Neutral Citation Number: [2015] EWHC 2558 (Ch)

Case No: HC13E04392, HC-2013-000401

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 September 2015

Before :

EDWARD MURRAY
(sitting as a Deputy Judge of the Chancery Division)

Between :

(1) AMANDA STEPHANIE CLUTTERBUCK **(2) IAN SCRANTON PATON**	**Claimants**
- and -	
WILLIAM CLEGHORN **(AS JUDICIAL FACTOR TO THE ESTATE OF ELLIOT NICHOL DECEASED)**	**Defendant**

Mr Stuart Cakebread (instructed by **Strafford Law**) for the **Claimants**
Mr Jonathan Seitler QC and Ms Emer Murphy (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendant**

Hearing dates: 11, 12, 13 and 14 May 2015

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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EDWARD MURRAY
(sitting as a Deputy Judge of the Chancery Division)

Edward Murray (sitting as a Deputy Judge of the Chancery Division) :

1. On 11, 12, 13 and 14 May 2015, I had before me two applications in relation to proceedings issued on 4 October 2013 by the Claimants, Ms Amanda Clutterbuck and Mr Ian Paton, against the Defendant, Mr William Cleghorn (as judicial factor to the estate of Elliot Nichol deceased) in respect of three claims. On 14 May 2015 I dismissed the Claimants' claim as an abuse of process under CPR Rule 3.4(2)(b), giving brief reasons and indicating that I would provide a written judgment in due course. This is that judgment.

2. The three claims relate to:

   i) an alleged unwritten joint venture agreement between the Claimants and, among others, Mr Elliot Nichol, relating to a property development at 62-66 Pont Street in London (the "Pont Street Claim");

   ii) an alleged unwritten agreement concluded, according to the Claimants, at a meeting between the Claimants and Mr Nichol at the Oriel Restaurant in Sloane Square in London in or about September 2005 (the "Oriel Agreement"), governing entry into joint ventures to develop property in central London (the "Oriel Agreement Claim"); and

   iii) a written joint venture agreement dated 3 August 2006 (the "Cliveden Agreement") between the Claimants and Westbrooke Properties Limited ("Westbrooke"), an Isle of Man company set up and controlled by Mr Nichol, and Mr Nichol as guarantor of the obligations of Westbrooke, relating to a property development at 9 Cliveden Place in London (the "Cliveden Agreement Claim").

3. Mr Nichol, unfortunately, died on 29 December 2009, and his estate (the "Estate") is represented in this matter by Mr Cleghorn, who was appointed by the Court of Session in Edinburgh on an interim basis in June 2011, with a final appointment on 30 September 2011, to administer the Estate under the Scottish procedure of judicial factory. As a judicial factor Mr Cleghorn is required to collect, hold and administer the Estate, subject to the supervision of a court-appointed officer known as the Accountant of Court and in accordance with Scottish law applicable to the role and duties of a judicial factor. The assets of an estate administered by a judicial factor do not vest in the judicial factor, and the assets of the Estate are therefore not vested in the Defendant. Counsel for the Defendant raised the question whether the Estate should have been joined to these proceedings. I did not, however, have an application to that effect or hear argument on whether it is necessary or, indeed, what it would mean, given the nature of the Scottish procedure of judicial factory, to join the Estate to this action. I have proceeded on the basis that there is an identity of interest between the Defendant and the Estate for all relevant purposes.

4. The two applications are:

   i) an application of the Claimants dated 19 February 2014 for summary judgment in relation to part of the Cliveden Agreement Claim; and

ii) an application of the Defendant dated 24 March 2014 and amended 18 July 2014 for the proceedings to be struck out as an abuse of process or, alternatively, for summary judgment against the Claimants in relation to the Pont Street Claim and the Oriel Agreement Claim.

5. On 7 April 2014 Mr Justice Barling ordered the two applications to be heard together.

6. At the beginning of the second day for the hearing of these applications, the first day having been allocated as a pre-reading day, I was asked to rule on an application by the Claimants to adjourn the hearing of the present applications until after the hearing of the Claimants' appeal of the order of Mrs Justice Asplin in the case of *Clutterbuck v Sarah Mohammed Saleh Al Amoudi* [2014] EWHC 383 (Ch) (the "*Al Amoudi* case"), which was handed down on 20 February 2014. That case forms the basis for the Defendant's abuse of process application as well as the adjournment application. I refused the application, for reasons I have given separately. I summarise the *Al Amoudi* case and deal with its relevance to this application below.

7. I agreed with the parties that it would make most sense for me to hear first the Defendant's application as it related to abuse of process on the basis that, if I acceded to it, the Claimants' application for summary judgment would fall away and the Defendant's alternative application for summary judgment would no longer be necessary.

8. The Defendant seeks for the Claimants' claim to be struck out under CPR Rule 3.4(2)(b) as an abuse of process on two interrelated grounds. First, in relation to the whole of the claim, the application is made on the basis that the Claimants should have sought directions from Asplin J during the trial of their claim against Sarah Al Amoudi as to whether and, if so, how and to what extent their claim against the Defendant and/or the Estate of Mr Nichol should be combined with the claim against Ms Al Amoudi. The failure to do so, the Defendant submits, is contrary to the principles laid down in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748. Secondly, in relation to the Pont Street Claim and the Oriel Agreement Claim, the Claimants' claim is an abusive collateral attack on the decision of Asplin J in the *Al Amoudi* case.

Factual background

9. According to Ms Clutterbuck's witness statement dated 18 February 2014, Ms Clutterbuck and Mr Paton have lived together since 1994 as wife and husband while maintaining separate finances and property holdings and jointly pursuing development projects. They have a son. Their business is to "source, purchase, refurbish, let, sell and finance the development of residential properties for profit", principally, it appears, in central London, with a focus on "high-end" properties. Ms Clutterbuck, in particular, has carried through many substantial developments and owns a number of properties either in her own name or through corporate vehicles.

10. Mr Nichol was a Scottish businessman, who, as I have mentioned, died on 29 December 2009. He owned and controlled a group of companies known as the Randolph Hill Nursing Homes Group, which principally operates care home businesses in Scotland. According to the witness statement dated 11 August 2014 of Mr Peter McCormick, who managed Mr Nichol's business and property interests for the last ten years of Mr Nichol's life, Mr Nichol had extensive experience in commercial and residential property development, initially in Scotland. According to Mr McCormick, from approximately 2005 Mr Nichol began to spend more time in London and to get involved in London residential property development.

11. According to Ms Clutterbuck's witness statement of 18 February 2014, the Claimants' first contact with Mr Nichol was when he was introduced to Mr Paton by an agent at Knight Frank Estate Agents "for the purpose of discussing joint property developments with us".

