IN THE HIGH COURT OF JUSTICE **Claim no CL-2018-000824**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

B E T W E E N :

(1) MAROIL TRADING, INC
(2) SEA PIONEER SHIPPING CORPORATION

Claimants

- and –

(1) CALLY SHIPHOLDINGS INC.
(2) VITAL SHIPPING CORPORATION
(3) DAINFORD NAVIGATION INC.
(4) TAMARA SHIPHOLDINGS S.A.
(5) TUSCANY MARITIME S.A.
(6) NOVOSHIP (UK) LIMITED

Defendants

- and -

(1) BURFORD CAPITAL (UK) LIMITED
(2) DANIEL JAMES HALL

First and Second Named Third Parties

AMENDED DEFENCE AND PARTICULARS OF ADDITIONAL CLAIM AGAINST THIRD PARTY

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1. This is the Defence of the First to Sixth Defendants ("the Defendants") to the Claimants' Claim, and the Defendants' Particulars of Additional Claim against the First and Second Named Third Parties, Burford Capital (UK) Limited ("Burford") and Daniel James Hall ("Mr Hall"). By their Additional Claim against Burford and Mr Hall, the Defendants seek, inter alia, an indemnity for any loss or damages for which they are found liable to the Claimants and an account of profits made by Burford and Mr Hall.

2. In this Defence and Particulars of Additional Claim, unless otherwise stated, references to paragraph numbers are to paragraphs in the Claimants' Particulars of Claim, and the headings and abbreviations used therein are adopted (without any admissions as to their accuracy).

3. The Claimants allege that the Defendants are in breach of the Settlement Agreement dated 26 September 2016 as a result of an alleged wrongful disclosure of the Swiss Proceedings Documents by Mr Hall (the Defendants' former investigator) to LAIL. The Claimants allege that LAIL, and subsequently OTS, relied on the Swiss Proceedings Documents to bring claims (defined at paragraph 11 as the "Commercial Court Proceedings") against the Claimants.

4. In the Commercial Court Proceedings, LAIL and OTS made allegations of fraud against the Claimants and against Mr Ruperti and brought claims against the Claimants for breach of trust, breach of fiduciary duty and breach of contract. LAIL and OTS further obtained worldwide freezing injunctions against the Claimants to the value of US$60.8 million in LAIL's case and US$23 million in OTS's case. The Claimants settled the Commercial Court Proceedings by agreeing to pay LAIL and OTS US$30 million (of which it is understood the Claimants have paid US$8 million to date). The Claimants now seek to recover from the Defendants losses consisting of: (1) the costs of defending the Commercial Court Proceedings, (2) the amount the Claimants paid in settlement of those proceedings and an indemnity in respect of the amounts they have not paid, and (3) further losses alleged to have been suffered as a result of those proceedings including as a result of the worldwide freezing injunctions.

5. As pleaded in more detail below, the Claimants' claims are misconceived. In short (and without prejudice to the Defendants' requirement (set out below) that the Claimants prove the matters pleaded in paragraphs 11 to 23 concerning their alleged losses):

    5.1. The relevant information contained in the Swiss Proceedings Documents (that is to say the information which is alleged to have formed the primary basis of the claims in the Commercial Court Proceedings) was in the public domain at all times from 1 April 2015. In particular, the Payment Agreement itself had been in evidence in this Court in a hearing in open court on 1 April 2015 involving Mr Ruperti, Sea Pioneer (the Second Claimant herein), PMI and the Defendants and was not "Sensitive Information" within the terms of the Settlement Agreement, nor, from that time (if not before), was there any confidence or confidentiality in such documents or information.

5.2. The Claimants' claims to have suffered loss as a result of the Commercial Court Proceedings are, in any event, unsustainable for the following reasons:

5.2.1. If the Claimants were in fact liable to the JV Companies (as defined below) and/or to LAIL and OTS as the JV Companies, LAIL and OTS alleged (and the Claimants do not, in the present proceedings, allege that they were not so liable), then:

5.2.1.1. payment by the Claimants of money (either held by the Claimants on trust for the JV Companies and/or for LAIL and OTS or owed by the Claimants to the JV Companies and/or to LAIL and OTS by way of debt or compensation) to LAIL and OTS in settlement of the JV Companies', LAIL's and OTS's claims caused no loss to the Claimants and

5.2.1.2. any losses caused by the granting of freezing orders in support of the JV Companies', LAIL's and OTS's claims were not caused by any breach of the Settlement Agreement or breach of confidence on the part of the Defendants or their agents, but were caused by the Claimants' wrongful withholding of monies held on trust for or owed to the JV Companies, and/or LAIL and OTS.

