the terms of the Bear Stearns Transaction Term Sheet.

80. It was also submitted that certain individuals who were alleged co-conspirators in the Bear Stearns Trade would have prevented information being given. In particular, the LIA submitted that it was unrealistic to expect information to have been provided by alleged "co-conspirators", which included Bear Stearns / JP Morgan. However, this overlooks the fact that Nadim Shabsogh (the Bear Steams employee named by the LIA in its Particulars of Claim as having "marketed" the Bear Stearns Notes to the LIA) left Bear Stearns/JP Morgan in 2008 before the investigations in 2010 into the LIA's transactions by Mr Baruni and Mr Rais. The only other employees of Bear Stearns who were involved in the marketing of the Bear Stearns Trade were Bruno Pannetier and Vincent Van Pelt who also left Bear Stearns/JP Morgan in 2008.

81. It was no doubt in recognition of this that the LIA's emphasis shifted, to suggest that the LIA would be unable to source the relevant information on account of the individuals who had knowledge of the Bear Stearns Trade having left. However the Bear Stearns Trade was for a significant sum of money and a large amount of paper work would have been generated as a result. There is nothing to suggest that the underlying documentation and email correspondence would not have been retained when JP Morgan took over Bear Stearns. It is not credible to suggest that, because certain individuals who may have had direct knowledge of Mr Giahmi's involvement had left, that JP Morgan would have been unable to supply information to the LIA about the involvement of Mr Giahmi.

82. Neither the Bear Stearns Transaction Term Sheet nor JP Morgan were asked by the LIA to provide information regarding the involvement of Lands in the Bear Stearns Trade. This is notwithstanding the invitation to do so on the Bear Stearns Trade term sheet which reads "further information is available on request". It is not realistic to suggest that JP Morgan would not have complied with any request by its customer, the LIA, for information as to who the natural person working on behalf of Lands was, and how much he or she was paid, still less that JP Morgan would in any way conspire to prevent information being disclosed in the event of a request on behalf of the LIA in 2010.

83. As a final point on this "building-block", knowledge of Mr Giahmi's involvement was not necessary for knowledge of the claim against Lands.

The "notorious" prevalence of corruption in Libyan business at the time (see para 25(6) of Mr Giahmi's skeleton and SocGen POC para 38(7)).

84. It is not disputed that the LIA knew of this at the time the Bear Stearns Transaction took place, and evidence of corruption associated with intermediaries and the payment of commission is in Gheblawi, paragraphs 52 to 61 and Baruni, paragraphs 47, 51-52, and 129-131.

Other matters

85. Mr Giahmi and Lands deny that the alleged "opaque" and "inconsistent" description of the services provided by Lands was a necessary "relevant fact" for the Statement of Claim test (i.e. SocGen POC 38(1)).

86. However: (1) The "opaque" description of the services as "structuring" was apparent from the face of the Bear Stearns Transaction Term Sheet; and (2) The "inconsistent description" is the difference between the description in the Bear Stearns Transaction Term Sheet as "structuring services" and the description of the services as "introducing broker" ("*…appoint you…as broker to introduce*") in the Lands Company Agreement. The LIA could have requested from JP Morgan a description of the services provided by Lands and/or a copy of the agreement with Lands. At that stage there would have been inconsistency between the two descriptions and so this matter was discoverable with reasonable diligence.

87. The knowledge or discoverability with reasonable diligence of the above is to be viewed in light of the background in which the relevant documents and matters were being considered by the LIA prior to April 2012, as already referred to above, namely:

(1) The LIA's concern from late 2007/early 2008 onwards of the risk of corruption (and specifically the risk of officials having received illegitimate payments) arising from payments made to unknown third parties in LIA transactions (evidence summarised in Riem 1 at paragraph 51 to 54 with reference to evidence from the LIA's witnesses);

(2) The LIA's concern as to corruption and the use of intermediaries in its transactions during and before the 2010 investigations headed by LIA CEO Mr Rais (engaging Mr Baruni and Dr Khan to investigate) (evidence summarised in Riem 1 at paragraphs 55 to 66), including the concerns regarding the use of the term "structuring" in relation to services provided by unknown third parties to entities that allegedly had no need of such services.

88. In light of the above I am satisfied that the LIA either knew or with the exercise of reasonable diligence could have discovered the facts necessary to plead its claims prior to 6 April 2012 and accordingly the LIA's claims against Mr Giahmi and Lands stand no real prospect of success by reason of the limitation defences available to Mr Giahmi and Lands. In such circumstances the order for service out of the jurisdiction should be set aside, and I so order.

89. However, as will appear, whether in fact the LIA's claims have any real prospect of success as a result of limitation defences available to Mr Giahmi and Lands, is academic given the findings I make below concerning the LIA's failure to give full and frank disclosure on the ex parte application in relation to disclosure, as a result of which service is to be set aside in any event quite apart from the lack of any real prospect of success.

C. Full and Frank Disclosure

90. Mr Giahmi and Lands seek to set aside service of the claim form outside of the jurisdiction on the basis that the LIA failed to give full and frank disclosure as required in without notice applications.

91. The following paragraphs will set out the legal principles applicable to full and frank disclosure before turning to consider its application to the issue of limitation in the present case. The remainder of the Defendants' full and frank discloser arguments will be addressed within each section where applicable.

C.1. Applicable Legal Principles

92. The principles to be applied to breaches of full and frank disclosure were summarised in *OJSC ANK Yugraneft v Sibir Energy plc* [2008] EWHC 2614 (Ch), in which Christopher Clarke J. approved the following guidance at [102]:

> "Mr Boyle drew my attention, with appropriate diffidence, to a decision of his own, sitting as a Deputy Judge of the Chancery Division, as to the approach to be taken by the Court in the event that there is culpable non-disclosure. In *The Arena Corporation Limited -v- Schroeder* [2003] All ER (D) 199 (May) at paragraph 213, he summarised the main principles which should guide the Court in the exercise of its discretion as follows:
>
> (1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
>
> (2) Notwithstanding the general rule, the court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the Judge might have made the order anyway is of little if any importance.
>
> (6) The Court can weigh the merits of the plaintiff's claim but should not conduct a simple balancing exercise of which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

> (8) The jurisdiction is penal in nature and the courts should have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

93. In *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570 the Court at [65] explained the "golden rule" which must be followed with respect to full and frank disclosure:

> "65. The leading cases remain *Brink's Mat Ltd v. Elcombe* [1988] 1 WLR 1350 and *Behbehani v. Salem* [1989] 1 WLR 723. Those authorities in this court bring their reminder of the essential principles: that there is a "golden rule" that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion; that failure to observe this rule entitles the court to discharge the order obtained even if the circumstances would otherwise justify the grant of such relief; that a due sense of proportion must be maintained between the desiderata of marking the court's displeasure at the non-disclosure and doing justice between the litigants; that for these purposes the degree of any culpability on the part of the applicant or of any prejudice on the part of the respondent are relevant to the reviewing court's discretion; and that a balance must be maintained between undermining "the heavy duty of candour and care" which falls on applicants and promoting a "tabula in naufragio" to save respondents who lack substantial merits."

94. The duty of full and frank disclosure only extends to those issues which can be said to be material to the decision which the judge had to make on the application. This was made clear by Lawrence Collins J in *Konamaneni & Ors v. Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, where his Lordship stated at [180]:

> "On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries*: Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, 1356–1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present.
>
> These principles have long been applied to applications for permission to serve out of the jurisdiction: see e g *The Hagen* [1908] P 189, 201. In that context it has been held that it would not be reasonable to expect an applicant for permission to serve out to anticipate all the arguments or points which might be raised against his case: see *Electric Furnace Co v Selas Corpn* of

> America [1987] RPC 23, 29. A failure to refer to arguments on the merits which the defendant might raise at trial should not generally be characterised as a "failure to make full and fair disclosure", unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant permission: BP Exploration Co (Libya) Ltd v Hunt [1976] 1 WLR 788, 788–789, approved in the *Electric Furnace* case [1987] RPC 23, 29."

95. Males J in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [19], made clear the importance of "not to allow a dispute about full and frank disclosure to turn into what is euphemistically described as a"mini" trial of the merits".

96. In *Banca Turco Romana S.A. (in liquidation) v Cortuk* [2018] EWHC 662 (Comm), Popplewell J gave the following further guidance at [45]:

> "The importance of the duty of disclosure has often been emphasised. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even- handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in [Yugraneft], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

97. In *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm) Toulson J set out the following guidance to be adopted, at [23]-[32]:

> "23. The starting point is that an applicant for an order on a without notice application must make full and frank disclosure of all material facts, that is, facts known to the applicant which might reasonably be taken into account by the judge in deciding whether to grant the application: *R v Kensington Income Tax Commissioners ex parte Princess Edmund De Polignac* [1917] 1 KB 486 , 514 (Scrutton LJ); *Siporex Trade SA v Comdel Commodities Limited* [1986] 2 Lloyd's Rep 428 , 437 (Bingham J); *Brink's Mat Limited v Elcombe* [1988]

1 WLR 1350 , 1356 (Ralph Gibson LJ).

24. It is for the court to determine what is material according to its own judgment and not the assessment of the applicant: *Brink's Mat Limited v Elcombe*. This means that if the court considers there to have been material non-disclosure, it is not an answer that the applicant in good faith took a different view, although that may affect the court's exercise of its discretion in deciding what to do in the light of the non-disclosure. It does not mean that an applicant is under a duty to disclose facts which could not reasonably have a bearing on the decision which the judge has to make.

25. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it. I was referred to a number of statements on the duty of disclosure in the context of applications for freezing injunctions. In such cases the court is being asked to make an order of an exceptional kind, prohibiting or restricting a defendant's use of its own assets before any adjudication has been made against it. Because of its draconian nature, it is a jurisdiction which requires great caution and a wide range of factors may have a bearing on the court's decision.

26. An application for permission to serve out of the jurisdiction is of a very different nature. The general principles about disclosure on without notice applications still apply, but the context is different. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case.

27. Authority supports this approach. In *BP Exploration Co (Libya) Limited v Hunt* [1976] 3 AER 879 (which concerned an application for leave to serve out of the jurisdiction) Kerr J said at 893:

> In my view, a failure to refer to arguments on the merits which the defendant may seek to raise in answer to the plaintiff's claim at the trial should not generally be characterised as a failure to make a full and fair disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant leave. …

29. If MRG was aware of matters which might reasonably have caused the judge to have any doubt whether he should grant permission to serve out of the jurisdiction, those would have been relevant matters and therefore ought to have been disclosed. This must be so in principle, and it is implicit in the authorities to which I have referred.

Mr Gruder's answer was that:

i) it is for the court and not for the applicant to decide what is material and

> ii) anything which is relevant to the merits of the claim is potentially relevant to the matters which the judge has to consider.
>
> I do not accept that submission. The first proposition is correct, but Mr Gruder seeks to apply it in such a way as to enlarge the test of materiality. It is for the court to determine what is material, but the test of materiality is that to which I have referred: whether the matter might reasonably be taken into account by the judge in deciding whether to grant the application. The second proposition goes too far. There may be many points which would be relevant to the ultimate merits of an action, but which could not on any reasonable view affect the judge in deciding the "merits threshold" question (or the ultimate question whether to grant the application).
>
> 31. Mr Gruder submitted that if the applicant is not required to disclose all matters which go to the merits of the action, but only those matters which go to the questions whether there is a serious issue to be tried, whether the court has jurisdiction to hear it and whether England is clearly the appropriate forum, the result will be to reduce the judge's role on such an application to a "rubber stamping" exercise. I would not agree with that description, although I do agree that the issues which the judge is required to consider are limited. This is because the judge is at this stage concerned with the question whether the court should assume jurisdiction, rather than with the question who is likely to win. …
>
> 36. Appendix 15 to the Admiralty and Commercial Courts Guide gives good guidance about the evidence which should support an application for permission to serve out of the jurisdiction. The guidance focuses on the matters which the judge will need to take into account in deciding whether it is a proper case in which to give permission."

98. The Commercial Court Guide, now at Appendix 9, states the following in relation to Service Out of the Jurisdiction: Related Practice at paragraph 2(c) at page 117:

> "The claimant should also present evidence of the considerations relied upon as showing that the case is a proper one in which to subject a party outside the jurisdiction to proceedings within it (stating the grounds of belief and sources of information); exhibit copies of the documents referred to and any other significant documents; draw attention to any features which might reasonably be thought to weigh against the making of the order sought; and otherwise comply with the duty of full and frank disclosure to the Court. Where convenient the written evidence should be included in the form of application notice, rather than in a separate witness statement. The form of application notice may be extended for this purpose."

C.2. Full and Frank Disclosure and Limitation

99. Having identified the legal principles to be applied, I now turn to consider whether the LIA satisfied its duty of providing full and frank disclosure with respect to the issue of limitation.

100. As is expressly required by Appendix 9 paragraph 2(c) of the Commercial Court Guide, a claimant when seeking permission to serve a claim form out of the jurisdiction in the Commercial Court must *"draw attention to any features which might reasonably be thought to weigh against the making of the order sought; and otherwise comply with the duty of full and frank disclosure to the Court".*

101. The claims made by the LIA in the claim form issued on 6 April 2018 against Mr Giahmi and Lands were indisputably commenced well after the ordinary six-year limitation period for tort, contract and breach of trust, including dishonest assistance and knowing receipt, had expired (sections 2, 5 and 21(3) of the Limitation Act 1980), as must have been obvious to the LIA given (1) the knowledge of Enyo Law LLP and counsel instructed as to English principles of limitation; (2) the limitation pleas taken by Mr Giahmi in the SocGen Proceedings including as to limitation under English law; (3) the fact that the Bear Stearns Note was issued on 15 November 2007 (even earlier than the Permal transaction in the SocGen Proceedings on 28 November 2007) and the JP Morgan Proceedings being issued years after the SocGen Proceedings were issued. Indeed (though in the different context of the claim against JP Morgan and laches) Mr Allen referred to the six year limitation period at paragraph 82 of his first statement demonstrating that he had it in mind.

102. Accordingly, the LIA knew (given that Mr Giahmi, and no doubt Lands, would undoubtably allege that the claims were time-barred under English law as Mr Giahmi had already done in the SocGen Proceedings), that they would need to avail themselves of section 32 of the Limitation Act 1980 (as they had done in the SocGen Proceedings) so as to argue as to a postponement of the commencement of the limitation period until after 6 April 2012, on which they bore the burden of demonstrating that the action was based upon a fraud of the defendant, or any fact relevant to the claimant's right of action had been deliberately concealed from the claimant by the defendant, and the claimant could not, with reasonable diligence, have discovered the fraud or concealment until after 6 April 2012. Indeed the LIA had so relied in the SocGen proceedings, as it inevitably would have to rely in the JP Morgan Proceedings. As such the LIA, and those instructed by it, knew that Mr Giahmi and Lands would take a limitation point in relation to English law, and that unless the LIA made good a section 32 of the Limitation Act 1980 plea, the claims would be time-barred.

103. The LIA does not dispute that the reasonable diligence test applies to the LIA's claims against Mr Giahmi by virtue of being prima facie time barred subject to satisfying the requirements of Section 32. Nor does the LIA dispute that they were aware that this test applied at the time of its original application for service out.

104. Limitation under English law (the only law being advanced at this time in the JP Morgan Proceedings) was on any view, and without any benefit of hindsight, a very important potential defence to the claims being advanced. Indeed (as I have found) it was a matter

that meant that the LIA did not have a real prospect of success, and as such service should be set aside. But whether that was so or not, it was a matter which indisputably might reasonably be thought to weigh against the making of the order for permission to serve out of the jurisdiction, as it went to the question of a real prospect of success of the LIA's claims. Equally, in terms of the duty of full and frank disclosure, the issues that arose in relation to limitation are matters which might reasonably have caused the judge to have doubt whether he should grant permission to serve out of the jurisdiction, in the context of whether the LIA had a real prospect of success and as such were relevant matters which ought to have been disclosed (*MRG v Engelhard Metals Japan*, supra, at [29] per Toulson J).

105. The LIA further failed to satisfy its duty of full and frank disclosure with respect to raising matters which are adverse to its case by choosing not to highlight to the court the evidence which is set out in the previous section of this judgment in relation to limitation which demonstrates that information pertaining to the relevant matters for bringing a claim was available to the LIA prior to April 2012. These matters were highly material to the issue of limitation, the test of reasonable diligence and to the court's judgment of whether the LIA's case stood a reasonable prospect of success. A failure to place these matters before the court represents a serious failing to provide satisfactory disclosure. With respect to these breaches, the LIA has not provided any satisfactory explanation which excuses these breaches of full and frank disclosure.

106. The LIA, by way of witness evidence from Mr Allen, advances the argument that in the original application it was highlighted that there had been a pattern of concealment on behalf of Mr Giahmi such that the relevant facts had been concealed from the LIA. However, this argument does nothing to justify the LIA's breach of full and frank disclosure, and does not grapple with what was either known or could with reasonable diligence have been known. Similarly, the LIA submits that it was highlighted in the original application that the fraud was only discovered after issuing the SocGen Proceedings. However, the LIA's own assertion as to when it alleges it acquired sufficient knowledge to bring a claim is not the benchmark against which limitation is to be judged and the LIA did not address the operation of section 32, and arguments as to what could have been discovered with the exercise of reasonable diligence. It is also submitted on behalf of the LIA that the LIA reached the conclusion that there was no credible limitation defence available to Mr Giahmi. It does not fall to a claimant to determine which defences are credible and to put only those before the court. The purpose of full and frank disclosure is to ensure that the claimant will put before the court all facts and arguments material to the court's decision.

