Neutral Citation Number: 2011 EWHC 1441 (Comm)

Case No: 2010 FOLIO 368

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 June 2011

Before :

MR JUSTICE ANDREW SMITH

Between :

Michael Wilson & Partners Ltd.	**Claimant**
- and -	
John Forster Emmott	**Defendant**

David Cavender QC and Edward Davies (instructed by **ENYO Law LLP**) for the **Claimant**
Philip Shepherd QC (instructed by **Michael Robinson**) for the **Defendant**

Hearing dates: 14, 15 & 16 February 2011

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.

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MR JUSTICE ANDREW SMITH

Mr. Justice Andrew Smith:

1. Michael Wilson and Partners Limited ("MWP") applies under sections 68 and 69 of the Arbitration Act 1996 (the "1996 Act") in relation to an award, the Tribunal's Second Interim Award dated 19 February 2010, which was clarified under section 57 of the 1996 Act on 7 April 2010. The Tribunal (Mr. Christopher Berry, Lord Millett and Ms. Valerie Davies) were appointed under an arbitration agreement included in a contract (the "Emmott agreement") made on 7 December 2001 between MWP and the respondent, Mr. John Emmott, whereby Mr. Emmott, a qualified solicitor, became a director of MWP and joined its practice. MWP contends that the Tribunal were guilty of a large number of serious irregularities in their conduct of the reference and of making numerous errors of law, in respect of each of which they were obviously wrong.

2. On 17 June 2010 David Steel J ordered that, on the hearing of the application under section 68, the Judge should give directions as to the application under section 69. At the hearing before me, after some initial resistance on the part of Mr. Emmott, the parties agreed that I should hear submissions about the application under section 69 and that, if and to the extent that I granted leave for an appeal, I should determine it.

3. MWP is a company incorporated in the British Virgin Islands, which practises both as a conventional law firm, with a practice particularly of transactional work, and as a business consultancy in central Asia. It has offices in, among other places, Almaty, Kazakhstan. Its managing partner is Mr. Michael Wilson.

4. Mr. Emmott, an Australian citizen, was admitted as a solicitor in the Supreme Court of New South Wales in 1978 and as a solicitor in England and Wales in 1985. Before joining MWP Mr. Emmott was for some years employed by and then a partner in Richards Butler. Under the Emmott agreement, Mr. Emmott joined MWP on 10 January 2002. He resigned from the company on 30 June 2006. The circumstances of his resignation gave rise to the disputes which were the subject of the reference.

5. MWP is the claimant in the reference and Mr. Emmott is the respondent. In broad summary, MWP claimed:

   i) That Mr. Emmott had been in repudiatory breach of the Emmott agreement because he had purported to terminate it with immediate effect and without giving the requisite 6 months' notice.

   ii) That, in breach of his contractual and fiduciary duties to MWP, Mr. Emmott had acted as a consultant to Richards Butler, and had diverted work and business opportunities from MWP to Richards Butler.

   iii) That Mr. Emmott had received secret profits from Richards Butler and elsewhere, including a reward for acting in relation to a series of transactions leading to and following the flotation of Max Petroleum plc ("Max") by way of 14.75 million shares in Max and some US$950,000.

   iv) That Mr. Emmott had, with others, formed a competitor to MWP that comprised a group of companies and a trust and practised under the name of

> "Temujin", and that he had diverted work, commercial opportunities and clients or potential clients of MWP to Temujin.

v) That Mr. Emmott had misappropriated confidential documents, information and materials belonging to MWP or its clients and provided them to Temujin.

MWP also pleaded that Mr. Emmott had failed to act competently when employed by MWP but that claim was not pursued in the reference. Mr. Emmott brought a counterclaim against MWP under the Emmott agreement and in particular claimed that he was entitled to an interest of one third in MWP.

6. The applications were made by a claim form dated 22 March 2010. MWP has served notices of two amended versions of the claim form. The first was served on 5 May 2010 and contains what I shall call the "May amendments", and the second was served on 26 January 2011 and contains the "January amendments". Mr. Emmott does not resist the May amendments. He opposes the January amendments, principally on the grounds that the application to make them was inexcusably late and that the proposed amendments do not meet the requirements for applications under sections 68 and 69 of the 1996 Act. I see force in these observations, but in the event Mr. Emmott has not, I think, been prejudiced by the lateness of the proposed amendments and has been able to respond to the substance of the complaints. Given the nature of this litigation, in my judgment it is preferable that the court rule upon the applications that MWP seek to make. I grant permission for both the May amendments and the January amendments.

7. The arbitration proceedings were brought on 16 August 2006. Between 3 October 2007 and 13 July 2009 the Tribunal made numerous procedural orders and issued other directions and orders. The Second Interim Award followed a hearing that took place over 20 days between 10 November 2008 and 24 February 2009. There were no oral closing submissions: I heard explanations for this, but they are not relevant to my decision.

8. In paragraph 1.4 of the Second Interim Award the Tribunal wrote that,

> "In the Parties' closing submissions various unpleaded allegations were made on which there was little, if any, evidence and some allegations were made in the amended Points of Claim of which there was no evidence. We have in this Award dealt with those pleaded allegations on which findings are required by the Parties for the purposes of finalising, in due course, the accounting between them".

As I shall explain, some of MWP's arguments on these applications seem to me to amount to complaints that the Tribunal did not consider allegations which had not been pleaded, but they cannot be criticised for confining their Award in the way that they explained.

9. Before coming to MWP's complaints, it is convenient to mention other proceedings to which it referred in its submissions. First, MWP has brought proceedings in the Supreme Court of New South Wales against a Mr. Robert Nicholls and a Mr. David

Slater, who are said to have been involved with Mr. Emmott in establishing Temujin, and against three of the Temujin companies. On 6 October 2009 Einstein J delivered a judgment in which he upheld complaints by MWP of breaches of fiduciary duties and contract, of inducements to breach of duty and of conspiracy. On 11 December 2009 Einstein J delivered a judgment about the quantum of MWP's loss and awarded MWP by way of equitable compensation and damages the equivalent of something in excess of $8 million. On 15 September 2010 the Court of Appeal set aside the judgments of Einstein J on the grounds of apparent bias. On 14 February 2011 the High Court of Australia granted special leave to appeal against the decision of the Court of Appeal.

10. MWP emphasised differences between the conclusions of Einstein J and the Tribunal. It was submitted that Einstein J had advantages which were not available to the Tribunal: for example, Mr. Slater gave evidence in the New South Wales proceedings but not before the Tribunal, and documents about Temujin were disclosed in the Australian proceedings that were not available to the Tribunal. To my mind, this does not assist MWP's contentions that the Tribunal were guilty of serious irregularities and that they made errors of law. The only possible relevance of the Australian proceedings is that they might have supported MWP's submission that matters of which they complain have caused or are likely to cause substantial injustice, but in view of my other conclusions I do not consider that they do so in any material way.

11. On 19 October 2006 Mr. Thomas Sinclair brought proceedings in the Supreme Court of the Bahamas in which he sought declarations about the 14.75 million shares in Max. The defendants to these proceedings are MWP, Mr. Emmott and Eagle Point Investments Limited ("EPIL"), a Bahamian company whose shares were owned by two trusts, Eagle Point Trust 1 and Eagle Point Trust II, the discretionary beneficiaries of which are Mr. Emmott and members of his family. The Bahamian court granted Mr. Sinclair leave to serve the proceedings on MWP out of the jurisdiction, but the Court of Appeal has overturned that decision. Mr. Sinclair has been granted leave to appeal to the Privy Council.

12. Further, MWP has brought in this court proceedings against Mr. Sinclair, EPIL and others about MWP's claims, in which it seeks a declaration that EPIL holds the shares on trust for it.

13. Mr. Philip Shepherd QC, who represented Mr. Emmott, submitted that MWP's pleading in the claim form for these applications is defective, and does not properly plead any claim under section 68 or section 69 of the 1996 Act. For example:

    i) The Civil Procedure Rules require at part 62.4 that an arbitration claim form identify the part or parts of the award challenged and specify the grounds for the challenge. Often the form does not identify the part or parts of the award to which a complaint relates.

    ii) As Mr. Shepherd rightly observed, the form does not even mention, let alone specifically identify, any substantial injustice which has been caused or will be caused by the alleged irregularities. During the hearing before me those

representing MWP produced, at my request, a document setting out the injustice that it asserts, which went some way to remedying this.

iii) An appeal may be brought only under section 69 only on a point of law and section 69(4) requires that an application for leave to appeal "shall identify the question of law to be determined …". Many complaints under section 69 have not been properly identified a question of law. To give just two examples, MWP seeks to appeal on the questions: "Whether the Tribunal erred in law in finding, as it must implicitly have in section 5 of the Award, that EPIL received the shares as a nominee and trustee for Mr. Thomas Sinclair", and "Whether the Tribunal erred in law in failing to consider and apply all of the principles set out in paragraphs 1,2,7,8,9 and 10 of the judgment of Lawrence Collins J in CMS Dolphin Limited v Simonet & Another, [2001] 2 BCLC at 704".

iv) Section 69(4) of the 1996 Act requires that the claim form identify "the grounds on which it is alleged that leave to appeal should be granted". MWP's claim form does not do so, but states that they are identified in two skeleton arguments and two witness statements. To my mind, that does not comply with the Act.

14. Mr. Shepherd's complaints about the Claim Form were justified. The deficiencies in it have hampered the efficient determination of these applications. I do not, however, consider that I should refuse them simply for this reason, and I have sought, as best I have been able, to understand and consider the substance of the complaints about the Second Interim Award that MWP wishes to make. I should add that Mr. David Cavender QC, who was instructed on behalf of MWP only shortly before the hearing before me, is in no way responsible for these deficiencies: on the contrary, I am grateful to him that, in the time available to him, he introduced some welcome coherence into MWP's submissions.