5.2.2. If the Claimants were not, in fact, liable to the JV Companies, LAIL and/or OTS as the JV Companies, LAIL and OTS alleged (and, as pleaded above, the Claimants do not allege in the present proceedings that they were not liable to the JV Companies, LAIL or to OTS as alleged), then no recoverable loss was caused by any breach of the Settlement Agreement or breach of confidence on the part of the Defendants or their agents, since it was not reasonably foreseeable when the Settlement Agreement was entered into that the JV Companies, LAIL or OTS would bring unmeritorious claims or obtain (or be able to maintain) freezing orders in support of unmeritorious claims or that the Claimants would agree to pay $30 million in settlement of unmeritorious claims (instead of defeating such claims and being awarded their costs) and the Claimants' alleged losses in that regard are too remote to be recoverable. Further, in the event the Claimants' alleged losses were not too remote to be

recoverable, the Claimants failed to take reasonable steps to mitigate those losses by agreeing to pay US$30 million in respect of unmeritorious claims that would (if the Claimants were not liable to LAIL and/or OTS) have failed at trial.

5.2.3. Further, in either event, the granting of freezing orders did not cause or it was not foreseeable that the granting of freezing orders would cause the losses alleged or any loss to the Claimants in terms of lost business or previously planned business opportunities such as the Petcoke Development Agreement since, in the usual way, the freezing orders in question permitted the Claimants to trade in the ordinary course of business (and, in particular, did not prevent the Claimants from dealing with or disposing of their assets or from making charter hire payments or other timely payments in the ordinary course of business) and/or would have been varied in order to permit such trading as the Claimants reasonably wished to conduct.

The Parties

6. Paragraphs 1 and 2 are admitted.

7. The First Named Third Party, Burford, is a company incorporated and registered in England and Wales with company number 06016173. Its registered office is at 24 Cornhill, London, EC3V 3ND. The Second Named Third Party, Mr Hall, is and has been since January 2015 a senior employee of Burford with the title of "director" and co-head of Burford's global intelligence, asset tracing and enforcement business. Until its dissolution on 27 September 2016, Mr Hall was a director of Focus.

The Settlement Agreement

8. Paragraph 3 is admitted save as follows:

8.1. In the London Proceedings, the Defendants brought an action against (among others) Mr Ruperti, the Second Claimant and PMI alleging fraud, dishonesty and bribery. Mr Justice Christopher Clarke gave judgment in favour of the Defendants for approximately US$87 million including pre-judgment interest against (inter alia) Mr Ruperti, Sea Pioneer and PMI ([2012] EWHC 3586 (Comm)).

8.2. Mr Ruperti, PMI and the Second Claimant failed to pay the judgment debt. Following subsequent steps taken to enforce that judgment, a settlement was agreed on 26 September 2013 between the Defendants, Mr Ruperti, PMI and the Second Claimant (the "2013 Settlement") under which Mr Ruperti, PMI and Sea Pioneer agreed to pay US$40 million to the Defendants by instalments within an agreed period of time.

8.3. However, payments were not made as due under the 2013 Settlement and the Defendants subsequently launched enforcement actions against Mr Ruperti, Sea Pioneer and PMI, which included the Florida Proceedings, and instigated the Swiss Proceedings, which were brought by the Swiss Prosecutor.

9. In connection with their attempts to enforce Mr Justice Christopher Clarke's judgment, the Defendants, through their parent, Intrigue Shipping Inc., engaged Focus to investigate the assets of Mr Ruperti and his companies. Services were provided to the Defendants by Mr Hall who was a director of Focus and also owned 50% of its shares. On 30 December 2014, Focus and its business were acquired by Burford and, as pleaded above, Mr Hall became a senior employee of Burford. The investigative services were thereafter provided to the Defendants by Burford, acting by Mr Hall.

10. Further:

10.1. The Swiss Proceedings were criminal proceedings brought at the instigation of the Defendants by the Swiss Prosecutor against the Claimants for money laundering and criminal mismanagement. The Swiss Proceedings arose after the Claimants had failed to make payments pursuant to the 2013 Settlement, which were due by July 2014, as pleaded above.

10.2. In March 2015, Mr Ruperti, Sea Pioneer and PMI paid the instalments overdue under the 2013 Settlement including interest, amounting to US$25.5 million and applied to this Court for a declaration that upon payment of the balance due under the 2013 Settlement they would be discharged from liability to the Defendants. Further particulars relating to this application, which was heard by Mr Justice Andrew Smith on 1 April 2015 (and at which the Swiss Proceedings Documents

and/or the relevant information contained in them were made public) are set out in paragraph 12 below.

