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Neutral Citation Number:[2022] EWHC 1712 (Ch)

IN THE HIGH COURT OF JUSTICE

No. CH-2021-000129

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

ON APPEAL FROM

THE COUNTY COURT AT CENTRAL LONDON

ORDER OF HHJ JOHNS QC

Rolls Building

Fetter Lane

London, EC4A 1NL

Friday, 24 June 2022

Before:

MRS JUSTICE FALK

B E T W E E N :

AMJAD SALFITI

Appellant/Third Defendant

- and -

SADDIQ OMAR ABU SEEDO

Respondent/Claimant

- and -

(1) FAHMY EL GAMAL

(2) EL GAMAL AND CO LIMITED

Respondents/Defendants

MR J. MUNRO (instructed by Caytons) appeared on behalf of the Appellant/Third Defendant.

MR M. MORRISON (instructed by Saddiq Abu Seedo) appeared on behalf of the Respondent/Claimant.

MR F. SAIFEE (instructed by TKD Solicitors) appeared on behalf of the Respondents/First and Second Defendants.

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**J U D G M E N T**  
**(via Microsoft Teams)**

MRS JUSTICE FALK:

- 1 This is an appeal by the Third Defendant, Amjad Salfiti, against an order made by HHJ Dight on 14 January 2021 following a six day trial heard between 30 November and 7 December 2020. Permission to appeal was given by Michael Green J at an oral hearing. I heard the appeal on 22 June but there was insufficient time to deliver judgment on that day.
- 2 The factual background can be summarised as follows. The Claimant, Saddiq Omar Abu Seedo, is a wealthy Jordanian citizen resident in Dubai. The First Defendant, Fahmy El Gamal, is a London based surveyor and estate agent who also holds property investments. The Second Defendant, El Gamal & Co Limited, is an associated entity of Mr El Gamal. Mr Salfiti, like Mr El Gamal, is UK resident and is a solicitor who has acted for each of Mr Abu Seedo and Mr El Gamal in the past.
- 3 On 2 June 2004 Mr Salfiti successfully bid at auction for a long leasehold interest in commercial property at 306 - 308 Elgin Avenue, W9 (the "Property") for a price of £301,000. Mr Salfiti had also successfully bid for three adjacent properties. On completion, on 8 August 2004, Mr Salfiti caused the Property to be registered in the sole name of Mr El Gamal. The legal title was transferred by Mr El Gamal to the Second Defendant in 2015, and the Property was charged by that company to support borrowings.
- 4 Mr Abu Seedo's case at trial, which the judge accepted, was that prior to the auction he had entered into an oral joint venture agreement with Mr Salfiti for Mr Salfiti to purchase the Property on 50/50 basis between Mr Abu Seedo and Mr Salfiti, and that it was only in 2016 that he learned that the Property had been acquired in the name of Mr El Gamal. He had provided Mr Salfiti with a 50 per cent contribution to the deposit and costs of acquisition, being £69,500.
- 5 The First and Second Defendants' case was that Mr El Gamal became the sole beneficial owner when the Property was acquired in 2004. They said that, following the auction, Mr El Gamal agreed to a request from Mr Salfiti to invest in and complete the purchase of the Property in Mr El Gamal's name because Mr Salfiti did not have sufficient funds to pay for it and risked losing it. Mr El Gamal said that at the time he knew nothing about Mr Abu Seedo. He maintained that the sum of £69,500, which Mr Salfiti had in fact obtained from Mr Abu Seedo, was understood by Mr El Gamal to be funds provided by Mr Salfiti himself, and that he had agreed with Mr Salfiti that it would be treated as a loan from Mr Salfiti to Mr El Gamal, repayable when the Property was sold.
- 6 Mr El Gamal funded an equal sum from his own resources and raised mortgage finance from RBS for the balance of the price. Mr Salfiti acted for Mr El Gamal and the mortgagee on the acquisition, and the judge found that Mr Salfiti had also acted for Mr Abu Seedo. Mr El Gamal did not accept that he had signed a trust deed dated 6 August 2004 under which the judge found that Mr El Gamal had declared that he held the Property on trust for himself and Mr Abu Seedo as tenants in common in equal shares (the "Trust Deed"). No entry was made at the Land Registry in respect of the Trust Deed.
- 7 The claim was commenced by Mr Salfiti in Mr Abu Seedo's name against Mr El Gamal and El Gamal & Co. The judge accepted that Mr Salfiti did so without authority. The proceedings were subsequently adopted by Mr Abu Seedo and Mr Salfiti was joined as a party. By the time of the trial each of Mr Abu Seedo, Mr El Gamal and El Gamal & Co were seeking relief against Mr Salfiti on the basis of a number of alleged breaches of duty. Mr Salfiti denied any such breach.