15. Mr. Cavender identified four main matters about which MWP complains:

i) The Tribunal's conclusions about remedies, which, as MWP submits, were made after a hearing confined to issues of liability;

ii) The Tribunal's findings about the Max shares and the payment of $950,000;

iii) The Tribunal's conclusions about money earned by Temujin; and

iv) The Tribunal's treatment of the consequences of Mr. Emmott's breaches of duties owed to MWP and in particular his duty to make disclosure about his activities to MWP. This complaint is relevant particularly to Mr. Emmott's counterclaim.

Applications under both section 68 and section 69 of the 1996 Act were made about each of these four matters.

16. Under section 68 of the 1996 Act a party may apply to the court challenging an award on the grounds of "serious irregularity affecting the tribunal, the proceedings or the

award". A "serious irregularity" is defined exhaustively in section 68(2), and a complaint is of a "serious irregularity" only if (i) it "has caused or will cause substantial injustice to the applicant", and (ii) (at least) one of the nine conditions specified in the section 68(2)(a) to (i) is satisfied. The conditions stated in 68(2) include these:

i) By section 68(2)(a), "failure by the tribunal to comply with section 33 [of the 1996 Act]", which provides that the tribunal is to act "fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of his opponent" and is to "adopt procedures suitable to the circumstances of the particular case ... so as to provide a fair means for the resolution of the matters falling to be determined".

ii) By section 68(2)(c), "failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties".

iii) By section 68(2)(d), "failure by the tribunal to deal with all the issues that were put to it".

iv) By section 68(2)(g), "the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy".

17. As for the requirement that the irregularity should have caused or be one that will cause substantial injustice to MWP, no single test is identified in the authorities for deciding whether the applicant has established this. In Profilati Italia SRL v PaineWebber Inc and anor, [2001] 1 All ER 1065, where an award was challenged on the grounds that the successful party had failed to make proper disclosure, Moore-Bick J applied the test whether there was "any substantial likelihood that disclosure ... would have resulted in the tribunal reaching a different conclusion" (at para 36). Where it is said that the tribunal adopted improper procedures to determine an issue, the courts have declined themselves to try the issue in order to establish whether substantial injustice has in fact been caused: Cameroon Airlines v Transnet Ltd, [2004] EWHC 1829 (Comm), Vee Networks Ltd v Econet Wireless International Ltd, [2005] 1 Lloyd's Rep 192, London Underground Ltd v Citylink Telecommunications Ltd, [2007] EWHC 1749 (TCC). Equally the court will not determine what the tribunal would have done or what it would have made the award but for the irregularities: see Checkpoint Ltd v Strathclyde Pension Fund, [2003] EWCA 84, in which Ward LJ, with whom the other members of the Court agreed, said (at para 58) that the court should "try to assess how the [applicant] would have conducted his case but for the procedural irregularity", and continued:

> "It is the denial of the fair hearing, to summarise procedural irregularity, which must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will."

The same approach was adopted by the Court of Appeal in Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd, [2003] EWCA Civ 751 at para 58, where the

question was stated in terms of whether the court was satisfied that, but for the irregularity, the applicant would have dealt with the matter differently or that the outcome would have been "materially different".

18. None of this detracts from the overriding principle, emphasised in many authorities, sometimes by reference to the frequently cited paragraph 280 of the Report of the Departmental Advisory Committee which led to the 1996 Act, that relief under section 68 is "really designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected".

19. The court has jurisdiction under section 69 of the 1996 Act to grant leave to appeal against an award only upon a question of law, and section 69(3) requires that, before granting leave to appeal to appeal, the court must be satisfied:

    i) That the determination will substantially affect the rights of one or more of the parties.

    ii) That the question was one which the tribunal was asked to determine.

    iii) Where, as here, no question of general public importance is said to arise, that the decision of the tribunal on the question is obviously wrong.

20. As Bingham J observed in Zermalt Holdings S v Nu-Life Upholstery Repairs Ltd, [1985] EGLR 14,

> "...as a matter of general approach the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found in it".

Bingham J's decision in that case was made under the Arbitration Act 1950, but his observations apply no less to applications under the 1996 Act, including applications under section 68 and 69.

21. After this introduction, I shall consider the four main areas of complaint about the Second Interim Award that Mr. Cavender identified. It is convenient first to consider the complaint that the Tribunal did not deal properly with Mr. Emmott's counterclaim and with the consequences of Mr. Emmott's breaches of his duty of disclosure and other duties owed to MWP.

22. The Tribunal determined, that on the proper construction of the Emmott Agreement, Mr. Emmott became immediately entitled to a one third shareholding in MWP, although (under clause 2.3) shares were not to be issued to him until he had contributed £225,000 for them: the agreement stated that "the time at which the shares should actually be issued or transferred to him free from any right of Mr. Wilson or

MWP to retain them as security for the payment" was to be determined by clause 2.3. They further concluded that by December 2004 Mr. Emmott had become entitled to have the shares transferred to him, and MWP would then have had no defence to a claim by Mr. Emmott that MWP should ensure that the appropriate shareholding was vested in him (whether by creating further shares or otherwise). They rejected MWP's argument that Mr. Emmott had somehow lost that right because of later breaches of duty: the Tribunal considered that, having fully "earned" his right to the shareholding before he committed any breach of fiduciary duty, Mr. Emmott had a claim to the shareholding in trust, rather than in contract. Nevertheless, they did not, for reasons that they explained, make an order that MWP should bring it about that Mr. Emmott became a shareholder in MWP, but ordered an account as to the value of MWP at 31 December 2005 (subject to certain adjustments): "The value of Mr Emmott's one third share must be ascertained after taking a partnership dissolution account as between Mr. Wilson and Mr. Emmott as at 31 December 2005 and after an appropriate adjustment for the value of the Steppe Shares as between Mr. Wilson and Mr. Emmott" (see para 8.23(i) of the Second Interim Award). (It is not necessary for present purpose to explain the reference to the Steppe Shares.)

23. MWP criticises this reasoning. First, it is said that the Tribunal's interpretation of the Emmott Agreement was obviously wrong, and that Mr. Emmott did not become immediately entitled to a 33% shareholding in MWP, whether or not the entitlement was subject to a proviso about when it should be issued or transferred free from MWP's security interest. I cannot accept the Tribunal were wrong, still less that they were obviously wrong, in their interpretation of the agreement. It was dictated both by the wording of the agreement and by commercial sense. Clause 1.1 of the Emmott Agreement stated that "Mr. Emmott and MWP have agreed that Mr. Emmott will join MWP as a director and shareholder, with effect from 7 January 2002 in accordance with the terms set out in this agreement" and recital C to the agreement was in similar terms. This provision was not displaced, contradicted or qualified as to when Mr. Emmott's entitlement to the shares vested; clause 2.3 was concerned only with when he was entitled to receive a shareholding and when MWP and its shareholders were to cause to be vested in Mr. Emmott or his nominee the interest to which he was entitled. Any other interpretation would have exposed Mr. Emmott to the risk that, having worked for MWP for some years and made some payment towards the shares, he might never become entitled to a shareholding.

24. MWP also claims that the Tribunal were obviously wrong in finding that Mr. Emmott's right to a shareholding is in trust, rather than in contract. To my mind, the Tribunal's reasoning is clear and obviously right: given that the contract was not wholly executory and in particular Mr. Emmott had made payments for the shares, the claim to the shares was in trust. The thrust of MWP's argument, as I understand it, is that unissued shares do not constitute property and so there could not be a trust of shares in MWP that had not been issued. This argument does not acknowledge that "A person who has been allotted shares is in as good a position in equity as a person to whom shares have been issued but that does not mean that there is no distinction between allotment and issue": National Westminster Bank plc v IRC, [1995] 1 AC 119 at p.126H per Lord Templeman. In any case, the Tribunal's reasoning does not depend upon this question: shares in MWP had been issued before the Emmott Agreement was made.

25. Thirdly, MWP seeks to appeal under section 69 of the 1996 Act on the grounds that the Tribunal were obviously wrong to award monetary relief, or the monetary relief that they did. (I shall later refer to their complaint under section 68 that the Award should not have dealt with remedies or relief upon the counterclaim at all, and that it was a serious irregularity for them to do so.) The Tribunal recognised that normally Mr. Emmott would have been entitled to a declaration of his interest and an order that, if necessary, MWP create sufficient shares to give effect to it and have shares registered in his name. They declined to do so partly because, although a company, MWP was in reality a "quasi-partnership", which had come to an end. If an order were made to bring it about that Mr. Emmott became a shareholder, it would have had to be followed by a winding up order and Mr. Emmott would thereby be provided with an appropriate monetary remedy. They also considered that an order that Mr. Emmott receive a one third shareholding might be ineffective because, although Mr. Wilson had presented himself as the sole shareholder in MWP, it appeared that the shares might be owned by Windsor Fine Arts Establishment Ltd, the ownership of which was obscure.

26. Although it is asserted on behalf of MWP that, "There is no legal principle which would permit the imposition of an alternative remedy on the basis which the Tribunal ordered or on any other basis", this argument was not developed. I see no proper basis for this complaint. If, as the Tribunal concluded, shares were held on trust, MWP, as trustee, was obliged to account to Mr. Emmott, the beneficiary of the trust, and had not done so. It was appropriate to order accounts and enquiries to ascertain the extent and financial implications of that failure. The obligation of the trustee is to make good to the beneficiary the deficiency in the trust assets, and equity affords to the Tribunal discretion as to the form in which they should direct that the deficiency be made good. Mr. Emmott was entitled to an account, and I am unable to accept that the Tribunal was guilty of an obvious error of law in ordering monetary relief.