107. The duty of an applicant on an application for permission to serve out of the jurisdiction is a duty to make full and frank disclosure of all material facts. The material facts are those which it is material for the Judge to know in dealing with the application made - *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 and 1356 G-H—here an application to serve outside the jurisdiction which would have the effect of bringing a person and an entity outside the jurisdiction, into the jurisdiction. In the present case, LIA should have identified that the claims sought to be advanced against Mr Giahmi and Lands were, under English law, prima facie time barred subject to the application of section 32 of the Limitation Act 1980, and should have provided sufficient particulars of the basis on which the LIA said that it could not with reasonable diligence have discovered all

necessary elements of a proper plea of fraud until after 6 April 2012, so that the judge could consider whether he or she was satisfied that the claims nevertheless had a real, as opposed to fanciful, prospect of success. The LIA did not do so. It is no answer to say that limitation is a point taken by way of defence – when applying for permission to serve out of the jurisdiction the LIA knew that such a defence would be taken given the stance Mr Giahmi had adopted in the SocGen proceedings, and the fact that the JP Morgan proceedings had been commenced very much more than six years after the Bear Stearns note. It was obvious that limitation was relevant to a reasonable prospect of success.

108. There was accordingly a failure to comply with the requirements of Appendix 9 paragraph 2(c) of the Commercial Court Guide, and a breach of the duty of full and frank disclosure. Importantly this was not, and was not suggested to be, an inadvertent failure to address such matters (due to lack of familiarity with the case, or pressure of time or the like). On the contrary, and as Mr Masefield rightly accepted on the LIA's behalf, LIA was aware of the limitation issue under English law and Mr Giahmi's reliance thereon (as demonstrated by the taking and addressing of that issue in the SocGen Proceedings), and as such it must have been a conscious decision on the part of those acting on behalf of the LIA not to address, in relation to Mr Giahmi and Lands, the limitation position under English law, and the need for the LIA to rely upon section 32, and to draw such matters to the attention of the judge. This is a significant aggravating factor.

109. It is of relevance that unlike on an application for a freezing injunction where the applicant is under considerable time pressure (yet must still comply with the duty of full and frank disclosure), the application for service out was made on 11 June 2018 over two months after the JP Morgan Proceedings were issued on 6 April 2018, with the result that the LIA, and those acting on the LIA's behalf, had a considerable period of time in which to draft the application for service out and supporting evidence, draw attention to any features which might reasonably be thought to weigh against the making of the order sought, and otherwise comply with the duty of full and frank disclosure. In this regard, the limitation position so far as a claim against Mr Giahmi and Lands was concerned was obviously material going, as it did, to the question of a reasonable prospect of success.

110. Whilst it is rightly not suggested (and could not be suggested) that there was an intention to mislead the court, there was, nonetheless, a conscious, and therefore deliberate, decision not to inform the court of such matters, and the degree and extent of the culpability was of a high order. Nor did the LIA recognise the non-disclosure and apologise for the same. An assertion that there was no need to inform the court of such matters was maintained on behalf of the LIA throughout the three-day hearing before me, and indeed Mr Masefield stated that he wished to make clear that LIA apologised <u>if</u> it was felt that there had been a non-disclosure (my emphasis). That is not an apology, nor does it demonstrate true contrition on the LIA's part. Rather it is an attempt by the LIA to brazen matters out. Indeed, when pressed by the court, it was not accepted that there had been <u>any</u> non-disclosure. All that the LIA was willing to say (in the words of Mr Masefield) was that *"with the benefit of hindsight…we accept that the alternative exposition under English law in Allen 1 could have been fuller and clearer".* That is something of an understatement – the limitation position under English law was not

properly addressed or drawn to the court's attention, as it should have been, and it is not a matter of hindsight. That the claims were prima facie time barred under the ordinary limitation period in English law (the only laws relied upon by the LIA) and that the LIA would have to rely upon section 32 of the Limitation Act, on which they bore the burden of proof, was known to the LIA and such matters should have been addressed together with what the LIA said as to why the LIA could not have discovered necessary matters for a proper plea of fraud prior to 6 April 2012.

111. As already noted, the supporting Skeleton Argument (running to some 16 pages and bearing the names of leading and junior counsel) did not address limitation at all. It contained a submission that "*On the basis of the evidence as it currently stands, there is no basis on which it could be concluded that the claim against either Mr Giahmi or Lands Company is bound to fail"*, and that *"it is clear that, even at the very lowest, the claim against Mr Giahmi and Lands…has a reasonable prospect of success".* Such submissions would be viewed by the court considering the paper application in a very different light had the limitation position under English law in relation to Mr Giahmi and Lands been referred to and addressed. Nor did the Skeleton Argument address the duty of full and frank disclosure in any detail or the legal or factual issues that would arise in relation to limitation concerning the claim against Mr Giahmi and Lands.

112. As already noted, under Part III of the Skeleton Argument headed "Miscellaneous matters" (which ran to only 3 paragraphs), it was stated:

> "44. Both the application for service out of the jurisdiction and for alternative service have been made on an ex parte basis, subjecting the Claimant to the duty to make full and frank disclosure.
>
> 45. Mr Allen has dealt fully with those points that he considers may be taken against the Claimant by Mr Giahmi and Lands…in relation to service out at paragraph [83] and by Mr Giahmi in relation to alternative service at [92]. Further, this duty has informed Mr Allen's presentation of the evidence throughout his statement, and the (extensive) presentation of the relevant law in Parts I and II above.
>
> 46. At the time of filing this skeleton, the Claimant is not aware of any other facts or matters that it should draw to the court's attention".

113. No reference was made to the claims against Mr Giahmi being time barred subject to any application of section 32 of the Limitation Act 1980, nor were the requirements of section 32 and any case that LIA had thereon, referred to, or addressed. These are facts and matters which should have been drawn to the court's attention. The Skeleton Argument therefore did nothing to augment, or make up for, the deficiencies in the supporting witness statement of Mr Allen.

114. At paragraph 66 of his witness statement Mr Allen stated:-

> "The JP Morgan Proceedings were issued on 6 April 2018, in order to protect the LIA's position in relation to the expiry of a Libyan limitation period which it was apprehended might be argued as being applicable by Mr Giahmi. In particular, in

> the SocGen Proceedings, Mr Giahmi contended that the claims against him were matters of Libyan law (which was denied by the LIA) and subject to a three-year limitation period (which, in any event, the LIA contended had not expired by the time that the SocGen Proceedings were issued – as to which, see further below)." (emphasis added)

115. The entire focus of this paragraph is Libyan law (where what is relevant is actual knowledge as opposed to what ought reasonably to have been known). Nothing is said about English law in the context of the claim against Mr Giahmi and Lands, nor the fact that Mr Giahmi also argued in the SocGen Proceedings that the Permal transaction was time barred under English law, nor that the LIA relied (and needed to rely) on section 32 of the Limitation Act 1980, and would need to make the same good. This was all directly relevant to a matter that needed to be addressed and established on the application for permission, namely whether LIA had a real prospect of success on its claim.

116. At paragraph 83 of his witness statement, Mr Allen stated that so far as the claims against Mr Giahmi and Lands are concerned, he remained sure of his belief that the LIA's claim had a reasonable prospect of success, even though he had considered 9 points that the Defendants might raise in their defences. The last at (i) was as follows:-

> "(i) The fact that the Disputed Trade was executed back in 2007, giving rise to possible limitation defences (whether under English law, or Libyan law). I do not believe that any credible limitation argument will be available to Mr Giahmi or Lands Company. In the SocGen Proceedings Mr Giahmi relied upon the Libyan law of limitation. Although I understand that the *prima facie* limitation period under Libyan law is 3 years, I also understand that this does not start to run until a party is aware of the identity of the actual wrongdoer. The LIA was not aware of Mr Giahmi's position behind Lands…or the true nature of the 'services' provided until after the issue of the SocGen Proceedings". (emphasis added)

117. The first sentence makes the blandest reference to possible limitation defences whether under English law or Libyan law, but does not address the limitation period under English law and the need for the LIA to rely on section 32 of the Limitation Act 1980 (on which LIA bears the burden of proof) nor does it address, in outline or otherwise, what the LIA would rely upon factually in that regard. The second sentence is said by Mr Giahmi and Lands to be not only wrong but positively misleading given the prima facie position on limitation under English law and the issues that arise in relation to section 32. There were, on any view, credible limitation arguments (indeed on examination very much more than that as I have found). The final two sentences relate to the Libyan law on limitation and actual knowledge, and not English law and what could have been discovered with reasonable diligence and when (for the purposes of section 32 of the Limitation Act 1980). The overall impression, albeit unintentional, is a misleading one as to the limitation position under English law.

118. Other paragraphs where Mr Allen refers to limitation relate to the position of JP Morgan (specifically paragraph 82), and not Mr Giahmi or Lands. Furthermore what is being addressed there is laches and actual knowledge. It is clear, however, from that paragraph that Mr Allen had put his mind to the date of 6 April 2012, which he expressly refers to, but he does not address the relevant considerations in relation to Mr Giahmi and Lands, and what could have been discovered with reasonable diligence and when.

