Neutral Citation Number: **[2026] EWHC 3133 (BP)**

Case No: BL-2023-000899

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
BUSINESS LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27th November 2026

Before:

MR JUSTICE ADAM JOHNSON

- -

Between:

HIPGNOSIS MUSIC LIMITED

Claimant

- and -

(1) MERCK MERCURIADIS
(2) HIPGNOSIS SONGS FUND LIMITED
(3) HIPGNOSIS SONG MANAGEMENT LIMITED

Defendants

- -
- -

Edward Davies KC and **Anna Scharnetzky** (instructed by **Forsters LLP**) for the **Claimant**
Edmund Cullen KC and **Edward Granger** (instructed by **Payne Hicks Beach LLP**) for the **First Defendant**
Neil Kitchener KC, Patrick Harty and **Dominic Li** (instructed by **Herbert Smith Freehills Kramer LLP**) for the **Second and Third Defendants**

Hearing dates: 20th October 2026

- -

Approved Judgment

This judgment was handed down remotely at 2:00pm on 27th November 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE ADAM JOHNSON

MR JUSTICE ADAM JOHNSON:

1. This Judgment deals with three matters relating to costs, which arise from the Court's Judgment following the trial in these proceedings: see [2026] EWHC 1500 (Ch) ("*the Trial Judgment*"). I will adopt here the abbreviations used in the Trial Judgment.

Indemnity Costs

2. The first question is whether the successful Defendants should be entitled to their costs on the indemnity basis. Some background is necessary to understand the necessary context.

Background

3. The successful Defendants are (1) Mr Merck Mercuriadis, (2) HSFL2, a company now in private ownership, but which at the time was a closed-ended investment trust company, listed on the London Stock Exchange, and (3) HSML, a private company via which Mr Mercuriadis provided investment advisory services to HSFL2.

4. The Claimants are two companies called HML and Copyrights. (HML is the sole named Claimant, as assignee of all Copyrights' causes of action, but in the Trial Judgment it was useful to distinguish them for certain purposes: see at [6].)

5. The focus of the proceedings was a dispute about the exploitation of a business idea. The business idea was to acquire the copyright in back catalogues of songs by composers of popular music, at a time (before the development of streaming services) when they were thought to be undervalued.

6. The original plan was for HML and Copyrights (HML's subsidiary) to exploit the idea, by Copyrights raising money via a bond issue. Plans for the bond issue stalled in about April 2017, however. The background involved allegations that two of Mr Mercuriadis' original co-investors in HML, Mr Gergeo and Mr Ingmanson, were involved in a major fraud in Sweden. Instead, Mr Mercuriadis made an initial attempt to launch an IPO via a closed-ended investment trust called HSFL1 and an investment adviser called HSL, but this failed in September 2017 for technical reasons. In the same month, September 2017, both HML and Copyrights were "*de-banked*" (i.e., their bank accounts were frozen). Mr Gergeo and Mr Ingmanson were arrested in England in December 2017 and were extradited to Sweden, where they were later convicted. HML was wound-up in February 2018, and Copyrights was dissolved in May 2018. The period up to May 2018, when Mr Mercuriadis was a director of HML and/or Copyrights, was referred to in the proceedings as "*Phase 1*".

7. HSFL2 and HSML were incorporated shortly thereafter, in June 2018. This later period, after Mr Mercuriadis had ceased his directorships of HML and Copyrights, was referred to as "*Phase 2*". HSFL2 went on to launch a successful IPO, based on the music publishing catalogues idea, in July 2018. Thereafter, its business expanded and it acquired many music publishing catalogues. Mr Mercuriadis provided investment advice to the directors of HSFL2, via the medium of HSML, which earned income as a result.

8. In addition to claims for an account, the pleaded claims against the Defendants originally included claims for equitable compensation and (in the case of Mr Mercuriadis) for contractual damages.

9. The claims for equitable compensation all rested on the same premise, which was that it would have been possible for Copyrights and HML in the Spring of 2017 to have implemented essentially the same business model implemented via HSFL2 and HSML a little over a year later, in the Summer of 2018. That is to say, the claims depended on saying that if Mr Mercuriadis had acted in accordance with his duties, then Copyrights and HML would have earned profits in the way HSFL2 and HSML later did; and that being so, the Defendants were liable to make good the loss by paying damages – in the case of Mr Mercuriadis, to both Copyrights and HML (PoC at paras 117 and 120/121), and in the case of HSFL2, to Copyrights (PoC at para. 129).