27. MWP have another argument. They complain that the Tribunal's conclusion that Mr. Emmott was entitled to a shareholding in MWP allowed him to take advantage of his own wrong because:

i) the Tribunal failed to recognise and to apply the principle of construction explained in Alghussein Establishment v Eton College, [1988] 1 WLR 587 that a party cannot rely upon his own contractual breach to assume an advantage or benefit under the contract to which he would not otherwise be entitled; or

ii) the Tribunal did not recognise that "a term was to be implied into the Emmott agreement akin to that implied in Tesco Stores v Pook, [2003] EWCA 823".

In the Tesco Stores case (the correct citation of which is [2003] EWHC 823 (Ch)) Peter Smith J considered the application of the principle explained in the Alghussein Establishment case to a share option agreement and concluded (at para 52) that the agreement had an implied a term that the holder of the option should not be entitled to exercise it if he had committed "a serious breach of the contract".

28. MWP's argument is that, before the end of December 2004 when he became entitled to have issued to him shares in MWP (as well as afterwards), Mr. Emmott was in

breach of his obligations to MWP in that he had not accounted to MWP for commissions that he received under his arrangements with Richards Butler nor disclosed that he had received them. At para 2.17 of the Second Interim Award, the Tribunal recorded that Mr. Emmott "now concedes that he must account to MWP for such receipts", and observed that "It is difficult to understand how he could ever have justified retaining such commissions for himself ...". Furthermore, Mr. Emmott did not disclose to MWP that he had entered into agreements with Richards Butler, the so-called Second Consultancy Agreement of 20 April 2004 and the so-called Third Consultancy Agreement of 29 December 2004. He was therefore in breach of his obligations to MWP, including an express term of the Emmott agreement which provided that the parties were to "keep each other fully and promptly informed as to all events, matters and things material or relevant to this Agreement and their relationship". MWP says that, had Mr. Emmott made proper disclosure, it would have been able to end the Emmott agreement before Mr. Emmott became entitled to receive a shareholding and he would never have become so entitled.

29. MWP seeks relief under s.68 of the 1996 Act on the basis that the Tribunal were guilty of a serious irregularity in that they failed to deal with these issues although they were essential to their decision on the claims before them. Had they done so, it is said, they would have concluded that Mr. Emmott was in serious and dishonest breach of his obligations and, as a matter of construction of the Emmott agreement or because of its implied terms, not entitled to receive his shareholding. Further, they seek to appeal under s.69 of the Act on the grounds that the Tribunal made an obvious error of law in this regard.

30. In its request for clarification under s.57 of the 1996 Act, MWP requested that the Tribunal explain their reasons for their decision in relation to these arguments (or at least its argument in relation to an implied term). In the clarification, the Tribunal referred to paras 8.2ff of their Second Interim Award, where they rejected MWP's contention that Mr. Emmott never intended to comply with his fiduciary obligations and that he was in breach "from the very outset of the relationship" in view of his failure to account for commissions received from Richards Butler. They accepted that, if Mr. Emmott had been in breach of his fiduciary obligations from the outset, MWP would have been entitled to rescission of the Emmott agreement *ab initio*, but they concluded that he was not and therefore rejected the claim for rescission: in their judgment, the failure relied upon by MWP was not a breach of fiduciary obligations. They made it clear that this conclusion applied not only to Mr. Emmott's failure to account for commission, but also to other failures on Mr. Emmott's part and in particular his failure to make proper disclosure.

31. This answers MWP's arguments based upon the principle explained in the Alghussein Establishment case and its application by Peter Smith J in the Tesco Stores case because, although Mr. Emmott's entitlement to an interest in MWP arose when the Emmott agreement was made and he would have been divested of it if the agreement had been rescinded *ab initio*, Mr. Emmott's rights were not contractual but proprietary. He was entitled to have shares transferred only upon payment of the £225,000 which discharged MWP's right to keep them security, but this does not assist MWP: Mr. Emmott's entitlement to the shares arose upon the agreement being made. Mr. Emmott could end MWP's right by paying £225,000, and no breach by

Mr. Emmott of his contractual obligations or fiduciary duties would have prevented him from doing so or would have elevated MWP's right to security to an absolute right to the shares. As Mr. Shepherd succinctly put it, "Mr. Emmott wasn't relying on his own wrong in order to make a claim because his right to the shares had already vested before any wrongdoing....There is no rule in English law that you forfeit the right to something that's already your property because of some later wrongdoing".

32. I come to MWP's complaints that the Tribunal dealt in the Award with questions concerned with what remedies and relief should be ordered and did not confine themselves to questions of liability.

33. By a direction given on 29 July 2008 Mr. Berry, as chairman of the Tribunal and on their behalf, wrote as follows: "By my letter of 10 July I indicated that the Arbitrators accept that it appears inevitable that the taking of any account or an assessment of damages would follow any relevant findings as to liability either way". He referred to an opportunity given to Mr. Emmott to make representations and continued, "I ... order and direct that the hearing fixed to commence on 10 November 2008 will deal with issues relating to liability only, and not to the quantum of any damages nor evidence required for the taking of an account".

34. MWP submits that the hearing before the Tribunal was conducted accordingly, and in particular the parties did not adduce evidence or make submissions relating to remedy, including whether it suffered loss as a result of what Mr. Emmott did or the quantum of its loss. I do not need to refer in detail to the material upon which it relies in support of its submission because in the Clarification the Tribunal accepted this: "We recognised that the hearing was concerned with liability, not quantum, and told the parties that save where quantum was agreed we would merely order accounts and enquiries. But to obtain an order for damages to be assessed or an inquiry as to damages it is not enough for a party to prove breach; he must prove some loss (though this can be inferred). This forms part of the liability hearing. Where we found no evidence of loss, we naturally did not order an inquiry as to damages".

35. It can, of course, constitute a serious irregularity that a tribunal determines an issue which is not "in play" between the parties: ABB AG v Hocntief Airort GMBH, [2006] 1 All ER (Comm) 529, para 72. However, as I interpret the direction of 29 July 2008 the Tribunal did not defer all questions concerning remedies: more specifically, they did not defer questions about the kind of remedy that they should award if they found Mr. Emmott liable on the claim or MWP liable on the counterclaim; they deferred issues about the amount of damage, not about whether damage had resulted from the alleged breaches of duty; and they deferred the taking of any accounts and not decisions about whether they should order accounts or what accounts they should order.

36. I therefore reject the complaint that that the Tribunal should not have determined the nature of the relief that should be awarded on the counterclaim.

37. With regard to the claim, MWP complains that, by dealing in the Second Interim Award with issues that had been deferred, the Tribunal were guilty of serious irregularities in relation to seven matters, to which they refer as the "Chilisai

Phosphate", "Urals Gold", "Pinegrove/Roxi", "Roxi 2", "Destruction of documents", "Six Months' Notice Provision" and "Failing to Devote Time and Attention" claims.

38. The first four of these matters are similar: they all concern work that MWP alleges Mr. Emmott diverted from it to Temujin. MWP pleaded in the reference that "in breach of the terms of the agreement and his fiduciary duties and in breach of trust from about September 2005 Mr. Emmott, whilst a director and full-time employee of MWP, with the assistance of Mr. Nicholls, Mr. Slater and Mr. Shaikenov diverted work, commercial opportunities and clients or potential clients of MWP to Temujin", including work for a company called Sokol Holdings Inc ("Sokol") in relation to the "Chilisai Phosphor deposit" and the "Urals gold project" and work in relation to the "Pinegrove/Roxy project" and the "Roxy 2 project".

39. The Tribunal's findings in relation to these matters were as follow:

i) With regard to the Chilisai Phosphor project, the Tribunal concluded (at para 4.129 of the Second Interim Award) that:

> "... as Mr. Sinclair [of Sokol] ordained the transfer of the work to Temujin, we find that Mr. Emmott was not responsible for the diversion of this work although he was in clear breach of his fiduciary duties to MWP in failing to inform Mr. Wilson of the correct position. He did not try to persuade the clients to remain with MWP and as he failed to tell Mr. Wilson about what was going on Mr. Wilson was not afforded any opportunity to try to persuade the clients to stay with MWP. Given Mr. Sinclair's view regarding Mr. Wilson as expressed to us it is clear that the instructions would not have remained with MWP."

ii) With regard to the Urals Gold Project, the Tribunal similarly concluded (at para 4.134):

> "... we accept Mr. Sinclair's evidence that he wished to move the work so that it would go to Mr. Nicholls who had continued to be involved with the work. Accordingly, we do not find that Mr. Emmott actively diverted this work to Temujin. However, it is clear that Mr. Emmott by failing to inform Mr. Wilson and MWP of the formation of Temujin was in breach of his fiduciary duties to MWP. Rather than accept a "split" retainer without discussion with Mr. Wilson, Mr. Emmott should have advised his clients that if they wanted to continue to work on the transaction at MWP they should instruct MWP alone because he could not accept joint instructions with another firm without Mr. Wilson's consent".

iii) With regard to the Pinegrove/Roxy project, the Tribunal referred (at para 4.144(h)) to the evidence of Mr. Schoonbrood of Roxy, whom the Tribunal regarded as a reliable witness, that he "decided of his own volition to use Mr. Nicholls for drafting work after Mr. Emmott had left MWP but apparently

before Mr. Emmott had decided what his plans were". They said that, consistent with his fiduciary duty to MWP, Mr. Emmott should have proposed to Mr. Schoonbrood that he continued to instruct MWP and that another lawyer should deal with the matter, and also that he should have told Mr. Wilson of his conversation with Mr. Schoonbrood. They decided that "although we consider Mr. Emmott was in breach of his fiduciary duty to MWP in this regard we consider that his conduct did not cause a loss to MWP. We find that he did not receive a secret profit". The Tribunal went on to conclude, at para 4.144(s), "that the Roxy 1 transaction was obtained by Temujin through Mr. Emmott informing Mr. Schoonbrood that he was not available to do the work and was leaving MWP", and, while recognising that Temujin and, if he was a partner in Temujin, Mr. Emmott would be liable to account in proceedings in New South Wales for any profits received by Temujin, there was no liability to account in the arbitration proceedings.

iv) With regard to the Roxy 2 transaction, the Tribunal concluded (at para 4.157) that they were "not satisfied that there is any evidence ... that shows that this business opportunity existed while Mr. Schoonbrood was a client of MWP. Mr. Schoonbrood was free to make his choice of advisor and as the client he followed the individual lawyers who had been dealing with earlier transactions for him. Accordingly MWP's claim that this transaction was an opportunity that belonged to MWP fails".