119. In the above circumstances, and for the reasons I have identified, the LIA's breach of the duty of full and frank disclosure was both conscious, and therefore deliberate, and was, in my view a substantial, indeed an egregious, breach of duty in relation to a matter, limitation, which, on any view, went to the heart of the merits of the application for permission to serve out against Mr Giahmi and Lands. I address in due course below the other allegations of failure to give frank disclosure. However, I consider that the breach under consideration in itself justifies, and indeed necessitates, that permission to serve out be set aside.

120. The importance of the duty of full and frank disclosure, on applications for permission to serve out, just as in the context of a freezing injunction, cannot be over-stated. There is a difference in terms of what the disclosure must be directed at, and the matters being considered, but the underlying reason and rationale for the duty remains the same, as is the need to comply with the same. A failure to comply with that duty is by its very nature serious – an individual or entity has been brought into the jurisdiction without having had any opportunity to address the court as to why permission should not be granted, and as demonstrated by the present case, they are then exposed to very considerable costs upon an application to set jurisdiction aside.

121. I remind myself of the guidance given by Christopher Clarke J in the *Yugraneft* case at [104]. The general rule is that where, as here, the court has found a breach of the duty of full and frank disclosure on an ex parte application, the court should discharge the order obtained and refuse to renew it notwithstanding that the court has a jurisdiction to continue or re-grant the order. That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest requiring full and frank disclosure. In the present case the degree and extent of the culpability was high for the reasons I have given. It was a conscious decision not to say more about limitation, and cannot be characterised as an innocent breach. It related to a matter that was of importance and significance to the outcome of the application for permission to serve out of the jurisdiction. It went directly to real prospect of success. It was a matter which weighed heavily against the making of the order sought. I am doubtful whether the court would have granted permission on an ex parte basis had the duty been complied with, though whether that be so or not is of little if any importance on the authorities. As for the merits – the matter not disclosed went directly to the merits as limitation was a potential complete defence. Equally, leaving limitation aside, it cannot be said that the overall merits are of such strength, as would justify, a departure from the policy objective of the principle, not least having regard to the hurdles that have to be overcome in a case based on allegations of fraud, and in circumstances where the events

in question were many years ago, and potentially relevant documentation, and evidence, may no longer exist.

122. I have had careful regard to the penal nature of the jurisdiction, and the need for proportionality between punishment and offence. However, this was on any view a very serious breach in relation to which it is proportionate and appropriate to discharge the order. In this regard I remind myself of, and for my part endorse, what was said by Popplewell J in the guidance he gave in *Banco Turco Romana,* supra, at [45]:

"45. The importance of the duty of disclosure has often been emphasised. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in *Re OJSC ANK Yugraneft v Sibir Energy PLC* [2010] *BCCC 475* at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

123. The setting aside of the order obtained is the appropriate sanction, and the only appropriate sanction, in the present case. The LIA's breach of the duty was both conscious, and therefore deliberate and was, as I have identified, in my view a substantial, indeed an egregious, breach of duty in relation to a matter, limitation, which, on any view, went to the heart of the merits of the application for permission to serve out against Mr Giahmi and Lands. An adverse costs order or the like would not begin to reflect the seriousness of the breach, nor would it reflect, or adequately further, the public policy behind the duty which is fully engaged, and clearly illustrated, by the failings in the present case. On the contrary the only appropriate sanction is the setting aside of the order for the failure to give full and frank disclosure and I so order.

D. Money Had and Received and the Fraud Claim

124. Amongst other claims, the LIA advances claims against Mr Giahmi for money had and received and for fraud. Mr Giahmi challenges service of these claims outside of the

jurisdiction on the basis that they stand no real prospect of success. I address the relevant legal principles applicable to money had and received below.

125. In the Privy Council decision of *Mahesan v Malaysia Government Officers' Co-Operative Housing Association Ltd* [1979] AC 374 the existence of the tort of fraud/bribery and the basis for a claim of monies had and received was identified at 383:

> "(1) for money had and received under which he can recover the amount of the bribe as money had and received or, (2) for damages for fraud, under which he can recover the amount of the actual loss sustained in consequence of his entering into the transaction in respect of which the bribe was given, but he cannot recover both."

126. Similar remarks were made by Longmore LJ in *Fiona Trust & Holding Corp v Skarga* [2013] EWCA Civ 275 at para [1]:

> "Thus English law will permit a claimant employer or principal whose employee or agent has been bribed to recover: i) the amount of the bribe from both the person bribed and the briber, regardless of the question whether any loss has been suffered by the claimant; ii) the amount of any loss following the bribe, it being (probably) presumed both that loss has occurred in at least the amount of the bribe and that any subsequent transaction created by the employee or agent was caused by the bribe..."

127. In the present case, the LIA pleads its claims at paragraph 45(2) of the Amended Particulars of Claim in the following terms:

> "all or any part of the premium and/or their traceable substitutes received... and to recover the same and/or their traceable substitutes, either as monies had and received to the LIA's use... alternative by way of damages for fraud (the damage being irrebuttably presumed as being equivalent to the Lands Company Payments)"

128. The LIA does not assert in its pleading that it has suffered loss as a result of the bribes and accordingly does not bring a claim for such loss, however, equally the LIA does not simply claim for the amount of the purported bribes. The two bribes alleged in the proceedings against Mr Giahmi total the amount of US$ 225,040. However, rather than claim for the amount of the bribes, the LIA is instead bringing claims for the sum of US$ 6.01 million, representing the amount of the payments made by Bear Stearns to Lands. This is said, by Mr Giahmi and Lands, to be a novel cause of action which is not consistent with the position under English law pursuant to which a party can claim for the amount of alleged bribe, or the loss suffered as a result but cannot claim for the value of the underlying transaction facilitated by the bribe.

129. In Mr Allen's witness evidence in response to the challenge to the service out application, he explains that the basis of this claim is that the legal principle could arguably be extended so as to apply to the amount of the inflated premium that it is contended was paid by the LIA to Bear Stearns and then by Bear Stearns to Lands. In advancing the argument that the law can be extended in this manner, Mr Allen relies upon the case of *Hovenden v Millhoff* [1900-03] All ER Rep 848. However, in *Mahesan* (set out above)

Lord Diplock disapproved of the dicta in *Hovenden* at 380 stating: "*In their Lordships' view, these dicta [in Hovenden], notwithstanding the eminence of the judges by whom they were made, are in conflict with basic principles of English law as they have been developed in the course of the present century. They call for re-examination in their historical setting*".

130. Further, the case of *Hovenden* is authority for the proposition that it is the amount of the bribe that stands to be recovered and not the sums of the underlying transaction, as can be seen from the following statements of the court:

(1) Smith LJ at 849-850: "It seems to me clear from the judgments in *Salford Corpn v Lever* and in *Grant v Gold Exploration and Development Syndicate Ltd* that, inasmuch as the amount of the bribes has been quantified, it can be recovered as money had and received" and "in this case, the purchase money was 28,000 pounds, in which was included the 700 pounds given to the purchaser's agent. Of course the vendor would have sold the goods for 28,000 pounds less 700 pounds; therefore, he has in his pocket 700 pounds, money of the purchasers. That 700 pounds he must disgorge. That is the cause of action here. When a purchaser finds out this state of things, he may call on his agent or the vendor to disgorge" and "the direction to the jury ought to have been that the amount which could be recovered as money had and received was the amount of the bribes".

(2) Vaughan Williams LJ at 850: "This is an action against a briber in which the plaintiffs seek to recover from him the amount of the bribe" and "whatever the amount of the bribes is proved to be, that amount can be recovered from the agent" and "I used to think that the action against the briber was an action of fraud sound in damages; but the judges in *Salford Corp v Lever* did not hold out much encouragement to me in that view".

(3) Romer LJ at 851: "if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount of value of the bribe".

131. On the basis of the law as it currently stands, the LIA can claim for the sum of the bribes but if it wishes to claim for sums over and above those of the bribes then any loss alleged must be pleaded and proved. The LIA has advanced no claim for loss with respect to this point. Any claim for loss would require an investigation of the transaction, and what the LIA would have done with its money but for the transaction. Nor does the LIA claim that, but for the alleged bribe that it would have entered into the Bear Stearns Trade at a lower premium. The LIA acknowledged this in the SocGen Proceedings where in the LIA's SocGen skeleton argument at Schedule 6 paragraph 153(1) it was stated that "*if the principal seeks to recover damages for more than the amount of the bribe, he must prove the actual loss he has sustained, by way of a claim in fraud*". In the present proceedings, the LIA claims a sum other, and of an amount greater, than the amount of the alleged bribes but does not allege that it has sustained loss in this amount.

132. Whilst academic, in light of my setting aside of service for a failure to give full and frank disclosure in relation to limitation, and in the light of my finding in relation to limitation itself, I do not consider that the claims for more than the amount of the bribes stand any real prospect of success on the current state of English law, and as such service would have been set aside in relation to those claims on that basis or such claims would have been struck out had the action proceeded.

