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Berwin Leighton Paisner LLP
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By Email and Courier

25 June 2012

Dear Sirs

Cathal Lyons v Ernst & Young Europe LLP, Ernst & Young (EMEIA) Services Limited, Ernst & Young (CIS) BV Moscow Branch and Others
Claim No: HC11C00546

Please find **enclosed** by way of service, the witness statement of Kelly John Tinkler. The exhibit ("KJT1") will be sent by hard copy only.

We will be relying upon the witness statement at the hearing on 28 June 2012.

Yours faithfully

SGHM

SGH Martineau LLP

IN THE HIGH COURT OF JUSTICE **CLAIM NO. HC11C00546**

CHANCERY DIVISION

BETWEEN

Cathal Anthony Lyons

Claimant

-and-

(1) Ernst & Young Europe LLP
(2) Ernst & Young (EMEIA) Services Limited
(3) Ernst & Young LLC
(4) CJSC Ernst & Young Vneshaudit
(5) Ernst & Young Valuation LLC
(6) Ernst & Young Business Advisory Services LLC
(7) Ernst & Young Valuation Advisors LLC
(8) Ernst & Young (CIS) Limited
(9) CIS Luxembourg SA
(10) Ernst & Young (CIS) BV Moscow Branch

Defendants

WITNESS STATEMENT OF KELLY JOHN TINKLER

I, **KELLY JOHN TINKLER,** Solicitor, of One America Square, Crosswall, London EC3N 2SG.

WILL SAY AS FOLLOWS:

1. I am a partner in the firm SGH Martineau LLP, solicitors for the Claimant, and I make this witness statement for the purposes of the hearing on Thursday 28 June 2012 at which the Second Defendant's application to contest the jurisdiction of this Court will be heard. As appears below, the Second Defendant has now abandoned that application. However, the Second Defendant refuses to pay the substantial costs associated with its Jurisdiction Application challenge, and so the Claimant will be making an application at the hearing for the usual order that the Second Defendant to pay his costs of the application (on the indemnity basis, for the reasons explained below). The Claimant claims costs on the straightforward basis that costs should follow the event, and now that the Second Defendant has abandoned its Jurisdiction Application it should pay the costs. At a hearing on 19 April 2012 Master Price noted that, in the absence of exceptional circumstances, the Claimant's costs of the

abandoned Jurisdiction Application should be paid by the Second Defendant. As explained below, there are no exceptional circumstances and so costs should follow the event in the normal way.

2. I also take the opportunity to respond to the first witness statement of Lisa Mayhew served late on 22 June 2012 in connection with the Jurisdiction Application (this witness statement appears to be an attempt to identify "exceptional circumstances" as to why the Second Defendant should not have to pay the costs of the Jurisdiction Application). As explained below, Ms Mayhew's witness statement contains a number of incorrect, misleading and/or irrelevant matters and seeks to portray the Claimant and his solicitors as the ones at fault. This impression is wholly incorrect, and in this witness statement I propose to redress the balance so that the Court has the true and complete picture. As will be seen, Ms Mayhew has been very selective in her evidence, and she has seriously distorted the true position. There are no exceptional or other circumstances to justify the Second Defendant from escaping from the consequences of the usual costs order.

3. In addition, at the hearing on 28 June 2012 the Claimant seeks an unless order against the Second and Tenth Defendants in respect of their failure to comply with the Court's disclosure order dated 16 May 2012 (the Claimant also seeks his costs of this application).

4. The Claimant also seeks his costs of the Second and Tenth Defendants' security for costs application (made without warning) dated 11 April 2012.

5. Finally, the Court will be invited to make directions for the future progress of this action at the hearing on 28 June 2012.

6. There is now produced and shown to me marked Exhibit **"KJT 1"** a paginated bundle of copy documents to which I shall refer in this witness statement by page number.

Background to the claims in the proceedings

7. The background is largely taken from the Claimant's witness statement dated 16 March 2012 opposing the Second Defendant's application for a stay. The Claimant was a partner in Ernst & Young from 2002 moving to the CIS Practice to Moscow in 2004. On 17 June 2006 (i.e. just over 6 years ago) he suffered a very serious road traffic accident while returning from an Ernst & Young training day. He had to have a

partial amputation of both his right foot and shoulder and has had further amputations. The current prognosis is that he will require further amputations to his foot and shoulder. The consequence of the accident was that the Claimant was incapable of working full time, and so he returned to work a few months after the accident on a part-time basis.

8. At the time of the Claimant's accident, it is understood that Ernst & Young had placed cover, on behalf of its partners (including the Claimant), for Long Term Disability ("LTD") and Accidental Death & Dismemberment ("AD&D") with Colonial Medical Insurance and AGF. From 1 July 2006 it is understood that such cover was placed with Generali (see Lyons paragraph 13). The Claimant believes that he is entitled under one or other of these policies to US$300,000 per annum (approximately US$6,000,000 over 20 years) and/or a lump sum payment.

9. Following a further amputation in 2009 the Claimant determined, having taken medical advice, that he could not continue to work for Ernst & Young. In consequence, he concluded an agreement evidenced by a document headed "Agreement" (the "Settlement Agreement", annexed to the Defence) signed in April 2009 which provided the terms on which it was agreed he would give up his partnership and his function as Chief Financial Officer of the Ernst & Young CIS Practice with effect from 30 June 2009. At the time the Claimant was an employee of the Third to Eighth and Tenth Defendants and he was a director of the Ninth Defendant.

10. The Settlement Agreement also included a term which was of critical importance to the Claimant, given his medical condition following his accident in 2006, as follows:

> *"So long as Mr Lyons is alive, the Practice will take all such steps as are necessary to ensure that Mr Lyons is included as an individual into the CIGNA medical insurance coverage that is now currently available to partners. Procedures will be put in place to ensure that the person responsible for Partner medical insurance is aware of this arrangement and confirmation of Mr Lyons' coverage will be sent to him every year or upon his request. No change in insurance carrier for Partner medical insurance will be made unless it accepts Mr Lyons and agrees to the same or better coverage now in effect..."*

11. The Settlement Agreement provided that, with effect from 1 July 2009, the Claimant should be employed as a consultant by the Ernst & Young CIS Practice indefinitely and that such could not be terminated *"except by agreement with Mr Lyons or as*

specified in his employment agreement." As a result of the Settlement Agreement, the Claimant's employment with the Third to Eighth Defendants terminated on 3 July 2009, his directorship of the Ninth Defendant ceased but he continued as an employee of the Tenth Defendant. In addition, the Claimant entered into a new service agreement with the Third Defendant dated 1 July 2009.

