

Neutral Citation Number: [2020] EWHC 1985 (QB)

Case No: QB-2018-000676

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 22/07/2020

**Before** :

SENIOR MASTER FONTAINE

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**Between :**

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| --- | --- | --- |
|  | **EXECUTIVE AUTHORITY FOR AIR CARGO AND SPECIAL FLIGHTS** | Claimant |
|  | **- and -** |  |
|  | **(1) PRIME EDUCATION LIMITED****(2) TEVFIK SEKERCI****(3) SERA JANE SEKERCI****(4) PRIME EDUCATION HAVACILIK LIMITED SITKETI****(5) YORK PROPERTY SUITES LIMITED** | Defendants |

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**Mr Philip Coppel QC** (instructed by **MS-Legal Solicitors**) for the **Claimant**

**Mr David Head QC and Ms Lisa Lacob** (instructed by **Stewarts Law**) for the **Defendants**

Hearing date: 1 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR MASTER FONTAINE

If this Judgment has been emailed to you it is to be treated as ‘read-only’.
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**Senior Master Fontaine**

1. This was the hearing of the Claimant’s application for summary judgment dated 7 October 2019 against the First, Second, Third and Fifth Defendants (the Claimant not having been able to serve the Fourth Defendant). For the purposes of this judgment I refer to the Respondents as “the Defendants”. The draft order to the application seeks summary judgment against the Defendants in the sums of €13,439,788.74 and £1,871,560 plus interest. Documents referred to in this judgment in the following format: [bundle /tab/page].
2. The application is supported by the third witness statement of Mohamed Bashir Shaban dated 7 October 2019 (“Shaban 3”) and responded to by the second witness statement of Tevfik Sekerci dated 24 March 2020 (“Sekerci 2”) and the witness statement of Sera Jane Sekerci dated 24 March 2020 (“SJ Sekerci 1”). I was also referred to previous witness statements prepared in support of /in response to injunction proceedings leading to a freezing injunction made by Morris J. on 19 December 2018, continued by order of Yip J. dated 11 January 2019 as follows:

Claimant

First affidavit of Mohamed Bashir Shaban dated 17 December 2018 (“Shaban affidavit”)

First witness statement of Captain Emran Al Banghazi dated 17 December 2018 (“Al Banghazi 1”)

Second witness statement of Captain Emran Al Banghazi dated 7 January 2019 (“Al Banghazi 2”)

Second witness statement of Mohamed Bashir Shaban dated 8 January 2019 (“Shaban 2”)

Defendants

First witness statement of Tevfik Sekerci dated 7 January 2019 (“Sekerci 1”)

**Senior Master Fontaine :**

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Claimant

First affidavit of Mohamed Bashir Shaban dated 17 December 2018

First witness statement of Captain Emram al Banghazi dated 17 December 2018

Second witness statement of Captain Emram al Banghazi dated 7 January 2019

Second witness statement of Mohamed Bashir Shaban dated 8 January 2019

Defendants

First witness statement of Tevfik Sekerci dated 7 January 2019

**Summary of the Claim**

1. The Claimant’s claim is for:
(i) breach of contract by the First Defendant;

(ii) breach of fiduciary duties by the First Defendant;

(iii) breach of constructive trust by the First Defendant;

(iv) inducing breach of contract by the Second and Third Defendants;

(v) dishonest assistance in breach of trust by the Second and Third Defendants;

(vi) dishonestly or knowingly receiving funds in breach of trust by the Fourth and Fifth Defendants; and

(vii) unlawful means conspiracy between all Defendants, including misappropriation of money with intent to defraud.

The relief sought is the return of the Transferred Money (as defined in Paragraph 23 of the Particulars of Claim and in Paragraph 11 below) less payments which the Claimant accepts are properly payable to the First Defendant.

**Summary of the factual background from the statements of case and affidavit/witness statements**

1. The Claimant (“EACS”) is an executive agency of the government of Libya with the principal purpose of providing flights for senior government ministers and officials, including the head of state. In or about 2012 the remit of EACS was extended so that it took on the responsibility for all Libyan pilot and aviation engineer training. The First Defendant (“Prime Education”) is a company registered in England and was incorporated on 20 June 2008. The Second and Third Defendants, who are husband and wife, (“Mr Sekerci and Mrs Sekerci”) are the sole directors of Prime Education, and Mr Sekerci is also the company secretary. The Fourth Defendant (“PE Turkey”) is a Turkish company incorporated in 2012 of which Mr Sekerci is a director and 50% shareholder, the other 50% shareholder being his business partner, Burhan Conoglu. The Fifth Defendant (“York Property”) is a company registered in England and Wales, of which Mr and Mrs Sekerci are the sole directors.
2. In 2012 the remit of EACS was expanded to take on responsibility for all pilot and aviation engineer training in Libya. This required building up a pool of pilots and engineers that was larger than was required for EACS flights alone. Libya’s two state-owned airlines, Libyan Airlines and Afriqya were also intended to benefit from the pool of pilots and engineers. EACS therefore proposed to train approximately two hundred and fifty students who would need to attend aviation schools outside Libya (there not being any in Libya) and have the necessary language skills in English. (Shaban affidavit paras. 6-11 [1/4/70-71]; Al Banghazi 1 paras.5-8 [1/6/146]).
3. Prime Education’s business was to run international education and training programmes from the UK. PE Turkey was established to run education and training projects from Turkey. Both Prime Education and PE Turkey provided such services for a variety of organisations in Libya and across the Middle East. Prime Education was first put in touch with EACS through the commercial attaché of the British Embassy in Libya in about 2014. (Sekerci 1 paras. 7-12 [1/10/271-272]).
4. On 17 December 2015 EACS and Prime Education entered into a written contract (“the 2015 Agreement”) [1/3/55]. The 2015 Agreement was signed on behalf of EACS by Mr Jamil Shubana, the general manager/CEO of EACS, and by Mr Sekerci on behalf of Prime Education on 17 December 2015 [1/3/64]. The company stamp of EACS, with the words “EACS General Director” appears under Mr Shubana’s signature, description and date. There is no company stamp for Prime Education.
5. In summary, the 2015 Agreement provided that Prime Education would supply civil aviation educational and training consultancy and management services within the European Union, including the UK, to EACS, for persons nominated by EACS, in return for fees to be paid by EACS to Prime Education. In practice Prime Education acted as an intermediary between EACS and the educational institutions which would provide the training to the students and would handle the financial dealings with the educational institutions. For this purpose, EACS were to provide funds in advance to Prime Education, so that it would be able to give assurances to the educational institutions that it was in a position to pay course fees, accommodation costs and living expenses of the students. The funds would also be used to pay fees required in obtaining visas for the students. Prime Education was required to set up a designated client account for EACS with its bankers, HSBC, to hold these funds. The fees payable to Prime Education for its services were to be paid into Prime Education’s own account with HSBC.
6. Mr Shubana was dismissed as CEO/General Manager of EACS by the Prime Minister of Libya in about October 2016 and Khalil Taher Gammoudi was appointed as CEO. Mr Gammoudi asked Captain Al Banghazi, general manager of EACS, to investigate EACS’s dealings with Prime Education, as it appeared that EACS had paid over very large sums of money to Prime Education but had received very little in return: Al Banghazi 1 para. 13 [1/6/147]. Captain Al Banghazi sets out the results of his review of EACS’s financial and banking records in a schedule of payments made to Prime Education between 25 January 2016 and 31 March 2016, and the results of his enquiries to the aviation schools named on the invoices from Prime Education: Al Banghazi 1 paras. 15-22 [1/6/148-149].
7. Pursuant to the 2015 Agreement, EACS transferred to Prime Education’s nominated account sums of money totalling €15,218,008.75 and £1,946,040 (“the Transferred Money”): Particulars of Claim paragraph 23 [2/13/568]. These transfers were intended to be the course fees payable to the relevant educational establishments: Shaban affidavit para. 15 [1/4/73]. Of those sums, EACS accept that Prime Education has paid the sum of €444,500.00 to educational establishments pursuant to the 2015 Agreement, but states that the remainder of the money advanced is unaccounted for: Shaban affidavit para. 16 [1/4/74].
8. Captain Al Banghazi reported his initial findings to Mr Gammoudi, who wrote to Mr Sekerci by email on 6 and 27 November 2016 asking for an account of what had happened to the funds advanced, and what was happening with regard to placing students with flying schools: Al Banghazi 1 para. 23 [1/6/149] EAB1 pages 72-73 [1/7/225-226]. No reply was received. Mr Gammoudi made further attempts to contact Mr Sekerci by telephone and left voicemail messages but did not receive any response: Al Banghazi 1 paras.23-24 [1/6/149-150]. In his witness statement at paras. 25 to 27 Captain Al Banghazi explains the circumstances in which he came into possession of copies of Prime Education’s Euro bank statements from March to May 2016 [1/6/150] which showed payments totalling €8,000,000 made to PE Turkey as follows:

30 March 2016 €2,000,000

28 April 2016 €500,000

5 May 2016 €5,500,000.

1. It was apparent from the bank statements that most if not all of the money passing through Prime Education’s account during this period came from EACS.
2. Captain Al Banghazi then sought the assistance of the Libyan Foreign Ministry which contacted the Libyan Embassy in London on 29 March 2017. An employee of the Cultural Attaché’s office, Mr Osama Raghi, was able to contact Mr Sekerci and arranged for him to attend a meeting at the Cultural Affairs Bureau on 25 April 2017. The report from Mr Raghi to EACS following that meeting was that Mr Sekerci had said that:

 “(i) He was continuing to hold the money from EACS, from which I understood it would still be in the First Defendant’s client account;

(ii) he was still trying to arrange the courses;

(iii) there had been a problem in that HSBC had frozen the First Defendant’s accounts due to concerns about source of funds;

(iv) the first defendant was bringing a legal case against HSBC to unfreeze the funds, and expected to have access to the funds shortly; and

(v) he would provide a full written report on the project within 10 days.” Al Banghazi 1 para.31 [1/6/151].”