133. It is also alleged that there was a failure to give full and frank disclosure in relation to such matters. I can deal with this point briefly in the light of the findings I have already made. In this regard I note the arguments advanced on behalf of Mr Giahmi which highlight that Mr Allen sets out in his written evidence supporting the original application for service out that the LIA is claiming the amount of the proceeds of the Bear Stearns premium which were received by Lands but did not raise the fact that the legal basis for this claim is novel, and is not directly supported by existing authorities.

134. Mr Riem submits that in complying with the duty of full and frank disclosure, the LIA should have put before the court that: (i) the claim for money had and received only enables a claim for the amount of the bribes; and (ii) the claim under the tort of fraud only enables a claim for the loss caused (which the LIA has not sought to prove) or a presumption of the amount of the bribes.

135. The matters raised bear upon whether it can be said that the LIA has a good prospect of success in its claim, which in turn makes such matters material to the court's determination of the application for permission to service out. I consider that there should have been at least some reference to the issues that arise and why it was that the LIA nevertheless submitted that it could advance such claims and that they had a real prospect of success notwithstanding the novel arguments that were being run. There was not, and this was a further breach of the duty to give full and frank disclosure. However, I do not consider the breach to have been such as to have made it appropriate to set aside service on that basis alone. Nevertheless, it is a further instance of non-disclosure aggravating the non-disclosure in relation to limitation.

E. Abuse of process

136. This application is academic given my findings in relation to limitation and the failure to give full and frank disclosure. However, in circumstances where the matter was fully argued I will express my views albeit more briefly than might otherwise have been necessary. Mr Giahmi argues that the bringing of claims against him amounts to an abuse of process as they are materially similar to the claims advanced against him in the previous SocGen Proceedings and should have been raised, if at all, in those proceedings.

E.1. Applicable legal principles

137. The general principle of abuse by which a claim can be struck out under CPR Part 3.4(2)(b) where a claimant seeks to advance a claim which should have been advanced in earlier proceedings is set out in *Johnson v Gore Wood & Co* [2002] 2 AC 1 per Lord Bingham 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."

138. The authority of *Aldi Stores Ltd v WSP Group Plc* [2008] 1 WLR 748 sets out helpful guidance to be applied in cases of abuse of process based upon previous litigation. In particular, see paragraphs [29], [31] and [38]:

> "29. I also wish to add a word as to the approach that should be adopted if a similar problem arises in the future. In circumstances such as those that arose in this case, the proper course is to raise the issue with the court. Aldi did write to the court, as I have set out at para 2(xiii), but not in terms that made it clear what the court was being invited to do. WSP and Aspinwall knew of Aldi's position and were before the court on numerous occasions; they did nothing to raise it.
>
> 31. However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

139. In *Stuart v Goldberg Linde* [2008] 1 WLR 823 Sedley LJ held the following at [77]:

> "as Aldi again makes clear and as the Master of the Rolls stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."

140. Similar guidance was given by Lord Clarke MR at [96]:

> "96 For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court

> can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated."

141. At [57] Lloyd LJ held that the merits of the challenges brought against the defendant are not an important factor:

> "Whether the claim appears to be weak or strong, it is the fact of it being brought as a second claim, where the issue could have been raised as part of or together with the first claim, that may constitute the abuse."

142. In *Clutterbuck v Cleghorn* [2017] EWCA Civ 137 Kitchin LJ gave the following guidance at [91]:

> "There are, to my mind, striking similarities between these claims and the claim in Gladman. Just as in that case, the consequence of permitting the Pont Street Claim and the Oriel Claim to continue would be that the very same issues would fall to be litigated again in two successive trials involving a very great deal of court time and huge expense in terms of both management time and litigation costs."

143. In *Barker v Baxendale-Walker* [2018] EWHC 1681 (Ch), Briggs LJ at [22] stated as follows:

> "The claim made by the Debtor concerns the same factual matrix as the original claim before Roth J. There would be extensive overlap of witnesses, issues and evidence between the original action and the claim now issued but not served. The claim should have been pleaded as a counter-claim but was not. Even if it is argued that a separate claim should have been issued, no reason has been advanced as to why the *Aldi* requirement was not met. If the *Aldi* requirement had been met the judge at the case management stage would have ordered the matters be tried together as they arise out of the same factual matrix, there would be less risk of inconsistent findings of fact (a public policy issue), it would have been more efficient to hear the claims together in terms of Court time and the cost of witness attendance, and such a case management decision would have been consistent with the principle that the court requires the parties to litigation to bring forward their whole case."

144. Turning to consider CPR Part 38.7, no permission is required to discontinue proceedings in a typical case. Instead, CPR Part 38.7 requires permission to be sought at the time when the second claim is brought:

> "Discontinuance and subsequent proceedings
>
> 38.7 A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if –

(a) he discontinued the claim after the defendant filed a defence; and

(b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim."

145. In *Westbrook Dolphin Square Ltd v Friends Provident Life and Pensions Ltd* [2011] EWHC 2302 (Ch) Arnold J held the following at [45]:

"45 Counsel for Friends Provident submitted, and I accept, that the principles identified by the maxims *nemo debet bis vexari pro una et eadem causa* (no-one should be vexed twice in respect of one and the same cause) and *interest reipublicae ut sit finis litium* (it is in the public interest that there be an end to litigation) should inform the court's approach to CPR r. 38.7. In my judgment it follows that there is an analogy between the principles to be applied to an application under r. 38.7 and those applied by the courts under CPR r. 3.4(2)(b) with respect to *Henderson v Henderson* abuse of process. The main difference I perceive is that under r. 38.7 the onus lies upon the applicant to show that it should be given permission to bring the new claim, whereas under r. 3.4(2)(b) the onus lies upon the defendant to show that the new claim is an abuse of process."

146. In *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 Briggs LJ held as follows at [60]:

"60 In my judgment there is indeed an analogy between the re-introduction of a claim previously abandoned in the same proceedings and the making of a fresh claim after discontinuance of a similar claim based on the same or substantially the same facts, as is controlled by Part 38.7 . Both types of conduct, unless closely controlled by the court, tend to undermine the public interest in finality in litigation. But Part 38.7 imposes that control not in terms by the requirement to show special circumstances, but rather by the requirement that such fresh proceedings may only be brought with the Court's permission. In that respect they equate the bringing of fresh proceedings with the re-introduction of an abandoned claim by amendment, since amendment itself requires the court's permission. Beyond that, it seems to me that the rule leaves it to the court to decide whether to grant or refuse permission having regard, as I have said, to the public interest in finality."

147. With respect to whether abuse of process can apply where earlier proceedings have been settled, see Lord Millett at 59 in *Johnson v Gore Wood & Co* [2002] 2 AC 1 where he held:

"In one respect, however, the principle [of abuse of process] goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding."

148. This was confirmed in *Aldi Stores Ltd v WSP Group Plc* [2008] 1 WLR 748 by Thomas LJ at [11]:

> "11. Mr Thomas QC also contended that as a matter of law, a distinction had to be drawn between previous litigation where the case was settled and previous litigation where the case proceeded to judgment. The submission was based on a passage in the speech of Lord Millett in *Johnson v Gore-Wood* at page 59. However, Lord Bingham made clear at page 32–33:
>
> > "An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

149. Accordingly no distinction is drawn, as a matter of law, between cases where the original action concludes by settlement and where it concludes by judgment. The course of the original action and whether it resulted in a settlement or a trial are but part of the facts to be considered alongside all the other facts.

150. It should be noted that the LIA and Mr Giahmi disagree as to the precise application of the law with respect to abuse of process. Whilst Mr Giahmi submits that a general principle of abuse applies along the lines of *Johnson v Gore Wood*/CPR Part 38.7, the LIA argue that *Henderson v Henderson* abuse of process only applies where a judgment has been given and where considerations of res judicata arise. However I do not consider it necessary to lengthen an already lengthy judgment by engaging in this debate in circumstances where it has been held in previous authorities that analogies can be drawn between the principles to be applied under CPR 38.7, CPR 3.4 (2)(b) and abuse of process, and the LIA concedes in its skeleton argument that for present purposes this is a "distinction without a difference".

E.2. Application to the facts

151. Turning to the facts in the present case, and an assessment of the extent to which they are similar to those of the previous proceedings in SocGen.