12. In paragraph 9 of her first witness statement, Ms Mayhew says that the Settlement Agreement is invalid because it was made by Mr Turowski on behalf of the "Ernst & Young CIS Practice" and no such legal entity exists (it is unclear whether she means just as a matter of Russian law, or both English and Russian law). However, the Settlement Agreement says in the first paragraph that it is between the Claimant and "the firms constituting the Ernst & Young CIS Practice", and in the final paragraph it says that it is binding on "all Ernst & Young entities for which Philipp Turowski has a power of attorney". In the Second and Tenth Defendants Further Information dated 20 June 2012 they set out in paragraph 2.1 those Ernst & Young entities for which Mr Turowski held powers of attorney at the relevant time, and these included the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Defendants. Accordingly, the Claimant says that the Settlement Agreement is valid because it is clear from its terms which Ernst & Young entities are bound by it (and these include each of the Third to Tenth Defendants).

13. In September 2009 the Claimant became aware of a suspicious payment of the Rouble equivalent of about €120,000 to a law firm called "Liniya Prava" which had been authorised by Ernst & Young's CIS Practice's Managing Partner, Karl Johansson.

14. This was investigated by James Mandel who was at the time the General Counsel of the Tenth Defendant. He concluded that the principals involved in making the payment could not provide a satisfactory justification for it and were concealing its real purpose (see Mr Mandel's witness statement at paragraph 23.3). However, Mr Johansson advised Mr Labaude, General Counsel to the Second Defendant, that the monies were payment purely for legal services and Mr Labaude immediately closed the investigation. This was despite the fact that there was no evidence to support Mr Johansson's statement.

15. Believing the review conducted by Mr Labaude to have been a "whitewash", the Claimant met with Maz Krupski from the Global Finance Tax and Statutory Department of Ernst & Young London office in May 2010 to express his concerns

about the investigation. Subsequently, Mr Mandel also spoke to Mr Krupski. Mr Krupski then spoke to Mr Labaude, following which Mr Mandel and the Claimant received a number of irate calls from him. Relatively shortly thereafter, they were both informed that their contracts of employment with Ernst & Young were to be terminated. They were both, therefore, being "crushed" (to adopt the threatening words used by Mr Labaude in a telephone conversation with Mr Mandel) because they dared to be whistle-blowers. This was also in clear breach of Ernst and Young's own Anti-Bribery and Anti-Corruption policy.

16. Ms Mayhew complains in her witness statement (paragraph 3(4)) that the allegation of corruption against Ernst & Young has not been pleaded. This is clearly incorrect: It is referred to in paragraph 16 of the Amended Particulars of Claim (as was pleaded from the outset in the original Particulars of Claim), and it is also extensively referred to in the Further Information served by the Second and Tenth Defendants dated 20 June 2012. It is also being pleaded in the Reply. The allegations of corruption and whistle-blowing are central to the claim, as on the Claimant's case, this is why the Defendants have treated him as they have.

17. Not only have the Defendants (wrongfully and in breach of the Settlement Agreement and in breach of contract) terminated the Claimant's employment contracts, the Second Defendant has procured those breaches. In addition (and as procured by the Second Defendant), the Defendants have:

    17.1. contrary to the express terms of the Settlement Agreement, refused to include him in the CIGNA medical health insurance scheme of which the Claimant was supposed to have the benefit until his death (and the Defendants have not provided him with any alternative);

    17.2. refused to progress his claims against LTD insurers and AD&D insurers or to provide him with relevant documentation which would permit him to progress such claims (this led to the Claimant's application for specific disclosure and the Court's order of 16 May 2012 which the Second and Tenth Defendants still have not fully complied with, hence the Claimant's current application for an "unless" order which is dealt with below).

Ms Mayhew's false and misleading evidence to the Court about the jurisdiction application

18. Ms Mayhew has, regrettably, given false and incorrect information to the Court in her first witness statement about the Second Defendant's Jurisdiction Application (abandoned by the Second Defendant on 11 April 2012 – see page 45 of Ms Mayhew's exhibit).

19. Ms Mayhew says in her first witness statement (paragraph 15) as follows:

> *"It is important to emphasise that the basis for the application was not that the English Court lacked or should decline jurisdiction* ***in respect of the claim against the Second Defendant,*** *but simply that it was expedient that the primary claims against the other defendants should be tried first"* (Ms Mayhew's emphasis).

20. She then goes on to refer to two "Volte Face" allegedly performed by the Claimant. The first alleged "volte face" (paragraphs 24 – 26 of Ms Mayhew's statement) was the Claimant serving the Claim Form and Particulars of Claim on the Tenth Defendant on 8 March 2012. Ms Mayhew says (paragraph 26) that it thus:

> *"became apparent* ***for the first time*** *that the Claimant intended to pursue his primary claim for breach of contract against at least one defendant in England."* (my emphasis)

21. The second alleged "volte face" (paragraphs 27 – 30 of Ms Mayhew's statement) was the Claimant undertaking on 27 March 2012, at the Second Defendant's request, not to commence proceedings against the Defendants in Russia or anywhere else in the world.

22. Ms Mayhew's evidence as summarised in the three preceding paragraphs is false and incorrect because, as I believe Ms Mayhew well knows:

    22.1. the Second Defendant's Jurisdiction Application was launched on the incorrect basis that (according to the Second Defendant) the action should be stayed in England because Russia, not England, was the *forum conveniens* for the claims for breach of the Settlement Agreement,

    22.2. the Second Defendant knew full well at all times that the Claimant intended to pursue these claims in England and only in England; and,

22.3. there was no "volte face" by the Claimant because:

22.3.1. service of the Claim Form and Particulars of Claim on the Tenth Defendant was entirely consistent with the Claimant's position all along that these claims should be tried in England and only in England, and

22.3.2. it has never been the Claimant's intention that these claims should be tried anywhere other than England, and so the undertaking given by the Claimant (which the Claimant says was in any event unnecessary) adds nothing, and was certainly not any form of "volte face": it merely confirmed that which had been obvious all along.

23. In the following paragraphs I develop these points in a little more detail for the assistance of the Court.

24. It is clear from the evidence that the Second Defendant has been fully aware from the outset that the Claimant intended to pursue these claims in England and only in England. In this regard I would refer to the following specific matters:-

24.1. The Claimant commenced all of his claims against the First to Ninth Defendants in the English Court by issuing the Claim Form on 9 March 2011 (**pages 3 to 5**). This of itself clearly indicated that the Claimant was intending to pursue all of his claims against these Defendants in England and not in Russia.

24.2. The core of the claim, as set out in the Claim Form which was served on the Second Defendant by letter dated 14 June 2011 (**pages 1 to 2**), was the allegation that the Defendants had breached the Settlement Agreement. It was therefore clear from the Claim Form that the Claimant wanted the allegation of breach of the Settlement Agreement to be tried in England.