- 8 Mr Salfiti's case was that initially he had agreed with Mr Abu Seedo that the Property, together with the adjacent properties, would be purchased in the name of Mr Abu Seedo and another person, a Mr Bassem Bosheh, but that person had dropped out from the purchase of the Property while remaining involved in the acquisition of the other properties. Mr Salfiti claimed that it had been expressly agreed that the Property would be purchased by Mr Abu Seedo and Mr El Gamal jointly, and the Trust Deed accurately reflected that. It was Mr El Gamal who later sought to defraud Mr Abu Seedo. Further, Mr Salfiti maintained that the claims against him were time barred.
- 9 The adjacent properties that were purchased at the auction were registered in the name of Mr Bosheh. A dispute regarding them was settled in 2017 with Mr Salfiti guaranteeing a payment by Mr Bosheh to Mr Abu Seedo.
- 10 In summary, HHJ Dight concluded that Mr Abu Seedo's claim that the Property was held as to 50 per cent for him succeeded both by virtue of the express trust under the Trust Deed, which he found had been signed by Mr El Gamal, and also on the basis of a resulting or constructive trust, and that traceable proceeds of any dealings were held as to 50 per cent for Mr Abu Seedo. Further, Mr El Gamal and El Gamal & Co had dealt with the Property in breach of trust. However, the judge concluded that Mr Salfiti was liable to indemnify each of Mr Abu Seedo and Mr El Gamal and El Gamal & Co.
- 11 As far as Mr Abu Seedo was concerned, the judge found that Mr Salfiti had acted in breach of trust, breach of fiduciary duty and breach of contract and had made fraudulent misrepresentations which were intended to be relied on by Mr Abu Seedo and, further, that the claims were not time barred because they were carried out fraudulently, they were concealed or involved breaches of trust and fiduciary duty. As far as the First and Second Defendants were concerned, the judge concluded that Mr Salfiti had acted in breach of contract and in breach of tortious duties and had made fraudulent representations, with such claims also not being time barred because they were carried out fraudulently or were concealed.

## THE GROUNDS OF APPEAL

- 12 There are ten grounds of appeal to which Mr Salfiti seeks to add an eleventh, which he says was omitted in error when the grounds were reformulated pursuant to an order of Adam Johnson J. The first nine all relate to the Trust Deed. Mr Salfiti says that the judge reached conclusions that made no sense, that he was wrong to disregard what Mr Salfiti described as the "extreme improbability" and uncommerciality of the version of events that the judge found had occurred. If that version was correct, then there was no possible reason for Mr Salfiti to provide the Trust Deed to Mr El Gamal or for him to sign it. The judge had failed to pay adequate regard to the need to rely on objective facts and contemporaneous documents rather than recollections. It was physically impossible for Mr El Gamal to have signed the Trust Deed without looking at it as the judge had found. The overwhelming likelihood was that he had. The judge had also overlooked that Mr Abu Seedo had repeatedly stated to the court prior to the trial that he had agreed to purchase the Property on a 50/50 basis with Mr El Gamal, and the absence of an explanation for that should not be disregarded.
- 13 The tenth ground is that the judge was wrong to find in an Addendum to his judgment that time did not start running in respect of Mr El Gamal's claim against Mr Salfiti at the time of correspondence in 2009 which Mr Salfiti says not only referred to but enclosed the Trust

Deed. That correspondence meant that Mr El Gamal had sufficient knowledge to make a claim for fraud and for a declaration that he was the sole beneficial owner.

