JUDGMENT : Mr Justice Patten : Chancery. 25th July 2008.

Introduction

1. This judgment deals with a number of applications which arise out of the disclosure to the first Claimant ("DGI") of what have been referred to as the Eagle documents. These consist of a number of documents stored on the hard drive of the computer system at Citilegal Consultants Limited ("CCL") which were downloaded by Ms Julie Eagle, a former director of CCL, and then handed to DGI's then solicitor (Mr Simon Serota of Wallace LLP) at a lunch meeting on 25 April 2007. CCL was set up by the First Defendant, Mr Paul Simms, in 2002 after the Law Society had intervened in his practice as a solicitor. It is owned and controlled by him through a family trust. Prior to that date he acted as the solicitor to the third and fourth Defendants, Mr Jack and Mrs Helga Dadourian, for a number of years. He was formerly the senior partner of Messrs Bower Cotton & Bower but was struck off on 2 February 2004 following disciplinary proceedings brought against him by the Law Society. His attempt to challenge the decision of the tribunal failed. Through CCL he has since 2002 provided what are described as business services to various clients including Mr and Mrs Dadourian. This has undoubtedly included legal advice in relation to this litigation.

2. Ms Eagle was also a director of Citilegal Directors Limited ("CDL") which is the corporate director of Azuri Limited, the twelfth Defendant. In this latter capacity Ms Eagle has made a number of witness statements in these proceedings during the course of 2005 relating to the assets and corporate structure of Azuri and Brinton Establishment, the 13th Defendant, which I shall come to later. She now says that these witness statements were prepared for her by Mr Simms, and are in a number of material respects untrue and misleading. In a desire, she says, to set the record straight and to bring into the open what she alleges has been fraud and perjury committed by Mr Simms and by Mr and Mrs Dadourian, she decided on the advice of her solicitors to contact Mr Serota and to provide him with the documents and information disclosing the true facts.

3. The documents handed over to Mr Serota represent only a small fraction of the total number of documents extracted by Ms Eagle from CCL. She said in evidence that she began to take papers from her employers at the end of 2004 when she realised that Mr Simms was behaving dishonestly. This turned into an obsession and she estimates that between then and her leaving CCL in February 2007 she took literally thousands of documents most of which are still in her possession. She gave to Mr Serota (and to her own solicitors) only what she thought might be relevant to them and they had no part in the process of selection.

4. Most (if not all) of the documents handed to Mr Serota came from a computer file or files relating to this litigation. There is therefore no doubt and can have been no doubt at the time of their removal, that the documents were confidential to Mr Simms and probably also to the third and fourth Defendants and were in any case the property of CCL. Their removal was clearly unlawful and Ms Eagle accepted in evidence that she had no legal right to take them. There is no suggestion by her that she had the permission of either CCL or its clients to act as she did.

5. On 9 May 2007 CCL issued proceedings in the Queens Bench Division against Ms Eagle seeking mandatory orders requiring her to deliver up the documents she had taken and any copies and an injunction restraining her from making use of the material or from disclosing it to any third parties. There was no application for interim injunctive relief but on 29 May 2007 an application was issued for judgment in default of acknowledgment of service. On 7 June 2007 McKinnon J made an order by consent on this application requiring Ms Eagle forthwith to deliver up all the documents and any copies to CCL and not to use any of the material or to disclose or copy it to the detriment of CCL and its clients. As part of the same order CCL is required to preserve the documents and other data until trial or further order.

6. It is apparent from Ms Eagle's evidence at the hearing before me that she has not in fact complied with the order for delivery up and still retains in her possession a large quantity of the documents which she removed from CCL. But that is a matter for CCL to pursue. What is of relevance to these applications is that the order came too late to prevent the handing over to Mr Serota of the documents he received on 25 April.

7. DGI was not a party to the Queen's Bench proceedings and therefore to the consent order made on 7 June. But it wishes to use some of the Eagle documents to assist it on a Part 24 application which is pending before Warren J (following judgment in the main action) in which it seeks a declaration that the assets of the 12th, 14th, 15th and 16th Defendants ("Azuri"); ("Libourne"); ("Ardales"); and "(Republic"), otherwise referred to as the Corporate Defendants, are held by these companies in effect as nominees for Mr and Mrs Dadourian.

8. Following the trial of the action in May 2006 Warren J gave judgment in favour of DGI on part of its claim in deceit against Mr Simms and Mr and Mrs Dadourian and ordered them to pay damages to be assessed. They were also ordered to pay 75% of DGI's costs of the action. The Judge made orders for an interim payment of damages in the sum of £650,000 and an interim payment on account of costs in the sum of £885,000 subject in both cases to limited stays pending an appeal. This has been fixed for as soon as possible after lst October 2008.

9. The purpose of the Part 24 application is to obtain a ruling that the assets of the Corporate Defendants are available to meet the judgment against Mr and Mrs Dadourian in the event that their appeal is unsuccessful and the stay is then lifted. The hearing of the application began on 11 May 2007 supported by a largely pro forma witness statement from Mr Serota dated 13 March 2007 in which he recited that the Corporate Defendants had pleaded that their ultimate owner is Brinton and refers to various passages in the judgment of Warren J which are said to support DGI's claim that the assets of the Corporate Defendants are held for Mr and Mrs Dadourian

beneficially. In the light of these findings by the Judge at trial he has deposed that the Corporate Defendants have no real prospect of defending the claim for the declaration sought.

10. It is, I think, convenient at this point to mention briefly what the claims made in the action were and the extent to which Warren J was in fact asked or required to consider the issues which arise on the Part 24 application. The claim for damages based on deceit and fraudulent conspiracy arises out of a contractual dispute between DGI (a New York company) and Charlton Corporation plc ("Charlton"), an English company, in relation to an option agreement entered into between them in September 1997. Under this agreement DGI granted Charlton an option to purchase tooling and other equipment for use in the manufacture of hospital beds and other related equipment. The option was exercised with the result that Charlton was required to open a letter of credit in order to purchase the tooling and equipment. It failed to do so. DGI contended that this amounted to a repudiation by Charlton of the contract. Charlton in turn contended that the obligation to open the letter of credit did not arise until after it had acquired all of the equipment it had contracted to purchase. On 18 September 1998 DGI terminated the contract relying on Charlton's alleged repudiation of the agreement. Charlton contended (on the basis that it had no obligation to open the letter of credit) that the act of termination was itself a repudiation of the agreement by DGI.

11. These events led to an action by Charlton in New York alleging that DGI had unlawfully terminated the option agreement and that DGI with its directors, Mr Alex and Mr Haig Dadourian, had fraudulently induced Charlton to enter into the option agreement by falsely representing that DGI owned and possessed everything which was to be sold to Charlton under the agreement. As the Judge records in his judgment, it was common ground that DGI did not own the general equipment (as opposed to the specialist tooling) necessary to manufacture the hospital beds.

12. The New York proceedings were stayed pursuant to an arbitration clause in the option agreement but on terms that Alex and Haig Dadourian would agree to submit to the arbitration the claims made against them by Charlton in the New York action for fraudulent misrepresentation. In turn, DGI itself counterclaimed for breach of contract and for fraudulent misrepresentation. The arbitration commenced in April 1999. On 4 July 2002 the arbitrator dismissed Charlton's claims due to its failure to comply with a direction for the payment of security and costs. On 13 June 2003 in the first of a series of awards the arbitrator found that Charlton was in breach of contract by failing to open the letter of credit; that DGI had been entitled to treat this as a repudiation of the contract and to terminate it on this basis; that DGI had itself been induced to enter into the option agreement as a result of fraudulent misrepresentations made by Charlton and its directors (Mr Simms and the second defendant Mr Rahman) (i) that Mr Simms and Mr Rehman each owned major shareholdings in Charlton; (ii) that Charlton was a sound and creditworthy trading company and was able to perform its financial obligations under the option agreement; and (iii) that it was a company experienced in manufacturing various products in Third World countries that could not be manufactured profitably in the West. The arbitrator also found that DGI and its directors had not misrepresented what assets DGI owned and that Charlton in any event knew before exercising the option that the general equipment to be purchased under the agreement was to be acquired at a later date.

13. This knowledge was imputed to Charlton based on what the arbitrator found Jack Dadourian himself knew at the material time. He found that Jack and Helga Dadourian were the parties who controlled Charlton and from whom its directors obtained their instructions.

14. The arbitrator made awards of substantial damages against Charlton and ordered it to pay the costs of the arbitration. That company has no assets and is unable to meet the awards. DGI therefore sought in these proceedings to recover from Mr Simms, Mr Rehman and Mr and Mrs Dadourian the amount of the awards. The claim was made on various alternative bases. First it was said that Charlton was used by Jack and Helga Dadourian as a mask or façade to conceal their involvement in the option agreement and that the corporate veil of Charlton should be lifted so as to make them directly liable for the amount of the awards. Secondly, it was contended that Mr and Mrs Dadourian were privies of Charlton and therefore bound on the principles of res judicata and issue estoppel by the findings of fact made by the arbitrator about the misrepresentations alleged in the arbitration proceedings and their own knowledge of and involvement in these. In the alternative, DGI made claims of deceit and conspiracy against Mr Simms, Mr Rehman and Mr and Mrs Dadourian. As against Mr Simms and Mr Rehman, they relied on the same allegations of fraud made in DGI's counterclaim in the arbitration which I have referred to above including that Mr Simms and Mr Rehman induced DGI to enter into the option agreement by representing that they were major shareholders in Charlton. As against Jack and Helga Dadourian they alleged that in August 1997 the Dadourians made false representations including one that they were mere intermediaries when in fact they owned and controlled Charlton.

15. As part of the particulars of falsity in relation to the alleged misrepresentations both by Mr Simms and Mr Rehman and by Mr and Mrs Dadourian the Claimants pleaded that the Dadourians were not intermediaries but owned, directed and controlled Charlton and used the company to conceal their true involvement in the option agreement. As part of the particulars given of fraud it was alleged that Ancon, the controlling shareholder of Charlton, was itself an entity controlled by Brinton which was itself owned and controlled by the Dadourians and that the assets held by the trust in any event belonged to Jack and Helga.

16. Warren J in a long and extremely detailed judgment (extending to some 762 paragraphs) declined to lift the corporate veil of Charlton so as to make Mr and Mrs Dadourian liable for the contractual obligations of the company. In relation to the alternative claim in fraud he held that there was no evidence to support the claim that Ancon (and therefore Charlton) had ever been placed into the Brinton trust structure either directly or by its shares

being vested in Republic or one of the other Corporate Defendants ultimately owned and controlled by the trust. In paragraph 449 of his judgment he found that Ancon was owned and controlled by Mr and Mrs Dadourian who therefore had ultimate control of Charlton. In practical terms, (see paragraphs 457-8) this led to their being involved in all strategic decisions about the option agreement and to their having control of Charlton by being able if necessary to replace Mr Simms and Mr Rehman as directors.

17. As to the intermediary representation alleged to have been made by the Dadourians themselves to DGI Warren J found that such a representation was made by Jack Dadourian prior to the conclusion of the agreement and that Helga knew about the misrepresentation and failed to correct it in circumstances where she had an obligation to do so. He also held that the misrepresentation was made fraudulently by Jack with the intention that it should be relied on and that it had induced DGI to contract. He found Helga liable as a joint tort-feasor. These findings are the subject of an appeal by Mr and Mrs Dadourian and it is unnecessary and inappropriate for me to analyse them further in this judgment.

18. In relation to the balance of the claim, the Judge dismissed all the remaining claims based on the other alleged misrepresentations and the allegations of conspiracy and procuring a breach of contract. He therefore took a much narrower view of the facts than the arbitrator and rejected the argument that there was any issue estoppel binding Mr and Mrs Dadourian to the findings of the arbitrator most of which he had rejected in relation to the unsuccessful claims in deceit and conspiracy. The result was that only the claim by DGI for deceit based on the intermediary representation succeeded. The claims made by Alex and Haig Dadourian were dismissed. On this basis the Judge made an award of damages in DGI's favour limited to the costs incurred by the company in the arbitration and the interest charges on loans it took out in order to finance the costs of those proceedings.

19. It will be apparent from this summary of the issues decided at trial that Warren J was not called upon to make any direct findings about the beneficial ownership of the assets vested in the Corporate Defendants. They had been added as Defendants earlier in the proceedings under the so-called Chabra jurisdiction following freezing orders made against the Dadourians over the assets which they were alleged to own and control.

20. The Claimant's case was that the assets registered in the name of the Corporate Defendants in some way belonged to Mr and Mrs Dadourian. These assets include a flat in Paris which is registered in the name of a French subsidiary of Azuri (SCI) and two flats in London; a basement flat at 14 Lennox Gardens registered in the name of Libourne and the third flat, 39 Lennox Gardens, which is registered in the name of Ardales. These are both Gibraltar companies.