24.3. On 6 July 2011 the signed Particulars of Claim were served on the Second Defendant (**page 7**) (unsigned Particulars had been served on 30 June 2011). In paragraph 8 of the Particulars of Claim (**pages 8 to 12** of exhibit "KJT1") it was pleaded that it was an implied term of the Settlement Agreement that the Settlement Agreement was subject to the exclusive jurisdiction of the English Courts. Accordingly, the Second Defendant can have been in no doubt from 6

July 2011 that the Claimant's position was that all claims concerning breach of the Settlement Agreement had to be tried in England. There was absolutely no question of these claims being tried in Russia.

24.4. Also on 6 July 2011, the Claimant issued an application notice to join the Tenth Defendant to the proceedings and amend the Claim Form. The application notice and Amended Claim Form are at **pages 20 to 24** of exhibit "KJT1". These documents made it clear beyond any doubt that the Claimant was proposing to sue the Tenth Defendant in England (not in Russia) for breach of the Settlement Agreement, and the amendments to the Claim Form also made it clear that similar claims against the Third to Eighth Defendants were also being pursued by the Claimant in England (and not in Russia). These documents were served on the Second Defendant on 6 July 2011 (see the letter from Fox Williams (the Claimant's then solicitors) – dated 6 July 2011 (**page 7**)). Accordingly, as from 6 July 2011, the Second Defendant was fully and unequivocally aware that the Claimant was pursuing his claim against the Tenth Defendant in England and that all claims in connection with the breach of the Settlement Agreement were being pursued in England, not in Russia.

24.5. On 19 July 2011 the Second Defendant filed its Acknowledgement of Service (**page 16**). In its Acknowledgement, the Second Defendant ticked the box saying it intended to contest the jurisdiction of the English Court. Accordingly, by 19 July 2012 (and in the face of the clear evidence that the Claimant wanted his claim for breach of the Settlement Agreement to be tried in England), the Second Defendant had nailed its colours to the mast and decided to contest the jurisdiction of the English Court.

25. In the light of the above, Ms Mayhew cannot be believed when she says in paragraph 12 of her first witness statement that the basis of the Second Defendant's application for a stay was:

> *"not that the English court lacked or should decline jurisdiction in respect of the claim against the Second Defendant but simply that it was expedient that the primary claims against the other defendants should be tried first."*

26. At that stage (19 July 2011) the Claimant had made it clear that he was pursuing all the claims against all of the Defendants in England and that the Settlement

Agreement required all such claims to be pursued in England (because of the exclusive jurisdiction provisions). The Second Defendant had made it equally clear (by ticking the box on the Acknowledgement) that it intended to contest the jurisdiction of the English Court (on *forum conveniens* grounds). It follows that Ms Mayhew cannot be believed when she says (in paragraph 17 of her witness statement) that there was:

> *"a potential risk that there would be concurrent proceedings in England and Russia, involving identical issues of fact and law as to whether there was any underlying breach of contract."*

27. There was no question, ever, of any proceedings in Russia by the Claimant, and this was clear from paragraph 8 of the Particulars of Claim and the application to join the Tenth Defendant and amend the Claim Form which had been served on 6 July 2011.

28. On 16 September 2011 the Second Defendant issued its Jurisdiction Application. By this time, the Claimant had obtained permission pursuant to his application dated 6 July 2011 (see above) to join the Tenth Defendant and to amend the Claim Form. The Court's Order was dated 8 August 2011 and Fox Williams notified BLP of the outcome on 9 August 2011 by email. On 19 August 2011 Fox Williams served Deputy Hoffmann's order on BLP joining the Tenth Defendant to the English proceedings and amending the Claim Form (**pages 28 to 39**). Accordingly, again as at 19 August 2011 (before the Jurisdiction Application) the Second Defendant can have been in no doubt about the Claimant's intention to pursue all claims in England and not in Russia.

29. In the meantime, the Claimant sought the Second Defendant's co-operation to serve the English Amended Claim Form on the Tenth Defendant. By letter dated 12 August 2011 Fox Williams wrote to BLP (**page 32**) saying:

> *"At the hearing on 8 August, the Master suggested that your firm might well agree to accept service on behalf of the Tenth Defendant, given that you are already on the record for the Second Defendant."*

30. The letter went on to invite BLP to accept service on behalf of the Tenth Defendant, and the letter concluded with Fox Williams asking BLP to confirm whether the Tenth Defendant (Ernst & Young (CIS) BV Moscow Branch) was a separate legal entity from Ernst & Young (CIS) BV whose registered office was in Amsterdam (as Fox Williams believed to be the case).

31. BLP refused to accept service of the English proceedings on behalf of the Tenth Defendant (notwithstanding the fact that BLP now acts for the Tenth Defendant). In its letter dated 15 August 2011 refusing to accept service on behalf of the Tenth Defendant (**page 33**), BLP said as follows:-

> *"We also note your comment that were we not to accept service on behalf of the Tenth Defendant it would be for purely tactical reasons. In circumstances where your client has chosen to concoct an allegation of inducement against our client in a blatant attempt to forum shop, the allegation of tactical positioning does not sit well with your client.*
>
> *We are not currently instructed by the Tenth Defendant and there is no obligation for us to accept service on its behalf. Your client must do what it feels necessary in relation to service on the Tenth Defendant.*
>
> *In circumstances where we are currently instructed by the First and Second defendant only, we see no basis for our clients providing a response to your final question. Your client must satisfy himself in that regard."*

32. This response from BLP was deliberately obstructive and was clearly designed to cause the Claimant to incur significant additional and unnecessary costs, which he did. In this respect I am not referring to the fact that BLP refused to accept service on behalf of the Tenth Defendant. I am referring to the fact that BLP deliberately refused to answer Fox Williams' reasonable question whether there was a difference between the Tenth Defendant and Ernst & Young (CIS) BV in the Netherlands. Fox Williams had told BLP they thought there was a difference. In fact (as the Claimant subsequently discovered) there was no difference as they are the same legal entity. However BLP, knowing that there was no difference but realising that Fox Williams mistakenly thought that there was a difference, deliberately refused to put Fox Williams straight, instead saying that the Claimant must satisfy himself in that regard. As a result of that, the Claimant then applied to the Court for permission to serve the Tenth Defendant in Russia. The Claimant filed its application dated 24 August 2011 for permission to serve the Tenth Defendant in Russia, and the Court's order dated 2 September 2011 granted permission to serve the Tenth Defendant in Russia (**pages 44 to 47**). However, this was all totally unnecessary because the Tenth Defendant is in fact the same legal entity as Ernst & Young (CIS) BV registered in the Netherlands and the Tenth Defendant could have been served in the Netherlands (as subsequently happened). BLP knew this very well but chose not to tell the Claimant this important information.