40. As I read their reasons, the Tribunal rejected the pleaded claim in relation to this business because they concluded that Mr. Emmott did not divert it from MWP to Temujin. They observed that Mr. Emmott had not made proper disclosure to MWP what was going on, but MWP's pleaded case does not include a relevant claim either for an account or for compensation (by way of damages or by way of equitable compensation) for a failure to make such disclosure. The pleaded complaints were rejected because MWP did not establish the case on liability: they were not rejected because the Tribunal dealt with questions about whether loss was proved or because of any conclusion relating to remedies.

41. I come to so-called "Destruction of documents" claim. In evidence in support of this, MWP refers to a finding of the Tribunal (at para 6.19) that, following his resignation from MWP on 30 June 2006, Mr. Emmott delivered his laptop so that someone at Temujin would delete documents from it, and that the laptop was wiped completely. The Tribunal concluded that this was planned by Mr. Emmott and described it as "another example of disgraceful conduct on his part". They observed that MWP's claim in relation to transfer or removal of confidential documents by Mr. Emmott would be a claim in breach of contract and sound in damages, and they concluded that no financial loss had been established by MWP as a result of it.

42. In support of this part of MWP's application, Mr. Pietro Marino, a partner in Enyo Law LLP who are MWP's solicitors, said in a witness statement dated 24 January 2011 that substantial injustice was caused in that MWP did not have the opportunity to adduce evidence or to advance arguments about loss suffered because the contents of the laptop were wiped. He also said that self-evidently MWP would have incurred expense reconstructing records. He illustrated the volume and importance of

documents on Mr. Emmott's laptop by reference to documents about the Urals Gold transaction.

43. The answer to this complaint, as it seems to me, is again that MWP seeks to introduce a claim which was not pleaded in the reference. The Points of Claim do not refer to the "wiping" of the laptop or to loss by way of work done by way of reconstructing records or to expenses incurred in this regard. The only pleaded complaint about documents is that "in breach of his duty of confidence to MWP, Mr. Emmott wrongly misappropriated confidential documents, information and material belonging to MWP or its clients and provided the same to Temujin". The Points of Claim refer to three instances of this: a "Sea Shell Partners Inc Lock-in Agreement" relating to shares in Max, which Mr. Emmott was said to have sent to Mr. Nicholls; draft documents relating to the Chilisai project said to have been sent by Mr. Emmott to Temujin and documents sent by Mr. Emmott to Mr. Schoonbrood. These allegations were presented as part of, or at least as being associated with, the complaint about diverting work to Temujin.

44. Next, the "Six Months' Notice Provision" claim and the "Failing to Devote Time and Attention" claim. At paragraph 8.21 of the Second Interim Award, the Tribunal dealt with these as follows:

> "We have found that MWP suffered loss because Mr. Emmott undercharged or failed to charge clients for work undertaken by MWP. We attribute this to his cavalier, even slipshod, attitude to his responsibilities, not to any secret arrangement to collect the amount involved for himself from Temujin. Bearing in mind that the amounts involved are impossible to ascertain given that we reject the evidence of Mr. Gibson and are likely to be relatively small, and that one third would have been attributable to Mr. Emmott's own share in MWP in any case, we think that the fairest and most practical solution is to treat Mr. Emmott's liability to compensate MWP for his undercharging as satisfied by denying him the right to recover anything for the work he did for MWP during the same period. This also absolves us from having the need to order an inquiry into the amount of damage to which MWP would otherwise be entitled for Mr. Emmott's failure to devote his whole time and attention to MWP's affairs, or for his failure to give 6 months' notice of his intended departure. In effect, we consider the most appropriate and convenient course is to take the accounts as if all the parties were partners and their partnership was dissolved at 31 December 2005."

45. The Tribunal further explained this part of their decision in the Clarification. They acknowledged that they had found it difficult to "fashion an appropriate remedy for Mr. Emmott's breaches of fiduciary duty (and no doubt contract) during 2006". They explained that they had concluded:

i) that MWP had no claim for loss of clients who had moved to Temujin when Mr. Emmott left MWP;

ii) that "There were simply too many imponderables to form a satisfactory basis for an award of damages or compensation for losses arising from Mr. Emmott's conduct during 2006"; and

iii) that it was impossible to reconstruct what would have happened in the event that Mr. Emmott had given proper notice or had told Mr. Slater and Mr. Nicholls that he would not join them, and in either event had he told Mr. Wilson what Mr. Slater and Mr. Nicholls were doing, or had he advised clients that, while at MWP, he could not accept joint instructions with Temujin without Mr. Wilson's consent.

The Tribunal considered it likely that, had Mr. Emmott given six months' notice, Mr. Wilson would have had him MWP leave immediately, so that Mr. Emmott would have been free to join Temujin and clients would have been free to follow him, but in any event clients would have been free to instruct Temujin. The Tribunal concluded that damages would be unquantifiable and would be an inadequate remedy to reflect the wrong done to MWP, and decided that they should award another remedy in order properly to recompense MWP.

46. The Tribunal considered that MWP was probably overcompensated by their order, which, in effect, stripped Mr. Emmott of any benefit to which he would have been entitled from his one third interest in MWP because MWP gained one third of the value of both Mr. Emmott's work during the period from 31 December 2005 and of work done by Mr. Wilson. In their view, this remedy sufficiently compensated for Mr. Emmott's liability for the various breaches of which he was guilty.

47. MWP complains about this because, it is said, it was not mentioned during the hearing and was not justified by the evidence. It is submitted that there was no evidence about the loss caused by Mr. Emmott's breaches by way of not devoting his full time and attention to MWP, by way of undercharging for work and by way of not giving the proper notice before leaving. The Tribunal, it is said, were guilty of a serious irregularity because they assumed that losses would be small without any proper evidential basis for the assumption and because they should not have done so because the hearing was not to deal with losses.

48. I do not consider that this criticism is justified. Paragraph 8.21 of the Second Interim Award is primarily concerned with the complaint that Mr. Emmott had undercharged for work. MWP had introduced evidence at the hearing about this, by way in particular of a report by Mr. George Gibson, a costs draftsman, and also evidence of Mr. Michael Schilling, a partner of Linklaters, whose report had been prepared for the New South Wales proceedings. The Tribunal concluded (at para 4.218) that, although there was evidence of under-billing by Mr. Emmott on transactions while he was at MWP, they did not "accept that the extent of the aggregate figures arrived at by Mr. Gibson and Mr. Schilling respectively". There can be my mind be no complaint that the Tribunal, having been presented with such evidence by MWP on the hearing about liability, determined not only that there was some undercharging by Mr. Emmott but also that it was far less than MWP's witnesses suggested. Consideration of the question whether there was any undercharging necessarily involved consideration of the extent of it. The Tribunal could not meaningfully decide whether there had been culpable undercharging on the

part of Mr. Emmott but defer any consideration of the extent of the undercharging and, had they simply concluded that there had been *some* under-billing, their award would have been vulnerable to the criticism that the reasons were inadequate.

49. At paragraph 8.21, the Tribunal went on to consider what kind of remedy would be appropriate, and in particular whether they should award damages or order some other remedy. This did not involve them in questions consideration of which they had deferred in their direction of 29 July 2008: it did not involve consideration of the quantum of damages or taking any account. It involved consideration of the nature of the appropriate remedy.

50. In any event, there is no realistic reason to think that the remedy adopted by the Tribunal under-compensated MWP for this breach on the part of Mr. Emmott, or indeed to doubt the Tribunal's assessment that it probably resulted in overcompensation. In the words of Moore-Bick J in the Profilati Italia case, there was, in my judgment, no substantial likelihood that the procedure adopted by the Tribunal might affect the outcome of the reference to MWP's disadvantage, and it will not, in the language of the Warborough Investments case, be materially different because of it.

51. What then of the Tribunal's conclusion that, by adopting this remedy, they were absolved from ordering further relief in respect of Mr. Emmott's failure to devote proper time and attention to the affairs of MWP and failure to give proper notice of his intention to leave MWP? The complaint that Mr. Emmott did not give six months' notice is pleaded in paragraphs 20 and 21 of the Points of Claim. The allegation was that by letter dated 30 June 2006 Mr. Emmott purported to terminate the Emmott agreement with immediate effect, and, because he did not give the requisite notice, he was in repudiatory breach of it, which breach MWP accepted so as to terminate the agreement on 20 July 2006. However, there is no claim for relief in respect of this. At paragraphs 29 and 30 of the Points of Claim it is pleaded that MWP is entitled to damages, an account and other relief because of matters set out in other paragraphs of the Points of Claim but not in relation to the breach which led to the termination of the Emmott Agreement. It was therefore not open to MWP to assert in the reference that this caused it to lose work or business opportunities. In fact, as the Tribunal pointed out in the Clarification, there is no reason to suppose that it did so. Certainly, no special damages were claimed by MWP in respect of this breach, and, in the absence of special damage, all that MWP lost was the value of Mr. Emmott's work for six months, which prima facie was best measured by what he would have been paid for it.

