

OPUS 2

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Peak Hotels and Resorts Limited v Tarek Investments Limited &
Ors

Day 1

August 20, 2015

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1 Thursday, 20 August 2015
 2 (10.30 am)
 3 Application by MR BRISBY
 4 MR BRISBY: Good morning, my Lord.
 5 May it please your Lordship. In this matter, I,
 6 together with my learned friend Mr Cook, appear for the
 7 plaintiffs, or claimants, PHRL.
 8 Mr Gatt, Queen's Counsel, a partner in Herbert Smith
 9 Freehills, appears for defendants 1 and 2 and also for
 10 the intended 5th to 7th defendants.
 11 All Mr Gatt's corporate clients are, we say,
 12 creatures controlled by the intended 6th defendant,
 13 a Mr Doronin, who is or who portrays himself as
 14 a Russian oligarch.
 15 Mr Doctor, Queen's Counsel, appears today for the
 16 3rd and 4th defendants, Sherway Limited and
 17 Mr John Eliasch.
 18 MR GATT: Before we go further, I don't appear on behalf of
 19 the 2nd defendant.
 20 MR BRISBY: I am so sorry, that is absolutely right. The
 21 second defendant is effectively the joint venture
 22 company and is a nominal defendant. I do apologise to
 23 your Lordship.
 24 Before embarking on opening the applications, can
 25 I just give your Lordship I hope some good news in

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1 relation to the emails that passed between your Lordship
 2 and myself and Mr Gatt yesterday. The matters for
 3 decision today have been quite substantially narrowed as
 4 a result of discussions between my learned friend and I,
 5 and as a result, I certainly feel comfortable that we
 6 are going to finish well within the day today.
 7 My Lord, your Lordship knows this is my application
 8 for two things. Firstly, injunctive relief against the
 9 intended 5th to 7th defendants in respect of what we
 10 have described in our skeleton argument as a stunt. The
 11 stunt was a device designed through, we say, an improper
 12 use of the remedy of foreclosure, to wrest ownership and
 13 control of an extremely valuable hotel group, the
 14 parties had bought it for in excess of \$350 million just
 15 over a year ago, from a joint venture between my
 16 client's, PHRL, and Mr Doronin's company, TIL.
 17 The aim, and if the defendants are right, possible
 18 effect of the stunt was to transfer the hotel business
 19 to another entity, however, one that was solely
 20 controlled by Mr Doronin, namely the intended 7th
 21 defendant, AH Overseas Limited.
 22 The timing of the stunt is interesting. The
 23 purported foreclosure took place on 11 August, less than
 24 three months before the commencement of the trial of
 25 these proceedings between the existing parties that

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1 would have decided once and for all who would control
 2 the Aman Hotel Group going forward.
 3 This is because one of my client's, PHRL's main
 4 claims in the action is that as a result of various
 5 serious breaches by Mr Gatt's client, TIL, of the
 6 shareholding agreement between them governing the joint
 7 venture they were entering into in respect of the Aman
 8 Hotel Group, my clients, PHRL, are now entitled to buy
 9 out TIL's shareholding in the joint venture at 80% of
 10 its actual value.
 11 We say, as your Lordship will be aware, that the
 12 obvious inference to be drawn from the timing of the
 13 stunt, particularly given -- although this was not
 14 disclosed to us until the end of July -- the fact that
 15 it appears, or it is asserted, that the relevant
 16 borrower, ARGL, went into default on the loan as long
 17 ago as February, and we say the obvious inference from
 18 all of that is that the stunt has been designed to lead
 19 to the trial date, which has been fixed for many months
 20 now to commence on 9 November, being vacated.
 21 Alternatively --
 22 MR JUSTICE WARREN: What is the trial length?
 23 MR BRISBY: Five weeks.
 24 Alternatively, to ensure so far as possible, that
 25 Mr Doronin will be entitled to retain ownership and

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1 control of the hotel group even if TIL loses at trial.
 2 My Lord, it is interesting to know that for the
 3 first time last night BLP, the solicitors instructing
 4 Dr Doctor, wrote a letter and made it clear that they
 5 are already saying that in the light of these new claims
 6 that have had to be brought as a result of the
 7 defendant's own actions, it is clear that the trial will
 8 need to be vacated.
 9 My Lord, I can hand up a copy of that letter.
 10 I don't know if your Lordship had it annexed to
 11 Mr Doctor's skeleton argument which I have just seen
 12 this morning.
 13 MR JUSTICE WARREN: If it is any help to your thinking, you
 14 will not be able to have a two-day PTR in September. It
 15 is down for a day and it is extremely unlikely that
 16 listing can provide you with a judge for two days. If
 17 the trial date does have to be vacated, you will get
 18 a new date at counsel's convenience in January 2016 or
 19 at Easter in time to finish before the end of June 2016
 20 in order that the judge can write a judgment.
 21 MR BRISBY: Well, my Lord, that is interesting.
 22 I can't remember if I handed the letter to your
 23 Lordship before.
 24 MR JUSTICE WARREN: Yes.
 25 MR BRISBY: Your Lordship just needs to look at -- just cast

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1 a glance at it. You will see they are already putting
 2 a shot across our bows, if I can put it that way, about
 3 adjourning the trial.
 4 My Lord, that brings me conveniently to the second
 5 head of relief sought by me today: directions designed
 6 to ensure that the fact we are having to bring in three
 7 new defendants so as to inter alia injunct them from
 8 disposing of the hotel group pending trial does not in
 9 fact derail the trial and lead to the vacation of the
 10 trial date.
 11 My Lord, we are not proposing directions down to
 12 trial today because we take the view that is best done
 13 at the PTR which will presumably be heard by the judge
 14 who is going to be trial judge.
 15 MR JUSTICE WARREN: The PTR?
 16 MR BRISBY: Yes.
 17 MR JUSTICE WARREN: That is extremely unlikely, because
 18 there are two judges on duty in September and it is by
 19 no means clear that either of those two judges will be
 20 available to hear the trial.
 21 MR BRISBY: Your Lordship may know more about -- it is
 22 always thought to be desirable that PTRs should be
 23 conducted by the trial judge.
 24 MR JUSTICE WARREN: Of course, but the PTRs don't normally
 25 happen in the middle of the long vacation.

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1 MR BRISBY: No. It may be that the powers that be have
 2 given thought to that and one of the two judges is the
 3 person that is presently earmarked for the trial.
 4 MR JUSTICE WARREN: I can assure you that that is not the
 5 case.
 6 MR BRISBY: Your Lordship's information is obviously --
 7 MR JUSTICE WARREN: I have spoken to Mr Bell, the listing
 8 officer, this morning, about this case. In retrospect
 9 someone should have asked for an assigned judge on this
 10 case months and months and months ago. But there is not
 11 an assigned judge, and there are just duty judges in
 12 vacation, and Mr Bell is unable at this stage to say who
 13 could possibly be the trial judge.
 14 It might be that if you apply to the Chancellor or
 15 these triage judges that we now have, you will get an
 16 assigned judge, but whether you get the assigned judge
 17 to come in on 14 September, whatever the date is, is
 18 a different issue.
 19 MR BRISBY: My Lord, I am very grateful for that
 20 information, and, my Lord, obviously everything your
 21 Lordship has said will be considered very clearly by
 22 those with me and no doubt by Mr Gatt and Mr Doctor and
 23 their respective clients.
 24 My Lord, of the directions that we are actively
 25 seeking today, there has been quite a lot of agreement.

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1 The only question that remains for decision of any
 2 substance is how long the defendant should have to put
 3 in their defence.
 4 MR JUSTICE WARREN: The last stuff I read -- Mr Gatt, thank
 5 you for your 2.00 am skeleton -- the last material
 6 I have read, and I'm sure things have moved on from
 7 then, is there was still a spat about whether the
 8 undertakings went far enough, because you were seeking
 9 injunctive relief that went considerably further.
 10 MR BRISBY: My Lord, there is still that spat. What I am
 11 going to do now, before I open the applications in
 12 somewhat more detail, is taking you to a revised version
 13 of the order which we have marked up in different
 14 colours, hopefully helpfully so your Lordship can see at
 15 a glance what is agreed and what is not agreed.
 16 My Lord, can I hand that to your Lordship.
 17 (Handed). If your Lordship could read down to
 18 paragraph 3.3 of the order, 1 and 2 being agreed.
 19 MR JUSTICE WARREN: (Pause). Yes, I have read to the end of
 20 3, is that far enough?
 21 MR BRISBY: Yes, my Lord. The debate is basically whether
 22 the defence should be produced in just over three weeks,
 23 which is by 11 September, or whether, as the defendants
 24 say, they should have 45 days. My Lord, in relation to
 25 that --

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1 MR JUSTICE WARREN: When does 45 days take us to?
 2 MR BRISBY: Well, my Lord, it takes us to a date where it is
 3 inevitable that the trial cannot continue on 9 November
 4 with these allegations being heard at that trial as
 5 opposed to at a subsequent hearing.
 6 My Lord, one thing the PTR judge may decide to do is
 7 to allow the action to proceed on --
 8 MR JUSTICE WARREN: On the existing claim.
 9 MR BRISBY: With further days in January being allocated to
 10 try this rather discrete new allegation which builds on
 11 the existing Pontwelly allegations.
 12 MR JUSTICE WARREN: Pretty unsatisfactory where there are
 13 allegations of fraud kicking around left, right and
 14 centre; do you have two bites at the witnesses or one?
 15 MR BRISBY: My Lord, that is a matter that would have to be
 16 raised at the PTR. My Lord, this is not a situation of
 17 our making. We think this has been deliberately done in
 18 order to sabotage the trial, because the defaults, if
 19 they are indeed defaults, took place in February, and
 20 yet not a hint that interest wasn't being paid on the
 21 loans until I think 26th -- some date in the last week
 22 of July.
 23 Why five months of silence? Why did the defence
 24 disclose what they were up to just as the long vacation
 25 was about to begin?

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1 But, my Lord, I am just indicating at this stage
 2 what is in essence. My Lord, although everyone keeps
 3 going on in their skeletons about a 100-page pleading,
 4 the new pleading is in fact 11.5 pages long, much of
 5 which is actually quotations from documents that they
 6 have prepared and sent, such as the default and
 7 foreclosure notices.

8 My Lord, our date of 11 September is to ensure that
 9 defences are available before the judge who is hearing
 10 the PTR, so he is in the best position to ensure that
 11 appropriate directions, moving the matter globally
 12 forward, are given. Only then will he know the precise
 13 extent of what is in issue.

14 My Lord, what is interesting is the one thing that
 15 is agreed here is how long the defendants should have to
 16 put in their evidence in opposition to the injunctions,
 17 which we will seek renewal of at the PTR.

18 And, my Lord, just looking forward, they have agreed
 19 to do that by 4 September. My Lord, if they can do
 20 their evidence by 4 September, why, one wonders, can't
 21 they do their defences by the 11th? One would imagine
 22 they have to consider what their defences are in order
 23 to file evidence in opposition to our case for the
 24 continuation of the injunctions.

25 My Lord, then could your Lordship read 4 to 6, which

1 is dealing with the ...

2 MR JUSTICE WARREN: Yes.

3 MR BRISBY: So, my Lord, looking just firstly at 5.2, there
 4 is agreement, if I can put it that way, that some
 5 protection should be given, but there is a dispute about
 6 the appropriate form of wording.

7 5.1.2 is designed to protect the position that even
 8 though AHOL is now prepared not to sell on the
 9 Silverlink shares which it acquired from Pontwelly, we
 10 say it is necessary to provide additional protection in
 11 case they try another stunt and simply sell the hotels
 12 themselves on to some purchaser, no doubt again
 13 connected with Mr Doronin.

14 My Lord, 5.1.3 is an attempt to preserve the status
 15 quo by inter alia enabling my clients' nominee director
 16 on the board of Silverlink to continue to receive
 17 information and documents he would have been entitled to
 18 receive as a director of that company had he not
 19 allegedly been removed by Pontwelly at the end of
 20 the July. My Lord, we don't accept he was validly
 21 received, but we say maintenance of the status quo,
 22 especially given the propensity of the defendants to
 23 mount stunts of the sort that we are presently
 24 continuing, requires us to have some protection.

25 My Lord, there is also an issue about whether there

1 should be fortification of the cross undertaking on
 2 damages, but no evidence has been put in by the
 3 defendants, although they have put in -- by the Tarek
 4 defendants, if I can call them that -- although they
 5 have put in some evidence to show that any loss will
 6 suffer from any of these suggested injunctions.

7 My Lord, just if your Lordship would read to the end
 8 of the order.

9 MR JUSTICE WARREN: I have done.

10 MR BRISBY: My Lord, in relation to that, it is, I believe,
 11 all agreed with two exceptions. Firstly, in relation to
 12 the filing of evidence, we don't know what the position
 13 of the 3rd and 4th defendants is and it is not dealt
 14 with in Mr Doctor's skeleton. My Lord, I assume he
 15 doesn't wish to put in any evidence because no relief is
 16 sought against him, but perhaps he could confirm that.
 17 My Lord, he does confirm that.

18 My Lord, I may have been over-optimistic in thinking
 19 that the costs of the injunction application be reserved
 20 to the PTR, that certainly is Mr Gatt's position, but
 21 I notice from his skeleton, Mr Doctor is suggesting your
 22 Lordship should make an order in respect of the costs of
 23 our original application because we sought relief
 24 against Mr Eliasch when we issued and served that on
 25 Friday, which we are no longer pursuing.

1 My Lord, we say now is not the moment to discuss
 2 that, it can be gone into in the PTR. The obvious
 3 answer to Mr Doctor's prospective application is the
 4 fact that we were only informed about the transfer of
 5 the shares in Silverlink from Pontwelly to the new shelf
 6 company, AHOL, this Monday, that is to say, after the
 7 applications had been issued and served, and accordingly
 8 we say, and I will develop this, we were deliberately
 9 led up the garden path, if I can put it that way.

10 We said accordingly -- and as your Lordship knows,
 11 we have had to produce complete new redrafts of the
 12 pleading and indeed of the relief we are seeking in
 13 order to cater with this new factual situation that we
 14 were only informed of in a letter from Herbert Smith
 15 this Monday. Your Lordship will recall the first draft
 16 of the amended statement of claim made ARGL the borrower
 17 under the Pontwelly loan and a party and sought relief
 18 in respect of the affairs of that company against inter
 19 alia Mr Eliasch as a director of that company. All that
 20 has gone by the wayside because it now transpires that
 21 for reasons that have been unexplained, at any rate
 22 unexplained in any satisfactory motion, those shares
 23 have now been moved two days after the alleged
 24 foreclosure to a new shelf company, namely AHOL,
 25 obviously and plainly controlled by Mr Doronin.

1 So, my Lord, that's what on the menu.
 2 MR JUSTICE WARREN: You have referred to one document which
 3 I don't have, which is the Doctor skeleton.
 4 MR BRISBY: I'm so sorry. I assumed --
 5 MR JUSTICE WARREN: Well, you could reasonably have assumed,
 6 but I haven't seen it.
 7 MR BRISBY: My Lord, Mr Doctor was kind enough to send this
 8 to me I think at 8.30 this morning. I don't know
 9 whether your Lordship wants to take -- it is very
 10 short -- two minutes to read it.
 11 MR JUSTICE WARREN: (Pause). Thank you.
 12 MR BRISBY: My Lord, can I deal firstly with the injunction
 13 sought. On the assumption your Lordship has had an
 14 opportunity of reading my skeleton and the affidavits,
 15 albeit not the exhibits identified in our reading
 16 list -- my Lord, I can take this quite quickly --
 17 I would like to make nine submissions in relation to the
 18 factual material which your Lordship will hopefully have
 19 read and digested.
 20 MR JUSTICE WARREN: Well, it is the "and digested" bit that
 21 is the presumption that may be incorrect, the "read" bit
 22 is correct. But not being the cleverest man in England,
 23 as the newspapers would have it, we more humble
 24 people -- I have had a lot of information to absorb in
 25 a lot of cases in the last two weeks.

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1 MR BRISBY: I do understand that.
 2 MR JUSTICE WARREN: Of course I know what this is about, but
 3 actually to get on top of this in the way that would
 4 necessary to write a proper judgment about a disputed
 5 freezing order would take a hearing of two days and
 6 probably another day to write a judgment, if not longer,
 7 which is not what you are getting, so ...
 8 MR BRISBY: Well, knowing your Lordship as I do, and your
 9 Lordship's (a) diligence and (b) intelligence, my Lord,
 10 I'm happy to deal with the factual background to the
 11 injunctions on the basis of the nine points that I think
 12 leap out of the papers, but of course on the assumption
 13 that if there is anything that doesn't ring bells with
 14 your Lordship that I'm saying, I hope your Lordship will
 15 ask me to just deal with additional points --
 16 MR JUSTICE WARREN: Okay.
 17 MR BRISBY: -- if my presentation is preceding erroneously
 18 on the assumption that your Lordship will be fully
 19 familiar with a point which I'm making, which may not be
 20 the case.
 21 My Lord, point number (1). The story starts with
 22 TIL, and through it Mr Doronin's failure to comply with
 23 their obligations, voluntarily undertaken under the
 24 shareholders' agreement, governing their joint venture
 25 with my clients, that they would assist PHRL in

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1 refinancing the Pontwelly loans.
 2 My Lord, as we explain in our skeleton, that was put
 3 into the agreement because although the parties were
 4 glad of the fact that the Pontwelly loan was made
 5 available by Mr Doronin's trust, so he says, to help
 6 finance the acquisition of the group, the interest
 7 payable on that loan was as compared with market rates
 8 of interest usurious. My Lord, it was a rate of 12% for
 9 a loan agreed in February last year.
 10 My Lord, I just pause to say that although the
 11 defendants have dealt with a number of allegations in
 12 letters from Herbert Smith, and they have put in
 13 evidence on this application, they don't deal with this
 14 complaint which is, of course, already a complaint in
 15 the existing proceedings and has been pleaded out fully.
 16 My Lord, moving on to point (2). Notwithstanding
 17 the high rate of --
 18 MR JUSTICE WARREN: In their defence, which I haven't looked
 19 at, they presumably say that that is a load of nonsense
 20 and they haven't instructed --
 21 MR BRISBY: Yes, but, my Lord, the facts speak for
 22 themselves and that is dealt with in the evidence that
 23 your Lordship will have read. They have firstly
 24 stalled -- we found financiers ready to refinance at
 25 a much lower rate. They stall that for as long as they

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1 could by insisting on non-disclosure agreements that the
 2 financiers would have to sign in order to gain access to
 3 information about the business so that they could
 4 refinance the Pontwelly loan and then when those
 5 agreements were finally executed, the confidentiality
 6 agreements, they provided in any event no information
 7 that had been sought by the finance house assisting the
 8 exercise, namely Pontwelly.
 9 And another point I can mention, again, it will ring
 10 a bell from the skeleton, hopefully, they alleged at one
 11 moment there had been no board authority given for
 12 authorising an attempt to secure finance at a better
 13 rate when, as we point out in the skeleton, the minutes
 14 of an earlier board meeting expressly authorise that
 15 that should be done with the apparent agreement of all
 16 shareholders. So that is the first point.
 17 The second point is this: notwithstanding the high
 18 rate of interest payable on the Pontwelly loan, no
 19 suggestion was ever made to PHRL or its representatives
 20 on the board of the borrower, ARGL, that ARGL might not
 21 in fact be able to discharge the interest payable such
 22 that the loan might go into default, thereby enabling
 23 Pontwelly to exercise its security rights over the
 24 shares it held in Silverlink by way of pledge.
 25 My Lord, again, that allegation has not been

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1 addressed either in the Herbert Smith letters or in the
 2 evidence that the defendants have chosen to put in.
 3 MR JUSTICE WARREN: That company is not a party to these
 4 proceedings?
 5 MR BRISBY: Sorry?
 6 MR JUSTICE WARREN: That company is not a party --
 7 MR BRISBY: The borrower, no. It is named in the draft
 8 pleading that was served on Friday, but because
 9 apparently the situation has moved on and Pontwelly has
 10 now sold the shares in Silverlink that were held by ARGL
 11 to the new company, AHOL, it is no longer necessary that
 12 ARGL be a party.
 13 MR JUSTICE WARREN: Okay. Who was the borrower under the
 14 Pontwelly loan?
 15 MR BRISBY: ARGL, which is a subsidiary of the joint venture
 16 company.
 17 MR JUSTICE WARREN: ARGL.
 18 MR BRISBY: It is the joint venture company under that ARGL,
 19 which borrowed from Pontwelly, under that Silverlink,
 20 which is the holding company for the hotel group. Does
 21 your Lordship have that?
 22 MR JUSTICE WARREN: Yes.
 23 MR BRISBY: My Lord, the third point -- the second point
 24 being that no warning was given that ARGL might be in
 25 financial difficulties because of the higher rate of

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1 interest on this loan.
 2 Third point is this: rather, the group chief
 3 executive officer, Mr Jolivet, who since his appointment
 4 in August last year has shown himself to be a stooge for
 5 Mr Doronin, Mr Jolivet circulated members of the board
 6 with projections that showed ARGL would be in a position
 7 to meet its obligations in respect of interest and,
 8 my Lord, importantly, was putting aside money for that
 9 purpose.
 10 My Lord, could your Lordship just remind your
 11 Lordship of what we say about that in paragraph 53 of
 12 our skeleton argument.
 13 Mr Cook reminds me that if your Lordship would find
 14 a corporate --
 15 MR JUSTICE WARREN: A chart, yes.
 16 MR BRISBY: -- chart -- I am not going to refer to it, but
 17 if your Lordship could just take it out of the bundle.
 18 MR JUSTICE WARREN: Where is it, remind me?
 19 MR BRISBY: It is the pleadings bundle, tab 2. It is the
 20 last page of that tab. So the page immediately before
 21 tab 3. I'm sorry, my Lord, I should have actually shown
 22 this to your Lordship.
 23 MR JUSTICE WARREN: Yes.
 24 MR BRISBY: My Lord, three up from the bottom is the company
 25 Peak Hotels and Resorts Limited. That is what I have

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1 been calling the joint venture company. Your Lordship
 2 sees it is held by PHRL and by Tarek, with Mr Eliasch's
 3 Sherway Group having lent \$50 million to PHRL on
 4 a convertible basis, which is why we say he should be in
 5 our camp, and that was indeed the basis of our joint
 6 venture with him. And below --
 7 MR JUSTICE WARREN: If we look at the top, where is
 8 Mr Doronin's family's interest?
 9 MR BRISBY: My Lord, that is not shown on this, this is just
 10 the corporate structure.
 11 MR JUSTICE WARREN: Yes, but what is he interested in?
 12 MR BRISBY: He is interested in Tarek.
 13 MR JUSTICE WARREN: He is down there, okay.
 14 MR BRISBY: He owns and controls Tarek, so in the joint
 15 venture company he has 64%, whereas PHRL, the claimant,
 16 has only 35%, but the joint venture agreement is
 17 structured in such a way that gives them equal control.
 18 MR JUSTICE WARREN: Yes.
 19 MR BRISBY: Below the joint venture company you see the
 20 company I have been calling ARGL, and that is the
 21 company that has the 168 million loan from Pontwelly,
 22 which was secured over ARGL's shareholding in Silverlink
 23 which is in turn the operating company of the group.
 24 MR JUSTICE WARREN: Yes.
 25 MR BRISBY: I should have probably started with that,

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1 my Lord, but hopefully that makes it all a bit clearer.
 2 MR JUSTICE WARREN: Yes. Am I concerned today with any of
 3 the entities above your client?
 4 MR BRISBY: No.
 5 MR JUSTICE WARREN: Or the Sherway Group Limited loan?
 6 MR BRISBY: No.
 7 Now, my Lord, could your Lordship look at
 8 paragraph -- this is in relation to my third point --
 9 could your Lordship look at paragraph 53 of our
 10 skeleton. We make the point that -- this is four lines
 11 in -- on 28 August, Mr Jolivet wrote to the directors of
 12 the joint venture company stating that the joint venture
 13 company had been dedicating portions of its cashflow to
 14 the payment of interest on the Pontwelly loan. It is
 15 apparent from spreadsheets attached to this letter that
 16 Mr Jolivet envisaged that liability for these payments
 17 would begin in February 2015 and that provision was
 18 being made to meet this expense. So, my Lord, that is
 19 all that we were being told.
 20 My Lord, that allegation has not been answered
 21 either in correspondence from Herbert Smith or in the
 22 evidence that Mr Gatt's clients have chosen to put in on
 23 this application.
 24 My Lord, the fourth point. Although we are now
 25 told -- we have no way of knowing whether this is true

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1 or not, because we have been excluded from management,
 2 that is the basic gravamen of our complaint in these
 3 proceedings -- although we are now told that no interest
 4 was apparently paid on the Pontwelly loan after it
 5 started falling due in February 2014, that fact was
 6 concealed, we say dishonestly, from PHRL and its
 7 representatives on the board of both the joint venture
 8 company and ARGL. Quite to the contrary, management and
 9 Mr Doronin made a raft of statements which were wholly
 10 inconsistent with such a statement of affairs.

11 My Lord, that is dealt with and amplified in
 12 paragraphs 61 to 64 of our skeleton argument, and we say
 13 far from alerting PHRL Carpenteria, Carpenteria is the
 14 director, to the problem whether in February
 15 or March 2015, or at any time thereafter, the JVC's
 16 management gave the impression not only that the Group
 17 was meeting all of its liabilities when they fell due,
 18 but also that it sufficient spare cash to invest in
 19 other things.

20 By way of example, on 10 April 2015, that is two
 21 months after the alleged default first happened on the
 22 Pontwelly loan, Mr Jolivet emailed the board informing
 23 it that the Aman Resorts Group had committed to and
 24 budgeted for a substantial marketing campaign which
 25 involved the company spending some \$800,000 on various

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1 branding initiatives and a new website.
 2 On 14 May 2015, that is three months after the
 3 alleged default, Mr Jolivet sent an email to the board
 4 proposing that the company acquire a further 30% share
 5 in a Bhutan joint venture company which operates
 6 Amankora -- my Lord, that is one of the hotels -- for
 7 a total sum of \$2 million. Ms Turnbull wrote to
 8 Mr Cole, who has been held out -- he is another Doronin
 9 crony, if I can put it that way.

10 MR JUSTICE WARREN: Who is Ms Turnbull?
 11 MR BRISBY: She is one of our nominee directors. She is the
 12 representative of Carpentaria on the boards of the joint
 13 venture company, ARGL, and we say Silverlink, although
 14 they say Silverlink has been removed. So she is
 15 effectively our nominee director acting for Carpentaria.

16 Ms Turnbull wrote to Mr Cole on 11 June -- that is
 17 four months after default -- raising a number of
 18 questions in respect of the proposed purchase in Bhutan
 19 and in particular asking for financial information
 20 supporting the purchase and where the investment funds
 21 are intended to come from, including an analysis of what
 22 this purchase may have on other capital projects,
 23 servicing of debt -- that is an interesting phrase, she
 24 was assuming that the Pontwelly debt was being serviced,
 25 but just wanting to check that this new capital

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1 investment wouldn't have an adverse effect on that.
 2 Renovation programmes or other projects. The reply
 3 which Ms Turnbull received from Mr Cole was mealy
 4 mouthed and was evasive about the potential impact which
 5 such expenditure would have had on the Aman Group's
 6 ability to service its debt. Again, it is inconceivable
 7 that any competent general counsel acting in good faith
 8 in the interests of the business would not have
 9 mentioned the fact that there had been an alleged breach
 10 of the Pontwelly loan agreement entitling that company
 11 to foreclose on the Group's assets.