33. Having obtained permission to serve the Tenth Defendant in Russia, the Claimant then set about trying to effect service on the Tenth Defendant in Russia but was met by the usual (and well known) bureaucratic obstacles which meant that it would have taken many months, if not years, to effect service on the Tenth Defendant in Russia. (See paragraph 92 of the Claimant's witness statement, where Fox Williams were told it would take years to serve in Russia). Fortunately, the Claimant subsequently discovered that the Tenth Defendant and Ernst & Young (CIS) BV were indeed one and the same, and effected service of the Amended Claim Form on the Tenth Defendant in the Netherlands as soon as he was able to on 8 March 2012 (having obtained further permission to amend the Tenth Defendant's address).

34. In the light of the evidence I have set out in the preceding four paragraphs, Ms Mayhew's evidence about service on the Tenth Defendant is wholly disingenuous and thoroughly misleading. In support of an argument that the Second Defendant believed that the claims for breach of the Settlement Agreement might not be pursued in England and might be pursued in Russia instead (an argument which is literally incredible given the evidence I have set out above), Ms Mayhew says this in paragraphs 16, 17 and 23 of her first witness statement:

> *"Furthermore, although the Claimant had obtained permission to add the Tenth Defendant to the proceedings, he had not at that time taken any steps to serve the Claim Form on the Tenth Defendant. Such claims would, therefore, presumably be pursued in Russia. ... This meant that there was a potential risk that there would be concurrent proceedings in England and Russia, involving identical issues of fact and law as to whether there was any underlying breach of contract. This would give rise to unnecessary duplication of time and expense and the spectre of inconsistent findings. ... As noted above, the validity of the Claim Form for service against the Tenth Defendant was due to expire on 8 February 2012, but was not served by that date. This further confirmed the appearance consistently given by the Claimant that he did not intend to pursue any of his primary claims for breach of contract against any of the Third to Tenth Defendants in England. As I detail below, however, the Claimant's first volte face in his approach to these proceedings came on 8 March 2012, when he effected service of the claim on the Tenth Defendant in the Netherlands."*

35. In the light of BLP's letter dated 15 August 2011, this evidence from Ms Mayhew is, I am afraid to say, thoroughly devious to say the least. As Ms Mayhew well knows, by letter dated 12 August 2011 Fox Williams asked BLP to accept service on behalf of the Tenth Defendant (which BLP refused in its letter dated 15 August 2011) and asked for assistance in clarifying whether the Tenth Defendant and Ernst & Young (CIS) BV were one and the same (so allowing service in Europe). In its letter dated

15 August 2011 BLP deliberately left Fox Williams under the illusion that they were not one and the same (when BLP knew that they were) with the consequence that Fox Williams then went on a wild and expensive goose chase seeking and obtaining permission to serve the Tenth Defendant in Russia and then trying to effect that service.

36. So, when Ms Mayhew says that the Claimant's delay in serving the Claim Form on the Tenth Defendant until 8 March 2012 (in the Netherlands) led the Second Defendant to believe that this:

> *"confirmed the appearance consistently given by the Claimant that he did not intend to pursue any of his primary claims for breach of contract against ... the Tenth Defendant in England"*

she (seemingly deliberately and certainly misleadingly) makes no reference at all to the following facts (of which she was perfectly well aware):-

36.1. Fox Williams had asked BLP to accept service on behalf of the Tenth Defendant on 12 August 2011 but BLP had refused on 15 August 2011.

36.2. BLP knew that Fox Williams thought that the Tenth Defendant had to be served in Russia, knowing full well that the Tenth Defendant could be served in the Netherlands (without the need for permission), and that this was what had caused the delay in service because Fox Williams then had to make the application for permission to serve in Russia.

36.3. If BLP had accepted service on behalf of the Tenth Defendant (as it could have done), or if BLP had told Fox Williams that the Tenth Defendant could be served in the Netherlands, then service on the Tenth Defendant would have been effected in August 2011 rather than on 8 March 2012.

37. In paragraph 25 of her witness statement, Ms Mayhew unfairly criticises Ms Parkin's witness statement in support of the application by the Claimant on 7 February 2012 to extend the validity of the Claim Form against the Tenth Defendant. Ms Mayhew says that Ms Parkin's statement gives the impression that when the Claimant obtained permission to serve the Tenth Defendant in Russia on 2 September 2011 the Claimant believed the Tenth Defendant was domiciled in Russia and that it had only recently been discovered that the Tenth Defendant was incorporated in the Netherlands. Ms Mayhew suggests that Ms Parkin's impression cannot have been

genuine, and in this respect Ms Mayhew bases herself on paragraph 18 of Ms Meleagros' witness statement dated 24 August 2011 in support of the application to serve the Tenth Defendant in Russia. However, Ms Mayhew mischaracterises Ms Meleagros' evidence. In paragraph 18 of her statement, Ms Meleagros says that her belief was that the Tenth Defendant was a branch office of Ernst & young (CIS) BV in the Netherlands. This is entirely consistent with the belief held by Fox Williams (not corrected by BLP on 15 August 2011) that the Tenth Defendant was a "separate legal entity from Ernst & Young (CIS) BV" – see Fox Williams' letter to BLP dated 12 August 2011 at **page 29** of exhibit "KJT1". Accordingly, Ms Mayhew is wrong to suggest (as she does) that when Fox Williams applied for leave to serve the Tenth Defendant in Russia, Fox Williams knew that the Tenth Defendant was domiciled in the Netherlands. I respectfully suggest that Fox Williams' belief must have been that the Tenth Defendant was domiciled in Russia, and that is why they applied for permission to serve the Tenth Defendant in Russia. This is consistent with paragraph 19 of Ms Meleagros' statement (not quoted by Ms Mayhew) where Ms Meleagros says that the actions in question were carried out "by the Moscow Branch" and that is why the Tenth Defendant needed to be served in Russia. This reference by Ms Meleagros to the Moscow Branch makes it clear that Fox Williams thought that the Moscow Branch was a separate legal entity from Ernst & Young (CIS) BV.

38. The final matter I wish to draw attention to about BLP's letter dated 15 August 2011 is the statement by BLP that BLP's view was that the Claimant had "*chosen to concoct an allegation of inducement against our client in a blatant attempt to forum shop.*" This letter was written just a few weeks before the Second Defendant issued its application for a stay and sets out the Second Defendant's real thinking. Contrary to what Ms Mayhew says, the Defendant's real thinking was not that there was a risk of proceedings in Russia by the Claimant. The Second Defendant's real thinking was that the Claimant had engaged in forum shopping and that all the claims for breach of the Settlement Agreement should be heard in Russia, not in England, since Russia was the *forum conveniens*. In order to try to make that happen, the Second Defendant decided to issue its Jurisdiction Application. This is confirmed by the terms of the Second Defendant's Jurisdiction Application stay issued on 16 September 2011, to which I now turn.