12. According to the Particulars of Claim:

    i) At a meeting at the Lanesborough Hotel in or around November 2002, Mr Nichol introduced Mr Paton to three women, who were described by Mr Nichol as potential investors in joint ventures to be undertaken by the Claimants and Mr Nichol or by the Claimants, Mr Nichol and others. The three women are referred to in the Particulars of Claim as the "Consortium", one of whom was a woman named Sarah Mohammed Al Amoudi. At that meeting, Mr Paton explained to Mr Nichol the Claimants' two principal property investment strategies, the "portfolio assembly model" and the "site assembly model". The former involved the acquisition of individual properties to be refurbished then let or sold. The latter involved the acquisition of individual flats in the same building and/or in adjacent buildings, the acquisition of the relevant freeholds and subsequent redevelopment of the sites and/or the buildings or the sale of the unredeveloped but assembled site at a "very considerable" profit due to the planning gain achieved by the assembly. Under either approach, third party investors and/or funders might be involved.

    ii) Between that meeting and the summer of 2004, there were various dealings between the Claimants and Mr Nichol. For example, Mr Paton, acting for Ms Clutterbuck and himself, developed a joint bid with Mr Nichol for a property at 80 Eaton Square in Knightsbridge, a joint bid for a property at 33 Hans Place and a further joint bid for the property at 80 Eaton Square, each of which was unsuccessful.

    iii) In or about July 2004 the Claimants agreed with Mr Nichol and Ms Al Amoudi that they would enter into a joint venture agreement for the purchase, refurbishment and further development, including the obtaining of planning permission, of a property at 66 Pont Street. The agreement included the eventual purchase and conversion of neighbouring properties at 62 and 64 Pont Street. This alleged oral

joint venture agreement forms the basis of the Pont Street Claim, to which I have referred at para 2(i) above.

iv) In or about September 2005 the Claimants met Mr Nichol at the Oriel Restaurant in Sloane Square in London. At that meeting the Claimants and Mr Nichol agreed orally that they would together undertake future joint ventures for the development of prime residential properties. Paragraph 8 of the Particulars of Claim sets out the alleged principal terms of that agreement, including that the Claimants would offer "all properties found by them to Elliot Nichol and the Consortium, which would have the right of first refusal or acceptance of the Claimants' proposal to enter into a joint venture with respect to that property." Mr Nichol would be responsible for arranging immediate funding for exchange and completion of purchase of the property from his own resources and/or those of the Consortium and for securing further funding, as required. The subsequent disposal of the property would require agreement of the Claimants and Mr Nichol. The net profits of the joint venture after sale of a property would be divided equally between, on the one hand, the Claimants and, on the other hand, Mr Nichol and, if relevant, the Consortium. This alleged oral agreement (the "Oriel Agreement") forms the basis of the Oriel Agreement Claim, to which I have referred at para 2.ii) above.

v) Under the Oriel Agreement, the Claimants entered into joint ventures with Mr Nichol or with Mr Nichol and the Consortium in relation to six properties at the following addresses: Herbert Crescent, London SW1; 19 Basil Street, London SW3; 50 Cadogan Square, London SW1; 8 Walton Place, London SW3; 36 Drayton Court, London SW1 and 9 Cliveden Place, London SW1.

13. In relation to the property at 9 Cliveden Place, the Claimants entered into the Cliveden Agreement with Westbrooke and with Mr Nichol, as guarantor of the obligations of Westbrooke. It is not in dispute that the Cliveden Agreement is the only written joint venture agreement to which the Claimants and Mr Nichol are parties.

14. The Defendant denies the existence of the Oriel Agreement and therefore disputes the Claimants' contention that the Cliveden Agreement was entered into pursuant to the Oriel Agreement. The Defendant also denies that there were any other joint ventures between the Claimants and Mr Nichol, either pursuant to the Oriel Agreement or otherwise. The Cliveden Agreement forms the basis of the Cliveden Agreement Claim, to which I have referred at para 2.iii) above.

Clutterbuck v Al Amoudi

15. As I have already mentioned, Ms Al Amoudi is alleged by the Claimants to have been one of the three investors present at the meeting at the Lanesborough Hotel in November 2002. She is also alleged to have been a party to the oral joint venture agreement that is the subject of the Pont Street

Claim, but she is not expressly alleged to have been a party to the joint venture agreements, allegedly entered into by Mr Nichol pursuant to the Oriel Agreement, relating to the six properties to which I have referred at para 12.v) above.

16. In the *Al Amoudi* case, which I have already noted is the basis for the Defendant's abuse of process application, Asplin J summarised at para 97 Ms Clutterbuck's evidence as to the existence of the Oriel Agreement. At para 98 of her judgment, she noted that Mr Paton's evidence was that all of the joint ventures to which Ms Al Amoudi was a party also involved Mr Nichol. This is also asserted at pages 9 and 60-61 of the Claimants' Further Information provided in the *Al Amoudi* case.

17. In the *Al Amoudi* case, Ms Clutterbuck and Mr Paton as the claimants brought a claim for fraudulent misrepresentation, deceit and breach of trust against Ms Al Amoudi as defendant, arising out of various property dealings in and around Knightsbridge, Belgravia, Chelsea and Westminster in London. Ms Al Amoudi counterclaimed for the repayment of certain sums that she lent or gave to Mr Paton for safe-keeping and for the return of a number of items of jewellery and various documents that she gave to Mr Paton for safe-keeping.

18. In her thorough judgment, which followed nineteen days of evidence, Asplin J set out in considerable detail her reasons for dismissing the claimants' claim in its entirety and most of the defendant's counterclaim, allowing the counterclaim in part. She heard and assessed the credibility of numerous witnesses. She found the evidence of all three of the parties to be unsatisfactory, but found a number of other witnesses to be independent, credible and reliable or, if not entirely independent, credible and reliable due to consistency with the documentary evidence, other reliable corroborating evidence or other good reasons.

19. Asplin J handed down her judgment on 20 February 2014. On 13 March 2014 she refused the claimants' application for permission to appeal. On 5 June 2014 Lord Justice Briggs refused, on the papers, the claimants' application to the Court of Appeal for permission to appeal. The claimants applied for Briggs LJ's decision to be reconsidered at an oral hearing. The hearing was originally listed for 16 October 2014, but on 13 October 2014 the claimants sought an adjournment of the hearing to allow a new application to be made to amend the grounds of appeal and to rely upon additional evidence. The hearing was adjourned and re—listed for 24 February 2015, then, for reasons I do not need to recite, adjourned to 28 April 2015 and then subsequently to a date to be fixed in Michaelmas Term of this year. Regardless of the merits or otherwise of the appeal, I have before me a final judgment of Asplin J in relation to the *Al Amoudi* case. The fact that the Court of Appeal may at some point in the future grant permission to appeal, may hear an appeal and may grant the appeal in whole or in part (making no comment on the likelihood or timing of any of these stages being reached) has no bearing on my current task

in relation to the Defendant's application to strike out the current claim as an abuse of process.

Relevant law

20. The modern law on abuse of process is set out by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1, clarifying and bringing up—to—date what is sometimes referred to as "*Henderson v Henderson* abuse of process", referring to a famous formulation of the principle by Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100. Broadly, it concerns the raising of a claim or defence that should have been raised, if at all, in earlier proceedings, but was not, in circumstances where, considered in the round, the raising of the claim or defence in the subsequent proceedings is therefore abusive. It is distinct from res judicata in the form of cause of action estoppel or issue estoppel, where a cause of action or issue had been raised in earlier proceedings and had been decided by the court.

21. In *Johnson v Gore Wood*, Mr Johnson sued a firm of solicitors, Gore Wood & Co, who had acted for him personally in the past and also for a company he controlled, Westway Homes Limited ("WH Ltd"). In an earlier action, WH Ltd had sued the firm for professional negligence in connection with the exercise of an option to purchase land for development. That earlier action had been compromised, with WH Ltd receiving payment of a substantial proportion of the amount it had claimed. Mr Johnson then brought a personal claim against the firm arising out of the same matter. The firm applied for the second action to be set aside as an abuse of process. The trial judge declined to do so, but the Court of Appeal set aside the judge's order in that regard. On appeal by Mr Johnson and cross-appeal by the defendants on other issues, the House of Lords held that, in all the circumstances, Mr Johnson's action was not abusive and reversed the Court of Appeal in that regard. The principal judgment was given by Lord Bingham, with whom the other members agreed without further discussion in relation to the abuse of process aspect, apart from by Lord Millett, who set out his own reasoning separately. In his speech, Lord Bingham says the following at p 31A – F:

> "... *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any

> additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

22. In his speech in *Johnson v Gore Wood*, Lord Millett says the following at [2002] 2 AC 1, 59D – G:

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of a citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* 3 Hare 100 is abuse of process and observed that it 'ought only to be applied when the facts are such as amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation'. There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action."