1. Captain Al Banghazi states “*I do not recall Mr Raghi at the sending me the report which the Second Defendant had promised to Mr Raghi*.” (para. 32 [1/6/151]). However, Mr Shaban, referring to that paragraph, states “*My enquiries within the Libyan embassy in London suggest that the Second Defendant may have sent such a report, although it is not been possible to locate a copy.*” (Shaban Affidavit para. 47 [1/4/81]). A representative from the Libyan Embassy told Captain Al Benghazi that after a number of unsuccessful attempts to contact Mr Sekerci he was unable to assist further. Captain Al Banghazi then made various reports to banking, legal and government authorities in Libya. Criminal investigations have now commenced in Libya arising out of the matter. In October 2017 the Litigation Directorate of the Libyan Government instructed English solicitors to pursue the matter: Al Benghazi 1 paras.32-36 [1/6/151-152].
2. Captain Al Benghazi refers to the filed accounts of Prime Education which record that the company had debtors totalling £11,756,821, comprising an interest-free loan to PE Turkey, with no fixed date of repayment, of which £11,179,822 was outstanding; and a loan to York Property amounting to £448,847, of which the full amount was outstanding, and again the loan was interest-free and had no fixed date of repayment. The accounts showed funds due to creditors totalling £13,222,620, primarily funds received from EACS, and cash at the bank totalling £1,583,386, so that it appeared that the funding for the loans to PE Turkey and York Property must have come from the funds transferred by EACS, in breach of the 2015 Agreement: Al Benghazi 1 paras.36-39 [1/6/152].
3. The explanation put forward on behalf of Prime Education, Mr and Mrs Sekerci and York Property is set out in the witness statements of Mr Sekerci and Mrs Sekerci. Sekerci 1 was the response of all Respondents to the worldwide freezing injunction granted by Morris J. in December 2018. In that statement it is accepted that between 15 February 2016 to 18 May 2016 EACS transferred the sum of €15,218,008.75 to Prime Education’s Euro account at HSBC by way of four separate payments, and the sum of £1,946,040 to Prime Education’s sterling account at HSBC by way of six separate payments. Mr Sekerci exhibits a schedule of the payments and the corresponding invoices: Sekerci 1 paras. 38-39 [1/10/277]; TS1 61 to 63 [1/10/361 – 363].
4. Mr Sekerci then explains practical problems were experienced by Prime Education from March 2016 onwards. These fall into two categories:
	1. difficulties with dealing with the Libyan students, comprising the inability of the students to provide the correct documents to comply with the requirements to obtain visas and for the courses for which they were to be enrolled, and the conduct of some of the students who were rude and abusive to their staff, conduct which was also reflected in reports from the educational establishments with whom the students have been dealing direct;
	2. HSBC were blocking significant numbers of payments out of the euro account, the account in which the Transferred Money was held.
5. As a result of these problems Prime Education sought Mr Shubana’s agreement to transfer the funds received from EACS to PE Turkey in March 2016. Mr Sekerci states that Mr Shubana’s agreement was obtained in discussions at some point in March 2016, that he does not know the exact date of the conversations but says that Prime Education had Mr Shubana’s express agreement to the funds moving to Turkey by the time the first tranche of money was transferred to PE Turkey at the end of March 2016. Mr Sekerci states that Mr Shubana was aware of the problems being experienced with HSBC, as he had been contacted by the students who had been impacted by those issues. The communications with EACS were with Mr Shubana and a Mr Lutfi, and were by telephone conversation only. Accordingly in the period from March to May 2016 Mr Sekerci was concerned that the project was running into difficulties for the reasons set out above, and the delivery of the project was changing from that which had been anticipated at the outset, and that what had been agreed with Mr Shubana with regard to the future delivery of the project, including the delivery of the contract from Turkey, which had not been documented. After discussions with Mr Shubana in May 2016 he arranged a face-to-face meeting with Mr Shubana in Istanbul, which took place in July 2016. Mr Shubana arrived in Turkey on 16 July and stayed for a number of days, and met Mr Sekerci and Mr Conoglu at PE Turkey’s offices: Sekerci 1 paras.46- 64 [1/10/279-283].
6. Mr Sekerci states that prior to the meeting he sent a letter to Mr Shubana dated 1 June 2016 setting out in detail the problems caused by the students including the abuse directed at staff, and with EACS’s conduct in performing the contract: Sekerci 1 para. 61 [1/10/282]; exhibited at TS1 90-94 [1/11/390-394]. The copy of the letter exhibited is not dated.
7. Mr Sekerci states that during the discussions with Mr Shubana in Turkey agreement was reached to amend the 2015 Agreement. He states that the amended agreement (“the Amended Agreement”) was drawn up and signed by both parties on 22 July 2016 whilst Mr Shubana was still in Turkey. He says that both he and Mr Shubana signed the signature pages and also signed every page of the document, and they each retained one copy. The Amended Agreement is exhibited to TS1 pages 116 to 118 [1/11/416-418].
8. EACS’s evidence is that this was the first time they had heard of the Amended Agreement or seen a copy of it, and dispute its validity. Captain Al Banghazi notes that when Mr Sekerci met the representative of the Libyan Cultural Affairs at the Libyan Embassy in London in April 2017 to explain the position in relation to the 2015 Agreement he did not mention or allude to the Amended Agreement, but confirmed that Prime Education was continuing to hold the relevant sums on behalf of EACS: Al Banghazi 2 paras.2-6 [1/8/253-254]. Mr Shaban’s evidence states that even if Mr Sekerci’s account is true, there are certain formalities that need to be carried out under Libyan law for a government contract, including a contract that ends an earlier contract which do not appear to have been complied with: Shaban 2 paras. 6-10 [1/9/262-263].
9. In Sekerci 1, Mr Sekerci confirms that of the sum of €15,218,008.75 received from EACS into Prime Education’s Euro account (see paragraph 17 above) the following transfers were made:
	1. €12,819,000 was transferred to a Euro account in the name of PE Turkey in the period from 30 March 2016 to 21 March 2017;
	2. €444,500 was transferred to ESMA (a French aviation College);
	3. €1,333,720 was paid to the students attending the course at ESMA in France; and
	4. The remaining €620,788.75 of the amount not transferred to PE Turkey included other fees incurred by Prime Education, including bank charges and fees payable to Prime Education. (Paragraph 82) [1/10/286]
10. Of the sum of £1,946,040 received from EACS by Prime Education into its Euro account (see paragraph 17 above):
	1. £1,395,480 was transferred to PE Turkey on 8 September 2017;
	2. £495,411.04 is held in Prime Education’s account; and
	3. The sum of £55,248.96 remaining included fees payable to Prime Education and other expenses incurred in the course of business. (Paragraph 83) [1/10/286-287]
11. Mr Sekerci confirms that the majority of the transfers from the HSBC Euro account (€10.5 million) had been made by the end of July 2016 and that the money sat in PE Turkey’s account whilst waiting for projects in Spain, Greece and the UK to commence. Apart from the French project the rest of the contract ground to a halt and little progress was made after his meeting with Mr Shubana when the Amended Agreement was entered into. Mr Sekerci states that whilst the 2015 Agreement had required that the funds received from EACS be held in a client account, this and other obligations regarding the funds was removed under the Amended Agreement, as was any obligation to refund such sums if EACS cancelled the contract. (Sekerci 1 paras. 84 to 85 [1/10/287]).
12. Mr Sekerci also confirms that the money transferred from Prime Education to PE Turkey did not remain in PE Turkey’s account but that he:

 “…considered it prudent to invest the money and assets to be owned by PE Turkey and specifically PE Turkey decided to purchase and develop two prime sites in Istanbul which we considered to be a good investment.” (Sekerci 1 para 86 [1/10/287]

1. Mr Sekerci gives details of two projects which were included in the investments referred to, namely:
	1. land and building on a site at 1215 sok. 34210 Bagcilar, Istanbul, Turkey;
	2. land and buildings on a site at Mahmutbey Cad 34210 Bagcilar, Istanbul, Turkey. (Paragraph 86) [1/10/287]
2. Mr Sekerci calculates the current equivalent Euro value of the Turkish lira amount invested in these two projects as €8,562,524 but says that as a result of falling Turkish exchange rates this would have given a Euro equivalent value of €11,723,561.50 in January 2018. He says that the intention was always to liquidate or leverage the assets as and when the money was required to progress the project. He says that the entirety of the funds was not invested immediately but spent across the two-year period and the construction works. (Sekerci 1 para 87) [1/10/288].
3. Mr Sekerci does not say that Mr Shubana agreed to this use of EACS funds, or deal with the fact that such use was ostensibly in breach of the requirements of the Amended Agreement.

**The Issues on the Application**

1. EACS submits that the claim shows that Prime Education is in breach of the 2015 Agreement, in breach of fiduciary duty and/or constructive trust, in that:
	1. It did not keep the Transferred Money in a separate client account;
	2. It misappropriated the Transferred Money by using it other than for meeting the cost of courses and accommodation etc for aviation students as requested by EACS;
	3. It used the Transferred Money other than on behalf of EACS;
	4. It failed to protect the Transferred Money for the benefit of EACS; and
	5. It wrongfully used the Transferred Money to make interest free and unsecured loans to PE Turkey of €11,179,822 and to York Property of not less than £448,847.
2. EACS claims against each of Mr and Mrs Sekerci that they:
	1. Induced Prime Education to breach its contact with EACS;
	2. Procured and/or knowingly and/or dishonestly assisted in a breach of trust by Prime Education; and
	3. Conspired and combined with Prime Education, each other, PE Turkey and York Property to use unlawful means (including misappropriation of money with intent to defraud) with the intention and effect of harming EACS.
3. EACS claims against York Property that it has:
	1. Dishonestly received from Prime Education sums of money in breach of trust by Prime Education, alternatively knowing that those sums were in breach of trust; and
	2. Conspired and combined with Prime Education, Mr and Mrs Sekerci and PE Turkey to use unlawful means (including misappropriation of money with intent to defraud) with the intention and effect of harming EACS.
4. The Defendants say that the Amended Agreement constitutes a complete answer to the claims. The Claimant submits that the Amended Agreement is invalid and unenforceable for a number of reasons, and that as the Defendants do not attempt to suggest that there is any defence to the claim under the terms of the 2015 Agreement, there is no real prospect of success nor any compelling reason to permit the claim to proceed to trial and the Claimant is entitled to summary judgment.
5. Accordingly, the only issue before the court is whether the Defendants have a real prospect of success in their defence relying on the Amended Agreement.