52. The so-called "Failing to Devote Time and Attention" claim was also not pleaded in the reference. In fact, the Tribunal decided (at para 8.15 of the Second Interim Award) that Mr. Emmott was in breach of his duty to devote his full time and attention to developing the practice and business of MWP. They considered that his breaches before the beginning of 2006 were not significant, and would not normally give rise to a damages claim. It was, they recognised, a different matter that in 2006 Mr. Emmott devoted time that should have been spent on the partnership's affairs "to assisting in the development of a competitor", and the Tribunal considered that this should be compensated "by way of a reduction in the wages, salary or share of profits to which the offender would otherwise be entitled". The Tribunal therefore rejected

the complaint that Mr. Emmott did not devote proper time and attention to the affairs of MWP. It was the assistance to Temujin that was recognised in the "general damages by way of a reduction in wages" etc.

53. I do not consider, therefore, that the Tribunal were guilty of any irregularity or error in concluding that therefore, provided Mr. Emmott was deprived of any earnings from MWP after 31 December 2005, there was any basis upon which MWP should be awarded other relief in respect of these breaches of contract.

54. In reaching this conclusion I do not overlook that MWP also complains about the reasoning in paragraph 8.21 of the Second Interim Award on the grounds that:

    i) It "shifts the focus from the value of any *shareholding* in MWP to a remedy based on the underlying *economic value* of MWP", and

    ii) It assumes that during the period from the beginning of January 2006 Mr. Emmott remained entitled to a third of MWP's profits, despite being in breach of his fiduciary and contractual duties.

MWP says that the Tribunal's approach was flawed and procedurally unfair, and that, before ordering deciding to deal with Mr. Emmott's liability to compensate MWP in this way, the Tribunal should have received submissions about whether the remedy that they fashioned was appropriate. As I have explained, no question about the nature of remedies was deferred, and I do not consider that the Tribunal were guilty of any irregularity in proceeding to order the remedy that they did. The remedy does indeed assume that Mr. Emmott would otherwise have been entitled to his share of MWP's profits in 2006 despite any breach of duty, but I can see no basis upon which he would not have been. Nor can I understand on what basis it could be said that the Tribunal were obviously wrong because of some distinction between the value of a shareholding and the value of the underlying asset, the "economic value of MWP". Paragraph 8.23(i) of the Second Interim Award did not preclude any appropriate adjustments to take account of the distinction when it referred to taking a partnership dissolution account as between Mr. Wilson and Mr. Emmott with a view to ascertaining the value of Mr. Emmott's share, and the Tribunal's order consequential upon the award was that inquiries be carried out and accounts "into the value of Mr Emmott's 33% interest in MWP after appropriate adjustment for the element of value attributed to MWP's ownership of the Steppe Shares …".

55. The next main matter of complaint identified by Mr. Cavender concerns Max. MWP alleges that Mr. Emmott sought and received secret profit by way of 14.75 million shares in Max and $950,000. Max had acquired rights to explore for and exploit oil in areas in Kazakhstan by buying shares in companies holding these assets from Sokol, which was beneficially owned in equal shares by Mr. Sinclair and a Mr. Brian Savage.

56. These claims arose from an initial public offering of shares in Max and their listing on the Alternative Investments Market of the London Stock Exchange. MWP alleges that as a result of the Max transactions 14.75 million shares in Max were transferred to EPIL, which was owned by Mr. Emmott's family trusts and managed by professional trustees, and that they represented a secret profit. Mr. Emmott's

pleaded case was that he "received" them "as nominee and trustee for Mr. Thomas Sinclair, who is and has at all material times been the beneficial owner thereof". The Tribunal described what they had to decide as "a pure question of fact" (at para 5.12) and formulated it as follows: "Are the 14.75 million Max shares held by EPIL or any of them held in trust for Mr. Emmott or do they all belong beneficially to Mr. Sinclair?", observing that "If any of them are found to be held in trust for Mr. Emmott it is not and could not seriously be disputed that they represent a secret profit for which he is accountable to MWP". The Tribunal decided that "the shares were impressed with an existing trust in favour of a third party such as Mr. Sinclair" when they were transferred to EPIL, and therefore rejected MWP's contention that they represented a secret profit for Mr. Emmott. They did not consider it credible that Mr. Emmott should be allocated so many shares for himself, and, while they considered it likely that Mr. Sinclair had told Mr. Emmott that he would "look after" him, and that Mr. Emmott fully and justifiably expected to receive shares in Max, in fact he had received none beneficially and had no legal right to any.

57. MWP summarised its complaint about the determination in relation to the Max shares as follows:

> "MWP's complaint is that:
>
> (1) the Tribunal adopted a novel analysis of the issue of beneficial ownership of shares ..., which analysis had not been advanced on behalf of Mr. Emmott and was unsustainable on the available evidence, and did so without giving MWP, which alleged that the shares in question constituted a secret commission for Mr. Emmott, an opportunity to respond and make submissions in light of it;
>
> (2) the Tribunal made a finding, on the back of this analysis, which if true gave effect to a dishonest scheme contrary to public policy, and which should have resulted in additional findings of breach of fiduciary duty and contract by Mr. Emmott;
>
> (3) the Tribunal also made its findings as to beneficial ownership of the Max Shares without the benefit of certain documents that show that Mr. Emmott caused the registered holder of the Max Shares, Eagle Point Investments Limited ("EPIL"), to make a declaration to Nabarro, Wells & Co Ltd, the AiM NOMAD [or Alternative Investment Market Nominated Adviser] to Max, in unequivocal terms that EPIL was itself the beneficial owner of the Max Shares ...".

58. The argument that the Tribunal adopted a "novel analysis" is this: as I have said, Mr. Emmott's pleaded case was that EPIL "received" the shares as nominee and trustee. Against this, MWP argued that EPIL could not so have received the shares because it is impossible for a trustee to hold property in trust for a beneficiary that it does not

know about or (in the case of a discretionary trust) is not an object of the trust. That argument was rejected by the Tribunal (at para 5.10): they pointed out that the legal title to the shares vested in EPIL and they were not the trustees of Mr. Emmott's family trusts; and, if the shares were impressed with a trust in favour of a third party such as Mr. Sinclair when they acquired them, EPIL would not have been able to deal with the shares according to Mr. Emmott's directions or consent. Therefore, they did not represent commission or secret profit for Mr. Emmott. MWP's complaint is that the "notion of the Max Shares being impressed with an existing trust in favour of Mr. Sinclair when they were acquired by EPIL had not been put to the parties and was not identified at the hearing", and so it is said that the Tribunal were guilty of a serious irregularity because MWP did not have a proper opportunity to make submissions about this.

59. MWP goes on to say that the findings of the Tribunal about the Max shares were vitiated by obvious errors of law: that the shares could not have been impressed with a trust in favour of Mr. Sinclair because the property (by way of a chose in action) represented by a share is created only when it is issued and not earlier. (In the submissions before me, neither party distinguished between the position when a share is allotted and when it is issued: see National Westminster Bank plc v IRC, (loc cit)). MWP therefore says (i) that the irregularity in the proceedings in that the Tribunal did not give it a fair and proper opportunity to address them upon this argument resulted in substantial injustice and (ii) it should be given permission to appeal under section 69.

60. I reject these arguments. First, I do not consider that the Tribunal conducted the reference unfairly as MWP allege or were guilty of an irregularity of this kind. The question whether Mr. Emmott had an interest in the shares or was in a position to give directions as to how EPIL should deal with them was clearly before the Tribunal: this was a necessary part of MWP's contention that the shares represented secret profit. I am not persuaded that Mr. Emmott confined his case to arguing that Mr. Sinclair's interest in the shares arose when they were acquired by EPIL, but in any case the Tribunal would, in my judgment, have been entitled to approach the matter as they did. In the end, the important question in the reference was not whether Mr. Sinclair had any interest in the shares but whether Mr. Emmott had acquired a valuable interest in them or otherwise was in a position to deal with them so that they were a profit to him. MWP's case required the Tribunal to be satisfied that, when the shares were in EPIL's legal ownership, Mr. Emmott had such interest in them or such control over them. The Tribunal were not out into a straight-jacket as to how they dealt with that issue by the precise legal submissions of the parties: they were entitled to make their own analysis of the legal position in light of the parties' contentions.

61. I also reject the submission that the Tribunal's reasoning was subject to obvious errors (or an obvious error) of law or that the question of which MWP complains substantially affected its rights or those of Mr. Emmott. Since this question might well be considered in other proceedings (in this court and in the Bahamas) and since an application for permission to appeal under section 69 of the 1996 is not an appropriate vehicle for detailed legal analysis, I deal with this only summarily. As I have said, in the end what mattered was whether Mr. Emmott had acquired an interest in or control over the shares. The Tribunal were entitled to conclude, for the reasons

that they gave, that there was no intention on anyone's part that a beneficial interest in the shares should be advanced to Mr. Emmott or that he should have control over them for his benefit, and in particular that was not Max's intention when they allotted and issued the shares. In these circumstances, I am unable to accept that the Tribunal made any obvious error in law in rejecting the argument that Mr. Emmott had acquired a beneficial interest in the shares when or before EPIL acquired legal title to them, and that EPIL were obliged to deal with them according to Mr. Emmott's directions and without regard to Max's intentions. That sufficed to dispose of this claim.