The Second Defendant's Jurisdiction Application and its subsequent abandonment of the application

39. The Second Defendant was originally due to file its application for a stay on 2 August 2011 (being the time limit in CPR 11 (4)(a)). By letter dated 27 July 2011 (**page 17** of exhibit "KJT1") BLP asked for an extension of time until 9 September 2011. Fox Williams on behalf of the Claimant granted BLP's request (see Fox Williams' letter dated 1 August 2011 (**page 18**). On 6 September 2011 the parties agreed a further extension of time until 16 September 2011 when the Second Defendant served its Jurisdiction Application and evidence in support.

40. The order sought by the Second Defendant in the application notice dated 16 September 2011 was that:

> *"The claim against the Second Defendant shall be stayed* ***pending determination in Russia*** *of the claim(s) by the Claimant for breach of contract against any one or more of the Third to Tenth Defendants who are alleged in the Particulars of Claim to constitute the "Practice".* (my emphasis).

41. Since it was clear to the Second Defendant that the Claimant was pursuing his claim in England, and only in England, the Second Defendant's application for a stay was based clearly on the proposition that England was not the *forum conveniens* for the resolution of the dispute and that the *forum conveniens* was Russia. This is confirmed by the evidence in support, all of which tries to show that Russia was the *forum conveniens* for the claims in respect of the breach of the Settlement Agreement.

42. Further, in paragraph 8 of Mr Statsenko's witness statement dated 16 September 2011 Mr Statsenko positively invites the Claimant to sue the Third to Tenth Defendants in Russia for breach of the Settlement Agreement. All of this makes it abundantly clear that, contrary to what Ms Mayhew now asserts, the Second Defendant was not operating on the basis that the Claimant might abandon its claims in England and pursue them in Russia. Rather, the Second Defendant was fully aware (for the reasons set out above) that the Claimant was pursuing his claims in England and, by its application the Second Defendant was trying to compel the Claimant to bring these claims in Russia.

43. The Second Defendant's Jurisdiction Application was subsequently listed to be heard on 1 February 2012. In January 2012 my firm replaced Fox Williams as the

Claimant's solicitors and a new date for the hearing of the Second Defendant's application for a stay was obtained (before a Judge between 2 to 4 May 2012). Under the timetable ordered by the Court on 30 January 2012, the Claimant was due to serve his evidence in response on or before 21 March 2012.

44. By mid-March 2012 very substantial work had been undertaken in preparing the Claimant's evidence in response (statements from the Claimant and from Mr Mandel, the Tenth Defendant's former General Counsel) and the statements were very nearly ready for service. Whilst the finishing touches were being made to these statements, we received BLP's letter dated 9 March 2012 which is at pages 28-29 of Ms Mayhew's exhibit. This letter came without warning and was, I suspect, designed to set the scene for the Second Defendant abandoning its Jurisdiction Application whilst at the same time making a crude attempt to lay the blame for that abandonment at the door of the Claimant, entirely without justification. BLP's letter dated 9 March 2012 makes a number of different points, each of which I shall deal with in turn:

44.1. First, BLP says that the Second Defendant had grounds to believe that the Claimant did not intend to pursue his claims for breach of the Settlement Agreement in England and proposed to pursue them in Russia. This is entirely incorrect for the reasons set out above. The Second Defendant was fully aware that the Claimant was pursuing his claims only in England, and not in Russia.

44.2. Secondly, BLP says that the basis for its application for a stay was NOT that England is not the convenient forum for the claim. This is also incorrect. It is clear that this was precisely the basis upon which the Jurisdiction Application was made (see the application notice and evidence in support).

44.3. Thirdly, BLP correctly point out that since *Owusu v Jackson* [2005] QB 801 any application for a stay based on *forum conveniens* was bound to fail on the case law. It appears that when the Second Claimant made its Jurisdiction Application for a stay it was unaware of *Owusu v Jackson*. It seems to be no coincidence that between making the Jurisdiction Application in September 2011 and BLP's letter dated 9 March 2012 BLP had changed its Counsel. I presume that BLP's new Counsel advised that the Jurisdiction Application was bound to fail on *forum conveniens* grounds. As a result, BLP appear to have

embarked on the course set out in their letter dated 9 March 2012 to try to lay the blame on the Claimant.

45. The course adopted by BLP was two-fold. First, BLP said in its letter dated 9 March 2012 that the basis for the claim for a stay was the Court's *Reichold* jurisdiction. Although it is a matter for submission, this is clearly not a *Reichold* jurisdiction case because:

45.1. there were and are no concurrent proceedings on foot, and no prospect of any such proceedings, which is a pre-requisite to the exercise of the *Reichold* jurisdiction;

45.2. there were in any event no "rare and compelling circumstances" which is another condition for the exercise of the jurisdiction; and,

45.3. if the Second Defendant had really been relying on the *Reichold* jurisdiction (instead of a challenge to the jurisdiction of the English Court) the Second Defendant would have accepted the jurisdiction of the English Court and, having done so, then applied for a *Reichold* stay under the Court's case management powers. The *Reichold* stay is granted under the Court's inherent jurisdiction to grant a stay (preserved by section 49(3) of the *Senior Courts Act 1981)*, not an application to challenge jurisdiction of the Court under CPR Part 11 (which is the rule which applies to challenging the jurisdiction of the English Court).

46. The second course adopted by BLP in its letter dated 9 March 2012 was to invite the Claimant to undertake not to bring proceedings against the Defendant in Russia or in any other country. There was no need for the Claimant to give such an undertaking because his position was already very clear that he was only going to sue in England. Nevertheless in paragraph 98 of his witness statement dated 16 March 2012 (just one week after BLP's letter dated 9 March 2012) the Claimant stated in terms that:

> *"There will not be, and was never intended to be, any proceedings in Russia"*

(the Claimant also gave a formal undertaking to the same effect on 27 March 2012 – see my firm's letter of the same date at page 40 of Ms Mayhew's first exhibit).

47. However, the real point is this: If the Second Defendant was in reality concerned that the Defendants might face claims from the Claimant in Russia (or elsewhere), the Second Defendant could, and should, have asked for such an undertaking back in August 2011 (when it filed its Acknowledgement of Service indicating an intention to challenge the jurisdiction) or in September 2011 (before the Second Claimant filed its application to challenge jurisdiction). Had the Second Defendant done so, then the Claimant would readily have confirmed that he had no intention of pursuing his claims anywhere other than England. There is no excuse for the Second Defendant not having done this, and the Second Defendant's failure in this regard has caused the parties to incur very large costs dealing with an application which should never have been made. Even if I am wrong in everything else I have said in this witness statement, this failure on the part of the Second Defendant is, I respectfully suggest, sufficient in and of itself to justify an award of costs against the Second Defendant for its abandoned Jurisdiction Application.

48. The Second Defendant finally abandoned its Jurisdiction Application on 11 April 2012 (see BLP's letter of that date at pages 43 – 45 of Ms Mayhew's exhibit), which was nearly one month after service of the Claimant's witness statement saying that proceedings in Russia were never a possibility, and over two weeks after the Claimant had given the undertaking sought by the Second Defendant. No excuse has been put forward by the Second Defendant for this unacceptably long delay.