23. In the *Aldi Stores* case, Aldi Stores Ltd ("Aldi") brought an action against WSP Group plc and WSP London Ltd (referred to together as "WSP") and Aspinwall & Co Ltd ("Aspinwall") for damages for breaches of warranty and negligence. The three defendants applied to have the claim struck out as an abuse of process on the basis of an earlier action by Aldi against Holmes Building Ltd ("Holmes"), a building contractor, arising out of the same matter, in relation to which Holmes had brought Part 20 claims against WSP and Aspinwall. In that earlier action, judgment on liability was given for Aldi against Holmes, a few weeks after Holmes had gone into administration. Aldi received interim payments of the damages due from Holmes, but was left with a substantial balance, which it attempted unsuccessfully to recover from the excess layer underwriters. In the *Aldi Stores* case, Mr Justice Jackson struck out Aldi's claim against WSP and Aspinwall as an abuse of process. The Court of Appeal reversed that decision. Lord Justice Thomas (as he then was) gave the principal judgment, with Lord Justice Wall and Lord Justice Longmore agreeing and adopting his conclusions. Although the Court of Appeal found no abuse of process by Aldi having weighed all the relevant factors in the case, Thomas LJ took the opportunity to lay down mandatory case management rules for complex commercial multi—party litigation at paras 29 – 31 of his judgment:

> "29 I also wish to add a word as to the approach that should be adopted if a similar problem arises in the future. In circumstances such as those that arose in this case, the proper course is to raise the issue with the court. Aldi did write to the court, as I have set out at para 2(xiii), but not in terms that made it clear what the court was being invited to do. WSP and Aspinwall knew of Aldi's position and were before the court on numerous occasions; they did nothing to raise it.
>
> 30 Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often, no problems arises; in this case, Aldi, WSP and Aspinwall each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. It may have seen if a way could have been found to determine the issues applicable to Aldi in a manner proportionate to the size of Aldi's claim and without the very large expenditure that would have been necessary if Aldi had to participate in the trial of the actions. It may be that the court would have said that it was for Aldi to elect whether it wished to pursue its claim in the proceedings, but if it did not, that would be the end of the matter. It might have inquired whether the action against excess underwriters could have been

> expedited. Whatever might have happened in this case is a matter of speculation.
>
> 31 However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

24. The *Aldi Stores* case was considered by the Court of Appeal the following year in *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823. Once again, the Court of Appeal reversed the decision of the trial judge that a second action arising out of the same matter was an abuse of process. Although there was some difference of approach between Lord Justice Lloyd, on the one hand, and the Master of the Rolls and Lord Justice Sedley, on the other hand, in relation to one aspect of the case, the Court of Appeal underlined the importance of the guidelines set down by Thomas LJ in para 31 of his judgment in the *Aldi Stores* case (the "*Aldi* guidelines"), with the Master of the Rolls saying the following at para 101:

> "101 I only add by way of postscript that litigants and their advisers should heed the points made by this court in the *Aldi Stores Ltd* case and underlined here that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the risk of a second action being held to be an abuse of process."

25. The Master of the Rolls was critical of the claimant's failure in that case to make it clear to Mr Linde, one of the defendants in the second action, or to the court that he realised he had a potential claim against Mr Linde for inducement to breach contract once he received Mr Linde's witness statement in October 2000. The Master of the Rolls commented at para 92: "In my opinion he should have done so and it is at least arguable that his deliberate failure not to do so for partisan tactical reasons renders this second action an abuse of process of the court."

26. More recently, the Court of Appeal applied the *Aldi* guidelines in the course of reaching its conclusion that a second action was an abuse of process in the case of *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466, [2014] PNLR 11. Lord Justice Briggs gave the principal judgment, with which Lord Justice Ryder and Lord Justice Longmore agreed.

27. In the *Gladman* case, Gladman Commercial Properties ("GCP") brought claims for damages for fraudulent and/or negligent misrepresentation against two firms of chartered surveyors, Fisher Hargreaves Proctor ("FHP") and HEB Chartered Surveyors ("HEB"), and two individuals, David Hargreaves and Jonathan Bishop, who were both chartered surveyors and at various times partners and/or directors in FHP and HEB, respectively.

28. The background was that GCP, as purchaser, had refused to complete its purchase of two sites, a disused fire station owned by the Nottinghamshire and City of Nottingham Fire Authority and adjoining land owned by the Nottingham City Council. The Fire Authority brought an action for specific performance by GCP, which GCP defended, counterclaiming against the Fire Authority and joining the Council as an additional Part 20 defendant. In its counterclaim GCP alleged that FHP, HEB and others had knowingly made false representations on behalf of the Council and the Fire Authority as to the suitability of the sites for student accommodation. This earlier action was settled on the basis of a substantial payment by the Council to GCP, described as being in satisfaction of all claims of GCP against the Fire Authority and the Council and "in full and final settlement of all and any existing or potential claims of any nature, whether or not contemplated, that the Defendant [GCP] has against the other parties". The reference to "other parties" apparently included FHP, HEB, Mr Hargreaves and Mr Bishop.

29. In its second action, GCP made similar allegations of fraudulent misrepresentation, or in the alternative negligent misrepresentation, to the allegations it had made against the Council and the Fire Authority in the first action. At first instance, Mr Justice Arnold granted the application of the four defendants to strike out the claim, for various reasons, including as an abuse of process on the basis that since the facts and matters relied on against FHP and HEB were clearly known to GCP at a time when it might properly have sought to join them to the first action, its failure to do so rendered the second claim an abuse of process under the *Aldi* guidelines.

30. Before the Court of Appeal, counsel for GCP submitted that Arnold J had erred in principle in treating the failure of GCP to follow the *Aldi* guidelines by applying for directions during the trial of the first claim as a factor to be weighed in the balance in favour of the conclusion that the second claim amounted to an abuse. Failure to observe best principles of case management could not amount to an abuse.

31. Commenting on Thomas LJ's judgment in the *Aldi* case, Briggs LJ said the following at paras 64 – 66:

> "64 ... [Thomas LJ] plainly regarded the requirement to refer a contemplated future claim for case management directions in the earlier claim as mandatory, and as serving the public interest in the efficient use of court resources. He described a failure to do so as inexcusable. Furthermore, in the *Stuart* [*v Gold Lindberg*] case, both Sedley LJ and Sir Anthony Clarke MR spelt out in express terms that a failure to follow the *Aldi* guidelines involved the claimant running a risk that the pursuit of a second claim would constitute an abuse.
>
> 65 As has been repeatedly stated, the conduct of civil proceedings is a process in which the stakeholders include not merely the parties, but also other litigants waiting for their cases

> to be tried, and the public at large, who have an interest in the efficient and economic conduct of litigation. I consider that Arnold J was correct to treat a failure by the Appellant [GCP] to follow guidelines laid down as mandatory future conduct in two successive reported decisions of this court as relevant matters pointing to a conclusion that the Second Claim constituted an abuse of the process of civil litigation.
>
> 66 The shocking consequence of permitting the Second Claim to continue would be that precisely the same issues would fall to be litigated at two successive trials involving the waste of between four and six working weeks of court time and, no doubt, millions of pounds of wasted costs and lost management time, quite apart from the double jeopardy faced by Mr Bishop and Mr Hargreaves to which I have referred. The judge's conclusion was that compliance with what were by then mandatory guidelines could have entirely avoided that wasteful duplication of time, money and effort. I agree that the failure was, as described in the *Aldi* case, inexcusable. An inexcusable failure to do something which would have contributed so substantially to the economy and efficiency with which this dispute might have been resolved seems to me to be a primary candidate for identification as abuse."