21. Prior to the trial DGI and the other Claimants were given permission to amend the Particulars of Claim by adding paragraphs 44 A-D. These contain various allegations including that Azuri, Libourne and Ardales are or are claimed to be agents or nominees of Brinton; that they are owned and controlled by Republic; and that Jack and Helga Dadourian have used them as a façade to conceal their ownership of assets. As mentioned earlier, DGI seek a declaration that all of the Corporate Defendants' assets belong to Jack and Helga.

22. These amendments should have led to Warren J determining the beneficial ownership of the Corporate Defendants' assets at the trial, but at a CMC Sir Donald Rattee (sitting as a judge of this Division) directed that the Corporate Defendants should take no part in the trial and would only need to become involved (if at all) when it came to the enforcement of any award of damages. This order has had the result of delaying until now the determination of whether the Corporate Defendants' assets are available to meet the liabilities of Mr and Mrs Dadourian under the judgment.

23. The hearing of the Part 24 application which began on 11 May 2007 was adjourned by Warren J to allow the Corporate Defendants to put in evidence about the basis on which their assets are held. As mentioned earlier, Mr Serota in his witness statement in support of the Part 24 application, makes reference to paragraphs 391-413 of the judgment in which Warren J considered the position of Brinton and the Corporate Defendants. This part of the judgment refers to some of the earlier witness statements made by Maitre Croisier, the Geneva lawyer who set up Brinton as a family trust for Mrs Dadourian and who was said to hold Azuri's shares for the trust. Brinton (formerly known as Wildhorse) is a Liechtenstein Anstalt or Establishment which according to Maitre Croisier's evidence was set up in February 1994 and had settled into it certain assets formerly held by another trust for the benefit of Mrs Dadourian's family. His witness statement of 16 November 2004 exhibits letters written to Kingsley Napley and Addleshaw Goddard, the Dadourian's previous solicitors, and encloses the statutes of Brinton registered in 2003 but not the by-laws. The letters say that the beneficiaries include Mrs Dadourian and her issue, but not Jack. Maitre Croisier also states in the letter to Kingsley Napley that the trust has no beneficiaries with fixed entitlements all benefits being *"at the discretion of the Board of the Establishment subject to the Founder's rights"*.

24. In a subsequent witness statement of 12 May 2005 Maitre Croisier says that the Founder was Domar Fiduciary and Management Establishment and that it was not until the making of the revised statutes that the current beneficiaries were specified. He also explains that Brinton is under the sole direction and control of its directors based in Vaduz. These include Dr Peter Marxer who is a partner in the Vaduz firm of Marxer & Partner Rechstanwalte. The Judge refers in his judgment to an affidavit of 3 October 2005 by Dr Marxer in which he exhibits a letter confirming that the only asset in Brinton is a bank account at Banque Privee Edmond de Rothschild in Geneva.

25. This affidavit and the other witness statements from Maitre Croisier were made in order to provide disclosure of assets in accordance with the various freezing and other orders made against Mr and Mrs Dadourian in these proceedings. The first such order was made by Lindsay J on 3 February 2004 and required disclosure of each of

their assets worldwide which exceeded $2,500 in value whether in their name or not. The order contained the now usual extended definition of assets as follows:

"*…For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own, and the Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.* …"

26. The order was continued by Lewison J on 13 February 2004 in similar terms. On 22 April 2005 Evans-Lombe J ordered Azuri on the application of DGI to provide details of the identity of the trustees or directors of the Dadourian family trust and to produce a full and un-redacted copy of the past and current statutes of the trust, those of Domar and any other deed or declaration of trust by which the trust and its founder were established. This resulted in the first of Ms Eagle's witness statements dated 5 May 2005 in which she identified the trust as Brinton and produced a copy of its statutes but again not its by-laws.

27. The application was adjourned to a further hearing date on 30 June 2005 when it came before Mr Edward Bartley Jones QC (sitting as a Deputy Judge of the Chancery Division) who reserved judgment until 13 July 2005. On that date he delivered a judgment in which he concluded that there was (as he put it) good reason to suppose that the assets of Azuri (which include the Paris flat) were, via Brinton, the assets of Helga or of Helga and Jack. On the day judgment was given Azuri's legal representatives had produced in court an undated and unsigned copy of what purported to be the by-laws of Brinton which do not include Jack Dadourian as a beneficiary and which whilst designating Helga Dadourian as the principal beneficiary provide in terms that she has no legal entitlement to either capital or income. But Mr Bartley-Jones ordered Azuri to be added as a defendant and to produce (so far as they were within its possession or control) a signed and dated copy of the by-laws produced in Court and a copy of any other by-laws or statutes of Brinton in existence from time to time since 21 February 1994 down to the date of his order.

28. The undated copy of the by-laws supported Helga Dadourian's evidence that she was only a discretionary beneficiary under the trust set up for her in 1994. In her first affidavit of 29 June 2004 sworn in order to comply with the order of Lindsay J of 3 February 2004, she said that Jack Dadourian had transferred all of his assets to her in 1979 and that she had settled her assets (including those received from her husband) into a discretionary trust. She mentions the Paris flat which she says is owned by a French subsidiary of Azuri whose shares are held by a US tax lawyer (Mr Martin Sturman) beneficially for the trust. The trustees have, she says, given her a right to occupy the flat but nothing more. In relation to the flat at 39 Lennox Gardens this, she says, is owned by Ardales whose shares are also owned beneficially (through two intermediate companies) by the trust.

29. In her third witness statement of 18 November 2004 Mrs Dadourian refers again to the discretionary nature of the trust saying that it has always been her understanding that the trust arrangements would avoid any liability to tax on Jack Dadourian's death and would allow her to name her husband's children, grandchildren and great grandchildren plus her brother and his children as potential beneficiaries. The trust was therefore formed in 1994 on the advice of Maitre Croisier in order to achieve these objectives. The statutes of Brinton were registered in January 2003 following the change of name from Wildhorse. In paragraph 15 of the witness statement she said that:

"*..My understanding of the trust is that there is no person who is entitled as a beneficiary of the trust. Payments by the trust are at the discretion of the trustees. They have a list of potential discretionary beneficiaries including myself, my brother, his children and grandchildren and my husband's children, grandchildren and great grandchildren. I am entitled to give my suggestions to the trustees as to the manner in which they may confer benefits but my requests in this respect have no legal effect. I have no access to the bank account of the trust or any of its assets. The trustees are free to agree or not with my suggestions, as they think fit. I have never regarded myself as being able to compel the trustees to use the trust assets as I want them to be used, nor do I regard the assets of the trust as being 'my' assets. I believe that it is precisely because the assets are not my assets that, for example, tax advantages can be obtained. ...*"

30. In the same witness statement she confirms that the Paris flat forms part of the trust through Azuri. In relation to 14 Lennox Gardens her evidence is that the flat was bought by Libourne in 2000. This is a company incorporated by the trust with which she has no connection. She is not a shareholder or director of Libourne and does not know who the directors and shareholders are. She says she has had no involvement with the running of the company's affairs and her only dealings with Libourne have been through her solicitors. The property is let out but she says that she has not received any rent from it. Neither she nor her husband have any interest in the property.

31. Finally, in her witness statement of 5 May 2005 filed in answer to DGI's application for the disclosure of the identity and the by-laws of the trust Mrs Dadourian again denies that Brinton is a bare trust or that she and her husband are beneficially entitled to its assets. In relation to Azuri she says that "*Azuri's assets do not belong to us and we do not treat that company's assets as our own*". Her evidence about the trust is therefore consistent with the evidence of Maitre Croisier referred to in Warren J's judgment.

32. To comply with Mr Bartley Jones' order of 13 July 2005 Ms Eagle made the witness statement of 20 July 2005 which she now accepts was false and misleading in its contents. In it she says that Azuri is inactive and simply holds the shares in its French subsidiary which owns the Paris flat. The sole shareholder of Azuri is Maitre Croisier (in succession to Mr Sturman) who holds its shares for Brinton. She also refers to a witness statement from a Dr Grabner, Azuri's expert witness on Liechtenstein law, dated 29 June 2005 which was used as part of Azuri's opposition to the continuation of a freezing order granted against it by David Richards J on 22 March 2005. In this witness statement Dr Grabher refers to the by-laws in the context of the discretionary structure of Brinton and to Helga Dadourian having no legal entitlement to any payments she receives from the trust. In paragraph 4 of

her witness statement of 20 July Ms Eagle confirmed that the by-laws disclosed to DGI on 13 July were the same as those supplied to Dr Grabner. "*Azuri Limited has*", she said, "*no other by-laws signed or otherwise*".

33. As part of DGI's relentless pursuit of the Dadourians' assets, further freezing orders were obtained in September 2005 from David Richards J in relation to the assets of Brinton, Libourne and Ardales. On 3 October 2005 DGI made a further application against Mr and Mrs Dadourian and the Corporate Defendants seeking additional information about the assets of Brinton and the assets of any other trust of which Jack and Helga were or had been beneficiaries. In response to this application Helga Dadourian made a witness statement on 12 October 2005 in which she said:

".. The trust arrangements affecting Azuri, Ardales, Libourne and Brinton have been in existence for over 5 years. As far as I am aware, no change has been made to them whatsoever and neither my husband nor myself have attempted to procure any change to the arrangements. The legal and beneficial ownership has not changed and nothing has been done to reduce the value of any of the assets owned by Ardales, Libourne and Azuri Limited. … "

34. On 14 October 2005 Peter Smith J made a wide-ranging order for the disclosure of the information sought on DGI's application. In her witness statement of 18 November 2005 made in compliance with that order Helga Dadourian stated that she believed that the shares of the Corporate Defendants were all owned beneficially by Brinton and that she believed but was not certain that the same went for the shares in Ancon.

35. Finally, in her witness statement of 21 November 2005 for use at the trial Mrs Dadourian repeated her account of Brinton being a discretionary trust controlled by its directors. In paragraphs 68-70 of the witness statement she said this: "..

68 *I understand that the statutes of this establishment were registered in January 2003. I do not know why there was such a delay in registering the statutes. I have never been given a copy of the statutes or by-laws of the Trust. The Trust is based in Liechtenstein and Dr Peter Marxer of Marxer & Partners is one of the Directors. I believe that there are other Directors, but I do not recall any of their names. Neither Jack nor I are or ever have been Directors of the Trust.*

69 *My understanding of the Trust is that no single person is entitled as a beneficiary of the Trust. Payments by the Trust are at the discretion of the Directors. The Directors have a list of potential discretionary beneficiaries which includes me, my brother, his children and grandchildren and my husband's children and great grandchildren. I am entitled to give my suggestions to the Directors as to the manner in which they may confer benefits, but my recommendations in this respect have no legally binding effect on the Directors; they are free to agree or not with my suggestions, as they think fit. I have no access to the bank account of the Trust, nor do I own any of its assets. I do not regard the assets of the Trust as being 'my' assets. I believe that it is precisely because the assets are not my assets that, for example, tax advantages can be obtained.*

70 *I therefore remain of the belief that I am a potential discretionary beneficiary of the trust. The fact that I am named as a "principal beneficiary" in the by-laws of the Trust does not, I believe, affect the position. The by-laws seem to make it clear that I have no legal entitlement to any assets of the Trust."*

36. In his witness statement of 18 November 2005 Jack Dadourian said that he had no independent knowledge of the assets of the trust and that Helga had always dealt with Mr Simms and Maitre Croisier on these financial matters. When he needed cash he would ask Helga for it.

37. This remained the position of the Defendants going into the trial. In paragraph 34 (b) of their amended defence, they pleaded that Ancon was wholly owned by a trust of which Helga Dadourian was a potential discretionary beneficiary; that the trust was a discretionary trust and was not owned and controlled by them; and that they are not the beneficial owners of the assets of the Corporate Defendants.

38. As mentioned earlier, the Judge found at trial that no effective steps had been taken to vest Ancon into the trust structure and that through Ancon Mr and Mrs Dadourian did exercise control over Charlton. This meant that the intermediary representation which he found Jack Dadourian to have made was false and this was enough to found the claim in deceit. It was not therefore necessary for Warren J to make any findings about the position of the Corporate Defendants or their assets not least because they were not represented at the hearing following the order made at the CMC.

39. In the paragraphs of his judgment referred to by Mr Serota in his witness statement of 13 March 2007, the Judge dealt with the control of Brinton and its assets. The evidence of Maitre Croisier was that the shares of the Corporate Defendants were held ultimately by Republic (a BVI company) whose own issued share capital was held beneficially by Brinton. But as part of his evidence he referred to the procedure under Liechtenstein law for placing new assets into an Establishment. This requires the assets to be accepted as a donation by resolution of the board of directors of the Establishment. The Judge records in paragraph 396 of his judgment that no such resolution appears to exist in respect of the shares in Republic or any other companies or assets except the bank account in Geneva. He also said (in paragraphs 400-401) that it was unclear whether the shares in Azuri had been effectively transferred from Mr Sturman to Maitre Croisier and for whose benefit they were being held. Mr Sturman had signed a declaration of trust in respect of the shares in favour of Republic whereas Maitre Croisier held the shares (according to Mr Simms) for the benefit of Brinton. But the Judge made no definitive finding on these issues or as to the basis on which each of the Corporate Defendants held their own assets.