10.3. The US$25.5 million payment referred to above was made by way of a SWIFT transfer from a Swiss Bank account in the name of the First Claimant, Maroil. The Defendants thereby discovered, and the Swiss Prosecutor then obtained Swiss freezing orders over, two Swiss bank accounts in the name of Maroil. The Defendants were also provided by the Swiss Prosecutor with documents explaining the payments into those bank accounts. These documents included the Swiss Proceedings Documents.

10.4. The dispute between Mr Ruperti, the Second Claimant and PMI and the present Defendants was eventually settled by the 26 September 2016 Settlement Agreement referred to by the Claimants at paragraph 5.

11. In the premises, paragraphs 4 and 5 are admitted. Paragraph 6 is also admitted.

12. Paragraph 7 is denied. The Swiss Proceedings Documents and the relevant information contained in them were not "private and sensitive" and were not "Sensitive Information" within the meaning of the Settlement Agreement. Without prejudice to the generality of the foregoing:

12.1. The fact that Mr Ruperti and his companies had received payment under a settlement with PDVSA had been openly referred to on behalf of Mr Ruperti, Sea Pioneer and PMI at the 1 April 2015 hearing of the application in this Court in the London Proceedings referred to in paragraph 10.2 above and the Payment Agreement formed part of the evidence at that hearing. In particular:

12.1.1. In a witness statement made by Edward Poulton on behalf of Mr Ruperti, Sea Pioneer and PMI for the purposes of the 1 April 2015 hearing, and dated 18 March 2015, Mr Poulton stated:

> "23 Subsequent to Mr Ruperti's most recent asset disclosure under the 2014 Freezing Order, and as a result of on-going commercial negotiations between the Ruperti Defendants and a third party, I am instructed that the Ruperti Defendants are now in receipt of sufficient

funds to enable satisfaction of the sums owned under the Settlement Agreement [*sc,* the 2013 Settlement Agreement], as they fall due."

In paragraph 22 of a witness statement dated 27 March 2015 made by Benjamin Patrick Ogden for the purposes of the 1 April 2015 hearing, Mr Ogden (the solicitor acting on behalf of the Respondents at the 1 April 2015 hearing (the Defendants in the present proceedings)) stated:

> ". . . the Claimants' Swiss lawyers have been able to review the bank documentation concerning the funds received . . . . This documentation reveals that the funds remitted to the bank appear to be the first payment tranche of settlement of $230 million dated 22 December 2014 between PDVSA and, inter alia, Maroil and Sea Pioneer (and thus Mr Ruperti) and Mr Ruperti [*ie,* the Payment Agreement referred to at paragraph 4 (a)]. I attach a copy of that agreement (which is in Spanish) at pages 66-85 [of exhibit "BPO 1"]. It makes clear that the Ruperti parties to that agreement were to receive $68 million by the end of January followed by four payments of $32.5 million at the end of February, March, April and May. Another party, Intercontinental is to receive the balance of the payments over the same time periods."

12.1.2. In a witness statement in response by Richard Allen, on behalf of Mr Ruperti, Sea Pioneer and PMI, dated 30 March 2015, Mr Allen stated:

> "5 At paragraph 22, Mr Ogden refers to a settlement agreement between PDVSA Petroleao CA, Intercontinental View Inc, Maroil Trading Inc and the First and Second Applicants [*sc,* Mr Ruperti and Sea Pioneer] . . . .
> "6 . . . . I am instructed by Mr Ruperti that the agreement was signed by Mr Ruperti, on behalf of himself, Maroil Trading Inc and the Second Applicant, on 16 January 2015. . . .
> "7 Furthermore, the Respondents were well aware of the position with respect to the prospective agreement. I can confirm that settlement discussions between the Applicants and the Respondents continued throughout January and February 2015, on the basis that Mr Ruperti was due to conclude an agreement that would, when concluded, enable him to satisfy the sums due under the 2013 Settlement Agreement. The Respondents were well aware of these negotiations; indeed, the earlier 2013 Settlement Agreement was premised on the anticipated conclusion of an earlier iteration of the same negotiations."

12.1.3. In his judgment following the 1 April 2015 hearing (reported at [2015] EWHC 992 (Comm)) Mr Justice Andrew Smith, at paragraphs 3 and 8, referred to the settlement with and receipt of funds from PDVSA.

12.2. The Payment Agreement, as an agreement entered into by a Venezuelan state-owned entity, PDVSA, was at all material times publicly available through the Venezuelan "Transparancia" application process.