12 Moreover -- and this is an important point -- there
 13 would have been no point in any of the current
 14 Aman Resorts group of companies acquiring a further
 15 share in the Bhutan joint venture in such circumstances,
 16 because the whole Group would, if there was a right to
 17 foreclose, go down the spout.

18 And then, my Lord, a very serious matter, which
 19 I will come back to in the context of fortification.
 20 Perhaps your Lordship could just read paragraphs 62 to
 21 64.

22 Has your Lordship read that?

23 MR JUSTICE WARREN: Yes.

24 MR BRISBY: My Lord, I just want to explain that in a bit
 25 more detail, the significance of Mr Doronin's lies here.

23

1 Your Lordship may recall we have had to get injunctions
 2 from High Court judges or deputy High Court judges in
 3 this matter on five separate occasions, and as a result
 4 of one of the hearings before Mrs Justice Rose in the
 5 long vacation last August, the defendants intimated that
 6 they would be seeking fortification of our cross
 7 undertaking in damages. In relation to that, perhaps
 8 unwisely, my clients put \$10 million into court.
 9 My Lord, what was being suggested, your Lordship will
 10 recall, is we had got various injunctions injunctioning the
 11 defendants from proceeding with purported capital calls,
 12 the purpose of which we said was to dilute our
 13 shareholding in circumstances where the company didn't
 14 need money for the business.

15 My Lord, the defendants put in a lot of evidence on
 16 this, and they identified the main risk of the lack of
 17 capital, if the capital call was injunctioned, was there
 18 would be delays to the opening of a new Aman hotel in
 19 Tokyo, that hotel being due to open at around Christmas
 20 last year.

21 My Lord, in fact, the opening went ahead, despite
 22 the fact that the capital call had been delayed by the
 23 injunctions, and in April/May this year we applied to
 24 the court to get paid back to us some of the money in
 25 court as fortification for cross undertaking damages on

24

1 the basis that it was common ground that the hotel
 2 opening, or at least we allege, had gone ahead as
 3 scheduled, and accordingly, the damage by way of delay
 4 to the opening that had been pressed upon the court in
 5 order to obtain an order for fortification, or in fact
 6 an undertaking that fortification would be provided, no
 7 longer bit and there was a change of circumstance.

8 My Lord, that application failed -- and I will come
 9 to Mr Justice Barling's judgment in due course -- inter
 10 alia, because he specifically refers to this, because of
 11 the evidence we have cited in paragraphs 62 and 63 of
 12 our skeleton.

13 Now, in this evidence, put in by Mr Doronin, four
 14 months after the alleged default, Mr Doronin was
 15 saying: look, even if the Tokyo opening went ahead as
 16 planned, there are other losses that have arisen as
 17 a result of the injunction restraining the capital
 18 calls, or the injunctions, because there were a number
 19 of them, restraining the capital calls.

20 And what he is saying is this: look, even if it
 21 wasn't needed for Tokyo, had the money come in pursuant
 22 to the capital call, it could have been used to pay down
 23 the principal on the Pontwelly loan such that the
 24 company would not be having to pay so much interest over
 25 to Pontwelly.

25

1 And if you look at the quote in 62 of the skeleton:
 2 "For instance [he says], if only \$20 million had
 3 been used to pay down the debt [that is the Pontwelly
 4 debt] then from July 2014 to March 2016, which is when
 5 I understand judgment might be expected, the interest
 6 saved would be in the region of 4.8 million."

7 And then it is said:

8 "If all of the 60 million capital called for by the
 9 board on 6 June had been used to pay down the debt then
 10 from July 2014 to March 2016 the interest saved alone
 11 would exceed 12 million."

12 And that was one of the reasons Mr Justice Barling,
 13 as we will see in due course, said we couldn't get back
 14 any of the money that had been paid into court by way of
 15 fortification.

16 Mr Doronin here is asserting that the group is
 17 suffering a loss because it is having to pay out
 18 interest and is going to have to pay out interest until
 19 2016 on the Pontwelly loan, which it could have reduced
 20 had it applied some of the capital call proceeds to
 21 paying down part of the capital on the debt.

22 He is clearly saying this is a loss that is
 23 incurring because the company is having to pay all this
 24 extra interest. He is now saying, quite contrary to
 25 that, that in fact, no interest has been paid at all

26

1 since February 2014. Now, I don't know whether the
 2 statement that no interest had been paid is a lie, I'm
 3 not in a position to say that because we have been
 4 excluded, we don't know what has been going on behind
 5 our back, but what I can and do say is a lie is the
 6 evidence that Mr Doronin put before Mr Justice Barling
 7 to justify his case that we should not get any of the
 8 money we paid in by way of fortification of our cross
 9 undertaking of damages back. My Lord, this is a most
 10 serious matter, for which there has been no explanation
 11 either in any letter from Herbert Smith or in the
 12 evidence which Herbert Smith have chosen to file on this
 13 application.

14 MR JUSTICE WARREN: He doesn't say in the passages you have
 15 quoted that anything has been paid. He says it could be
 16 a liability of the company.

17 MR BRISBY: No, my Lord, that is wrong. If you look at the
 18 last sentence of paragraph 64:

19 "The JVC has significant outstanding debt. Reducing
 20 it would have had the result of saving the company
 21 substantial sums in interest".

22 MR JUSTICE WARREN: Well, it would have, even if the
 23 interest hadn't been paid.

24 MR BRISBY: Well, my Lord, that is not how I read this.
 25 My Lord, the fact is, and you will see it in due course

27

1 when we look at Mr Justice Barling's judgment, the
 2 10 million was kept in court inter alia to compensate
 3 the defendants for losses they would suffer as a result
 4 of the company having to pay higher amounts of interest
 5 than it would otherwise do had it been able to use the
 6 capitalisation proceeds, proceeds of the capital call,
 7 to repay part of the principal.

8 My Lord, I wonder whether I can take myself slightly
 9 out of course and just give your Lordship the reference
 10 to what Mr Justice Barling did actually say. My Lord,
 11 can you take up the core bundle, volume 2, tab 29, and
 12 if your Lordship could read paragraphs 87 to 90 of the
 13 judgment. Actually, you can start at 86, my Lord,
 14 perhaps.

15 Has your Lordship read that?

16 MR JUSTICE WARREN: Yes.

17 MR BRISBY: My Lord, can I just put the converse point, why
 18 I have to be right in my interpretation of what
 19 Mr Doronin said. A much stronger point for him to have
 20 made would be this, in the context of that
 21 application: the lack of capital call monies as a result
 22 of the injunction starved ARGL of capital such that it
 23 regrettably defaulted on the Pontwelly loan in February
 24 this year and hasn't made any payments of interest since
 25 then, such that Pontwelly is able at any moment to

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1 exercise its rights and sell or foreclose the pledged
 2 assets, meaning that TIL, the shareholder, the Doronin
 3 shareholder in the joint venture company, would lose the
 4 entire value of its shareholding. That would have been
 5 a really good point to make in relation to delays on the
 6 capital call, but it wasn't made. Now, why wasn't it
 7 made?
 8 Because Mr Doronin, as part of what we now call the
 9 Pontwelly conspiracy, was keeping the alleged failure to
 10 pay interest quiet for his own purposes, and we know
 11 those own purposes now, so he could spring the purported
 12 forfeiture on PHRL during the long vacation and
 13 hopefully succeed in putting off the trial.
 14 My Lord, we can see no answer to that, and we will
 15 be very interested to hear how Mr Gatt deals with that
 16 in due course.
 17 My Lord, can I go back to my points. In fact, my
 18 last comment leads nicely on to my fourth point.
 19 My Lord, although no interest was apparently paid after
 20 it started falling due in February 2014 --
 21 MR JUSTICE WARREN: I have already got to 4.
 22 MR BRISBY: I'm sorry.
 23 MR JUSTICE WARREN: If this is 4, so -- I had started 4
 24 at --
 25 MR BRISBY: Yes, I'm so sorry. You have got 4, I'm sorry.

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1 Yes. My Lord, 5.
 2 MR JUSTICE WARREN: Yes.
 3 MR BRISBY: My Lord, given the statements that we have set
 4 out in paragraphs 61 to 64, it came as a complete
 5 surprise to PHRL to be told at the end of July that
 6 interest on the Pontwelly loan had not been serviced
 7 since February. My Lord, there is no way that PHRL
 8 could have otherwise found out that that was the case.
 9 MR JUSTICE WARREN: Since February 2014?
 10 MR BRISBY: No, 2015, I'm so sorry. The alleged default
 11 is February 2015.
 12 MR JUSTICE WARREN: In which case, there wouldn't have been
 13 default when Mr Justice Barling gave his judgment.
 14 MR BRISBY: Yes, there would. He gave his judgment in May.
 15 MR JUSTICE WARREN: July 2015, sorry, yes.
 16 MR BRISBY: Sorry, July, yes. My Lord, Pontwelly loan was
 17 at the beginning of 2014.
 18 MR JUSTICE WARREN: Yes.
 19 MR BRISBY: The interest was rolled up under its terms for
 20 the first year, and so an obligation to pay interest
 21 kicked in in February this year, and as you know, we
 22 have been told, because I took your Lordship to it as
 23 part of one of my earlier points, by Mr Jolivet, that
 24 not only was the obligations -- money was being put
 25 aside, provisioned, for paying the interest when it

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1 began to fall due.
 2 So, my Lord, point 5 is this: that it came as
 3 a surprise to us to learn for the first time in July
 4 that the interest on the loan had not been serviced and
 5 the point I was going to make allied to that is there is
 6 no way we could have found that out because our whole
 7 complaint in this matter, as your Lordship knows from
 8 the skeleton, the pleadings, is that since August last
 9 year, in 2014, we have been wholly excluded from
 10 management, even though we remain a director of various
 11 of the relevant companies.
 12 My Lord, in the pleadings your Lordship will
 13 probably notice there are a great deal of complaints
 14 about failure to provide information, that sort of
 15 thing.
 16 My Lord, that leads on to the sixth point, which is
 17 this: we say it is clear, indeed it is the only
 18 inference one can draw from the facts, that the
 19 defendants decided to engineer the default, because our
 20 evidence is that ARGL had plenty of money with which it
 21 could have paid the interest due, and then kept quiet
 22 about it for over five months -- nothing said about any
 23 default between February and late July -- so as to
 24 ensure that the planned sale or foreclosure would take
 25 place in the long vacation when it would be difficult to

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1 do anything about it and when, because of its proximity
 2 to the trial date, there was a good chance that it might
 3 lead to the trial being derailed or postponed. My Lord,
 4 again, like all my other points, this is not a point
 5 that the defendants have addressed in correspondence or
 6 in the evidence, although they have chosen to put some
 7 evidence in.
 8 My Lord, my seventh point is this: although what we
 9 have called the stunt was initially designed, as your
 10 Lordship will recall, to culminate in a sale by auction
 11 of the shares in Silverlink, there has been a change of
 12 tack, and foreclosure under various provisions of the
 13 New York unified code is now relied on.
 14 My Lord, the conditions for that are identified in
 15 paragraph 74 of our skeleton. I don't know to what
 16 extent that is fresh in your Lordship's mind. My Lord,
 17 what the defendants are saying is Pontwelly served
 18 a notice saying that it was making a proposal to acquire
 19 the shares in Silverlink, which as I have told your
 20 Lordship were purchased by the joint venture for about
 21 \$358 million, in satisfaction of the Pontwelly debt of
 22 168 million plus the unpaid interest.
 23 It is said -- this is their case -- that the company
 24 ARGL consent to that by not filing a notice of objection
 25 within the 20-day period allowed by the relevant

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1 New York code.
 2 My Lord, what we say is that the whole exercise has
 3 been conducted dishonestly and in bad faith, such that
 4 AHOL, the new holder of the Silverlink shares, having
 5 acquired them on terms that no one has told us about
 6 from Pontwelly, we say that AHOL holds them as a knowing
 7 recipient on trust for ARGL.
 8 My Lord, but leaving that point to one side, we also
 9 say what has happened is invalid under New York law.
 10 MR JUSTICE WARREN: That is a constructive trust under New
 11 York law?
 12 MR BRISBY: No -- well, both under New York law and under
 13 English law.
 14 MR JUSTICE WARREN: How does English law come into this?
 15 MR BRISBY: Well, my Lord, if you prefer BVI law, but that
 16 is the same as English law. We say there were dishonest
 17 breaches of duty by the directors of ARGL, to give an
 18 example, because they didn't call a board meeting, they
 19 didn't file an objection to the Pontwelly foreclosure
 20 notice. We, of course -- I accept our director -- that
 21 we didn't know about it. And we say this was all done
 22 dishonestly to swipe the assets of the Group from any
 23 entity in which we had an interest and to put it into an
 24 entity controlled solely by Mr Doronin.
 25 My Lord, Bryan Cave, who are a firm of lawyers to

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1 whom notices are required to be sent, say they never
 2 received such a notice. My Lord, that is Mr Dunn's
 3 eleventh witness statement, paragraphs 16 and 17.
 4 My Lord, that is the applications bundle 1, at tab 9.
 5 My Lord, overnight, the defendants have put in a witness
 6 statement from their lawyers, or their American lawyers,
 7 that is a Mr Strickon of Paul Hastings, saying that in
 8 fact Bryan Cave were sent a copy of the forfeiture
 9 notice and there is a dispute on that which your
 10 Lordship can't resolve today.
 11 But, my Lord, there are a number of oddities with
 12 what Paul Hastings are saying. If your Lordship looks
 13 at the relevant notice, and, my Lord, if your Lordship
 14 takes up the exhibits bundle, volume 3, this is the
 15 notice of the cancellation of the sale.
 16 MR JUSTICE WARREN: At page ...
 17 MR BRISBY: 1088 and 1089. Sorry, it is the forfeiture
 18 notice I want, my Lord. My Lord, you need to have that
 19 document I showed to your Lordship out, and at the same
 20 time have volume 1 of the applications bundle, tab 10.
 21 My Lord, it is the last three pages of that tab. Does
 22 your Lordship see, this is the proposal and on the last
 23 page it has the consent to acceptance.
 24 And if your Lordship looks on the second page,
 25 your Lordship sees Bryan Cave is not copied in on this

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1 proposal, and one contrasts that with the other document
 2 which your Lordship hopefully still has out.
 3 MR JUSTICE WARREN: Which one is that? Page 1088?
 4 MR BRISBY: Yes. And if your Lordship looks at 1089, your
 5 Lordship sees Bryan Cave & Co is copied in on that one.
 6 MR GATT: Mr Brisby, can I have the reference to the other
 7 document, not 1088, the other document you are comparing
 8 it to, please?
 9 MR BRISBY: Yes. The last three pages of tab 10 of volume 1
 10 of the applications bundle.
 11 So, my Lord, we say very odd. We say although there
 12 is a dispute which you can't decide, it is very odd that
 13 on their face, whereas notice of the cancellation of the
 14 sale is given to Bryan Cave, as it has to be, it isn't
 15 on its face given in respect of the forfeiture proposal
 16 we have in the other one.
 17 My Lord, all right, one has conflicting evidence
 18 from representatives of two distinguished American
 19 firms, but our version is borne out by the face of the
 20 documentation, and, my Lord, our version that we were
 21 not told about the forfeiture proposal gets some support
 22 from some intersolicitor correspondence. My Lord, this
 23 is all very important, because it is not challenged that
 24 under the code, the lender has to act in good faith in
 25 enforcing security. That is dealt with in paragraph 50

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1 of Mr Dunn's tenth witness statement and not
 2 controverted in the witness statement that came in
 3 overnight from Mr Strickon of Paul Hastings.
 4 Now, my Lord, in relation to this, having got the
 5 original sale notice, you will see what Candey & Co, my
 6 instructing solicitors did. If you take up the third
 7 volume of the -- your Lordship probably still has it --
 8 of the exhibit, because we had been looking at 1088 and
 9 1089.
 10 MR JUSTICE WARREN: Yes.
 11 MR BRISBY: And looks at 1085 and then 1084.
 12 My Lord, at the bottom of 1085 you see Candey & Co
 13 writing in on July 21 to Mr Strickon at Paul Hastings:
 14 "Dear sir, we act for PHRL. We have received
 15 a notice of default sent to Messrs Bryan Cave."
 16 That is the one talking about the sale which we have
 17 looked at:
 18 "Please kindly provide by return copies of all
 19 documents pursuant to which the notice has been sent."
 20 Mr Harvey replies, just above halfway up the page:
 21 "Our firm represents Pontwelly as administrative
 22 agent in connection with enforcing its legal rights and
 23 remedies ... inter alia the payment default by
 24 Aman Resorts and Silverlink Resorts under the loan and
 25 security agreements references in the notices you

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1 received."
 2 Candey replies, also on 21 July, at 8.50. To get
 3 that you have to turn over the page back to 1084:
 4 "Thank you. Please can you provide us with
 5 accounting documents referred to in the notice together
 6 with all your correspondence to include your client's
 7 correspondence with ARGL and/or PHRGL."
 8 Ignore PHRGL, just concentrate on ARGL. Now,
 9 my Lord, the response on 1084 is -- well, firstly there
 10 is a chaser from Mr Candey on 28th, a week later:
 11 "Dear sir, we note that we have yet to receive the
 12 accounting and other documents requested in our email
 13 dated 21 July 2015. Please kindly provide these by
 14 return. If you do not intend to provide these
 15 documents, then please confirm that that is the
 16 position."
 17 And then your Lordship will see from the email at
 18 the top of the page, Mr Strickon of Paul Hastings
 19 replies and he says:
 20 "Beyond the notice of default and of acceleration of
 21 which you privately have a copy..."
 22 Then they say:
 23 "Unfortunately beyond that, we are not in a position
 24 to provide any documents to your client."
 25 Now, my Lord, just asking rhetorically, if, as they

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1 say, they had provided a copy of the forfeiture proposal
 2 to Bryan Cave as they had the original notice of sale,
 3 why were they not prepared to provide a copy of it to
 4 Candey & Co pursuant to a request which covered, just
 5 reminding your Lordship:
 6 "Your client's correspondence, your correspondence,
 7 to include your client's correspondence with ARGL."
 8 And we say, my Lord, it is quite clear they did not
 9 want to let us know about the forfeiture proposal until
 10 the 20-day period had elapsed.
 11 My Lord, as I told you, we only learnt of the
 12 foreclosure notice in Herbert Smith's letter of
 13 13 August, which was after the expiry of the 20-day
 14 period under the New York section.
 15 So, my Lord, Paul Hastings, on Pontwelly's behalf,
 16 declined to give us a copy of this and we say we never
 17 received a copy because Bryan Cave never received
 18 a copy.
 19 But, my Lord, all that is very interesting in
 20 a sense, but even if one assumes that ARGL consented to
 21 the foreclosure because they didn't object to the
 22 proposed forfeiture within the 20-day period, it doesn't
 23 get the defendants anywhere. Pontwelly, through
 24 Mr Doronin, knew that the directors of ARGL, other than,
 25 of course, Carpentaria, who was wholly in the dark about

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1 any of this, had decided they would not dispute the
 2 notice because they were acting in bad faith, and
 3 pursuant to the Pontwelly conspiracy, and because they
 4 were effectively in breach of duty to the company of
 5 which they were directors, they were effectively
 6 assisting Pontwelly to grab the Group's only valuable
 7 assets.
 8 My Lord, eighthly we say the story doesn't stop with
 9 the purported foreclosure that took place on 11 August.
 10 Two days later, Pontwelly purportedly transferred --
 11 that is the word used in the Herbert Smith's letter --
 12 Silverlink's shares to another entity, apparently
 13 controlled by Mr Doronin. The only excuse for this is
 14 it is not unusual in New York -- that is what
 15 Mr Strickon says -- for such a thing to happen, but he
 16 doesn't explain why it is done. And we say --
 17 MR JUSTICE WARREN: The Silverlink shares transferred to
 18 AHOL by AR --
 19 MR BRISBY: No, by Pontwelly.
 20 MR JUSTICE WARREN: By Pontwelly.
 21 MR BRISBY: Having foreclosed. No explanation is given as
 22 to why this was done. We say it is obvious: to put an
 23 extra obstacle in the way of unscrambling the
 24 transaction which we seek to do by the amended pleading
 25 before your Lordship.

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1 Just a few points about AHOL to show that it is
 2 clearly an entity controlled by Mr Doronin, and that has
 3 never been denied. Firstly, my Lord, and this is in
 4 evidence, we note it has the same registered office as
 5 both TIL and Pontwelly in the BVI, and TIL is admitted
 6 to be Mr Doronin's company and although we don't accept
 7 it, Mr Doronin admits he controls Pontwelly, but he says
 8 it is actually owned by a family trust. That is
 9 inconsistent, I may say, with his own press statement,
 10 where he says effectively -- we can look at that if
 11 necessary -- he is the sole owner.
 12 My Lord, it appears that this company is a shelf
 13 company which was specifically incorporated for the
 14 purposes of the stunt in, I think, June 2015. My Lord,
 15 thirdly it is also instructing Herbert Smith as well as
 16 Mr Doronin and Pontwelly, which points strongly, we
 17 would suggest, to it being a Doronin company.
 18 Your Lordship will note from our skeleton argument
 19 that before Herbert Smith actually had instructions to
 20 act on behalf of the new company, AHOL, it was already
 21 agreeing, or already suggesting that AHOL would give
 22 undertakings. My Lord, most clearly your Lordship knows
 23 that by consent, because we have looked at the order,
 24 Mr Doronin is agreeing to procure that AHOL does not do
 25 certain things. How can he undertake to procure that if

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1 he doesn't control AHOL. So, my Lord, in the absence of
 2 any evidence to the contrary, and, my Lord, although
 3 there is evidence about the transfer to AHOL in
 4 Mr Strickon's witness statement, there is no evidence
 5 rebutting our case that AHOL is obviously a Doronin
 6 company. Your Lordship has accordingly to proceed on
 7 that basis today.

8 My Lord, in addition, and if 8(a) is the transfer of
 9 the Silverlink shares from Pontwelly to AHOL, 8(b) is
 10 what Herbert Smith are also saying about the board of
 11 Silverlink, namely that on 21 July our nominee directors
 12 were removed as directors of Silverlink. My Lord, it is
 13 said that this was done pursuant to powers in the pledge
 14 agreement over the Silverlink shares. We don't accept
 15 that. My Lord, we know from correspondence, from BLP,
 16 Sherway's solicitors, that the removal of Mr Eliasch,
 17 indeed, and Carpentaria as directors of Silverlink, took
 18 place on 21 July. But, my Lord, that was before the
 19 purported foreclosure which only took place on
 20 Herbert Smith's case on 11 August, so we say that is all
 21 very odd.

22 My Lord, we say pending the PTR, whether or not the
 23 removal is unlawful, and we say it wasn't, because under
 24 New York law we say lenders in exercising their security
 25 rights have to act in good faith, we say on Cyanamid

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1 principles pending the PTR, and we will be saying at the
 2 PTR pending trial, whatever the legality of that
 3 removal, which can't be decided now because it depends
 4 inter alia on disputed facts, Carpentaria should be
 5 treated as if it were a director and should get
 6 information and documentation to which it is entitled in
 7 that capacity and that it should be given notices of
 8 board meetings.

9 MR JUSTICE WARREN: Of Silverlink?

10 MR BRISBY: Yes. My Lord, I don't know why this is such
 11 a point of objection to the defendants, because on their
 12 case, Silverlink is a pure shell now because all the
 13 assets have been transferred from it to AHOL -- sorry,
 14 no, that is a mistake.

15 MR JUSTICE WARREN: Yes.

16 MR BRISBY: I heard gasps, and the gasps were right, for
 17 once. But, my Lord, we say maintaining the status quo
 18 means maintaining the status quo ante, as it has been
 19 throughout this litigation and in circumstances where
 20 there is clearly a triable issue about the bona fides of
 21 what has been going on here, that dictates that the
 22 status quo ante should be preserved and that the
 23 defendant should not have the benefit of the stunt they
 24 have engineered, in these circumstances which
 25 I respectfully submit are wholly extraordinary.

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1 My Lord, the ninth point is this --
 2 MR JUSTICE WARREN: Who, do you know, is the shareholder of
 3 AHOL?

4 MR BRISBY: They are just nominees, company registration
 5 people in the BVI. There is a search in evidence.
 6 I can take your Lordship to it. It doesn't tell your
 7 Lordship anything. But we infer from the full facts as
 8 I listed to your Lordship that they are clearly
 9 a Doronin company and that is certainly not denied.

10 My Lord, again, if you want, the best point is
 11 Mr Doronin agreeing to procure that AHOL does things.
 12 There are all the other points like the location of its
 13 registered office, the fact that Herbert Smith have been
 14 instructed by them, so on and so forth.

15 MR JUSTICE WARREN: Putting your side back into
 16 a directorship is not necessarily the most appropriate
 17 way of protecting your interests.

18 MR BRISBY: That is true to this extent: our complaint in
 19 the proceedings is we have been entirely excluded from
 20 all role in management and indirectly the affairs of any
 21 of the Group companies since August last year, so I do
 22 accept that. My Lord, it does seem to me that we should
 23 be entitled to information and documentation. So if
 24 documents are sent out to directors of the company, we
 25 should receive them too, to give an example. We say we

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1 have a statutory right (inaudible) to get information.
 2 In a sense, that matters less in the debate, the
 3 pleading is full of examples of endless requests for
 4 information to which we are plainly entitled, and we
 5 haven't been given it, so I suppose the point could be
 6 taken against you: well, does it really matter, they
 7 won't comply in any case.

8 My Lord, it is one thing not to comply when you are
 9 not subject to an order; it is another thing not to
 10 comply when you have been ordered to comply.

11 My Lord, the interesting thing is had we had the
 12 benefit of such an information provision order we would
 13 of course have known all about the foreclosure notice
 14 and we would have been able to call a board meeting of
 15 ARGL to authorise the filing of an objection, and if
 16 that wasn't agreed to, we would have obtained an order
 17 requiring the defendants to do so, if necessary, in
 18 a derivative or double derivative basis, but, my Lord,
 19 we couldn't do any of that because in breach of duty,
 20 the directors of ARGL, other than Carpentaria, who
 21 should have been jumping up and down to prevent the
 22 assets of the company being swiped by Pontwelly, did
 23 nothing.