40. At the first hearing of the Part 24 application on 11 May Warren J made it clear to Mr Samek that he had not yet decided anything about the assets of the Corporate Defendants or the structure of Brinton. This is recorded in the following exchange:

"MR JUSTICE WARREN: Your summary judgment claim is asserted on the basis that the assets of the corporate defendants are the assets of Jack and Helga, correct?

MR SAMEK: That there is no real prospect of them successfully imposing that conclusion, yes. Exactly.

MR JUSTICE WARREN: That is not something which I have decided.

MR SAMEK: It is not something which you have decided directly so far.

MR JUSTICE WARREN: Or indirectly. If I can just say this: The action which I was dealing with was not about the ownership of assets by the corporate defendants. The only reason we looked at Brinton's structure was in order -- because it was alleged by the defendants that Ancon and Charlton were within that structure. What was important to me was to discover the control or, whatever you like to call it, influence, that Jack and Helga had over Charlton directly or indirectly. My decision was on the evidence before me that Ancon Charlton were not within the structure so I made no decisions about the structure at all, so it seems to me very difficult for you to say on a summary judgment application that anything that Warren J said is of relevance."

41. A little later Warren J said this:

"They do not have to show that they are in the Brinton structure. What evidence are you going to rely on to show that -- what we do know is that the companies, as structures, where under Republic. Whether Republic is in Brinton or not is a different issue because we know there has been a declaration of trust, but we also know that Brinton never accept that declaration. There will be a question, which I have not decided, of the Liechtenstein/BVI law about what the legal effect of that declaration of trust is, but either Republic is or is not within Brinton. If it is not it does not follow the Jack and Helga own its assets, let alone any of the assets of the companies underneath. I would have thought that it was quite important to bear in mind my findings in relation to Charlton and Ancon where I decided that it was not appropriate to lift the corporate veil. I have not said anything about the other companies because I did not receive any evidence about how they are conducted."

42. When Miss Levy came to apply for an adjournment of the application Warren J asked what her case was in relation to the assets of the Corporate Defendants and specifically whether their assets belonged to the companies beneficially or were held as nominees for someone else further up the chain. Her initial response was that the underlying assets were held by the Corporate Defendants for the benefit of Brinton but after taking instructions she said that the position was that each of the Corporate Defendants owned its own assets.

43. The Part 24 application was then adjourned with directions for further evidence. By then, of course, Mr Serota had received the Eagle documents. On 11 May CCL issued its proceedings against Ms Eagle which culminated in the consent order of 7 June. On 11 May Warren J gave to the Corporate Defendants permission to produce further evidence by 23 May. On that day witness statements from Jack and Helga Dadourian (dated 23 May) were served by the Corporate Defendants in support of their defence to the Part 24 application. In her witness statement Mrs Dadourian says that Brinton was set up with the assistance of legal advice from Maitre Croisier and Marxer & Partners and that she and her husband have been entirely reliant on their legal advisers to provide them with information about the Corporate Defendants and the Brinton trust. In paragraph 30 of her witness statement she said this:

"*It was my intention that the properties should be owned by the Corporate Defendants and that the Corporate Defendants should be ultimately owned by the trust in the sense that their shareholdings should be owned by it. I have of course always relied upon my lawyers to ensure that my wishes were put into effect.*"

44. Mrs Dadourian then deals with the position of the Corporate Defendants and their assets. She states that the Paris flat is owned by the French subsidiary of Azuri (SCI) and not by her or her husband. The same (she says) is true of 14 Lennox Gardens which is owned by Libourne and 39 Lennox Gardens which is owned by Ardales. The evidence of Jack Dadourian is to the same effect.

45. On 20 June 2007 Warren J permitted the Corporate Defendants to rely on these additional witness statements and directed that DGI should serve any evidence in reply by 18 July 2007. Mr Serota then served a further witness statement dated 19 July 2007 exhibiting a selection of the Eagle documents. It is this witness statement which has led to the present applications.

46. The exhibits include some 29 documents selected from those handed over to him by Ms Eagle in respect of which disclosure is objected to on grounds of legal privilege. With the exception of some board resolutions these documents are mainly drafts of letters from Mr Simms to Mr and Mrs Dadourian, Maitre Croisier and Marxer & Partners dated between 23 August 2004 and 22 August 2006. The exhibits also contain drafts of letters from Mr and Mrs Dadourian to third parties which have obviously been prepared by Mr Simms. There is no evidence as to whether any and if so, which of the drafts was in fact sent as a letter.

47. On 24 September 2007 the Corporate Defendants issued their application for an injunction to restrain DGI from making any use of the documents and information supplied to them by Ms Eagle and for delivery up of the documents and any copies. The application is supported by a witness statement of Mr Robert Cook of Robert Cook & Co. (dated 25 September 2007) which asserts that the documents and other material are confidential to CCL and to the Corporate Defendants and contain material covered by legal professional and litigation privilege. According to the witness statements CCL through Mr Simms gave legal advice and assistance to both the

Corporate Defendants and to Mr and Mrs Dadourian for the purpose of obtaining information or advice or assisting in the conduct of the litigation. The material is also subject to the order of McKinnon J of 7 June 2007 prohibiting its use.

48. Mr Cook's witness statement is supported by one from Mr Simms dated 3 October 2007 in which he too asserts that his communications with foreign lawyers and other defendants are covered by litigation privilege. There is a further witness statement from him dated 19 October 2007 in which he confirms that he gave legal advice and assistance to both Mr and Mrs Dadourian and to the Corporate Defendants on what he describes as the trust issues under attack in the action after it was commenced in February 2004. In this witness statement he goes through each of the documents exhibited to Mr Serota's witness statement and explains its purpose and significance.

49. The Corporate Defendants' application was followed by one from Mr and Mrs Dadourian dated 24 October 2007 claiming the same relief and relying on the evidence filed by the Corporate Defendants. In return DGI issued its own applications on 14 December 2007. The first application seeks the permission of the Court to rely on the Eagle documents in these proceedings and a variation of the order of McKinnon J for that purpose. In the second application they seek specific disclosure of the by-laws of Brinton and two other documents referred to in a letter from Mr Simms to Marxer & Partners dated 19 May 2005 which is one of the Eagle documents.

50. Warren J heard the applications of the Corporate Defendants and Mr and Mrs Dadourian on 24 October 2007. It appears from his judgment that much of the argument centred on whether DGI, although not a defendant to the Queen's Bench action, was prevented by the order of 7 June 2007 from using the material contained in the Eagle documents. Mr Samek's case was that his clients were not bound by the order but that the documents were neither privileged nor confidential in any event. The Judge was asked to rule as a preliminary issue whether DGI would be in contempt if it attempted to deploy the Eagle documents as part of its evidence in these proceedings. The determination of the questions of confidentiality and privilege was postponed. The Defendants also submitted to the Judge that if he ruled against them on the preliminary point then the balance of the application should proceed before a different judge who would be able to look at the documents themselves in order to assist in determining whether they contained privileged material. Warren J has not read any of the Eagle documents exhibited to Mr Serota's witness statement.

51. Having considered the decision of the House of Lords in ***A-G v Punch Ltd*** *[2003] 1 AC 1046* the Judge concluded that the order of 7 June did prevent DGI from using the Eagle material if by doing so, DGI would be in contempt of court. This would depend on whether the use of the material would have a significant and adverse effect on the trial of the action against Ms Eagle. Warren J said that it might have this effect because it could frustrate the purpose of that litigation which was to protect and preserve any privilege or confidentiality attaching to the documents. Ultimately, however, this could only be determined by looking at the documents themselves which he was not prepared to do whilst the claim of privilege remained unresolved.

52. As a result, the three applications before the Judge on 24 October 2007 were adjourned to me. On 14 December 2007 DGI also issued an application to vary the order of 7 June plus the two other applications seeking details of the Corporate Defendants' legal funding and the disclosure of Brinton's by-laws. I took the view that it was not necessary for me to decide the issue of contempt and there has been no further argument on that point. If the Defendants are correct in their submissions that the documents or their contents are subject to some form of privilege which should prohibit disclosure then I can and will make an order on their applications for an injunction to restrain its use in these proceedings. The issue of contempt can be left undecided. Conversely, if there is nothing in the documents to justify a claim of privilege then on the Judge's analysis, there is no possibility of a contempt. Mr Simms, on behalf of CCL, has indicated that he does not wish to assert the company's rights of ownership and privilege as a bar to disclosure and will leave it to the court to decide whether the documents can be deployed. The only remaining objection to their disclosure therefore is the claim of privilege raised by both sets of Defendants. If (and to the extent that) I rule against them on that claim then all parties are content that I should vary McKinnon J's order to make it clear that it does not inhibit the use of the documents exhibited to Mr Serota's witness statement in these or other proceedings.

The Brinton by-laws

53. As mentioned earlier, Azuri was ordered in April 2005 to disclose the identity of the trust and to produce its statutes and by-laws. Ms Eagle identified Brinton in her witness statement of 5 May 2005 and disclosed the statutes but the by-laws were not produced until the hearing on 13 July 2005 and were confirmed by Ms Eagle in her witness statement of 20 July 2005 to be the only by-laws known to and in the possession of Azuri. It has now transpired that this was not the case and that the witness statement prepared by Mr Simms for Ms Eagle to make was materially false in this regard. The only by-laws adopted by Brinton are in fact ones dated 16 January 2003 in which both Helga and Jack Dadourian are named as beneficiaries for life whose "beneficial interest… pertains to the totality of the assets and the income without limitation". Mr Simms and Mr Sturman are named as the protectors of the Establishment.

54. DGI's case is that the evidence produced by Ms Eagle to confirm the undated by-laws referred to in her second witness statement was part of a deliberate attempt orchestrated by Mr Simms to mislead Warren J into believing that Brinton is a discretionary trust of the kind described by Mrs Dadourian in the witness statements I have already referred to and by Mr Simms in his evidence to the court who described Brinton as a properly regulated true discretionary trust. Mr Samek submits that Mr and Mrs Dadourian were privy to this and as a consequence are not entitled to claim the benefit of any privilege which otherwise attaches to the Eagle documents. He also

submits that this is a case where their conduct has jeopardised the fairness of the trial (or what remains of it) and that the court should refuse to allow them to take any further part in the proceedings and should give judgment against the Corporate Defendants whose case is reliant on their evidence.

55. Before coming to these issues it is therefore necessary for me to trace the history of the disclosure of the Brinton papers and to explain how this relates to the Eagle documents. I should however mention at the outset that Mr and Mrs Dadourian strongly deny ever having knowingly misled the Court. They say that they relied on Mr Simms and that the description of the terms of the trust was one obtained from him which they accepted in good faith. All that seems to be common ground is that Mr Simms has undoubtedly misled the Court and that his conduct in this regard has been both intentional and dishonest. But Mr Cakebread says that his clients should not be penalised for having relied on his advice.

56. I need to begin with a brief explanation of how the 2003 by-laws came to be disclosed. In a witness statement of 15 February 2008 (made in opposition to DGI's application to adduce the Eagle documents in evidence) Mr Wyld, the solicitor who has acted for Mr and Mrs Dadourian since shortly before the trial, says that during the course of 2006 and 2007 it became apparent to the Dadourians' legal team that there were unsatisfactory gaps in the picture relating to Brinton. This ties in with DGI's own submissions that at the trial there was what Mr Samek described as a remarkable lack of documentation disclosed by the Defendants about Brinton and Republic.

57. Mr Wyld's evidence is that his clients said they had no documentation of their own regarding Brinton and had had very little contact with Marxer & Partners and with Maitre Croisier. One particular difficulty facing Mr Wyld and needing to be addressed was the fact that by then Brinton had been struck off the register in Liechtenstein. Local lawyers were therefore instructed to see if it could be restored. As part of this process those lawyers (Dr Oliver Schmidt) asked Marxer & Partners for information about Brinton's by-laws and sent to Mr Wyld on 28 January 2008 a copy of the 2003 by-laws which clearly differed from the document produced at the hearing on 13 July 2005. Mr Wyld says that he sent a copy to Jack and Helga who said that they had no knowledge of them.

58. Mr Wyld then made enquiries of Maitre Croisier and he too sent a copy of the 2003 by-laws which he had on his file. Mr and Mrs Dadourian maintained, he says, that these did not conform with their instructions.

59. Mr Wyld therefore decided to visit Vaduz and Geneva in order to inspect the files kept by Dr Marxer and Maitre Croisier. He went first to Vaduz on 12 February 2008 and inspected some, but not all, of the material kept on file. He says that the file contained no evidence of any contact between his clients and Dr Marxer's firm since 2000. Apart from this, the file contained a copy of the 2003 by-laws and two other sets of by-laws both of which were unsigned. The first purports to amend the existing by-laws by removing Jack Dadourian as a beneficiary. The second draft is dated 31 March 2005 and retains both Jack and Helga as the first life beneficiaries but varies the amounts to which various residual beneficiaries are entitled to the property after the Dadourians' death.