- 14 The ground which Mr Salfiti seeks to add is that the judgment in effect found that Mr Salfiti duped Mr El Gamal into signing the Trust Deed so that Mr El Gamal would enter into a 50/50 purchase with Mr Abu Seedo to which neither had agreed. That not only made no sense but was not alleged, pleaded or put either to Mr Salfiti or to the individual who had witnessed the deed, a Ms Adib. It was, therefore, not a finding open to the judge.
- 15 Mr Munro, for Mr Salfiti, submitted that the judge had placed undue reliance on oral evidence and had failed to have regard to the need to rely on objective facts and documents and overall probabilities, contrary to the Court of Appeal guidance in *NatWest Markets v Bilta* [2021] EWCA Civ 680 at [48]-[49], Leggatt J's well-known observations in *Gestmin SGPS v Credit Suisse* [2015] EWHC 3560 and his subsequent comments in *Blue v Ashley* [2017] EWHC 1928 at [68].
- 16 It is also worth noting that the order sought by Mr Salfiti is the setting aside of the whole of the judge's order. However, the other parties have made no appeal against it, so, rationally, it can only be an appeal against the conclusion that Mr Salfiti is obliged to indemnify the other parties.

## DISCUSSION

### *Principles to apply*

- 17 At its heart, this is an appeal against the judge's findings of fact made at a six day trial at which Mr Salfiti gave oral evidence over two days. Where a first instance decision depends on facts found by the judge who has had the benefit of hearing the oral evidence, then it will only be on "the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed the wrong opinion" (see *Re DB's application for judicial review* [2017] UKSC 7 at [78]). This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences drawn from them (see *FAGE UK v Chobani* [2014] EWCA Civ 5 at [114], per Lewison LJ).
- 18 The appellant must demonstrate that there was "no evidence" to support a challenged finding of fact, that the trial judge's finding was one that "no reasonable judge could have reached", or show that the judge's conclusion was "rationally insupportable" (see *Staechelin v ACLBDD Holdings* [2019] EWCA Civ 817 at [32]-[33], per Lewison LJ).
- 19 One of the reasons an appellate court must be cautious in interfering with findings of fact is that "in making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping": *FAGE* at [114(iv)]. As Lewison LJ also said earlier in that paragraph, the trial is not a dress rehearsal, it is the first and last night of the show.
- 20 Mr Munro referred to *Bilta* at [48] and [49], but the full relevant passage is [47] to [51], which needs to be read together. I can see no misdirection by the judge as to the approach he should adopt. After commenting at para.14 of his judgment that there were relatively few documents available, including none or very few of the numerous documents that would ordinarily be found on a solicitor's files, he said this at paras. 15 and 16:

“15. The case turns therefore principally on the oral evidence of the parties and a number of other witnesses. I have considered the internal consistency of the evidence given by each of the witnesses, how it fits together with other evidence, how it fits together with such documentary evidence as there is, the context of the evidence, and, of course, the inherent probability or improbability of the various versions of events being put forward by each of the witnesses. In a number of respects, the evidence of the witnesses is diametrically opposed to evidence coming from one or more others and, therefore, my findings as to credibility are important.

“16. The only other thing I want to mention in considering my approach to the evidence is that in a number of instances, in the absence of direct evidence or documentary evidence I have to draw inferences about what actually happened. That is not speculation but it is the reaching of a sensible conclusion based on primary evidence and findings of primary facts.”

21 I see no inconsistency between this and the passage in *Bilta* to which I have referred. The findings challenged are essentially findings about whose oral evidence should be accepted, and in what respects, in the context of the limited documentary evidence and inherent probabilities. As I will explain, Mr Salfiti is also attempting to encourage this court to island hop without a proper regard to all the evidence taken into account by the judge.

22 With this point in mind, before dealing with Mr Munro’s submissions in more detail, I need to summarise certain other findings that the judge made.

*Dishonesty findings against Mr Salfiti*

23 The judge found at para.33 of his judgment that Mr Salfiti’s evidence was neither honest nor reliable. This was part of a number of comments about his evidence at paras. 30 to 34. It is notable that the challenges being made on appeal do not extend to a number of the judge’s findings that Mr Salfiti had been dishonest. In particular, whilst the grounds do amount to a challenge in respect of the Trust Deed, they do not challenge other findings of dishonesty including relevant findings as to what subsequently occurred, findings which support the judge’s conclusions about what occurred in 2004. There are a number of unchallenged findings of dishonesty that are of particular relevance.