62. MWP also complains that the Tribunal should not have made a specific finding that Mr. Sinclair was beneficially interested in the shares. In the Second Interim Award at para 8.27, the Tribunal stated, "... we find MWP has no claim to any of the 14.75 million shares in Max held by the trustee of Mr. Emmott's Bahamian trusts and that they are held to the order of Mr. Sinclair. We shall authorise and direct each of the parties to inform the relevant trustees and the Supreme Court of the Bahamas of this finding but not of the reasons on which it is based". It is submitted that, even if the Tribunal rejected MWP's case that the Max shares were held on trust for Mr. Emmott, they should have held only that there was insufficient evidence so to find, and that the Tribunal should have confined themselves to this. It is unfair and causes substantial injustice to MWP, it is said, that they held explicitly that the shares had at all times been beneficially owned by Mr. Sinclair.

63. I do not accept this. Mr. Sinclair was not party to the reference or the Award. The Tribunal's findings and directions do not determine any dispute other than between MWP and Mr. Emmott. They confer no rights upon Mr. Sinclair. I am unable to see how the finding that the Tribunal made can result in substantial injustice to MWP: as MWP acknowledges, in proceedings to which Mr. Sinclair is party the courts are free to reach a different conclusion from that of the Tribunal. This possibility might, as MWP submits, lead to conclusions which MWP characterises as "irreconcilable": that is no basis for challenging the Second Interim Award under either section 68 or section 69.

64. I come to the complaints that the implication of the Tribunal's analysis is that their determination gives effect to a dishonest scheme, that the Second Interim Award and the directions made by the Tribunal in it are contrary to public policy and that, given their reasoning and consistent with it, they should have made in further findings of breach of fiduciary and contractual duties on the part of Mr. Emmott. It is submitted that:

> "In particular, if the Tribunal's finding is correct, Mr. Emmott must have misled the London Stock Exchange, Max Petroleum, the markets, investors, MWP and others as to the true beneficial ownership of the Max Shares or at least concealed crucial information concerning their ownership, and in so doing exposed MWP to potential liability in respect of the transaction. It is contended that it would have been proper for the Tribunal to refrain or defer from making any findings concerning the Max Shares until such irregularities had been reported and investigated by the relevant authorities."

65. I do not need to consider whether it would have been proper for the Tribunal to decline to deal with issues before them pending investigation of this kind. It suffices to say that it was not incumbent upon them to do so, and it cannot be said to be a serious irregularity that they did not do so. As far as I am aware, it was not a course that MWP urged upon the Tribunal.

66. I reject the submission that the Tribunal's award gives effect to a dishonest scheme. It might be that the argument that MWP advances will arise in other proceedings about the shares to which Mr. Sinclair is party. As far as these proceedings are concerned, it suffices to say that, even if the reason for the shares being issued to EPIL was dishonest, the Second Interim Award does not advance the scheme or give effect to it. It simply rejects the claim that Mr. Emmott received them by way of commission or a secret profit.

67. Finally with regard to the Max shares, MWP says that its contention that Mr. Emmott misled the market and the regulatory authorities was supported by other documents which were not put in evidence before the Tribunal because they were overlooked or their potential significance was not appreciated. This is not a basis for challenging an award under either section 68 or section 69 of the 1974 Act.

68. MWP complains that Mr. Emmott also received in relation to the Max transaction $950,000 and, while he acknowledged that he had to account for $250,000, he refused to account for the remaining $700,000. The Tribunal concluded with regard to the money that "on balance and with some hesitation, we accept Mr. Emmott's evidence that of the sum of $950,000, $250,000 was accepted as a gift to him and the rest was intended for Mr. Sinclair". MWP submits that the Tribunal made an error of law because "in the absence of any evidence that the sum of money was intended to by (sic) payor to be held in trust for a third party, the Tribunal erred in law in holding ... that the $700,000 was received by EPIL as a gift for Mr. Sinclair". The challenge in relation to the $700,000 seems to me to raise no questions distinct from that concerning the shares and therefore I reject it.

69. Next, the complaint about the Tribunal's findings and conclusions in relation to Temujin. They directed an account of "all payments, if any, by way of fee, commission or otherwise received by Mr. Emmott from Temujin before 1 July 2006". MWP complains that "The Tribunal failed to decide whether MWP was entitled to look to Mr. Emmott for an account of monies accruing by Temujin (on the basis that he was a partner in that firm) despite this issue forming part of MWP's case". This is said to have been a serious irregularity under section 68(2)(d).

70. There are two answers to this complaint. First, it was not pleaded by MWP that Mr. Emmott was a partner in Temujin. MWP pleaded at para 25 of the Points of Claim that, "... in breach of the terms of the Agreement and his fiduciary duties and in breach of trust Mr. Emmott, whilst a director and full time employee of MWP and with the assistance of Mr. Nicholls, Mr. Slater and Mr. Shaikenov, formed Temujin as a competitor to MWP". Particulars of the paragraph are given, but they do not allege (expressly or upon any reasonable interpretation of them) that Mr. Emmott became a partner in Temujin (or had any comparable role in any of the companies or other entities that comprised Temujin). It is true that it is asserted by MWP at para 29 of the Points of Claim that it was entitled to claim "all monies earned by Temujin", but I

am unable to accept that it is implicit in this that MWP alleged that Mr. Emmott became a partner.

71. In any case, it is clear from the Second Interim Award that MWP did not establish to the satisfaction of the Tribunal that Mr. Emmott had become a partner. It was incumbent upon them to do so: as I have said, the procedural order of 29 July 2008 deferred the taking of accounts, not any question about what accounts should be taken. The findings of the Tribunal included these:

i) On 20 December 2005 Mr. Emmott signed a "Co-Operation Agreement". It provided that Mr. Shaikenov and Mr. Slater would establish a consultancy which would be "owned and operated by Temujin International Limited (TI) acting as the Trustee under a trading trust known as Temujin International Trust …", with each of them holding "the first two units in the Trust". It also provided that Mr. Emmott might participate in the consultancy "as and when he is legally free to do so", with a proviso that he should do so by no later than 30 July 2006: the agreement recognised that he was obliged to give not less than six months' notice of an intention to leave MWP.

ii) By the Co-Operation Agreement Mr. Emmott undertook a personal financial commitment to support the new Temujin enterprise, whether or not he joined it.

iii) At para 6.21 of the Second Interim Award, the Tribunal found as follows:

> "Mr. Emmott now maintains that he is only a consultant to Temujin. He has resisted disclosure of Temujin's documentation, called for by MWP, upon the basis that he has no authority from that practice. Given the nature and scale of the litigation brought by MWP following the events recited above, we accept that Mr. Emmott's current role may be as he describes it, but it is clear to us that he left MWP with the intention that he would continue to practice in Kazakhstan, at Temujin, and in co-operation or partnership with his former colleagues, Messrs Slater and Nicholls, and with Mr. Shaikenov who provided the original infrastructure for the firm, and that he had formed that intention when he committed himself legally and financially to his colleagues upon entering into the Co-Operation Agreement".

iv) At para 8.14 of the Second Interim Award, the Tribunal concluded that Mr. Emmott assisted Mr. Slater and Mr. Nicholls to establish Temujin and "(whatever his own mental reservations may have been) led them to believe that he would join them after six months, as in the event he did".

72. In the request for clarification of the Second Interim Award, MWP suggested that the Tribunal should determine "that Mr. Emmott acted in breach of the Emmott Agreement for which damages are to be assessed … in that … Mr. Emmott was from December 2005 in breach of … the Emmott Agreement by participating in the establishment, management and running of the Temujin business … without

disclosing all relevant matter pertaining thereto to MWP". In their Clarification the Tribunal stated that "we have not found and did not intend to find that Mr. Emmott "participated in the management and running" of Temujin. This was repeatedly put to Mr. Emmott, but was denied by him and in our view not supported by the evidence. We suspect that Mr. Emmott was careful not to take any part in the management or running of Temujin; but we have made no finding to this effect either".

73. I reject any complaint that the Tribunal should have ordered accounts be taken on the basis that Mr. Emmott was a partner in Temujin or that the Tribunal should have concluded that he was.

Section 68

74. Having considered the four main aspects of MWP's complaints, I can deal with the various grounds of its application quite briefly. I take first those for the application under section 68.

75. The first paragraph of the statement of the remedy claimed and the grounds on which it is clamed is as follows:

> "questions of relief and remedies flowing from findings of breaches of duty made by the Tribunal against the Defendant ("Mr. Emmott") in relation to the "Chilisai Phosphate", "Urals Gold", "Pinegrove/Roxi", "Roxi 2", "Destruction of documents", "Six Month Notice Provision" and "Failing to Devote Time and Attention" claims ..."

Sections 68(2)(a), (c) and (d) of the 1996 Act are relied upon.

76. As I have said (at paras 40,43 and 48-53), I consider that MWP seeks relief or remedies in respect of complaints that either were not pleaded or were rejected by the Tribunal.

77. The second paragraph is: "questions of relief and remedies flowing from findings made by the Tribunal in relation to the Counterclaim ..." and reference is made to sections 68(2)(a) and 68(2)(c) of the 1996 Act. As I understand it, this is directed to MWP's arguments based upon the Alghussien Establishment and Tesco cases, and Mr. Emmott's alleged failures to make proper disclosure to MWP of breaches of his obligations to MWP. I have explained at paras 30-31 why I reject those arguments.

78. Thirdly, MWP seek an order that the Tribunal reconsider "the claims made in relation to the "Max Shares" and $700,000 received by EPIL...". MWP relies upon section 68(2)(a) of the 1996 Act. As I understand it, the thrust of the complaint about the Max shares is that the Tribunal were not entitled, having rejected the claim that the shares represented profit for Mr. Emmott, to determine the beneficial ownership of them. I have explained (at para 60) why I refuse this part of the application. I do not

understand the complaint about the $700,000 raises any additional matters that I have not considered in relation to the shares.