152. The evidence put before me demonstrates that the proceedings which the LIA has sought to serve out of the jurisdiction and the previous SocGen Proceedings are undoubtedly highly similar and arise out of the same events involving the same individuals. Of particular importance are the following factors:

(1) The SocGen and Bear Sterns claims concern precisely the same alleged bribes;

(2) As a result, the alleged bribes were paid to the same persons related the LIA's employees (Mr Gheriani's father and Person Z) in both instances;

(3) These matters occurred at exactly the same time for the purposes of both proceedings as distinct bribes are not alleged;

(4) The same alleged incidents of intimidation are made with respect to the same individuals (Mr Gheriani and Mr Zarti);

(5) The transactions said to have been induced (the SocGen and Bear Stearns Trade(s)) were entered into by the same LIA individuals (Mr Gheriani, Mr Zarti and Mr Layas) during the same month, November 2007;

(6) Both alleged breaches of the same fiduciary duties owed to the LIA;

(7) In both instances the transactions are impugned on the same grounds;

(8) The causes of action claimed against Mr Giahmi are the same in both proceedings;

(9) Mr Giahmi was not a party to the SocGen or Bear Sterns transactions and his liability therefore arises solely from his alleged acts of bribery and intimidation, those alleged acts are said to have been made for the purposes of inducing both the SocGen and Bear Stern Trade(s).

153. It is noteworthy that the LIA has on previous occasions accepted the overlap between the current proceedings and the SocGen Proceedings.

154. In the LIA's skeleton argument submitted in support of the collateral use application, the LIA contended that:

> "there is substantial overlap between the Compromised Proceedings [the Soc Gen Proceedings] and any potential claim(s) regarding the Questionable LIA Trades [which include the Bear Stearns Trade]. It is likely that–apart from the SocGen Defendants–the other defendants to the Compromised Proceedings would be parties to any fresh proceedings... The causes of action that would be pursued in any fresh proceedings would likely be the same: namely setting aside transactions as being procured by bribery and corruption. The issues engaged by any fresh proceedings would also be similar to those engaged by the Compromised Proceedings"

155. Similarly, in Mr Allen's witness evidence in favour of the LIA's service out application it was noted that:

> "Much of the information relied upon by the LIA in the JP Morgan Proceedings is derived from information obtained during the course of the SocGen Proceedings. The LIA's claim in the JP Morgan

> Proceedings is based on similar, if not near-identical, fraudulent and corrupt scheme identified in the SocGen Proceedings. ...The factual basis for the LIA's fraud and bribery claims in the SocGen Proceedings demonstrate a strikingly similar modus operandi as the JP Morgan Proceedings"

156. In the above circumstances I consider that there is a very considerable overlap on the facts although, of course, there are distinctions including separate parties in the form of JP Morgan and Lands. On balance, I consider that the present proceedings do arise out of facts which are the same or substantially the same as those relating to the SocGen Proceedings. In accordance with the authorities set out above, I consider that the parties should have brought the matter of separate proceedings against Mr Giahmi with respect to the Bear Stearns Trade to the attention of the court in the SocGen Proceedings. However, I consider that the likelihood is that by the time the LIA (or indeed any of the parties) brought the matter to the attention of the court, directions for trial would already have been given in relation to the SocGen Proceedings and the action would have been well advanced. I do not consider that in the circumstances of the present case the court would have been willing to de-rail the existing trial directions or to vary the directions given in the SocGen Proceedings so as to enable a combined trial of the SocGen and JP Morgan issues which would inevitably have led to a vacation of the existing trial and a very lengthy delay accommodating what would then be a considerably longer trial involving additional parties. I am also sceptical that even if the issues in the JP Morgan Proceedings had been raised at an early stage the court would have considered that the appropriate case management course was to have a trial of both proceedings together given the scale of each litigation in its own right. It also does not follow that such a course would have been advocated by (for example) SocGen or JP Morgan, and the court would no doubt have considered any representations they made in that regard.

157. In the above circumstances, and although the court was deprived of the ability to case manage the issues arising in both proceedings, had it been relevant (and it is not given my findings on limitation and the failure to give full and frank disclosure), I do not consider the outcome would have been any different – i.e. Mr Giahmi would still have faced the present proceedings, and in all the circumstances I do not consider that the present proceedings are an abuse of process or ought to be struck out (if they would otherwise have proceeded).

E.3. Full and frank disclosure with respect to the abuse of process argument

158. The possibility of an abuse of process argument should, however, have been apparent to the LIA given its own recognition of the similarity of the issues arising and I consider it should have been addressed given that it would go to the merits of the claims if they were potentially liable to be struck out. That said I do not consider such failure to give full and frank disclosure would, in and of itself, have led to service being set aside, but it is a further non-disclosure compounding the central non-disclosure in relation to limitation.

F. Alternative service

159. Service upon Mr Giahmi would ordinarily have to be facilitated by way of the UK/UAE Treaty for service via diplomatic channels. However, the LIA sought, and obtained, two orders permitting for alternative service of their claims on Mr Giahmi, first via courier to

his home in Dubai and the second by leaving the documents at Mr Giahmi's address. Mr Giahmi submits that alternative service should not have been granted, and service should be set aside. Once again the point is academic given my findings in relation to limitation and the failure to give full and frank disclosure. However, given that the point was fully argued, I will address it.

F.1. Applicable legal principles

160. In *Abela v Baadarani* [2013] UKSC 44 Lord Clarke set out the following guidance at [23], [24] and [33]:

> "23. Orders under rule 6.15(1) and, by implication, also rule 6.15(2) can be made only if there is a "good reason" to do so. The question, therefore, is whether there was a good reason to order that the steps taken on 22 October 2009 in Beirut to bring the claim form to the attention of the respondent constituted good service of the claim form upon him. The judge held that there was. In doing so, he was not exercising a discretion but was reaching a value judgment based on the evaluation of a number of different factors.
>
> 24. It is important to note that rule 6.15 applies to authorise service "by a method or at a place not otherwise permitted" by CPR Part 6. The starting point is thus that the defendant has not been served by a method or at such a place otherwise so permitted…"
>
> I do not think that it is appropriate to add a gloss to the test by saying that there will only be a good reason in exceptional circumstances. Under CPR 6.16, the court can only dispense with service of the claim form "in exceptional circumstances". CPR 6.15(1) and, by implication, also 6.15(2) require only a "good reason". It seems to me that in the future, under rule 6.15(2), in a case not involving the Hague Service Convention or a bilateral service treaty, the court should simply ask whether, in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service.

161. In *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2017] EWHC 667 (Comm), Popplewell J gave the following guidance at [49]:

> "49. I would endeavour to summarise the relevant principles as follows:
> …
> (9) Cases involving service abroad under the Hague Convention or a bilateral treaty:
>
> (a) Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost: *Knauf* at [47], *Cecil* at [66], [113].

(b) It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections: see *Shiblaq* at [57]. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in *Cecil* at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in *Knauf* at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of *Abela* was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of *Abela* , there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Conventions case: *Bank St Petersburg* at [26]."

162. In *Marashen Ltd v Kenvett Ltd* [2017] EWHC 1706 (Ch) David Foxton QC, sitting as a Deputy High Court Judge, held the following at [57]-[59]:

"57 In my judgment, the current state of the law is as set out in the decisions of Mr Justice Cooke in *Deutsche Bank AG v. Sebastian Holdings Inc.* and Mr Justice Popplewell in *Société Générale v. Goldas Kuyumculuk Sanayi and others [2017] EWHC 667 (Comm)* , and that in HSC cases, or cases in which there is a bilateral service treaty which is exclusive in its application:

i) "exceptional circumstances", rather than merely good reason, must be shown before an order for alternative service other than in accordance with the terms of the treaty can be used; and

ii) mere delay or expense in serving in accordance with the treaty cannot, without more, constitute such "exceptional circumstances". I say "without more" because delay might be the cause of some other form of litigation prejudice, or be of such exceptional length as to be incompatible with the due administration of justice.

58. As I have set out above, the Supreme Court in *Abela* took care to make it clear that it was not addressing the use of CPR 6.15 in a service treaty context. There is nothing in that decision which calls into question what I regard as the key reason why an "exceptional circumstances" test is appropriate, viz the need to ensure that the provisions of the treaty are not circumvented. While it

> is true that Stanley Burnton LJ's characterisation of the service of legal proceedings abroad as constituting interference with the sovereignty of another state now falls to be qualified, I do not regard that as an essential part of his reasoning when identifying the approach to be adopted in service treaty cases.
>
> 59. In this regard, it is significant that one of the reasons which Lord Sumption JSC gave in *Abela* as to why the " *muscular presumptions against service out which are implicit in adjectives likes `exorbitant' were no longer appropriate* " was the accession by the United Kingdom to a number of conventions, and the greater measure of practical reciprocity which now exists. While Lord Sumption JSC was referring to jurisdiction conventions, service conventions themselves reflect the new reality to which Lord Sumption JSC was referring, and provide a formal reciprocity on service issues. In these circumstances, I see nothing in Lord Sumption JSC's observations which would justify a court in being more ready to subvert or by-pass a service treaty now than was the case before *Abela."*

163. In *Punjab National Bank v Srinivasan & Ors* [2019] EWHC 89 (Ch) Chief Master Marsh held the following at [97]-[99]:

> "David Foxton QC sitting as a Deputy Judge of the High Court in *Marashen Ltd v Kenvett Ltd [2017] EWHC 1706 (Ch)* held that permission to permit service by alternative means in a Hague Convention case should only be permitted if exceptional circumstances existed. In reaching that conclusion, after a full review of the authorities, Mr Foxton followed the two first instance decisions to which he refers in paragraph [57] of his judgment.
>
> 98 The difference between there being a good reason and a good reason based upon exceptional circumstances will lead to a different result in some cases. It seems to me that the conclusion reached by Mr Foxton is to be preferred for two reasons. First, the court should be careful to avoid watering down a treaty obligation by the application of domestic service rules. Secondly, I consider that a threshold test of "good reasons" sets the bar much too low. The application of such a test risks losing sight of the exceptional nature of service by alternative means regardless of whether service is to be effected abroad.
>
> 99 I consider, however, on the facts of this case the difference between the two tests is immaterial."