10. Shortly before the trial, however, the claims for equitable compensation and contractual damages were abandoned in correspondence on 27 January 2026. That followed after the Claimants' own financial markets expert Mr Christie, in his report prepared for trial, expressed serious doubts as to the viability of Copyrights being able to launch its own public fundraising after the Spring of 2017, given its connections with Mr Gergeo and Mr Ingmanson. An application to amend the claim to seek to address the resultant difficulties was dismissed by the Court in a judgment of 20 January 2026 ([2026] EWHC 82 (Ch) - "*the Amendment Judgment*") which was not appealed.

11. The remaining claims by HML and Copyrights were (broadly) for an account of the profits made by the Defendants in Phase 2, following the July 2018 IPO. The claims rested on the premise that Mr Mercuriadis was in breach of his duties as a director of both HML and Copyrights, in diverting for his own benefit the music publishing catalogues idea which was originally intended to be a part of their business. In order to fix HSFL2 and HSML with liability, the Claimants alleged that Mr Mercuriadis had breached his duties dishonestly, and argued that his dishonest state of mind could be attributed in law both to HSFL2 and to HSML, thus making them liable as dishonest assistants.

12. The claims failed. Some of the key reasons can be summarised as follows:

    i) All the forms of profit in respect of which the Claimants sought an account were profits arising during Phase 2, after Mr Mercuriadis had ceased to be a director of either HML or Copyrights.

    ii) Although the law recognises that a former director can remain subject to ongoing duties in respect of a corporate opportunity of which he became aware at a time when he was a director (see now Companies Act 2006, s.170(2)(a)), the music publishing catalogues idea was *not* an opportunity in the relevant sense (i.e., it was not a "*maturing business opportunity*"), but instead was merely a general sentiment about the likely profitability of a particular asset class; and anyway, the idea had been thought of by Mr Mercuriadis before he became a director of either of HML or Copyrights. Since it was not in law a *maturing business opportunity*, Mr Mercuriadis was not subject to any continuing duties in respect of the music publishing catalogues idea during Phase 2. That conclusion was not affected by the fact that although Copyrights was dissolved in May 2018, it was later restored to the Register of Companies in October 2022:

the deeming provision in Companies Act 2006 s.1032 *("... the company is deemed to have continued in existence as if it had not been dissolved or struck off...*") did not have the effect of requiring Mr Mercuriadis to be treated as if he had been a director of Copyrights between 2018 and 2022, including during the period of the HSFL2 IPO (see Bilta (UK) Limited v. Tradition Financial Services Limited [2025] UKSC 18; [2025] 2 WLR 1015).

iii) If the music publishing catalogues idea *had* qualified as a maturing business opportunity, then Mr Mercuriadis would have been in breach of duty during both Phases 1 and 2. However, that was not the case (see above), and the position could not be salvaged by a possible alternative case put forward during trial, that Mr Mercuriadis must have been in breach of duty during Phase 1 in any event, whether or not the music publishing catalogues idea was a maturing business opportunity. That was not the pleaded case and had not been properly developed; and in any event, if the music publishing catalogues idea was *not* a maturing business opportunity, it was very difficult to see how any Phase 2 profits would owe their existence to a significant extent to breaches of duty by Mr Mercuriadis in Phase 1.

iv) The allegation of dishonesty against Mr Mercuriadis failed. The precise scope of the allegation was not entirely clear, but what it appeared to amount to was an allegation that from about April 2017 onwards, Mr Mercuriadis' basic motivation was to "*steal*" the music publishing catalogues idea from HML/Copyrights, and thus from Mr Gergeo and Mr Ingmanson, because he had only ever wanted Mr Gergeo and Mr Ingmanson for their money, and by April 2017 there had been a falling out, there was no prospect of them making further funds available, and so Mr Mercuriadis wanted to cut them out of the picture. That theory, however, ignored the obvious (and correct) alternative explanation, which was that given by Mr Mercuriadis in his evidence: that he had no intention of "*stealing*" the music publishing catalogues idea, but instead had formed the view by April 2017 that there was no real prospect of Copyrights ever pursuing a business in acquiring music publishing catalogues given its association with Mr Gergeo and/or Mr Ingmanson. That explanation was consistent with the evidence given by the Claimants' own financial markets expert, Mr Christie, and in any event was a matter of common sense. Neither would an ordinary, honest person, looking at matters objectively, think that Mr Mercuriadis had acted dishonestly, if he was doing no more than exploiting a general investment idea he had thought of for himself before becoming a director of either HML or Copyrights, in circumstances where, because of Mr Gergeo's and Mr Ingmanson's suspected involvement in a large scale fraud, neither HML nor Copyrights were able to exploit it for themselves. That would not involve "*stealing*" anything of value.