79. In the alternative to the application for an order that the Tribunal reconsider these matters, MWP seeks orders as follows:

i) A determination

> "whether (i) the untruths perpetrated by Mr. Emmott (or caused to be perpetrated by him) with regard to the beneficial ownership of the Max Shares (including untruths made to Nabarro Wells & Co Ltd. Max Petroleum PLC and London Stock Exchange plc) and/or (ii) Mr. Emmott's failure to protect MWP's position with regard to the alleged interest of Mr. Sinclair in the Max Shares and/or Max Payment and/or (iii) Mr. Emmott's failure to disclose to MWP the matters referred to in (i) and (ii) above, constitute breaches of Mr. Emmott's duties to MWP"; and, if these matters are determined in their favour, MWP seeks an order for the determination of "the questions of (i) relief and remedies flowing from such breaches and/or (ii) the extent, if any, to which such breaches affect the findings on the Counterclaim and questions of relief and remedies flowing from the Counterclaim".

This application is based on sections 68(2)(a) and (c) of the 1996 Act.

ii) An order for

> "reconsideration in order to determine whether by reason of Mr. Emmott having perpetrated (or having caused to be perpetrated) untruths with regard to the beneficial ownership in the Max Shares (including untruths made to Nabarro Wells & Co Ltd. Max Petroleum PLC and London Stock Exchange PLC), the Tribunal on public policy grounds, should report such untruths to the appropriate authorities and/or refrain from making and/or defer making any findings or Orders with regard to the Max Shares pending the expiry of a reasonable period of time to enable such reporting to be made and the matter investigated".

This application is based upon section 68(2)(g) of the 1996 Act.

80. These applications seek relief that was not sought before the Tribunal and I reject them: see paras 65-68.

81. Fourthly, MWP seeks on the basis of section 68(2)(d) of the 1996 Act an order that the Tribunal reconsider "questions of relief and remedies flowing from the findings made by the Tribunal at paragraphs 2.21 and 2.22 of the Award and from the findings that Mr. Emmott failed to disclose his failure to account to MWP for commissions

received from Richards Butler and failed to disclose two consultancy agreements which he had entered into with Richards Butler ...".

82. By an agreement dated 23 October 2001 Mr. Emmott entered into the so-called "Richards Butler agreement" (or "2001 Richards Butler agreement") whereby Mr. Emmott was to receive commission from Richards Butler. The Tribunal concluded that Mr. Wilson, and so MWP, was aware of the existence and terms of the Richards Butler agreement. Mr. Emmott later entered into further agreements with Richards Butler, the "Second Consultancy Agreement" being signed on 20 April 2004 and relating to the period from 1 February 2004 to 31 December 2004 and the "Third Consultancy Agreement" being entered into on 29 December 2004 for the period from 1 January 2005 to 31 December 2005. The Tribunal concluded that Mr. Wilson and MWP were not aware of the existence and terms of those two later agreements.

83. In paragraphs 21 and 22 of the Second Interim Award, the Tribunal dealt with an arrangement entered into by Mr. Emmott in December 2001 with Al Sayegh Richards Butler, the name under which Richards Butler practised from Dubai. MWP complained that, because it required Mr. Emmott to consult with Richards Butler "with a view to maximising the legal practice of the office in relation to Central Asia", Mr. Emmott could not have been devoting his full time and attention to MWP and so was in breach of the Emmott agreement. The Tribunal rejected the complaint and concluded that Mr. Emmott's arrangement with Richards Butler did not create any conflict with his capacity as a "partner" in MWP: that Mr. Emmott could promote the interests of Richards Butler subject to his duties as a partner and he could promote Richards Butler without being in breach of his duties to MWP.

84. The Tribunal directed an account of "all commissions and/or sums received by Mr. Emmott from Richards Butler ... prior to 1 July 2006 and not previously accounted for".

85. I find it difficult to understand the complaint made in this paragraph of the claim form. In its Points of Claim in the reference MWP pleaded that, from the time that he started in full time employ with MWP and became a director, Mr. Emmott acted as a consultant to Richards Butler under the Richards Butler agreement and that that agreement was "continued by further agreements with Richards Butler dated on or about 23 March 2004, and on or about 29 December 2004". There was also a pleaded complaint that he diverted work to Richards Butler. This led to a claim for secret profits, and the Tribunal directed an appropriate account. The only pleaded claim of non-disclosure in relation to Richards Butler was in the particulars under paragraph 22 of the Points of Claim at para 3: "It was understood by MWP that no concluded agreement had been reached by Mr. Emmott with Richards Butler in the terms of the Richards Butler agreement or at all ...": that allegation was rejected by the Tribunal.

86. It seems to me that the Tribunal dealt properly with the relevant pleaded complaints, and I reject this ground of complaint.

87. Fifthly, MWP complains, on the basis of section 68(2)(d) of the 1996 Act, as follows:

> "the following issues that were put to the Tribunal and which were essential to a decision on the claims before it but which the Tribunal failed to deal with …:
>
> (a) that the Emmott Agreement was to be construed in accordance with the rule of construction applied in Alghussein Establishment v Eton College, [1988] 1WLR 587 that a party cannot rely on his own contractual breach (in this case a failure to disclose receipt of secret commissions and entering into commission agreements with a third party) to assume an advantage or benefit under the contract to which that party would otherwise be entitled; and
>
> (b) that a term was implied into the Emmott Agreement akin to that implied in Tesco Stores v Pook, [2003] EWHC 823."

88. I have explained at paras 30-31 why I reject these complaints.

89. Sixthly, MWP complains, under sections 68(2)(a) and (d) of the 1996 Act about

> "the Tribunal proceeding to determine questions of loss and appropriate relief for established breaches of duty which accordingly denied MWP of:
>
> (a) Its right to elect between remedies arising a result of the breaches of fiduciary duty found to have been proved;
>
> (b) Its right to an assessment of common law damages; and
>
> (c) Therefore any remedy in respect of the breaches found".

90. The procedural direction of 29 July 2008 did not defer consideration of the type of relief that the Tribunal should award, and I reject this complaint.

91. Seventhly, MWP complains about the Tribunal

> "in breach of its own procedural direction, [determining] in a liability only hearing that no loss has been suffered by MWP in respect of the breaches of contractual and fiduciary duty found in section 6 of the Award [which dealt with the formation of Temujin and Mr. Emmott's departure from MWP] and paragraph 8.14 [which dealt with breaches of fiduciary duty by way of assisting Mr. Slater and Mr. Nicholls to establish Temujin and not persuading clients to remain with MWP] the Tribunal's failure to direct that the question of loss and remedies flowing from the breaches be dealt with at a hearing [in] relation to quantum".

92. I have explained at paras 48-53 why I reject these complaints (as they were developed in submissions).

93. Finally, MWP seeks an order that the Tribunal reconsider "the issue of whether MWP is entitled to an account, inter alia, of all monies earned by Temujin (including the issue of whether Mr. Emmott was at any material time a partner in Temujin) which was … essential to a decision on the claims made before it but the Tribunal failed to deal with it …".

94. As I have explained at para 70, there was no pleaded claim that Mr. Emmott was a partner in Temujin at any material time.

Section 69

95. I come to the application for leave to appeal under section 69 of the 1996 Act.

96. The first question upon which MWP seeks leave to appeal is stated as follows:

> "Whether the Tribunal erred in law finding that, on a proper construction of the Emmott Agreement:
>
> (a) Mr. Emmott became immediately entitled to a 33% shareholding in MWP …
>
> (b) the entitlement was subject to the proviso that "the time at which the shares should actually be issued or transferred to him free from any right of Mr. Wilson or MWP to retain them as security for payment" was to be determined in accordance with clause 2.3 of the Agreement …such that;
>
> "Our own interpretation of the Agreement is more favourable to Mr. Wilson than this, since while it treats Mr. Emmott as entitled to be treated as a shareholder from the outset, it allows MRP [sic] to refrain from issuing any of the shares and to retain them as security until they had been fully paid for…." and
>
> (c) the entitlement meant that Mr. Emmott's claim to a "one third shareholding in MWP lies in trust not in contract""

97. As I have already said, I do not consider that the Tribunal were obviously wrong in construing the Emmott Agreement as they did. MWP submits that, even on the basis of the Tribunal's construction of it, the Tribunal were obviously wrong in deciding that Mr. Emmott's claim lies in trust because there cannot be a trust of unissued shares: they do not constitute property. I am unable to accept this submission: there were, according to Mr. Wilson, two bearer shares issued: the Tribunal's reasoning does not assume that further shares were necessarily to be issued and that Mr. Emmott would not have any beneficial interest in MWP unless and until they were.

98. Secondly, MWP seeks leave to appeal on this question:

> "... whether, if the finding [that Mr. Emmott's claim to a "one third shareholding in MWP lies in trust not in contract"] is correct, then the Tribunal erred in law in awarding monetary relief on the Counterclaim in the terms ... [that it did]."

99. I have explained at para 26 above why I reject this complaint.

100. Thirdly and fourthly, MWP seeks leave to appeal in relation on these questions:

> "Whether the Tribunal erred in law in finding, as it implicitly must have in ...the Award, that EPIL received shares as a nominee and trustee for Mr. Thomas Sinclair."

and:

> "Whether the Tribunal erred in law in holding ... that US$700,000 was received by EPIL as a gift for Mr. Sinclair and therefore not involving any breach of fiduciary duty in the absence of any finding that the payer in making the payment to EPIL had created a trust in favour of Mr. Sinclair".

101. The finding that the shares were held for Mr Sinclair did not itself substantially affect the rights of MWP or Mr Emmott, but in any case I am not persuaded that the Tribunal's finding about the beneficial ownership of the Max shares was obviously wrong in law. Although I do not find it easy to understand the question formulated by MWP in relation to the $700,000, I am unable to discern any relevant question of law relating to it and the claim form does not identify one. I am not persuaded that the Second Interim Award is open to proper criticism with regard to the $700,000.