60. Mr Wyld then visited Maitre Croisier in Geneva and was given limited access to his documents. From the documents he was shown he has exhibited various papers signed by Jack and Helga including some resolutions of the meeting of the bearers of the Founder's rights of Wildhorse Establishment dated 30 December 1996 which sets out various provisions similar to those contained in the 2003 by-laws. They include the nomination of both Jack and Helga as beneficiaries and resolution 4 which is in the following terms:

"… *During the lifetime of Helga Dadourian and of Jack Dadourian, Helga and Jack Dadourian shall be the principal beneficiaries of the Establishment and all distributions of income or capital shall be made to Helga and/or Jack Dadourian and no other beneficiary shall benefit unless Helga Dadourian so approves in writing and no consent of the Protector shall be required for such a distribution. ..*"

There has already been disclosure of a letter from Mr Simms to Mr and Mrs Dadourian dated 26 November 1996 in which Mr Simms refers to a meeting with them following which he has revised the Wildhorse resolutions and asks them to sign the revised by-laws "*if you are happy that they now represent what you wish*".

61. Mr Wyld has also exhibited the balance of the documents made available by Marxer & Partners and he produced at the hearing a letter from Maitre Croisier to Dr Marxer dated 21 December 2004 which he now accepts is disclosable. From these and the other documents exhibited to his witness statement the following picture appears to emerge in relation to the by-laws of Brinton. The 2003 by-laws were registered on 16 January 2003. Subject to any point of interpretation based on Liechtenstein law, they appear to an English lawyer to create a trust in which both Mr and Mrs Dadourian have vested interests in possession. In February 2004 the proceedings began and were served on Mr and Mrs Dadourian together with the freezing order granted by Lindsay J on 3 February 2004.

62. On 29 June 2004 Mr and Mrs Dadourian signed a document headed Bye-Statutes No.4 which in paragraph 1 removes Jack Dadourian as a beneficiary and whilst making Helga *"the principal discretionary beneficiary*" during her lifetime provides in art.2 that no beneficiary shall have any legal or defined interest in any part of the capital or income of the assets held by the Establishment. This document was provided to Mr Wyld by Mr Simms on 13 February 2008 together with various other draft by-laws and similar documents.

63. On 13 October 2004 DGI served its application for a freezing order against the assets of the trust. On 1 November 2004 Maitre Croisier sent to Dr Marxer what he describes as a new set of internal regulations "*which take into consideration intervening family events"*. The letter goes on to say that Mr and Mrs Dadourian have asked him to provide Dr Marxer with a draft which needs to be approved by him as soon as possible. The draft was not

on Maitre Croisier's file when inspected and disclosed but appears from Marxer & Partners' reply of 23 November 2004 to be the Bye-Statutes No.4 referred to in the last paragraph above. In that letter Marxer & Partners raise a number of technical objections to the form of the proposed new by-laws and ask Mr Croisier to produce an amended draft signed by his clients.

64. I should mention at this stage that on 29 June 2004 Mrs Dadourian had sworn the affidavit referred to in paragraph 28 above in which she stated (in paragraph 3) that her assets (including those derived from her husband) had been settled into a trust of which she was "a potential discretionary beneficiary". On 16 November 2004 Maitre Croisier also made a witness statement (see paragraph 23) referred to by Warren J in his judgment confirming that the trust was discretionary and did not include Jack Dadourian as a beneficiary. In his witness statement this was said by Maitre Croisier to be an accurate description of the relevant trust and its operation. On the face of it this is in flat contradiction to the correspondence with Marxer & Partners on 1 November 2004 and certainly to their reply of 23 November with which they sent to Maitre Croisier a copy of the 2003 by-laws which they said were those then in force.

65. On 21 December 2004 Maitre Croisier wrote to Marxer & Partners the letter produced by Mr Wyld at the hearing in which he enclosed Bye-Statute No.4 approved by Mr and Mrs Dadourian. This enclosure has not been produced but looks to have been an amended version of the document first sent on 1 November. At this stage in the litigation Mr and Mrs Dadourian had applied unsuccessfully to set aside the freezing orders granted by Lewison J on 13 February 2004 and on 22 March 2005 David Richards J made the freezing order against Azuri. On 31 March 2005 Marxer & Partners wrote to Maitre Croisier enclosing some draft amended by-laws based on his letters of 1 November and 21 December 2004 and presumably their enclosures. This appears to be the draft exhibited to Mr Wyld's witness statement from Dr Marxer's file: see paragraph 59 above.

66. It is clear from this correspondence that as of 31 March 2005 the 2003 by-laws remained in full force and effect un-amended. In his letter of 31 March Dr Marxer asked Maitre Croisier to amend his draft as required and to arrange for Jack and Helga to sign it "if it accords with their requirements". On 22 April 2005 Evans-Lombe J ordered Azuri to identify the trust. This led to Ms Eagle's witness statement of 5 May 2005 exhibiting the statutes but not the by-laws. This seems to have prompted a letter from Mr Simms to Maitre Croisier of 6 May 2005 which was also disclosed by Mr Wyld during the hearing. It reads as follows:

"*The situation on the by-laws is not satisfactory. It seems that Marxer & Partners have not implemented changes which occur from time to time and I have a number of by-laws on my file which they obviously have never implemented.*

In view of the evidence already filed it seems to me important that the position is corrected and Mr and Mrs Dadourian have initialled two additional by-laws, copies of which are attached. I have not sent these to Marxer & Partners at the present time. The purpose of the first is obvious namely to cancel the existing by-laws. The second is to substitute by-laws which represent what the parties have intended. I am sending the originals of these to you by post.

Normally the question of the implementation of changes to the by-laws have been dealt with by your office. It seems to me that we do not want any potential suggestions that the description of the Trust in earlier evidence was incorrect based on what was actually implemented by Marxer & Partners. If these are now implemented, the trust will be in a position that the parties thought it was already in."

67. The two sets of by-laws faxed to Maitre Croisier with the letter have also been disclosed. The first simply revokes and cancels the 2003 by-laws. It refers to them as being dated 17 January 2003 but this is clearly an error. The other set is in the same form as the undated and unsigned document handed over at the hearing on 13 July 2005 and subsequently confirmed by Ms Eagle in her witness statement of 20 July 2005 to be the only version of the by-laws of Brinton signed or otherwise which Azuri had. In her third witness statement of 27 July 2005 she said that Azuri did not have a signed and dated copy of the document or a copy of any other by-laws.

68. This was clearly untrue. Mr Simms both knew about and had copies of the 2003 by-laws and on 6 May 2005 had sent to Maitre Croisier a copy of the new proposed by-laws initialled by the Dadourians. Mr Samek submits that this was part of an attempt by him to re-write history by changing Brinton into a discretionary trust and concealing from DGI and the Court the existence of the 2003 by-laws which falsified the statements made in earlier witness statements and other disclosures that the trust had always been a discretionary one. As part of this stratagem Mr Simms then wrote to Dr Marxer on 19 May 2005. This is one of the disputed Eagle documents but it is convenient to refer to it at this stage as part of the chronology in relation to Brinton. The letter deals with a number of matters but in relation to Brinton Mr Simms says this:

"… *Sometime ago various changes were made, or so Mrs Dadourian thought, to the beneficial interest but they do not appear to have reach you from Geneva. In order to put matters right, I attach drafts of two prospective changes to the bylaws which were signed by Mr and Mrs Dadourian, the first being the revocation of the existing bylaws and the second setting out a discretionary situation. Whether this is in correct Liechtenstein format I do not know but it is intended to follow the general way in which bylaws appear to be prepared in Liechtenstein.*

Since these were signed it has come to light, according to Dr Schreiber that Domar is no longer the Bearer of the Founders Rights and that any changes to the bylaws would be instituted by the directors and not by Domar. Clearly, that would therefore need to be changed.

However, before involving the clients in any changes to their instructions in order to satisfy proper legal requirements, it would seem sensible to ensure that the totality of the documents is correct.

Perhaps you could therefore look at this carefully and let me have your views. …"

The documents referred to are almost certainly those sent to Maitre Croisier with the letter of 6 May 2005.

69. There then followed the application before Mr Bartley-Jones QC referred to in paragraph 27 above. At the hearing on 13 July Azuri's representative produced the unsigned version of the proposed new by-laws sent to Maitre Croisier and Dr Marxer. The order made by Mr Bartley-Jones required Azuri to produce a signed and dated copy of the by-laws handed over on 13 July together with copies of any other by-laws in existence since 21 February 1994. The witness statement made by Ms Eagle in response to this order involved in my judgment a deliberate deception by Mr Simms in that the new by-laws (as yet only a proposal) were put forward as the current and only by-laws of Brinton and the existence of the 2003 by-laws which remained the governing instrument at that time was suppressed. Mr Wyld said in evidence that he had come to the conclusion that the new by-laws were as he put it concocted by Mr Simms. Mr Cakebread, on behalf of his clients, accepted that the 2003 by-laws were still in force when the Azuri disclosure statements were made and that the new by-laws produced by Mr Simms were intended to deceive Warren J as to the correct position in relation to the structure of Brinton. But he said that his clients were not aware of this and this is a central issue on this application.

70. Mr Simms continued his attempts to re-formulate Brinton. On 2 August 2005 he wrote to Mr and Mrs Dadourian. This is another of the Eagle documents. Again, the letter covers a variety of matters connected with the litigation but it includes an update on his attempts to persuade Marxer & Partners to implement the proposed changes to the trust. The relevant part of his letter reads as follows:

"*I have had a further very lengthy telephone conversation with Martina Zarn. It is difficult to get any urgency into this situation and it is clear that they would prefer that the problem did not exist and that they were not involved with it. Before we can get them to make any final decision, they want a definitive answer to the question of whether there are any other participations additional to those already mentioned. In that context, there is Dunmurry but it may be that this is now a write-off. However, the position is that whatever is crystallised now, will not be alterable and therefore you should be clear as to what is and what is not within the Trust.*"

71. On 5 August 2005 Mr Simms wrote again to Marxer & Partners to say this:

"*..It is also the case that Maitre Croisier has confirmed the existence of the trust structure. It is therefore very much in the interest of all parties that the structure should be as disclosed and as the parties thought and if Republic Investment Company Limited were not held by the Trust, then the question is how the Republic Investment Company is held and that could then create total confusion since Mrs Dadourian would not wish to claim ownership having made a declaration to the contrary and there would then be problems with the directors of Republic Investment Company since they regard the company as being held by Brinton. It does seem very much the best thing to regularise matters and proceed from there. ....*"

72. It is now common ground that the changes to Brinton proposed by Mr Simms have never been implemented. DGI contends that this was known by Mr and Mrs Dadourian no later than 2 August 2005 when Mr Simms wrote to them about the problems he was facing in getting Marxer & Partners to act. Between then and October 2005 nothing changed and there is no evidence of any further communication between Mr Simms and Mr and Mrs Dadourian on this subject. By then David Richards J had made freezing orders against Brinton and the Corporate Defendants and on 12 October 2005 Mrs Dadourian made her sixth witness statement which I have quoted from in paragraph 33 above. At trial her position remained the same: see paragraph 35. The by-laws she is referring to in paragraph 70 of her witness statement were of course the draft by-laws which in August she was told had not been implemented. At the time of the trial nothing had changed.

73. To complete the material relevant to Brinton I need finally to refer to Mrs Dadourian's witness statement of 15 February 2008 made in response to DGI's application to use the Eagle documents. This contains her explanation of her understanding of Brinton in the light of the disclosures by Mr Wyld of the documents relating to the by-laws. She begins by saying that she has always believed that Brinton created a discretionary trust of which she was the principal beneficiary. For this she relied on Mr Simms to explain the meaning of the Brinton documents. She does not identify which documents she is referring to. In paragraph 4 she says that she believed that her husband would not be a beneficiary but that it has been explained to her that his inclusion was necessitated by the fact that most of her assets were to be settled into Brinton. Again, no further details of who provided this explanation or the basis of it are given.

74. She then turns specifically to deal with the 2003 by-laws. Her evidence is that she did not see these before they were sent to her by Mr Wyld in January 2008. She says that at no time did she instruct Mr Simms to turn Brinton into a bare trust. She says that for much of the time he dealt with Maitre Croisier and Dr Marxer without reference to her. She accepts that she signed the document headed *"Bye-Statutes No.4*" which provides for Jack Dadourian's removal as a beneficiary and says that:

"*...I signed this because Paul Simms told me that it would look as if Jack had always been a beneficiary unless this change was made. I did not believe that Jack had been a beneficiary of the trust and so I signed it.*"

75. Most importantly, however, she denies that she was party to any attempt by Mr Simms to change the by-laws during 2005 which she accepts did happen. Paragraphs 15 and 16 of her witness statement read as follows:

"***15*** *I should lastly state that I was not told by Paul Simms during 2005 that he was making any attempt to change the by laws as now appears to be the case. I knew nothing of this, was not consulted about it and did not instruct or authorise any such steps to be taken. I was not privy to the communications which went between Maitre Croisier and Paul Simms or Paul Simms and Dr Marxer. I should also point out that Maitre Croisier confirmed my*

understanding of the nature of the trust in the evidence he put before this court in 2004. I was not responsible for seeking or obtaining that evidence.