v) Even if Mr Mercuriadis had been in dishonest breach of duty, there was no basis in law for attributing his state of mind to HSFL2, which at the time was a publicly listed company with an independent board of directors. Further, there was no sufficient causal connection between the profits made by HSFL2 and any alleged wrongdoing by Mr Mercuriadis, and it would in any event be disproportionate and inequitable to require HSFL2 to account for all the profits it had made, when Copyrights could never have made such profits itself.

vi) Had Mr Mercuriadis been in dishonest breach of duty, then I would have been prepared to attribute his knowledge to his own vehicle, HSML, and would in principle have been willing to order an account; but the point was doubly academic, because the parties' experts agreed HSML had not made any profits as at the relevant valuation date.

The approach to awarding indemnity costs

13. The discretion to award indemnity costs is a wide one, to be exercised taking account of all the circumstances of the case, including the conduct of the paying party. It has been said that in order to obtain an order for indemnity costs, the receiving party must be able to demonstrate "*some conduct or some circumstance which takes the case out of the norm*" (see Lord Woolf CJ in Excelsior Commercial and Industrial Holdings Ltd v. Salisbury Hamer Aspden and Johnson [2002] CP Rep 67 at [32]). As to what may be "*out of the norm*", it seems to me necessary to acknowledge that litigation is an adversarial activity. So I understand "*out of the norm*" to mean some conduct or circumstance which goes beyond the forms of behaviour one might reasonably expect to see in a process which is inherently adversarial, which is necessarily founded on disagreement, and which is therefore likely to give rise to a certain amount of hostility. This is a high hurdle. Specifically, it has been said that where the application is based on the paying party's conduct, it is necessary to show that such conduct was "*unreasonable to a high degree*": see Kiam v. MGN (No. 2) [2001] 1 WLR 2810, cited with approval by the Court of Appeal in Thakkar v. Mican [2024] 1 WLR 4196, at [19(c)].

The decision in this case

14. My assessment is that a number of features of the present case, looked at together, take it outside the norm and thus justify an order for indemnity costs. They have a common theme: the changing nature of the Claimants' case in the period immediately before and during trial. This gave the presentation of the case a somewhat improvisational quality. That is unusual, and certainly undesirable, in large-scale commercial litigation.

The claims for equitable compensation

15. A central problem for the Claimants was that presented by the report of their financial markets expert, Mr Christie, served shortly before trial, in late October 2025. The question he was addressing was whether it would have been feasible for Copyrights or for another vehicle established by HML to have undertaken a fundraising in the period between April 2017 and July 2018, for the purpose of the intended music catalogues business. This analysis was critical to the Claimants' claims for compensation. In short, Mr Christie's answer to the question asked of him was no: such a fundraising would not have been possible, at least not without appropriate (but unspecified) mitigations in place, given the taint arising from HML's association with Mr Gergeo and Mr Ingmanson.

16. What is relevant for present purposes is that this problem could easily have been foreseen. Indeed it was foreseen by Mr Mercuriadis' solicitors, in pre-action correspondence on 17 December 2021, in which they said that by March 2017 at the latest, both HML and Copyrights were "*doomed*", because *"... there was no prospect of raising money from the bond market (or elsewhere) on the basis of Mr Gergeo's and*

Mr Serwin's criminal wrongdoing" (Max Serwin is a known pseudonym of Mr Ingmanson). The response from the Claimants' solicitors of 4 March 2022 took issue with this basic proposition ("… *it is manifestly inaccurate to suggest … that the business opportunity … was 'doomed'* …"), but did not engage with how HML's association with Mr Gergeo and Mr Ingmanson might actually be managed and mitigated, which was the point Mr Christie was to emphasise some three and a half years later.

17. When the Claimants finally sought to engage with this issue, by way of the draft amendment advanced at the PTR on 16 January 2026, it was only in the most general terms. The amendment proposed only that "… *an arrangement could and would have been reached … under which Mr Gergeo obtained a legally enforceable entitlement to receive a share of the economic benefits to be derived from Copyrights' intended business* …" (Amendment Judgment at [17]). That was unsatisfactory because it was really only an assertion that "*something could have been done which would have addressed the problem*", but without specifying what (Amendment Judgment at [30]). Looked at on its own terms, the proposed amendment was insufficiently particularised and had no real prospect of success (Amendment Judgment at [40]), and the amendment application was therefore refused.