102. Fifthly, MWP seeks leave to appeal on this question:

> "Whether the Tribunal erred in law in failing to award rescission of the Emmott Agreement based upon Mr. Emmott's breaches of his duty of disclosure as alleged in paragraph 12 of the Re-amended Points of Reply and Defence to Counterclaim ...".

103. Again, the claim form identifies no question of law. It appears from the written skeleton argument of MWP that MWP seeks to raise arguments based upon the Alghussein Establishment case and the Tesco Stores case, and I have explained (at paras 30-31) why I reject these arguments. Apparently the complaint here is based upon this passage in the Clarification:

> "We rejected MWP's claim to rescission of the Agreement ab initio because we considered it inappropriate to rescind the Agreement as from any date before Mr. Emmott became guilty of any serious breaches of fiduciary duty which would justify rescission. We took this date to be near the end (and for practical convenience the end) of 2005. This was because (i) his failure to account for the Richards Butler commissions was

> not a breach of fiduciary duty; (ii) his failure to disclose the receipt of these commissions could not justify a remedy which his failure to account for them did not (iii) we did not regard the possible receipt of secret profits from ICH as justifying rescission (though we granted appropriate relief) and (iv) we did not consider that Mr. Emmott's conduct as a whole before the end of 2005 justified rescission ab initio"

104. It is said that this passage of the Second Interim Award contains obvious errors of law because (i) it does not recognise that a failure to disclose is a breach of duty that is distinct from any failure to account for commissions, and (ii) the receipt of secret commissions necessarily gave rise to a right to rescind.

105. I reject these complaints. The Tribunal do not say that failure to disclose receipt of commissions can never give rise to a right to rescind: they simply concluded that failure to disclose particular commissions ("*these* commissions") did not do so. Similarly, their statement about the possible receipt of profits from ICH was directed to particular receipts. MWP's argument appears to suppose that, in the context of a joint venture agreement such as this, *any* receipt of commissions that was not disclosed and *any* failure to disclose receipt of commissions gives rise to right to rescind. I do not consider that it does: the authority of Conlon v Simms, [2008] 1 WLR 484, cited by MWP, does not support this proposition. In my judgment, the complaint of MWP does not turn upon any question of law, but is about the Tribunal's assessment of the nature of particular breaches of duty by Mr. Emmott.

106. Sixthly, MWP seeks leave to appeal on this question:

> "Whether the Tribunal erred in law in requiring, in a liability hearing, proof of loss caused by a breach of fiduciary or contractual duty as a pre-condition to further relief."

107. MWP submits that it should be given permission to appeal in respect of the question (which it argues is one of law) "whether proof of "some loss" is a condition of obtaining any monetary relief for breaches of fiduciary duty and breaches of contract". It submits that the Tribunal erred because they considered that the proof of some loss is a condition of obtaining such an award, whereas:

i) A proper application of the "corporate opportunity doctrine" (exemplified by the decision of Roskill J in Industrial Development Corp Ltd v Cooley, [1972] 1 WLR 443) should have led the Tribunal to conclude that MWP did not need to prove opportunities that would have been available to it but for Mr. Emmott's breaches of duty; and

ii) An account of profits is available without proof of loss, and the onus is upon the defaulting party to show that profits are not ones for which he should account: Murad v Al Saraj, [2005] EWCA 949 at paras 77 and 78 per Arden LJ.

108. None of this seems to me controversial, but I am unable to understand where in the Second Interim Award (or the Clarification) the Tribunal made any error of this kind.

I have already referred (at para 35) to what questions were deferred by the direction of 29 July 2008 and explained why in my judgment the Tribunal did not deal with matters that had been deferred.

109. Seventhly, MWP seek leave to appeal on this question:

> "As to the assessment of any loss suffered by MWP, whether the Tribunal erred in law:
>
> (a) With regard to equitable compensation, in finding that it was necessary for MWP to establish that the corporate opportunities diverted by Mr. Emmott would have been available to MWP had the breaches committed by Mr. Emmott and related to the establishment of Temujin … as a competitor to MWP not occurred.
>
> (b) In investigating a hypothetical situation as to what would have happened if the fiduciary had performed his duty ….
>
> (c) With regard to common law damages, in failing to assess the loss of opportunity that MWP had, absent Mr. Emmott's breaches, to retain the clients and work had the breaches not occurred.
>
> (d) In failing to take account of either profits or losses arising by reason of Mr. Emmott taking advantage of business opportunities after his departure from MWP on 20 June 2006.
>
> (e) In failing to take into account profits or losses arising by reason of Mr. Emmott perpetrating untruths with regard to the beneficial ownership of the Max Shares, and/or failing to protect MWP's position in respect of the alleged interest of Mr. Sinclair in the Max Shares and/or failing to disclose to MWP such untruths and/or failure to protect."

110. The complaints about equitable compensation that MWP developed in its submissions with regard to this complaint are that the Tribunal erred in investigating whether the breach of fiduciary duty in fact caused MWP loss. It is said that they did so in that they concluded that, when Mr. Emmott left MWP, MWP's clients such as Sokol would not have stayed with MWP even if Mr. Emmott had not moved to Temujin. This complaint does not recognise that MWP's pleaded case was that Mr. Emmott "*diverted* work, commercial opportunities and clients or potential clients of MWP to Temujin", and that case was rejected by Tribunal. I do not overlook that MWP also complain that in the Clarification the Tribunal said that both equitable compensation and common law damages "needed to be assessed at the date of the breach", and submit that this is inconsistent with the statement of McLachin J in Canson Enterprises Ltd v Broughton & Co, (1991) 85 DLR (4th) 129, cited by Lord Browne-Wilkinson in Target Holdings Ltd v Redfern, [1996] 1 AC 421. No submission was

developed as to how this question substantially affected the rights of the parties, and I am not persuaded that it might do so.

111. The complaints about common law damages that MWP developed with regard to the seventh ground in its application under section 69 of the 1996 Act again ignore the limits of its pleaded case.

112. Eighthly, MWP seek leave to appeal on this question:

> "Whether the Tribunal erred in law in failing to consider and apply all of the principles set out at paragraphs 1, 2, 7, 8, 9 and 10 of the judgment of Mr. Justice Lawrence Collins in CMS Dolphin Limited v Simonet & Another, [2001] 2 BCLC at 704."

113. In fact these paragraphs of the judgment of Lawrence Collins J in CMS Dolphin Limited v Simonet do not state legal principles, but some of the facts in that case. It appears from MWP's skeleton argument that MWP intended to rely upon principles stated by Mr. B Livesey QC (sitting as a deputy judge of the High Court) in Hunter Kane Ltd v Watkins, [2003] EWHC 186 (Ch) at para 25, which he said were deduced very largely from the judgment of Lawrence Collins J and the authorities cited and discussed by Lawrence Collins J. Mr Livesey stated eleven principles, including these to which MWP apparently intended to refer:

> "A director, while acting as such, has a fiduciary relationship, with his Company. That is he has an obligation to deal with it with loyalty, good faith and avoidance of the conflict of duty and self-interest": para 1.
>
> "A requirement to avoid a conflict of duty and self-interest means that a director is precluded from obtaining for himself, either secretly or without the informed approval of the Company, any property or business advantage either belonging to the Company or for which it has been negotiating, especially where the director or officer is a participant in the negotiations": para 2
>
> "A director is ... precluded from acting in breach of the requirement at 2 above, even after his resignation where the resignation may fairly be said to have been prompted or influences by a wish to acquire for himself any maturing business opportunities sought by the Company rather than a fresh initiative that led him to the opportunity that he later acquired": para 7.
>
> "In considering whether an act of a director breaches the preceding principle the factors to take into account will include the factor of position or office held, the nature of the corporate

> opportunity, its ripeness, its specificness and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary relationship where the alleged breach occurs after termination of the relationship with the Company and the circumstances under which the breach was terminated, that is whether by retirement or resignation or discharge": para 8.
>
> "The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the Company is that the opportunity is to be treated as if it were the property of the Company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating to himself that property. He is just as accountable as a trustee who retired without properly accounting for that trust property": para 9
>
> "It follows that a director will not be in breach of the principle set out at point 7 above where the Company's hope of obtaining the business was not a "maturing business opportunity" and it was not pursuing further business orders nor where the director's resignation was not itself prompted or influenced by a wish to acquire the business for himself": para 10.

114. Despite the apparent reference in the claim form to these six points, in its submissions MWP (without specifically abandoning any part of the pleaded complaint) referred only to the point in paragraph 7. I can see no possible complaint based upon the points in the other paragraphs. With regard to paragraph 7 it is said that, had that principles been applied, then "clearly some consideration would have been given to Mr. Emmott's breach of his 'no profit' fiduciary duty arising out of his co-founding, personally guaranteeing the financing, using his best endeavours to implement and achieve that agreed Temujin Business Plan and Financial Model, being a partner in and physically joining the competitor Temujin after 30 June 2006", and that the Tribunal gave no consideration to this. I reject this complaint: it seeks to raise claims that were not pleaded in the reference.

115. Ninthly and tenthly, MWP seeks leave to appeal on these questions:

> "Whether the Tribunal erred in law in failing to construe the Emmott Agreement in accordance with the rule of construction applied in Alghussein Establishment v Eton College, [1988] 1 WLR 587 that a party cannot rely on his own contractual breach (in this case a failure to disclose receipt of secret commissions and entering into commission agreements with a third party) to assume an advantage or benefit under the contract to which that party would otherwise be entitled."

and

> "Whether the tribunal erred in law in failing to imply a term into the Emmott Agreement akin to that applied in Tesco Stores v Pook EWHC 823."

116. I have already explained why I reject these complaints.

Conclusion

117. Despite the large number of serious irregularities alleged against the Tribunal and the many allegations of obvious errors of law, I refuse all the applications.