**Summary Judgment - Principles**

1. The relevant law is as follows:

CPR 24.2 provides:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on

a particular issue if –

(a) it considers that–

(i) …

(ii) that defendant has no real prospect of successfully defending the claim or issue;

and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

1. Both parties agree that the relevant principles are those cited by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] approved by the Court of Appeal in *AC Ward Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24], including the following:
	1. The court must not conduct a ‘mini-trial’ without the benefit of disclosure and oral evidence: *Swain v Hillman* [2001] 1 All ER 91 at [95];
	2. The court ought to consider whether the defendant has a “realistic” as opposed to a “fanciful” prospect of success;
	3. The court ought to ask itself whether the pleaded defence carries “some degree of conviction” and is “more than merely arguable”;
	4. The court does not take at face value and without analysis everything that a defendant says in his statements before the court, however in some cases it may be clear that there is no real substance in factual assertions made
	5. The court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550 at [19];
	6. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co* 100 Ltd [2007] FSR 63; and
	7. If an application gives rise to a short point of law or construction, and if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if a party’s case is bad in law, it will in truth have no real prospect of succeeding on it. Under CPR 24.2 the court has the power to give summary judgment on the parts of a claim that are denied.

**Issues in the Application**

1. EACS relies on five grounds for its submission that the Amended Agreement is invalid and unenforceable:
	1. there was no consideration for the Amended Agreement;
	2. the Amended Agreement effected a penalty;
	3. there was no authority for the Amended Agreement;
	4. the Amended Agreement was *ultra vires*;
	5. the Amended Agreement lacked the necessary formalities.
2. It is common ground between the parties that:
	1. The sums paid by EACS to Prime Education under the 2015 Agreement would be used:
		1. to show potential course providers that students had enough money to cover course fees and living costs and that Prime Education would be required to sign contracts with each course provider and that it would transfer the required course/accommodation fees to the course provider;
		2. for Visa application purposes; and
		3. for student salaries;
	2. The bank account for the purposes of EACS paying the fees of Prime Education was an account at HSBC bank in York identified in paragraph 19 of the Particulars of Claim;
	3. The Transferred Money was paid to Prime Education by EACS; and
	4. Part of the Transferred Money was transferred from Prime Education to PE Turkey.
3. EACS accepts for the purposes of the application that:
	1. English law governs the 2015 Agreement;
	2. English law governs the Amended Agreement;
	3. Mr Shubana signed the Amended Agreement in Istanbul in 2016; and
	4. Prime Education paid the sum of €1,333,720 to students on the ESMA course as alleged in the Defence at para. 24 [2/14/636].
4. Leading counsel for the parties each produced detailed skeleton arguments, and made detailed oral submissions which I summarise where necessary. I consider that the issue of applicable law does have to be addressed in relation to issues set out at Paragraphs 36 (iii), (iv) and (v) above as explained below. I will therefore deal first with these grounds of challenge to the Amended Agreement by EACS, and then with issues in Paragraph 37 (i) and (ii), which it is agreed are subject to English law.

**Whether the Amended Agreement is void/unenforceable on grounds of lack of capacity/authority/necessary formalities**

1. The issue of lack of authority of Mr Shubana to bind EACS, relied upon in the evidence in support of the application, was, correctly in my view, not pursued in submissions, as it is at the very least arguable to the relevant standard that that if Mr Shubana had actual authority to enter into the 2015 Agreement he must have had at least ostensible authority to enter into the Amended Agreement. The issues of capacity/*vires*/formal validity are considered separately below.

Whether Libyan or English law applies to the above issues

1. The 2015 Agreement contains no governing law clause. No submissions were made on behalf of EACS but Mr Coppel at the hearing made concessions as to the applicable law governing each of the agreements (see Paragraph 39 (i) and (ii) above).
2. Mr Head submits that the law governing the 2015 Agreement will be determined under Article 4 of the Rome I Regulation (“Rome I”). Article 4 (1) (b) applies to a contract for the provision of services, which is governed by “*the law of the country where the service provider has his habitual residence*”. Article 4 (2) (which applies where Article 4 (1) does not apply), provides that the contract shall be governed “*by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence*”. Prime Education is the service provider and the party to effect the characteristic performance of the 2015 Agreement, so on either basis the law of the 2015 Agreement is English law. It is submitted that there is no reason why a different governing law would apply to the Amended Agreement, which simply amends the 2015 Agreement, or if it did, why it would be Libyan law. The Amended Agreement does not require Prime Education to perform the contract in Libya and it was signed in Turkey.
3. EACS submits that, although they accept Prime Education’s case for the purpose of the application that both agreements are subject to English law, the power of EACS to enter into a contract is a matter of Libyan law, as it is an entity constituted in Libya and in accordance with Libyan law. However, Mr Head, on behalf of Prime Education, submits that this is wrong as a matter of English conflicts principles and contrary to the decision of the Court of Appeal in *Integral Petroleum SA v SCU-Finanz AG* [2015] EWCA Civ 144.
4. Because of that issue between the parties, both parties have submitted reports from experts in Libyan law, Dr Ali Abusedra for EACS and Mr Tarek Eltumi for Prime Education.
5. The Defendants’ primary submission is that, even if Libyan law applies to the issues of capacity/*vires*/formal validity, (which is a question of fact for the English Court: *Dicey, Morris & Collins on the Conflicts of Laws* (15th edn.) Paras.9R-001 to 9R-002 (Rule 25)), the court should consider, as part of determining whether the claim has a ‘real prospect of success’, the evidence provided in the foreign law expert reports, having regard to, amongst other things, the cogency of the experts’ reasoning. The court should, however, be cautious when dealing with questions about foreign law at an early stage. A foreign law issue should only be summarily determined if the Court considers that there is no real prospect of the respondent’s evidence as to foreign law being accepted at trial: *OJSC TNK-BP Holding v Beppler & Jacobson Ltd & Others* [2012] EWHC 3286 (Ch) at [123-125]. If there is a dispute between two foreign law experts who have set out their views in cogent reasoned opinions, the matter will need to be addressed at trial so that the conflicting opinions can be tested: *Tatneft v Bogolyubov* [2016] EWHC 2816 (Comm) at [64-66]; *Edgeworth Capital (Luxembourg) SARL v Maud* [2015] EWHC 2364 at [19-25] and White Book 2019 Vol I Note 24.2.3.

**Whether Libyan Government (NAB) approval required for EACS to have the capacity to enter into the Amended Agreement**

Summary of Submissions by EACS

1. The capacity to make binding agreements is a central part of English contract law. It is submitted that as EACS is a Libyan government executive agency it is subject to special rules of Libyan law which apply to certain contracts entered into by an organ of the state in its capacity as such: “administrative contracts”. Libyan law also has rules governing the disposal of assets belonging to the state. To the extent that the experts differ as to Libyan law on this issue, EACS are content to proceed on the basis of Mr Eltumi’s opinion. The position of EACS as described by Mr Eltumi, a “*quasi profit-making administrative entity with corporate personality that is owned and supervised by the government*” [2/19/697, §42] is not materially in dispute.
2. It is not in dispute between the experts that contracts entered into by such bodies require the approval of the National Audit Bureau (“NAB”) of Libya in certain circumstances. The evidence is that the 2015 Agreement was submitted to the NAB for approval, and received such approval (Shaban 2. Para. 15(x)) [1/9/264]. There is however no evidence that the Amended Agreement was ever submitted to the NAB for approval (Shaban 3 paras.20-21) [1/2/9]. It is therefore submitted that the purported variation of the 2015 Agreement by the Amended Agreement is therefore of no legal effect.
3. It is submitted that Mr Eltumi’s statement that he is not able to answer the question of whether the value of the Amended Agreement exceeds LYD5,000,000 overlooks the financial impact of the cancellation clause relating to the transfer of money, and that had Mr Eltumi looked at the figures and understood the operation of the Amended Agreement he would have had to have concluded that it triggered NAB oversight as required by Article 24 of Law 19.
4. It is further submitted that Mr Eltumi’s speculation that a letter from NAB dated 20April 2016 addressed to the Libyan Foreign Bank [2/19/729 -730] suggests that the 2015 Agreement and the Amended Agreement may have been approved by NAB, or EACS did apply for NAB approval and may have relied on Article 25 of Law 19 to enter those agreements [2/19/708, §93]. It is submitted that this cannot be correct because the letter from NAB referred to predates the Amended Agreement by over 3 months, and the defendants do not suggest that there was a prior draft so it is difficult to see how the NAB could have approved it in advance.
5. Further, Mr Eltumi’s assertion that Mr Shubana could ignore the requirement to seek NAB approval [2/19/710 §103] contradicts his earlier analysis [2/19/702 §66] and makes no sense. Although Mr Shubana, as the CEO/general manager of EACS was a necessary condition for binding EACS, that was insufficient on its own as the agreement would have to meet the precepts of Libyan law, namely to be submitted for and receive NAB approval.
6. In respect of Mr Eltumi’s argument that the cancellation clause of the Amended Agreement may only have triggered the requirement for NAB approval, but the other aspects of the Amended Agreement would not have required NAB approval [2/19/79 §100], Mr Eltumi has not appreciated that the Amended Agreement effected a transfer of property in the transferred money from EACS to Prime Education. It is not possible to carve out that effect of the Amended Agreement and leave a working agreement. Article 143 of the Libyan Civil Code, quoted by Mr Eltumi, underscores this point [2/19/709 §100]