24 An important starting point is the judge’s finding that Mr Salfiti misrepresented the position to Mr Abu Seedo and concealed Mr El Gamal’s role. Importantly, in reaching his conclusions the judge had found that Mr Salfiti had lied in respect of documentary evidence dating from the time of the purchase which had manuscript annotations on it. Mr Salfiti relied on those annotations as having been made by him in 2004 and as showing that Mr Abu Seedo knew at the time that there were other investors involved; indeed Mr Salfiti had expressly instructed his counsel to put to Mr Abu Seedo’s son in cross-examination that the annotations had been present in 2004. However, the originals that had been sent to Dubai in 2004 were produced during the trial and were found to contain no such annotations. The judge found that Mr Salfiti was lying and accepted the evidence of Mr Abu Seedo’s son that they had been added by him in April 2017 when he was trying to work out what had gone on (see paras. 75 and 76 of the judgment). This was obviously a significant finding of dishonesty. The judge further found at para. 73 that Mr Salfiti had not told RBS, for whom Mr Salfiti was also acting on the acquisition, the truth.

- 25 A further important finding of dishonesty was that the judge found that a false power of attorney was created at the instance of Mr Salfiti in November 2006, purportedly executed by Mr Abu Seedo in favour of Mr Salfiti. The judge accepted that Mr Abu Seedo had not been in London, where the power of attorney was said to have been executed, since 2004 and indeed could not have entered the UK at the relevant time because his visa and passport had expired. There was also no reason for Mr Abu Seedo to provide a power of attorney, rather, the judge found “it would have been necessary or useful to the third defendant later on in furtherance of his scheme” (see para. 39). He rejected Mr Salfiti’s evidence of the alleged reasons for a power of attorney which he found at para. 42 to be pure fiction. He further decided at para.79 that the power of attorney was created around the time that there was a breakdown in relationships between Mr El Gamal and Mr Salfiti.
- 26 The judge also found that, without instructions from Mr Abu Seedo, Mr Salfiti consulted Counsel about the Property in 2007 and sent correspondence to Mr El Gamal, again without instructions. The judge found that the reason that Mr Salfiti gave for the correspondence, namely that Mr Abu Seedo had said he wanted more feedback from Mr El Gamal, was a lie (see para.83). There are some letters addressed to Mr El Gamal apparently dating from 2007 but there was no finding that any of them were received by Mr El Gamal before 2009. The letters sent by or on behalf of Mr Salfiti refer to and describe the Trust Deed and one, dated 26 August 2009, purported to enclose it, although the judge made no finding that it was in fact enclosed. The correspondence alleged a breach of trust and sought an account of outstanding rent. I will revert to this correspondence.
- 27 Moving six years forward, the judge also concluded that Mr Salfiti lied in his claim that demands made by him to Mr El Gamal in 2015 were made on Mr Abu Seedo’s instructions, and he further found that Mr Salfiti dishonestly commenced the present proceedings in 2016 using his home address without authority and at a time when he was not practising, Mr Abu Seedo knowing nothing about them. The judge found at para. 96 that this was:
- “... deliberately dishonest conduct on the part of the third defendant intended to protect himself and undo the harm which he had done or prevent his double dealings from being revealed.”
- 28 The judge rejected Mr Salfiti’s evidence at trial that the reason he had not asked Mr Abu Seedo to sign the statement of truth on the claim form and particulars of claim was that he had his instructions to do so, had a power of attorney and acted as his solicitor (see para.97). The judge also found that, without Mr Abu Seedo’s knowledge, Mr Salfiti used the power of attorney to instruct solicitors to go on the record in respect of the claim (see para. 99 of the judgment). The judge further rejected as “incredible” Mr Salfiti’s assertion that a similar trust deed had been created in respect of the three adjacent properties but had been destroyed when the settlement was reached in 2017 (see para. 55).
- 29 Overall, the judge was quite satisfied that Mr Salfiti was not telling the truth, that his evidence was neither honest nor reliable and that his carefully crafted witness statement had been comprehensively unpicked in cross-examination (paras. 30 to 34).
- 30 I would observe that neither the forged power of attorney nor the commencement of the claim without authority can rationally be explained if Mr Abu Seedo had in fact entered into an agreement with Mr El Gamal in 2004, that being Mr Salfiti’s case.