12.3. In the premises:

12.3.1. Neither the Payment Agreement nor the other Swiss Proceedings Documents were or contained "private and sensitive" information within the definition of "Sensitive Information" in clause 7.2 of the Settlement Agreement. The Payment Agreement was in the public domain, having been deployed in open court prior to the signing of the Settlement Agreement.

12.3.2. The parties to the Settlement Agreement could not have intended clause 7.2 of the Settlement Agreement to apply to such documents or information as were in the public domain when the Settlement Agreement was signed and the Settlement Agreement should not be construed so as to apply to such documents and information.

12.3.3. Further, by reason of the matters pleaded above, there was no confidence or confidentiality in the information contained in the Swiss Proceedings Documents at the time of the Settlement Agreement (26 September 2016) or by the time of the alleged disclosures by Mr Hall (October 2016).

12.3.4. Further, or in the further alternative, there can be no right to damages under clause 7.3 of the Settlement Agreement in respect of disclosure of documents which are or information which is already in the public domain or readily available to the public.

Breach of the Settlement Agreement

13. As to paragraph 9:

13.1. It is denied that the Defendants disclosed the Swiss Proceedings Documents to any third party.

13.2. The Defendants' legal representative in Geneva, Mr Yves Klein, provided access to various documents he obtained from time to time in the Swiss Proceedings to Mr Hall, in his capacity as the Defendants' agent, via an online "DropBox" set up on 25 February 2015, (the Defendants infer that the Swiss Proceedings Documents were among those documents made accessible in this way) and (as set out in paragraph 9 above) paragraph 9(b) is admitted.

13.3. The Defendants were unaware of the disclosures by Mr Hall, which are alleged in paragraph 9, and are unable to admit or deny that Mr Hall and/or Burford disclosed the Swiss Proceedings Documents. The Defendants did not instruct or permit Mr Hall or Burford to disclose the Swiss Proceedings Documents. The Claimants are required to prove the facts and matters pleaded in paragraphs 9(a), and 9(c) to (h). If Mr Hall or Burford did disclose the Swiss Proceedings documents as alleged, they were not acting as the Defendants' agents within meaning of Clause 7.3 of the Settlement Agreement.

14. As regards paragraph 10, the Claimants are not entitled to "reserve their position". If they make any allegations concerning the Defendants' conduct or knowledge, they should now give proper particulars of such allegations.

Causation, Loss and Damage

15. As regards paragraph 11, in the Commercial Court Proceedings:

15.1. The Amended Particulars of Claim of LAIL and others and the Amended Particulars of Additional Claim of OTS included the following allegations:

15.1.1. Pursuant to the Payment Agreement, PDVSA would pay US$167.6 million to the First Claimant (Maroil) and US$62.4 million to

Intercontinental View Inc (an assignee of some of the Claimants' claims against PDVSA). Pursuant to a further agreement dated 22 December 2014 ("the COA Agreement"), PDVSA agreed to pay US$30 million to the Second Claimant (Sea Pioneer).

15.1.2. Pursuant to the Commission Agreement, Sea Pioneer received US$10 million "Commission Payment" from Commerzbank AB, paid into a Swiss bank account of Maroil.

15.1.3. The above agreements were made in settlement of a dispute involving the Claimants, LAIL, OTS, PDVSA and, subsequently, Commerzbank AB. The dispute had arisen in relation to certain vessels, 2 of which were owned by joint venture companies in which LAIL, OTS and Maroil were equal shareholders, and 2 of which were owned by joint venture companies in which LAIL and Maroil were equal shareholders ("the JV Companies").

15.1.4. The Claimants, through Mr Ruperti, had falsely, dishonestly and in bad faith represented to LAIL and OTS that no settlement agreements had been entered into with PDVSA and that no monies were held by the Claimants for (or were due from the Claimants to) LAIL or OTS or the JV Companies.

15.1.5. The Claimants were in a position of trust and confidence as trustees, agents and/or intermediaries between the JV Companies and PDVSA, and owed to the JV Companies and/or to LAIL and/or to OTS contractual and fiduciary duties.

15.1.6. Accordingly, Maroil held a proportion of the monies received under the Payment Agreement on trust for the JV Companies and/or was liable to pay the JV Companies a sum equivalent to that amount and/or equitable compensation and/or damages. Further, the Claimants held the Commission Payment, its traceable proceeds and/or any profits made on trust for the JV Companies and/or were liable to pay a sum equivalent to the Commission

Payment and any profits made on the same and/or equitable compensation and/or damages.