24 My Lord, the ninth point is this --

25 MR JUSTICE WARREN: Give me a minute. Yes.

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1 MR BRISBY: All this comes on top of the factual situation
 2 that has required five separate judges or deputy judges
 3 of this division to grant injunctive relief against the
 4 existing defendants in respect of similar stunts, with
 5 relief being obtained twice from Miss Newman, Queen's
 6 Counsel, sitting as a deputy High Court judge, once from
 7 Mr Englehart, Queen's Counsel, sitting in the same
 8 capacity.
 9 MR JUSTICE WARREN: Barling and Rose, okay, I have got them.
 10 MR BRISBY: Rose. Not Barling, Barling was dealing with
 11 different applications, about the amount of
 12 fortification we were trying to recover. Also there was
 13 an unsuccessful application by Sherway for an interim
 14 payment in respect of its \$50 million loan. The fifth
 15 was Pelling, Judge Pelling, sorry, sitting again as
 16 a deputy High Court judge, back in September last year.
 17 MR JUSTICE WARREN: Right.
 18 MR BRISBY: My Lord, I said nine; there is a tenth point.
 19 My Lord, there is much hot air, with respect, in both my
 20 learned friends' skeletons about late service of these
 21 proceedings and about ambushes and so forth. My Lord,
 22 we say the complaints are absurd and overblown and
 23 really this is a paradigm case of the pot calling the
 24 kettle black.
 25 We say firstly, they got the notice they are

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1 entitled to under the rules. As regards Mr Gatt's
 2 eloquent complaints about changes to the relief sought
 3 and changes to the statement of claim, my Lord, although
 4 we served the application and the evidence in support
 5 and the pleading we were then seeking to rely on, and
 6 the orders we were then seeking, on Friday of last week,
 7 so they had three full days' notice as required by the
 8 rules, we only learnt of the alleged transfer of the
 9 Silverlink shareholding by Pontwelly to AHOL
 10 subsequently, on Monday this week, as a result of
 11 receiving Herbert Smith's letter of 17 August.
 12 My Lord, that did necessitate a radical rethink of
 13 both the injunctions being sought and the relief being
 14 sought, and it led, indeed, to dropping Mr Eliasch,
 15 Sherway and ARGL from the people against whom
 16 injunctions were going to be sought, dropping ARGL as
 17 a party to the proceedings, and substituting AHOL.
 18 But whose fault is it that the form of the relief
 19 sought and the form of proceedings had to be rejigged
 20 quite substantially? My Lord, given how long the
 21 defendants say they need in order to plead defences
 22 here, when they know all the facts, your Lordship might
 23 contrast the fact that we radically recast the original
 24 amendments in a period of less than two days.
 25 So, my Lord, we say we have gone as fast as we can,

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1 and your Lordship should ignore the complaints that have
 2 been made about the manner in which this has been
 3 handled on our side. True it is we didn't seek to
 4 suggest undertakings might be given in correspondence
 5 prior to issuing the application, but, my Lord, history
 6 tells us, and I refer back to the five judges who have
 7 had to grant injunctions against the defendants, that
 8 doing that only wastes time and never produces anything
 9 that is acceptable.

10 In any case, they have not agreed to give us the
 11 relief we are seeking and so, my Lord, we say that is
 12 a complaint which doesn't affect whether or not your
 13 Lordship should grant the relief we seek. Again,
 14 my Lord, I repeat briefly a point I have already made,
 15 as regards the complaints about the 100-page statement
 16 of claim which they say they have to consider, have been
 17 unable to consider properly, only 11.5 pages are new and
 18 a substantial part of the 11.5 pages consist of
 19 citations from the various notices that they drafted and
 20 sent out.

21 My Lord, can I now go back and make some brief
 22 submissions on the three injunctions we are seeking.
 23 Does your Lordship have the draft order?

24 MR JUSTICE WARREN: I don't know. Where is the most recent
 25 one to be found?

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1 MR BRISBY: It is the one I took your Lordship to --
 2 MR JUSTICE WARREN: Yes.
 3 MR BRISBY: -- with colours, trying to show what was agreed
 4 and not agreed.
 5 MR JUSTICE WARREN: I have got that.
 6 MR BRISBY: My Lord, can I first invite your Lordship to
 7 consider the not agreed injunction at 5.1.2. My Lord,
 8 two, if I can call them, oddities, about this order, or
 9 so at any rate Mr Gatt would say: firstly, we want to
 10 prevent sales of the hotels even if they are at full
 11 value. Your Lordship knows we are trying to regain, as
 12 a result of the default notices that have been served
 13 under the joint venture shareholders' agreement, we are
 14 trying to regain control of the Group in which we
 15 invested as part of the joint venture. We have a right
 16 to buy out Tarek, we say. And what we want to do is
 17 being running a hotel group, not managing a pile of
 18 cash. That is why we made the investment, because we
 19 thought there was huge potential here for improving the
 20 profitability of the company.
 21 What this injunction is likely to do is enable the
 22 companies to carry on trading normally, but not to be
 23 able to sell the hotels, which they could do by another
 24 stunt. They say this is unnecessary, because 5.1.2,
 25 says Mr Gatt, adds nothing to 5.1.1, but if they sell

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1 the hotels to another Doronin entity at full value, that
 2 would not be a breach of 5.1.1.
 3 Mr Gatt's other criticism is that the phrase
 4 "ordinary course of business and full value", which we
 5 use is unclear. With respect, he is wrong on that. The
 6 phrase is commonly used in freezing or Mareva
 7 injunctions and, my Lord, why it is a convenient phrase
 8 is because there is a substantial body of law in the
 9 section 127 of the Insolvency Act context on what is to
 10 be regarded as a transaction falling within the usual
 11 127 proviso being in the ordinary course of business and
 12 at full value.
 13 So, for instance --
 14 MR JUSTICE WARREN: But the usual form of a freezing order
 15 doesn't have "and for full value in disposals in the
 16 ordinary course of business", does it?
 17 MR BRISBY: I thought it did, but maybe I'm conflating -- we
 18 have all had not that much time -- certainly "for full
 19 value" you would see in a 127 order. So, my Lord, it is
 20 designed to be a helpful phrase, because there is
 21 authority which assists in interpreting what is meant.
 22 MR JUSTICE WARREN: Well, I have made dozens of freezing
 23 orders and I don't think I have ever included the word
 24 "and for full value" in the exception for ordinary
 25 course of business, but if you get the bits about the

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1 hotels, that is enough for you.
 2 MR BRISBY: Yes.
 3 MR JUSTICE WARREN: There is not much else that can be
 4 disposed of at an under value.
 5 MR BRISBY: No, that may be right, my Lord. Can I just say
 6 this: My Lord, we can't understand why they won't agree
 7 to give this, unless they are planning another stunt.
 8 One would have thought that there is no chance of them
 9 selling either the hotel group or even one of the hotels
 10 if no sale already is in prospect and there is no
 11 evidence that one is, before the PTR. My Lord, the
 12 evidence is quite the contrary, but I will come on to
 13 that when I deal with the fortification.
 14 Mr Doronin has been putting out statements saying
 15 business as usual, and so, my Lord, he can't be thinking
 16 about disposing of the hotel group.
 17 Can I move on to the second injunction. My Lord,
 18 I have really already dealt with that.
 19 MR JUSTICE WARREN: There is a curiosity that if your claim
 20 is completely wrong and you fail, Mr Doronin doesn't
 21 appear to be fighting it in order that he can realise
 22 a capital asset, he seems to be doing it because he
 23 wants to run a hotel business.
 24 MR BRISBY: Yes, indeed. My Lord, that is exactly my point.
 25 Why won't they give this, unless they are planning

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1 a stunt, to make it more and more difficult for us to
 2 unscramble the transaction, because Mr Doronin has made
 3 it abundantly clear that he wants to run this Group.
 4 MR JUSTICE WARREN: Okay, that is 5.1.2.
 5 MR BRISBY: Yes. And then finally 5.1.3. My Lord, I have
 6 already made my points on maintaining the status quo and
 7 in a nutshell what we say is maintaining the status quo
 8 means maintaining the status quo ante until the legality
 9 of the foreclosure and purported sale of the assets and
 10 removal of Carpentaria as a director of Silverlink can
 11 be properly gone into.
 12 MR JUSTICE WARREN: What does "acting as a de facto director
 13 of Silverlink" mean?
 14 MR BRISBY: Well, it means -- it is not very elegantly put,
 15 but I couldn't do better in the time available. What it
 16 is designed to do, so there is no mystery about it, if
 17 they are saying we are not a director, it will be said
 18 an injunction restraining us from acting as a director
 19 won't bite on anything. So what I'm trying to say is
 20 without prejudice to whether or not we are in truth
 21 a director, they should treat us as one and not exclude
 22 us, pending the return date.
 23 No doubt it can be put more succinctly and more
 24 elegantly, but that is what we are talking about.
 25 MR JUSTICE WARREN: It is pretty unsatisfactory -- I can see

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1 that you could be provided with information as if you
 2 were a director.
 3 MR BRISBY: Yes, that is part of it, that is --
 4 MR JUSTICE WARREN: If it is suggested that you are going to
 5 have a vote as though you were a director, then the
 6 injunctive relief you ought to be seeking is that they
 7 take steps to reinstate you as a director, if you are
 8 not one. It is deeply unsatisfactory to have people
 9 acting as directors, certainly pursuant to an order of
 10 the court, when they are not in fact directors.
 11 MR BRISBY: The trouble is the court can't decide that
 12 question now, because that depends on -- my Lord,
 13 I think what it comes down to --
 14 MR JUSTICE WARREN: I have jurisdiction, do I not, to make
 15 an order that you be reinstated as directors, if you are
 16 not already directors.
 17 MR BRISBY: Yes, your Lordship could do that.
 18 MR JUSTICE WARREN: Not that I would, but --
 19 MR BRISBY: No --
 20 MR JUSTICE WARREN: What I am saying is that I would be
 21 reluctant to accede to what you want, unless I was
 22 prepared to do what I have suggested.
 23 MR BRISBY: Yes. But a halfway house, if I can put it that
 24 way, could simply require for them to answer requests
 25 for information and documents. One would have thought

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1 they would have to do that in any case because of
 2 obligations of disclosure, but in addition, to give us
 3 notice, the same notice we are entitled to under the
 4 shareholders' agreements of any meetings being proposed,
 5 because then I suppose we would be in a position to get
 6 a further injunction.
 7 My Lord, what we say they cannot do is exclude us
 8 totally from the loop on the basis of this coup or stunt
 9 which we say is plainly illegal.
 10 My Lord, I don't know the extent to which the
 11 defendants would obey such an order in any case, because
 12 they have not respected our statutory rights of
 13 inspection of documents and so on and so forth, hence
 14 all the parts of the pleading that deal with those
 15 allegations. But there it is, my Lord, that is what we
 16 seek.
 17 MR JUSTICE WARREN: I am prepared to give anyone the benefit
 18 of the doubt today that they will obey a court order.
 19 MR BRISBY: Yes. My Lord, then it is of worth and that is
 20 why we seek it.
 21 My Lord, finally, 5.2. Now, my Lord, your Lordship
 22 needs to contrast what we are seeking with what they are
 23 seeking. My Lord, so far as I can understand, but no
 24 doubt Mr Gatt will in due course correct me if I am
 25 wrong, the only real difference between our versions

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1 arises on whether Mr Doronin has to amend his website to
 2 delete the reference saying he is in sole control.
 3 My Lord, we say, oddly, that even if the court accepted
 4 my learned friend's wording, he would be in breach of
 5 his own proffered undertaking if he didn't remove the
 6 offending words from the website, because we would say
 7 that without more, every time someone accesses the
 8 website, at that moment, Mr Doronin is through the
 9 website making a further public statement about his
 10 ownership and control of the Group. So when you click
 11 on the button and you read what he says, he is making
 12 a statement. So --
 13 MR JUSTICE WARREN: That is easy to deal with. I need to
 14 know how far the undertaking which he has proffered
 15 goes. If it goes as far as you say then there is no
 16 difference, if it is meant to say something else, it
 17 ought to be amended so that we know what the undertaking
 18 means.
 19 What is the answer to that, Mr Gatt?
 20 MR GATT: The answer to that, my Lord, is it is a further
 21 public statement and that is intended to leave -- and
 22 when we were discussing it last night, it was on the
 23 basis it is staying up there and not coming down there.
 24 That is the point of difference between us.
 25 MR BRISBY: My Lord, I think for everyone's sake, if your

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1 Lordship thinks that is the right thing to do, there
 2 should be a proviso saying provided always it shall not
 3 be a breach of this undertaking if he --
 4 MR JUSTICE WARREN: Yes, it should be made clear one way or
 5 the other.
 6 MR BRISBY: Yes, that is the real point I'm making. Can
 7 I just briefly say, firstly, it is the easiest thing to
 8 say in the world, just to delete or amend the offending
 9 passage, which we have set out in the skeleton argument.
 10 My Lord, it is not right that our position should be
 11 prejudiced by him continuing to be able to make
 12 statements which we say are inaccurate.
 13 MR JUSTICE WARREN: He could be hardly be restrained from
 14 claiming that he was the owner, as long as he made clear
 15 that there was a dispute.
 16 MR BRISBY: Yes, that might be a way of skinning the cat, if
 17 I can put it that way. If there was a proviso saying it
 18 shall not be a breach of this undertaking if he amends
 19 what is currently on the website to make it clear that
 20 although that is his position, this is a matter that is
 21 hotly disputed and will be decided at a trial in these
 22 proceedings.
 23 My Lord, I wouldn't have any objection to that.
 24 That would be uncontroversial, so, my Lord, I would be
 25 happy to -- I don't know whether my learned friend would

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1 accept that, but I would be happy with that. And
 2 disclosing the proceedings, my Lord, can hardly be
 3 a matter of much objection, because there have been
 4 a large number of articles in the press about this
 5 dispute. Mr Doronin has put out a large number of press
 6 releases, some of them highly inaccurate. No doubt
 7 he would say my client has done the same.
 8 Yes, it is pointed out, a further amendment, I'm
 9 afraid, that we would suggest, in (i):
 10 "From holding out Mr Doronin ..."
 11 And we would want to add "Pontwelly and/or AHOL",
 12 because otherwise both forms of undertaking could be
 13 side-stepped by referring to the fact that AHOL, which
 14 could be said to be a company, in alignment with
 15 Mr Doronin's interests.
 16 MR JUSTICE WARREN: What do you want to change, where?
 17 MR BRISBY: Just in (i). 5.2(i).
 18 MR JUSTICE WARREN: Oh yes, okay.
 19 MR BRISBY: That:
 20 "Mr Doronin, Pontwelly and/or AHOL".
 21 So, my Lord, finally, fortification.
 22 MR JUSTICE WARREN: You say finally, we haven't dealt with
 23 the timing yet.
 24 MR BRISBY: My Lord, I was going to deal with the
 25 injunctions first.

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1 MR JUSTICE WARREN: I see, yes, okay.
 2 MR BRISBY: On timing, it is only the question of timing for
 3 the service of the defence, so I imagined your Lordship
 4 would --
 5 MR JUSTICE WARREN: "Only" is a short but very big word.
 6 MR BRISBY: Well, comparatively short. I am in your
 7 Lordship's hands. I had assumed your Lordship would
 8 want to hear --
 9 MR JUSTICE WARREN: Yes, I will hear you on fortification,
 10 but I want you to talk about timing before you sit down.
 11 MR BRISBY: As well. Yes, okay, well, I will do that last,
 12 then.
 13 MR JUSTICE WARREN: Fortification.
 14 MR BRISBY: Yes. Can your Lordship remind yourself of what
 15 is said in paragraphs 100 to 102.
 16 MR JUSTICE WARREN: Yes.
 17 MR BRISBY: Now, my Lord, the first point to make is the
 18 obvious one. The orders we seek are only being sought
 19 until the PTR. It is principally, one would imagine,
 20 loss arising from the orders we seek in 5.1.1 and 5.1.2
 21 that will be engaged here. My Lord, we say what losses
 22 could these injunctions cause. But, my Lord, although
 23 they have put in evidence on this application, the
 24 Herbert Smith defendants don't deal with the potential
 25 loss they say might be sustained as a result of these

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1 injunctions.
 2 My Lord, there is no suggestion, I have already made
 3 this point, that either AHOL or Mr Doronin wants to sell
 4 the shares in Silverlink or indeed in any of the
 5 undertaking hotels, but if they do want to do so, we
 6 have included a liberty to apply specifically for this
 7 purpose, because, my Lord, the words at the end "save
 8 with PHRL's consent or the leave of the court" govern
 9 all the three injunctions.
 10 My Lord, quite the contrary, and as I mentioned
 11 a moment ago, the defendants are saying to the whole
 12 world that as far as this group is concerned, it is
 13 business as usual. My Lord, in that regard could your
 14 Lordship look at paragraphs 71 and 72 of our skeleton
 15 argument.
 16 MR JUSTICE WARREN: Yes, I have reminded myself of that.
 17 Mr Brisby, okay?
 18 MR BRISBY: Yes, indeed. So, my Lord, business as usual.
 19 No suggestion in evidence or correspondence or elsewhere
 20 that there is any intention to sell any of the hotels or
 21 the shares in Silverlink, and, my Lord, we say it is
 22 fanciful to think that any genuine sale as opposed to
 23 yet another stunt, of either the Silverlink shares or
 24 any of the hotels could be accomplished by the time of
 25 the PTR absent an injunction.

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1 My Lord, the sale of Silverlink to the joint venture
 2 company took months to negotiate. These are complicated
 3 matters. Due diligence even in relation to one hotel
 4 would take a lot of time. This is just fanciful, we
 5 say.
 6 My Lord, the authorities establish the defendants
 7 must make out their case on loss if they want
 8 fortification. Here there is nothing. My Lord, if your
 9 Lordship looks to our skeleton bundle tab 11, there is
 10 the most recent authority on the subject.
 11 MR JUSTICE WARREN: What was the bundle called?
 12 MR BRISBY: The one with my skeleton argument in.
 13 MR JUSTICE WARREN: Oh, the one with your skeleton argument,
 14 yes. Tab 11. Energy Venture Partners.
 15 MR BRISBY: Yes, if your Lordship could read the headnote
 16 and then paragraph 13.
 17 MR JUSTICE WARREN: Paragraph 13?
 18 MR BRISBY: Yes. Of the judgment. It is a judgment of the
 19 court -- the judgment of Lord Justice Tomlinson in which
 20 the two other Lord Justices concurred.
 21 MR JUSTICE WARREN: Yes.
 22 MR BRISBY: Now, my Lord, picking up what is said in the
 23 Court of Appeal here, of course in some cases it will be
 24 perfectly obvious what the loss that will be suffered
 25 will be, and will be substantial in the case of an

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1 application for interlocutory judgment, but here we say
 2 it is not at all clear that any loss will be suffered
 3 given what the defendants themselves have said in the
 4 press releases, and given there is no evidence
 5 suggesting particular losses that aren't obvious.
 6 My Lord, the authorities establish the defendant
 7 must make out a case on the reality and what the
 8 authorities call a sufficient level of risk that there
 9 will be loss, and here there is nothing.
 10 My Lord, we know from Mr Gatt's skeleton that the
 11 sum sought by way of fortification is \$10 million. We
 12 say that is a ludicrous figure. It is simply plucked
 13 out of the air with no attempt to justify it, and no
 14 doubt it is chosen because the defendants think,
 15 probably rightly, that my clients would have difficulty
 16 in putting up such a sum in addition to the 10 million
 17 that is already in court by way of fortification.
 18 Now, in relation to that, we say they do have an
 19 element of fortification because it is now clear that
 20 part of the 10 million in court is available to cover
 21 these further injunctions in addition to the ones for
 22 which it was granted, because contrary to the impression
 23 Mr Justice Barling gained in his July judgment as
 24 a result of Mr Doronin's, we say highly misleading
 25 evidence, the losses won't -- for which the existing

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1 10 million stands, won't include losses suffered by the
 2 defendants as a result of AHOL paying some 4.8 million
 3 in extra interest which it shouldn't have paid because
 4 no such interest has been paid.
 5 So, my Lord, that being the case -- and your
 6 Lordship has all the references earlier to the judgment
 7 and to the bits in my skeleton where I deal with what
 8 Mr Doronin said, so I will not give them again, unless
 9 your Lordship wants them -- so, my Lord, we say if your
 10 Lordship thinks any fortification is required, my Lord,
 11 we wouldn't have a problem with an order that is saying
 12 the 10 million can also stand as security for these
 13 further injunctions as well as the existing ones.
 14 My Lord, can I finally deal with a timing point.
 15 My Lord, there was also the question of cost. Does your
 16 Lordship want me to deal with that? Mr Doctor's
 17 submission that the costs of the original application
 18 which did seek relief against Sherway and Eliasch should
 19 be paid by me now?
 20 MR JUSTICE WARREN: Well, you can do that in reply.
 21 MR BRISBY: Yes.
 22 MR JUSTICE WARREN: So just timing.
 23 MR BRISBY: Yes, that is the only thing left, my Lord. The
 24 debate here is defences by 11 September, which is what
 25 we say, or alternatively within 45 days after service of

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1 the particulars claim, which is what the Herbert Smith
 2 defendants say. I don't think Mr Doctor has committed
 3 himself to how long he wants, but at any rate, I will
 4 treat the 45 days, unless stopped, as what all
 5 defendants want, because even Mr Doctor says he can do
 6 with less, I accept that the train, as Mr Gatt put it to
 7 me in conversation yesterday, moves at the speed of the
 8 slowest coach.
 9 So, my Lord, we say there is no reason whatsoever
 10 why defences cannot be produced by 11 September.
 11 Firstly, we are only talking about 11.5 pages of new
 12 pleading. I have already made the point that a good
 13 part of that is citations from documents they have
 14 drafted. We are dealing with big firms of solicitors
 15 who have been involved in this matter for a very
 16 substantial period of time, well over a year, both for
 17 Herbert Smith and BLP. They are large counsel teams
 18 involved.
 19 MR JUSTICE WARREN: I don't know that. All I know is that
 20 Mr Howard and his junior are on holiday.
 21 MR BRISBY: Yes.
 22 MR JUSTICE WARREN: Is anybody else involved?
 23 MR BRISBY: Yes, Mr Brindle and I think two juniors.
 24 MR GATT: That is not for my team.
 25 MR JUSTICE WARREN: I'm talking about the HSF defendants.

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1 MR BRISBY: There is a silk and two juniors.
 2 MR JUSTICE WARREN: Not Mr Gatt.
 3 MR GATT: No, Mr Gatt is not available.
 4 MR BRISBY: My Lord, unless Mr Gatt is saying one of the
 5 juniors who has appeared before has fallen off the
 6 team --
 7 MR GATT: He is not on the team. There is Mr Caplan who is
 8 the junior and Mr Howard as the leader.
 9 MR BRISBY: What about Mr Eschwege?
 10 MR GATT: He covered -- the voice behind me says he covered
 11 when Mr Caplan was away.
 12 MR BRISBY: Well, maybe he can still cover. He is well
 13 aware of the matters involved and did, as far as I can
 14 recall, the Mr Justice Barling hearing.
 15 My Lord, and on the other side there is Mr Brindle,
 16 and again, a junior -- two juniors, sorry.
 17 MR JUSTICE WARREN: Who are they for? Mr Doctor's clients
 18 as well? Who is the Brindle team for?
 19 MR DOCTOR: My Lord, I understand, well, it is, it is
 20 Mr Brindle and Mr Sinclair, I'm not sure who the second
 21 junior is, but I shall find out.
 22 MR JUSTICE WARREN: For your client?
 23 MR DOCTOR: Yes, my Lord.
 24 MR JUSTICE WARREN: You are brief holding --
 25 MR DOCTOR: I am indeed, yes. Mr Brindle is away on holiday

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1 until the 28th and then goes straight to Singapore;
 2 Mr Sinclair is back next week.
 3 MR BRISBY: My Lord, I am told for the first time that
 4 Mr Zellick, who was the second junior on the BLP team is
 5 no longer involved. My Lord, what is interesting is
 6 there seems to be an ability to, as one would expect
 7 with large and distinguished and powerful firms like
 8 Herbert Smith and BLP, to get extra members on the team
 9 when it suits them, but equally to shed them when it is
 10 not necessary for their purposes that matters need to be
 11 addressed very -- Mr Zellick has turned up at a number
 12 of hearings, to the best of my recollection, and I am
 13 surprised to learn that apparently he no longer is on
 14 the team.
 15 Now, my Lord, we have produced two versions of the
 16 particulars of claim, radically different, in August, in
 17 a period of three weeks. The second, which involved
 18 a complete re-write because of what we learnt this
 19 Monday about the transfer of Silverlink to AHOL, was
 20 effected in two days. We are allowing them three weeks,
 21 which is only one week less than the CPR which provides
 22 for 28 days, and, of course, the usual situation where
 23 a defendant is served with proceedings is that he has to
 24 find solicitors that he will act for him, instruct them,
 25 get together all the documents, and it is a much bigger

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1 task. Here, the defendants have teams that are up and
 2 running. The new allegations build on what already is
 3 squarely in the pleadings, because as I told your
 4 Lordship and as our skeleton points out, there have been
 5 allegations about Pontwelly and Tarek's failure to
 6 fulfil their contractual obligations in the
 7 shareholders' agreement, to assist in its refinancing,
 8 since the statement of claim was first served. So it is
 9 not coming to this completely out of the blue. There is
 10 already a substantial pleading involving complaints
 11 about what Mr Doronin and Tarek have been up to with
 12 regard to Pontwelly.

13 My Lord, obviously, in relation to the new claims,
 14 the defendants know the relevant facts much better than
 15 we do. This is all something they cooked up, we say,
 16 behind closed doors. So, my Lord, we really think that
 17 given the pressures with the oncoming trial date,
 18 abridging the time fixed by the rules by one week is
 19 entirely proportionate. My Lord, we say it has the
 20 advantage that the judge considering the matters in the
 21 round at the PTR will be able to make the right decision
 22 about whether the trial should go ahead or whether it
 23 should be adjourned or whether some part of it should be
 24 adjourned, knowing precisely what the issues are on the
 25 new allegations, in the 11.5 pages.

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1 MR JUSTICE WARREN: Can I just ask you this -- you can only
 2 ask for yourself, but I am asking everyone, you are
 3 going to be at the PTR, are you, yourself?
 4 MR BRISBY: Yes.
 5 MR JUSTICE WARREN: With your junior?
 6 MR BRISBY: Yes.
 7 MR JUSTICE WARREN: Who will be conducting the PTR at the
 8 hearing on behalf of the HSF defendants?
 9 MR GATT: May I just take instructions, my Lord?
 10 MR BRISBY: My Lord, I believe it is Mr Howard and
 11 Mr Brindle, with their juniors, because it was
 12 incredibly difficult to fix the PTR because of people's
 13 commitments, so I think I can say that --
 14 MR JUSTICE WARREN: Fairly safely.
 15 MR BRISBY: -- fairly safely.
 16 MR JUSTICE WARREN: Okay.
 17 MR BRISBY: In fact, that shouldn't be a surprising
 18 conclusion, because my understanding is, absent
 19 exceptional circumstances, counsel who are conducting
 20 the case should always attend the PTR. I seem to
 21 remember that that is stated in the practice directions
 22 somewhere.
 23 MR JUSTICE WARREN: Yes, I think that is right.
 24 MR BRISBY: I can't point to --
 25 MR JUSTICE WARREN: Whether it is or not, it is obviously

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1 desirable.