### *Other relevant findings*

- 31 Importantly, the judge also found that Mr Abu Seedo only became aware of the existence of Mr El Gamal in November 2016 when he received copies of the claim in these proceedings from Mr El Gamal, and that they have never met. The judge found that Mr El Gamal became aware of Mr Abu Seedo's existence in 2009 as a result of the correspondence already referred to (para. 23). This is of course relevant to the inherent likelihood that Mr Abu Seedo would have agreed to a joint venture with someone he had no knowledge of. Mr Abu Seedo had given evidence that he would conclude a deal with someone he trusted and knew, adding, "I will not conclude such a deal with anyone".
- 32 Further, the judge found that Mr Abu Seedo was not only an open and frank witness but that he had no reason or motive to lie (see paras. 21 and 36). This latter point is obviously correct. Mr Abu Seedo would still have been entitled to a 50 per cent interest in the Property if Mr Salfiti's story was true.
- 33 The judge also took into account that the available documentary evidence from the time of the purchase gave no indication to Mr Abu Seedo that Mr El Gamal was involved, including but not limited to the annotated correspondence already referred to. There was also a WhatsApp message from Mr Salfiti as late as December 2017 which the judge quite properly concluded supported Mr Abu Seedo's case that Mr Salfiti had represented himself to Mr Abu Seedo as the joint owner (paras. 62 and 63). The judge commented that for Mr Salfiti's evidence to be believed he would have to reject the core evidence of both Mr Abu Seedo and Mr El Gamal (para. 30).

### *Mr El Gamal and the 2009 correspondence*

- 34 An important plank of Mr Munro's case in oral submissions was a challenge to the judge's findings about Mr El Gamal not knowing what he was signing. As part of this, he sought to distinguish between Mr Abu Seedo and Mr El Gamal and invited me to conclude that, even if findings about Mr Abu Seedo's honesty should not be disturbed, then those about Mr El Gamal could not be supported.
- 35 An initial point that is worth emphasising is that Mr Salfiti's case at trial was put solely on the basis that the Trust Deed reflected the actual agreement between Mr Abu Seedo and Mr El Gamal. It was no part of his case that Mr El Gamal knew that there was a 50/50 deal with Mr Abu Seedo but the latter did not or might not. That approach, if adopted now, would necessarily involve a conclusion that Mr Salfiti lied at trial in relation to the one case he put. This is not simply a case, as Mr Munro suggested, of succeeding on part of his case.
- 36 It is also relevant to note that the way in which Mr El Gamal's case was put at trial did not simply rest on the Trust Deed being a forgery. He did not accept that he signed it but he did also put an alternative version of events in his trial witness statement, based on not knowingly having done so. The judge picked up on this at para. 52.
- 37 The judge found at para. 54 that the Trust Deed:

“... was part of a parcel or batch of documents which were put before the first defendant to sign at the same time and that he did so without looking at them or questioning them. That does not mean that he knew what they were or that he had been advised in respect of them.



... It seems to me that this is something which the third defendant decided to put in place to try to reflect what had happened on the purchase of the Property but he wanted to keep it in reserve for when he needed to use it.”

38 Dealing with one small point first, Mr Salfiti said that the judge was not entitled to conclude that the Trust Deed was signed without Mr El Gamal looking at it. In my view, that is a mischaracterisation of the judge’s findings. In context, it clearly means that Mr Salfiti signed it without reading it or understanding what it did. That is hardly an uncommon experience, including among experienced businessmen, at least when dealing with trusted advisers (see, for example, *Saunders v Anglia Building Society* [1971] AC 1004 at 1016D).

39 The judge had concluded at para. 53 that Mr El Gamal was close to and trusted Mr Salfiti, and would have signed documents that his trusted adviser put in front of him without reading them. Given that finding there is no need to investigate Mr El Gamal’s motives in signing the document any further, but it also provides a rational explanation of why Mr El Gamal would have been prepared to sign the document alongside another one he was provided with at the same time, without reading it.

40 Mr Munro submitted that the judge failed to have proper regard to the inherent improbability of an experienced businessman like Mr El Gamal not recognising what he was signing, bearing in mind that the document clearly uses the term “Trustee” on the signature page, or the risk that Mr Salfiti ran of Mr El Gamal realising what it was and uncovering the fraud.