Summary of Prime Education’s Submissions

1. In determining whether Libyan law would apply to determine the consequences of EACS failing to obtain the NAB Approval, notwithstanding that English law applied to the agreements, it is submitted on behalf of Prime Education that it is necessary to characterise this issue having regard when doing so to the way in which the issue would be characterised under the foreign legal system: *Raiffesen Zentralbank Osterreich AG v Five Star Trading LLC and others* [2001] EWCA Civ 68. It is submitted that the court cannot consider the characterisation of this issue without first understanding the proper effect of not obtaining the NAB Approval.
2. It is submitted that there is confusion in the report of Dr Abusedra between the consequences of Mr Shubana lacking authority to execute the Amended Agreement, and inconsistently, to it being invalid under Libyan law because EACS lacked the capacity to enter into it. Dr Abusedra also states that this is not a question of following the correct procedure as EACS simply could not have entered into a valid contract which had the effect of the Amended Agreement.
3. There is a substantial conflict between experts on these conclusions. Mr Eltumi concludes that if an application is submitted to NAB in respect of a contract, but NAB does not reach a conclusion or take any action within one month, the validity of the contract is not in question unless and until NAB decides to audit the contract [2/19/704].
4. Assuming NAB oversight was triggered in respect of the payment made under the 2015 Agreement by application of Article 24 of Law 19, Law 19 is silent as to whether subsequent amendments to contracts which trigger NAB oversight would then also require NAB oversight. Mr Eltumi is of the view that amendments to contracts which have the effect of creating new rights or financial obligations with a value which exceed LYD5,000,000 would trigger the requirement for NAB oversight and that the Cancellation Clause (but no other clause of the Amended Agreement) would have triggered Article 24 if the value of this provision exceeds LYD5,000,000 [2/19/703-4].
5. If NAB approval was required but was not sought in respect of the Amended Agreement, then only the cancellation clause (the offending provision) would be held to be invalid under Libyan law. This is because Article 143 of the Libyan Civil Code provides: “*if the contract is partially void or may be voided, only such a part is void, unless it is established that the contract would not have been concluded if it was not for the part which was deemed void or may be voided, in such case the contract is voided in its entirety*” [2/19/709 §§98-100].
6. Failure to obtain prior NAB approval for a contract (even if required) would therefore not mean the contract is invalid with no effect. There may be no doubt as to its validity (if approval was applied for but not received within a month) or (if the approval was not applied for) the contract may be only partially invalid to the extent of the offending provision.
7. Further, it is submitted that to the extent that EACS contends that the issue should be properly characterised as concerning Mr Shubana’s ability or authority to bind EACS in its dealings with third parties (such that the issue is excluded from Rome I under Article 1(f) or (g)), that is contrary to the Court of Appeal decision in *Integral Petroleum* at [39], [42-44]. Applying the *Integral Petroleum* analysis, the NAB Approval is not about authority but about formal validity.
8. The NAB approval has no bearing at all on the expression of EACS’ will to be legally bound because it is not an internal decision-making of EACS, but an extraneous act by a third party which post-dates the making of a contract, even if the contract does not commence until either the approval has been obtained, or the one month period expires. Article 11(1) of Rome I addresses formal validity and provides that:

“A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.”

As such, the Amended Agreement is formally valid if it satisfies the requirements of English law (which it does), even if it would be formally invalid under Libyan law.

1. In the alternative, even if the issue is properly characterised as one of “material validity” i.e. where something in the nature of the contract makes it wholly or partially invalid, such as a contract in restraint of trade or a wagering contract: see *Dicey* §32-121), Article 10(1) of Rome I provides that:

“The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.”

English law would therefore also apply to determine the material validity of the contract or any of its terms.

1. Even if this issue were characterised as an issue of authority rather than formal material validity, Mr Shubana had authority, actual and/or ostensible, as general manager to express the intent of EACS to enter into contracts and to bind EACS by his signature alone.
2. EACS also had legal capacity to contract, contrary to the views expressed in the report of Dr Abusedra that the alleged absence of NAB Approval means that EACS did not have legal capacity to contract (that it acted “*ultra vires*”) in respect of the Amended Agreement [1/3/31-32 §§52-53]. The requirement to seek NAB approval under Law 19 would not impact, limit or prevent the power of Mr Shubana to enter into commercial contracts on behalf of EACS: see Mr Eltumi’s report at §§51-53 [2/19/699]. Mr Eltumi states that EACS had a separate corporate personality and had capacity under Article 53 of the Libyan Civil Code. The requirement to apply for NAB approval for certain contracts does not limit or restrict the capacity of EACS to enter into and/or varying agreements, but rather subjects the commencement of those agreements to certain regulatory processes.
3. In any event, as the governing law of the 2015 Agreement and the Amended Agreement is not Libyan law, there is no reason why Libyan financial regulatory rules would be relevant, even if those rules are mandatory provisions in Libya. Pursuant to Article 9 of Rome I, the only overriding mandatory provision as defined in Article 9 (1) which matter are the overriding mandatory provisions of the law of the forum, namely English law or the law of “*the country where the obligations arising out of the contract have to be have been performed*”. The court therefore has the discretion to apply a mandatory provision of foreign law if it is being asked to enforce performance of a contract in a foreign country and the act of performance is unlawful (rather than merely unenforceable or invalid) there: *Dicey & Morris* §32-096. In this case, Prime Education was not obliged to perform its obligations under the Amended Agreement in Libya.
4. Finally, it is submitted that there is no basis in the evidence for the court to conclude on a summary application that either the 2015 Agreement was submitted for and received NAB approval, or that the Amended Agreement was not submitted for and/or did not receive NAB approval. If NAB approval was required as a matter of Libyan law it would have been the responsibility of EACS to apply for it, the documentation relating to it would be available to EACS alone and only EACS would be in a position to make enquiries and investigations in relation to this matter. These matters are therefore wholly within the knowledge of EACS to ascertain and their evidence in this respect is inadequate, limited to a single paragraph in Shaban 3, containing double hearsay evidence with no supporting documentary evidence. There is no evidence from Mr Yusef Geith, stated to be the head of legal at NAB, or from anyone else at NAB or from EACS. The account of Mr Shaban’s telephone call on 20 September 2019 with Mr Geith does not explain how EACS was able to assert in January 2019 that NAB approval had not been obtained, more than 8 months before the telephone call.

**Discussion**

1. It is accepted by Mr Coppel that it would be inappropriate for the court to make a summary determination based on foreign law that is disputed. I therefore consider the relevant sections of Mr Eltumi’s report.
2. Mr Eltumi states in his report [2/19/702-710]:
	1. The National Audit Bureau of Libya (“the NAB”) is a national oversight body that forms part of the legislative arm of government in Libya. The matter of NAB approval is governed by Law 19 for the year 2013 regarding reorganising the national bureau as amended by Law 24 of the year 2013.
	2. He is of the view that EACS would fit within the broad description of entities which are subject to NAB oversight under article 3 of law 19. The question of whether the 2015 Agreement and the Amended Agreement triggered NAB oversight would depend on whether Article 24 is satisfied, and he believes that NAB oversight was triggered in respect of the payment made under the 2015 Agreement by application of Article 24 of Law 19.
	3. Law 19 is silent as to whether subsequent amendments to contracts which trigger NAB oversight would also then require NAB oversight. On the basis of the requirements in Article 24 of Law 19 he is of the view that amendments in contracts which have the effect of creating new rights or financial obligations with a value which exceed LYD5,000,000 would trigger the requirement for NAB oversight over amendments in the same way as it would apply to the underlying contract. It is a question of fact as to the financial impact of the cancellation clause in the Amended Agreement whether it would trigger NAB oversight is required by Article 24 Law 19. He is not able to answer the question of whether the value of the Amended Agreement exceeds LYD5,000,000.
	4. The provisions in the Amended Agreement which are of “an administrative nature”, including Prime Education’s right to change the client account arrangements in which it held EACS’ funds so that these funds could now be held and managed in different manner, would not trigger NAB oversight.
	5. If NAB approval was required under Article 24 Law 19, the contract “*shall not be deemed to have commenced until after the approval of the Bureau*”. But it is not clear whether this means that the contract does not come into existence, all the parties are not bound, or the commencement date of the contract is yet to start.
	6. It is possible that the 2015 Agreement and the Amended Agreement may have been approved by NAB, or EACS applied for NAB approval and may have relied on Article 25 of Law 19 to enter into those agreements.
	7. Mr Eltumi disagrees with Dr Abusedra’s statement that “*failure to obtain prior NAB approval for the variation renders the variation in valid with no effect*.” His view is that if NAB approval was required but was not sought in respect of the Amended Agreement, then only the cancellation clause would be held to be invalid under Libyan law, if the value of that clause exceeded LYD5,000,000. This is because of the requirement of Article 143 of the Libyan Civil Code that:

“if the contract is partially void or may be voided, only such a part is void, unless it is established that the contract would not have been concluded if it was not for the part which was deemed void or may be voided, in such case the contract is voided in its entirety.” (Para 99) [2/19/709].

* 1. Failure to obtain prior NAB approval for a contract (even if required) would therefore not mean the contract is invalid with no effect. There may be no doubt as to its validity (if approval was applied for but not received within a month) or (if the approval was not applied for) the contract may be only partially invalid to the extent of the offending provision.
1. I accept the submissions on behalf of Prime Education that the factual evidence relating to this issue is inadequate for the purposes of the summary judgment application. It is unsatisfactory that there is no direct evidence from anyone at NAB or EACS, and no documentary evidence with an explanation as to why that is the case. There is no explanation as to what are the “*extensive enquiries*” referred to (Shaban 3§20) [1/2/9]. I note that in the judgment of Mrs Justice Yip dated 11 January 2019 she states:

“It seems to me there is some force in the argument that a fuller explanation much been given as to what investigations have been undertaken. There are other aspects of Captain Al Bangazi’s evidence of the investigations that are somewhat vague.” (Paragraph 46 [2/17/671])

It is unsatisfactory that despite that comment, no further information has been provided.

1. There is no reference in the evidence submitted by EACS to the letter dated 20 April 2016 from the NAB to EACS, the Arabic version of which is annexed to the Particulars of Claim, [2/13/593] or any explanation in relation to it: see Mr Eltumi’s report paragraphs 86 to 89 [2/19/706-707] and his unofficial English translation at Appendix 3 to his report [2/19/729]. There is no explanation as to why no other documents relating to NAB approval of the 2015 Agreement are available.
2. It appears from the evidence that the Amended Agreement did effect transfer of property in the Transferred Money from EACS to Prime Education above the threshold of LYD5,000,000 (which I am told is in the region of €3 million), and it seems likely that NAB approval was required for the Amended Agreement, but I can reach no conclusion on the evidence as to whether or not the Amended Agreement was submitted for NAB approval, and if so whether it was approved expressly or by default.
3. I do not consider it appropriate on a summary judgment application to determine the question of the capacity of EACS, a Libyan state entity, to enter into the Amended Agreement, under Libyan law where there is disputed expert evidence. I accept the submissions of Mr Head in that regard.
4. In any event, it is apparent from the submissions summarised above that Prime Education has a real prospect of success in its submission that this issue would be governed by English law, not Libyan law, by reference to Article 11 (1) of Rome I.

**Whether the Amended Agreement was *ultra vires* EACS**

Summary of Submissions by EACS

1. It is submitted on behalf of EACS that the Amended Agreement violated numerous Libyan anticorruption laws and thus EACS had no authority to agree to forfeit property in the Transferred Money. It is submitted that the effect of the Amended Agreement, in relation to the change to the requirement for funds to be held in a client account, effectively converted the Transferred Money to be the property of Prime Education. EACS relies on Dr Abusedra’s evidence that EACS lacked the capacity to enter into the Amended Agreement so as to effectively give away large sums of Libyan state funds [1/3/32 §53(ii)]. The Amended Agreement constituted a misuse of public funds, as it is undisputed that large amounts of funds intended for the education and training of Libyan nationals has ended up funding speculative private property development in Turkey owned by PE Turkey with no benefit to the Libyan public. It is pointed out that Mr Eltumi acknowledges that contravention of Article 24 of the State Financial System Law would render the Amended Agreement void [2/19/710 §105].