2 MR BRISBY: Yes, indeed. My Lord, what I can say is it was
 3 incredibly difficult to fix this PTR and the reason was,
 4 as I understand it, is that everyone wanted their full
 5 teams available.

6 My Lord, I don't know if you have noticed in the BLP
 7 letter I handed up, that it is said that Mr Eliasch is
 8 much too busy attending, principally a tennis tournament
 9 in the US, to attend to give instructions to the
 10 defence. If that is the US Open -- apparently next week
 11 he is quite busy, he is meeting some minister. My Lord,
 12 frankly --

13 MR JUSTICE WARREN: In what country?

14 MR BRISBY: In Sweden, the minister and the US Open is in
 15 the US.

16 MR JUSTICE WARREN: Yes, Swedish minister. Perhaps he is
 17 meeting the Swedish minister at the US Open.

18 MR BRISBY: I think not. I think a fair reading of the
 19 letter is the Swedish minister is next week and the
 20 US Open is the following three weeks.

21 MR JUSTICE WARREN: Are these business commitments?

22 MR BRISBY: So he says. Not so clear maybe about the
 23 minister, but the Open is.

24 My Lord, perhaps your Lordship ought to read what is
 25 said about that. Has your Lordship got that letter to

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1 hand?

2 MR JUSTICE WARREN: Yes. It is in the first big paragraph.

3 MR BRISBY: Yes. My Lord, just looking at what is said
 4 about the US Open. The one thing -- can I say
 5 this: Head is not a sponsor of US Open, I have checked
 6 that on the internet; it is IBM for that matter. No
 7 doubt Mr Eliasch will be hosting parties, that is
 8 entirely plausible, and arranging meetings, but the one
 9 thing one would have thought one could guarantee is the
 10 meetings and the parties will not be taking place when
 11 the tennis is being played, because people will be
 12 wanting to watch the tennis and my Lord, we say it is
 13 extraordinary that it can seriously be suggested that
 14 because of these commitments, and they are expressed in
 15 the vaguest possible terms, he has no time to give
 16 instructions by telephone, for instance, and/or by email
 17 in relation to 11.5 pages of defence.

18 My Lord, we say he has chosen to align himself with
 19 Tarek and Mr Doronin to help engineer the situation
 20 where there has been this alleged default, to sit quiet
 21 about the alleged default for five months, and then to
 22 embark upon what we have called the stunt, immediately
 23 before the long vacation, and we have had to work jolly
 24 hard in order to try and prevent that all derailing the
 25 trial and everything, and we say it is not unreasonable,

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1 so we suggest, to require Mr Eliasch to devote some time
 2 to putting in his case on a matter which is urgent.
 3 And so, my Lord, we say that three weeks, given we
 4 have got up and running teams, given we have got major
 5 firms of solicitors, given we have got extremely rich
 6 defendants who can hire additional counsel if they need
 7 to assist in this task, and there are a number of people
 8 who apparently are no longer on the team but who have
 9 substantial background knowledge that could be resorted
 10 to, we say three weeks is, in an imperfect world, the
 11 only sensible way forward because unless the judge
 12 hearing the PTR knows in essence what is in dispute in
 13 relation to the new allegations, he will not be in
 14 a position to make the right decision about timetabling
 15 matters going forward, and so, my Lord, I think really
 16 that is all I need to say on that.
 17 MR JUSTICE WARREN: Okay. Thank you.
 18 MR BRISBY: And I keep saying 21 days, but it is 21 days and
 19 one day, 22 days, because we are Thursday.
 20 MR JUSTICE WARREN: If you serve it today.
 21 MR BRISBY: Yes.
 22 MR JUSTICE WARREN: Okay.
 23 MR BRISBY: The only other thing I could say is this,
 24 my Lord, and again, this is putting more strain on me.
 25 My understanding is that the CMC is marked not before

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1 Tuesday in the week of 15 September.
 2 MR JUSTICE WARREN: September, yes.
 3 MR BRISBY: Yes, September. My Lord, if the defendants
 4 wanted another couple of days, my Lord, I wouldn't
 5 object to the defences coming in by 6.00 pm on the
 6 Sunday, although it would require a lot of midnight oil
 7 on our part to revise our skeleton arguments to take
 8 account of any points made in time to serve them by
 9 10 o'clock, or whatever the appropriate time is on the
 10 Monday.
 11 MR JUSTICE WARREN: So it is floating over that four days?
 12 MR BRISBY: Yes.
 13 MR JUSTICE WARREN: Okay.
 14 MR BRISBY: I don't know whether with your Lordship's
 15 influence another that could be done to help is see if
 16 we can gently persuade the listing authorities to list
 17 it at the back end of that week, rather than on the
 18 Tuesday.
 19 MR JUSTICE WARREN: Yes.
 20 MR BRISBY: Because it may be that every day will help. My
 21 primary submission, however, is that the difficulties of
 22 producing the defence are overblown and in any case it
 23 is the defendants who are responsible for the situation
 24 we are all in, when we are going to have to all work
 25 very hard to save the trial date. My Lord, we say the

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1 fact they don't seem keen to do that is good evidence in
 2 support of my opening submission that this was all
 3 devised precisely with the aim of punting the trial,
 4 which has been fixed for months, into the long grass.
 5 MR JUSTICE WARREN: Okay, thank you very much.
 6 MR BRISBY: That concludes my submissions.
 7 MR JUSTICE WARREN: Mr Gatt, I'm going to rise now and we
 8 will start at 12.50.
 9 MR GATT: I was going to invite you to do that anyway,
 10 because it may be I can shorten my submissions.
 11 MR JUSTICE WARREN: I would like everyone to come -- I know
 12 that you two gentlemen are not at the PTR -- I would
 13 like you to come with the diaries of Messrs Brindle and
 14 Howard for the week beginning 21 September to see if the
 15 PTR can be shifted by a week.
 16 MR GATT: Yes, thank you.
 17 MR JUSTICE WARREN: And yours, Mr Brisby.
 18 (12.52 pm)
 19 (The short adjournment)
 20 (1.53 pm)
 21 Submissions by MR GATT
 22 MR GATT: My Lord, would you mind if Mr Keillor sat next to
 23 me in the front row simply to help with the logistics of
 24 bundles and finding things? I am grateful.
 25 I don't know whether your Lordship is planning to

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1 take a short break during the afternoon for the
 2 shorthand writers?
 3 MR JUSTICE WARREN: I forgot them this morning, I'm sorry.
 4 MR GATT: I can tend to speak --
 5 MR JUSTICE WARREN: They should have leapt into the air.
 6 MR GATT: I can tend to speak quite quickly. I will try not
 7 to.
 8 My Lord, what I would like to do is break my
 9 submissions up into a number of different sections.
 10 I am hoping to complete within an hour and 15 minutes,
 11 maybe even a little bit shorter if I can, because the
 12 issues for your Lordship really are quite narrow and you
 13 have been taken to quite a detailed exposition of some
 14 of the background which really isn't relevant for today,
 15 given that there can, there is no challenge today of
 16 whether there is a serious issue to be tried, but I will
 17 just touch upon some of the aspects of the background,
 18 simply which might have been put in for colour, in your
 19 Lordship's case.
 20 So the way in which I propose to deal with matters
 21 is under these headings: firstly, some general
 22 background observations about how we come to be here and
 23 the criticisms which are made of the HSF parties in that
 24 respect.
 25 Secondly, to deal with, or to address Mr Brisby's 10

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1 points, to draw some matters which are relevant there to
2 your Lordship's attention. But that is really in the
3 context of a serious issue to be tried and against what
4 I have already said in relation to that.

5 I will then be saying something about damages as an
6 adequate remedy, again, as background to the context of
7 what we are discussing. I will look at the wording of
8 the undertakings and the proposed injunctions sought,
9 deal with fortification, and finally timing. But I hope
10 to move along at a reasonable pace, given your
11 Lordship's constraints on time.

12 So turning first of all to the question of --

13 MR JUSTICE WARREN: Mr Brisby's aeroplane, as well.

14 MR GATT: Well, if it is Mr Brisby's aeroplane, I don't
15 really mind if he misses it or not. I am free tomorrow.

16 Turning to the background and how we come to be
17 here, a number of things are clear and one thing that is
18 clear is that on 21 July, the claimant received the
19 notification in relation to the forfeiture process and
20 this is probably best summarised -- the sale process --
21 at page 25 of my learned friend's skeleton argument,
22 paragraph 65.

23 So it is clear undisputable fact that Bryan Cave
24 received a copy of the letter alleging a default under
25 the financing agreement and on the same day, PHRL's

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1 solicitors received a letter entitled notification of
2 disposal of collateral and that refers to the
3 prospective auction on 25 August 2015.

4 Now, it is interesting to see what the claimant
5 actually did and didn't do at that time given where we
6 are now, and if one looks over the page at page 68 to
7 see what it is alleged everybody else should have been
8 doing -- this is page 26, paragraph 68 of my learned
9 friend's skeleton, it says this:

10 "Furthermore, despite the demand and sale notice
11 having been served, no other member of the ARGL board or
12 the JVC board, including notably Mr Eliasch, took any
13 action whatsoever to raise this issue with the other
14 board members or at any rate with Carpentaria."

15 Again, it is inconceivable if there was a genuine
16 situation rather than one dishonestly manufactured by
17 the conspirators that the other board members would not
18 be taking immediate action to seek to resolve the issue,
19 whether through urgent court action, as PHRL is, or
20 through negotiation or litigation with Pontwelly.

21 Well, when the claimant received this, they don't
22 seem to have done a great deal at all. They didn't call
23 a board meeting. They didn't write to Herbert Smith
24 Freehills or Berwin Leighton Paisner and say what is
25 going on, and most notably, they didn't say, hang on

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1 a moment, we thought the interest on these loans was
2 being paid. What is going on? And the reality is, we
3 will say, in more detail on another occasion, that that
4 is because they knew what the position was in relation
5 to the loans.

6 MR BRISBY: My Lord, I must object to that. If my learned
7 friend is giving evidence --

8 MR JUSTICE WARREN: He said it is for another time. He is
9 saying what his case is going to be when this comes back
10 for a trial or whatever. He is giving me background.

11 MR BRISBY: Well, my Lord, I undertook him to say so it can
12 be noted, his case is that we knew that interest was not
13 being paid. I just want to be clear about that.

14 MR GATT: My Lord, you will see what I say in a moment in
15 relation to their knowledge, but it is surprising, when
16 this notice is received, if they believed it was being
17 paid and there wasn't a problem, that there wasn't some
18 jumping up and down. It is certainly a matter for
19 inquiry.

20 MR BRISBY: My Lord, I accept that, that is perfectly fair,
21 he can say that, but he said before that we knew it was
22 being paid. I just want to clarify, it may be loose
23 language, whether that is his case.

24 MR GATT: It may be loose language, my Lord. As your
25 Lordship appreciates, I am new to this case, and I am

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1 picking things up quickly.

2 But what is clear is if their state of mind was that
3 there was not a problem with this loan, then one might
4 have expected a different reaction. The reaction
5 appears to be to have hunkered down and started to
6 prepare proceedings, and one may speculate because they
7 have chosen not to tell us what they were, but it was an
8 injunction to restrain the auction on 25 August, which
9 hadn't been made, notwithstanding that they were aware
10 of it from 21 July, by 14 August when these proceedings
11 were served. So they sat on their hands, they didn't
12 contact Herbert Smith Freehills, they didn't request
13 undertakings, they didn't ask for consent in relation to
14 the joinder of parties, they didn't raise the issue at
15 all.

16 What happened when they did raise the issue --

17 MR JUSTICE WARREN: When was the auction fixed for?

18 MR GATT: 25 August. Next Tuesday, effectively. So if one
19 wanted to cause maximum disruption to it, one might have
20 applied this week for an injunction. What happened when
21 the proceedings were issued and served 4.40 pm last
22 Friday is on the first business day afterwards, and this
23 is Herbert Smith Freehills' letter of 17 August,
24 undertakings were offered and it was indicated that they
25 had got the wrong person, that Pontwelly no longer had

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1 the shares and they were with AHOL. So there was
 2 a complete frankness in that position as to where it was
 3 which necessitated them to replead the case, and
 4 thereafter there has been a cooperation in relation to
 5 the matter as well.
 6 Because notwithstanding that it was only at 2.00 pm
 7 yesterday that we got the substantially revised pleading
 8 and the counsel on the case have not had the opportunity
 9 to look at it, and not having a properly formulated
 10 pleading could impact upon the whole service process and
 11 could have held matters up, until the pleadings were
 12 considered by your Lordship, we put forward the proposal
 13 of agreeing to the amendment subject to the seven-day
 14 review period to allow the amendments to be effected, to
 15 have that ability to come back and comment if needs be,
 16 but then cooperating in relation to service as well.
 17 So no points taken in relation to service, making it
 18 go through channels, your Lordship may well have ordered
 19 some form of substituted service, but you weren't
 20 troubled with it. So cooperation in that respect.
 21 Cooperation in relation to the undertakings.
 22 So that is the background. But the criticism now
 23 made by Mr Brisby is: well, you managed to put in
 24 a witness statement for Mr Strickon, so your Lordship is
 25 effectively invited to draw inferences in relation to

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1 all the other matters in the case which in the very
 2 limited time available and the mammoth amount of
 3 evidence which has been served, that you can effectively
 4 draw inferences from a failure to put evidence in, when
 5 in our submission that would be entirely inappropriate
 6 and the absence of evidence at this stage goes neither
 7 one way nor the other, particularly as I'm not inviting
 8 your Lordship to conclude, it would be a very bold
 9 submission indeed, that there is no serious issue to be
 10 tried.
 11 So, my Lord, turning to the nine points that became
 12 10 that Mr Brisby said, starting with the first one,
 13 which is an important one, he said the story starts with
 14 Tarek and Mr Doronin's failure to comply with
 15 obligations under the JVC SHA to assist PHRL to
 16 refinance the Pontwelly loan, and the important thing
 17 there is the obligation which is on them, which is one
 18 of cooperation, and that is -- which you weren't taken
 19 to -- in bundle C1, tab 1, at page 23, because this is
 20 background as to --
 21 MR JUSTICE WARREN: Sorry, this is volume ...
 22 MR GATT: Core bundle volume 1, tab 1.
 23 MR JUSTICE WARREN: Yes.
 24 MR GATT: And it is clause 5.6, refinancing:
 25 "The shareholders will, and will procure that the

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1 directors appointed by them will use reasonable
 2 endeavours to (1) assist the A directors..."
 3 And the A directors are the PHRL appointed
 4 directors.
 5 "... and management of JVC to attract the lowest
 6 cost of debt capital including providing non-recourse
 7 carve out guarantees..."
 8 And (2):
 9 "Will not unreasonably withhold or delay their
 10 respective consents."
 11 So it is (1) to use reasonable endeavours to assist,
 12 but the obligation is on the A directors and management
 13 of JVC to get the refinancing in place, and the reason
 14 why the Pontwelly loans or loan was in place was because
 15 there was no better -- I believe it is in the underlying
 16 case -- no better source of finance at the end of
 17 2013/start of 2014.
 18 MR JUSTICE WARREN: Or none that had been found.
 19 MR GATT: None that had been found.
 20 MR JUSTICE WARREN: I don't have any idea about the time
 21 pressures in this acquisition taking place. It may have
 22 been that finance was available but it was a very rushed
 23 purchase. I simply don't know. It could be either way.
 24 MR GATT: But certainly if it was going to be put in place
 25 shortly afterwards or there was a lead time, it wasn't.

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1 The position was that was the nature of the obligation,
 2 and all of this, as Mr Brisby said, is dealt with in the
 3 underlying pleadings with which he is far more familiar
 4 than I am.
 5 But only one introducer of potential capital was
 6 found, that is Imperial who are a broker, and Mr Brisby
 7 talks about delays and NDAs, but the reality is -- and
 8 there is email evidence in the case which has been
 9 disclosed which indicates it -- they pulled out because
 10 of the existence of the shareholder dispute, and nothing
 11 else was ever forthcoming from the A shareholders to
 12 replace it.
 13 So yes, there is the obligation, but the primary
 14 obligation is on the PHRL team to introduce and there
 15 simply wasn't the appetite.
 16 The second of Mr Brisby's points is --
 17 MR JUSTICE WARREN: Sorry, the team that had to introduce
 18 was the management of the joint venture company.
 19 MR GATT: Yes.
 20 MR JUSTICE WARREN: Yes.
 21 MR GATT: But the A directors, the PHRL directors were the
 22 driving force behind it.
 23 MR JUSTICE WARREN: It was his side?
 24 MR GATT: Correct, yes.
 25 MR JUSTICE WARREN: Okay.

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1 MR GATT: Second point: there were no warnings, they weren't
 2 told it was going to go into default. Our case is and
 3 will be that they knew what the financial position was
 4 and one can give some indication of that by going to
 5 Mr Brisby's point 3, where he produced Mr Jolivet's note
 6 from August 2014, and looking at what that note actually
 7 says, the full quote, and the figures behind it,
 8 your Lordship has that in ARD 3 -- sorry, ARD 10,
 9 bundle 3, at page 844, starting at 843.
 10 So this is the document of 28 August which was said
 11 to be a misleading -- what was said:
 12 "Mr Jolivet, the stooge for Mr Doronin, circulated
 13 the board with projections to show that the company
 14 would meet its obligations and was putting aside money
 15 for those purposes."
 16 And he referred to paragraph 53 of his skeleton.
 17 Well, if we look at what the note actually says,
 18 starting at 843, it is to Mr Amanat, amongst others,
 19 Mr Amanat being the force behind PHRL, and on 844, under
 20 the heading on 843, "Group Capital Needs", he says this:
 21 "I have also attached as exhibit C a numerical
 22 explanation of how the lack of capital investment has
 23 hindered Aman's performance, as manifested by the
 24 underperformance of properties owned by Aman when
 25 compared to properties managed by Aman and owned by

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1 third parties, nearly all of which invest a greater
 2 amount of capital to keep such properties up to Aman's
 3 exacting standards.
 4 "It is my view that this ongoing undercapitalisation
 5 resulting in underperformance represents a decline in
 6 the value of the shares in Aman. The decline is
 7 exacerbated by the company's need to dedicate portions
 8 of its cashflow..."
 9 This is the quote which wasn't a full quote from
 10 Mr Brisby:
 11 "... the decline is exacerbated by the company's
 12 need to dedicate portions of its cashflow to the payment
 13 of interest on the Pontwelly loan."
 14 MR JUSTICE WARREN: Which it didn't. Is it disputed that it
 15 didn't?
 16 MR GATT: No, it didn't. But we will look at the
 17 spreadsheet that is attached in a moment.
 18 MR BRISBY: It didn't what, sorry?
 19 MR JUSTICE WARREN: It didn't pay the interest.
 20 MR GATT: "Exhibit D is Aman's balance sheet which
 21 demonstrates how the value of the company has been
 22 negatively impacted by these considerations."
 23 And then if we turn to page 847, which is the
 24 spreadsheet which he puts in in relation to this, and we
 25 look at the bottom lines, we can see there what the

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1 Pontwelly interest is and how it comes to be paid, or
 2 how it comes to be represented here, sorry, not paid.
 3 MR JUSTICE WARREN: This is a cashflow spreadsheet.
 4 MR GATT: It's a cashflow, yes, and what it is showing is
 5 a deteriorating position. It is a projection.
 6 Consolidated cashflow.
 7 MR JUSTICE WARREN: Okay, but do the cash balances in the
 8 figure three-quarters of the way down the page take
 9 account or not take account of interest that has not
 10 been paid but is due to be paid?
 11 MR GATT: I will check, but my understanding is due to be
 12 paid.
 13 MR JUSTICE WARREN: It is a funny sort of cashflow.
 14 MR BRISBY: My Lord, this was produced in 2014, which was
 15 before the obligation to pay interest, as opposed to
 16 have it rolled up, kicked in. That kicked in
 17 in February 2015.
 18 MR GATT: I am grateful to Mr Brisby, I didn't interrupt any
 19 of his submissions, although I was desperate to on many
 20 occasions.
 21 But this is a cashflow which shows a deteriorating
 22 position. The company was not operating in a way that
 23 enabled it to meet the interest payments and its other
 24 expenses, that is what this shows, and that is what
 25 Mr Jolivet was saying. He was saying we are

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1 undercapitalised. There are these interest liabilities.
 2 Our undercapitalisation is exacerbated by the company's
 3 need to dedicate portions of its cashflow to the payment
 4 of interest, and that is how he projected it.
 5 So the position was, we say, that the PHRL side knew
 6 that finance was needed, they knew that new money needed
 7 to come in and they knew that new money hadn't come in,
 8 so they knew what the position was in relation to this
 9 business, because they knew it was undercapitalised.
 10 MR JUSTICE WARREN: So they would have known that something
 11 needed to be done to improve the business. They
 12 wouldn't have had the first idea from this letter or the
 13 spreadsheet -- or they wouldn't from the spreadsheet,
 14 because that pre-dated the events -- that in fact
 15 interest which was due had not been paid and it wasn't
 16 merely that there was a problem, it was going to be
 17 a precipice.
 18 MR GATT: They wouldn't have known at that stage that it
 19 wasn't going to be paid, but they would know that the
 20 interest liabilities were such that it was going to
 21 cause problems.
 22 MR JUSTICE WARREN: Yes. The problem was the business would
 23 not flourish and the loan needed to be refinanced, which
 24 is what they wanted to do.
 25 MR GATT: Yes.

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1 MR JUSTICE WARREN: And there had to be a capital injection,
 2 but that is a million miles away from the complaint that
 3 Mr Brisby is making.
 4 MR GATT: Well, maybe I am missing something, but --
 5 MR JUSTICE WARREN: The complaint he is making is that this
 6 letter gives the impression that even if there is
 7 a financial problem, it doesn't suggest that there is
 8 something critical which is about to happen which is
 9 going to bring the company down.
 10 MR GATT: My Lord, we say that is where they are mistaken.
 11 It shows the continuing deterioration of the company
 12 without further capitalisation.
 13 MR JUSTICE WARREN: Deterioration. But where would the
 14 reader of this letter -- I come along as a consultant,
 15 I say: there is a big problem here, it needs
 16 refinancing, tell me about this loan agreement. And
 17 I look at it, if I do look at it, and I see that there
 18 is lots of interest that is due. I say: has the
 19 interest been paid? No. If I ask the question and get
 20 the answer, but that is not what they were told.
 21 MR GATT: My Lord, the cashflow shows -- we are dealing with
 22 sophisticated people -- it is a negative cashflow. The
 23 bottom line shows a continuing deteriorating position.
 24 If one looks at the final line above the accumulated
 25 cash required, which is itself deteriorating, total

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1 included Pontwelly interest --
 2 MR JUSTICE WARREN: Is this on the first page?
 3 MR GATT: It is on 847.
 4 MR JUSTICE WARREN: Yes.
 5 MR GATT: It is a deteriorating cash position. There is
 6 a cash shortfall each month. So the clear message is,
 7 and that is what Mr Jolivet was saying, unless there is
 8 capital injection, this is the scenario: a deteriorating
 9 cash position. There is no cash. The income is
 10 exceeded by the expenditure, and they knew no new
 11 finance had been introduced, so unless they thought
 12 there was some ...
 13 So, my Lord, this is all again by way of background.
 14 I am told in stereo, by Mr Brisby that some £11 million
 15 was forthcoming, and from those behind me that some
 16 £7 million was forthcoming at one stage. That is not
 17 going to touch those figures, and that was in relation
 18 to the Tokyo -- the opening of the hotel there.
 19 Point 4, as I understood it, related to paragraphs
 20 61 to 64 of their skeleton.
 21 MR JUSTICE WARREN: Yes.
 22 MR GATT: And was Miss Turnbull assuming that the Pontwelly
 23 debt was being serviced. That is her evidence. And the
 24 second point there was Mr Doronin was lying in his
 25 witness statement before Mr Justice Barling in relation

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1 to how he put it in relation to the interest
 2 obligations.
 3 Turning to Miss Turnbull's assumption, we will say
 4 that is not one that she would sensibly have arrived at
 5 based on the information that she did have, but also
 6 there is evidence from Mr Zecha in his sixth witness
 7 statement which deals with his view, and this is
 8 application bundle volume 1, tab 8.
 9 MR JUSTICE WARREN: Sorry, not core bundle.
 10 MR GATT: No, the application bundle, my Lord.
 11 MR JUSTICE WARREN: Yes.
 12 MR GATT: And it is at paragraph 7, so this is a witness
 13 statement produced for this hearing, under the
 14 "Pontwelly loan and discussion with Mr Jolivet", he says
 15 at paragraph 7:
 16 "Since the inception of the Pontwelly loan I have
 17 had considerable concern about the interest rate and the
 18 level of monthly interest payable. As Aman Resorts is
 19 not a cash-rich business, our operating model has always
 20 been to reinvest in assets and the development of
 21 existing Aman hotels. Until I was unlawfully removed as
 22 CEO I attempted to ensure that management supported the
 23 approach to refinancing."
 24 Well, he accepts it is not a cash-rich business, it
 25 is not, and that is what is borne out by Mr Jolivet's

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1 spreadsheet; the interest wasn't there to cover it, so
 2 it needed to be financed in order to pay that liability.
 3 There is then the attack on Mr Doronin, who is said
 4 to be lying, but your Lordship may form your own view as
 5 to what was being done in that witness statement in
 6 terms of characterising how the interest on the loan was
 7 accruing and how, had the money been available, it would
 8 reduce the interest which was payable and a mathematical
 9 calculation was done.
 10 MR JUSTICE WARREN: I saw his letter but not his witness
 11 statement, I think.
 12 MR GATT: I thought it was ...
 13 MR JUSTICE WARREN: Did I?
 14 MR GATT: You were taken to the paragraphs, I think they
 15 were quoted in --
 16 MR BRISBY: I only took you to the skeleton.
 17 MR JUSTICE WARREN: They were in the skeleton.
 18 MR BRISBY: I didn't bother to -- yes.
 19 MR JUSTICE WARREN: Yes, that's right.
 20 MR GATT: There has been quite a lot of pot calling the
 21 kettle black in this case, but there has only been one
 22 character in this case whose integrity has been
 23 judicially considered so far and that is Mr Amanat, and
 24 you will have seen from our skeleton argument what
 25 Mr Justice Henderson had to say about him and his

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1 familiarity with the truth. I'm not going to go to that
 2 at the moment.
 3 Point 5 in Mr Brisby's analysis was that it came as
 4 a complete surprise then when at the end of July, to
 5 learn that the interest had not been serviced. Well,
 6 two points there, we say we don't accept that it can be
 7 right for the reasons that I have given, because they
 8 knew the liability was there, they knew there weren't
 9 the resources to pay it. But if that was right, the
 10 reaction at that stage was very strange. On receiving
 11 the documentation on 21 July, given what is said in
 12 paragraph 68 of my learned friend's skeleton argument as
 13 to what the expected reaction of the other directors who
 14 are criticised would have been, didn't call for a board
 15 meeting and so on, why didn't they do so? Why didn't
 16 they write and say: but we assumed all of this was being
 17 paid, there must be some mistake. There was
 18 a resounding silence in that respect. But what instead
 19 they seem to have done is quietly set about preparing
 20 for the injunction.
 21 Point 6 is the inference point. The inference there
 22 is that it is designed to engineer the default. Because
 23 it is said it had plenty of -- this was my learned
 24 friend's submission: it had plenty of money to pay the
 25 interest. Well, my Lord, where is that? Mr Zecha says

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1 it wasn't cash-rich, the cashflows show it wasn't
 2 cash-rich. It couldn't pay.
 3 Point 7 was although the stunt, as it has been
 4 rather colourfully called, was designed to culminate in
 5 a sale by auction, there was a change of tack, and you
 6 will have seen Mr Strickon's witness statement which
 7 deals with this, you see he is the co-author of
 8 Enforcing Judgments and Collecting Debts in New York.
 9 He describes how it is perfectly usual to run the two
 10 processes in tandem. You run the article 9.620 and the
 11 auction alongside each other.
 12 And then it is said that the 9.620 process is
 13 followed and the subsequent transfer took place to AHOL,
 14 which is then said holds them on trust for ARGL. I am
 15 going to come back to this shortly, but this is one of
 16 what we believe to be the acute legal flaws in the way
 17 in which the claimant puts its case.
 18 ARGL, in the first draft of the consolidated amended
 19 particulars of claim, was a party. ARGL has
 20 disappeared. My learned friends say in their skeleton
 21 argument towards the end, page 46, paragraph 109:
 22 "PHRL has been continuing to consider the position
 23 in the light of ongoing developments and has decided
 24 that it does not for the moment need to join ARGL to
 25 these proceedings at this stage. It reserves the right

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1 to do so in the future should it become necessary."
 2 Well, given that its claim, and I will come back to
 3 this, appears to be a claim based on a constructive
 4 trust in favour of ARGL, it appears to us in the very
 5 limited time we have had available that that is
 6 a derivative claim being brought by PHRL, and one which
 7 they have no place to bring in these proceedings, and
 8 that is relevant in relation to the question of whether
 9 they have a proprietary claim rather than a damages
 10 claim in terms of the relief sought on the undertakings
 11 or injunctions.
 12 So point 8(a) and 8(b) dealt with the transfer of
 13 the shares from Pontwelly to AHOL and it is said no
 14 explanation was given, it was incorporated into the
 15 stunt, it is said, and it was suggested that it was done
 16 in some way as if to make the matter even more
 17 difficult.
 18 Well, the astonishing thing therefore is if it was
 19 designed to make the matter all the more difficult, why,
 20 then, is it one of the first things that Herbert Smith
 21 Freehills say in their first letter in response to the
 22 claim, which is: well, you have got the wrong people
 23 here, the owner of the shares now is AHOL, and they are
 24 put on notice straightaway and they are able and do put
 25 a stop notice on the Silverlink shares.