16 *I am very disturbed by all that I have now seen and simply cannot understand how and why we were so misled. I have throughout in my evidence to this court stated what I believed to be true. In doing so I have been almost totally reliant upon what I was told by Paul Simms. Clearly much has been done in my name about which I knew very little or nothing. "*

76. This witness statement makes no reference to Mr Simms' letter of 2 August 2005 except insofar as it acknowledges that he did set out in 2005 to change the by-laws. There is no denial of the receipt of that letter or of the circumstances in which Mr and Mrs Dadourian came to initial the two draft by-laws sent to Maitre Croisier with Mr Simms' letter of 6 May 2005, one of which as I have explained was in identical terms to the undated document produced at the hearing before Mr BartleyJones QC. Mr Samek's case is that these documents give the lie to what Mrs Dadourian says in paragraphs 15 – 16 of her witness statement and prove that she and her husband were privy to Mr Simms' attempt to change the by-laws and to mislead the Court.

77. Before turning to the issues of privilege which arise in these applications I need for completeness to mention that Mr Simms has made various witness statements for use on these applications. On 7 February 2008 Peter Smith J made an order giving directions for the hearing of these applications. These included a direction that each deponent whose evidence was served in support of or in opposition to the applications must attend for cross-examination failing which their written evidence could not be relied on. Neither Mr and Mrs Dadourian nor Mr Simms attended for cross-examination. As mentioned earlier, Mr Simms had written a letter to DGI's solicitors saying that CCL did not wish to assert any claim to privilege and would leave the question of disclosure to the Court. Given Mr Cakebread's submission that Mr Simms was in his client's view dishonest and unreliable, I saw no reason to depart from the order of Peter Smith J and I declined to admit Mr Simms' evidence. In relation to Mrs Dadourian, a letter was produced saying that she was suffering from extreme nervous exhaustion and depression and was unfit to attend the hearing. Mr Samek invited me to exclude her evidence but I declined to do so. I did, however, indicate that I might be unable to give it very much weight where it was not supported by other reliable evidence. Mr Dadourian is, it is agreed, seriously ill and his non-attendance was expected. He, in any event, relies upon the evidence given by his wife.

The legal issues

78. As a result of the conduct of Miss Eagle, DGI has documents containing material which is said to be confidential and privileged from disclosure. Twenty years ago it was a common belief that if confidential or privileged material belonging to one party to litigation fell into the hands of the other party he was entitled to us it in any way he wished regardless of the privilege which attached to it. But in ***Goddard v Nationwide Building Society*** *[1987] 1 QB 670* the Court of Appeal clarified the relationship between the rule of evidence which allows a litigant to adduce copies of privileged documents as secondary evidence and the Court's jurisdiction in equity to restrain the disclosure of privileged or confidential material. The correct position (see per May LJ at p.683) is that:

"…If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them. .."

79. In this particular case the Defendants have not placed any special reliance on the confidential nature of the documents separate from the claim of privilege. Any property in the documents is vested in CCL which as already mentioned, does not seek to assert rights of confidentiality or privilege on these applications. But in the case of the Dadourians and the Corporate Defendants the confidentiality which is asserted stems from and is co-extensive with the claim of privilege. It is also clear on authority that although the Court has power in the exercise of its equitable jurisdiction to restrain the use of confidential information regardless of whether it is also privileged, that power will not normally be exercised to prevent the use of such material in litigation when it would otherwise be admissible in evidence. In ***Goddard v Nationwide Building Society*** *(supra)* at page 685 Nourse LJ explained the position in these terms:

"…although the equitable jurisdiction is of much wider application, I have little doubt that it can prevail over the rule of evidence only in cases where privilege can be claimed. The equitable jurisdiction is well able to extend, for example, to the grant of an injunction to restrain an unauthorised disclosure of confidential communications between priest and penitent or doctor and patient. But those communications are not privileged in legal proceedings and I do not believe that equity would restrain a litigant who already had a record of such a communication in his possession from using it for the purposes of his litigation. It cannot be the function of equity to accord a de facto privilege to communications in respect of which no privilege can be claimed. Equity follows the law. …"

80. This passage was cited and followed by the Court of Appeal in ***Sutton v GE Capital Finance Limited*** *[2004] 2 BCLC 662* at page 670.

81. The essential issues therefore are whether the Eagle documents are privileged from disclosure on account of the material they contain and if so privileged, whether that privilege has been lost either by being waived or more fundamentally because, as DGI claims, they are covered by the fraud exception set out by the House of Lords in ***O'Rourke v Darbishire*** *[1920] AC 581*. DGI challenges the claim to privilege in respect of each of the documents but it relies on the fraud exception as justifying the disclosure of all the documents even though the deception alleged to

have been practiced on the Court is limited in terms to the position relating to the Brinton by-laws. The conduct of Mr and Mrs Dadourian is relied on as justifying the release of all the privileged material under consideration on these applications on the basis that to do otherwise would give rise to a substantial risk of injustice.

Privilege

82. The documents are said to be covered both by legal advice privilege and by litigation privilege. In relation to some documents there is a claim to common interest privilege. A measure of agreement exists as to the requirements for each.

(i) *Legal advice privilege*

83. This is confined to communications made in confidence between a lawyer and his client. Communications with third parties are not included unless the third party is acting simply as the intermediate agent of either the lawyer or his client. The purpose of the communication must be the giving or obtaining of legal advice whether in connection with litigation or otherwise. In ***Balabel v Air India*** *[1988] Ch 317* at page 330 Taylor LJ said that:

"…legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context. …"

But that:

"…to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. …"

84. This formulation was approved by the House of Lords in ***Three Rivers District Council v Bank of England (No.6)*** *[2005] 1 AC 610* where the issue was whether legal advice privilege extended to advice given by the Bank's lawyers on presentational issues in relation to the Bingham inquiry. Lord Scott at para 38 set out his view of the limits of the relevant legal context:

"…If a solicitor becomes the client's "man of business", and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one. …"

85. But it is clear from the decision in ***Three Rivers (No.6)*** itself that the particular communication in issue need not contain the legal advice as such. Lord Carswell (at para 111) considered that:

"…all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client. …"

(ii) *Litigation privilege*

86. This can include a communication between a client and his lawyer or between one of them and a third party which comes into existence after litigation is commenced or contemplated for the dominant purpose of obtaining information or advice in connection with such litigation or of obtaining evidence (or information which might lead to evidence) for use in the conduct of such litigation: see ***Waugh v British Railways Board*** *[1980] AC 521* at page 543H.

87. The issue of litigation privilege is to be determined objectively by the Court having regard to the time when and the purpose for which the documents were brought into existence. DGI places particular emphasis on the passage in the speech of Lord Edmund-Davies in *Waugh* (at page 543C) where he refers to the public interest being best served by rigidly confining within narrow limits the cases where material relevant to litigation may be withheld. But this dictum has, I think, now to be read in the light of more recent observations about legal privilege in cases such as ***R v Derby Magistrates' Court ex pB*** *[1996] AC 487* which have re-emphasised its importance in the administration of justice.

(iii) *Common interest privilege*

88. This is not a separate type or category of legal professional privilege. It is simply a convenient way of describing the principle under which communications between parties with a common interest may be entitled to protection from disclosure. The law was stated by Brightman LJ in ***Buttes Gas & Oil Company v Hammer (No 3)*** *[1981] 1 QB 223* at page 267H as follows:

"…if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each. …"

89. The parties must therefore share a common solicitor and the information must itself be privileged from disclosure in the hands of the communicating or primary party. The privilege can be either legal advice privilege or litigation privilege. The second party obtains the same protection in respect of the shared material by establishing that it was disclosed to him in recognition of his shared or common interest in the subject matter of the communication.

Are the Eagle documents privileged?

90. Mr Samek has divided the documents into four categories:

i) Brinton documents;

ii) Documents relating to the beneficial ownership of the assets of the corporate Defendants;

iii) Libourne documents; and

iv) Documents allegedly showing breaches of the freezing orders.

91. There is also a point of general application to all the privileged material arising from the status of Mr Simms at the time when the documents were brought into existence. As mentioned earlier, Mr Simms was removed from the roll as a solicitor in 2004 and although he appears to have continued to give advice to Mr and Mrs Dadourian through CCL and to have communicated with Maitre Croisier and Marxer & Partners about such matters as the Brinton by-laws he did not carry out these activities as a solicitor who was qualified to practise at the time. Since all of the Eagle documents post-date his disqualification as a solicitor, DGI contends that no legal advice privilege can attach to any of these communications. As a matter of authority it is an open question whether litigation privilege can be claimed by Mr Simms as a litigant in person but Mr Samek is content to accept for the purposes of these applications that it can. Mr Simms does not, however, assert any legal professional privilege of his own in relation to the legal documents. It is not therefore open to the two sets of Defendants to assert a right to common interest privilege in communications between Mr Simms and them about issues in the litigation based on their being privileged in Mr Simms' hands. Their only possible objection to disclosure of the Eagle documents has to be based on their own legal professional privilege arising in respect of the communications by Mr Simms with them or with third parties which must depend upon Mr Simms qualifying as their lawyer for purposes of the rule. I shall come back to this point after considering the claims for privilege made in respect of the individual documents.

The Brinton documents

92. For convenience I propose to refer to these and the other Eagle documents by their page numbers in the bundle of exhibits in which they appear. A number of the letters are divided into several sections dealing with different issues and where this is the case I shall indicate which of the parts of the letter are or are not subject to a claim of privilege. Unless otherwise stated, each of the documents is a letter written by Mr Simms.

i) ***Letter:19 May 2005 to Marxer & Partners: pages 69-71***

93. This is divided into two parts. The first deals with the Corporate Defendants and their assets; the second with changes to the Brinton by-laws (see para 68 above). The letter is not written by or to the Dadourians or the Corporate Defendants and is essentially an enquiry by Mr Simms as to whether earlier changes to the trust have been implemented. Communications from a client seeking advice are as much privileged as the replies containing the advice sought but the issue here is whether the letter can be treated as a request for advice to Marxer & Partners from Mr and Mrs Dadourian (through Mr Simms as their agent) or is a communication by Mr Simms seeking information in order to give advice of his own. DGI contends that a communication of this sort with a third party is not covered by legal advice privilege and could (if at all) only be privileged if made in connection with litigation.

94. The issue really turns on whether Marxer & Partners were at the relevant time acting as lawyers for Mr and Mrs Dadourian or were retained as legal advisers to Brinton. If the latter, then it seems to me that the case is covered by the principle in ***Wheeler v le Marchant*** *(1881) 17 Ch D 675* and the letter can only be privileged if written for the purpose of obtaining information relevant to the litigation. In his earlier witness statement Mr Simms described Marxer & Partners as acting for the directors of Brinton in contrast to Maitre Croisier who was retained by the Dadourians. On this basis, legal advice privilege is not available and the only arguable claim is to litigation privilege.

95. As explained earlier in this judgment, this letter forms part of a sequence of correspondence between Mr Simms, Maitre Croisier and Marxer & Partners generated by Mr Simms' attempt to change the Brinton by-laws so as to make them conform to the discretionary trust which the Dadourians have always maintained was the nature of the trust. This involved what is admitted to have been a deliberate deception on the part of Mr Simms. I shall deal with the fraud exception argument later in this judgment, but there is, I think, a short answer to the claim to litigation privilege (or legal advice privilege) in respect of this and the other Brinton documents.

96. Even if (subject to the fraud exception point) the documents are arguably subject to some form of legal professional privilege that has in my judgment been waived by the disclosures which have been made by Mr Wyld following his examination of the Croisier and Marxer files. He has produced the various drafts of the Brinton by-laws and accompanying correspondence such as the letter from Marxer & Partners to Maitre Croisier of 23 November 2004 and the fax from Mr Simms to Maitre Croisier of 6 May 2005. Once these documents have been disclosed it becomes impossible in my judgment to maintain a claim to privilege in respect of the other communications with Mr and Mrs Dadourian and the foreign lawyers which explain how the sequence of draft by-laws came into existence. This is particularly so given the contents of Mrs Dadourian's most recent witness statement which describe in terms her version of these events.

97. The general rule is that when a party chooses to deploy privileged material in litigation the opposing party must be given the opportunity of satisfying themselves that they have the whole of the material relevant to the issue in question. In practice this means that the party introducing the privileged material will be required to disclose the whole of the document unless it is severable in terms of its subject matter: see ***The Nea Karteria*** *[1981] Comm LR 138;* ***R v Official Receiver for Transport exp Factortame*** *[1997] 9 Admin LR 591 at p.598*. Fairness is said to be the guiding principle in relation to the scope of the waiver.