32. In the *Gladman* case, the Court of Appeal eliminated any doubt, if there had been any, that the *Aldi* guidelines are mandatory and that an inexcusable failure to comply with the *Aldi* guidelines is a relevant factor to be taken into account in the "broad, merits-based judgment" the court is required to exercise, taking account of the public and private interests involved, and all the facts of the case, to determine whether a party is abusing the process of the court by seeking to raise before the court an issue that it could have raised in prior proceedings.

33. Mr Jonathan Seitler QC for the Defendant made a number of submissions in support of the Defendant's application to strike out this claim as an abuse of process for failure to comply with the *Aldi* guidelines.

i) First, he noted the extensive overlap between the proceedings in the *Al Amoudi* case and the current proceedings. As noted in para 2 above, the Claimants' case in these proceedings consists of the Pont Street Claim, the Oriel Agreement Claim and the Cliveden Agreement Claim. The existence of the alleged unwritten joint venture agreement on which the Pont Street Claim is based was squarely before Asplin J in the *Al Amoudi* case as was the existence of the Oriel Agreement on which the Oriel Agreement Claim is based.

ii) In relation to the Cliveden Agreement Claim, although Ms Al Amoudi was not alleged to be a party to the joint venture reflected in the Cliveden Agreement, the Claimants pleaded many of the facts on

which they rely in relation to the Cliveden Agreement Claim, including what they claim is evidence of fraudulent or dishonest behaviour by Mr Nichol. They used the Cliveden Agreement in the *Al Amoudi* case to support their case in relation to the Oriel Agreement, by characterising it as an example of an oral joint venture entered into under the Oriel Agreement, retrospectively confirmed in writing. The Claimants also gave extensive evidence on the Cliveden Agreement in the *Al Amoudi* case, as did Ms Al Amoudi's witnesses, a number of whom will also be relied upon in these proceedings by the Defendant, including Mr McCormick, whom I have already mentioned, Mr Peter Misselbrook, Mr Nichol's Scottish solicitor and a former executor of his estate and Mr Francis Gonzalez, a surveyor and the project manager of the development at 9 Cliveden Place.

iii) In addition, Messrs McCormick, Misselbrook and Gonzalez were cross-examined extensively on the Cliveden Agreement. Mr McCormick, for example, was cross-examined by reference to a lever arch file of documents handed up by the Claimants during his evidence, containing the various Cliveden documents relied upon by the Claimants in these proceedings. The credibility of Mr Gonzalez was attacked during cross-examination, although his evidence was ultimately wholly accepted by Asplin J (para 158 of her judgment in the *Al Amoudi* case).

iv) As a result of this evidence on the Cliveden Place development, Asplin J considered it in her judgment even though the Claimants had not pleaded it as a joint venture to which Ms Al Amoudi was a party.

v) As part of the presentation of their case, the Claimants sought to lay groundwork for an allegation of dishonesty against Mr Nichol. For example, it was put to Mr McCormick in cross-examination that Mr Nichol "was being downright dishonest, wasn't he, putting it simply?"

vi) Given the overlap of issues, witnesses and other evidence, the Claimants should have sought directions from Asplin J in relation to their claim against the Defendant in accordance with the *Aldi* guidelines. Their failure to do so resulted in the same "shocking consequence" decried by Briggs LJ in the *Gladman* case at para 66, namely, duplication of effort, waste of resources and potential double jeopardy for witnesses.

34. Mr Seitler further submitted that the Claimants had no good reason for failing to follow the *Aldi* guidelines. The reasons proffered by the Claimants for failing to seek directions from Asplin J during the course of the litigation in the *Al Amoudi* case do not bear scrutiny. I will revert to these reasons in due course.

35. Mr Seitler submitted that the Claimants implicitly accept the Defendant's position that the *Aldi* guidelines apply to this case. For example, Ms Clutterbuck in her third witness statement dated 9 December 2014 at para 16

says that if the Claimants successfully appeal Asplin J's judgment in the *Al Amoudi* case "directions may well be given to have both this claim and a retrial of the Al Amoudi litigation combined". Mr Seitler also cited various examples of the use of evidence from the *Al Amoudi* case to support their claims in this case, including in relation to the Cliveden Agreement Claim.

36. Finally, Mr Seitler made the following submissions in support of the Defendant's application in relation to failure to follow the *Aldi* guidelines:

i) Representatives of the Estate pressed the Claimants for over two years either to drop their threatened claim or issue proceedings, for example, by letter dated 6 December 2011 from the Estate's Scottish solicitors, Tods Murray LLP, to the Claimants' then solicitors, Lorrells LLP and by letter dated 6 June 2013 from the Defendant's solicitors, Squire Sanders (UK) LLP to the Defendant's then solicitors, Keystone Law. It was only when the Defendant threatened to issue a "put up or shut up" application in the Scottish Court of Session to compel the Claimants to issue (so that, failing such issuance, the Estate could be distributed without risk to the Defendant as judicial factor) that this claim was finally issued on 4 October 2013.

ii) The original intimation of these claims against the Estate is what prompted the then executors of the Estate to seek appointment of a judicial factor in 2011. Judicial factory is an expensive process. The delay of the Claimants in commencing these proceedings has caused substantial loss and harm to the estate in the form of the expense of the judicial factory, the legal expenses incurred in responding to and seeking to resolve these claims, the delay in the distribution of the Estate to the detriment of Mr Nichol's intended beneficiaries and the potential damage to business interests developed over decades by Mr Nichol. This is highly relevant to the question of whether failure to follow the *Aldi* guidelines is excusable and, more generally, whether these proceedings are oppressive.

iii) The Claimants had ample opportunity to seek directions during the course of the litigation in the *Al Amoudi* case. The proceedings took over three years to come to trial.

iv) The Pont Street Claim and the Oriel Agreement Claim are collateral attacks on the judgment of Asplin J in the *Al Amoudi* case. This is a separate ground of the Defendant's application that these claims be struck out as an abuse, but is also relevant to the question of whether the failure to adhere to the *Aldi* guidelines was abusive.

37. Mr Stuart Cakebread on behalf of the Claimants in response to this application made a number of submissions. He began his submissions by running through eight abstract scenarios ranged along a spectrum, from, at one extreme, a matter involving the same parties, same issues and same claims (involving both issue estoppel and cause of action estoppel) and clearly therefore an abuse of process to, at the other end of the spectrum, an action by a claimant

against a defendant who was a witness in an earlier action, where the witness was cross-examined on issues not pursued against the defendant in the first action where those issues overlap in subject matter with the claims in the second action. This action, according to Mr Cakebread, falls into this eighth category, and it is highly questionable whether this last category comes within the *Aldi* guidelines.

38. Mr Cakebread also submitted that this action could fall within his seventh scenario in which a claimant brings an action against a defendant, and a witness whom that defendant is likely to call had already been cross-examined by the claimant in an earlier action on an issue that was pursued against the defendant in the first action. Mr Cakebread submitted that this did not establish that the second action was abusive, but merely that it could be within the "ambit of abuse". This action could fall within that seventh scenario due to the overlap of witnesses relating to the Pont Street Claim. Otherwise, this action did not fall within any of the other five scenarios along the spectrum, and he urged me to bear these scenarios in mind when considering the law in this case, as reflected, in particular, in the *Aldi Stores* case, the *Stuart v Goldberg Linde* case and the *Gladman* case.

39. Mr Cakebread underlined the importance, stressed by the Master of the Rolls in the *Stuart v Goldberg Linde* case at para 98, of the court considering "all the circumstances of the case, judged as at the time the second action was brought". He had a number of observations to make on differences between the factual background, for example, of the *Gladman* case and the present case.