**Summary of Submissions by Prime Education**

1. It is submitted that the suggestion in Dr Abusedra’s report that the alleged absence of NAB approval for the Amended Agreement means that EACS did not have the legal capacity to contract, namely that it acted *ultra vires*, is an unreasoned proposition and an unjustified attempt to characterise the NAB approval issue in a way which excludes it from the scope of Rome I, namely under Article 2 (f) which applies to parties’ legal capacity. This is decisively rejected in Mr Eltumi’s report on the following grounds:
	1. EACS has separate corporate personality from the Libyan government;
	2. Pursuant to Article 53 of the Libyan Civil Code, EACS has the right and capacity to enter into and vary commercial contracts;
	3. The requirement of Article 24 of Law 19 is a general regulatory obligation which does not limit or restrict EACS’ capacity to enter into a contract; rather it makes the commencement of those contracts subject to certain regulatory processes.
2. In any event, it is submitted that as the governing law of the Amended Agreement is not Libyan law, there is no reason why Libyan financial or regulatory rules would be relevant to this contract, even if those rules are mandatory provisions in Libya, for the same reasons as set out in Paragraphs 59 - 60 above.

**Discussion**

1. Dr Abusedra comes to his conclusion that EACS lacked the capacity to enter into the Amended Agreement because of the “Economic Effects” of the Amended Agreement. These are explained as effectively breaches of Article 24 State Financial System Law and Economic Crime Law Number 2 of 1979, both of which are provisions of Libyan criminal law and he concludes the Amended Agreement would infringe such provisions [1/3/29-32 §§44-53]. He does not provide any further explanation as Mr Shubana’s lack of authority to bind EACS, but presumably this would be on the basis that a Libyan state authority would not have the *vires* to commit a breach of criminal financial law. He also states that this would be the position whether the Amended Agreement was governed by Libyan law or by a foreign law.
2. Mr Eltumi addresses Article 24 State Financial System Law and Economic Crime Law Number 2 of 1979 at Paras. 104 -109 [2/19/710-711]. He accepts that non-compliance or contravention with either law would render the offending contractual agreement void. But he explains that this would be subject to an action proving the existence of the constituent elements of the crime in question, which would be pursued by the judicial and/or law enforcement authorities. He says that only a judgment convicting the offender of the crime would lawfully form the basis to void the underlying contract.
3. In the light of the evidence of Mr Eltumi, which is not addressed fully by Dr Abusedra, and where there is no evidence of a criminal conviction against either Mr Shubana or EACS, I conclude that Prime Education have a real prospect of success in its case that EACS did have the *vires* to enter into the Amended Agreement. Further, the lack of agreement between the Libyan law experts is such that this issue is not suitable for summary determination.
4. In any event, as referred to above, it is not necessarily the case that the issue of *vires* would be addressed under Libyan law, and Prime Education has demonstrated with a real prospect of success that the issue may be governed by English law.

**The Amended Agreement lacked necessary formalities.**

Summary of submissions by EACS

1. The 2015 Agreement bears the seal of EACS, both in its Arabic version and its English-language version. The Amended Agreement does not bear the corporate seal. EACS submits that this lack of formality contravenes Libyan law and non-compliance with this formality results in the non-recognition of the document.
2. EACS rely on the evidence of Dr Abusedra at paragraphs 38-41 [1/3/28], in particular, at para. 38:

“Circular No 5 of 1991… required all public bodies to ensure that all correspondence and official documents should be “*signed by the person authorised to sign on their behalf clearly stating his name and capacity while making sure that the stamp of the said department is placed in a way that does not hide signature or the name of the sender. Any communication or correspondence violate the aforementioned will not be recognised*.””

1. It is noted that Mr Eltumi’s evidence is that he is not familiar with Circular No 5 of 1991, as an instrument which would limit the validity of the contract [2/19/700 §57]. Although the use of seals can be seen in other Libyan state documents exhibited [1/11/477, 478, 532, 533, 558; 2/19/731], Mr Eltumi does not offer any alternative legal provenance for that practice [2/19/701 §60]. It is no answer for Mr Sekerci to say that “he did not notice at the time” or that he “would not have thought anything of this” (Sekerci 2 paras. 16-17 [2/18/678]). The reality is that an official seal had to be fixed to the Amended Agreement to make it effective. It was not so affixed so the Amended Agreement is not effective.

Summary of submissions by Prime Education

1. Paragraph 38 of Dr Abusedra’s report does not go so far as to say that a contract requires a seal for its validity. Mr Eltumi’s report states definitively that there is no Libyan law requirement that a company’s seal must be affixed to a contract for that contract to be valid and that the Circular No 5 has no bearing at all on the validity of the 2015 Agreement or the Amended Agreement [2/19/700-701 §§54-60].

**Discussion**

1. Dr Abusedra’s conclusion (at Para. 39 [1/3/28]) is limited to the issue of NAB approval, and does not deal expressly with the effect of Circular No 5 of 1991. The wording of the Circular assumes that a seal will be placed on an official document together with a signature, but it is ambiguous as to whether a seal is mandatory, and whether there would not be recognition if there is no seal. That may be the reason why Mr Eltumi concludes:

“I know of no Libyan law requirement which impacts, subjects and predicates the validity of the contract (or a contract amendment) and the requirement to affix a seal to such a document. ([2/19/700-701 §54])”

1. Dr Abusedra concludes that even if Libyan law was not applicable to the Amended Agreement, the issue of whether Mr Shubana followed the correct authorisation procedures will be a matter of Libyan law in any event [1/3/28 §41]. He does not provide any authority for that assertion.
2. Mr Eltumi’s evidence [2/19/700-701 §§54-60] provides sufficient reasoned support for his conclusion that:

“…it is my view is that the Circular has no bearing on the assessment of the validity of the Original Agreement or the Amended Agreement, and I am presently unaware of any other instrument of Libyan law which would have the same or similar impact as the Circular.”

1. In the light of the dispute between the experts on Libyan law as to the effect of the lack of a seal on the Amended Agreement, and the dispute as to whether English law would apply to this issue, I conclude this not is not an issue that is suitable for summary determination and that Prime Education has a real prospect of success in its argument in relation to the effect of the lack of a corporate seal on the Amended Agreement.

**Conclusion in respect of Issues (iii), (iv) and (v)**

1. In summary, there are many disputed issues that are not suitable for summary determination in relation to the issues of EACS’s capacity/*vires*/formal validity in relation to the Amended Agreement, in particular:
	1. whether English law or Libyan law applies to these issues;
	2. if Libyan law applies, the lack of agreement between the experts as to the issues and the consequences;
	3. if English law applies, the need for further submissions in relation to the consequences in respect of these issues; and
	4. in relation to the issue of NAB approval, the unsatisfactory state of the factual evidence.
2. None of these issues can be described as giving rise to a “*short point of law or construction*” nor is the court “*satisfied that it has before it all the evidence necessary for the proper determination of the question*” in respect of the issue of NAB approval, (see *Easyair* at [15 (vii)]).
3. I note and concur with the observations of Mrs Justice Yip at paragraph 29 judgment [2/17/667] that:

“If the court finds the agreement was genuinely signed by Mr Shubana, significant issues would still arise as to its validity. Plainly such issues are not matters to be resolved on an interlocutory application,…”

**Whether the Amended Agreement is void/unenforceable for lack of consideration**

Summary of submissions of EACS

1. The Claimant submits that in comparison to the position of EACS under the 2015 Agreement, the Amended Agreement purely advantaged Prime Education and disadvantaged EACS. Mr Coppel demonstrated this by analysis of the Amended Agreement.
2. Accordingly, even on the assumption that Mr Shubana had signed the Amended Agreement, it represented an agreement to vary the 2015 Agreement for which there was no consideration. It is fanciful to attempt to discern any advantage to EACS in the Amended Agreement and equally fanciful to discern any detriment to Prime Education in the Amended Agreement. Thus, the Amended Agreement was legally of no effect: see by way of analogy *Re Ovenden Colbert Printers Ltd; Hunt v Hosking and ors* [2013] EWCA Civ 1408; [2014] 1 BCLC 291 at [26]. Thus the 2015 Agreement governs the contract and relations between EACS and Prime Education so that EACS necessarily succeeds against Prime Education.

Submissions of Prime Education

1. Mr Head’s preliminary submission in relation to this point is that the issue as to lack of consideration did not form any part of the application, was not mentioned in the Claimant’s evidence and the first time it was raised was in Mr Coppel’s skeleton argument. It is submitted that this was an afterthought to the application.
2. It is accepted that English law applies to the question of consideration. It is trite law, and not in dispute, that consideration does not have to be adequate. The Defendants rely on the following authorities:

Chitty on Contracts (3rd edn.): 4-080-081;

*Ficom SA v Sociedad Codex Limitada* [1090] LL.L.R.118 at 132 per Goff LJ;

*Stilk v Myrick* (1809) 2 Camp. 317*;*

*Williams v Roffey Bros and anor* [1991] 1 QB 1 at 35-36;

*Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 at [18];

*Collier v Wright* [2009] 1 WLR 643 at §§28, 42, 44, 49-50.

1. The Defendants rely on the line of authorities following *Stilk v Myrick* to support the submission that a pragmatic or commercial advantage is sufficient to provide consideration; see Chitty at 4-081:

“Thirdly, the parties may agree to vary the contract in a way that is considered to be capable of conferring a legal benefit on one party only: e.g. where one party agrees to pay more for the performance of the other party’s original obligation, or to accept less than the other party had originally undertaken without any corresponding variation (that could benefit him) of his own obligation. In some situations of this kind, it is settled that there is no consideration………………… In other situations falling within the present group, it is arguable that the variation may be supported by consideration if, though capable of conferring a legal benefit on only one party, it can also confer a factual benefit on the other: e.g. where a buyer’s promise to pay more than the originally agreed price secures eventual delivery of goods when strict insistence on the original contract would have led to nothing but litigation.”