164. It was submitted before me that the test to be applied in cases in which service under a bilateral treaty is engaged was undecided with authorities favouring both a test of "good reasons" and of "exceptional circumstances". Whilst I accept that a number of authorities support the application of the good reasons test, on balance I consider that the weight of the authorities cited above supports the contention that in cases concerning service under a bilateral treaty, or the Hague Convention, the test to be applied is that of exceptional circumstances. Although, as will become evident from the reasons outlined below, I find that on the facts of the case before me it does not matter which test is to be applied as the result would be the same on either application.

F.2. Application to the facts

165. In the case before me there have been two orders made for alternative service. The following passages set out the factual background and why I consider that the present case was an appropriate one for alternative service, albeit that the point is academic in light of my findings in respect of limitation and the LIA's failure to give full and frank disclosure.

166. Service of proceedings in the instant case fell under the UK/UAE Treaty, as The United Arab Emirates is not a party to the Hague Convention on Service. Under the UK/UAE Treaty, service is to be effected via diplomatic channels. It was submitted before me that service under the diplomatic method would take approximately six to twelve months to take effect. It was set out in the witness evidence of Mr Allen that service via the diplomatic route under the UK/UAE Treaty involves the following stages:

(a) Stage 1 – two identical copies of each document to be served are provided to the Foreign Processing Section, and a fee is paid.

(b) Stage 2 – the Foreign Processing Section supplies the documents to the Foreign & Commonwealth Office.

(c) Stage 3 – the Foreign & Commonwealth Office supplies the documents via diplomatic pouch to the British embassy in Dubai.

(d) Stage 4 – the British embassy in Dubai sends the documents to the UAE Ministry of Foreign Affairs.

(e) Stage 5 – the UAE Ministry of Foreign Affairs directs the documents to its Judicial Cooperation Department.

(f) Stage 6 – the Judicial Cooperation Department forwards the documents to the UAE Ministry of Justice, specifically the International Cooperation Department.

(g) Stage 7 – the UAE Ministry of Justice assesses whether the documents are to be provided to the local Dubai courts (as opposed to one of the other six emirates) and transmits the documents to the Chief Justice's Office of the Dubai Court, along with a full list of the documents to be served.

(h) Stage 8 – the Chief Justice's Office then provides the documents to the Head of the Court Bailiff's Department.

(i) Stage 9 – the Head of the Court Bailiff's Department then provides the documents to the relevant court bailiff, according to their area of service.

(j) Stage 10 – the court bailiff seeks to effect service.

167. I now turn to consider the history of service in respect of Mr Giahmi. With regard to the SocGen Proceedings, the LIA sought and obtained permission to serve Mr Giahmi via diplomatic channels under the UK/UAE Treaty. Whilst this was taking place, the LIA's solicitors took steps to ensure that Mr Giahmi was notified of the SocGen Proceedings. These steps included delivering documents to Mr Giahmi's residence, which at the time was situated in the same gated community where he currently resides in Dubai. In relation to this, Mr Allen put forward evidence that the LIA's solicitors found that the courier was unable to gain access to the gated community. On 14 April 2014, the courier was able to speak briefly to a gentleman on the UK mobile number provided for Mr Giahmi. However, upon explaining that the call related to an attempt to deliver documents on behalf of the LIA's solicitors to Mr Giahmi the phone line was cut off and was thereafter unobtainable.

168. Subsequently, the LIA obtained an order permitting alternative service on Mr Giahmi's two known addresses in Dubai by both post and courier. Service was eventually effected. However, the LIA put forward witness evidence by way of Mr Allen in which it was stated that there was an issue with service by the courier at one of the addresses, noting that: *"On 24 July 2014, a lady answered the door who initially, after a brief exchange, instructed the courier to wait, and closed and locked the door. After another minute or so, she returned to the door, whilst talking on a mobile telephone. She was speaking in English to someone with a man's voice. It appears that the lady and the gentleman on the phone agreed that the courier would leave the service pack and the Early Disclosure Pack just inside the door. On informing the gentleman on the phone that she had been asked by the courier to sign a delivery receipt, after pausing she indicated to the courier that she could not sign. I suspect that the man on the phone was Mr Giahmi".*

169. With respect to the present proceedings brought against Mr Giahmi, the LIA's solicitors sent a letter before action to Mr Giahmi's former solicitors, Mishcon de Reya, on 20 April 2018. On 4 May 2018, they replied stating that they were not retained by Mr Giahmi or Lands in relation to this matter. Therefore, on 9 May 2018, a member of the LIA's solicitors sought to hand-deliver a letter dated 4 May 2018 to what was understood to be Mr Giahmi's address within the gated community in Dubai. In this letter, Mr Giahmi was asked to confirm whether the address was his usual residence and, if not, confirm by return his new address. No response was received to this letter but the porter was able to confirm Mr Giahmi's new address within the gated community.

170. The Service Out and Alternative Service Application was granted by Mr Justice Teare on 13 June 2018. Pursuant to the terms of the Service Order, the LIA was granted permission to serve Mr Giahmi by courier in Dubai. The date of deemed service was stated to be the second business day *"after the courier leaves the Court Documents at the Third Defendant's Address".* Since obtaining such permission, the LIA's solicitors sought to serve Mr Giahmi by courier. However, either Mr Giahmi or someone within his household refused to accept the documents with the result that they were not left at Mr Giahmi's apartment but returned to the courier's depot. This presented a difficulty as service was to be effected by leaving the Court Documents at Mr Giahmi's apartment.

171. The LIA believed that similar problems would likely be encountered if attempts were made to re-serve the Court Documents by employing the services of another courier company. In light of this, the LIA applied and obtained a variation order to permit service by hand by a member of the LIA's solicitors who had previously hand-delivered the letter to Mr Giahmi on 9 May 2018.

172. Specifically, the LIA was granted permission to leave the Court Documents outside the door to Mr Giahmi's apartment. A photograph of the Court Documents was to be taken when they were left *in situ*. If it was not possible to take the Court Documents to Mr Giahmi's apartment, then they would be provided to the porter at the point-of-access to the gated community or the concierge who is based within the gated community. In light of what is set out above, the LIA had concerns arising out of its previous attempts to deliver documents to Mr Giahmi in Dubai during the course of both the SocGen and present proceedings.

173. I now turn to consider whether the facts of the case before me meet the test of exceptional circumstances so as to warrant upholding the order for alternative service. I proceed to consider the following factors as relevant to this determination: (1) delay; (2) prejudice caused by delay; (3) risk of evasion; and (4) Mr Giahmi's knowledge of these proceedings.

Delay

174. It was submitted on behalf of the LIA by Mr Allen that there is likely to be significant delay in serving the proceedings on Mr Giahmi using the mechanisms provided for by the UK/UAE Treaty, as set out above. Namely, it was submitted that the approach is likely to take between six to twelve months. Further it was noted that there exists a real possibility that service might not be effective if the court bailiff is refused entry to the gated community in which Mr Giahmi resides. The effect of this would be to require the process to start again from the beginning. Whilst I acknowledge the fact that a six to twelve month delay, or possibly longer depending upon the likelihood of success of service, may not, in itself, constitute a reason for the court to order alternative service, it is nevertheless a factor which the court can take into account when considering whether alternative service should be ordered.

Prejudice caused by delay

175. It was submitted before me by counsel for the LIA that a delay in advancing the proceedings against Mr Giahmi would also serve to make it harder for the court justly to determine the litigation as documents might be destroyed and/or witnesses' memories may fade, or witnesses might pass away (which has been the case with the LIA's pre-revolution chairman of the board of directors–Mohammed Layas–who died in August 2015), and potentially prejudice the LIA in circumstances where the events underlying the LIA's claim took place over a decade ago. In particular, the money trail may grow cold, and prove harder to follow with the passage of time.

176. In this respect, it is submitted that the position of Mr Giahmi should not be looked at in isolation. JP Morgan has been served with these proceedings as of right within the jurisdiction, and therefore the conduct of these proceedings could become threatened by having to rely upon diplomatic channels. The court should take account of the fact that in these proceedings Mr Giahmi is not a sole defendant and there is a need for the proceedings to advance collectively.

Risk of evasion

177. In light of the nature of the serious allegations that have been made against Mr Giahmi in the SocGen Proceedings and in the present proceedings, and in light of Mr Giahmi's knowledge that the LIA will be seeking to serve the proceedings upon him, the LIA submitted that they were concerned that Mr Giahmi may take steps to evade service. The examples provided to the court were that Mr Giahmi might seek to prevent entrance to his gated community for the court bailiff.