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1 So it has hardly been concealed in terms of
 2 a complicated web in order to make things difficult, it
 3 seems to have singularly ineffective, it seems to have
 4 been volunteered and there is really nothing
 5 inconsistent with Mr Strickon's observation that that
 6 is, in his experience, the normal way of dealing with
 7 these things in these circumstances.
 8 Point 8(b) was the board of Silverlink nominee
 9 directors were removed and again, Mr Strickon deals with
 10 that in paragraph 12 of his witness statement. He says
 11 there -- I have kept it loose, my Lord, I don't know if
 12 you have got it put in a bundle. I'm sorry for not
 13 having the references at my fingertips.
 14 MR JUSTICE WARREN: Well, yes.
 15 MR GATT: Paragraph 12:
 16 "Following service of the notice of default and
 17 acceleration, Pontwelly was entitled to exercise the
 18 rights under clause 5(a) of the pledge agreement to
 19 exercise the voting rights of ARGL in respect of
 20 Silverlink and to transfer Silverlink into its name.
 21 This type of provision is standard in New York law
 22 pledge agreements. It provides the pledgee with wide
 23 rights and powers, including the right to change the
 24 board of companies where shares in a company have been
 25 placed as collateral. On 21 July, pursuant to this

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1 right, Pontwelly caused ARGL to pass resolutions
 2 removing Mr Eliasch and Carpentaria management from the
 3 board."
 4 So it was done in accordance with that power.
 5 I accept there is still the issue as to whether it was
 6 done in good faith, but it was done pursuant to that
 7 power and done at an appropriate time.
 8 MR JUSTICE WARREN: But if not done in good faith, it would
 9 be ineffective?
 10 MR GATT: That must be a matter for New York law. I am
 11 going to say nothing on that at the moment, because that
 12 must be a matter of New York law. That is something
 13 that will need to be looked into.
 14 Point 9 was --
 15 MR JUSTICE WARREN: Sorry, give me a moment.
 16 MR GATT: Sorry.
 17 MR JUSTICE WARREN: Yes.
 18 MR GATT: Point 9, as I noted it down, was five separate
 19 judges have granted injunctive relief against the
 20 existing defendants in relation to similar stunts.
 21 I think technically it may be four, because one was
 22 twice.
 23 In terms of -- I can give you the references in due
 24 course to the orders, but I'm told, not having
 25 previously been involved, that they were largely dealt

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1 with, or may exclusively have been dealt with by
 2 undertakings, so when comes back to Mr Brisby's point,
 3 well, why didn't you seek undertakings, and he
 4 said: well, we simply wouldn't have got them, we had to
 5 get injunctions, my instructions are based on what the
 6 orders say, what the position was that that is not
 7 correct.
 8 Finally, my Lord, point 10, was there is a lot of
 9 hot air. I am not going to say anything about hot air
 10 in this case, I'm probably generating enough myself on
 11 this occasion, but one might think that part of the
 12 difficulty in this case has come from the claimant
 13 itself not doing what it expected others to do in the
 14 aftermath of 21 July and making the obvious inquiries
 15 which it says everybody else should have done, or
 16 convening the obvious board meetings which it says
 17 everybody else should have done.
 18 So my Lord, I am not going to be pressing upon you
 19 on this occasion that there is not a serious issue to be
 20 tried, and I am sure that will come as no surprise to
 21 you, but my Lord, in terms of looking at the scope of
 22 the undertakings --
 23 MR JUSTICE WARREN: Before you do that, you haven't
 24 addressed Mr Brisby's point 2, I think. No warning was
 25 given that this was going to happen.

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1 MR GATT: My Lord, I'm sorry, I thought I had said in
 2 relation to that, they were well aware of what the
 3 financial position was. I moved into that with Mr
 4 Jolivet's position that they were aware that it wasn't a
 5 cash-rich business, that the interest was due. My Lord,
 6 certainly in the time I have had available, that is all
 7 I'm able to say at the moment. Bear with me a moment.
 8 MR JUSTICE WARREN: Mr Brisby's point is there was no
 9 warning to his appointed board members that ARGL was
 10 going to go into default. It is not a big problem, but
 11 you didn't tell me you weren't actually going to pay
 12 interest next week or indeed six months ago: that is the
 13 point that he says had not been addressed by HSF or the
 14 evidence, and I am suggesting actually you haven't
 15 addressed it yet either, but if you have, I'm sorry, but
 16 you had better re-address it.
 17 MR GATT: My Lord, I will check in a moment, but I hope your
 18 Lordship will bear with me in the sense that given the
 19 very limited time available, we never sought to address
 20 everything in the correspondence. We have put very
 21 limited evidence in. It was never going to be
 22 a realistic exercise in order to seek to deal with it in
 23 the very short timeframe that we had.
 24 The PTR is a different matter and I suffer from the
 25 unfortunate position of not even having been counsel on

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1 the case before. But bear with me a moment and I will
 2 just see if I can assist your Lordship further on that.
 3 The point put is this: that they knew what the
 4 income was, they knew what the expenditure was, they
 5 were fully aware of the situation and the inability to
 6 pay and we say they were aware when the default notice
 7 was served because the copy was sent on Bryan Cave.
 8 There is an issue in relation to that, clearly, but it
 9 was also sent --
 10 MR BRISBY: The issue in relation to forfeiture notice.
 11 MR GATT: But the forfeiture notice, from recollection,
 12 refers to the interest which is accrued and been unpaid.
 13 That was sent to ARGL. It was sent to the authorised
 14 representatives, and again, I'm picking up the detail of
 15 this from others, who had an obligation to pass that on
 16 to the PHRL directors. So it should have gone, an
 17 investigation will explore whether it did or not in due
 18 course, it should have gone via two routes: One by
 19 being sent to ARGL and the other by being sent to
 20 Bryan Cave, so they were aware of the default at that
 21 stage.
 22 But even on 21 July, this is why I perhaps
 23 overlaboured the point earlier, even on 21 July, when it
 24 is apparent that it is being said that enforcement
 25 action is going to be taken, where are the howls of

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1 surprise? What do you mean, we thought the interest was
 2 being met? How can this be the case? Let's convene
 3 a board meeting. You told us this was being paid.
 4 Where is it? It is Sherlock Holmes' dog that barked in
 5 the night; it simply didn't happen. We say that is
 6 because they were aware of the financial position of
 7 ARGL and its inability to meet the interest payments.
 8 MR JUSTICE WARREN: Why didn't ARGL serve whatever notice
 9 was required in relation to foreclosure notice?
 10 MR GATT: That will have to a matter of evidence in due
 11 course. I am not in a position to deal with that today,
 12 and that is why further instructions are clearly going
 13 to be needed. We have had three days, most of which
 14 have been occupied in getting down to grips with the
 15 detail of this, providing a limited response and
 16 producing a skeleton argument.
 17 Certainly in terms of background information, the
 18 understanding is it was sent to Carpentaria's agent, so
 19 they would have known as well. If that is right, the
 20 question should equally be asked of them as well, but
 21 what I don't want to do at the moment is go into what
 22 will be an important area of detail when I'm not counsel
 23 in the case and I'm not fully instructed on that due to
 24 lack of time.
 25 MR JUSTICE WARREN: But for the purposes of today, there is

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1 a disputed fact, there is a arguable point, that they
 2 didn't have notice, so if I assume that to be correct,
 3 it is quite clear that your side knew, it leaves a huge
 4 question mark in the air, which you may have an answer
 5 to, but looks suspicious, certainly from their point of
 6 view, but nothing was done about it. And certainly
 7 there was no board meeting which they were invited to
 8 where it was decided not to serve the notice.
 9 MR GATT: They didn't call one. We didn't call one.
 10 MR JUSTICE WARREN: No, there was no board meeting.
 11 MR GATT: There was no board meeting, yes. But I hope your
 12 Lordship won't think I'm being evasive, but I am not
 13 sufficiently au fait with the detail or the inquiries
 14 that have been made on this in the limited amount of
 15 time. This is one of the areas that clearly needs to be
 16 fully fleshed out.
 17 MR JUSTICE WARREN: Yes, I'm sorry, not a hint of criticism,
 18 it is the basis on which I have to proceed today.
 19 MR GATT: Yes, of course.
 20 MR JUSTICE WARREN: My ignorance is as great as yours.
 21 MR GATT: My Lord, it is probably slightly less.
 22 But I do urge upon your Lordship the lack of
 23 surprise, the lack of anything said, on or after
 24 21 July, which would indicate that they were taken by
 25 surprise by the default. It really is a classic case of

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1 the dog not barking in the night.
 2 My Lord, I don't contend today and it will be of no
 3 surprise, that there is not a serious issue to be tried,
 4 but, my Lord, in terms of whether damages are an
 5 adequate remedy, we say all the claims, all the properly
 6 advancable claims in this case are monetary claims which
 7 can -- which sound in damages, and it cannot be said
 8 that damages are not an adequate remedy.
 9 The way in which in the reformulated consolidated
 10 amended particulars of claim served yesterday afternoon
 11 sought to get round this is to plead, my Lord, and you
 12 will need the pleading for this, in paragraph 190(x),
 13 this is application bundle, volume 1, tab 4.
 14 MR JUSTICE WARREN: Is that the same as Mr Brisby's bundle,
 15 tab 3?
 16 MR BRISBY: Yes. My Lord, yes.
 17 MR JUSTICE WARREN: Thank you.
 18 MR GATT: I seem to have it at tab 4, for some reason.
 19 MR JUSTICE WARREN: You have your application bundle. It is
 20 his red 4 Stone Buildings bundle.
 21 MR BRISBY: The applications bundle has the original one.
 22 MR GATT: I am looking at 190(x).
 23 At the moment I don't know where the new one is to
 24 be found in the bundles --
 25 MR BRISBY: It is tab 3 of the bundle that contains my

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1 skeleton argument.
 2 MR GATT: Which is which bundle?
 3 MR JUSTICE WARREN: The red one.
 4 MR GATT: Mine are all one colour. This doesn't --
 5 MR JUSTICE WARREN: I have got it. If you have it loose,
 6 that is fine.
 7 MR GATT: I don't have that bundle I'm afraid.
 8 MR JUSTICE WARREN: 190(x).
 9 MR GATT: 190(x). Bear with me a moment while I find it.
 10 MR JUSTICE WARREN: This is page 79 of page 101.
 11 MR GATT: It will be different on mine, because I have
 12 a black line compare (inaudible) to show the changes:
 13 "In the premises PHRL seeks a declaration that AHOL,
 14 by virtue of its knowledge acquired through Mr Doronin
 15 of the Pontwelly conspiracy and/or of the individual
 16 defendants' dishonest breaches of duty as directors of
 17 the JVC and/or ARGL, and/or knowledge of their breaches
 18 of contract as herein before and herein after pleaded,
 19 is not a bona fide purchaser for value and accordingly,
 20 holds the Silverlink shares on constructive trust for
 21 ARGL."
 22 Well, ARGL isn't a party, and it goes on to say in
 23 190(x)(b):
 24 "AHOL is liable for knowing receipt of trust
 25 property."

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1 Well, that is, if they are right, trust property
 2 belonging to ARGL. So that claim was introduced in the
 3 amended particulars sent yesterday afternoon and they
 4 are self-evidently claims of ARGL. If PHRL is right and
 5 there has been a breach of fiduciary duty, then those
 6 were duties owed to ARGL, and AHOL has trust property
 7 belonging to ARGL which it should either hold on trust
 8 for ARGL or return to ARGL. AHOL does not owe any
 9 duties to the claimant in this case and wouldn't hold
 10 the shares on trust for it if its claims were to
 11 succeed.
 12 So in effect, it is seeking a declaration as to the
 13 position between a third party and a defendant rather
 14 than as between it and a defendant, and it is unclear
 15 certainly at this stage whether there is any
 16 jurisdiction for it to do so.
 17 If there is such a claim, then effectively it is
 18 a claim which should be brought by ARGL. Instead, the
 19 claimant, the shareholder of the parent company of ARGL,
 20 is seeking to bring the claim, and under the well known
 21 principles of reflective loss going back as far as
 22 Foss v Harbottle and Johnson v Gore Wood, they are not
 23 the appropriate person to sue in respect of that wrong.
 24 So the proper course of action, if that is a viable
 25 claim, is for ARGL to bring the claim --

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1 MR JUSTICE WARREN: ARGL is the -- I have to get this
 2 right -- is still -- the shareholders of ARGL are still
 3 the JV?
 4 MR GATT: Yes.
 5 MR JUSTICE WARREN: But they don't control the JV, so they
 6 would have to have a minority shareholders' action.
 7 MR GATT: Correct.
 8 MR JUSTICE WARREN: Yes.
 9 MR GATT: And the position is, and there appears to be some
 10 authority on this on what we have been able to ascertain
 11 in the limited time available, it is a case called
 12 Novatrust v Kea Investments, it is a decision of
 13 His Honour Judge Pelling, that under BVI law a member of
 14 a company, and this is a BVI company, does not have the
 15 right to bring proceedings --
 16 MR BRISBY: Do you have a copy for me?
 17 MR GATT: I think we have a copy, yes. But ... (Handed).
 18 I can hand it up.
 19 For relevant purposes I think it is paragraph 38:
 20 "In my judgment, the effect of ..."
 21 And he is talking about a provision in the BVI
 22 Business Companies Act of 2004:
 23 "... is that by BVI law, a member of a company does
 24 not have the right to bring proceedings in the name of
 25 or on behalf of a company unless that member has

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1 complied with the other provisions within section 184(c)
 2 and that is so whether the proceedings are to be brought
 3 in the courts of the BVI or elsewhere. Absent that
 4 provision I would have agreed the requirement for leave
 5 from the BVI court was procedural. However the effect
 6 of that is that before the member of a BVI company can
 7 have the right to bring derivative proceedings in
 8 respect of that company, permission has to be obtained
 9 by that member from the BVI High Court."
 10 My Lord, this is, on the face of it, in the limited
 11 time we have had to look at it, the proprietary claim
 12 appears to be a derivative action for which no
 13 permission has been sought from the BVI court. It is
 14 therefore not a case that this claimant can properly
 15 bring, and that is the only proprietary claim which we
 16 say affects the scope of the relief to which the
 17 claimant is entitled, all other claims sounding in
 18 damages, and there being no suggestion that the
 19 defendants aren't good for the money in some way or we
 20 would say, and this is not something that is accepted,
 21 but we would invite your Lordship to conclude, or that
 22 is otherwise insufficiently protected by the undertaking
 23 which has been offered.
 24 So, my Lord, that, as we see it, and it is, even
 25 though 11.5 pages may be the only new bit, that is in

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1 effect the nature of that, of the only proprietary
 2 claim. That is not a claim that this claimant can
 3 bring, and curiously, ARGL was originally in the first
 4 draft amended consolidated particulars of claim, but
 5 dropped out. I don't know why. I don't know what
 6 prompted my learned friends to do that, but it has gone.
 7 It was an original respondent to this application and it
 8 is there no more, it has been deleted.
 9 So, my Lord, against that background, if I can turn
 10 to look at the undertakings offered and reminding your
 11 Lordship, as I'm sure you know, that they were offered
 12 on the first working day after service of the
 13 application and a lot of time, expense and court time
 14 might have been avoided, and some of the heat that has
 15 been generated, had correspondence ensued in July rather
 16 than against the very short deadline of this hearing.
 17 We have tried, my Lord, to continue to reflect the
 18 moving goalposts and offer undertakings pending the
 19 pre-trial review, and we do so, and have done so
 20 expressly on the basis that this does not in any way
 21 affect any right to challenge jurisdiction in due
 22 course, which at the moment is not reflected in the
 23 draft order but was made clear in our skeleton argument
 24 and was made clear when I discussed it with my learned
 25 friend yesterday evening.

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1 Turning to the undertakings that have been offered,
 2 and my Lord, I am in our skeleton argument now on
 3 page 11 at paragraph 33, and it may be worth having the
 4 draft form of order that was handed up this morning at
 5 the same time. My Lord, in relation to that, we would
 6 like the reservation in relation to jurisdiction to be
 7 expressly stated, just so there is no problem in the
 8 future. Turning to paragraph 5 on page 3 of that and
 9 putting it alongside my note at paragraph 33(a), AHOL
 10 has offered an undertaking in the terms sought in
 11 clause 5.1.1, so it will be restrained in those terms
 12 from purporting to transfer, dispose of, deal with,
 13 create any rights or encumbrance, whether by way of
 14 security or otherwise, overall diminish the value of the
 15 shares which it holds in Silverlink Resorts.
 16 MR JUSTICE WARREN: You say in your skeleton that 5.1, 5.2
 17 and 5.3 don't add anything to that.
 18 MR GATT: My Lord, we do, because what they seek to do --
 19 I will step back for a moment as well -- when I refer to
 20 5.1.3, I am referring to 5.1.2, because when I discussed
 21 it with my learned friend last night, he was calling the
 22 new one 5.1.3, so there is that bit of complication, but
 23 we say they don't add anything.
 24 MR JUSTICE WARREN: So you say that in relation to what are
 25 now point 2 and point 3?

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1 MR GATT: Yes. And effectively what they are trying to do
 2 there is preserve the asset and they are not entitled to
 3 do that, because that is the proprietary claim and they
 4 are interfering in those circumstances with the
 5 underlying asset in circumstances where they have no
 6 legitimate claim to do so in these proceedings.
 7 So, my Lord, just dealing with the --
 8 MR JUSTICE WARREN: You may be right, but it is quite
 9 unattractive. If they win everything -- just go down
 10 the road and they win everything at trial and you say:
 11 sorry, we sold the hotels, it is a pretty unattractive
 12 result: Here is some money. Especially when you
 13 actually -- we are only looking at the PTR when this
 14 jurisdiction issue can be sorted out: is it seriously
 15 suggested other than by a stunt that you can do anything
 16 with these hotels before the PTR? It is not going to
 17 stop you marketing them, but it is only stopping you
 18 selling them.
 19 MR GATT: My Lord, I hear what you say and I don't mean that
 20 in any discourteous way. It clothes the claim with
 21 a proprietary air where none is given. It purports to
 22 interfere more significantly with the asset than the
 23 value that it represents.
 24 My Lord, what is interesting is this relief wasn't
 25 even sought in the original application. It wasn't

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1 thought necessary in the original application. It seems
 2 to be a rather late starter. The claimants seem to be
 3 happy themselves with what they sought in 5.1.1.
 4 MR JUSTICE WARREN: Well, you know how your thinking
 5 develops as you get into something.
 6 MR GATT: I am told it wasn't even in the second version.
 7 It wasn't in the second version. It was a late starter
 8 last night which Mr Brisby indicated and dictated over
 9 the telephone. So we have had, effectively, less than
 10 18 hours to consider that.
 11 And yes, my Lord it is a short period of time and
 12 there is, it appears, no real risk in any event, so why
 13 is it said to be necessary in those circumstances.
 14 MR JUSTICE WARREN: Of an actual sale, but there is a fear,
 15 whether justified or not, but in light of the hatred
 16 which these parties obviously have for each other, there
 17 is a fear that you will do something that is not in the
 18 ordinary course of business and that will have the
 19 result of these assets being put beyond their reach in
 20 the interim.
 21 MR GATT: My Lord, there is no evidence, we would say, to
 22 suggest that, but in any event, they don't have
 23 a proprietary claim in relation to the asset at the
 24 moment.
 25 My Lord, I don't know if there is anything more

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1 I can say in relation to that.
 2 MR JUSTICE WARREN: Okay. And then 5.2, then.
 3 MR GATT: 5.1.3.
 4 MR JUSTICE WARREN: Sorry.
 5 MR GATT: Which is the director, treating them as a de facto
 6 director, I don't know if your Lordship wants to hear me
 7 on that. That does seem to be entirely inappropriate.
 8 It is an unreasonable interference with their rights.
 9 It effectively mandatorily requires them to include and
 10 treat Carpenteria --
 11 MR JUSTICE WARREN: What about provision of information
 12 documents, as though they were directors?
 13 MR GATT: Well, let me just take some instructions on that.
 14 My Lord, the position is that the foreclosure has
 15 taken place, it has been effected, they have been
 16 removed as directors. That is an end of the matter.
 17 And given the relationship between the parties,
 18 effectively doing this allows the wound to continue to
 19 be scratched. Anything that they would be entitled to
 20 by way of disclosure they would get in any event under
 21 the disclosure application --
 22 MR JUSTICE WARREN: Down the line, before they got a chance
 23 to do anything significant to prevent you doing
 24 something which would be a breach. You have to remember
 25 that this relief is sought on the premise, subject to

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1 your point about BVI law and dog leg actions, that this
 2 foreclosure was acquired by fraud, or was part of a
 3 conspiracy, and at least for today's purposes, I am
 4 going to have to assume that if that is established,
 5 New York law might be a bit like ours and say it has to
 6 be unravelled, which means that the purpose of the
 7 injunction is to preserve the rights that people would
 8 have and they would at least if they were directors,
 9 which they ought to be if they win, be entitled to
 10 receive.

11 So I mean, I would be minded to make an order if you
 12 don't give an undertaking in relation to provision of
 13 information.

14 MR GATT: Well, just finally in relation to this, it appears
 15 to be accepted by the claimant in any event that there
 16 is very little that they can do. If we just turn to two
 17 references in their skeleton argument.

18 MR JUSTICE WARREN: Yes.

19 MR GATT: The first is at page 45 at paragraph 104.3. It
 20 says there in the third line:

21 "Mr Doronin is effectively and de facto in control
 22 of Aman Resorts in any event through the various
 23 vehicles ..."

24 Well, they accept that, so the injunction serves no
 25 purpose in terms of control and that is echoed also at

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1 paragraph 37 of their skeleton on page 15.

2 It says at the end of paragraph 37:

3 "Since Mr Jolivet took as an interim CEO over a year
 4 ago, only four board meetings have been held, the last
 5 of which was on 17 December 2014. There have been no
 6 meetings in 2015. Evidently Mr Doronin has discovered
 7 that it is possible to push through his vision for
 8 Aman Resorts unilaterally through Aman Resorts
 9 executives as opposed to by board meetings which PHRL
 10 might choose to adjourn."

11 So there seems to be an acknowledgment on their part
 12 that all this is pretty futile because of his de facto
 13 control and the lack of board meetings. So one does ask
 14 what real purpose does this order seek to achieve, and
 15 there is the undertaking not to diminish value as well
 16 which has been given.

17 My Lord, 5.2 is the publicity undertaking or
 18 injunction. We say that the claimant is satisfactorily
 19 protected by the proposed undertaking. We would make it
 20 clear that the continued maintenance of the website does
 21 not amount to a breach of the undertaking. We say it is
 22 unreasonable to retract statements which have already
 23 been made and reported --

24 MR JUSTICE WARREN: But they are made, as Mr Brisby says,
 25 every time I go and look at your website -- I have never

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1 looked at it, but the first time I do it, I will be told
 2 something that your client is restrained from telling me
 3 in any other way, why should he continue to be able to
 4 tell me via his website?

5 MR GATT: My Lord, it is going to be repeated in any event
 6 throughout the internet, because the fact that that
 7 press release was there will have been reported
 8 elsewhere, so unless one is going to go around the
 9 internet and take down every other reporting of that...

10 MR JUSTICE WARREN: You don't have to do that. That is very
 11 different from him in his own website saying: I am the
 12 sole owner, folks, and continuing to do so. You can
 13 write letters to newspapers to say these reports are
 14 wrong.

15 MR GATT: We say there is no explanation offered as to why
 16 this relief is necessary, what damage will be sustained
 17 if it remains in place, and on the contrary, and we
 18 would say this was recognised by Mr Justice Barling in
 19 one of the earlier judgments in this case, continual
 20 to-ing and fro-ing in the public domain on the press
 21 front creates uncertainty around the brand which can be
 22 damaging.

23 Mr Justice Barling dealt with this in his judgment
 24 which you have at core bundle 2 at tab 29 at
 25 paragraph 83.

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1 MR JUSTICE WARREN: Paragraph?