98. Applying these principles it seems to me that the Defendants must be taken to have waived any privilege in the Eagle documents so far as they bear on the issue of the Brinton by-laws. This must include the entirety of the second part of the letter of 19 May 2005 under the heading "*Beneficial interests*": (pages 70 – 71). It does not extend to the first part of the letter which deals with the assets held by the Corporate Defendants. So far as that is concerned the issue remains whether it is covered by litigation privilege. This in turn depends upon whether its dominant purpose was to obtain advice or information for use in connection with the litigation. There is nothing in the contents of the letter to suggest that this is the case. On the contrary, Mr Simms sets out information about the subsidiaries of Republic and their assets including information on how they were acquired. Although these are issues in the Part 24 application, Mr Simms appears to be providing information to Marxer & Partners rather than seeking it. Nor is there any discussion about specific issues or tactical questions arising in the litigation. In my judgment the first part of the letter is not subject to litigation privilege and should be disclosed.

(ii) ***Letter: 2August 2005 to Mr and Mrs Dadourian (pages 76 – 78)***

99. This is also divided into sections the third of which is headed "*The Trust*" and relates to Brinton. Part of it deals with funding arrangements but is not, I think, severable for purposes of waiver. For the reasons already given, privilege has in my judgment been waived in respect of the third section on pages 77 – 78.

100. The first two parts of the letter deal with funding issues and fall into Mr Samek's fourth category. He submits that their contents do not attract litigation privilege because they relate only to funding issues and the impact of the freezing orders on the funding arrangements. I agree that the first section of the letter headed "Ellis Taylor & Co" does not contain privileged material but the second section ("Going forward") clearly does contain advice from Mr Simms about the litigation and is therefore privileged subject to the point about his status. Subject to that, this section of the letter cannot be deployed unless covered by the fraud exception.

(iii) ***Letter: 5 August 2005 to Marxer & Partners (pages 79- 80).***

101. For the reasons already given this is not covered by legal advice privilege and any litigation privilege has been waived. The document is a single letter with no obviously severable parts and the waiver in my view extends to the whole of it.

(iv) ***Letters: 16 August and 23 August 2005 to Marxer & Partners (pages 85 and 86)***

102. These letters contain the views of Mr Simms, Mr and Mrs Dadourian and the Corporate Defendants as to whether Brinton should submit to the jurisdiction of the English court. This cannot give rise to any privilege for the benefit of the Dadourians and the Corporate Defendants and they can have no objection to its disclosure.

(v) ***Letter: 30 September 2005 to Marxer & Partners (page 91)***

103. In this letter Mr Simms complains to Marxer & Partners about the disclosure of information about Brinton to DGI's solicitors by Maitre Croisier. Given that the Brinton material has been disclosed and is no longer privileged the same must apply to this letter.

Documents referring to the assets of the Corporate Defendants

i) ***Letter: 26 May 2005 to BNP Paribas, Geneva (page 72);***

ii) ***Letter: 7 June 2005 to Mr and Mrs Dadourian (page 73);***

iii) ***Letter: 7 June 2005 to BNP Paribas, Geneva (page 74);***

iv) ***Letter: 8 September 2005 to Dexia Private Bank, Zurich (page 88 – 9);***

v) ***Letter: (undated): Mr and Mrs Dadourian to Basil Zarour (page 90);***

vi) ***Letter: 19 October 2005 to Societe General, Paris (page 92)***

104. The issue in the case of all the documents in this category is whether they are covered by litigation privilege. All the letters form a sequence of correspondence written to third parties who are not lawyers and concern the raising of loans to assist Mr and Mrs Dadourian in funding the litigation. The security being offered is the Paris and the London flats.

105. Most of the letters are simply requests to various banks to consider the loan and to arrange a valuation of the security. The only exception is the letter of 8 September 2005 which gives Dexia Private Bank a summary of the issues in the action but is largely taken up with the details of the proposed facility.

106. None of these communications is in my view covered by litigation privilege. Discussions with third party lenders about funding do not amount to communications whose sole or dominant purpose is the obtaining of advice or information for use in the proceedings.

vii) ***Letter: (undated) to Mr and Mrs Dadourian (page 68)***

107. This letter also relates to the raising of finance but contains advice from Mr Simms about Azuri's position in relation to the freezing order. This is clearly advice about the litigation and subject to the point about Mr Simms' status, this letter is in my view covered by litigation privilege.

The Libourne documents (pages 93 – 98)

108. These are two letters from Mr Simms to Mr Joseph Brice, the director of Mees Pierson Intertrust (Anguilla) Limited, the controlling shareholder of Republic. The first letter (dated 28 April 2006) raises the possibility of Libourne providing security in the form of a charge over 14 Lennox Gardens for a loan to assist Mr and Mrs Dadourian in meeting the costs awarded against them in the action. This is in the same category as the funding letters written to the banks and is not covered by litigation privilege.

109. The second letter to Mr Brice (dated 22 August 2006) raises the question of how the shares in Republic were placed into the Brinton trust. The purpose of the letter is to ask Mr Brice for his views on the possibility of creating a new BVI trust to hold the shares of Republic on the same terms as the Brinton trust. Again, the purpose of the letter is not to give Mr Brice (or Republic) legal advice or advice about the litigation but rather to make an enquiry about the possibility of setting up an alternative trust structure to Brinton which, as Mr Simms explains in his letter, had by then been dissolved in Liechtenstein. This communication is not in my judgment covered by any form of legal professional privilege which the Defendants can enforce.

Documents relevant to the freezing orders

110. The remaining Eagle documents are relied on by DGI in support of a contention that the Defendants have committed various breaches of the freezing orders made against them. Even if true, this does not provide a ground in itself for over-riding any viable claim to legal professional privilege and DGI seeks to use the documents either on the basis that they are not covered by any available privilege or that (if covered) the claim to privilege is defeated by the fraud exception.

111. As in the case of the previous three categories of documents I propose to deal first with the claims to privilege.

i) ***Letter:16 February 2005 to Maitre Croisier (page 63)***

112. This asks Maitre Croisier to transfer €5000 to the French lawyers dealing with the enforcement of the freezing order against Azuri. It is a purely administrative request and is not privileged.

ii) ***Letter: (undated) to Mr and Mrs Dadourian (page 64)***

113. This is a request for funds out of which to pay Mr Simms' costs. It does not involve the giving of legal advice. It is not privileged.

iii) ***Minutes of a meeting of the Board of Directors of Azuri Ltd 18 March 2005 (page 65)***

114. The minute records the service of proceedings on Azuri and the decision of the company to contest the application. It does not contain a reference to any legal advice tendered to the company and is not privileged.

iv) ***Letter: 20 April 2005 to Maitre Croisier (pages 59 – 60)***

115. This letter discusses the effect of the freezing order on payments made by Brinton. Subject to the point about Mr Simms, it does therefore contain advice about the litigation between lawyers acting for the Defendants and is in my view protected by litigation privilege.

v) ***Letter: (undated) to Mr and Mrs Dadourian (pages 66 – 67)***

116. From its terms, this was obviously written after the orders for disclosure made by Evans-Lombe J on 22 April 2005. It discusses in some detail how that order should be complied with and provides some advice about other issues in the action. It seems to me that it is covered by litigation privilege even though it contains some reference to purely funding issues. The two are not in my view severable and the privilege extends to the entire document subject to the point about Mr Simms.

vi) ***Letter: 19 July 2006 to Mrs Dadourian (page 57)***

117. This letter discusses and gives advice about the effect of the freezing order made against Azuri. If Mr Simms can properly be treated as the Dadourians' lawyer for these purposes, it is privileged.

Other documents

118. During the hearing Mr Samek indicated that DGI no longer sought any relief in respect of the Eagle documents at pages 62, 75, 81 – 84 and 87. It is therefore unnecessary for me to deal with any questions of privilege relating to them. The Defendants have themselves accepted that the document at page 58 is not privileged.

The status of Mr Simms

119. In ***New Victoria Hospital v Ryan*** *[1993] ICR 201* the Employment Appeal Tribunal held on an application for discovery that communications between the complainant's former employers and a firm of personnel consultants who had acted as their advisers were not covered by legal professional privilege. Tucker J at page 203H said that:

"…there is a more fundamental reason for not affording privilege to these documents. That is because in our opinion the privilege should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their professions, and who owe a duty to the Court. This is a clearly defined and easily identifiable qualification for the attachment of privilege. To extend the privilege to unqualified advisers such as personnel consultants is in our opinion unnecessary and undesirable. …"

120. In ***Three Rivers (No 6)*** the point did not arise but Mr Samek pointed out that the definition of legal advice privilege given by Lord Rodger (at para 50) was expressed in terms of communications in confidence between solicitors and their clients. He also referred me to the decision of the House of Lords in ***Jones v Great Central***

Railway Company *[1910] AC 4* where information provided by an employee to his trade union to enable it to decide whether to grant legal assistance with a claim against his former employers was held to be discoverable at the suit of the employers. The privilege in the material was lost when it was communicated to someone "who was not a solicitor, nor the mere alter ego of a solicitor".

121. Legal professional privilege operates to prevent the disclosure of material which is likely to be highly relevant to the issues raised in the litigation and would otherwise be admissible in those proceedings. This rule of public policy is said to be justified by the need to ensure that communications between a lawyer and his client involving the giving of legal advice should remain confidential unless disclosed with the client's consent. Without this guarantee of confidentiality the client is unlikely to feel able to put all the facts before his lawyer and without this information the lawyer will be unable to give to his client the advice which he is entitled to and needs. Absent waiver the privilege once established is absolute. There is no balancing exercise to be performed unlike in cases where the advice, although confidential, is not as such privileged. Obvious examples of cases in the latter category are discussions between doctor and patient or accountant and client. The giving of legal advice is therefore placed in a special category apart from any other species of confidential communication : see the speech of Lord Scott in *Three Rivers (No 6)* at paragraphs 23 – 34.

122. It is therefore no surprise to find legal professional privilege described in terms of communications between a lawyer and his client because this is the relationship to which the law for the policy reasons I have described gives this extended form of protection. No other professional relationship qualifies. But it does not necessarily follow from this that a client who in good faith instructs someone whom he mistakenly believes to be a qualified solicitor or barrister should forfeit the protection of the legal privilege which he would otherwise obtain in relation to the disclosures he has made or the advice he has received.

123. In ***Calley v Richards*** *(1854) 19 Beav 401* Sir John Romilly MR upheld a claim to privilege in respect of communications between a person and his legal adviser who had been a solicitor but who at the time of the communications had (without the client's knowledge) ceased to practise. The privilege, he held, was only lost if the client knew at the time that the person he instructed was not a practising solicitor. A similar view has prevailed in Australia: see ***Global Funds Management (NSW) Limited v Rooney*** *(1994) 36 NSWLR 122.*

124. In my judgment the EAT was clearly right in ***New Victoria Hospital v Ryan*** to conclude that legal professional privilege did not attach to communications between the employers and a firm of unqualified consultants even if the latter were in fact relied on to give legal advice. The privilege is conferred to ensure that qualified lawyers are protected in their dealings with their clients. The corollary to this form of protection is that the lawyers in question should be subject to the control of their professional bodies and the rules of practice which govern them. But in ***New Victoria Hospital*** no issue of mistake arose and the case is not therefore inconsistent with the decision in ***Calley v Richards***.

125. Miss Levy submits on the authority of ***Calley v Richards***, that unless the Defendants became aware that Mr Simms had ceased to be a solicitor prior to the time when the Eagle documents were created then they are entitled to assert any form of legal professional privilege which would have been available to them had he been fully entitled to practise as a solicitor at that time. It would, she says, be quite unjust for the client who deals with an apparently qualified solicitor or barrister in good faith to be deprived of all protection if it subsequently turns out that the lawyer was not properly qualified at the time.

126. Mr Samek does not accept the authority of ***Calley v Richards*** as representing a correct statement of the law. But he has been unable to produce any subsequent authority casting doubt on it. His principal submission, however, is that the Dadourians have produced no proper or convincing evidence to establish that they were unaware that Mr Simms had been struck off at the time and that such material as does exist indicates the contrary.

127. In his witness statement of 14 December 2007 filed in support of DGI's application to vary the terms of McKinnon J's order so as to allow the Eagle documents to be used in the Part 24 application, Mr Bamford of Withers LLP does specifically refer to Mr Simms being struck off as a reason why legal advice privilege cannot attach to the Eagle documents. The Defendants were therefore on notice of the point from the start. In her witness statement of 15 February 2008, Mrs Dadourian says that she and her husband have relied on the advice of Mr Simms for over 25 years but does not say in terms whether she was aware that he had ceased to practise as a solicitor in 2004. Given that the general rule is that legal professional privilege does not attach to communications between a lawyer and his client unless the former is qualified to practise, it seems to me that the burden is on the Defendants to show that they continued to believe that Mr Simms held a practising certificate as a solicitor at the time when the Eagle documents came into existence and that in the absence of such evidence the claim to legal professional privilege in the documents cannot be maintained except for any documents sent by the clients themselves (or their agents) to third parties for the purpose of gathering information relevant to the proceedings. None of the five privileged documents I have identified falls into this category. They are all letters written by Mr Simms to the Dadourians containing legal advice.