40. Mr Cakebread also objected to the position apparently taken by Mr Seitler that the mandatory nature of the *Aldi* guidelines means that a failure to follow them, if they apply, is dispositive of the application. In the Gladman case, Briggs LJ, at para 66, said that "[a]n inexcusable failure to do something which would have contributed so substantially to the economy and efficiency with which this dispute might have been resolved seems to me to be a primary candidate for identification as an abuse." Briggs LJ would not have used those words if the failure to follow the *Aldi* guidelines were dispositive.

41. While Mr Cakebread's primary position was that the *Aldi* guidelines did not apply to the category of case in which this action falls, except perhaps as to the Pont Street Claim, if I disagreed with him on this point, his submission was that nonetheless I need to consider the merits of the Defendant's application in the round, having regard to context and the proportionality of the sanction of striking out the claim. It would be disproportionate to strike out these claims on the basis of the *Aldi* guidelines. None of the witnesses relevant to this action who gave evidence in the *Al Amoudi* case were in jeopardy in the *Al Amoudi* case or are in jeopardy in relation to this trial. This is not a case of the Claimants getting "two bites of the cherry" or rehearsing their case and their evidence against Mr Nichol in the context of the *Al Amoudi* litigation before bringing their claims in this action against the Defendant.

42. Mr Cakebread then reviewed the key elements of the case against Ms Al Amoudi, comparing those with the key elements of the case against the Defendant. The key point was that the allegations against Ms Al Amoudi were quite different. It was part of the Claimants' narrative that Mr Nichol was involved in the original introduction of Ms Al Amoudi to Mr Paton and thereby to the property dealings of the Claimants. But that is the extent of it. Ms Al Amoudi was pursued, on the Claimants' case against her, to recover monies advanced to her by the Claimants and to recover certain properties (referred to as the "Security Properties" in Asplin J's judgment in the *Al Amoudi* case, see, for example, para 10) transferred to her at an undervalue in exchange for her false promise to obtain a £46 million sharia-compliant loan to finance a property development at Hans Place in Knightsbridge. Neither of those claims were made against Mr Nichol or are made against his Estate.

43. Mr Cakebread acknowledged that the Pont Street Claim was an overlap. It was purchased, on the Claimants' case, pursuant to an oral joint venture agreement between the Claimants, Mr Nichol and Ms Al Amoudi. The property was in Ms Al Amoudi's name, not Mr Nichol's. But, Mr Cakebread submitted, there was otherwise not much of an overlap in the claims.

44. As to Mr Seitler's submissions in relation to the witnesses in the *Al Amoudi* case, Mr McCormick's evidence took no longer than the better part of a morning. The other witnesses were dealt with even more briefly. Mr McCormick was not attacked. He was asked to deal with Mr Nichol's conduct, including in relation to the Cliveden Place development, as part of the Claimants' narrative regarding the oral joint ventures agreed between Mr Paton on behalf of the Claimants, Ms Al Amoudi and Mr Nichol. It was made perfectly clear that Mr McCormick's integrity was not being impugned, nor could it be. It would be disproportionate for the court to conclude that he was a principal witness in the *Al Amoudi* case or that it would be oppressive for him to be cross-examined again in this action. There is no rule that precludes a witness giving evidence regarding certain matters in one action and then again regarding the same matters in a subsequent action.

45. Mr Cakebread submitted that the current case is therefore quite different from the *Gladman* case in the way the witnesses were treated and the matters with which the witnesses were required to deal. There was a legitimate question as to whether the Cliveden Agreement was relevant to the claim against Ms Al Amoudi, but Asplin J did not make any finding in relation to that point. This is all a long way from the *Gladman* case.

46. As to Mr Seitler's submissions on delay and on cost, Mr Cakebread submitted that it was important for the court to remember what was involved in the *Al Amoudi* litigation. There were large claims against Ms Al Amoudi that, for the most part, did not relate to Mr Nichol or the Claimants' case against him. It is true that there were questions regarding his honesty and straightforwardness, but they were part of the background and a minor element relative to the case against Ms Al Amoudi seen as a whole.

47. In the event that the court were to conclude that the *Aldi* guidelines do apply, contrary to his earlier submissions on that point, Mr Cakebread had the following submissions to make:

i) There is no identity between the Defendant in this case and the defendant in the *Al Amoudi* case. This is a relevant factor that the court must take into account in its "broad, merits-based judgment" of all the factors in this case relevant to the application.

ii) The issues between the actions only overlap to a minimal extent. There is no overlap between the actions in relation to specific joint ventures, including the Cliveden Agreement, with the exception of the joint venture forming the basis of the Pont Street Claim. With that exception, no claim was brought against Ms Al Amoudi in relation to the joint ventures alleged now against the Defendant. There is no overlap between the deceit claim against Ms Al Amoudi and the claims against the Defendant. It is important to look below the surface of each action.

iii) The Cliveden Agreement Claim could not have been brought against Ms Al Amoudi. The Cliveden Agreement Claim was mentioned as part of the background in the *Al Amoudi* case, but this claim goes far beyond what was adduced there. Furthermore, the Cliveden Agreement Claim was not in a state at the time of the trial in the *Al Amoudi* case to have been litigated, if the actions had been joined. Evidence is still emerging as to the figures involved in the Cliveden Agreement Claim. If this application is successful, the Claimants will be prevented from pursuing a legitimate claim that they are not capable of bringing against anyone else, because it lies only against the Defendant as sole empowered representative of the Estate.

iv) Most of the evidence upon which the Claimants rely in this action was not adduced in the *Al Amoudi* case and was not relevant to it. With the exception of the Pont Street Claim, Ms Al Amoudi was not involved in the matters raised in these proceedings.

v) It would have been wholly disproportionate to have adduced the bulk of the evidence in relation to the Oriel Agreement in the *Al Amoudi* case. That claim was primarily based on allegations of deceit against Ms Al Amoudi.

vi) There is no evidence that the Claimants' actions were intended to be or are abusive. The only issue is that minor witnesses in the *Al Amoudi* case, Messrs McCormick, Misselbrook and Gonzalez, may be called to give evidence. Reading their evidence in relation to this matter shows clearly that the claims against the Defendant in this action relate, for the most part, to quite different matters from those in the *Al Amoudi* case.

vii) The Defendant was informed of the intended claim against the Estate in 2011 but raised no objection to that claim being dealt with separately

from the claims against Ms Al Amoudi and made no application to the court in that regard. He was fully aware of the proceedings in the *Al Amoudi* case and appeared to have followed them closely. It would not be fair to the Claimants for the burden to be solely on them in relation to compliance with the *Aldi* guidelines.

viii) To have heard the claims against both defendants in a single action would have produced an enormously complex and unwieldy trial that would, effectively, have to have been split in two in any event. As it was, the trial in the *Al Amoudi* case lasted nearly six weeks.

ix) To strike out the claims in these proceedings because of an overlap of witnesses in another action would be contrary to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). Mr Cakebread was careful to add that he did not lay great stress on this point, as it is well—established that a claim may be struck out as an abuse of process in exceptional circumstances. He simply reminded the court of the need, against this background, of "great caution" in acceding to an application of this type.

48. In determining this application, I remind myself that I must be jealous to ensure that a genuine claim can be brought. As Lord Bingham noted in *Johnson v Gore Wood* at [2002] 2 AC 1, 22C:

> "Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court: *Yat Tung Investment Co Ltd v Dao Heng Bank* [1975] AC 581, 590 per Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425 per Lord Wilberforce, giving the advice of the Judicial Committee)."

49. Of course, Lord Bingham in the same passage at 22D goes on to say that "[t]his does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward." But it is clear from the case law that it will only be appropriate to strike out a claim on the basis of what is referred to by Lord Bingham (and others), in a passage I have quoted from above, as *Henderson v Henderson* abuse of process in a rare or exceptional case.