41 Mr Munro also submitted that the judge did not grapple with the point that by a letter dated 14 September 2009 sent, it seems on Mr El Gamal’s behalf, in response to the 26 August letter already referred to, Mr El Gamal appeared to acknowledge that he was a trustee rather than saying that he had no knowledge of any trust. Although the relevant text of that letter was set out at para. 56, the judge only appeared to address it in the context of the validity of the Trust Deed rather than the issue of knowledge of the trust, stating at para. 57 that it was not very valuable evidence. The relevant text from the letter is:

“We have no notice of the appointment of your Mr Salfiti as an agent for the beneficiaries [a reference to the claimant]. You also did not enclose a written authority of your appointment as acting solicitors in relation to this matter. Being the trustee of the beneficiaries of the estate of Abu Seedo by law, I am the only person who is in empowered to instigate any action, including legal proceedings, on behalf of the trust.”

42 It is clear to me that the judge did have the relevant letter in mind in reaching his conclusions. I have seen closing submissions where the text of the letter was discussed. HHJ Dight asked the obvious question, namely why Mr El Gamal did not simply respond by saying that he had never heard of Mr Abu Seedo and that he was not a trustee. The response from his Counsel at the time was to agree with the suggestion that Mr El Gamal was being “too clever by half”.

43 Further, and importantly, paras. 56 and 57 are not the only relevant reference to the letter. At para. 29 of the judgment, the judge refers specifically to the 2009 correspondence in assessing the truthfulness of Mr El Gamal’s evidence. I consider that he was entitled to reach the conclusion that he did in that respect. He clearly took account of the letter,

alongside all the other evidence he had heard, in determining whether to accept Mr El Gamal's version of events. It was up to the judge to determine precisely what weight to attribute to the letter.

- 44 Further, as to the risk that Mr El Gamal was said to be taking, that is explicable either on the basis that Mr Salfiti believed that the Trust Deed would be signed without being read, and/or that if a point was raised it could be explained as a mistake. In summary, the conclusion is rationally supportable.
- 45 I would also observe that the terms of the letter sent on Mr El Gamal's behalf are in fact inconsistent with actually knowing anything about Mr Abu Seedo. The letter refers to being the "trustee of the beneficiaries of the estate of Abu Seedo by law", which appears to refer to the estate of a deceased person. That is more consistent with the "too clever by half" version of events, a version that also tallies with Mr El Gamal's evidence recorded at para. 57 of the judgment that he was trying to call Mr Salfiti's bluff.

*Explanation for the Trust Deed and its signature*

- 46 It was not incumbent on the judge to make findings about Mr Salfiti's precise motivations or the rationality or otherwise of his behaviour, provided he was entitled to reach the factual conclusions that he did. However, the passage from para. 54 of the judgment already referred to (see [37] above) provides the judge's explanation for why Mr Salfiti wanted to put the Trust Deed in place. Mr Salfiti places too much reliance on the words "to try to reflect what had happened", failing to take account of the words that follow and the context of the judgment as a whole. Clearly, without the Trust Deed there would be no documentary basis for Mr Salfiti to be able to assert that anyone other than Mr El Gamal had a beneficial interest in the Property. With the Trust Deed, Mr Salfiti had some basis to pursue Mr El Gamal to account for an interest in the Property and a share of the rent, which is precisely what he subsequently did, purportedly on behalf of Mr Abu Seedo but in fact without his instructions or knowledge.
- 47 The Trust Deed also had the benefit of Mr Salfiti being able to claim to Mr Abu Seedo, if and when he needed to do so, that Mr Abu Seedo did indeed have an interest in the Property. It was part of Mr El Gamal's case that the Trust Deed had been created by Mr Salfiti to cover up his fraud. This was effectively what the judge found (see the reference to maintaining the subterfuge by creating a power of attorney at para. 79, the reference to double dealings at para. 96 and to maintaining the fraud at para. 118).
- 48 It is also relevant that the judge found that Mr Salfiti kept the Trust Deed in his personal possession until 2016, and that there was no entry at the Land Registry in respect of it. He found at para. 54 that Mr Salfiti's explanation that Mr El Gamal did not want the Trust Deed to be registered was "utterly incredible". I would add that it might have been thought to be a point that Mr Salfiti should have concerned himself with as Mr Abu Seedo's solicitor.
- 49 Finally, on this aspect, Mr Munro submitted that para. 51 of the judgment disclosed an error of approach, because what the judge had done was to consider the Trust Deed separately, divorced from the rest of the factual findings. I would observe that para. 51 needs to be read in the context of the judgment as a whole, including the paragraphs that follow it, but in any event I do not agree with the criticism. In that paragraph the judge rightly recognised that the Trust Deed was a key document. He also referred to it as being capable of having its own independent effect. That clearly means legal effect. The judge went on to conclude in the following paragraphs that the Trust Deed was actually signed (see paras. 52 to 57). It is

perfectly understandable that in structuring his judgment he dealt with the validity of the Trust Deed first, before setting out his other factual findings. It does not mean that he ignored his conclusion that the Trust Deed was valid in reaching his other conclusions.