18. The result of this chain of events was a significant shift in the scope of the Claimants' case in the period immediately before the trial: as I have said, the claims for equitable compensation were abandoned. So were the claims for damages for breach of contract. Viewed from one perspective, this was positive, because it involved the Claimants acting responsibly in narrowing the issues in play. What the narrative above illustrates, however, is that the point could and should have been gripped much earlier. In my judgment in the amendment application, I made the point that the concern identified by Mr Christie, as to the special sensitivity presented by a background of fraud in the context of a public offering of securities, was an obvious one which should not have come as a surprise to anyone (Amendment Judgment at [34]). In the Trial Judgment at [185], I said something similar: "*In any event, it is a matter of common sense that a public fundraising with allegations of a serious fraud in the background would present a serious practical challenge …*".

19. It is this which in my view takes the present matter outside the norm. It is not unusual, in complex, large-scale litigation, for changes to the scope of the case to occur as it develops, sometimes even during the trial. What is unusual here, however, is that the problem which caused the Claimants' late shift in position was an obvious one, which was flagged in the parties' pre-action correspondence some years earlier.

20. In argument Mr Kitchener KC made the point, by analogy with the practice in professional negligence cases (see Pantelli Associates Limited v. Corporate City Developments Number Two Ltd [2010] EWHC 3189 (TCC)), that the claims for equitable compensation should not have been advanced without obtaining expert evidence in advance. I do not say there was anything improper in the way the case was pleaded; but I do say that where a claimant pleads a positive case which begs an obvious question, they take a risk on the costs consequences of doing so, and if in the end the case has to be abandoned on grounds that were predictable from the outset, then an order for indemnity costs is likely to follow.

The Dishonesty Allegation

21. A related feature of the case is the allegation of dishonesty made against Mr Mercuriadis, which was dismissed in the Trial Judgment.

22. One aspect of this was that the pleaded allegations of dishonesty were difficult to pin down.

23. They perhaps find their clearest expression in the sections of the PoC which deal with the liability of HSFL2 and HSML as dishonest assistants (see PoC paras 125 and 134). The gist of the allegation in each case was that Mr Mercuriadis acted dishonestly in procuring for HSFL2 and HSML the benefits of the music publishing catalogues idea which should have been exploited via Copyrights.

24. Even this, however, was somewhat vague as to why Mr Mercuriadis' subjective state of mind was said to have been dishonest, and the Second and Third Defendants pressed for additional information by means of an RFI. Mr Mercuriadis was not satisfied with the response and so in his Re-Amended Defence at para. 183, he said the following:

> "*The allegation in Paragraph 125 that Mr Mercuriadis behaved dishonestly is insufficiently particularised and denied in any event. In its RFI Response, the Claimant states that Mr Mercuriadis' alleged dishonesty 'includes' the allegation that Mr Mercuriadis 'caused Copyrights to be dissolved in breach of his duties as a director of Copyrights …'. However, the Claimant does not allege – despite a request from the Second and Third Defendants for further information in this regard – that Mr Mercuriadis, at the time of the alleged breaches (which are denied as set out above), believed that Copyrights was capable of exploiting Copyrights' intended business. Mr Mercuriadis had no such belief; and reserves his right to plead further upon provision of any proper particulars as to the alleged dishonesty*."

25. As I read it, the point being made here was that the Claimants were not themselves advancing a sufficiently clear positive case as to why *they* alleged Mr Mercuriadis must have had a dishonest state of mind, and at what point. Mr Mercuradis put forward his Defence on the basis of what he thought they must be saying – i.e. that he had a dishonest state of mind because he subjectively believed that Copyrights was still a viable business, but wilfully chose to ignore Copyrights' interests in favour of his own.

26. The result was unsatisfactory. It should not be for a defendant to an allegation of dishonesty to have to work out what he thinks the substance of the allegation involves. It should be for the person making the allegation to spell it out with precision.

27. The somewhat open-textured nature of the Claimants' case meant that the cross-examination of Mr Mercuriadis at trial covered a wide canvas, and the matters eventually relied on by the Claimants in closing their case on dishonesty were very broad. In their Written Closing Submissions, the Claimants said at para. 102: "*For the purposes of ascertaining whether Mr Mercuriadis was dishonest, it is submitted that*

all the circumstances in which the music catalogues opportunity came to be launched by HSFL2 and HSML are potentially relevant."

28. For all that, as counsel for Mr Mercuriadis pointed out (Written Closing at paras 167 and 263), there was no specific challenge to Mr Mercuriadis' evidence that by April 2017, he had come to the view that there were no prospects of Copyrights pursuing a business of its own. Instead, the Claimants' case relied on the Court being willing to impute a dishonest motive to Mr Mercuriadis based on a wide-ranging review of his behaviour over a period of about two years.