50. I also note that my determination of this application is not, in principle, an exercise of discretion. In the words of Lloyd LJ in *Stuart v Goldberg Linde* at para 24, "[e]ither the proceedings are an abuse of process, or they are not."

51. It is also clear that the burden of proof in making such an application is on the applicant: *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482 (CA), 1494A, per Auld LJ; *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL), 59H – 60A, per Lord Millett.

52. As Mr Cakebread highlighted when taking me through his eight scenarios, there are a variety of fact patterns that could apply to two successive actions arising out of, broadly, the same circumstances. In this case, we have an identity of claimants, but a lack of identity of defendants. It is clear, however, that for an abuse of process application to succeed, it is not necessary that the defendants in each action be the same. The *Gladman* case is a good example of this. The lack of identity of the defendants is characterised by Briggs LJ in the *Gladman* case at para 49 as a "powerful factor against finding abuse, but not a bar", citing the judgment of Thomas LJ in the *Aldi Stores* case at paras 6, 9 and 10.

53. I have closely reviewed the pleadings in the *Al Amoudi* case and, of course, in the present action. I have also reviewed evidence presented in the *Al Amoudi* case relevant to the Pont Street Claim and to the claims in this case relating to the Oriel Agreement and the Cliveden Agreement, as well as the witness statements provided by the parties in relation to the two applications referred to in para 4 above. I have also closely reviewed the judgment of Asplin J in the *Al Amoudi* case.

54. In my view, it is abundantly clear that the *Aldi* guidelines, which are mandatory, apply to this case, and that the Claimants failed to comply with them by seeking directions from Asplin J as to their claims against the Estate. I first state my reasons for this conclusion and for my conclusion that it was not an "excusable failure", if that is even possible, given Thomas LJ's statement in the *Aldi Stores* case at para 31 that "[t]here can be no excuse for failure to do so in the future". I then consider the consequences of these conclusions.

55. In relation to the Pont Street Claim, the essential facts of the Pont Street Claim were pleaded in the *Al Amoudi* case, and the evidence adduced in relation to the development at Pont Street is substantially the same. In any event, the issue of whether there was an oral joint venture agreement between the Claimants, Mr Nichol and Ms Al Amoudi was squarely before Asplin J, and she reached a clear conclusion in relation to it. There was no such joint venture. While her conclusion is the ground of the Defendant's application for the claim to be struck out as an abuse of process on the basis of an impermissible collateral attack, it is also, in my view, prima facie evidence that the *Aldi* guidelines are applicable at least to the Pont Street Claim portion of this action. In relation to the Pont Street Claim, we have (i) the same claimants, (ii) defendants in the successive actions who are alleged co-venturers, (iii) substantially the same pleaded claim and (iv) substantially the same witnesses and other evidence.

56. In relation to the Oriel Agreement Claim, the claim itself, as pleaded, in relation to the six alleged oral joint venture agreements stands or falls in my view on the existence of the Oriel Agreement. The Oriel Agreement was fully pleaded in the *Al Amoudi* case and pleaded in substantially the same terms in this case. The witnesses and other evidence intended to establish the existence

of the Oriel Agreement appear to be substantially the same. Significantly, there is a substantial overlap between:

i) the alleged oral joint venture agreements pleaded against Ms Al Amoudi in the *Al Amoudi* case, all of which were alleged to involve Mr Nichol (see para 98 of Asplin J's judgment) and none of which were found by Asplin J to exist (see paras 407 – 418 of Asplin J's judgment); and

ii) the six alleged oral joint venture agreements pleaded against the Defendant as having been entered into pursuant and governed by the Oriel Agreement.

57. The six alleged oral joint venture agreements are referred to in para 12.v) above. Of these, oral joint venture agreements entered into pursuant to the Oriel Agreement were pleaded against Ms Al Amoudi in relation to the properties at 5, 6, 6A and 7 Herbert Crescent, 24-28 Hans Crescent and 19A Basil Street, 50 Cadogan Square and 8 Walton Place, as set out in paras 24 – 26 of the Re-Re-Amended Particulars of Claim in the *Al Amoudi* case.

58. In addition, the oral joint venture agreements alleged against the Defendant in this action as arising under the Oriel Agreement in relation to 36 Drayton Court and the Cliveden Place development featured prominently in the Claimants' presentation of its case against Ms Al Amoudi. For example, the alleged joint venture relating to 36 Drayton Court is referred to over a dozen times in the Claimants' Further Information provided to Ms Al Amoudi in the *Al Amoudi* case and is mentioned by Asplin J at paras 190, 195 (in a quotation from a document), 199 and 203. The Cliveden Place development, despite not involving Ms Al Amoudi, is even more extensively referred to by Asplin J in her judgment, appearing in paras 25 – 26, 73, 79, 82 – 84, 89, 101, 103, 112, 115 – 118, 148, 157, 169, 180, 190 – 191, 226 – 227 and 414.

59. All of this is, in my view, ample evidence that the overlap of pleaded issues and evidence relating to the Oriel Agreement was sufficiently extensive that the *Aldi* guidelines were also engaged in relation to the Oriel Agreement Claim, and that this should have been clear to the Claimants and their legal advisers.

60. As to the Cliveden Agreement Claim, Mr Cakebread for the Claimants has acknowledged that the Cliveden Agreement, while not involving Ms Al Amoudi, was pleaded as part of the factual background of the claims against Ms Al Amoudi and that, as part of that, questions were asked, in particular of Mr McCormick, raising questions regarding Mr Nichol's honesty and integrity in his dealings in relation to that matter. I have already referred to the frequency of references to the Cliveden Place development in Asplin J's judgment.

61. It is beyond doubt, as I have already indicated, that the *Aldi* guidelines were engaged in relation to the Pont Street Claim and the Oriel Agreement Claim. The Claimants' presentation of their own case against Ms Al Amoudi underlines the interconnectedness of their dealings with Ms Al Amoudi and

Mr Nichol, hence the desire to add the alleged joint venture agreement in relation to 36 Drayton Court and the Cliveden Agreement to the factual matrix presented to the court in the *Al Amoudi* case. Mr Nichol was alleged by the Claimants in the *Al Amoudi* case:

i) to have introduced Ms Al Amoudi to Mr Paton at a meeting at the Lanesborough Hotel in or about November 2002 as part of the Consortium and to have represented to Mr Paton at that meeting that she was a Saudi Arabian princess (see para 63 of Asplin J's judgment);

ii) to have led the Consortium (see para 92 of Asplin J's judgment) of which, of course, Ms Al Amoudi was a prominent member; and

iii) to have been a party to every joint venture to which Ms Al Amoudi was a party.

62. In the Claimants' Further Information provided to Ms Al Amoudi, Mr Nichol is referred to extensively. To be fair, the references are primarily in response to a question put on behalf of Ms Al Amoudi as to the extent of Mr Nichol's involvement, but the answers, particularly on pp 9 – 52 of the Claimants' Further Information, amply illustrate how closely Mr Nichol's involvement is woven into the Claimants' narrative of their claims against Ms Al Amoudi. There are numerous iterations of phrases (by my rough count, at least a couple of dozen) such as "following Mr Nichol's representations", "following representations by Mr Nichol and the Defendant", "Mr Nichol and the Defendant represented" and so on, often in a context that at a minimum suggests, and sometimes makes explicit, that the representation was dishonest. While some of those references could possibly be characterised by the Claimants as innocent misrepresentation by Mr Nichol coupled with knowingly false or negligent misrepresentation by Ms Al Amoudi, the continual stress on the making of representations by Mr Nichol on behalf of Ms Al Amoudi and of joint representations with her strongly suggests that Mr Nichol was to some, if not a considerable, extent complicit in the dishonest and, indeed, deceitful behaviour alleged against Ms Al Amoudi.