Costs of the Jurisdiction Application

49. For the above reasons, the Claimant claims his costs of the Jurisdiction Application. At the end of the day, the Second Defendant brought an application which it abandoned, and there are no exceptional or other circumstances justifying a departure from the usual rule that costs should follow the event.

50. I would also add this additional point on costs: The Claimant is an individual with limited resources who is fighting the might of Ernst & Young in circumstances where (on his case) because he blew the whistle he was sacked and was denied the insurance coverage he was explicitly promised under the Settlement Agreement. The costs he is liable to pay his own lawyers just for the Jurisdiction Application (including the CFA success fee, which I deal with below) approach £200,000. If the Claimant is not awarded his costs for successfully defeating the Jurisdiction Application, the result is likely to stop this claim in its tracks because the Claimant was not expecting

jurisdiction to be challenged, and the litigation to effectively be stalled for a year, without progressing. As it is, the Claimant has already undertaken not to dispose of a property in Italy with equity of £350,000 to resolve the Second Defendant's application for security (which was brought without any warning). I make these points so that the Court is aware of the true position. Nevertheless, these points do not detract from the overarching point that the Second Defendant is properly liable to pay the Claimant's costs of the Jurisdiction Application (for the reasons set out above).

51. The Claimant claims his costs of the Jurisdiction Application on the indemnity basis because the conduct of the Second Defendant has been unreasonable to a high degree and took the case outside the norm such as to attract an award of indemnity costs. In this respect, the Claimant relies in particular on the following facts and matters:-

51.1. The failure of the Second Defendant, prior to issuing its Jurisdiction Application, to seek any assurance from the Claimant that he would only pursue his claims in England. Had the Second Defendant done so, the stay application would never have been made.

51.2. The shenanigans adopted by the Second Defendant and BLP as regards service on the Tenth Defendant (see above). Had BLP cooperated, the Tenth Defendant would have been served in August 2011 and the Jurisdiction Application would never have been made.

51.3. The misleading and inaccurate evidence given by Ms Mayhew to this Court in her first witness statement.

51.4. The improper threats by the Defendants against Mr Mandel and this firm to prevent Mr Mandel from giving his truthful evidence to the Court. I deal with this in more detail later in this witness statement.

51.5. The failure of the Second and Tenth Defendants to provide disclosure of the relevant insurance policies, the failure of the Second and Tenth Defendants to comply with the Court's order dated 16 May 2012 that those insurance policies be disclosed, and the consequent need on the part of the Claimant to issue an

application for an "Unless" order to compel disclosure of the remaining insurance polices. I also deal with this later in this witness statement.

51.6. Issuing the application for security for costs without any prior notice, and without engaging in correspondence first to see if the Claimant was willing to provide security (which the Claimant effectively has).

52. Before I leave the question of costs, there are two further matters I need to deal with. First, the Claimant's CFA and ATE insurance policy. Secondly, various miscellaneous points on costs taken by Ms Mayhew in her first witness statement.

The CFA and the ATE Insurance

53. From our instruction in January 2012, the Claimant was very concerned to limit costs, and to be protected from an adverse cost order should Ernst & Young succeed in the Jurisdiction Application.

54. As such, on 17 January 2012 we wrote to BLP (page 17 of Ms Mahew's exhibit) advising that we were seeking ATE insurance against adverse costs for the Jurisdiction Application, and that we would be acting on the basis of a Mixed CFA including a success fee for the Jurisdiction Application. Notices of Funding were filed and served dated 20 January (Mixed CFA) and 22 February 2012 (ATE insurance).

55. I am conscious that Mixed CFAs and ATE insurance are more usually looked at on the conclusion of trials, and accordingly I will briefly set out their operation, in case the Court should need any assistance of these issues.

Mixed CFAs

56. A Mixed CFA operates in very general terms as follows:

56.1. The solicitors act on the basis of a retainer whereby their usual charge out rate is significantly reduced (usually by 50%). Should the case or particular issue upon which the retainer is based be lost, then that is the only fee payable to the solicitors.

56.2. If the trial or application is won (which is defined in the retainer) then the client becomes liable for the balance of the usual fee (i.e. the "unbilled" 50%),

and also (to compensate the solicitor for taking the risk that his fee may be limited by losing, and other matters, such as the possibility of being disinstructed), he is entitled to charge a success fee, which is generally a percentage uplift on the full basic fee. That is what happened in this case.

56.3. In the present case "win" was defined as *"any result of the Jurisdiction Application, whether by negotiation, court order or judgment, which results in the Claim being able to be advanced in England."* As a result of the Second Defendant abandoning its Jurisdiction Application, the claims will be heard in England and so the Claimant has won for the purposes of the CFA, with the result that the Claimant is liable to pay my firm's fees in full, with the added success fee. If the Court agrees that, having defeated the Jurisdiction Application, the Claimant is entitled to his costs, then these will be recoverable from the Second and Tenth Defendants pursuant to a Court Order.

56.4. In the event that the usual costs order is given, and that costs follow the event, the full basic fee and success fee can be claimed as costs from the losing party: see section 58A of the Access to Justice Act 1999.

ATE Insurance

57. As with obtaining insurance against an adverse costs order for a full trial, the Claimant sought and obtained this insurance, in case he were to lose the Jurisdiction Application and become liable for BLP's costs, which we realised were likely to be extensive. The insurance also covers expenses, such as our own counsels' fees, up to £31,000.

58. There are various ways that such a premium can be calculated (such as by lump sums falling due at various stages of a case leading up to trial). In this case however, because it was an application, the premium for the policy is based upon a percentage of the risk the insurer has adopted. In other words, it is a percentage of the total costs BLP have incurred, together with our expenses (mostly) counsel's fees (plus IPT). That percentage is 77.404% and the premium can only be ascertained once BLP's total costs have been ascertained.

59. Again, should the Court agree that the usual order as to costs be made, this would then be recoverable as an expense, and payable by the losing party - see section 29 of the Access to Justice Act 1999.

Miscellaneous points taken by Ms Mayhew on costs

60. First, Ms Mayhew says in paragraph 32 of her witness statement that, if the Second Defendant is not entitled to its costs of the Jurisdiction Application, it should be entitled to them from 9 March 2012 when the Second Defendant first sought confirmation of the Claimant's intentions. For the reasons set out above, this confirmation (should it have really been required) should have been sought before the stay application was issued, and so it is the Second Defendant which is at fault, not the Claimant. In any event, having sought the Claimant's confirmation on 9 March 2012, the Claimant gave the confirmation sought in his witness statement dated 16 March 2012 and again in my firm's letter dated 27 March 2012. Even then it took the Second Defendant over two weeks, until 11 April 2012, formally to abandon the Jurisdiction Application. I respectfully submit that, in these circumstances, there is no reason to deprive the Claimant of any of his costs of the Jurisdiction Application, let alone order him to pay any of the Second Defendant's costs.