29. Granted, as acknowledged in the Trial Judgment at [182], a number of the matters relied on vis-à-vis Mr Mercuriadis were matters of serious concern. All the same, questionable behaviour by a defendant in one respect does not necessarily connote dishonesty in the respects relevant to the claim; and here, ultimately, my view was that Mr Mercuriadis was correct in his Defence to infer that what the Claimants must be saying was that his dishonesty sprang from a belief that Copyrights still had a viable business which he chose to appropriate for himself.

30. That case, however, was subject to the same basic vulnerability as the claims for equitable compensation, because Copyrights did not have a viable business. The vulnerability crystallised when Mr Christie served his evidence on financial markets practice shortly before the trial and agreed that the taint arising from Mr Gergeo and Mr Ingmanson presented a serious problem for any public fundraising involving HML and/or Copyrights. That reinforced Mr Mercuriadis' account because it provided a basis for explaining his actions which was consistent with an innocent, rather than a dishonest, state of mind. Other evidence pointed in the same direction, including that of Mr Gergeo himself, who based on his witness statement appeared to have been entirely resigned – in periods after about April 2017 – to the idea of Mr Mercuriadis pursuing the music catalogues idea via an alternative structure, provided he (Mr Gergeo) was paid back the seed capital he had originally invested (see the Trial Judgment at [188]-[192]). That suggested that he too had given up on Copyrights.

31. Two additional factors deserve mention. They both concern the fact that the dishonesty allegations against Mr Mercuriadis were the vehicle via which the Claimants sought to impose accessory liability on HSFL2 and HSML as dishonest assistants.

32. As regards HSFL2, Mr Davies KC said it was relevant that the dishonesty allegations were only ever personal to Mr Mercuriadis, and did not as such extend to HSFL2 or to its own directors. That is true technically speaking, but it seems to me a point of only limited weight. Although of course legally distinct from Mr Mercuriadis, HSFL2 is bound to have been affected by allegations of dishonesty made against someone so closely associated with its foundation and public image; and its directors would have been conscious at all times of the potential for the claim to have an impact on their personal reputations – indeed the PoC at para. 128 rather ominously reserved the Claimants' right "*to plead further … as to the state of mind and knowledge of the appointed directors of HSFL2*".

33. As regards HSML, in fact by the time of the trial, the agreed position was that it had made no profits as at the agreed valuation date in July 2024 (Trial Judgment at [363]). The claim for an account was persisted in anyway, and the Claimants at trial sought to argue for a different valuation date in October 2021. Although I admire Mr Davies

KC's creative advocacy, I agree with Mr Kitchener KC's point that this was really just another attempt to improvise a solution to an insurmountable problem, when the better course would have been to accept that the case against HSML had no value.

34. In summary, it seems to me that the Claimants' case on dishonesty (1) lacked precision, but also (2) on analysis had essentially the same in-built weakness as the claims for equitable compensation. To compound the problem, it was not abandoned at the same time as those claims but instead persisted in. Again, I do not say the case was improperly advanced; but I do say that since the basic weakness in it was an obvious one which could not be salvaged by the wide-ranging challenge to Mr Mercuriadis' character undertaken during cross-examination, it is right to mark its eventual dismissal with an award of indemnity costs.

The case on breach of duty

35. There is little doubt that the pleaded case on breach of duty by Mr Mercuriadis rested on the premise that the music publishing catalogues idea was a "*maturing business opportunity"* in the technical, legal sense. This was one of the key legal theories underpinning the idea that the Defendants could be liable to account for profits made in Phase 2, because if there was a maturing business opportunity then Mr Mercuriadis would be under an ongoing duty not to exploit it for his own benefit. CA 2006 s.170(2)(a) provides that a person who ceases to be a director nonetheless continues to be subject to the no conflict duty under CA s.175 as regards the exploitation of any opportunity of which he became aware at a time when he was a director.

36. At the trial, however, the Claimants sought to advance a different case as a possible alternative (Trial Judgment at [226]-[234]). This was the idea that there must have been breaches of duty by Mr Mercuriadis in Phase 1, whether or not the music publishing catalogues idea was a maturing business opportunity; and that those stand-alone breaches of duty during Phase 1 were capable of providing a basis for requiring the Defendants to account for all the profits they made during Phase 2, even if the business idea they were then exploiting was *not* a maturing business opportunity.

37. This was a new point, which emerged for the first time in the Claimants' Trial Skeleton and oral opening. It took Mr Mercuriadis' counsel team by surprise and was not addressed at all in their Trial Skeleton, I think understandably so.