63. In addition, there are clear references to dishonest or discreditable behaviour by Mr Nichol in his own right, for example, on pp 41-44 and 51, which presumably would not have been mentioned if the Claimants did not consider that behaviour relevant to their case against Ms Al Amoudi. The importance of Mr Nichol's role in relation to the *Al Amoudi* case is reflected in the number of times Mr Nichol is mentioned in Asplin J's judgment, which on a rough estimate is comfortably over two hundred times.

64. Looking at all of the various aspects that I have mentioned and considering this action in the round against the background of the *Al Amoudi* case, it seems to me inescapable that the *Aldi* guidelines apply.

65. In her third witness statement, Ms Clutterbuck dated 9 December 2014, Ms Clutterbuck gave an account of why the Claimants did not comply with the *Aldi* guidelines, but her reasons can be summarised as a combination of (i) the

pressure of events relating to their litigation against Ms Al Amoudi, (ii) representations from Brook Martin (a firm of solicitors who at various times had acted for the Claimants and the Estate, but principally acted for the Claimants in relation to their property dealings) that the Estate wished to settle their claims against it and (iii) advice from their solicitors "Follett Stock, Jeffrey Green Russell, Lorrells etc." that "proceedings against [Mr Nichol] had to be dealt with separately to [the proceedings against Ms Al Amoudi] because there were a great many matters that did not involve [Ms Al Amoudi]." None of these comes close to being an acceptable excuse not to have raised the question of their claims against Mr Nichol with the court for directions in accordance with the *Aldi* guidelines during the course of their litigation in the *Al Amoudi* case.

66. Accordingly, I have concluded that the Claimants' failure to comply with the *Aldi* guidelines is inexcusable. It therefore falls for me to consider the consequences of that failure.

67. As I have already mentioned, Mr Seitler appeared to take the view that the consequence of an inexcusable failure to comply with the *Aldi* guidelines is dispositive of the Defendant's application. In other words, having concluded that there was an inexcusable failure to comply with the guidelines in relation to these claims against Mr Nichol, I must, without more, strike out the Claimants' claims as an abuse of process.

68. I have summarised Mr Cakebread's submissions in opposition to that view, in relation to which he took me to the final sentence of para 66 of Briggs LJ's judgment in the *Gladman* case. Briggs LJ also said in para 65 of his judgment that he considered that:

> "Arnold J was correct to treat a failure by the Appellant to follow guidelines laid down as mandatory future conduct in two reported decisions of this court [the Aldi Stores case and the Stuart v Goldberg Linde case] as relevant matters pointing to a conclusion that the Second Claim constituted an abuse of process of civil litigation."

69. In my view, Briggs LJ's careful choice of words in paras 65 and 66 of his judgment indicate that an inexcusable failure to follow the *Aldi* guidelines is a heavyweight factor in the overall "broad, merits-based judgment" that the court must exercise in deciding an application of this type, but that it is not, without more, dispositive. There is, of course, some force in Mr Seitler's submission that it is hard to see what other sanction there could be for a failure to comply with the *Aldi* guidelines, given their mandatory nature.

70. An inexcusable failure to follow the *Aldi* guidelines is a heavyweight factor in favour of a finding of abuse due, among other things, to the significant public interest in the efficient and economic conduct of litigation, given the costs and other resources involved, and the importance of fairness to other court users,

in particular, other litigants waiting to have their actions heard, in respect of the allocation of scarce court resources. But, whether or not the inexcusable failure is dispositive, I find that this action, considering all the relevant factors and looking at the case in the round, is an abuse of process.

71. I have given my reasons as to why I believe that the *Aldi* guidelines were engaged in relation to each of the Pont Street Claim, Oriel Agreement Claim and the Cliveden Agreement Claim. In addition, I note the efforts of the representatives of the Estate, over a significant period, to get the Claimants either to drop or to issue their claims. I do not consider that the Defendant had an equal responsibility to seek directions from the court during the *Al Amoudi* litigation. The Estate had a natural interest in the progress of the case, but the Estate was not a party to that litigation, through the Defendant or otherwise. Furthermore, Mr Misselbrook in para 4 of his witness statement dated 27 February 2012 provided in relation to the *Al Amoudi* case raised the point that the Claimants had not sought to join the Estate to the action and discussed the interrelationship, as he understood it, between the Claimants' case against Ms Al Amoudi and the Claimants' apparent case against Mr Nichol (although he also complained of the lack of particularisation by the Claimants of the latter following the sending of their pre-action protocol letter before action). Asplin J noted Mr Misselbrook's evidence to this effect in para 78 of her judgment.

72. Mr Cakebread was at pains to stress the difference between the treatment of the witnesses in the *Gladman* case and this case, and he characterised the basis of the Defendant's application as it relates to the *Aldi* guidelines as little more than an overlap of witnesses. I have given my reasons as to why I have concluded that the *Aldi* guidelines are engaged, but I accept Mr Cakebread's submission that the treatment of Messrs McCormick, Misselbrook and Gonzalez is a long way from the treatment of, for example, Mr Bishop in the *Gladman* case.

73. It does, however, appear that Mr Gonzalez's professional integrity and competence were vigorously questioned in the *Al Amoudi* case. I consider that I am entitled to weigh in the balance the impact on him of having to give evidence on the same or similar issues in these proceedings were it to proceed to trial.

74. Moreover, it is clear that Mr Nichol's personal integrity and honesty were put into question by the way the Claimants conducted their case in relation to Ms Al Amoudi, and it would, in my view, be oppressive and harassing for those issues to be raised again in this case and for the Defendant, as the representative of his Estate, to have to address them now, especially in light of what I have said in para 71 above about the unsuccessful efforts of the representatives of the Estate to get the Claimants either to drop or bring their case against the Estate.

75. The Claimants have already had one attempt to establish the liability of a co-venturer in relation to an oral joint venture agreement that forms the basis of the Pont Street Claim that a judge of this Division has decided, after consideration of the available evidence and the hearing of full arguments, did not exist. They have also had the benefit of a rehearsal of their evidence and arguments in relation to the Oriel Agreement and the Cliveden Agreement.

76. Mr Cakebread has submitted that the Claimants have not done anything that is intentionally abusive or oppressive. Given, however, that strong overlap of issues and evidence, it is hard to resist the conclusion that the Claimants used the *Al Amoudi* litigation as an opportunity to conduct a "trial run" of their claims against Mr Nichol. It is very difficult, otherwise, to understand the relevance of the degree of detail that was introduced in that case of Mr Nichol's allegedly dishonest behaviour in relation to the Cliveden Agreement. The Court of Appeal in *Stuart v Goldberg Linde* strongly condemned that type of behaviour; see, for example, paras 88, 89 and 92, per the Master of the Rolls.

77. It is not possible to say what directions Asplin J or any other judge of this court would have given had the Claimants complied with the *Aldi* guidelines and sought directions during the course of the *Al Amoudi* litigation. Thus it is not possible to answer questions raised by Mr Cakebread as to whether the Cliveden Agreement Claim could have been litigated at the time of trial in the *Al Amoudi* case. It seems, however, that the essential elements and evidence supporting the Cliveden Agreement Claim were, for the most part known, based on the detailed consideration of the Cliveden Agreement in Asplin J's judgment in the *Al Amoudi* case, and further directions could have been given to ensure that the claim was trial-ready. The point of the *Aldi* guidelines is that the court should have been given the opportunity to manage these issues, given the interconnectedness of the two cases.

78. This last observation also deals with Mr Cakebread's submission that to have heard the claims against both defendants in a single action would have produced an enormously complex and unwieldy trial that would, effectively, have to have been split in two. That was a matter for the court, according to the Court of Appeal in the cases I have cited, and not a decision for the Claimants alone to make.