1. Mr Head submitted that in consideration for the payments made under the Agreement, Prime Education continued to owe a duty to EACS to deliver the project and Prime Education remained able and willing to perform its contractual obligations under the Agreement despite the difficulties encountered in running the project from the UK. EACS gained a benefit from overcoming the difficulties experienced in using the HSBC bank account for the client account by moving the operation of the project to Turkey. There was thus a mutual benefit in the Amended Agreement. There was a new obligation on Prime Education to find a new bank in Turkey.
2. It is submitted that the commercial benefit to EACS outlined above is sufficient to constitute consideration for the Amended Agreement. It is accepted that there was criticism of the approach in *Williams v Roffey* by the Supreme Court in *Rock Advertising,* but it is submitted that the argument is sufficient to constitute a real prospect of success on this issue.

**Discussion**

1. With regard to Mr Head’s preliminary point, it is stated in Shaban 3 at Paragraph 10 that “*The Purported Variation was not supported by consideration.*” Mr Shaban went on to analyse the financial effect of the purported variation at paragraph 11 [1/2/7]. It was not, however, part of the three grounds relied upon at paragraph 13, and expanded upon in paragraphs 15 to 35 [1/2/7-11]. I consider the reference in paragraphs 10 and 11 is sufficient to address Mr Head’s criticism, in particular as this is a point for legal argument, and he was more than able to deal with the point in oral submissions.
2. My conclusions in relation to whether there was any consideration for the Amended Agreement, are as follows, by reference to the capitalised headings in the Amended Agreement.
3. OFFICE IN LIBYA – Prime Education is no longer required to “*open an office in Libya*”. Under the 2015 Agreement it was Prime Education’s obligation to “*have an office during the Visa application process and will make sure students get the right support they need before they leave Libya*” That change was only of benefit to Prime Education.
4. CANCELLATION POLICY – the Amended Agreement provides that:

“If EACS cancels this contract for any reason, [Prime Education] will NOT refund any monies to EACS and will continue the contract only for any students who are enrolled on a course of study at the time of cancellation…. Any monies held by [Prime Education] for those students who have not yet enrolled in the course of study will not be refunded to EACS and will become cancellation penalty monies paid to prime education the cancellation of the contract. Any balance of funds held at the time of cancellation by [Prime Education] will then become the cash assets of [Prime Education] and EACS will no longer have any entitlement to the funds held.”

In contrast, the 2015 Agreement provides:

“If EACS cancels the contract after it has been signed and monies have been transferred to [Prime Education]. [Prime Education] will refund all course fees, accommodation fees and student salaries but will not refund any fees due to [Prime Education]. If EACS cancels the contract once the students have started their studies, only the course fees, accommodation fees and student salary balance remaining will be refunded back to EACS. No [Prime Education] fees will be refunded.”

This change in the cancellation policy was only of benefit to Prime Education and to EACS’s detriment. It was also already the case under the 2015 Agreement that EACS would continue to pay course fees for students already enrolled on a course, so there was no benefit to EACS in that provision.

1. STUDENTS WHO ARE EXPELLED OR FAIL THEIR COURSE - Prime Education’s obligation in the 2015 Agreement is:

“If a student is underachieving on their current course during the first year of study, [Prime Education] will re-assess the students abilities and will endeavour to find them a suitable alternative course which matches their skill set. The student will need to be able to meet the entry criteria of any new/alternative course.”

In the Amended Agreement this obligation is amended to:

“[Prime Education] will only find an alternative course for students who fail to pass the refreshment course and are unable to gain entry onto either an AML or ATPL course. The alternative course provided will be at the sole discretion of [Prime Education] and may not be for the same duration of time as the original intended course. [Prime Education]’s decision will be final in the circumstance of failed students. If any student is expelled, or is asked to leave either the refreshment course, AML or ATPL course due to underachieving or any misbehaviour, [Prime Education] will NOT find the students an alternative course in the course provider’s decision is final regarding the expulsion. It will be up to the students to deal with the deciduous and directly with EACS. No refunds will be given for the course fees or salaries of the students and the money will become the cash asset of [Prime Education] by way of a financial penalty imposed by [Prime Education] to EACS,”

 This change constitutes a detriment to EACS

1. CLIENTS ACCOUNT – the Amended Agreement negates the entirety of Prime Education’s obligations with regard to the HSBC client account set out at page 9 of the 2015 Agreement, and provides expressly:

“EACS’s funds will NOT be held in the clients account and EACS has no right to access or request the bank statements of [Prime Education] and all its subsidiaries…..[Prime Education] will look for an alternative bank who could provide such an account but no guarantees are given as it will be unlikely any bank will offer this service.”

Again this is a detriment to EACS.

1. ADDITIONAL AMENDMENTS WHICH SUPERSEDES ANY DETAILS RELATING TO THE FOLLOWING POINTS IN THE ORIGINAL CONTRACT - Prime Education’s obligation under the 2015 Agreement to apply for visas and to refund tuition fees on visa refusal [1/3/59-61] is reduced to an obligation that:

“If any students fail to successfully get a visa for the destination country, [Prime Education] will endeavour to find the student on alternative location where no visa is required for Libyan nationals. [Prime Education]’s decision will be final and accepted by EACS” [1/3/67].

1. There are other provisions which give Prime Education full autonomy in relation to its obligations in finding alternative/suitable courses for students, and a provision that removes EACS’s ability to change the list of names of students. In all respects it is provided that Prime Education’s decision will be final. All of the provisions in this section favour Prime Education and are to the detriment of EACS.
2. With regard to authorities relied on by Mr Head, *Ficom* involvedan amendment to a contract which required a letter of credit to be opened, and the terms of the letter of credit were held to be of mutual benefit to the parties. I have not been able to draw any assistance from *Ficom* in relation to the factual situation in this case*.*
3. The passage in Chitty cited by Mr Head refers by footnote to the decision in *Williams v Roffey.* In that case*,* in the judgment of Purchas LJ it was held (at 35) that:

“…..there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement………”

and

“with some hesitation… I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment.” (at 36).

1. Doubt was expressed with regard to this approach by Lord Sumption in *Rock*, *obiter,* at [18], where, referring to the above paragraph in *Williams v Roffey,* he stated:

“The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer* *(1884) 9 App. Cas 605:*… There are arguable points of distinction, although the arguments are somewhat forced. A differently constituted Court of Appeal made these points in *In re Selectmove Ltd* [1995] 1 WLR 474, and declined to follow *Williams v Roffey*. The reality is that any decision on this point is likely to involve a re-examination of the decision in *Foakes v Beer.*”

1. The practical benefits relied on by Prime Education in this case are the difficulties experienced in managing payments in and out of the HSBC bank account, and the agreement by Prime Education to set up a bank account in Turkey to resolve those difficulties. Prime Education’s evidence is that the problems experienced when the account was regularly frozen by HSBC led to the proposal to operate the project from Turkey, which it is submitted would be a practical benefit to both parties as EACS would find it easier to perform the project from PE Turkey. However, there is no evidence that EACS suffered any difficulties or detriment as a result of the operation of the HSBC account. There is also no evidence, for example, that Prime Education had threatened to withdraw from the 2015 Agreement unless new terms could be agreed, from which a pragmatic, commercial advantage to EACS could be derived if they would otherwise not have been able to complete the project. Although consideration does not have to be adequate, there must be some benefit to each party. Even if the obvious difficulties of the *Williams v Roffey* approach identified by Lord Sumption in *Rock* are ignored, and if I accept that it is an arguable approach to the point, I cannot see any commercial advantage to EACS in entering into the Amended Agreement, and only a detriment. The *Williams v Roffey* approach, outlined in Chitty at 4-081, requires a benefit to both parties. It follows that I do not consider that Prime Education has any real prospect of success in demonstrating that there was any consideration given for the Amended Agreement.
2. Mr Head also relies on the doctrine of promissory estoppel, i.e. where there is a compromise agreement, the agreement is binding if it would be inequitable for the creditor to enforce their strict legal rights (see *Collier* at [3]). In *Collier* there was no conclusive decision, and a finding only that the defendant had a real prospect of success in the promissory estoppel issue raised. In this case it is submitted, if my understanding is correct, that by agreeing to the terms of the Amended Agreement, EACS impliedly agreed that it would not seek recompense for breaches of the 2015 Agreement because it has represented by entering into the Amended Agreement that it would accept such breaches.
3. I agree with Mr Coppel that the facts in *Collier* were very different to the circumstances of this case, but that does not prevent the principle of promissory estoppel applying to the factual circumstances here. If the Amended Agreement is found to be valid, in my judgment there would just about be a real prospect of success in such a defence, as it could be reasonably argued that if EACS validly agreed to enter into an agreement to amend the 2015 Agreement, it implicitly agreed that it would not seek recompense for breaches of the 2015 Agreement, and that it would be unreasonable to renege on that, because Prime Education, relying on EACS’s implied representations, arranged new banking facilities in Turkey and arranged to run the project from Turkey, which would be in breach of the 2015 Agreement, and thus expose it to a claim for damages.
4. Although both Libyan law experts address the issue of consideration under Libyan law, there is disagreement between them as to the issue. In any event, it is agreed that for the purposes of this application English law applies to the Amended Agreement.
5. **Whether the Amended Agreement Amounts to a Penalty Clause and is Unenforceable**

Summary of Claimant’s Submissions

1. EACS relies on the provision in the Amended Agreement under “CANCELLATION POLICY” that:

“If EACS cancels this contract for any reason, without exception, [Prime Education] will not refund any money to EACS. Any money held by [Prime Education] for those students who have not yet enrolled on a course of study will not be refunded to EACS and will become cancellation penalty monies paid to [Prime Education] for the cancellation of the contract. Any balance of funds held at the time of cancellation by [Prime Education] will then become the cash asset of [Prime Education] and EACS will no longer have any entitlement to the funds held.” [1/3/66]

1. EACS had paid to Prime Education a total of €15,218,008.75 and £1,946,040,00. If Prime Education had performed the entirety of its obligations under the 2015 Agreement, out of this sum, Prime Education’s entitlement to fees would have been £339,480. The remainder was to be dispersed to pay third parties such as the aviation colleges. If EACS had terminated the agreement, the maximum extent of its loss would be £339,480.
2. In contrast the 2015 Agreement provides that:

“If EACS cancels the contract after it has been signed and monies have been transferred to [Prime Education]. [Prime Education] will refund all course fees, accommodation fees and student salaries but will not refund any fees due to [Prime Education]. If EACS cancels the contract once the students have started their studies, only the course fees, accommodation fees and student salary balance remaining will be refunded back to EACS. No [Prime Education] fees will be refunded.”