38. The point had not been prefigured in any prior correspondence – certainly, the pre-action correspondence was anchored firmly in the idea that the music publishing catalogues idea was a maturing business opportunity in the technical sense. There was some debate at the present hearing as to whether it was in any way referenced in the pleadings, but on a fair reading of the Claimants' PoC, it seems to me it was not.

39. The focal point of the pleaded case for breaches of duty by Mr Mercuriadis was PoC para. 48, which asserts that the music catalogues business for which the Copyrights bond issue was designed was "*a maturing business opportunity owned by and/or enuring to the benefit of Copyrights*". Para. 48 sets out at length the factors underpinning this conclusion, and the resultant "*maturing business opportunity*" is then defined as "*Copyrights' intended business*". The phrase "*Copyrights' intended business*" is thus a term of art within the pleading for what the Claimants asserted was

a maturing business opportunity. It is used as the platform for the many alleged breaches of duty which follow.

40. This is reflected in the basic structure of the pleading:

i) *As regards Phase 1*: Paras. 63 and 64 assert breaches by Mr Mercuriadis of the s.175 CA duty, by *inter alia* procuring the incorporations of HSFL1 and HSL "*in circumstances where Copyrights' intended business comprised a maturing business opportunity*".

ii) Para. 66 then relies on essentially the same matters (i.e. Mr Mercuriadis "… *taking steps over a period of months for the purpose of diverting Copyrights' intended business*") as giving rise to breaches of the s.172 CA duty.

iii) The same phraseology (wrongful conduct in "*diverting Copyrights' intended business*") then underpins later, discrete allegations made in respect of Mr Mercuriadis (i) serving a bond withdrawal notice, finally terminating Copyrights' efforts to launch a bond issue, in November 2017 (para. 78); (ii) petitioning for the winding-up of HML (para. 82.1); (iii) filing a deficient s.235 Statement (para. 86.3); and (iv) allowing Copyrights to be dissolved (para. 90).

iv) As regards Phase 2: At para. 101, the incorporations of HSFL2 and HSML are described as part of the process Mr Mercuriadis was engaged in of "*diverting Copyrights' intended business away from Copyrights*".

v) Paras 105 and 106 plead breaches by Mr Mercuriadis of his ongoing s.175 duty in procuring such incorporations, in circumstances where "*Copyrights' intended business comprised a maturing business opportunity*".

vi) Para. 114 pleads a breach of the s.175 duty by Mr Mercuriadis launching the HSFL2 IPO, as the means by which he effected "*the diversion of Copyrights' intended business*"; and at para. 115, the claim for an account against Mr Mercuriadis is linked to profits made by him "*as a result of the diversion and exploitation of Copyrights' intended business*".

vii) The claims against HSFL2 at paras 124/125 are likewise based on its having assisted in "*the wrongful diversion and exploitation of Copyrights' intended business*"; and at para. 133 the claims against HSML are premised on it "*fulfilling the function that HML had … been intended to provide for the progress of Copyrights' intended business*".

41. The late shift in the Claimants' position away from the pleaded case presented some challenges during the trial. Principal among them was a lack of definition as to the case actually being advanced. At times, this seemed to be anchored in the idea that there was a maturing business opportunity – for example, in his oral closing submissions (Day 15, p.70), Mr Davies KC said, "*Our pleading is put in the traditional language of maturing business opportunity*". At other points, however, the case was put differently. As noted in the Trial Judgment at [226], for example, Mr Davies KC at one point said, relying on certain comments of Lord Briggs in the Recovery Partners case (Recovery Partners GP Ltd and anor v. Rukhadze and ors [2025] UKSC 10, [2025] 2 WLR 529):

" *... none of that requires us to grapple with whether the opportunity was a maturing business opportunity*."

42. In my opinion this somewhat equivocal approach was unsatisfactory and unfair. The two permutations are quite different, and until the start of the trial, the Defendants' case preparation had focused on the idea that there had been a maturing business opportunity, so that what really mattered to the claims for an account of profits were the allegations of breach during Phase 2.

43. Some of the potential differences are described in the Trial Judgment at [226]-[234]. A major point is about causation. The law is clear since the Recovery Partners case, that when it comes to an account of profits from a fiduciary, the question is " … *did the profit owe its existence to a significant extent to the application by the fiduciary of property, information or some other advantage which he enjoyed as a result of his fiduciary position, or from some activity undertaken while he remained a fiduciary which the conflict duty required him to avoid altogether*" (per Lord Briggs JSC at [36], my emphasis added).