128. In the absence of such evidence it is, I think, open to DGI to submit that there is no material on which I can base a finding that the Dadourians continued to believe Mr Simms was a qualified solicitor at the time they received the letters in question. But the matter goes beyond that. In paragraph 1 (d) of the Particulars of Claim, it was pleaded that the first Defendant was a solicitor until he was struck off the roll by the Solicitors Disciplinary Tribunal on 2 February 2004. That averment was admitted by Mr Simms in his own defence which Mr Samek

submits the Dadourians must have seen when they entered an appearance on 29 June 2004. More pertinent however is their own defence which in paragraph 5 contains an express admission that Mr Simms was struck off on 2 February 2004. That defence contains a statement of truth signed by both Mr and Mrs Dadourian. In the absence of some convincing contrary explanation, the only conclusion open to me in the light of this material is that the Dadourians were aware that Mr Simms had been struck off. It is, I think, important to bear in mind that they were throughout this period represented by experienced litigation solicitors in the action and it is almost inconceivable that Addleshaw Goddard were not aware and did not bring to their attention what had happened to Mr Simms. All five documents which I have identified as privileged post date the Dadourians' defence of November 2004. I have therefore reached the conclusion that the principle set out in *Calley v Richards* has no application in this case and that the five documents emanating from Mr Simms are not covered by legal professional privilege notwithstanding the subject matter of the communications.

The fraud exception

129. In the circumstances it is not strictly necessary for me to deal with Mr Samek's arguments based on the fraud exception. It was however made clear during the course of the application that any findings I make on this issue adverse to the Defendants are likely to be used in support of an application for judgment and for the peremptory dismissal of the appeal as an abuse of process. It does therefore have a potentially much wider importance than the issue of legal professional privilege. Given that I have heard argument on this issue, I propose therefore to set out in summary my conclusions.

130. Mr Samek advances this part of his case at two levels. His first line of argument is that the Eagle documents and the Brinton papers disclosed by Mr Wyld show that Mr and Mrs Dadourian and through them the Corporate Defendants, have deliberately misrepresented to the Court the true position about the Brinton by-laws and the beneficial ownership of the assets of the Corporate Defendants. As already explained, it is accepted by the Defendants that the evidence produced by Mr Simms in the form of Ms Eagle's witness statement and his own evidence to the Court was to his knowledge false when he described Brinton as incorporating a discretionary trust on the terms of the document produced at the hearing before Mr Bartley Jones QC. Mrs Dadourian says in her latest witness statement that her own previous statements to the same effect were made in good faith in reliance on what Mr Simms had told her. That is now put in issue by DGI in the light of the correspondence between the Dadourians and Mr Simms in 2005 and the preparation of the draft amended by-laws which the Dadourians signed.

131. The challenge to their evidence is not however limited to the issue of the Brinton by-laws. It also extends (based on the Eagle documents) to their case on beneficial ownership of the Corporate Defendants' assets. It is said that in the correspondence with the banks about fund raising on the security of the Paris flat, Mrs Dadourian is referred to as the beneficial owner which gives the lie to her case that this and the other assets are not held by the Corporate Defendants as nominees for the Dadourians.

132. Mr Samek invites me to find on the basis of this evidence that Mr and Mrs Dadourian have, with Mr Simms, knowingly misled the Court to the extent that it would be justified in striking out their defence to the Part 24 proceedings. He relies on the decisions in ***Arrow Nominees Inc v Blackledge*** *[2001] BCC 591* and ***Molloy v Shell*** *UK [2001] EWCA Civ 1272* in which the Court of Appeal has affirmed the jurisdiction of the Court to protect its own process by refusing to allow its manipulation by a dishonest party. In *Arrow Nominees* at paragraph 54 Chadwick LJ summarised the position as follows:

"…for my part, I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations of Mr Justice Millett in ***Logicrose Ltd v Southend United Football Club Limited*** *(The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke. …"*

133. The second line of argument is more limited. It is based on the long established principle set out in the speech of Lord Sumner in ***O'Rourke v Darbishire*** *(supra)* at page 613 that:

"…No one doubts that the claim for professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties. To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud. …"

134. On the face of it what must be proved is conspiracy between client and solicitor to commit a fraud in the conventional sense but the principle has been applied in a wide variety of circumstances ranging from actual fraud in the conduct of the proceedings to what Bingham LJ in ***Ventouris v Mountain*** *[1991] 1 WLR 601* described as iniquity.

135. In this particular case it is unnecessary to investigate how wide the concept of fraud is capable of stretching because on Mr Samek's presentation of the evidence he invites me to conclude that both Mr Simms and the Dadourians have given evidence which to their knowledge was false. If established, this is not therefore a marginal case. Although Mr Simms' dishonesty is accepted on all sides, the more difficult question is whether the documentary material justifies a finding of that kind against the Dadourians.

136. If fraud by a client and solicitor is established then the privilege in their communications is lost. Where the fraud alleged relates to a prior transaction which later becomes the subject of litigation, then the issue on disclosure in the action will be whether the case of fraud is sufficiently strong to require production of the contemporaneous legal advice surrounding that earlier transaction as opposed to the advice given to the client about his past conduct for purposes of defending the subsequent claim. But where (as in this case) the fraud is alleged to have taken place in relation to the litigation itself then the application of the fraud exception will destroy privilege in relation to all the relevant legal advice obtained in the action itself; a proposition which Hoffmann J described in ***Chandler v Church*** *[1987] 177 NLJ 451* as startling.

137. There are obvious dangers in allowing a party to litigation who claims that the version of events being put forward by the other side is dishonest and untrue, to invite the Court to anticipate its judgment on that issue in advance of the trial and to require production of otherwise privileged material on the basis of an interlocutory finding about the strength of the opposing party's case. But in ***Dubai Aluminium Ltd v Al Alawi*** *[1999] 1 WLR 1964* Rix J accepted that it might be appropriate to make such an order where there was a strong prima facie case of criminal or fraudulent conduct by a party in the preparation of its case. The correctness of this decision has been confirmed by the subsequent decision of the Court of Appeal in ***Kuwait Airways Corporation v Iraqi Airways Company (No 6)*** *[2005] EWCA Civ 286* which has extended the principle to a case where the criminal purpose of the client and solicitor involved the commission of perjury.

138. In that case the Judge had found that perjured and fraudulent evidence in earlier proceedings between the parties had led to the Courts resolving issues of statutory immunity in the Defendant's favour and that the operation of the fraud exception was effective to revoke legal professional privilege (including litigation privilege) in the communications between the Defendant and its legal advisers. There was therefore a finding that perjury had taken place. But in many cases the dishonesty alleged against the opposing party will be a live issue in the action. In ***R (Hallinan Blackburn Gittings & Nott) v Crown Court at Middlesex Guildhall*** *[2005] 1 WLR 766* Rose LJ (in a criminal context) said at page 771 that:

"…"Where . . . there is evidence of specific agreement to pervert the course of justice, which is freestanding and independent, in the sense that it does not require any judgment to be reached in relation to the issues to be tried, the court may well be in a position to evaluate whether what has occurred falls within or out with the protection of legal professional privilege as explained in ***R v Cox and Railton*** *14 QBD 153."…."*

139. This was relied on by counsel for Iraqi Airways as justifying a distinction between cases where there has already been a judicial determination of the issue of perjury or dishonesty, or that issue is independent of the issues to be decided in the case, and those cases in which in order to apply the fraud exception to disclosure, the Court is faced at the pre-trial stage with determining the very issue or one of the very issues in the action. Longmore LJ, after quoting from the judgment of Rix J in *Dubai Aluminium Company,* analysed the authorities as follows:

*"…**34** This is an authority directly contrary to Mr Hildyard's submission that once litigation privilege has commenced, the fraud exception no longer applies. He submitted that the case had gone too far and was wrongly decided. He pointed out that Rix J appeared to have thought he should balance the interest of maintaining legal privilege as against the need for the court to obtain the truth which was contrary to* R v Derby Magistrates Court, ex parte B *in which Lord Taylor said there was no question of balancing one interest against the other since legal professional privilege must always win; the balancing act had been "performed once and for all in the 16th century". Mr Hildyard also pointed out that Rix J derived some comfort for his extension of the previous law from the fact that the documents sought would have been disclosable in the hands of the defendant in any event. I do not think that either of these considerations shows that Rix J was wrong. He did not purport to perform a balancing exercise; he merely observed that there were conflicting interests; he followed the principles stated in* Cox and Railton *and, in my judgment, he was correct to do so since it would be illogical to say that the fraud exception can never apply once the litigation has begun. The fact that the relevant documents were, in theory, disclosable by the defendant as well as by the claimant cannot make any difference to the principle of the matter. I would respectfully approve Rix J's decision.*

***35** In fact Rix J was not ploughing quite such a novel furrow as counsel before him suggested. In* Chandler v Church *(1987) 177 NLJ 451 a similar proposition, about the fraud exception applying to fraud in litigation which had been begun, had been put to Hoffmann J. He initially found the proposition a startling one but, in due course, he accepted, as Jacob J put it in (the antecedent transaction case)* Omar's Trustees v Omar *(2000) BCC 434,*

"that in principle the existence or absence of privilege is not affected by whether the fraud concerns an earlier transaction or the conduct of the proceedings themselves".

Hoffmann J did not in fact order disclosure in the case before him because he considered that disclosure at an interlocutory stage based upon prima facie evidence of fraud in the conduct of the proceedings carried a far greater risk of injustice to the defendant, if he should turn out to have been innocent, than disclosure of advice concerning an earlier non-contentious transaction.

36 *These two cases (together with the* Hallinan *case) show that the fraud exception can in principle apply even when litigation has begun with the result that privilege will not attach to documents which further the fraud or the criminal purpose. They also show that courts will be cautious about ordering disclosure or inspection of such documents. That caution has two aspects*

(1) it may be unfair to a defendant to make such an order if all that is shown on the evidence is a prima facie case which may turn out on full investigation to be incorrect;

(2) it may be unfair in what Glidewell LJ in Snaresbrook *called the ordinary run of cases (such as cross-allegations of assault or drivers falsely saying they were driving on the correct side of the road) to order disclosure and inspection merely because communications with a party's solicitors "are untrue and would, if acted upon, lead to the commission of the crime of perjury" (per Lord Goff of Chieveley in* Francis).

37 *These two reasons for caution are, of course, somewhat interdependent. If all one has is disputed versions of events, it will be difficult to say that there is even a prima facie case of fraud. This will be particularly so, if the disputed version of events is the very same issue that is to be tried in the proceedings. If, however, the evidence of crime or fraud is free-standing and independent and particularly if its evaluation "does not require any judgment to be reached in relation to the issues to be tried" (per Rose LJ in* Hallinan*) it may be perfectly possible, even on a prima facie case basis, to decide whether the fraud exception applies.*

…

41 *If the fraud exception cannot be relied on where there has been a final decision of the court that an earlier decision of the court has been procured by fraud, perjury and a conspiracy to pervert the course of justice, it would be difficult to think of any circumstances where it could be relied on once litigation was contemplated or begun. Once it is established (as I would hold) that the fraud exception can, in law, apply in such circumstances, it would be a travesty if it did not apply in the present case. Mr Hildyard argued that even if there was no privilege in relation to documents coming into existence for the purpose of the main action, there should still be privilege for the documents coming into existence for the purpose of the Perjury I action. But I can see no justification for that distinction since the fraud and perjury continued in Perjury I in an effort to ensure that the original forgery, perjury and fraud did not come to light. …"*

140. In this case DGI has served extensive particulars of the evidence given in witness statements and at trial by Mr Simms and the Dadourians which is said to have been false in the light of the Eagle documents and the Brinton papers, and I have mentioned earlier the principal passages in their evidence which is in issue. In essence, there are two questions which I have to resolve. The first is whether Mr and Mrs Dadourian were privy to what is now accepted to have been a dishonest response orchestrated by Mr Simms to the orders for disclosure of Brinton's by-laws. The second issue is whether in the light of the Eagle documents (and in particular those seeking to raise funds for use in the litigation) Mrs Dadourian has perjured herself by maintaining that the assets of the Corporate Defendants are not held beneficially for her or her husband. Neither of these issues has been decided by Warren J in the proceedings so far and the second of the two issues is, of course, what remains to be decided in the Part 24 application.