15.2. The Claimants filed an Amended Defence to the claim and a Defence to the Additional Claim in the Commercial Court Proceedings. They admitted that they had entered into the Payment Agreement, the COA Agreement and the Commission Agreement and that, pursuant to those agreements, US$167.6million and US$10 million had been paid by PDVSA to the First Claimant's Swiss bank account. The Claimants' position was that the above agreements did not settle or purport to settle claims between PDVSA and any of LAIL, OTS, or the JV Companies.

16. The Claimants are required to prove the facts and matters relating to their alleged losses alleged in paragraphs 12 to 23.

17. The Claimants have claimed that their losses consist in:

17.1. the legal expenses of defending the Commercial Court Proceedings, set out at paragraph 19;

17.2. the First Payment of US$8 million already paid, and the Second and Third Payments due in settlement of the Commercial Court Proceedings pursuant to the LAIL/OTS Settlement Deed, amounting to US$22 million, but which it is understood the Claimants have not paid, set out at paragraph 17 (collectively the "Settlement Sums"); and

17.3. further losses amounting to approximately US$45 to 60 million, allegedly suffered as a result of the Commercial Court Proceedings, including the obtaining of worldwide freezing injunctions against the Claimants, set out at paragraph 23.

18. The Claimants have failed to plead or set out (and are unable to plead or to set out) any basis upon which it can be established that they have suffered a recoverable loss in the above or any amounts for the following reasons:

18.1. The claims brought by the JV Companies, LAIL and OTS in the Commercial Court Proceedings were for (inter alia) declarations that the Claimants held monies on trust for the JV Companies and/or LAIL and OTS and/or were liable to pay money to the JV Companies and/or to LAIL and OTS pursuant to contract and/or as equitable compensation and/or damages. (As pleaded above, the Claimants do not, in the present proceedings, deny that they were liable to the JV Companies and/or LAIL and OTS as those parties alleged.)

18.1.1. If the Claimants held monies on trust for the JV Companies and/or LAIL and OTS, no loss to the Claimants resulted from the Claimants paying over such monies to LAIL or to OTS.

18.1.2. If the Claimants owed a debt or were liable to compensate the JV Companies and/or LAIL and OTS, the payment by the Claimant of monies to LAIL and OTS to extinguish that debt or liability to compensate resulted in no loss to the Claimants.

18.1.3. Any losses caused by the granting of freezing orders in support of the JV Companies', LAIL's and OTS's claims, including any legal costs incurred, were caused by the Claimants wrongfully withholding from the JV Companies, LAIL and OTS monies belonging to or owed to the JV Companies and/or LAIL and OTS and not by any breach of contract on the part of the Defendants or their agents.

18.2. If the Claimants' position (and the Claimants have not so alleged), is that they were not liable in respect of any of the claims made in the Commercial Court Proceedings, then:

18.2.1. it was not reasonably foreseeable that the JV Companies, LAIL or OTS (or any person) would bring unsubstantiated or unmeritorious claims or obtain (or succeed in maintaining) freezing orders in support of such claims;

18.2.2. it was not reasonably foreseeable that the Claimants would agree to pay US$30 million or any sum to such persons to settle such claims, and to

agree, as the Claimants did in the LAIL / OTS Settlement Deed, to release LAIL and OTS of any potential claims arising from the proceedings (including claims resulting from the wrongful granting of the freezing orders), rather than successfully oppose such claims, obtain an order for the costs of so doing and successfully pursue a claim for losses caused by the freezing orders; and

18.2.3. such wrongful proceedings broke the chain of causation between any breach of contract on the part of the Defendants or their agents and any alleged losses on the part of the Claimants and/or the Claimants' alleged losses are too remote to be recoverable.

18.3. Further, it was not reasonably foreseeable that the granting of freezing orders would cause any or any significant loss to the Claimants, such being contrary to the policy of the freezing order jurisdiction in this Court and the freezing orders containing the usual terms permitting the Claimants to trade in the ordinary course of business (including to dispose of their assets or make timely payments under the charter) which would have allowed the Claimants to perform the alleged Petcoke Supply Agreement. Nor was it reasonably foreseeable that the Claimants would agree to put up security in lieu of a freezing order which did not permit such trading (if such is alleged to have been the case) if to do so would cause losses as alleged. In the premises, any losses alleged to have been suffered in relation to the Petcoke Supply Agreement were not caused by any breach of contract on the part of the Defendants or their agents and/or are too remote to be recoverable.

18.4. Further, it was not reasonably foreseeable that any loss to the Claimants as the result of the granting of the freezing orders would not be compensated by the JV Companies, LAIL and/or OTS under the cross-undertaking in damages in the event that the JV Companies', LAIL's and OTS's claims were unmeritorious and the freezing orders were wrongly granted.