44. Here, while one can easily see how this test would be met as regards any Phase 2 profits made through exploitation of a maturing business opportunity owned by Copyrights, it is very far from clear that the same result would follow if there was no maturing business opportunity, even assuming breaches of duty in Phase 1. On that theory, as the Trial Judgment points out at [234], the Phase 2 profits likely would not owe their existence to a significant extent to any breaches of duty in Phase 1, but instead to the exploitation in Phase 2 of a business idea which (*ex hypothesi*) Mr Mercuriadis was free to exploit for his own benefit and on his own terms.

45. I make this specific point to illustrate a broader one, which is about the proper presentation and management of cases involving alleged breaches of directors' duties. Very often in such cases, the same basic course of conduct by the director can be analysed in different ways, potentially giving rise to breaches of a number of different duties. Although the duties may overlap (the duty under s.172, for example, may be engaged by the same pattern of conduct which engages the duty under s.175), it should not be forgotten that the elements of liability are different, and moreover that the available remedies may differ according to what precisely is being alleged. The possibility of different permutations is thus a challenging feature of such cases. It is all the more important, therefore, for the Defendant director, and the Court, to be clear precisely which permutations of liability are being advanced. That is why the pleadings are so critical. Where the factual background has been used in the pleadings in a particular way, as the basis for one theory of liability, it should not then be regarded as a platform from which other possible permutations can be freely developed. It seems to me that is what happened here, very late in the day. Although again I admire the ingenuity of the Claimants' counsel, in seeking to manoeuvre their clients into what they no doubt considered might be a more favourable position, in my opinion the result was an unsatisfactory one. It was unfair for the Defendants to have to address at short notice a major variation on the case they had been fighting for the previous four years, and unfair to the Court to have to try to untangle the strands of two overlapping but different theories of liability, one of which had been fully explored during the proceedings but the other of which had not.

46. For these reasons too, it appears to me that the present case falls outside the norm, and that an order for indemnity costs is therefore warranted.

Conclusion on indemnity costs

47. Mr Davies KC said in his submissions that the case was not an unusual one: a claim based on diversion of a corporate opportunity to a new vehicle is not exotic but instead quite routine. Moreover, he said that the Claimants had behaved reasonably in many respects – for example, in agreeing substantial payments on account of costs after the trial (see further below).

48. The first of these points may be true at a level of generality, but the specifics I have analysed above do, I think, take the case out of the norm. As to the second, I agree that the payments on account are evidence of reasonableness, but the assessment I have to make is an overall, qualitative one. In my opinion, the instances of unreasonableness I have discussed are sufficient, even when other points are weighed in the balance, to take the case as a whole outside the norm, and thus to justify an award of costs on the indemnity basis.

Pre-Judgment Interest on Costs

49. The point here is a short one, and arises only between HML (the named Claimant and the paying party) and Mr Mercuriadis. HML accepts that in principle, Mr Mercuriadis should be entitled to recover interest on sums expended by him in relation to his ongoing costs of the litigation, but there is a dispute as to the applicable rate. HML has conceded it will pay a rate of 1% above the Bank of England base rate from time-to-time; Mr Mercuriadis claims 2% above base.

50. In his submissions for HML, Mr Davies KC made the point that Mr Mercuriadis had not identified any particular circumstances or provided any evidence to rebut the application of what he called the normal 1% rate applied in commercial cases.

51. In my view however a rate of 2% above base rate is justified.

52. In Secretary of State for the Department of Energy & anor v. Jones & ors [2014] EWCA Civ. 363 at [18], Sharp LJ pointed out that historically at least, first class borrowers have generally recovered interest at base plus 1%. She went on though to say that SMEs and private individuals have tended to recover interest at a higher rate to reflect the real cost of borrowing to that class of litigant. I therefore do not think there is any presumption that a rate of 1% above base should apply to a litigant such as Mr Mercuriadis, who is a private individual.

53. Mr Davies argued that very little is known about Mr Mercuriadis' particular position, and his status as a borrower. As to that, however, the authorities are clear that the proper approach is a broad brush one, which does not depend on evidence as to the position of the particular litigant in question; it depends only on an assessment of the likely cost of borrowing to someone of the same general type and having the same characteristics: see for example Hoffman v. Finalto Group Limited [2026] 1702 EWHC (Comm), and the cases cited by Butcher J (as he then was) at para. [8]. The reason is one of proportionality: see again at [8].

54. Adopting that approach here, I consider it fair to treat Mr Mercuriadis as having the general characteristics of a private individual, and to categorise him as such for the purpose of assessing his likely cost of borrowing.