1. Thus under the Amended Agreement EACS loses the entitlement it had under the 2015 Agreement to a refund of fees and student salaries. It is accepted that in neither agreement was there any provision giving EACS a right to terminate. But a termination of the 2015 Agreement by EACS would give Prime Education a claim in damages, which would be limited to the loss suffered by reason of the termination. That would not include money that they would never have received because they were obliged to pay it on to third parties or to refund it to EACS.
2. In *Lewison: The Interpretation of Contracts* 5th edition, at 17.01, page 769, it is stated that:

“A penalty clause is a clause which without commercial justification provides for payment or forfeiture of a sum of money or transfer of property by one party to another in the event of a breach of contract, the clause being designed to secure performance of the contract rather than to compensate payee for loss occasioned by the breach.”

1. The contractual provision set out above, that if EACS were to cancel the agreement, Prime Education could keep for itself money that was to have been paid to the third parties, which would amount to €13,439,788.75 and £1,606,560 is extravagant, exorbitant and unconscionable. It constitutes a penalty and as such the Amended Agreement is void.

Summary of the Defendants’ submissions

1. it is submitted that the law on penalties has changed substantially since 2011 when *Lewison* 5th edition was published. In *Cavendish Square Holding BV v Talal El Makdessi*; and *ParkingEye Limited v Beavis* [2015] UKSC 67 [42], [152] and [241] the Supreme Court reconsidered the law on penalty clauses. It held that the law on penalties only applies to a sum payable on a breach of contract and not to a sum payable where one party exercises a right under the contract. This principle was applied in *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [467 – 468]. See also *Berg v Blackburn Rovers Football Club* [2013] EWHC 1070 (Ch) at [34].
2. The Amended Agreement states expressly that EACS can cancel at any time if it wishes to do so by writing to Prime Education. On a proper construction, early termination by EACS is therefore not a breach of contract. It is simply a voluntary exercise of a right in the contract to terminate it at any point. Using the *Cavendish* analysis of terms (at [14]), there is no “secondary obligation”. Insofar as EACS’ waiver of its right to repayment of any sums held by Prime Education can be described as an obligation at all, it is a primary obligation which is conditional on EACS exercising its right to cancel. The law on penalties does not apply to the Cancellation Clause at all.
3. The fact that monies payable on cancellation is described as a penalty in the Amended Agreement, does not make the clause a penalty clause. See *Cavendish* at (15):

“….the classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it.”

1. In any event (even if it were triggered by a breach of contract, which it is not) Prime Education’s right to retain monies held by it cannot be said to be payment of an “*agreed sum*” of money, because what is paid (if it can be said to be paid at all) depends on what is remaining of the sums paid to Prime Education at the point in time when the contract is cancelled by EACS. It may be very little, or nothing at all.
2. Even if the cancellation clauses were subject to the law on penalties the court would need to consider whether Prime Education had a legitimate interest in the performance of the contract and, if so, whether the relevant provision made for such interest is “*nevertheless in the circumstances extravagant, exorbitant or unconscionable*” (see *Cavendish* at [152]). As this would depend on the timing of cancellation (a decision exclusively within the control of EACS) and the relative value of the sums held for students not enrolled on courses and the performance still to be rendered in respect of students already enrolled on courses, it would be impossible to assess at the time the contract is concluded whether the sum is extravagant. In any event, this enquiry is a factual matter for trial.
3. Even if the Cancellation Clause is an unenforceable penalty, the clauses in the Amended Agreement dis-applying the Client Account Terms would still stand. It is those clauses which are the basis of EACS’ pleaded case against PE for breach of the 2015 Agreement. The pleaded case is not about the effect of cancellation by EACS: see Particulars of Claim Paras. 27-35 [2/13/571] where there is no allegation that EACS relies on the original cancellation clause in the 2015 Agreement, and Response to Request for Further Information para.10.4 [2/21/764] where EACs alleges that the 2015 Agreement was brought to an end by repudiatory breach, rather than reliance on the cancellation clause. Accordingly the rule on penalties is not engaged.
4. In any event, even if the clause was a penalty it would only be the particular clause which was enforceable and not the whole agreement. The submission that the whole agreement is void and of no effect is wrong, and the remainder of the agreement would be effective: see *Berg v Blackburn* at [34].
5. The Particulars of Claim does not plead a claim for breach of contract, as this was pleaded before EACS received the Defendants’ evidence, the first time they were aware of the existence of the Amended Agreement. However, there has been no amendment to plead reliance on the cancellation clause in the 2015 Agreement, nor could there be, on the evidence, and on the basis of the pleading at para.10.4 of the Claimant’s Response to Request for Further Information [2/21/764]. There is a more than arguable case, and certainly one with a real prospect of success, that:
	1. the cancellation clause, even if found to be an impermissible penalty, would not render the entire Amended Agreement unenforceable;
	2. there is no reliance on the cancellation clause in the 2015 Agreement in the pleaded case;
	3. the consequence of the decision in *Cavendish* is that the law on penalties applies only where a sum is payable on a breach of contract, and not a sum payable where one party exercises are right under the contract;
	4. whether Prime Education had a legitimate interest in the performance of the contract, and if so, whether the relevant provide provision made for that interest is unconscionable.
6. Accordingly, there is a real prospect of success in a defence that the Amended Agreement would not be unenforceable on this basis.

**Discussion**

1. I accept the submissions of Mr Head that the arguments put forward provide a real prospect of success in demonstrating that the cancellation clause is not an unenforceable penalty.

**Claim for monies transferred to PE Turkey prior to Amended Agreement**

1. Finally, EACS submits that the monies totalling €8 million transferred to PE Turkey between March and May 2016, all prior to the Amended Agreement dated 22 July 2016, were paid in breach of the 2015 Agreement and it is entitled to judgment for those sums in any event.

**Discussion**

1. Paragraphs 18.5 to 21 of the Defence [2/14/634 to 635] plead reliance on an oral agreement with EACS in about March 2016 agreed in telephone calls between Mr Shubana and Mr Sekerci, whereby it is alleged that it was agreed that the Transferred Money would not be held in the client account for EACS, but would be held by Prime Education for its own account and that Prime Education would transfer funds to PE Turkey so that the remaining parts of the project could be run from Turkey. The evidence in Sekerci 1 (Paras.57 – 59 [1/10/281-282]) supports the pleading in the Defence. No Reply has yet been served in response to that pleading as the time for serving a Reply is when Directions Questionnaires are served under CPR 15.8.
2. If the Defendants’ case rested entirely on this oral agreement the court might have come to the conclusion that, although oral evidence should usually be heard only at trial, if the Court were to conclude that evidence relating to the alleged oral agreement is not credible, it could nevertheless grant summary judgment. However, the subsequent written agreement gives sufficient support to the credibility of the alleged prior oral agreement, in my judgment, for the purposes of passing the threshold test of a real prospect of success in reliance such that I will not grant summary judgment in respect of those payments, alternatively that there is a compelling reason for that issue to proceed to trial, namely for oral evidence to be given.

**The Claims against Mr and Mrs Sekerci and York Property**

Summary of the submissions of EACS

1. It is submitted that the principles applicable to the claim are not contentious and are as follows:
	1. A third party to a trust who has received no trust property personally can be liable to account if he has provided dishonest assistance in a breach of trust: *Twinsectra v* *Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Royal Brunei Airlines v Tan* [1995] AC 378.
	2. The trust need not be a formal trust and it is sufficient that there should be a fiduciary relationship between the trustee and the property of another person. Thus, directors of a company in consequence of the fiduciary duties which they owed to the company are treated as if they were the trustees of the company’s property under their control: *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001], 1 BCLC 531. This also applies to employees whose fiduciary position within the company gave them control funds or enabled them to misapply funds: *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 566–567.
	3. Liability is not dependent upon receipt of trust property: it arises even though no trust property has reached the hands of the third party: *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Royal Brunei Airlines v Tan* [1995] AC 378.
	4. The stranger to the trust must act dishonestly: *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Royal Brunei Airlines v Tan* [1995] AC 378. In the context of accessory liability, acting dishonestly simply means not acting as an honest person would in the circumstances. It is an objective standard, so a morally obtuse defendant with lower standards cannot escape liability: *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords)* [2017] UKSC 67, [2018] AC 391.
	5. The third party need not be aware of the precise details, so long as he is aware that he is involved in some sort of wrongdoing or behaviour that he accepts the risk of it being wrongful: *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 295 (affd [1991] Ch 547 at 569); *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 at [28]; *Abou-Rahmah v Abacha* [2006] EWCACiv 1492, [2007] 1 All ER (Comm) 827 at [39].
	6. The trustee and the dishonest assistant are jointly and severally liable for losses arising from the breach of trust: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1600]; *Ffyes Group Ltd v Templeman* [2000] 2 Lloyd’s Rep 643 at 668.
2. It is submitted that Mr and Mrs Sekerci are and were each directors of Prime Education and York Property and persons with significant control over those companies. They set up Prime Education which had just two employees. Mr Sekerci was also a director of PE Turkey, a Turkish company in which he has a 50% interest [1/10/271, 282 §§8, 63a]. Mrs Sekerci has fully aligned herself with Mr Sekerci.
3. PE Turkey is the recipient of large amounts of money that EACS have transferred, as EACS believed, to the client account of Prime Education designated for the sole purpose of paying tuition and other fees of the aviation colleges and related expenses [1/10/281, 282, 287 §§57- 58, 63a, 84].
4. Mr Sekerci signed the Amended Agreement on behalf of Prime Education [1/3/67]. He knew that the stated effect was to take money totalling €14,773,508 and £1,946,040 that EACS had transferred to the client account designated by Prime Education so that it could be transferred and used by Prime Education for other purposes [1/10/298 §126(e); [2/18/681 §32]. Mr Sekerci knew very well that large amounts of the Transferred Money was used for a purpose that had absolutely nothing to do with training Libyan nationals that was of absolutely no benefit whatsoever to the Libyan public, namely, speculative private property developments in Turkey owned by PE Turkey [1/10/287 §§86- 89]. In fact, since engaging in that speculation, there has been “*significant deterioration of the Turkish economy in 2018 which is impacted both on the value of the lira and of the liquidity of assets within Turkey*”, a loss that falls to be borne by EACS [1/10/288 §90]. Thus, Mr and Mrs Sekerci each procured and/or knowingly and/or dishonestly assisted Prime Education in a breach of trust, that is the evacuation of EACS’s money from Prime Education’s client account.
5. It is submitted that this is sufficient to make out dishonest assistance on the part of Mr and Mrs Sekerci, and neither of them have any legitimate answer to this. An honest person would have been put on inquiry by the circumstances.
6. At the time during which Prime Education held the Transferred Money, York Property became the recipient from Prime Education of unsecured interest-free loans totalling £448,847 [1/5/106 §8]; [1/5/128]. The only possible ultimate source for the loan is the Transferred Money. Mr Sekerci’s explanation is unconvincing [1/10/288 §93] and is unsubstantiated by the cited documents [2/11/433-441]. Mrs Sekerci is the only director of York Property [1/5108, 125]. York Property is a property development company which, at the time of the injunction, Mr and Mrs Sekerci “were in the process of shutting down” [2/20/734 §9-10]. Mr and Mrs Sekerci claim that the loan has been repaid [1/10/288 §93, 126(e)]; [2/20/734 §10], but provide no convincing evidence to vouch it, and in any event it does not negate the dishonest assistance. The loan of £448,847 is a paradigm instance of dishonest receipt of money in breach of trust. York Property has no sensible answer to this.