61. In paragraph 35 of her witness statement, Ms Mayhew says that the Claimant's costs of the Jurisdiction Application are "excessive", not least because there was no substantive hearing of the application. This is not accepted: A considerable amount of work was undertaken seeking advice on the application, considering BLP's evidence, and preparing the evidence in reply. By the time we received BLP's letter dated 9 March 2012 the vast majority of that work was complete. Our reply witness statements were accordingly served (on 13 and 16 March 2012). The Second Defendant did not abandon the application until 11 April 2012. We are preparing a Statement of Costs for the purposes of the hearing on 28 June which will clearly set out the costs claimed, all of which were necessary and I submit reasonable.

62. In paragraph 35 of her witness statements Ms Mayhew says that our witness statements (those of the Claimant and Mr Mandel) were "disproportionately lengthy" and appear to be substantive witness statements for the proceedings. This is not

correct. These witness statements were prepared for the Jurisdiction Application only. They are necessarily lengthy for two reasons:

62.1. First, they respond to the witness statements served by the Second Defendant which also (necessarily) deal with the merits of the claims. It was necessary to deal with the merits of the claims given the jurisdictional attack (which was that Russia was a more convenient forum than England).

62.2. Secondly, as the Second Defendant accepts, the Court has jurisdiction over it under Article 2 of the Judgments Regulation (see paragraph 7 of Mr Labaude's statement, where he erroneously refers to Article 2 of the Brussels Regulation – the Brussels Regulation is not relevant, it is the Judgments Regulation which is relevant here). In order to bring its claims against the Tenth Defendant in England (as opposed to the Netherlands where the Tenth Defendant is domiciled), it is necessary for the Claimant to show that the claims against the Tenth Defendant are:

> *"so closely connected"* with the claims against the Second Defendant *"that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings"* – see Article 6(1) of the Judgments Regulation.

Accordingly, and in the light of the Second Defendant's assertion that Russia was the *forum conveniens*, it was necessary for the Claimant's evidence to show that his claims against the Tenth Defendant were so closely connected with those of the Second Defendant that it was expedient for them all to be heard in England (as opposed to Russia or the Netherlands). Accordingly, the Claimant's evidence in response was necessary and does not travel into the merits for the sake of it. Contrary to what Ms Mayhew says in paragraph 36 of her witness statement, the cost of preparing this evidence should be allowed in full.

63. At the end of paragraph 35 of her witness statement, Ms Mayhew refers to my firm's letter dated 16 March 2012 where we said that the Claimant's witness statement concluded our client's evidence *"with respect to the factual background to this case"*. Ms Mayhew suggests that this means that the evidence goes to the substantive merits rather than the Jurisdiction Application. This is not correct. The evidence was served for the Jurisdiction Application, and for the reasons set out above it

necessarily goes into the merits. My reference to "*the factual background*" was to distinguish the possibility of further evidence of "*the prevalence of bribery, and corruption of judges in Russia*" which is relevant to *forum conveniens* (see our letter of 27 March 2012 at page 40 of Ms Mayhew's exhibit). For the purposes of the trial, the Claimant will obviously be serving a full and detailed witness statement which will deal with all of the substantive merits, not just the selected merits necessary to respond to the Second Defendant's Jurisdiction Application.

64. In paragraphs 39–47 of her first witness statement, Ms Mayhew criticises the conduct of the Claimant in reporting Mr Labaude, BLP and the Second Defendant's Counsel to their respective professional bodies. This arises in connection with the wholly improper threat by the Second and Tenth Defendants to prevent Mr Mandel giving truthful evidence to the Court.

65. The Defendants claimed that Mr Mandel was in breach of his confidentiality obligations to the Tenth Defendant by making his statement in opposition to the Second Defendant's Jurisdiction Application, they threatened an injunction against this firm, demanding that Mr Mandel withdraw his statement, and threatened to sue him and this firm for its contents. The Defendants' position is set out in BLP's letters dated 18 April 2012 (pages 47-49 of Ms Mayhew's exhibit) and 15 May 2012 (pages 63–67 of Ms Mayhew's exhibit). The Defendants re lied on the unreported first instance decision in the Porton Capital case. However, the Defendants have overlooked the House of Lords authority in Watson v M'Ewan [1905] AC 480 (subsequently approved by the Court of Appeal and very recently by the Supreme Court) which is clear authority for the immunity of a witness when preparing evidence for and giving evidence in Court, notwithstanding any confidentiality obligations the witness was under to third parties. We pointed this out to BLP in our letter dated 22 May 2012 and explained that Porton Capital had been decided *per incuriam*. I note that Ms Mayhew has chosen not to exhibit this letter to her witness statement, even though it provides a complete and clear answer to the Defendants' complaint and has not received any response. Accordingly, I exhibit a copy of our letter at **pages 91 to 95** of exhibit "KJT1".

66. In that letter, we said we would that we would rely on Mr Mandel's statement in Court and we invited the Defendants, if they still contended that Mr Mandel's evidence was inadmissible, to apply for an injunction to be heard at this hearing. The Defendants

have not taken any further steps in this regard, and have not sought an injunction and have not sought to say that we cannot rely on Mr Mandel's statement. I surmise from this that the Defendants now accept that Mr Mandel has immunity under Watson v M'Ewan principles. Nevertheless, the Defendants attempts to browbeat the Claimant and my firm in this way were, in my respectful submission, clearly improper:

66.1. Much of Mr Mandel's statement simply supports what the Claimant has said, and shows the evidence served by Ernst & Young to be untruthful, or at the very least, not the complete truth.

66.2. Case law for over a century (starting with Watson v M'Ewan) shows that witnesses of fact have complete immunity from suit in relation to preparing and giving evidence to the Court (see the cases cited in our letter of 22 May 2012).

67. It is for this reason, I believe, that despite BLP making these threats, none of them have been followed through.

68. Having taken Leading Counsel's advice, we complained to the regulators about this conduct, as we considered the attempt to:

68.1. frighten a witness; and,

68.2. to prevent the Court from seeing evidence of the truth,

were attempts to pervert the course of justice.

69. Mr Mandel has also complained to Ernst & Young's Risk Department (**pages 96 to 97**), but I understand they have not yet responded.

70. As noted, while we have made regulatory complaints as a result of those unwarranted threats, I understand (from the responses from the regulators exhibited to Ms Mayhew's statement) that the regulatory bodies will not intervene unless and until the Court has considered the position, and they will not intervene in what they consider to be criminal conduct.