Measure of Damages

19. In the premises, it is denied that the Claimants are entitled to the relief claimed in paragraphs 24 and 25 or to any relief.

PARTICULARS OF ADDITIONAL CLAIM AGAINST THIRD PARTIES

20. Paragraphs 1 to 18 above are repeated.

21. Mr Hall and/or Burford owed the Defendants a duty of confidence in relation to the Swiss Proceedings Documents: As pleaded above, the documents obtained in the Swiss Proceedings were made accessible to Mr Hall and Burford by the Defendants' Swiss lawyer in circumstances where Mr Hall (and through him Burford) knew that those documents were confidential and were being provided to him for the limited purposes of assisting in investigating Mr Ruperti's and the Claimants' assets in the enforcement of the Defendants' claims against Mr Ruperti and the Claimants. In the premises, Mr Hall (and through him Burford), by accepting the Swiss Proceedings Documents, agreed to keep them confidential and to use them only for such limited purposes. In consequence, Mr Hall and Burford were at all material times under a duty of confidence to the Defendants not to make any other use of the Swiss Proceedings Documents.

22. If, as alleged in the Particulars of Claim, Mr Hall provided the Swiss Proceedings Documents to Mr Sargeant on 6 and 28 October 2016, then he and by him Burford, in breach of the above-mentioned duty of confidence, unlawfully made use of those documents otherwise than for the limited purpose for which they had been given to him.

23. By reason of the facts and matters set out above, if the Claimants succeed in their claims against the Defendants in these proceedings, the Defendants will have suffered loss and damage as a result of the above-mentioned breaches of confidence and are entitled to be indemnified by Mr Hall and by Burford in relation to all such losses and/or to damages.

24. If, and to the extent that Mr Hall and/or Burford seek to rely upon the terms of the Settlement Agreement dated 18 October 2017 (the "2017 Settlement Agreement") to which each of Mr Hall, Burford and the Defendants was a party, as absolving them (or either of

them) of liability to indemnify the Defendants in respect of their unlawful misuse of the Swiss Proceedings Documents, the Defendants' will say:

24.1. The 2017 Settlement Agreement was rescinded at common law by the Defendants, by letter dated 18 December 2018, as a consequence of fraudulent misrepresentations made by and/or on behalf of Mr Hall and Burford which induced the execution by the Defendants of the 2017 Settlement Agreement.

24.2. Alternatively, to the extent that the 2017 Settlement Agreement has not already been validly rescinded by the Defendants, the Defendants are entitled to seek the judicial rescission of the 2017 Settlement Agreement as a consequence of the said fraudulent misrepresentations.

24.3. In the further alternative, clause 3 of the 2017 Settlement Agreement, on its true interpretation, contained an express fraudulent representation that neither Mr Hall nor Burford had misused the Swiss Proceedings Documents and the Defendants are entitled to rescind the 2017 Settlement Agreement.

24.4. In the further alternative, by clause 3 of the 2017 Settlement Agreement, on its true interpretation, Mr Hall and Burford warranted that they had not misused the Swiss Proceedings Documents and the Defendants are entitled to damages in the amount of any liability they are found to have to the Claimants, and in respect of their costs of defending the proceedings commenced by the Claimants.

25. The Defendants rely upon the following facts and matters as entitling them to the above relief.

26. At all material times, Mr Hall and, through him, Burford knew that Mr Hall's disclosure of the Swiss Proceedings Documents was a breach of confidence and unlawful and would or might constitute a breach of the Defendants' duties owed to the Claimants. In support of this contention, the Defendants will, prior to disclosure, rely upon an email from Mr Andrew Preston, of Clyde & Co, to Mr Hall dated 11 May 2017 from which it is clear:

26.1. that Mr Hall was facing criticism internally within Burford (from a person or persons whom the Defendants are not, prior to disclosure, able to identify, but it is assumed, a member or members of the board of directors) for having provided, it is to be inferred, the Swiss Proceedings Documents to Mr Sargeant as alleged by the Claimants;

26.2. that Burford therefore knew that Mr Hall had provided the Swiss Proceedings Documents to Mr Sargeant;

26.3. that Mr Hall, and, it is to be inferred, Burford, knew that provision of the Swiss Proceedings Documents to Mr Sargeant may have had the consequence of placing the Defendants in breach of the Settlement Agreement;

26.4. that Mr Hall was aware at the time that he provided the Swiss Proceedings Documents to Mr Sargeant that this would expose him and, it is to be inferred, Burford, to liability for breach of confidence;