141. Earlier in this judgment (see paras *53 – 77*) I set out the history of events leading to the disclosure of the Brinton by-laws and Mrs Dadourian's response to the position as now revealed. There are two striking pieces of evidence contained in this material which indicate that the Dadourians were aware that Brinton in its original form did include them both as beneficiaries and was not discretionary in nature. First is the set of Wildhorse resolutions which Mr and Mrs Dadourian signed on 30 December 1996 after receiving Mr Simms' letter of 26 November 1996 (see para 60 above). This states in the clearest terms that both Mr and Mrs Dadourian are both beneficially entitled to distributions of capital and income. In her most recent witness statement Mrs Dadourian says that she signed the document believing it to be her will but in her earlier witness statements she makes it clear that she was well aware what Wildhorse was and that it was she who insisted its name be changed to one that she liked better.

142. The second is the By-Statutes No 4 document signed on 29 June 2004 (see para 62). This was obviously executed to coincide with Mrs Dadourian's witness statement of the same date in which she stated that her assets are held in a discretionary trust (see para 64). Her explanation of this document which I have quoted earlier in paragraph 74 of this judgment raises more questions than it answers, but makes it difficult to accept the statement in paragraph 15 of her witness statement that she was unaware that Mr Simms was making any attempts to change the by-laws.

143. If one takes this evidence alone it does seem to me to raise a strong prima facie case that Mrs Dadourian at least was well aware that Mr Simms was attempting to alter the by-laws so as to make the trust assets judgment proof and that the statements in her witness statement that the trust had always been discretionary in nature were misleading. Although Mrs Dadourian has not been cross-examined on her recent witness statement, its contents do not in my judgment provide a convincing justification for her earlier evidence. It may be that at an oral hearing further facts will emerge to correct this impression, but on the material before me DGI has I believe satisfied the test for disclosure set by the Court of Appeal in ***Kuwait Airways Corporation (No 6).*** This conclusion is fortified by the Eagle documents in the first of Mr Samek's four categories which in the event I have held not to be covered by

legal professional privilege on account of waiver. Even if I am wrong about that, I would have ordered disclosure of these documents based on the fraud exception. As already mentioned, there is no satisfactory explanation as yet of how Mrs Dadourian's evidence can be reconciled with the letter to her of 2 August.

144. This leaves the second issue about the assets of the Corporate Defendants. Mr Samek relies on the correspondence with the banks and in particular the letter to BNP Paribas of 26 May 2005 in which Mrs Dadourian is referred to as the beneficial owner of the Paris flat and that to Dexia Private Bank of 8 September 2005 in which the Dadourians are referred to as having two other properties in London. I am not persuaded that any of this material is sufficient in itself to raise a prima facie case of fraud on the part of the Dadourians in relation to the ownership of the Corporate Defendants' assets. Although there is the reference in the letter of 26 May 2005 to Mrs Dadourian being the beneficial owner this statement is made in the context of a letter to BNP Paribas which according to Mr Simms' earlier evidence required the borrower to be the beneficial owner of the security. This is mentioned again in his undated letter to the Dadourians at page 68 in the exhibit containing the Eagle documents. The fact that Mr Simms was prepared to put Mrs Dadourian forward on this basis does not prove the accuracy of what he states and in his letter to Maitre Croisier of 16 February 2005 he refers to Azuri as the owner of the flat. In the letter to Societe Generale of 19 October 2005 (also in connection with mortgage finance) he states that the French property is registered in the name of SCI and there is no suggestion in that letter of Mrs Dadourian being the beneficial owner. The reference in the letter to Mr Brice of 28 June 2006 to Libourne being willing to assist the Dadourians by providing 14 Lennox Gardens as security for a loan whilst arming Mr Samek with useful material for cross-examination, is also not sufficient in my judgment to raise a very strong or even strong prima facie case of fraud in relation to the Corporate Defendants' assets. These are issues to be resolved in the resumed proceedings before Warren J.

145. There are two matters to be considered in the light of these findings: (i) the scope of the disclosure consequent upon the application of the fraud exception in relation to the Brinton issue; and (ii) whether I should grant any relief based on DGI's first line of argument that the Defendants' continued participation in these proceedings would be an abuse of process.

146. I have ruled against the Defendants in respect of most of the Eagle documents on grounds which do not depend on the fraud exception. This includes the documents in the Brinton category where privilege has been waived. Given, however, that I would have ordered disclosure of those documents on the basis of the fraud exception, it is necessary to consider whether the exception extends to all the Eagle documents or is limited to those which are directly relevant to the Brinton by-laws issue.

147. It seems to me that the effect of the fraud exception must as a matter of principle be to remove privilege as an objection to the disclosure of any documents which are relevant to the issues in respect of which the fraud has been committed. This will inevitably create grey areas in some cases and the Court is likely to err in favour of disclosure rather than against it in marginal cases. But in this case, the by-laws issue is relatively self-contained and can easily be separated (e.g.) from the purely factual issue of the intermediary representation ruled on by Warren J or the question still to be considered of who owns the assets of the Corporate Defendants. Had I therefore concluded that some of the Eagle documents not related to the Brinton issue remained privileged I would not have been prepared to order their disclosure based on the prima facie case of fraud which I have found to be established.

148. The argument based on the principle in *Arrow Nominees* is relied on to support a general order for the disclosure of all otherwise privileged material. In the light of my earlier findings this argument adds nothing. But there is no application for me to strike out the defences to the remaining claim to the Corporate Defendants' assets. That is an application which ought to be made (if at all) to Warren J as the trial judge. I do not intend to pre-judge any such application. The making of such an order would, it seems to me, require the Court to make substantive rather than provisional findings that the party in question had acted in such a way as to imperil the fairness of a trial. Although I am satisfied on an interlocutory basis that a sufficient case has been made for lifting privilege on account of fraud in respect of the documents relating to the Brinton issue, those findings represent my assessment of the evidence put before the Court on these applications. As yet, Mrs Dadourian has not responded to the Eagle documents which DGI seeks to deploy. It will be for Warren J to decide whether any additional evidence filed by the Defendants creates a different picture and whether any misrepresentations to which Mr and Mrs Dadourian were knowing parties should disable them from participating further in the action.

149. That said, I need to mention one other aspect of the disclosure that Azuri through Ms Eagle has misled the Court about the position in relation to the Brinton by-laws. During the hearing I put it to Ms Levy and she accepted that once a party has conceded that someone on its behalf has put in evidence material which is admitted to be untrue then it is incumbent on that party to set the record straight at the earliest opportunity. Its willingness to do this and the quality of its subsequent disclosure is likely to be highly material to the exercise of the Court's discretion on any subsequent application to strike out and its absence may well justify an order of the kind contemplated by the Court of Appeal in *Arrow Nominees*. Despite the promises of action by Miss Levy, no such corrective evidence has been filed although it is said to be under preparation. Given the time which has already elapsed since the matter was raised, I am bound to say that I regard this position as completely unacceptable.

Relief

150. It follows from this that I will vary McKinnon J's order of 7 June 2007 so as to permit DGI to adduce in evidence the Eagle documents exhibited by Mr Serota to his witness statement. I should mention for completeness that Mr

Cakebread and Miss Levy, as part of their submissions, contended that much of the Eagle material (even if not privileged) was in fact irrelevant to the issues in the Part 24 proceedings. There are undoubtedly a number of Eagle documents which fall into that category but as I see it, relevance is not an issue for me on these applications. DGI has the documents and wishes to use them. Absent privilege they should be entitled to do so. Questions of relevance are for Warren J or the judge before whom the documents are deployed.

The other applications

151. There are three other applications by DGI before the Court:
    i) An application dated 14 December 2007 for specific disclosure of documents relating to the Brinton by-laws;
    ii) An application dated 21 December 2007 for further information about the source of legal funding of the Corporate Defendants; and
    iii) An application dated 23 April 2008 for letters of authority to obtain disclosure of details of the bank account of Cooke Investments Limited and a life management agreement made between Mrs Dadourian and Republic.

152. I was told at the hearing that the first and third applications had been resolved by the disclosure of the relevant documents and the production of the necessary letters of authority. It now appears that there has been continued delay in relation to the letters of authority and that they are not yet all in place. If this remains the position when this judgment is handed down I will make an order in the terms sought.

153. This leaves the application regarding the funding of the Corporate Defendants. The application seeks an order requiring Azuri, Libourne and Ardales to identify the source of their funding in these proceedings including details of the amounts paid and the bank accounts from which and into which the monies were transferred. It is supported by a witness statement of Mr Bamford dated 21 December 2007. This refers to the freezing orders made by Lewison J on 13 February 2004 and by David Richards J on 13 September 2005. In paragraph 30 Mr Bamford says that disclosure of the source of funding is relevant to the Part 24 application because if it transpires that Mr and Mrs Dadourian (or someone else associated with them) has been funding the Corporate Defendants this would support DGI's case that the Dadourians own the assets of these Defendants.

154. In his skeleton argument Mr Samek puts the matter more broadly. He says that the source of funding is relevant not only to the issue about the ownership of the Corporate Defendants' assets, but also to whether there have been breaches of the freezing orders against the Corporate Defendants.

155. The application is opposed on both grounds.

156. Paragraph 9(1) of the freezing order granted on 22 September 2005 against Brinton, Libourne and Ardales contains the first of various exceptions to the order restraining the Corporate Defendants from disposing of, dealing with or diminishing the value of their assets. It provides that:

> "*(1) This Order does not prohibit each Respondent from spending up to the sum of £20,000 or such greater sum as is reasonable on legal advice and representation. But before spending any money the Respondent must tell the Applicant's legal representatives where the money is to come from.* …"

157. DGI says that the meaning of paragraph 9(1) is clear. Before spending any money at all on legal costs the Corporate Defendants must disclose the source of the money. This applies regardless of whose money it is or where it comes from.

158. The exceptions contained in paragraph 9 of the order are by definition derogations from the freezing order itself contained in paragraphs 4 and 5. If the freezing order has no application to the assets in question, then there is no room in my judgment for the operation of paragraph 9. Miss Levy therefore submits that in order for paragraph 9 (1) to apply (including the requirement to notify DGI of the source of the funds) the monies used must come within the definition of assets for the purposes of paragraphs 4 and 5. Paragraph 5 of the order defines assets as:

> " ***a***. *all the Respondent's assets whether or not they are in its own name and whether they are solely or jointly owned;*
> b. *any asset which it has the power, directly or indirectly, to dispose of or deal with as if it were his own, and the Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its direct or indirect instructions;*
> c. *any asset in the name of the Respondent and whether held for its own benefit or for the benefit of others;*
> …… "

159. There is, she says, no evidence that the Corporate Defendants have been funded out of monies or other assets within this definition and the obligation to make disclosure under paragraph 9 (1) does not therefore arise.

160. The order against Azuri is in a different form. As originally granted by David Richards J on 22 March 2005 it restrains Azuri only from disposing of or dealing with its shares in SCI or from procuring SCI to dispose of or deal with the Paris flat. It does not apply to Azuri's assets generally and there is therefore no provision equivalent to paragraph 9 (1) of the order against the other Corporate Defendants. The order of 22 March 2005 was continued by Mr Bartley-Jones QC on 13 July 2005 in the same form.

161. It seems to me that in the absence of evidence indicating that the Defendants have used assets covered by the freezing orders to fund their own costs there is no basis for making the order sought. I do not accept that paragraph 9 (1) of the order of 22 September 2005 has a general application divorced from the context of the order as a whole and in the case of Azuri the order does not even contain a provision equivalent to paragraph 9 (1).

162. Mr Samek submits that the Court has a general jurisdiction to police its own orders but this does not justify applications for disclosure absent some proper evidential basis for the allegation that the orders have been breached. It is also relevant to point out that in Mr Bamford's witness statement in support of the application alleged breaches of the freezing orders are not relied upon to justify the orders sought.

163. The alternative ground for the application is that if the source of funding turns out to be Mr and Mrs Dadourian this may assist DGI in its claim that the assets of the Corporate Defendants are held for them beneficially. I am unconvinced about this. It seems to me that Mr and Mrs Dadourian could have as much interest in protecting a claim against the Corporate Defendants even if they have no direct interest in their assets but only an interest in the trust. Any such funding would be inconclusive in relation to the ownership of the assets. I am not prepared on these grounds to order disclosure of the funding arrangements. That application will therefore be dismissed.

Conclusion

164. I am grateful to counsel for their submissions. For the reasons contained in this judgment I will grant the relief sought by DGI in respect of the Eagle documents and dismiss the applications of the Defendants for injunctions restraining their use. The application for disclosure of the source of the Corporate Defendants' funding will be dismissed. Unless already provided, the letters of authority sought in DGI's application in respect of Cooke Investments and the management agreement will be made. In the absence of agreement I will invite further submissions from counsel about the terms of the order.

Mr Charles Samek (instructed by Withers LLP) for the Claimants
Mr Stuart Cakebread (instructed by David Wyld & Co.) for the 3rd & 4th Defendants
Miss Juliette Levy (instructed by Robert Cook & Co.) for the Corporate Defendants