71. Pausing there, I hope that the Court will be astute to see that:

71.1. by bringing then abandoning a hugely expensive Jurisdiction Application;

71.2. by bringing an Application for Security for Costs before even filing a Defence (see below);

71.3. by refusing to give disclosure until days before the disclosure hearing, and even then not providing disclosure in accordance with the order dated 16 May 2012 (see below); and,

71.4. by seeking to threaten a witness of fact and the Claimant's lawyers;

Ernst & Young and BLP are doing everything in their power to avoid having to deal with the merits of this claim. Our client is an individual with limited resources and BLP's sole strategy is to force him out of this litigation by making it unnecessarily expensive and hostile.

72. BLP also complain that the Claimant has contacted people at Ernst & Young. There is nothing improper with the Claimant doing so, and alerting its management to what is being done in their name. The Claimant's open letter to Jim Turley, Global CEO and Chairman is at **pages 76 to 77** of "KJT1". While Mr Turley has not responded, Mr Krupski has confirmed it was send to him.

73. With regards Mr Turowski, as was pointed our in my letter (page 88 of Ms Mahew's exhibit):

73.1. Mr Turowski returned the Claimant's call.

73.2. Mr Turowski did not say that he did not wish to discuss the litigation, he merely said he had been given strict instructions not to discuss the case in any detail.

73.3. the Claimant said that he was disappointed with Mr Turowski's statement. Mr Turowski described this situation as "livelihood against livelihood".

73.4. the Claimant's said that Mr Turowski must remember discussing English law. Mr Turowski did not deny this.

73.5. the Claimant repeated three times that all that Mr Turowski had to do was "tell the truth" about English law. On the final time, Mr Turowski responded "I hear you".

73.6. Mr Turowski indicated that in order to change his statement, he would need to talk to lawyers, as he "did not know what the consequences are". He promised to speak with lawyers.

74. It is noted that the Defendants do not adduce evidence from Mr Turowski about this.

Security for Costs

75. On 11 April 2012 (the day it abandoned the Jurisdiction Application), Ernst & Young also served an application for Security for Costs:

75.1. It is extremely rare for security to be sought long before any substantive defence had been served by the Defendants.

75.2. The amount of costs is simply inexplicable:

75.2.1. there are no less than eight fee earners working to seek to defeat a claim, basically relating to one paragraph of a two-page Agreement;

75.2.2. that £72,000 in costs (which amounts to over five fee earner weeks of work) had somehow been incurred not including the Jurisdiction Application (which is essentially all that had happened in the case).

76. While the Claimant has never accepted there was a proper basis for the security for costs application, the issue has now been resolved with the Claimant undertaking not to encumber an Italian property beyond £350,000 equity.

77. Bringing this application long before a Defence is served, and for grossly inflated amounts, shows BLP's determination to try to stifle this claim. Moreover, the application was brought without any prior warning or correspondence requesting security. This could all have been dealt with satisfactorily in correspondence, and I do not believe that there is any legitimate reason for the Second and Tenth Defendants not trying to agree security in advance of a formal application.

78. For these reasons, I respectfully request that the Claimant should be paid his costs in dealing with the security for costs application.

Specific Disclosure

79. As noted in the Claimant's witness statement, despite repeated requests of Ernst & Young, BLP and the insurers, they have each refused to provide us with the insurance policies under which Mr Lyons was insured by Ernst & Young.

80. As it transpires, this was because the Tenth Defendant's General Counsel, Alexey Statsenko, had given the insurers explicit instructions not to provide them to him.

81. Since the Defendants have failed to pursue the Claimant's claims under these insurances either properly or at all, the Claimant himself is having to do so. For that reason an application for specific disclosure of the policies was made, and this resulted in the order dated 16 May 2012.

82. Months after the Application was served and after repeated chasing (see **page 82**) on the day of the hearing on 16 May 2012 the Defendants eventually agreed an order that they would disclose the insurance policies and related documents, and pay costs of £16,000.

83. Despite that order, the Defendants did not disclose certain policies which are within their power. The correspondence is at **pages 82 onwards** of "KJT1" and I do not propose to repeat it. The report at **pages 116 to 119** makes detailed references to Colonial AD&D and AGF LTD insurance. However, the Defendants have even gone so far as to suggest that such policies do not exist (**page 114**), when there is explicit and detailed reference to them in the documents that they have disclosed.

84. I would emphasise that BLP's repeated arguments that the Claimant does not have claims on the insurance are immaterial. The argument is in any event incorrect. For obvious reasons, we do not accept what the Defendants' lawyers say as to the insurance position and our client cannot rely on BLP's advice in any event. Be that as it may, the Court's Order dated 16 May requires the Defendants to disclose the policies and they have not done so in three instances identified in the application notice for an "Unless" order.

85. If, as is likely to be the case, the Claimant is now out of time to bring proceedings against insurers (it is now more than 6 years from the date of the Claimant's accident), the Claimant may have to amend its claim against the Defendants to bring a claim for damages against them in respect of their failure to make a claim under the insurance on his behalf and/or their failure to provide the insurance policies to him so that he could do so in time.

86. I therefore respectfully ask the Court to make an Unless Order compelling t his disclosure, together with costs.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Signed: .....

Kelly John Tinkler

Partner

SGH Martineau LLP, One America Square, Crosswall, London, EC3N 2SG. DX 700 London City. Tel. 020 7264 4444. Fax. 020 7264 4440.

Dated this: 25th day of June 2012

IN THE HIGH COURT OF JUSTICECLAIM NO. HC11C00546

CHANCERY DIVISION

BETWEEN

Cathal Anthony Lyons

Claimant

-and-

(1) Ernst & Young Europe LLP

(2) Ernst & Young (EMEIA) Services Limited

(3) Ernst & Young LLC

(4) CJSC Ernst & Young Vneshaudit

(5) Ernst & Young Valuation LLC

(6) Ernst & Young Business Advisory Services LLC

(7) Ernst & Young Valuation Advisors LLC

(8) Ernst & Young (CIS) Limited

(9) CIS Luxembourg SA

(10) Ernst & Young (CIS) BV Moscow Branch

Defendants

WITNESS STATEMENT OF KELLY JOHN TINKLER

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DX: 700 London City
Our ref: KJT/LYO3-2

IN THE HIGH COURT OF JUSTICE **CLAIM NO. HC11C00546**

CHANCERY DIVISION

BETWEEN

Cathal Anthony Lyons

Claimant

-and-

(11) Ernst & Young Europe LLP
(12) Ernst & Young (EMEIA) Services Limited
(13) Ernst & Young LLC
(14) CJSC Ernst & Young Vneshaudit
(15) Ernst & Young Valuation LLC
(16) Ernst & Young Business Advisory Services LLC
(17) Ernst & Young Valuation Advisors LLC
(18) Ernst & Young (CIS) Limited
(19) CIS Luxembourg SA
(20) Ernst & Young (CIS) BV Moscow Branch

Defendants

EXHIBIT "KJT1" TO
WITNESS STATEMENT OF KELLY JOHN TINKLER