2 MR GATT: Paragraph 83, my Lord. It is not paginated, I'm
 3 afraid.

4 MR JUSTICE WARREN: No, that is fine.

5 MR GATT: Towards the end:

6 "Mr Doronin's evidence is that the reinstatement of
 7 Mr Zecha caused chaos in the senior management of the
 8 JVC, damage to the Aman brand and disruption to its
 9 operations. According to that evidence, the Aman brand
 10 is central to its business model as a top-end luxury
 11 business and places emphasis on intimacy, discretion,
 12 peace and privacy. Mr Doronin claims that the Zecha
 13 injunction brought about chaotic changes in leadership
 14 [this was putting him back in] which presented an image
 15 of the business in turmoil, likely to have put off
 16 guests and potential purchasers of Aman villas, giving
 17 rise to reduced booking and purchasers, decreased staff
 18 morale, increased staff turnover. These and other
 19 alleged effects of the reinstatement of Mr Zecha are
 20 said to have been likely to have caused significant
 21 damage to the business. Although the evidence is
 22 largely disputed by PHRL, including as to possible
 23 quantum of loss, it cannot be dismissed as so
 24 implausible that I can usefully take a view at this
 25 stage."

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1 So this constant to-ing and fro-ing where there is
 2 a publicity battle, and the matter is unresolved, can
 3 cause damage and your Lordship may well think that the
 4 real desire to get this down is to cause embarrassment
 5 to Mr Doronin and to unsettle matters, and my
 6 instructions over the lunch adjournment were that there
 7 has already been some chatter that they are going to
 8 have to take this press release down. Now, my Lord,
 9 that must have come from somebody in this hearing.
 10 So, my Lord, one might reasonably conclude, given
 11 the history of press releases in this matter, that if
 12 you were to direct that it be taken down, another press
 13 release will pop up on the claimant's side making some
 14 hay out of that, and that will, or may have, a
 15 destabilising effect on the brand.
 16 MR JUSTICE WARREN: They can do that as a result of whatever
 17 I decide today, or look, they have given undertakings in
 18 the first part of 5.2.
 19 MR GATT: Well --
 20 MR JUSTICE WARREN: Such interest as there is in the media
 21 about this will happen regardless, but for the person
 22 who goes on to Mr Doronin's website as an interested
 23 member of the public, he is being told something that is
 24 disputed. It does seem to me rather odd. Anyway.
 25 MR GATT: My Lord, at the risk probably as being seen as

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1 facetious, one can look at many law firms' websites and
 2 barristers' websites where many things may be said which
 3 are disputed by other people, but I know this is
 4 disputed in legal terms, which makes it different.
 5 MR JUSTICE WARREN: "A leading firm".
 6 MR GATT: My Lord, yes, as I am reminded from behind, is
 7 this necessary? Is this really central to the relief
 8 that is being sought, or is this a sideshow? Has this
 9 assumed an unnecessary importance in the claimant's mind
 10 for totally collateral reasons which are not necessary
 11 to the proper and proportionate resolution of this
 12 dispute?
 13 MR JUSTICE WARREN: Okay.
 14 MR GATT: My Lord, in relation to the question of
 15 fortification.
 16 MR JUSTICE WARREN: Yes.
 17 MR GATT: We set out very detailed submissions in relation
 18 to that. You will recall what Mr Justice Henderson had
 19 to say about this, and he was very strong in his
 20 criticism of the claimant in this respect and although
 21 he was dealing with security for costs, at
 22 paragraph 41(f) of our skeleton argument at the top of
 23 page 15, he made a finding that the claimant had taken
 24 steps designed to strip itself of most of its liquid
 25 assets which would make it difficult to enforce an order

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1 for costs against it.
 2 So, my Lord, if the cross undertaking needed to be
 3 enforced in the absence of fortification based on that,
 4 you can be satisfied that there is unlikely to be
 5 anything there. The \$10 million already in court which
 6 Mr Justice Barling ordered to remain there is earmarked
 7 for the earlier injunctions. It is not simply for the
 8 interest in relation to the Pontwelly loan, it covers
 9 a whole series of matters, of which that was an
 10 illustration.
 11 So the real issue, I suppose at this stage is, is
 12 there sufficient evidence of likely loss and that will
 13 depend upon the extent of the undertakings accepted or
 14 order imposed, but even the ability to encumber -- even
 15 the restriction by being encumbered from dealing with
 16 the asset by way of security can have a dramatic effect
 17 if one is not able to obtain attractive financial
 18 facilities because the shares can't be used as security,
 19 then one may miss out on the opportunity of finance
 20 facilities, and given the sums of money that are
 21 involved here, and we know that the Pontwelly debt was
 22 in the order of \$200 million, \$10 million is simply 5%
 23 of that.
 24 The claimant says well, if we were ordered to pay,
 25 we wouldn't be able to. That is effectively what

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1 Miss Turnbull says. Its present asset position is such
 2 that it is not currently able to put any substantial sum
 3 of money into court by way of fortification.
 4 Mr Justice Henderson had something to say about
 5 a similar argument when it came before him, and that is
 6 in his judgment in C2, tab 28, and it is paragraph 77
 7 and 78. I am going to remind your Lordship of what
 8 Mr Justice Henderson said about the quality of the
 9 evidence in relation to the financial position, which we
 10 set out in paragraph 41(d):
 11 "Nothing could more graphically illustrate the
 12 potential unreliability ..."
 13 MR JUSTICE WARREN: This is in your skeleton?
 14 MR GATT: It is, my Lord, yes, 41(d) on page 14:
 15 "... of any evidence about the financial position
 16 of entities connected with Mr Amanat [of which this is
 17 one] and the fact that even assurances given in good
 18 faith by solicitors acting for him or his companies
 19 cannot necessarily be accepted at face value."
 20 And not a cent had ever been paid into the account
 21 opened by the claimant. So when it was being said on
 22 that occasion well, there is a risk that we will be
 23 unable to provide the security, he said, back to the
 24 judgment at paragraph 77:
 25 "I would add that the risk of PHRL failing to

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1 provide security if ordered to do so is, in my view,
 2 a remote one. Mr Amanat is, according to his own
 3 evidence, a man very great wealth. In his statement of
 4 4 August 2014 he gave a non-exhaustive list of assets
 5 which he owned personally or through his associated
 6 companies worth well in excess of US\$160 million.
 7 Accordingly, if PHRL fail to provide security when
 8 ordered to do so it could only be because Mr Amanat had
 9 chosen not to provide the necessary funds. For the same
 10 reason PHRL has not attempted to argue that there will
 11 be any risk of its claim being stifled if security were
 12 to be ordered."
 13 So, my Lord, as used to be said in the good old days
 14 of getting permission to defend on order 14, if you
 15 believe you have an arguable defence and you are
 16 required as a condition to bring the money into court,
 17 Yorke Motors v Edwards, I think it was, you put your
 18 money where your mouth is, and in this case if they want
 19 the injunction with the risks that pertain to it, they
 20 need to fortify the undertaking and cannot simply say,
 21 my Lord, we won't be able to pay. They have tried that
 22 argument once before and it has been found wanting.
 23 MR JUSTICE WARREN: Undertaking by him personally, both to
 24 this court and contractually to you, as sufficient
 25 security, so that if this court were then to order

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1 \$5 million on an inquiry as to damages, you would have a
 2 summary judgment application wherever he has assets
 3 around the world.
 4 MR GATT: It is far better to have the money in court, then
 5 it can simply be paid out of court than have to go
 6 through what would be an expensive exercise chasing him
 7 around, and given what Mr Justice Henderson had to say,
 8 again, I go back to 41(b) of our skeleton argument,
 9 Mr Amanat has a lamentable history of judicially
 10 established fraud such as to raise insistent doubts
 11 about his personal integrity.
 12 MR JUSTICE WARREN: What is the loss between now and 15
 13 September that you can conceivably suffer as a result of
 14 these injunctions?
 15 MR GATT: Well, my Lord, one can only postulate on, for
 16 example, the inability to use it as security for loans.
 17 I don't think we have put forward any other suggestion.
 18 MR JUSTICE WARREN: Sorry, inability to use ...
 19 MR GATT: The shares as security, as security for
 20 alternative finance. And, of course, the disruption to
 21 the business which can be caused as a result of
 22 proceedings like this. One can see the effect that it
 23 had on Imperial, the financier brought in towards the
 24 end of 2014, who refused to deal with the matter because
 25 of the existing proceedings. And Mr Justice Barling

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1 acknowledged that in his judgment, the disruption caused
 2 by this constant public battle. This is the next
 3 episode in that.
 4 So finally timetable, and I deal with this on page 6
 5 of our skeleton argument. The bottom line in relation
 6 to this, and I hope we have been flexible in relation to
 7 time for acknowledgment of service by accepting a much
 8 shorter period of time than provided by the rules, so
 9 that the court at the PTR would know if there were any
 10 jurisdictional matters to be dealt with, is to agree to
 11 acknowledge service within 14 days.
 12 The rules, the CPR, would provide for much longer in
 13 relation to the newly added defendants. They would have
 14 31 days after service to file acknowledgment of service
 15 and we say it is interesting that the claimant in the
 16 original order which they put forward gave for the two
 17 BVI companies, Pontwelly and ARGL, who were then the
 18 parties, 45 days from date of the service of the
 19 particulars of claim to serve their defence.
 20 Now, at that stage, one might reasonably infer that
 21 they thought that that was the appropriate time. They
 22 didn't seek to abridge it at all and then what happened
 23 in the revisions of the draft order was that that came
 24 to be reduced and as we see from page 8 of our skeleton
 25 argument at paragraph 19, the time periods had been

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1 reduced considerably from 28 days in the case of
 2 Mr Doronin, it was then being said 14 days.
 3 45 days in the case of Pontwelly and ARGL, which
 4 would now be AHOL, 14 days was said to be sufficient,
 5 and for Tarek, no date was originally said and
 6 previously it was being said 4 September was proposed.
 7 Well, we invite your Lordship to ask yourself first of
 8 all if they were happy with those dates originally, why
 9 then subsequently reduce them, truncate them so
 10 severely. The answer was they concluded that that
 11 jeopardised the trial date, but they must have believed
 12 that those were sensible dates to include at the outset
 13 and it was only when it dawned upon them that that would
 14 mean that a November trial could not happen that they
 15 then have sought to argue that shorter dates are more
 16 reasonable.
 17 My Lord, they cannot be reasonable given the amount
 18 of work that needs to be done, not only in the drafting
 19 of the defences but the other work that needs to be
 20 carried on at the time. Your Lordship will now have
 21 seen from what Mr Brisby said, and some of the points
 22 I have made, the extent of the issues between the
 23 parties. There is a detailed chronology of events going
 24 from at least the end of 2014 up to the present day
 25 which needs to be explored. Looking only at my learned

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1 friend's skeleton argument for a moment, it appears that
 2 the integrity of a number of individuals is being
 3 attacked. Paragraph 58 of my learned friend's skeleton
 4 argument, the Aman Resorts chief financial officer,
 5 Mr Checoury is brought into the -- he is not alleged to
 6 be a conspirator, but he is brought into the alleged
 7 wrongdoing, and it is said in the skeleton argument of
 8 him that it is inconceivable that any competent CFO
 9 acting in good faith and in the interests of the
 10 business wouldn't have mentioned the catastrophic
 11 default, so he is somebody who needs to be spoken to, he
 12 is somebody who is said not to be acting in good faith.
 13 Mr Cole, the group counsel is identified in
 14 paragraph 6.1.2. It is said in relation to him:
 15 "It is inconceivable that any competent general
 16 counsel acting in good faith and in the interests of the
 17 business wouldn't have mentioned the fact that there had
 18 been an alleged breach of the Pontwelly loan agreement."
 19 He will have to be spoken to, allegations of not
 20 acting in good faith are made against him.
 21 The same goes in relation to Mr Jolivet. Mr Jolivet
 22 indeed is alleged to be a conspirator in the Pontwelly
 23 conspiracy, not joined as a defendant, but alleged to be
 24 a conspirator, in what is said to be a dishonest
 25 conspiracy. So serious allegations over a considerable

1 21

1 period of time which will need to be investigated and
 2 pleaded back to with the degree of care which one would
 3 expect in that case.
 4 At the same time in parallel with that,
 5 investigation into matters of New York law on the
 6 enforcement side, investigations in relation to BVI law
 7 in relation to directors' duties. Mr Brisby tells the
 8 court that BVI law is the same; well, it may or it may
 9 not be, but it certainly needs to be investigated. It
 10 may not be the same in all respects.
 11 There may be questions of value. There may be
 12 accountancy evidence that is needed. One front-loads at
 13 this stage, one doesn't plead the case it states the
 14 obvious without having the detail there. All that has
 15 to be done at a time when junior counsel only returns
 16 next week, leading counsel doesn't return until
 17 7 September and then at that stage they will be involved
 18 in the preparation of the pre-trial review. There will
 19 be preparation for the evidence for the return date of
 20 the interim injunction. The team on this case are in
 21 the process of reviewing the disclosure which was given
 22 last Friday from the claimant. I understand there are
 23 11,000 different documents comprising 120,000 pages of
 24 documents which need to be reviewed. Witness statements
 25 on the current timetable need to be served in the action

1 22

1 on 25 September, which would be at the end of the week
 2 in which the pre-trial review is to take place, and it
 3 is all very well being beaten by the stick of: well, you
 4 are a large firm, throw enough people at it, but one
 5 can't simply put somebody on a case and on day one they
 6 are productive. In a case of this nature, if you are
 7 going to do any kind of sensible work, there needs to be
 8 a learning curve and that can take some time in a case
 9 of this complexity.
 10 So it may come very easily from the claimants to say
 11 well, they managed to turn round their pleading in three
 12 weeks and they turned around the revised version in two
 13 days, but the allegations that are made are serious, the
 14 investigations that need to be undertaken are ones which
 15 require care, and the matter, given the seriousness of
 16 the allegations and the amount at stake, needs to be
 17 pleaded with care and with particularity, and the
 18 current timetable doesn't permit that.
 19 MR JUSTICE WARREN: Who drafts the defence on your team?
 20 MR GATT: I will hazard a guess and see if I am shouted
 21 down, but it will be Mr Caplan, subject to Mr Howard's
 22 approval and input. And Mr Howard, yes.
 23 So, my Lord, I was about an hour and 20 minutes;
 24 unless I can assist further ...
 25 MR JUSTICE WARREN: What time are you asking for, for the

1 23

1 service of the defence from today?
 2 MR GATT: It was 45 days, which is just over six weeks,
 3 which was their original proposal. 2 October would be
 4 a Friday, which is just over six weeks, and when one
 5 considers what will be happening in September in any
 6 event, it is still vacation. One still has problems
 7 with not -- I can't point to witnesses at the moment,
 8 because of limited time, but one will be looking to
 9 speak to people when they themselves may be on holiday.
 10 The timetable proposed by my learned friend would be
 11 a tight one on a speedy trial timetable. It would be
 12 difficult to envisage a case of this complexity and
 13 value being dealt with on a speedy trial timetable.
 14 MR JUSTICE WARREN: But if the scenario which you profess
 15 not to want, but it is being forced on you, which is the
 16 loss of the trial date will mean there is not a lot of
 17 point having a PTR before the defence is in...
 18 MR GATT: My Lord, if the trial were to be in January, there
 19 is very little loss of time at all, and if that was what
 20 the stunt was designed to achieve, which it certainly
 21 wasn't, it has been a very unsuccessful stunt. It
 22 really is a risible submission that that was designed to
 23 achieve the adjournment of a trial. It is just an
 24 astonishing submission made without any foundation other
 25 than bare assertion.

1 24

1 MR JUSTICE WARREN: If the PTR were to go off, you will give
 2 undertakings up to the new date?
 3 MR GATT: It would depend when it was, I suppose.
 4 MR JUSTICE WARREN: I can't tell you when it would be. You
 5 would have to go and fix it.
 6 MR GATT: Until the return date of the application, yes.
 7 MR JUSTICE WARREN: Yes.
 8 MR GATT: My Lord, the only other thing that would need to
 9 change if the return date changes, that is the date of
 10 the PTR, the direction we have agreed so far was
 11 predicated on that happening in the week of the
 12 14 September, so everybody compressed their time for
 13 serving the evidence. If it were to be later, even if
 14 it were to be in the week of the 20th, that is only the
 15 Friday of the week after the week after next, it would
 16 be --
 17 MR JUSTICE WARREN: It is surely desirable that the PTR and
 18 the return date are the same date whenever they are.
 19 MR GATT: My Lord, yes, but I am saying if it slipped from
 20 the week of the 14th into the following week, there may
 21 be an argument just for going back and revisiting the
 22 dates that we agreed on the basis the PTR was in the
 23 earlier week.
 24 MR JUSTICE WARREN: But if I say the defence doesn't need to
 25 be in for 45 days, then there is not much point having

1 25

1 a PTR in September.
 2 MR GATT: Correct. My Lord, sorry, we may be at
 3 cross-purposes. What your Lordship has got in the
 4 agreed part of the order at the moment is filing and
 5 serving evidence in response to the --
 6 MR JUSTICE WARREN: You would want to extend that if the
 7 return date moved?
 8 MR GATT: That is my point, sorry. I was being obtuse.
 9 MR JUSTICE WARREN: Mr Doctor?
 10 MR BRISBY: My learned friend asked us all to indicate
 11 whether we were available the following week if the PTR
 12 was moved back a week, maybe it would be helpful if my
 13 learned friend could deal with the result of his --
 14 MR JUSTICE WARREN: You could have 21st or 22nd but you
 15 couldn't have the rest of the week.
 16 MR BRISBY: My Lord, that would certainly suit me because
 17 I can do Monday, Tuesday, Wednesday of that week, but
 18 I can't do Thursday or Friday.
 19 MR JUSTICE WARREN: Did you have any success with Mr Howard
 20 and Mr Caplan and Mr Brindle? Meaning you didn't get
 21 their diaries?
 22 MR DOCTOR: No, I did, I am just waiting to be called on.
 23 MR GATT: Sorry, my Lord, I am just going to clarify what
 24 the position is in relation to Mr Howard and Mr Caplan,
 25 I thought I understood it. They can do 21st and 22nd.

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1 Of course, the longer the return date is, the more
 2 important we would say fortification is, because the
 3 longer the period of risk is.
 4 MR JUSTICE WARREN: Yes.
 5 What about Mr Brindle, Mr Doctor?
 6 MR DOCTOR: My Lord, Mr Brindle is away until 28th,
 7 effectively the end of this month. He is then going
 8 straight to Singapore. He will be back from Singapore
 9 on 4 September. He is leaving for Dubai on 19 September
 10 to attend a trial beginning on 21 September, which is
 11 listed in Dubai and he shall be back from Dubai on
 12 7 October. He may be leaving on 6th and arriving on the
 13 7th, so it is one of those two days. So he is not
 14 available on 21 September, that week.
 15 MR JUSTICE WARREN: Okay. Thank you. Now I am going to
 16 hear from you, that's right.
 17 MR DOCTOR: Thank you.
 18 MR JUSTICE WARREN: I am sorry, this is a convenient moment,
 19 I think, to give the shorthand writers a break.
 20 (3.19 pm)
 21 (A short break)
 22 (3.25 pm)
 23 Submissions by MR DOCTOR
 24 MR DOCTOR: Well, my Lord, no need for me to do any
 25 introductions or background, because your Lordship has

1 27

1 had enough of all that.
 2 The key question, my Lord, as far as my clients are
 3 concerned, is on the face of it, how much time would
 4 have they have for putting in their defence, and I will
 5 tell your Lordship what their difficulties are. It has
 6 been set out in correspondence and in my skeleton and
 7 I will try and develop some of those points, just to
 8 show your Lordship not only that there is a difficulty
 9 about the defence, but that the elephant at the side of
 10 this room here, which has not been grasped, is that it
 11 is, whatever happens, it is most unlikely that this
 12 trial date can be kept.
 13 Nobody seems to want to be the first to say it, but
 14 I'm saying it, and there are all sorts of reasons why,
 15 with the best will in the world, meeting the trial date
 16 would have been difficult.
 17 But with adding in all the extra material which is
 18 now about to be added to the trial, it will be
 19 impossible and, of course, the longer this decision is
 20 put off, the longer will be the date on which one can
 21 come back and the more the claimant will be able to
 22 say: well, now you have left it until too late and now
 23 if we go and try and get an alternative date it has
 24 moved much further and it is very unfair that we should
 25 have to wait so long, whereas if in fact they have been

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1 compelled to grasp the nettle here and now it might be
 2 no more than two months.
 3 And Mr Brisby has already made a suggestion that
 4 this material of his, that he wants to add to the trial,
 5 could be added, as it were, to the end of the trial
 6 period so that it would in any event take place
 7 in January, a completely unrealistic suggestion in this
 8 sense, it is the same witnesses and the same people by
 9 and large and they can't possibly be giving evidence
 10 twice on different issues, there would be only one
 11 witness statement from each witness covering all the
 12 issues and each witness would give evidence once.
 13 So my Lord, that is the overall background that one
 14 has to bear in mind, and my Lord, if I can begin by just
 15 taking the topics raised in the skeleton argument that
 16 was given to your Lordship earlier this morning, your
 17 Lordship will see that paragraph 6, the new allegations
 18 are not just allegations which introduce what I call the
 19 recent events, the conspiracy, apparently, to transfer
 20 the shares with the aim of obtaining an adjournment of
 21 the trial, my learned friend has described that as
 22 risible, and of course it is.
 23 But a conspiracy nevertheless to acquire these
 24 shares, for whatever purpose, and that is not -- those
 25 are not the only changes that have been put forward.

1 29

1 Interestingly, there have been, at least in relation to
 2 defendants 3 and 4, the introduction of allegations of
 3 dishonesty in relation to existing allegations and the
 4 examples I have given are in paragraphs 190(u), (v) and
 5 (w), which your Lordship would find at page 80 of the
 6 draft amended skeleton which I'm going to use the one in
 7 the application bundle tab 4, because that does have
 8 different colours and it is interesting to see how this
 9 has been added in.
 10 MR JUSTICE WARREN: That is in pleadings volume ...
 11 MR DOCTOR: I have never seen one ... I wasn't given your
 12 bundle this morning, but anyway, you tell me if it is
 13 not in here.
 14 MR JUSTICE WARREN: You are looking at volume -- the
 15 pleadings bundle?
 16 MR DOCTOR: I am looking at the application bundle.
 17 MR JUSTICE WARREN: Volume?
 18 MR DOCTOR: Tab 4, which I thought contained --
 19 MR BRISBY: My Lord, I hesitate to interrupt, my learned
 20 friend I don't think has understood that is not the
 21 version that he should be looking at, that is the
 22 previous version that we served on Friday.
 23 MR DOCTOR: Well, I'm not sure that that is right. Anyway,
 24 let me see if I -- perhaps Mr Gatt will tell me ...
 25 I want to look first at paragraph 190(u), which is at

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1 page 78.
 2 Now, does that have the word "dishonestly" in it?
 3 MR JUSTICE WARREN: Yes.
 4 MR DOCTOR: Now, my Lord, what I think has happened is that,
 5 as I understand it, and I will be corrected by Mr Brisby
 6 if I'm wrong, is that the first version which came last
 7 Friday did not have the word "dishonestly", although it
 8 did have this as an additional paragraph. The word
 9 "dishonestly" was then added in yesterday. That is my
 10 understanding of what has happened here.
 11 So there is an allegation in which "dishonestly" has
 12 been added into an allegation. In 190(v), the word
 13 "dishonest" has been added during the course of this
 14 week to the allegation of breaches by the directors. In
 15 190(w) in the second line, the word "dishonest breaches
 16 of duty" has been added.
 17 Now, if one goes back to 190(h) --
 18 MR JUSTICE WARREN: These are all the 11 pages of amendment,
 19 these are not allegations which have been made which are
 20 now having "dishonestly" added to them.
 21 MR DOCTOR: My Lord, I wasn't sure if these were originally
 22 made or if these were -- right, if these were made last
 23 Friday, then they have, during the course of the week,
 24 the word "dishonestly" has been added.
 25 MR JUSTICE WARREN: Added to the draft, but it is not added

1 31

1 to a pre-existing pleading.
 2 MR BRISBY: Can I help my learned friend.
 3 MR DOCTOR: Yes.
 4 MR BRISBY: Once we learnt this Monday about the transfer of
 5 the Silverlink share capital from Pontwelly to AHOL we
 6 amended the new allegations and the relief sought and
 7 one of the new claims we added in the version served
 8 yesterday was an allegation of knowing receipt and
 9 knowing assistance, and accordingly, the allegations in
 10 the previous version that had been served on Friday that
 11 stood had, where appropriate, the word "dishonest"
 12 added.
 13 MR DOCTOR: Did any of the existing allegations have the
 14 word "dishonest" added?
 15 MR JUSTICE WARREN: Mr Doctor, it is the allegations that
 16 were made in the application notice as originally
 17 formulated. They are not new -- they are not old in the
 18 sense of existing in the statement of particulars of
 19 claim as they existed two weeks ago, for instance.
 20 MR DOCTOR: Right, my Lord. Well, there is a another one,
 21 my Lord, at 15.4. It may be then, that these are new
 22 simply during the course of the week, but not in
 23 relation to allegations -- there is another one at 15.4,
 24 where I -- at some stage the word "dishonestly" has been
 25 added.