178. It is said that the nature of the allegations made against Mr Giahmi increases the risk of likely evasion. The LIA relies upon the following matters:

(1) The LIA alleges that Mr Giahmi has paid bribes and made intimidatory threats in order to bring about transactions worth billions of dollars.

(2) The Deferred Prosecution Agreements include serious admissions by SocGen (and another financial entity, Legg Mason) of criminal bribery and acts of intimidation involving Mr Giahmi. The LIA alleges SocGen knew Mr Giahmi was making payments in order to improperly secure influence within the LIA.

(3) As addressed in the limitation section above, the LIA alleges Mr Giahmi has consistently sought to conceal his involvement in the trades involving the LIA.

179.. It is also submitted that Mr Giahmi has shown that he is willing to try and frustrate the court's process:

(1) Mr Giahmi ignored various attempts to bring the earlier SocGen Proceedings to his attention and on at least one occasion a courier was unable to deliver the documents relevant to those proceedings, because the recipient at the relevant property (a maid or housekeeper) was instructed to refuse to accept them (it is inferred by Mr Giahmi).

(2) The LIA obtained an order for alternative service in the SocGen Proceedings, which was unchallenged by Mr Giahmi.

(3) Mr Giahmi ignored the initial attempts to bring the current proceedings to his attention.

(4) Mr Giahmi resisted the LIA's Collateral Use Application made so that it could properly investigate his role in the Bear Stearns Trade and other transactions in order to be able to bring these proceedings.

(5) On his own case, Mr Giahmi considers these proceedings to be an abuse that he argues will be discontinued if the Receivership is discharged.

180. It is submitted that a significant factor as to why the order for alternative service was justified and should be maintained is the risk of Mr Giahmi seeking to evade service if it were to take place via diplomatic channels. This is said to be so as the final stage of service being effected through diplomatic channels is delivery by a court bailiff. However, much like a courier, that bailiff must be allowed access at the door of the apartment in order to hand over the documents. This access can be refused, as can the documents themselves, even if the door has been opened. Therefore, service through diplomatic channels would greatly increase the risk of Mr Giahmi being able to evade service, which is exactly the vice which the LIA seeks to avoid. The consequence of a refusal of service by the court bailiff of the documents would be an even longer delay, with the documents being returned to the High Court.

181. It is submitted by the LIA that its suspicion that Mr Giahmi would seek to avoid service if diplomatic channels were used was subsequently vindicated by Mr Giahmi's actual refusal, when service was first attempted under the service out order, to accept delivery of the court documents from the courier.

182. The LIA therefore submits that it is incorrect of Mr Giahmi to suggest that there are no examples of evasion. This incident demonstrates that it is possible to avoid service at Mr Giahmi's address where the documents have to be delivered to Mr Giahmi himself or someone within his household. It is submitted by the LIA that there is no reason to think that Mr Giahmi would have acted differently if service had been effected via diplomatic channels; the only consequence of this course would have been very significant delay (because the documents would have had to be returned via appropriate channels to the High Court, taking further time, before the matter came to the LIA's attention and an application for alternative service was made at that point).

183. The facts about Mr Giahmi's apartment complex remain that: (1) Mr Giahmi lives in an apartment which is not accessible directly from the public street; (2) from reception, the receptionist must give access to the block; and (3) from the carpark, someone from the apartment must grant access. It is therefore submitted that it is possible that Mr Giahmi may be able to avoid access being given to a court bailiff, and if that bailiff wanted access he would have to tail-gate someone into the building. Further, it is said that a court bailiff could potentially be thwarted by simply not opening the door; as a result, there is a serious risk of Mr Giahmi evading service by which to justify alternative service.

Knowledge of proceedings

184. It is accepted that Mr Giahmi is aware of the proceedings. At the time at which the order for alternative service was made, Mr Allen gave evidence explaining that the LIA believed that Mishcon de Reya (Mr Giahmi's former solicitors) were likely to have made Mr Giahmi aware of the Claim Form, Brief Details and Particulars of Claim when seeking instructions on whether to accept service. Mr Giahmi's knowledge was subsequently admitted in the witness evidence of Mr Riem.

185. I consider that the matters relied upon do amount to exceptional circumstances justifying the grant of the initial order for alternative service. However, even if that were not so I consider the second order for alternative service on any view met the test of exceptional circumstances having regard to the difficulties experienced in relation to the initial service. The point is academic given my findings in relation to limitation and the LIA's failure to give full and frank disclosure, but I consider this was an appropriate case for altenative service.

G. Stay application

186. In the event that the court was not minded to set aside the order for service out, Mr Giahmi applied for a stay of the Bear Stearns Claim against him pending the resolution of an application brought by Dr Ali Mahmoud Hassan ("Dr Mahmoud") under CL-2018-000563, made on 28 August 2018, with a view to discharging the Receivership Order pursuant to which the present proceedings were initiated by the Receivers. I can deal with the point briefly as it does not arise on the findings I have made an order I make setting aside service.

187. Dr Mahmoud is, and was at the time of his application, the Chairman of the LIA and was appointed by Mr Fayez Serraj of the Libyan Government of National Accord which served as the interim government of Libya brokered by the United Nations. The respondents to his application are the Receivers of the LIA, Mr Breish and Dr Hussain, both of whom are also chairmen of the LIA, said to be appointed by other factions within Libya and the LIA.

188. Mr Giahmi's position is that a stay should be granted on the basis that should Dr Mahmoud succeed in his application to discharge the Receivership, there is a prospect that the LIA, who would no longer be acting through the Receivers, may wish to discontinue the Bear Stearns Proceedings.

189. Mr Giahmi submits that it would be wasteful of both the time and costs of all parties and the court if the proceedings against him were to continue in the meantime only to be discontinued if Dr Mahmoud's application is successful and the receivership is discharged. Mr Giahmi further submits that the stay of proceedings is unlikely to be unduly lengthy given that Dr Mahmoud's application was made last August and a preliminary issue has already been heard.

190. In response, the LIA submits that the stay application should not be granted on the basis that there are a range of possible outcomes in relation to the discharge application brought by Dr Mahmoud. Namely, that the application could be dismissed, stayed, delayed or appealed. It is further submitted, in any event, that there is no factual basis for believing

that Dr Mahmoud would discontinue the proceedings brought against Mr Giahmi if his application were successful. The solicitors for both Dr Mahmoud and the LIA have confirmed that Dr Mahmoud has consented to the bringing of these proceedings by the Receivers against Mr Giahmi.

191. Further, the LIA made the submissions that there is no guarantee that Dr Mahmoud will discontinue the present proceedings. They cited correspondence from Dr Mahmoud's solicitors in which it is said that Mr Giahmi seeks to place Dr Mahmoud in "*a difficult position*" as Dr Mahmoud is not yet party to all deliberations with the legal team who have conduct of the proceedings against him. The LIA submits that there is therefore not a "*real prospect*" that Dr Mahmoud would adopt a pre-determined course of action to abandon the claim against Mr Giahmi. Correspondence from Dr Mahmoud's solicitors state that he will not pre-judge the direction of the claim if he was to assume conduct of it, and instead that his "*decisions will only be guided by the best interests of the Libyan Investment Authority and the Libyan people more general, and will naturally be based on any legal advice that he receives in relation to the JP Morgan Claim at any point in time*".

192. I do not consider that the material before me demonstrates that Dr Mahmoud has an actual concluded intention of discontinuing the claim if the discharge applications are successful. Rather, it appears that he will need to take an informed view and will act in the best interests of the LIA and the Libyan people. In any event, as the matter currently stands, it is speculative whether Dr Mahmoud will in fact succeed in his application and even if he were to do so it is no more than speculation as to whether this will have any bearing upon the proceedings brought against Mr Giahmi. It is also unknown how long it will take Dr Mahmoud to resolve the discharge applications in full and with respect to any potential appeals.

193. In such circumstances I would not have considered this to be an appropriate case for a stay had the proceedings been continuing, and would not have granted a stay. A stay would have introduced what was likely to have been a significant and unnecessary delay to proceedings which would have been contrary to the overriding objective and the need for the court to deal with proceedings expeditiously. The point does not, however, arise in the light of my other findings.

H. Conclusion

194. For the reasons set out above I set aside service due to the LIA's failure to give full and frank disclosure in relation to limitation. I also find that the claims against Lands and Mr Giahmi stand no real prospect of success by reason of the limitation defences available to them, and as such service should also be set aside on that basis. The money had and received and fraud claims also stand no real prospect of success and service in relation to those claims should also be set aside on that basis. I would not have found these proceedings to be an abuse of process, and would have upheld alternative service. I would not have stayed proceedings were they otherwise continuing.

195. I trust the parties can agree an Order, and any consequential matters, including as to costs, in the light of my judgment, but if not, I will give directions in due course in relation to the resolution of such matters.