79. It is the Defendant's unchallenged case (supported by the evidence of Mr Misselbrook in his witness statement dated 1 August 2014 and of Mr Cleghorn in his witness statement dated 31 July 2014) that the then executors of the Estate, Messrs McCormick and Misselbrook, sought the appointment a judicial factor to administer the Estate solely because of the intimation by the Claimants, via a pre-action protocol letter before action from Follett Stock, the Claimants' then solicitors, indicating a claim of roughly £97.5 million against the Estate. The claim, if proven at that level, would have rendered the Estate insolvent. The executors took advice and, in order to protect their personal positions in light of the size of the claims, successfully

sought the appointment of a judicial factor, as I have already noted in para 3 above. After the Defendant's appointment as judicial factor was made permanent on 30 September 2011, Messrs McCormick and Misselbrook resigned as executors of the Estate on 18 October 2011. Both have remained involved in different capacities in the affairs of the Estate. The judicial factory is an expensive process, for example, incurring an annual premium in excess of £60,000 and the costs of the Accountant of Court, in addition to the other costs involved in administering the Estate as well as the costs to the Estate of this litigation. In his witness statement of 31 July 2014, the Defendant stated that the insurance costs alone amounted to over £225,000 as of that date.

80. According to Mr Misselbrook's evidence, which is unchallenged, the Estate has effectively been "mothballed" since 2011 as a result of the Claimants' threatened action against it. Mr Nichol's heirs have also been kept out of their inheritance for a lengthy period. The Defendant has not felt able to make any distributions pending the resolution of these matters. According to the Defendant's evidence, supported by Mr Misselbrook's evidence, that the effective management of the Estate's nursing home business has been hampered as it has not been possible to implement the strategies for the business that would have been implemented but for this litigation. While I, of course, have heard no valuation evidence as to the opportunity cost to the Estate occasioned by this threatened litigation, against the background of all the other factors I have mentioned and, of course, in particular, the failure of the Claimants to seek the directions of the court in the *Al Amoudi* case in accordance with the *Aldi* guidelines, I find that this action amounts to an unjust harassment of the Defendant.

81. In reaching my conclusion, I have not considered the prospects of success of the Pont Street Claim, Oriel Agreement Claim or Cliveden Agreement Claim. The Court of Appeal has indicated clearly that the merits of the claims in the second action are only relevant in an extreme case: *Stuart v Goldberg Linde* at para 57, per Lloyd LJ.

Collateral attack

82. In light of my conclusion in relation to Claimants' failure to comply with the *Aldi* guidelines, it is not, strictly speaking, necessary for me to deal with the collateral attack basis of the application in relation to the Pont Street Claim and the Oriel Agreement Claim. However, it may be helpful, nonetheless, if I express my views on that aspect of the application, which I will as briefly as I can.

83. The relevant law is set out succinctly in the decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL), a case that related to the Birmingham public house bombings of 21 November 1974, allegedly carried out by supporters of the Irish Republican Army. Lord Diplock gave the only judgment, with which the other members unanimously agreed. Robert Hunter, one of the six individuals convicted of murder in relation to the bombings (whose conviction was subsequently quashed as

unsafe by the Court of Appeal in 1991), had brought a civil action seeking damages for alleged assaults on him by police officers that occasioned physical injuries while he was in their custody between 22 and 25 November 1974. The respondent chief constables, who were the first and second defendants to the action, had appealed the refusal of Mr Justice Cantley to strike out Mr Hunter's statement of claim as an abuse of process. The Court of Appeal had allowed the appeal, and Mr Hunter appealed to the House of Lords, who upheld the decision of the Court of Appeal and dismissed his appeal.

84. At p 536C of the report of Lord Diplock's speech in the *Hunter* case, Lord Diplock set the scene for his subsequent discussion of the law relating to the abuse of the process:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

85. The relevant passage for present purposes appears at p 541B:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

86. The "broad, merits-based judgment" to which I have referred in the context of the *Aldi* guidelines encompasses the determination of abuse of process on the basis of a "collateral attack" of the type referred to by Lord Diplock. "Merits" in the phrase just quoted refers to the merits of the application rather than the merits of the second claim, subject to what I have said in para 81 above.

87. The Court of Appeal applied the *Hunter* case in its decision in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] Ch 1 where it had occasion to consider the circumstances in which a collateral attack would be an abuse of process notwithstanding the fact that the parties to the later civil proceedings had not been parties (or their privies) to the earlier proceedings. The Court of Appeal held that in such circumstances, a collateral attack on a judgment of the court on an issue in an earlier action would be an abuse of process if relitigation of the same issue in a subsequent action would be manifestly unfair or would bring the administration of justice into disrepute: the *Bairstow* case at para 38, per Sir Andrew Morritt V-C.

88. In my view, it is beyond question that each of the Pont Street Claim and the Oriel Agreement Claim is, in substance, a collateral attack on a decision of Asplin J. In relation to the Pont Street Claim, the only significant difference between the claims is that the defendant is different. The issues and evidence are broadly the same. Asplin J reviewed the evidence in relation to the Pont Street development in some detail at paras 136 – 159 of her judgment and concluded at para 417, not only that there was no such alleged joint venture between the Claimants, Ms Al Amoudi and Mr Nichol, but also, specifically, that there was no documentary evidence of Mr Nichol's involvement as a joint venturer. That, of course, is the very question that would have to be decided by this court in relation to the Pont Street Claim.

89. Similarly, Asplin J reviewed in some detail the evidence offered by the Claimants as to the Oriel Agreement, which, as I have already noted, was pleaded in essentially the same terms in the *Al Amoudi* case as in this action and concluded at paras 103 and 407 of her judgment that the Oriel Agreement was not entered into as alleged between the Claimants and Mr Nichol. In other words, there was no such agreement. That conclusion is reinforced by her conclusions at paras 408 – 409 and 415 – 416 of her judgment that there were, in fact, no joint ventures between the Claimants, Mr Nichol and Ms Al Amoudi.

90. To allow the Claimants to re-argue the Pont Street Claim and the existence of the Oriel Agreement on the basis of the same evidence as was or could have been before the court in the *Al Amoudi* case would, in my view, bring the administration of justice into disrepute.

91. In particular, the Claimants would be having a second opportunity to challenge the credibility of witnesses whose credibility was unsuccessfully challenged in the *Al Amoudi* case, for example, Mr Gonzalez. The Court of Appeal has made clear that the credibility of witnesses in relation to an issue should be dealt with on a single occasion: *Stuart v Goldberg Linde* at para 89, per the Master of the Rolls. For two different courts on different occasions to reach inconsistent conclusions on the credibility of a witness in relation to the same issue would bring the administration of justice into disrepute.

92. Finally, it would in my view be manifestly unfair or oppressive to allow the Claimants to bring the Pont Street Claim and the Oriel Agreement Claim, broadly for the reasons summarised in relation to my discussion of the *Aldi* guidelines basis of the application.

93. In relation to the question of collateral attack in relation to the Pont Street Claim and the Oriel Agreement Claim, Mr Cakebread, rightly in my view, broadly accepted the Defendant's case. He submitted that the conundrum that the court faced was the difficulty that would be occasioned if the Court of Appeal were to overturn Asplin J's judgment on the basis of what the Claimants maintain is new evidence of Ms Al Amoudi's fraud on the court, which would undermine the entire basis of Asplin J's judgment, upon which

the abuse of process application, of course, rests. This is why the Claimants had sought, as I have already noted, an adjournment. Mr Cakebread was, in effect, inviting me to reconsider that my ruling on that point, which I declined.

Conclusion

94. For the reasons given above, I conclude that the Pont Street Claim, the Oriel Agreement Claim and the Cliveden Agreement Claim, which constitute the entirety of the Claimants' action against the Defendant, should be struck out as an abuse of process.