1 32

1 My Lord, part of the problem is that it has been
 2 very difficult to actually grasp what is being added and
 3 what isn't being added before one actually is able to
 4 take instructions about the matter and prepare
 5 a defence, but in any event, there are very serious
 6 allegations made against Mr Eliasch and the third
 7 defendant and they have to be the subject of
 8 instructions taken and they have to be pleaded to.
 9 Now, my Lord, that is the first point. My Lord,
 10 Mr Eliasch is the instructing party both for himself and
 11 the third defendant and, my Lord, his existing
 12 commitments are set out in the letter that your Lordship
 13 has been shown, of which there has been some comment.
 14 It says:
 15 "Our client has business commitments in Europe
 16 throughout next week, including attending a conference
 17 with the Swedish foreign secretary in Stockholm."
 18 So that is throughout Europe, and they are all
 19 business commitments, including this conference with the
 20 Swedish foreign secretary.
 21 "From the period 31 August to 13 September he is
 22 engaged as principal for a major tennis and sporting
 23 endorser, Head..."
 24 I should add, my Lord, that he is the CEO and
 25 chairman of Head, the company, which makes sports

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1 equipment.
 2 "... and he is engaged at the US Open where he will
 3 be conducting business for Head and hosting business
 4 events."
 5 Now, my Lord, Head, as I understand it, sponsors
 6 players, not events, and indeed, my Lord, the recent
 7 winner of the Wimbledon contest, Mr Djokovic, was
 8 sponsored by Head. We would all perhaps like a life of
 9 attending tennis matches and one could easily simply
 10 say: what a wheeze Mr Djokovic must have, he has a spot
 11 of tennis to play next week.
 12 Mr Eliasch's business is promoting Head and one
 13 would have thought it would be accepted that during the
 14 week of the US Open, an important match, he would be, as
 15 he claims, fully engaged in working. This might involve
 16 attending sports matches and receptions but that is for
 17 Eliasch work, and no doubt, productive work and he says
 18 he is not available to attend to give proper
 19 instructions for the preparation of a defence in
 20 an important matter where it is not simply an allegation
 21 of some legal dispute, but an allegation involving him
 22 in a dishonesty and conspiracy.
 23 So, my Lord, that is what he is doing. Apart from
 24 that, my Lord, he returns to London on 15 September and
 25 what I am instructed to say is that his job involves

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1 much travel and he is going to, before the end
 2 of October, travel to five countries on two continents,
 3 but he will make time to prepare and give instructions
 4 for a defence when he is able to do that after
 5 15 September.
 6 My Lord, the only reason why there is any doubt
 7 about whether he should be allowed this time is because
 8 it is suggested he conspired in July in order to get an
 9 adjournment of a trial in November, which is absurd, and
 10 in any event, hardly successful. The only reason why it
 11 would be necessary in some way to put more pressure on
 12 Mr Eliasch to give more time to take time away from the
 13 US Open and his other commitments until then is because
 14 of the necessity of preparing a defence to these very
 15 serious allegations.
 16 Your Lordship is not in a position to determine
 17 whether the allegations have any validity or not, and
 18 what Mr Eliasch is asking for is no more than a man
 19 would be entitled to, which is time to prepare
 20 a defence.
 21 He asks for, my Lord, as I set out in my skeleton,
 22 28 days from 15 September. I realise that that will
 23 take us beyond the 45 days that my learned friend
 24 Mr Gatt is asking for, which would be 3 October, and it
 25 may be, my Lord, that some --

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1 MR JUSTICE WARREN: What date do you get to?
 2 MR GATT: I think we get to, my Lord, something like
 3 12 October and we would, if there is going to be
 4 a reduction, we would ask that the Saturday of the 45
 5 days be extended to the Monday, the 5th, rather than
 6 Friday, the 2nd. That would make it one week shorter
 7 than we are asking for, and that, we hope, will give
 8 Mr Eliasch the time to devote to this serious matter.
 9 MR JUSTICE WARREN: Of course he has to devote the time well
 10 before that to enable eminent counsel to draft the
 11 pleading on the basis of his instructions.
 12 MR DOCTOR: Yes.
 13 MR JUSTICE WARREN: So the question is when he is going to
 14 have been able to feed those who do the work on the
 15 legal end to do what they have to do?
 16 MR DOCTOR: Well, my Lord, he becomes more available from
 17 the end of the US Open, which is 15 October, and it is
 18 at that point where he can then devote his attention to
 19 this and it does not give a great amount of time to go
 20 the --
 21 MR BRISBY: I hesitate to interrupt my learned friend; he
 22 said 15 October, he meant 15 September.
 23 MR JUSTICE WARREN: I got that down.
 24 MR BRISBY: But probably helpful to point that out.
 25 MR DOCTOR: 15 September, and that does not give enough --

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1 it does not give a great deal of time, but it will
 2 enable some time to be given --
 3 MR JUSTICE WARREN: The question is when -- he is not going
 4 to come in in dribs and drabs for an hour on Tuesday and
 5 a couple of hours on Thursday; he is going to sit down
 6 with the relevant people at Herbert Smith and give them
 7 some clear instructions following lots of questions he
 8 is going to be asked, and the question is when that
 9 exercise can be completed because that has to be in good
 10 time for the lawyers then to draft the pleading to
 11 deliver it on whatever date I set for its delivery.
 12 MR DOCTOR: My Lord, presumably it would take place in some
 13 form of dribs and drabs because he would come on one day
 14 for a day or two, drafts would be prepared, no doubt
 15 there would be communication with him. He might have to
 16 come back, but he has accepted that when he returns from
 17 the US Open he will have to turn his attention to this,
 18 so that instructions can be given as fully as possible
 19 in order to enable a date in the beginning of October to
 20 be met.
 21 My Lord, so that is Mr Eliasch's availability and it
 22 is not an unreasonable state of affairs because the
 23 US Open is the US Open and was fixed long before
 24 anything was known about this.
 25 Now, my Lord, the existing timetable is very tight

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1 and disclosure has only just been made last Friday. So
 2 in any event there is going to be some time lapse before
 3 statements can be prepared, and that, in a sense, allows
 4 the solicitors to do work before the time when
 5 Mr Eliasch becomes more fully available.
 6 There is a lot of documentation, as you have been
 7 told. The new allegations are doubtless going to lead
 8 to demands for further disclosure on all sides. That's
 9 inevitable. I cannot imagine that Mr Brisby would be
 10 satisfied with no further disclosure once the amendments
 11 have gone through.
 12 There will be possibly additional witness evidence
 13 and Mr Gatt has already drawn your attention to
 14 additional persons against whom serious allegations are
 15 made and who are obviously going to be potential
 16 witnesses or sources of information and there may be
 17 many others.
 18 My Lord, the next important point is the one which
 19 is actually in the pleading, and this is the question of
 20 experts. There is no provision in the current trial
 21 timetable or the preparation timetable for experts, but
 22 the present pleading that your Lordship is being asked
 23 to give permission for explicitly refers to it having to
 24 be called. If your Lordship would look at page 77.
 25 I think it is -- on my version it is 77. It is

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1 paragraph 190(s) which starts at 76 and then goes on to
 2 77. This is a paragraph which begins with:
 3 "As Pontwelly and subsequently AHOL knew, as
 4 a matter of New York law..."
 5 And then various points are set out, and then at the
 6 end of the paragraph:
 7 "PHRL reserves the right to add or modify the above
 8 grounds to the extent necessary and will seek permission
 9 [not may or might seek permission] to adduce the
 10 evidence of an expert witness at trial."
 11 So even if that sentence hadn't been included it was
 12 obvious that we are going to have expert evidence on
 13 New York law and Mr Gatt has mentioned BVI law.
 14 Then, my Lord, we have paragraph --
 15 MR JUSTICE WARREN: That is a very self-contained little
 16 issue which will be done in parallel with anything else,
 17 but that is not going to extend time or trial
 18 significantly.
 19 MR DOCTOR: Well, my Lord, one doesn't know whether those
 20 additional allegations are going to be added, but even
 21 this issue, my Lord, there is already some dispute, your
 22 Lordship has identified another issue which is the
 23 question of what happens to the shares. These things
 24 have a way of increasing and at this stage, no one has
 25 really limited -- given any indication of how the

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1 foreign law is going to be limited.
 2 But, my Lord, if you look at page 80, I think it is
 3 80. Paragraph 190(y). Yes, 190(y) starts on the
 4 previous page and it is an allegation of the value of
 5 shares being reduced to nil and the value of the shares
 6 significantly exceeds the outstanding balance on the
 7 Pontwelly loan, and then at the top of the next page:
 8 "PHRL reserves the right to plead further to this
 9 loss and damage and will seek to rely at trial on the
 10 report of an expert accountant."
 11 And that is repeated in relation to, I think it is
 12 the next page, or page 81. Yes, 190(a), (b), there is
 13 reference to:
 14 "The loss of the opportunity to develop the
 15 Aman Resorts as a successful and profitable venture in
 16 the manner that has been envisaged at the time when it
 17 entered into the JVC. PHRL reserves the right to plead
 18 further to this loss or damage and will seek to rely at
 19 trial on the report of an expert accountant."
 20 So there is quite extensive accountant evidence or
 21 valuation evidence which is adverted to and which will
 22 have to be both factored into the trial timetable and
 23 the preparation, and those issues are not necessarily
 24 discrete. One doesn't yet know the full extent of the
 25 valuation evidence that will be necessary, but one can

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1 appreciate the valuation evidence by its nature is often
 2 quite lengthy and quite disputed.
 3 My Lord, the trial length I have mentioned, which
 4 must come under some question and then, my Lord, we come
 5 to the question of the absence, the current absence of
 6 the trial team. My Lord, I have told your Lordship
 7 Mr Brindle is not available until he comes back from
 8 Singapore on I think it is 5 September. Mr Sinclair is
 9 apparently returning next week. He is the only junior
 10 in the case and has been since the beginning of 2015.
 11 Mr Zellick, I am instructed, was previously the junior.
 12 There was a period during the course of the preparation
 13 of the defence when there was a handover and I think
 14 both of them took part in the preparation of the defence
 15 which was served last November. Mr Zellick appeared on
 16 the security for costs application last December and
 17 since then has not been involved in the trial at all.
 18 So there has always been one junior and it is intended
 19 that there will be one junior who is briefed and that is
 20 Mr Sinclair.
 21 So, my Lord, that is the position with -- there is
 22 some restraint, therefore, on the trial -- on the
 23 counsel team.
 24 Now, my Lord, I want to now turn to the point that
 25 the claimant has not addressed the subject of what is to

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1 happen to the trial, even if its contention is: oh,
 2 we'll think about that later, and I think that is its
 3 contention, you just get your defence in by
 4 11 September, and the court hearing the PTR will not
 5 only hear the injunction applications during the course
 6 of the day, but they will also then deal with the
 7 question of the trial timetable and the trial itself,
 8 because it will be able to see more than the parties can
 9 presently see, because there will be a defence.
 10 Well, my Lord, your Lordship is already aware that
 11 many of these allegations are disputed and in outline
 12 one can see what is in dispute. There is a new set of
 13 claims put forward, there is various additional evidence
 14 that is going to be required, but most of all, my Lord,
 15 at the present moment the parties can see that this is
 16 trying too hard to squeeze something into an impossible
 17 date and from the information your Lordship has obtained
 18 this morning, the solution to the problem appears to be
 19 at hand.
 20 The claimant cannot be unduly prejudiced by
 21 a shifting of the trial date to early next year. That
 22 would meet the problems that have arisen with these
 23 events having only taken place now. It would not be
 24 unfair to the defendants and force them to prepare their
 25 defences of very serious matters under great pressure.

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1 But the moment is now, and if the moment is lost, the
 2 situation will be completely different at the PTR when,
 3 of course, the claimant will say: well, now we have
 4 checked and the first date is some time in 2030 or
 5 something, so we can't possibly be put off until that
 6 date.
 7 So this is something which really ought to be
 8 grappled with now, but of course the third and fourth
 9 defendants can't force everybody else to this point of
 10 view, but it is obviously the sensible thing to do.
 11 My Lord, there is the point that can be made, that
 12 the claimant has known about at least the beginnings of
 13 these events since 21 July and it has taken some
 14 considerable time to come to court and one could make
 15 the point, if one wanted to, that 21 July was not during
 16 the vacation. They had received news that the asset was
 17 about to be sold, at a public auction, they received
 18 that news on 21 July. A genuine shocked response from
 19 somebody whose principal complaint is that: I would like
 20 to run a hotel, would have been to get to court before
 21 31 July, in term time, if only to secure dates and times
 22 for the preparation of what is to be done about this
 23 awful news, because obviously an auction is only
 24 different from what in fact happened in that somebody
 25 somewhere is going to acquire the asset for the auction

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1 price for which for all they knew might have been less
 2 than whatever price was obtained. One simply doesn't
 3 know.
 4 The uncertainty was there. The threat was there,
 5 and they will say: oh well, the auction wasn't going to
 6 take place until 25 August, in other words: we knew it
 7 would be in the vacation, we thought we will bring this
 8 application in the vacation, and one could speculate
 9 that it might have passed through their heads, God
 10 forbid, but it might have passed through their heads
 11 that some time in August would be more convenient
 12 because the defendants' various counsel would be away on
 13 holiday -- God forbid anyone should suggest such
 14 a thing, but of course, one can suggest that the whole
 15 of the auction and sale was all done in order to obtain
 16 a court advantage with regards to the date of the trial.
 17 So, my Lord, it works both ways, and the real
 18 question is what is to be done.
 19 So, my Lord, we suggest that if the parties can't be
 20 persuaded by your Lordship, we are not, as it were,
 21 making -- we haven't had time to make a formal
 22 application for the vacation of the trial date and we
 23 say that the appropriate thing is for your Lordship to,
 24 as it were, persuade the parties to go off and fix a new
 25 trial date in the light of the information your Lordship

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1 has given, but if the claimant does not wish to take
 2 advantage of that proposal, a sensible way of dealing
 3 with this thing, well then there is absolutely no reason
 4 to abridge the time limits for the service of the
 5 defence, that must just take place when it takes place,
 6 and that will of course take effect, will have the
 7 effect of putting the trial off, and at that stage the
 8 claimant's complaints about the length of delay and so
 9 on will have less effect than they do at the moment.
 10 Your Lordship might wonder why that obvious sensible
 11 suggestion isn't being followed. So that, my Lord, is
 12 what we say. We ask your Lordship should either suggest
 13 and get the parties to do the obvious, the sensible
 14 thing, or failing which -- we are obviously willing to
 15 do that -- failing which, the amendment is put through
 16 and the defendants are given the time we have asked for
 17 to file our defence, which would be ideally 12 October
 18 and if not, if your Lordship wants to make it slightly
 19 earlier, 5 October.
 20 My Lord, I also have the question of costs, but
 21 I see I think your Lordship would be reluctant to hear
 22 that and although your Lordship is in the best position
 23 to deal with that, I'm going to forego the opportunity
 24 provided that application can be adjourned to --
 25 MR JUSTICE WARREN: I am grateful.

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1 MR DOCTOR: -- some other court at some other point, but at
 2 the appropriate time, as your Lordship pleases.
 3 MR JUSTICE WARREN: Thank you.
 4 Mr Brisby.
 5 Submissions in reply by MR BRISBY
 6 MR BRISBY: My Lord, very briefly in reply, dealing first of
 7 all with what Mr Gatt said. Firstly, can I deal with
 8 the point which he returned to on at least three or four
 9 occasions which he referred to colourfully by reference
 10 to the Conan Doyle short story, the dog that didn't bark
 11 in the night. My Lord, that was apparently the fact
 12 that when given notice of the impending sale by
 13 Pontwelly of the Silverlink shareholding, instead of
 14 writing outraged letters to Herbert Smith, my client sat
 15 back and did nothing, and what was said was it could be
 16 inferred from that that they must have suspected that
 17 interest wasn't being paid all along and hence they
 18 weren't surprised.
 19 My Lord, that is nonsense, we say. What my clients
 20 did is hunkered down and produced this vast amount of
 21 evidence in time for a fully on notice hearing before
 22 the anticipated auction date.
 23 We moved very quickly to produce all this work
 24 within a period of just over three weeks. As your
 25 Lordship knows, a further amount of enormous work had to

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1 be done as on Monday next week because that was when we
 2 found out about the further stunt involving the transfer
 3 or sale of the Silverlink shareholding to AHOL and we
 4 had to reformulate not only the pleading, but the relief
 5 we were seeking, and we also to put in further evidence.
 6 My Lord, moving on from that, my Lord, my learned
 7 friend says that we should have dealt with the matter by
 8 way of correspondence because undertakings have been
 9 given in the past. True it is, my Lord, that
 10 undertakings have been given in the past, but never,
 11 I think, before an application had been issued. So we
 12 had to go to court and sometimes in the run-up to
 13 a court hearing, undertakings that proved acceptable on
 14 the points on which they were offered were proffered.
 15 My Lord, moving on to points of principle raised in
 16 relation to the law underlying our new claims. My
 17 learned friend sought to suggest that there was no legal
 18 basis for what he called the proprietary remedy
 19 sufficient to justify some of the injunctions sought
 20 because our claim was in reality a derivative one and
 21 ARGL wasn't a party before the court; ARGL, the
 22 borrower.
 23 My Lord, we don't accept that's right at all. There
 24 are two ways we put the claim that don't involve
 25 proprietary claims or derivative claims properly

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1 so-called, but which would justify an injunction under
 2 the Supreme Court Act on the basis that it was just and
 3 convenient.
 4 The first point is this: as we make clear in
 5 paragraph 190(aa) and (ab), damages in this case is not
 6 an adequate remedy even if, and there is no evidence on
 7 this, Tarek, which is a BVI company like, I may say, my
 8 clients, with nominee directors and shareholders, is in
 9 a position as to which there is no evidence to meet any
 10 claim we may have for damages.
 11 My Lord, just looking to the new pleading, 190(aa)
 12 and (ab). It is page 80, my Lord of the --
 13 MR JUSTICE WARREN: I have got it. I'm looking at it.
 14 MR BRISBY: You see:
 15 "In the further premises Mr Doronin, Mr Eliasch,
 16 Sherway, and Pontwelly, are liable to PHRL in damages
 17 for having induced or procured or assisted TIL's and the
 18 JVC's breaches of the JVC SHA. In particular, these
 19 individuals knew of the existence of PHRL's rights under
 20 the JVC SHA, and intentionally interfered with those
 21 rights to the detriment of PHRL, causing it loss and
 22 damage. PHRL is accordingly entitled to:
 23 "(a) damages..."
 24 And then:
 25 "(b) an injunction to prevent a continuation or

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1 repetition of the tortious conduct or the loss and
 2 damage flowing (or likely to flow) there from in
 3 substantially the form set out in paragraph 190(z)
 4 above".
 5 We say:
 6 "It is not possible at this stage to quantify
 7 precisely PHRL's loss, but such loss would at least
 8 include any diminution in the value of its shareholding
 9 in the JVC as a result of TIL and JVC's breaches of the
 10 JVC shareholding agreement and the loss of its
 11 opportunity to develop the Aman Resort's group of hotels
 12 as a successful and profitable venture in the manner
 13 that has been envisaged at the time when it entered into
 14 the shareholders' agreement. PHRL reserves the right to
 15 plead further."
 16 And also, my Lord, 190(y) on the previous page.
 17 My Lord, this meshes in with the second point. We made
 18 our investment in the joint venture agreement in the
 19 belief that we were investing in a hotel group which we
 20 could profitably take forward in the future. We say
 21 that a result of repeated breaches of that agreement
 22 under the provisions of the shareholders' agreement, we
 23 were entitled to acquire the balance of Tarek's
 24 shareholding in the joint venture company on favourable
 25 terms. If we succeed in that claim, we should be

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1 entitled to get what we invested in, namely now
 2 a controlling 100% interest in a hotel operating group,
 3 not in a group that actually has no operating assets at
 4 all, because the shareholding has been transferred to
 5 Silverlink.
 6 In those circumstances, it is obvious that damages
 7 is not an adequate remedy and accordingly pending
 8 vindication of our claim at trial to buy them out of the
 9 joint venture, we should be entitled, by way of
 10 injunction, not by way of proprietary claim, to maintain
 11 the assets as they are or should have been had the joint
 12 venture been fulfilled so we get what we bargained for.
 13 MR JUSTICE WARREN: Injunction against whom?
 14 MR BRISBY: Against Tarek, which is Mr Doronin's company,
 15 that is the other joint venture partner.
 16 MR JUSTICE WARREN: But the injunctive relief you are
 17 seeking is against all these other people as well.
 18 MR BRISBY: Yes, but that is to ensure -- that they are all
 19 controlled -- that is the point of the new pleadings.
 20 They are all controlled by Mr Doronin, who also controls
 21 Tarek. So we say what is essential is that the hotels
 22 mustn't be allowed to get out of Mr Doronin's control,
 23 such that when we succeed in trial in buying out his
 24 interests in the joint venture, we are prevented from
 25 getting the interests in the hotel which the joint

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1 ventures were all about. That is the other aspect of
 2 the stunt beyond trying to put off the trial that we
 3 complain about. This is an attempt dishonestly to steal
 4 our chances of victory at trial because but for the
 5 stunt, had we won the trial and had we succeeded in
 6 getting an order requiring Tarek to sell its
 7 shareholding in the joint venture to us, that would
 8 obviously have brought full control over the hotel
 9 group.
 10 The other function of the stunt, beyond simply
 11 putting off the trial is that it -- if it succeeds, it
 12 enables Mr Doronin to retain control of the hotel group
 13 and the procedure associated with owning these 26 very
 14 luxurious hotels, even if we succeed in getting an order
 15 forcing him to sell his shareholding in the joint
 16 venture company back to us at 80% of their value.
 17 My Lord, also we say that the stunt, which is the
 18 subject of the new claims, was effected pursuant to
 19 conspiracy to remove assets in which we had an interest
 20 through our shareholding in the joint venture company
 21 from the joint venture. My Lord, we say, because we
 22 have that person claiming dishonest conspiracy, we can
 23 get a claim for the return of those assets and
 24 appropriate declarations of trusts in our personal
 25 capacity without having to mount a derivative action on

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1 behalf of ARGL. That is certainly something that we
 2 could have done, but we haven't done it at the moment.
 3 My Lord, my learned friend referred to principles of
 4 reflective loss and to the well known Johnson v Gore
 5 Wood decision, but, my Lord, that is a total red
 6 herring. Those principles do not apply where the
 7 company which could bring the cause of action is dead
 8 locked and hence is not in a position to bring
 9 proceedings itself. Johnson v Gore Wood establishes in
 10 those circumstances you may personally bring a claim
 11 even if the loss that you are claiming is a loss by way
 12 of diminution to the value of the shares you hold in the
 13 holding company, because, of course, the company that
 14 might otherwise have brought the action is not in
 15 a position to do so. So Johnson v Gore Wood is
 16 a complete red herring. Derivative action, I suspect,
 17 would have been an option subject to the interesting
 18 points about first having to go to the BVI for leave
 19 which Mr --
 20 MR JUSTICE WARREN: But if this was an ARGL claim, because
 21 your claim is that it is held on constructive trust by
 22 AHOL for ARGL, and you can get your hands on ARGL but
 23 you haven't yet, why isn't it a derivative claim?
 24 MR BRISBY: Because we also make the claim in support of our
 25 personal claims as victims of a conspiracy, and there is

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1 the additional point which I started with that in
 2 support of our original claim which is to buy out
 3 Tarek's interest in the group, we could in any event,
 4 provided we could show sufficient connection between
 5 Tarek and the new company holding the assets, AHOL,
 6 which we can through Mr Doronin, we could in any event
 7 got an injunction restraining dispositions of the assets
 8 held by the Group to protect the value of that claim,
 9 which is the easiest way of dealing with that.
 10 MR JUSTICE WARREN: Explain that one again.
 11 MR BRISBY: Yes, my Lord. We have a contractual right to
 12 buy them out of the joint venture.
 13 MR JUSTICE WARREN: Yes.
 14 MR BRISBY: On a favourable basis. If they seek to stymie
 15 our ability to get such a judgment by transferring the
 16 assets out of the joint venture company so as to render
 17 it either valueless or unattractive, the court would
 18 have jurisdiction to grant an injunction on the basis it
 19 was just and convenient under section 51 of the Supreme
 20 Court Act, in effect, to protect the subject matter of
 21 the action.
 22 What in reality this is about is who is going to
 23 control the Aman group of hotels. It so happens they
 24 are not held by the joint venture company, they are held
 25 further down the corporate chain, as your Lordship has

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1 seen from the -- I hate to use the word organogram,
 2 I think, such -- the family tree of the group companies.
 3 My Lord, on that basis, the court clearly has
 4 jurisdiction to freeze the position so as to prevent the
 5 subject matter of the action, preserve it. Namely, our
 6 right if we succeed in showing Tarek has breached in
 7 material respects the shareholders' agreement to gain
 8 sole control of the group by buying them out
 9 compulsorily under the provisions in that regard
 10 contained in the shareholders' agreement.
 11 MR JUSTICE WARREN: Yes.
 12 MR BRISBY: My Lord, moving on to the other action,
 13 absolutely no reasons have been advanced as to why it is
 14 not appropriate, especially given the short time period
 15 over which these injunctions will lie, why there
 16 shouldn't also be a restraint on disposals of the
 17 underlying hotels. Mr Gatt was unable to answer your
 18 Lordship's question as to whether in practice any sale
 19 could be completed as opposed to negotiated prior to the
 20 PTR and that is evidently the reality of the matter.
 21 My Lord, in relation to 5.1.3 and the injunction
 22 sought in relation to preserving some of Carpentaria's
 23 rights at the very least as a director or former
 24 director of Silverlink, all Mr Gatt could suggest is
 25 they have been removed as a matter of New York law

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1 because the forfeiture process has been concluded. But,
 2 my Lord, that is no good as an answer, because that begs
 3 the question as to whether that has indeed happened.
 4 Our case on New York law, which is not dissented
 5 from in Mr Strickon's witness statement, is that the
 6 rights under the code have to be exercised in good
 7 faith. There is clearly an arguable case here,
 8 especially given the questions which Mr Gatt was unable
 9 to answer as to why no intimation that there might be
 10 a forthcoming default was given before that actually
 11 appears to have happened in February.
 12 Given it is arguable that what happened is wholly
 13 open to debate, really holding the ring and maintaining
 14 the status quo means effectively that we should have
 15 some protection in relation to at the very least access
 16 to information and documentation and notices of board
 17 meetings in the same way that we would have if the
 18 position was as we believe it is and that we were still
 19 directors of the relevant company.
 20 My Lord, just one small point there, how petty
 21 Mr Doronin's camp has been in this respect:
 22 Miss Turnbull, the representative of Carpentaria had
 23 booked to go and stay in one of the hotels -- you have
 24 probably seen this in the skeleton -- this coming
 25 weekend as part of her duties as director. Her visit

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1 has been cancelled. She has been told she is no longer
 2 welcome. That is just the sort of thing that we say is
 3 wrong pending -- we should be able to turn up at the
 4 properties, same terms as any other member of the
 5 public, to see what is going on on the ground.
 6 One of the big areas of dispute here is the extent
 7 to which Mr Doronin is changing the brand of the Aman
 8 group and the way it is marketed and the way it presents
 9 itself, contrary to the shareholders' agreement, without
 10 any consultation with my clients.
 11 My Lord, very briefly on 5.2 and publicity, my Lord,
 12 it is difficult to see how an amendment to what is on
 13 the website to make it clear that whatever it said there
 14 is what Mr Doronin is arguing but it is subject to
 15 dispute, how that is going to undermine public
 16 confidence in the group, given all the other publicity
 17 that there has been in the press about this dispute and
 18 given no doubt the further publicity that there will be
 19 as a result of today's hearing.
 20 My Lord, moving on to fortification. Mr Gatt was
 21 unable to point to any real risk of loss here. The only
 22 example he gave is that it might be difficult to obtain
 23 financing because Silverlink would be unable to pledge
 24 the hotels in support of loans obtained.
 25 There is no suggestion, or was no suggestion by

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1 Mr Gatt as to what the money might be needed for. This
 2 company or this group is a profitable and successful
 3 group and it has been relieved from the burden, the
 4 Silverlink group, that it had to produce money to repay
 5 the Pontwelly indebtedness, because that has just
 6 vanished. So the group is getting monies in without
 7 having to pay substantial sums of money out by way of
 8 interest. So in a way --
 9 MR JUSTICE WARREN: -- only if foreclosure is effective.
 10 MR BRISBY: Yes, that is if foreclosure is effective. But
 11 at the moment it must be common ground -- it must be the
 12 defendants' position that Silverlink doesn't need and
 13 ARGL doesn't need to service the debt because the debt
 14 has vanished and accordingly the refinancing in the
 15 sense we were talking about it before isn't necessary.
 16 We needed to refinance the Pontwelly loan because it was
 17 at usurious rates of interest. But it has gone now. So
 18 really my learned friend needs to be a bit more specific
 19 as to what money might be needed for.
 20 But because we hope to get at trial this group back,
 21 it goes without saying that if there is a real need for
 22 some substantial sum which the company can't raise from
 23 its own cashflow to make some renovation or restoration,
 24 let's say for an example to one of the hotels that will
 25 benefit the company, we would obviously consent to that,