Summary of the submissions of Mr and Mrs Sekerci and York Property (“the remaining Respondents”)

1. It is submitted that the evidence does not explain on what basis it is alleged that a finding that the Amended Agreement is invalid because of technical provisions of Libyan law would mean that the remaining Respondents do not have arguable defences to the particular claims advanced against them for dishonest assistance in a breach of trust and unlawful means conspiracy to defraud EACS.
2. It is submitted that these causes of action involve entirely different issues than those in the claim against Prime Education, including issues as to their specific intent and dishonesty, none of which is a function of the technical points of Libyan law advanced in the application. For the dishonest assistance claims against Mr and Mrs Sekerci, a court would need to “*ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts*”: *Ivey v Genting Casinos (UK) Limited* [2017] UKSC 67 at [74]. The cause of action for inducing a breach of contract similarly requires knowledge of the existence of the contract and an intention to breach the contract (see *Clerk and Lindsell on Torts* (22nd edn); paragraph 24-15). An intent to injure the Claimant is also an essential requirement for the unlawful means conspiracy claim (see *Clerk and Lindsell on Torts;* paragraphs 24-99 to 24-100 and *Houghton & ors v Fayers & ors* [2000] Lloyds Rep 145 citing *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685 at [16]).
3. The application does not set out any factual or evidential basis for a finding of dishonesty, intent to induce a contact breach or intent to injure on the part of Mr and Mrs Sekerci or (by attribution) York Property.
4. The fact that EACS (represented by Mr Shubana) expressly agreed in writing that the funds would not be held in a client account for EACS but would be held in accounts in the name of Prime Education and its subsidiaries, and specifically knew about, and consented to, the funds being transferred to PE Turkey, means that there is no basis at all for these claims. If the Amended Agreement was invalid by reason of absence of the NAB Approval, Mr and Mrs Sekerci did not know this in 2016. They had not heard of any requirement for NAB Approval then [2/18/648 §19] and [2/20/740 §42].
5. Further, the sequence of events in relation to the transfer of the funds to PE Turkey is not consistent with the actions of a dishonest person. Far from seeking to hide the transfer of funds to PE Turkey, Prime Education’s publicly filed accounts made it clear that this had happened. The accounts for the year ended June 2017 evidence the transfer of £11,179,822 to PE Turkey [2/11/438-439]. For accounting purposes, this was recorded as an intra-group loan. This was subsequently amended in the accounts for the year to June 2018. The June 2018 accounts were filed at Companies House (and available to the public) from 12 December 2018 [2/11/449-450] before these proceedings began.
6. It is well-established that questions about subjective beliefs / honesty are unsuitable for a summary judgment application: see *Wrexham Association Football Club v Crucialmove Limited* [2006] EWCA Civ 237 at [51][57] and [58].

**Discussion**

1. The claims against Mr and Mrs Sekerci as set out in the Particulars of Claim are: (i) knowing and/or dishonest assistance in the breach of trust by Prime Education, (ii) inducing Prime Education to breach the 2015 Agreement and unlawful means conspiracy to defraud EACS. The claims against York Property are (i) knowing receipt/accountability as constructive trustee and (ii) unlawful means conspiracy to defraud EACS (POC paragraphs 39-58 [1/13/573-576]. Given my conclusion that Prime Education has a real prospect of success in its defence relying on the Amended Agreement, and/or there is a compelling reason for the claim to proceed to trial, it would clearly not be possible to enter summary judgment against the Second, Third and Fifth Defendants to the application, because the claims against those Defendants are parasitic on the claim against Prime Education. However, since it was fully argued, I confirm that I would not grant summary judgment against the Second, Third and Fifth Defendants for the following reasons.
2. The question of dishonest assistance in a breach of trust was considered in the case of *Ivey v Genting.* In paragraph 62 Lord Hughes cited what he described as the “*test clearly established… in Barlow Clowes by Lord Hoffmann”*, as

“Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards the defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.”

1. At paragraph 74 of *Ivey v Genting* Lord Hughes went on to say:

“…..When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to fax is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

1. Mr Coppel submits that EACS can proceed on the basis of what Mr and Mrs Sekerci says is true, and the court can then decide whether that was an honest belief on an objective basis. Mr Head submits that when the Amended Agreement was entered into the Second, Third and Fifth Defendants would not have any reason to believe that what was agreed was wrong because they knew that Mr Shubana had approved the Amended Agreement.
2. In *Wrexham* Sir Peter Gibson (with whom all members of the Court of Appeal agreed) stated at paragraph 51:

“The Judge was well aware that the conclusion that a party has not acted in good faith generally to be reached at trial… However, it has not been suggested that that conclusion can never be reached on the summary judgment application, and it must depend on the circumstances of the particular case whether the point can be decided without a trial.”

1. At paragraphs 57 to 58 the President of the Queen’s Bench Division (as he then was) considered, (citing his comments in *Esprit Telecoms UK Ltd v Fashion Gossip Ltd* unrep. 27 July 2000) the question as to whether summary judgment should be entered in a case where “*the success of the claimant’s case involves establishing allegations of dishonesty and fraud, which are strongly denied, and which cannot be conclusively proved by, for example, a conviction before a criminal court*.” He concluded that whether or not in any particular case there is a compelling reason for allowing the case to proceed to trial or, one factor to be constantly borne in mind as to whether summary judgment is appropriate is the importance of a finding adverse to the integrity of one of the parties.
2. Mr Head also referred to comments in the authorities that cases of fraud sometimes disintegrate at trial so the court should be cautious about granting summary judgment in cases involving dishonesty.
3. On the face of the undisputed facts there appears to be a prima facie situation of an attempt to defraud EACS, involving the collusion of Mr Shubana. I note the remarks of Mrs Justice Yip at the return date for the injunction application on 11 January 2019, which supports this, namely:

“This is particularly extraordinary in circumstances where the value of the student disbursements was so significantly in excess of the fees chargeable by the first defendant. It frankly appears fanciful that the claimant could genuinely have intended that the first defendant should stand to obtain a windfall measured in millions of pounds” [2/17/666 §19].

1. I note also the failure of Mr Sekerci to mention the fact of the Amended Agreement or the transfer of funds to PE Turkey in his report to the Libyan Foreign Ministry dated 8 May 2017 (TS1) [1/11/427 – 430] following the meeting on 25 April 2017 (Al Banghazi 1 para. 31) [1/6/151], However, he could have assumed that EACS was aware of this, and his report stated: “*Due to these problems, we decided to run the French part of this project from our Prime Education Turkey company and since we made this decision, all money transfers have been running smoothly.*” [1/11/429]. I note that there was no explicit reference in that report to the transfers of funds in March 2016, but that sentence should have put EACS on enquiry. Mr Sekerci’s evidence that there was no follow-up or further instructions from EACS following the submission of that report until a letter of claim from solicitors acting for EACS in December 2018 is not disputed (Sekerci 1 paras. 80-81, 106) [1/10/286, 293-294], and Mr Shaban’s evidence is that enquiries have established that such a report may have been sent to the Libyan embassy, but it is not been possible to locate a copy (Shaban affidavit paragraphs 47) [1/4/81]. The evidence from EACS explaining that period of non-activity is in Mr Shaban’s affidavit at paragraphs 48 to 50 [1/4/81] explaining the difficulties of a government operating efficiently in Libya, described as “a country in turmoil”. His firm was first instructed in March 2018. There was then a delay until December 2018 when the injunction application was made.
2. The situation is also complicated by the participation of Mr Shubana in what EACS perceive, perhaps correctly, as an attempt to dishonestly appropriate its funds. In my judgment it is an argument with a real prospect of success that Mr Shubana had actual and/or ostensible authority to bind EACS, (and that was not argued otherwise by Mr Coppel at the hearing). EACS have provided no evidence as to what has occurred in relation to Mr Shubana, beyond saying that he was dismissed as CEO and replaced by Mr Ghammoudi in about October 2016 (Al Banghazi 1 para. 13) [1/6/47]. At paragraph 34 Captain Al Banghazi states:

“I am aware that various criminal investigations have now been commenced in Libya arising out of this matter.” [1/6/151]

1. No further details are provided. No evidence is provided as to what investigations were made, or information ascertained, that led to Mr Shubana’s dismissal and what contact, if any, there has been with Mr Shubana following his dismissal. That witness statement was made in December 2018 and although a statement in response was made by Captain Al Banghazi in January 2019 [1/8/253], no further information in this regard was provided. I do not know whether any civil or criminal proceedings have been brought against Mr Shubana or any other person in Libya. But I must assume that if that had been the case EACS would be aware of it and would have informed the court.
2. Those circumstances are sufficient, in my judgment, to provide a compelling reason why the claim against the Second, Third and Fifth Defendants should proceed to trial, and summary judgment should not be entered against them. I do not consider it would be appropriate for the court to enter summary judgment against those Defendants without hearing the oral evidence of Mr and Mrs Sekerci, and any further evidence that can be provided by EACS to assist the court.

**Conclusion in respect of the application**

1. Although on a superficial assessment of the facts this might appear to be, as Mr Coppel submitted “a paradigm case for summary judgment”, having been taken through a detailed examination of the law with the considerable and skilled assistance of leading counsel for all parties, it is clear that the legal position is extremely complicated, and also that the court would be considerably assisted by disclosure and by oral evidence. Mrs Justice Yip’s initial view at the short hearing before her in January 2019 has proved to be correct, that the issues involved in determining the validity of the Amended Agreement, and the honesty or otherwise of the Defendants are not suitable for summary determination. Accordingly, the application for summary judgment is dismissed. I propose to hand down judgment at a hearing where directions for trial can be made so that this matter can proceed more promptly than it has done thus far.