55. As to the precise figure to apply, I note that in the Hoffman case, Butcher J allowed Mr Hoffman a rate of 4% above base, even though he was a wealthy individual (see at [12]). Butcher J took into account data from the Bank of England showing that on average, between November 2022 and April 2026, private individuals were paying 4.15% above base rate.

56. That period overlaps materially with the periods covered by the present litigation. In the circumstances, it seems to me that a figure of 2% above base is modest, even if one treats Mr Mercuriadis as a wealthy individual with a good borrowing profile. I therefore propose to award pre-judgment interest on costs at that rate.

Judgment Act Interest

57. The issue here affects all Defendants. It concerns the period of time over which they will be entitled to recover interest under the Judgments Act 1838 on the orders for costs made in their favour. That is important because the rate is higher than that applicable to prior periods pre-judgment.

58. A particular issue arises in relation to costs because CPR, rule 40.8(1) provides that interest under the 1838 Act runs from the date that judgment is given unless the Court orders otherwise, and it has been held that in the case of costs the date judgment is given is the date that the order for costs is made: see Involnert Management Inc v. Aprilgrange Ltd & Ors [2015] 2 CLC 405; [2015] EWHC 2834 (Comm). That can be a problem, because at the date a costs order is made, the paying party may not know precisely how much is being claimed by the receiving party or how it is calculated. Even if the Court orders an interim payment on account, that may be on the basis of relatively limited information, and the paying party may not be able to make a fully informed assessment of how much should be paid to clear what it regards as the properly recoverable balance.

59. In the case of costs awards, therefore, it will often be appropriate for the Court to "*order otherwise*" and fix a date later than the date of the costs order from which Judgment Act interest begins to run. In the Involnert decision, Leggatt J (as he then was), taking the approach that the "*essential question is … what the justice of the case requires*", said that a reasonable objective benchmark was three months after the date of the costs order, corresponding to the period within which the receiving party must serve on the paying party a detailed bill of costs for the purposes of detailed assessment. By then, the paying party could be expected to have the information available to make an informed assessment as to how much to pay.

60. In the present case, certain complicating factors arise. The Trial Judgment was handed down on 23 June 2026, but consequential matters were adjourned to a date to be fixed. A hearing was scheduled for 17 July 2026. Prior to that, the Defendants provided detailed spreadsheets to the Claimants, setting out their costs. Shortly before 17 July, however, the Claimants' Leading Counsel was involved in a serious accident. The 17 July hearing was adjourned by agreement with a view to it being relisted. An Order was made on 15 July 2026 adjourning the hearing. It nonetheless provided for HML to pay the Defendants' costs of the proceedings " *… on a basis to be determined at the*

Relisted Consequentials Hearing". Meanwhile, HML agreed to make substantial payments on account: roughly £3.2m to Mr Mercuriadis, roughly £2m to HSFL2, and roughly £1.8m to HSML. The adjourned hearing was later fixed for 20 October 2026.

61. From what date, then, should Judgment Act interest begin to run? The Defendants – the receiving parties – say from 15 July, because by then HML had their detailed schedules and could take an informed view on what more to pay, beyond the amounts covered by the interim payments. Alternatively, the Defendants say three months from 15 July (following Leggatt J's logic), meaning 15 October (or perhaps 20 October, the day of the current hearing). HML, the paying party, says it should have three months from 20 October, expiring on 20 January 2027.

62. In my opinion, the correct date to take is 14 days after the handing down of the present Judgment. HML has had detailed costs information available since July. It does not need to wait for anything further to be provided by way of the form of bill used for detailed assessment. At the same time, the logic of Leggatt J's reasoning was that interest at the enhanced Judgment Act rate should not run until a point in time at which the paying party is in a position to make an informed assessment as to the true level of its liability. In this case, I think Mr Davies KC was correct to say that has not been possible until now, because the 15 July Order expressly left open the question of the basis on which costs are to be recoverable. (That was not a factor in the Involnert case, because costs had been ordered on the standard basis (see para. [1]).) The remaining variable having now been addressed, HML should be able to make an informed decision as to how much more to pay, and 14 days appears to be a reasonable period, given how long it has had access to the costs information the Defendants rely on.

Overall conclusion and disposition

63. The overall position is therefore as follows:

    i) The Defendants are awarded their costs of the proceedings on the indemnity basis.

    ii) The costs expended by Mr Mercuriadis will bear pre-judgment interest at the rate of 2% over the Bank of England base rate from time to time.

    iii) Judgment Act interest on costs will run from a date 14 days after the handing down of the present Judgment.