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1 because if we succeed in recovering the hotel assets,
 2 they will have been improved.
 3 But that is why we have included a proviso saying
 4 save with the consent of the court or indeed our
 5 consent. We obviously want the hotels back, if we
 6 succeed in our new claims at trial, in tip-top
 7 condition.
 8 My Lord, finally, if I can deal with timing of the
 9 defences. It has become entirely clear, particularly as
 10 a result of what Mr Doctor has been saying, that what
 11 your Lordship is being effectively asked to do is put
 12 off the trial today. My Lord, we say that would be
 13 a monstrous result. It would be allowing what we have
 14 called the stunt to succeed even if it was dishonest,
 15 for the purpose for which it was conceived, namely to
 16 put off the trial.
 17 MR JUSTICE WARREN: But if the only way justice can properly
 18 be done is to give them the time for their defence that
 19 they ask, that is the inevitable consequence, is it not?
 20 MR BRISBY: Well, my Lord, if it is -- I still say it might
 21 not necessarily be the case, because there are
 22 expedients, my Lord, which can be discussed at the PTR
 23 as to how the proceedings could be dealt with in two
 24 stages.
 25 My Lord, one way of dealing with --

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1 MR JUSTICE WARREN: If it can be dealt with in two stages
 2 there is not much point in dealing with it at the first
 3 stage. Why don't you just go off to January for
 4 everything?
 5 MR BRISBY: My Lord, my learned friends have not said, they
 6 have been very careful not to say whether they would be
 7 prepared to start on the first day of term in January.
 8 My Lord, we had enormous problems involving hearings and
 9 everything to agree this particular date. My Lord,
 10 I imagine the same shenanigans will carry on when there
 11 is an attempt to fix a date early in January. It will
 12 be told actually there are so many counsel involved and
 13 they are all -- myself of course excluded -- fashionable
 14 and busy people, it is going to be said that it is
 15 impossible to get everyone together until some date late
 16 next year. If they had come here -- I have looked at my
 17 position. But if they had come here saying we can all
 18 start for six weeks or whatever on the first day
 19 of January, that might have been a different position.
 20 But they are offering no comfort, and your Lordship,
 21 when your Lordship mooted, I think did say subject to
 22 counsel's convenience.
 23 MR JUSTICE WARREN: That is what I have said. But the dates
 24 are there, even if it is not convenient.
 25 MR BRISBY: Yes. It is one thing, if I may suggest, to

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1 suggest the trial should go off to the first day of
 2 the January term irrespective of counsel's convenience.
 3 It is another thing to say oh well, the earliest date,
 4 subject to counsel's convenience, beginning 1 January.
 5 Because that could be months.
 6 Now, just pausing there, since your Lordship doesn't
 7 know what the position -- that is par excellence
 8 a reason why that aspect of the decision should be left
 9 to the PTR and to the judge who will be specifically
 10 considering that rather than, as today, applications for
 11 injunctive relief.
 12 MR JUSTICE WARREN: Do you accept there is no point in a PTR
 13 if the defences aren't in?
 14 MR BRISBY: No. But I do accept that the PTR would be more
 15 productive if the defences are in, and that is why I say
 16 they can jolly well produce them by 11 September or, if
 17 they want a couple more days, by the Sunday night and
 18 maybe even the Monday night, if we could get a not
 19 before Thursday marking.
 20 MR JUSTICE WARREN: You can't.
 21 MR BRISBY: We can't, no. Well, then Sunday night, my Lord.
 22 Just two big picture points on that, finally. If
 23 they can put in their evidence in relation to these new
 24 allegations by 4 September, most of the work will have
 25 already have been done. As for New York law, they have

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1 already got an expert who not only has told them what
 2 the position is but has put in a witness statement, so
 3 they have got their evidence there. That just needs to
 4 be pleaded out, what they say. And secondly, this is
 5 effectively their own fault. There has been no
 6 explanation for why they sat on this alleged default
 7 between February, early February this year, and 21 July.
 8 Over five months of delay. My Lord, it is impossible to
 9 see, given Mr Doronin wants my clients out of the
 10 business, why, if it wasn't done for the express purpose
 11 of causing the trial date to be vacated, the default
 12 wasn't acted upon back in February. No explanation has
 13 been given for that, the most obvious point.
 14 My Lord, we say --
 15 MR JUSTICE WARREN: If I allow the time that they want for
 16 defences, do you accept it is inevitable that the trial
 17 date will be lost?
 18 MR BRISBY: No.
 19 MR JUSTICE WARREN: How not so?
 20 MR BRISBY: Because I suppose they could be ordered to do
 21 other things incredibly quickly. But, my Lord,
 22 I suspect it is highly likely. That is why, obviously,
 23 I'm fighting it. I think "impossible" is a very big
 24 word.
 25 My Lord, I come back to this simple point: we have

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1 10.5 pages or maybe it is 11.5 pages of new pleadings,
 2 and we have teams on board who are fully up to speed.
 3 They have chosen to do this when they could have done it
 4 months ago. Doing rough justice between us losing
 5 a fixture without any guarantee when it will come on, on
 6 the one hand, and them having to burn some midnight oil
 7 and/or return early from holidays, as I have had to do
 8 in order to present this application on behalf of my
 9 clients, we say the balance of justice, and it may be to
 10 an extent rough justice, comes down in favour of
 11 ordering them to do the best they can by 11, 12 or
 12 13 September, so that this whole matter can be revisited
 13 at the PTR.
 14 And my Lord, if it is revisited at the PTR, my Lord,
 15 I definitely do say --
 16 MR JUSTICE WARREN: A one-day PTR. One day, Mr Brisby. You
 17 promised me this would be done with me having given
 18 a decision and a (inaudible) judgment by now, and you
 19 haven't even finished yet.
 20 MR BRISBY: Well, I have finished. I have effectively,
 21 I think, answered your Lordship's point on this.
 22 MR JUSTICE WARREN: I knew this would happen.
 23 Conventionally, I would want to think about this. It is
 24 actually quite finely balanced. Of course. That is why
 25 I have to make a decision.

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1 How are you going to deal with Mr Eliasch, who --
 2 Mr Doctor has explained his position? You are making
 3 new allegations against him of dishonesty.
 4 MR BRISBY: Yes.
 5 MR JUSTICE WARREN: This is not something he can be bounced
 6 into having to deal with other than properly. The fact
 7 of the matter is he is a businessman who has prior
 8 commitments and it is not that he has known for ages
 9 that he has been involved in litigation and finds
 10 himself at a late stage having to do so things that he
 11 might not have anticipated. This is wholly new, as far
 12 as he is concerned.
 13 MR BRISBY: Yes, but, my Lord, he knows all about because he
 14 has been party to it all.
 15 MR JUSTICE WARREN: But he still has to have time to prepare
 16 his defence properly. How can he do it, given his
 17 current commitments?
 18 MR BRISBY: We say he can do it. We say he may have to miss
 19 the odd match. He may have to miss the odd business
 20 meeting. He may have to get one of his deputies at Head
 21 to host some of his existing commitments. But he is
 22 party to -- I mean, the odd thing about Mr Eliasch is
 23 this: he has to serve his witness statement in relation
 24 to the massive case that he already has to face by
 25 25 September. On the basis of what we have been told

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1 about his commitments, when is he going to find time to
 2 do that?
 3 Why we are perplexed by all of this, it seems to me
 4 that although Mr Doctor hasn't said so, BLP need an
 5 adjournment in any case, because they are not in
 6 a position, if Mr Eliasch is going to be allowed to
 7 spend two weeks at this tennis Open in New York, rather
 8 than working on the case, they are not going to meet the
 9 deadlines in any case?
 10 MR JUSTICE WARREN: Which deadlines?
 11 MR BRISBY: For service of witness statements in relation to
 12 the existing case. Because the witness statement is due
 13 on 25 September.
 14 MR JUSTICE WARREN: You don't know what work has already
 15 been done about that.
 16 MR BRISBY: Well, not very much, since Mr Doctor says
 17 because the parties agreed, I may say, the date for
 18 disclosure should go back, they have only just received
 19 the 11,000 documents. That is what they have said, and
 20 they need time to consider it, and that their counsel
 21 are away. So, my Lord, what concerns me is I don't
 22 think people have been very straight with your Lordship.
 23 Of course I am not making that personally about counsel
 24 here. But it seems to me, and again this is much better
 25 dealt with at the PTR, when that is absolutely on the

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1 agenda, it seems to me that --
 2 MR JUSTICE WARREN: This PTR, what are you proposing to do
 3 on the PTR, which is one day, like today? You are going
 4 to run all this again? Because it will not be me, I'm
 5 afraid.
 6 MR BRISBY: What I am going to do, paragraph 1 of my
 7 skeleton, is to suggest guillotining of submissions and
 8 what I will also do is endeavour to agree with my
 9 learned friends -- as we have to an extent here --
 10 exactly what is in issue and what is not in issue well
 11 in advance of the PTR.
 12 MR JUSTICE WARREN: You will not be able to do that with
 13 Mr Howard and Mr Brindle, because they are not going to
 14 be here.
 15 MR BRISBY: Well, they will be here in time to do that,
 16 because I think the latest any of them is coming back is
 17 on about 4 September. I will be corrected if I am
 18 wrong.
 19 MR JUSTICE WARREN: There are whole issues that will have to
 20 be dealt with properly on the return date about the
 21 cause of action point that Mr Gatt has raised. I mean,
 22 I can tell you now that during what I hope will be
 23 a short period between now and the return date, I think
 24 the appropriate course is to consider that you probably
 25 do have a cause of action, or enough interest to

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1 maintain an injunction. But I'm far from clear that
 2 I would come to that conclusion after proper argument on
 3 a proper return date. It seems to me that this
 4 injunction proceeding alone is a one-and-a-half or
 5 two-day hearing. It may be that side of the court say
 6 that is ridiculous, but I wouldn't be at all surprised.
 7 I don't see anyone nodding either way, which is deeply
 8 disappointing, but ...
 9 MR BRISBY: I say this much can be done: the defences should
 10 be in before the PTR and, my Lord, a letter should
 11 clearly be now written to the Chancellor explaining why
 12 additional matters have gone on to the menu for the PTR,
 13 why one day is no longer appropriate and why the parties
 14 think two days would be appropriate and your Lordship
 15 has even thought that two and a half days would be
 16 appropriate, and asking him to firstly see whether
 17 a judge, if necessary, can be brought back to hear that,
 18 if the existing judges on duty are not available, and
 19 further to that, suggesting, as again perhaps should
 20 have happened before, that it would be helpful if
 21 a judge could be assigned to hear this case, because --
 22 MR JUSTICE WARREN: Well, you can write what letter you
 23 like, and then I can talk to him about it, or somebody
 24 can. I'm seeing him tomorrow. I might mention the
 25 problems that have arisen.

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1 That doesn't resolve what we do about timetable and
 2 the defences.
 3 MR BRISBY: Well, my Lord, I do say, and it is perfectly
 4 possible given the resources here, the modern
 5 communications technology, that in relation to 11.5 new
 6 pages of pleadings dealing with a relatively limited
 7 point it is possible to put in a defence in three weeks,
 8 or just over, if my suggestion of giving them the
 9 weekend, if they need it, is taken up.
 10 My Lord, I don't think I can help your Lordship any
 11 further.
 12 MR JUSTICE WARREN: No. It is 4.35.
 13 MR BRISBY: I am sorry about that, my Lord.
 14 MR JUSTICE WARREN: No, I'm not going to -- I suggest
 15 everybody goes and has a cup of tea and comes back at
 16 5.20, okay.
 17 MR BRISBY: I am obliged.
 18 MR JUSTICE WARREN: You will have to tell security what
 19 I have done to let you back in.
 20 (4.35 pm)
 21 (A short break)
 22 (5.20 pm)
 23 JUDGMENT (DRAFT)
 24 MR JUSTICE WARREN: I expected to see a greater thinning out
 25 behind you.

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1 I am very reluctant to make any order which would
 2 inevitably result in the loss of the trial date or
 3 which, if the trial date is lost, would result in
 4 a potential subsequent date becoming unavailable. As
 5 I indicated, listing can accommodate a hearing
 6 commencing in January 2016, but I don't know of the
 7 availability of counsel currently instructed. This is
 8 not a case where today I, rather than the PTR judge at
 9 a later date, should ignore counsel's convenience, which
 10 should count for nothing.
 11 I have taken on board, I hope, the submissions made
 12 about the difficulty of producing the defences prior to
 13 the PTR, particularly those relating to Mr Eliasch,
 14 which carry more weight in my view than those in
 15 relation to the HSF defendants, not least because
 16 Mr Eliasch is a new party and allegations of dishonesty
 17 are made against him.
 18 However, I am not persuaded that the task is as
 19 difficult as counsel, particularly Mr Doctor for
 20 Eliasch, submits. As Mr Brisby points out, the pleaded
 21 case is not substantial, being only 11.5 pages long and
 22 including many quotations from the defendant's own
 23 documents.
 24 Moreover, Mr Eliasch will need to consider for the
 25 purposes of the production of his witness statement much

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1 of the material which would need to go into his
 2 pleading. In my view, in spite of logistical
 3 difficulties this may entail, particularly for
 4 Mr Eliasch, I consider that the defendants should
 5 produce defences so that they are available by the date
 6 of the PTR. Whether one calls these preliminary
 7 defences or holding defences, the defendants should be
 8 given, subject to the directions of the PTR judge, the
 9 opportunity to produce amended defences at a later date,
 10 as I said, a matter which can be dealt with in more
 11 detail at the PTR when the defendants will be able to
 12 explain how far they have got and in what areas they may
 13 need to consider matters further.

14 In this way, the PTR judge will be able to have at
 15 least some idea of the scope of the disputes and a feel
 16 for the overall shape of the litigation, and whether at
 17 that stage the trial date can reasonably be kept in
 18 a matter to be reconsidered.

19 It will not only be the defences which will impact
 20 on that, but the issue also of further disclosure as
 21 well as the need for expert evidence.

22 As to the PTR itself, the judge will be able to
 23 assess whether the defendants have had an adequate
 24 opportunity for the defences to be prepared and will
 25 have an explanation of what it has been possible and,

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1 importantly, not possible to achieve.
 2 In any case, were I not taking this course, the
 3 defences, it seems to me, should be in by 3 October and
 4 the PTR judge will need some persuading that further
 5 extension beyond that date should be granted.

6 The claimant has rejected the possibility of
 7 grasping the nettle now, as Mr Doctor submits it
 8 I should do, but I am clearly not doing, and to refix
 9 the trial date and postpone the PTR, giving the
 10 defendants the time for which they ask. It will not
 11 then lie in the mouth of the claimant to complain if the
 12 date for a new trial has by the time of the PTR receded.

13 So far as a new trial date is concerned, steps
 14 should be taken to ascertain counsel's availability
 15 in January to Easter 2016. If there is a date on which
 16 all of them can do, the relevant dates should be kept
 17 free until the PTR so that if the trial is adjourned by
 18 the PTR judge, the new date can be fixed with listing,
 19 if that date is still available. Listing, as well as
 20 myself, should be informed if such dates are available
 21 just as soon as possible. The PTR judge might decide
 22 that a new date should be fixed irrespective of
 23 counsel's availability, of course.

24 The PTR, pre-trial review, is precisely that. The
 25 priority is to deal with matters that are conventionally

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1 dealt with at a PTR, and as I have said before, only one
 2 day is available. It is to deal with what needs to be
 3 done in preparation for the trial. Only if there is
 4 time should the PTR date be treated as the return date
 5 for the matters which are before me today.

6 It might be better if I were to make this an
 7 application by order with a one-day time estimate plus
 8 two hours' reading. Although I indicated earlier that
 9 I thought it was a two-day case, on reflection, with
 10 a two-hour reading period, I think that one day should,
 11 with a following wind, be sufficient. Much of the time
 12 today after all was spent dealing with time issues and
 13 not with the substance of the undertakings and
 14 injunctive relief.

15 Turning to the injunctive relief sought,
 16 paragraph 5.1.1 is agreed. I am not clear if this is
 17 going to be given by way of undertaking or whether I am
 18 going to order an injunction?

19 MR GATT: By way of undertaking, I anticipate.

20 MR JUSTICE WARREN: Mr Gatt wants me, and I am quite happy
 21 to do this, either here or in the recitals to the order,
 22 to preserve his client's position in relation to the
 23 absence of jurisdiction.

24 As to 5.1.2, in my judgment, the balance of
 25 convenience is clearly in favour of preserving the

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1 assets of the Group. Mr Gatt may be right that without
 2 ARGL as a defendant the claim is defective and that the
 3 intervention of the BVI court and its consent is in any
 4 case needed, but I think it is well arguable that PHRL's
 5 alleged contractual and conspiracy claims are enough to
 6 form a basis for injunctive relief. At least until the
 7 return date, PHRL should be protected from the risk
 8 which it perceives of another so-called "stunt".

9 I would omit the words "and for full value" from
 10 5.1.2 as drafted. It seems to me that the inclusion of
 11 this provision will produce no real prejudice for the
 12 defendants at all. They do not wish actually to dispose
 13 of the hotels within the Group and the only prejudice,
 14 which I will come to later when considering
 15 fortification, relates to the need to obtain finance.

16 As to 5.1.3, I'm not prepared to grant this
 17 injunctive relief as sought. It is essentially to put
 18 Carpentaria Management Services Limited in the same
 19 position as if they had never been removed as directors.
 20 The practical position is that it has been removed. It
 21 is not appropriate on this application today. Mr Brisby
 22 can renew the application on the return date. It is not
 23 appropriate to reinstate Carpentaria Management Services
 24 Limited as a director and I'm not prepared to make an
 25 order that it should be treated as a de facto director.

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1 However, I do think that information should be
2 provided to Carpentaria as if it were a director, which
3 goes to all matters that board members are provided with
4 including agendas, papers for board meetings, notices
5 and minutes of meetings.

6 As to 5.2, I'm not willing to grant this relief
7 today. It, again, can be renewed on the return date.
8 I do not refuse the application. I simply decline to
9 deal with it as a matter of urgent vacation business,
10 and you may call that ducking the issue if you wish.

11 Fortification is the last issue which I have to deal
12 with. Mr Brisby has set out the principles in his
13 skeleton argument. On the evidence before me -- things
14 may be different on the return date when a longer period
15 of restraint may be in issue. I do not consider that
16 fortification is appropriate. The risk to the
17 defendants of any damage pending the return date is, it
18 seems to me, minimal. The defendants want to retain the
19 hotel group and in any case, a sale could not be brought
20 anywhere near a contractual stage prior to the PTR.

21 So far as financing is concerned, which is the issue
22 which Mr Gatt particularly relies on, the defendants are
23 not inhibited from proper funding of the Group and
24 security to be given over the hotels because there is
25 a provision in the draft order for the consent of PHRL,

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1 or failing that, the court.

2 So far as reputational prejudice to the defendants
3 or to the Group is concerned, it is not easy to see how
4 this application and the injunctions which I'm granting
5 could result in any adverse effect on trade which is not
6 already inherent in the litigation as a whole.

7 So far as a return date is concerned, I propose to
8 order this as an application by order with a one-day
9 time estimate to come on on the first available date on
10 or after 21 September this year. This is shortly after
11 the date of the PTR, and it is a date when Mr Brisby and
12 Mr Howard are available. Mr Brindle doesn't need to be
13 here because his clients are not at the receiving end of
14 this particular injunctive relief.

15 I am not ordering it to come on on 21 January
16 because I do not know that listing can accommodate it.
17 Listing told me that they would accommodate the PTR as
18 an alternative, but whether they are prepared to find an
19 extra day for you before the beginning of next term, I'm
20 afraid I do not know.

21 So I will make those orders over to the PTR and
22 return date. I suggest that you get the application
23 listed on the PTR date but with the understanding that
24 the judge may well not get to it.

25 MR GATT: My Lord, it wasn't entirely clear to me, it may be

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1 just me, the date for service of the defences.

2 MR JUSTICE WARREN: I didn't put it in. It is 22 days, it
3 is whatever Mr Brisby was asking for in his --

4 MR GATT: It was the Friday --

5 MR BRISBY: Friday 11th.

6 MR GATT: Thank you.

7 MR BRISBY: My Lord, just two points arising out of your
8 Lordship's judgment. One, a matter of correction. Your
9 Lordship mentioned that Mr Eliasch was a new party,
10 I think that was an inadvertent slip. He is in fact an
11 existing party, although he is party to the new
12 allegations as well as to the existing ones.

13 MR JUSTICE WARREN: Yes, if you could read it that way.

14 MR BRISBY: Yes, indeed, and my Lord, there is a transcript.
15 The other point is this, which your Lordship didn't deal
16 with: In 5.2 your Lordship said your Lordship was not
17 minded to make that order today, although it could be
18 renewed at the return date. Your Lordship is presumably
19 accepting, however, the slightly alternative wording
20 that Mr Gatt proposed.

21 MR JUSTICE WARREN: Yes.

22 MR BRISBY: Yes, indeed.

23 MR GATT: My Lord, just again, two points of
24 clarification -- well, one of clarification. What I am
25 understanding from what else was agreed was that the

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1 particulars of claim which we have been looking at
2 served yesterday afternoon are the ones that will be
3 served, and they will be served tomorrow, so that time
4 starts to run. We are not going to get something
5 different later, that is the position?

6 MR JUSTICE WARREN: Just to get the right ones, it is the
7 ones that are behind tab 3 of Mr Brisby's skeleton
8 argument bundle.

9 MR GATT: And they will be served tomorrow or tonight --
10 good, thank you.

11 MR JUSTICE WARREN: Will you accept service today, it is
12 after 4.30.

13 MR GATT: The order provides service tomorrow, but the end
14 time is the same anyway, as I understand it.

15 Secondly, we had previously agreed on the basis that
16 the PTR was to be the return date, dates for service of
17 evidence on the return date of 4th and 10th --

18 MR JUSTICE WARREN: I think you had better stick with those,
19 because my sincere hope is that you will get the return
20 date on 21 September, but I can't guarantee it.

21 MR GATT: I was hoping that was going to be the case, but
22 perhaps a little bit longer, because there will be the
23 time for the PTR as well so there is an awful lot of
24 work being done at that stage and if we could have a few
25 more days.

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1 MR JUSTICE WARREN: On that footing, I had better direct
2 that the return date is not the PTR date. If you think
3 you are going to have enough to do on that day without
4 the injunctive relief, I will order the first available
5 date on or after the 21st.
6 MR GATT: That was my understanding as to what you had done.
7 MR JUSTICE WARREN: I was actually hoping if there was any
8 time on the PTR date to do it then, but obviously there
9 is not going to be.
10 MR BRISBY: Unless we say first available date after 21st
11 unless the listing office can accommodate the PTR with
12 an estimate of two days, in which case --
13 MR JUSTICE WARREN: I know that they can't.
14 MR BRISBY: Fine, yes, okay.
15 MR JUSTICE WARREN: So you keep your PTR window, it's the
16 week -- on the 15th.
17 MR GATT: Yes.
18 MR JUSTICE WARREN: Return date, the first available date on
19 or after 21st, and I hope it will be 21st or 22nd.
20 Given that the return date is not going to be then --
21 I think we could put back evidence slightly to take
22 pressure off people.
23 MR GATT: If we were to take out say, the 8th, which would
24 be the Tuesday of the following week. Just bear with me
25 a moment. So if it is being moved back a week, we move

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1 everything back a week, so it would be 11th and the
2 17th.
3 MR BRISBY: My Lord, that puts us in difficulties, that is
4 during the PTR. I don't object to a few extra days.
5 I would point out, these days, the 4th of December were
6 my learned friend's suggestion, they were his dates.
7 MR GATT: My Lord, that is when we were working to the 14th
8 September.
9 MR BRISBY: If he wants another 48 hours, let's extend the
10 timetable accordingly --
11 MR JUSTICE WARREN: I think he has a good point about not
12 having to do this while the PTR window is there.
13 MR GATT: Why is why I went to the 8th and those behind me
14 shouted a little bit about it.
15 MR JUSTICE WARREN: Are you happy with the 8th, Mr Brisby?
16 MR BRISBY: My Lord, I would be.
17 MR JUSTICE WARREN: 8th for them.
18 MR BRISBY: Yes.
19 MR JUSTICE WARREN: Okay, that is the day that goes in.
20 MR BRISBY: And however many days extra I have myself. 14th
21 for me.
22 MR JUSTICE WARREN: 14th for you. 8th for you, 14th for
23 him.
24 MR GATT: Thank you.
25 MR JUSTICE WARREN: Will you draw up an order?

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1 MR BRISBY: Yes, my Lord.
2 MR JUSTICE WARREN: I haven't got an associate. What is the
3 best way --
4 MR BRISBY: We will try --
5 MR JUSTICE WARREN: They are all shut downstairs. If you
6 email it to my address and my clerk. You all know
7 judicial addresses.
8 MR BRISBY: Do you want it only emailed when it has been
9 agreed or do you want the draft tonight?
10 MR JUSTICE WARREN: No, when it's agreed.
11 MR GATT: Again, before you rise, and I am terribly sorry,
12 just again, maybe a lack of clarity between me and those
13 sat behind me, you were making no order on 5.2 today,
14 you were saying it could be renewed. My learned friend
15 asked for clarification on revised wording --
16 MR JUSTICE WARREN: I was going to make -- sorry, the order
17 that you agreed to, I will make, but not the red bit.
18 MR BRISBY: That is your undertaking about your wording,
19 which is --
20 MR GATT: Right.
21 MR JUSTICE WARREN: So the undertaking you have offered,
22 which is the black type, 5.2.
23 MR GATT: No, that is --
24 MR BRISBY: It is the red --
25 MR GATT: That is the order. It is the red one.

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1 MR JUSTICE WARREN: You are not getting --
2 MR BRISBY: The black one is what we wanted.
3 MR JUSTICE WARREN: I have got it the wrong way round,
4 sorry.
5 MR BRISBY: Or did your Lordship mean to --
6 MR JUSTICE WARREN: No, I didn't mean to give you what you
7 are asking for.
8 MR BRISBY: My Lord, it was worth a try.
9 MR GATT: You are accepting the undertaking with the
10 qualification that we are not required to take down the
11 website?
12 MR JUSTICE WARREN: Correct.
13 MR BRISBY: Your undertaking doesn't say that.
14 MR GATT: No, but that was the point you rose to clarify.
15 MR JUSTICE WARREN: It must be clear. I am not directing
16 them to take down the website. You can renew that.
17 MR BRISBY: I will suggest some wording that makes that
18 entirely clear, but otherwise stick to the word of their
19 undertaking.
20 MR JUSTICE WARREN: Yes.
21 MR BRISBY: Indeed. I am obliged to your Lordship.
22 MR GATT: Can I thank your Lordship on behalf of everybody
23 and the shorthand writers and the court staff for
24 sitting late.
25 MR JUSTICE WARREN: And the shorthand writers for staying so

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1 long.
 2 MR BRISBY: My Lord, I also must apologise because I was
 3 over-optimistic.
 4 MR JUSTICE WARREN: I don't mind. So you get that to me
 5 tomorrow and I will get it signed and sealed. Yes,
 6 don't worry about taking these bundles today. Okay.
 7 (5.40 pm)
 8 (The hearing adjourned)

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