26.5. that Mr Hall, and, it is to be inferred, Burford, were contemplating acquiring insurance to insure against the adverse consequence of litigation brought by the Claimants against the Defendants as a consequence of the breach by Mr Hall and Burford of their obligations to keep the Swiss Proceedings Documents confidential; and

26.6. that, in the premises, prior to the commencement of the negotiations in relation to the 2017 Settlement Agreement, Burford and Mr Hall:

26.6.1. were aware that Mr Hall had provided the Swiss Proceedings Documents to Mr Sargeant in breach of confidence and that the Defendants were therefore exposed to the risk of liability at the suit of the Claimants; and

26.6.2. were sufficiently concerned as to their personal exposure to consider obtaining insurance against the adverse consequence of the Defendants seeking an indemnity from Mr Hall and Burford for any exposure to the Claimants.

27. Against that background it is obvious that the 2017 Settlement Agreement was induced by deceit:

27.1. The 2017 Settlement Agreement was negotiated between Mr Stephen Kirkpatrick, the solicitor acting on behalf of the Defendants and Intrigue Shipping, and Mr Tom Evans, a lawyer acting on behalf of Burford Capital (UK) Limited, Green Arbour Investments LLC, Mr Hall and Mr Michael Redman.

27.2. In an email timed at 10:08 am on 16 October 2017, Mr Kirkpatrick wrote to Mr Evans:

> 'One last point they [Intrigue] raised is to request that it be confirmed in clause 3 that the Confidential Ruperti Data has not been used/disclosed to date other than pursuant to the engagement, as shown in underlining below. Could you confirm this is acceptable? We have instructions to sign today.
> ". . . . The Focus Parties warrant that the Confidential Ruperti Data has not been used otherwise than pursuant to the Engagement Letter and has not been disclosed otherwise than to the Intrigue parties or their affiliates, representatives or advisers or pursuant to the Engagement Letter."'

27.3. Mr Evans responded in an email timed at 4:59 pm on 16 October 2017:

> 'Apologies for the short delay in responding, as you know I have to get various approvals from different parts of the organization when dealing with this matter, and that takes some time.
> 'In short . . . we are not willing to agree this further change . . . there simply isn't the appetite to countenance more negotiation at the current settlement level.'

27.4. Further, in an email timed at 4:42 pm on 17 October 2017, Mr Evans wrote:

> 'Your clients' position is understood, but as touched on earlier, it is the breadth of 'status' that gives us the audit headache at this end. In particular, the dealings with the data by third party providers (eg Relativity), IT intermediaries, former employees, sub-contractor, etc make this difficult. We certainly don't want to be held up on what is a very minor point, but from a corporate perspective, this late addition of a broad-brush warranty is challenging. In addition, the feedback I'm getting here is that the position on confidential material is already clear in the draft—we will return, destroy or otherwise hold such material confidentially—and that is viewed in the wider organization as an appropriate level of comfort for your client given the quantum.

. . . If you have any suggestions of how we might move forward whilst avoiding the need for the costly and time-consuming audit process that would otherwise be required at this end, please do let me know.'

27.5. Further, in an email timed at 10:20 am on 18 October 2017, Mr Evans wrote

'. . . I wanted to explain the view internally on this matter so you can understand the issues being juggled at this end . . . .
. . . the 11th hour additional warranty has been viewed as a bridge too far . . . . There is no specific crystallised concern regarding particular third party service providers or former employees, but rather a general concern about being asked to give a broad-brush and last-minute warranty in circumstances where fulsome protection/comfort for your client already exists and will continue to exist under the settlement agreement. Any further general representation we now make (whether informally over email, 'to the best of our belief' or enshrined as a formal warranty, and whether with certain specific or generic carve-outs or not) gives us a potential layer of legal uncertainty given we do not possess every potential specific fact as we sit here today; therefore making any representation is not possible from a legal and audit perspective internally . . . . creating further legal uncertainty for ourselves in this manner reduces our existing poor deal to an unworkably bad deal.'

27.6. It is to be inferred that:

27.6.1. prior to writing his emails referred to above, Mr Evans had consulted Mr Hall and another or others within Burford who knew about Mr Hall's improper use of the Swiss Proceedings Documents concerning the warranty the Defendants had sought and that Mr Hall and that other or those others had failed to apprise Mr Evans of Mr Hall's wrongful disclosure (since, absent such consultation, Mr Evans would have had no basis for writing as he did);

27.6.2. Mr Hall and that other or those others knew of the terms of Mr Evans' emails referred to above, and/or became aware of the communications being made on Burford's behalf by Mr Evans prior to the execution of the 2017 Settlement Agreement.

27.7. In the premises, Mr Hall and another or others within Burford procured or permitted the making of the representations by Mr Evans which are particularised below and which they knew to be false.

Particulars of falsity of the representations

28. Mr Evans' representation in his 16 October 2017 email that '*there simply isn't the appetite to countenance more negotiation*' was false in that the reason why Mr Hall and Burford Capital would not agree to the warranty sought by Mr Kirkpatrick was that they knew that they would be in breach of it as a result of Mr Hall's actions.

29. Mr Evans' representation in his 17 October 2017 email that:

> *'Your clients' position is understood, but as touched on earlier, it is the breadth of 'status' that gives us the audit headache at this end. In particular, the dealings with the data by third party providers (eg Relativity), IT intermediaries, former employees, sub-contractor, etc make this difficult.'*

was false in that it was not dealings with the Swiss Proceedings Documents by third party providers, IT intermediaries, former employees, sub-contractors, etc., which made giving the warranty difficult, but rather the fact that Mr Hall had wrongfully disclosed those documents. Further, there was no need for any audit by Burford Capital in connection with the warranty which had been sought.

30. Mr Evans' representation in his 18 October 2017 email:

> *'There is no specific crystallised concern regarding particular third party service providers or former employees, but rather a general concern about being asked to give a broad-brush and last-minute warranty . . . .'*

carried with it the implication that, within Burford, there was no other specific crystallised concern and that the only concern about giving the warranty Mr Kirkpatrick had sought was a general one. That representation was false.

31. Further, Mr Evans' representation '*Any further general representation we now make . . . gives us a layer of legal uncertainty*' was also false in that, as Mr Hall, and through him Burford, knew the warranty or representation sought would, if given, be false and there was no legal uncertainty in that regard.

32. Mr Evans' representation '*making any representation is not possible from a legal and audit perspective internally*' was also false in that, as Mr Hall, and through him Burford, knew, it was not possible for them to give the representation sought because it would have been false.

33. The above representations were made with the intention that they should induce the Defendants to enter into the 2017 Settlement Agreement, and, in particular, Clause 2(*b*) thereof, and they did so induce the Defendants.

34. In the circumstances, upon learning of the above representations, the Defendants were entitled to and did elect to rescind the 2017 Settlement Agreement and communicated that election by letter dated 18 December 2018.

35. Further, or alternatively, the Defendants are entitled to rescission of the 2017 Settlement Agreement on the grounds of deceit.

36. In the further alternative, the Defendants are entitled to damages for breach of clause 3 of the 2017 Settlement Agreement as set out in paragraph 24.4 above.

37. Further, the Defendants are entitled to and claim:

    37.1. an account of all profits made by Mr Hall and Burford by using the Swiss Proceedings Documents otherwise than for the purpose for which they were given to them and to payment of all sums found to be due on the taking of such account, alternatively

    37.2. damages or equitable compensation.

38. Further, the Defendants are entitled to and claim interest on all sums claimed pursuant to Section 35A of the Senior Courts Act 1981 at such rate or rate and compounded or simple, for such period or periods as the Court thinks fit.

AND THE DEFENDANTS CLAIM:

(1) A declaration that they are entitled to be indemnified against the Claimants' claims, including the Claimants' claims for interest and costs.

(1)A A declaration that the 2017 Settlement Agreement has been validly rescinded.

(1)B Alternatively, rescission on the grounds of deceit.

(1)C Alternatively damages.

(2) An order for the taking of an account of all profits made by Mr Hall and Burford and an order for the payment to the Defendants of all sums found due on the taking of such account.

(3) Delivery up to the Defendants of all copies of the Swiss Proceedings Documents still held by Mr Hall and Burford and all documents obtained by Burford, Focus or Mr Hall in the course of their work for the Defendants in relation to their claims against the Claimants and Mr Ruperti.

(4) Damages or equitable compensation.

(5) Interest as pleaded above.

(6) Further or other relief.

DOMINIC DOWLEY QC
JUSTIN HIGGO

The Defendants believe that the facts stated in this Defence and Particulars of Additional Claim are true.

The Defendants confirm that steps have been taken to preserve relevant documents in accordance with the duties under paragraph 3.1(1) and 3.2(1) of Practice Direction 51U, and as required by paragraphs 4.1 to 4.4 thereof.

Filed 14 March 2019 by Reed Smith LLP, solicitors for the Defendants.
Filed as amended 2 May 2019 by Reed Smith LLP, solicitors for the Defendants.