*Statements allegedly made to court*

- 50 Mr Salfiti relies on Mr Abu Seedo having made statements to court following his adoption of the proceedings that continued to maintain that he had entered into a joint venture with Mr El Gamal in 2004, which he said the judge had not addressed. The relevant ground of appeal states that Mr Abu Seedo could not and did not give any explanation for having done so.
- 51 I do not accept that this ground has substance. First, Mr Salfiti relies on particulars of claim filed in June 2016 when independent solicitors were instructed, but the judge found that Mr Abu Seedo did not become aware of the proceedings until November 2016 and did not authorise them. There is no challenge to these findings. The relevant cross-examination of Mr Abu Seedo at trial was by reference to those particulars.
- 52 Secondly, Mr Salfiti relied on a witness statement that Mr Abu Seedo had signed in February 2018 in response to an application for security for costs, in which he said that he was “fully aware of the proceedings and will be attending Court to give full evidence”. I do not accept Mr Munro’s submission that this amounted to a ratification or verification of all the contents of the particulars of claim. Mr Abu Seedo did not in that witness statement make comments about the truth of the details of the claim; rather, he was responding to an application for security for costs in which it was being claimed that he had no knowledge of the proceedings.
- 53 Mr Abu Seedo then instructed counsel to amend his claim. The first set of amended particulars, signed by Mr Abu Seedo on 23 June 2019, added at paras.17 to 28 details of Mr Abu Seedo’s case that he had in fact reached an agreement with Mr Salfiti and not with Mr El Gamal. However, this set of amendments did not delete the version of events originally pleaded by Mr Salfiti at para. 4. This was clearly an oversight because the result was that the amended particulars alleged two wholly inconsistent versions of events which were not stated to be in the alternative. Indeed, Mr Abu Seedo made the point that there had been a mistake in not deleting the original version in his trial witness statement.
- 54 When the amended particulars were filed and served, Mr Salfiti responded by applying to strike out the claim. HHJ Dight recognised that the particulars required further amendment and gave permission to do so. As a result, the unauthorised version set out in para. 4 was deleted in the re-amended particulars of claim dated 27 July 2019.
- 55 The judgment expressly records at para. 18 that Mr Abu Seedo “was not interested in and had no proper understanding of some of the documents in the case,” and at para. 102 that he did not understand the details of the case when he received papers in November 2016, accepting that he had not read the details of the claim or the statements of case. Since he had dealt with the relevant case management the judge was obviously also aware of the inconsistency in the amended particulars.
- 56 I further observe that Mr Abu Seedo is not a fluent English speaker. He gave evidence with the benefit of a translator. It is unrealistic to suggest that the delay in amending the particulars of claim to reflect, and properly reflect, the case as finally put meant that Mr Abu

Seedo must be taken to have agreed to the original case as put by Mr Salfiti without his authority.

### *Limitation*

- 57 I turn to the limitation argument. This argument challenges the judge’s conclusion that the claims of Mr El Gamal and the Second Defendant against Mr Salfiti benefited from the extended limitation period under section 32 of the Limitation Act 1980. Mr Munro placed reliance on the letter dated 14 September 2009 already referred to (see [41] above). He submitted that once Mr El Gamal was on notice of the Trust Deed, and indeed had accepted in that correspondence that he was a trustee, then he had all that was required to make his claim against Mr El Gamal.
- 58 As submitted by Mr Saifee for Mr El Gamal, it is important to consider the actual claim made against Mr Salfiti by Mr El Gamal, rather than what the judge ultimately decided. Mr Saifee did not cite specific authority that explained why this was the correct focus, but I note that the submission was not directly contradicted by Mr Munro. Its statutory basis must be that it is the action brought that must be considered for the purposes of the Limitation Act (see sections 2 and 5 in respect of tort and contract respectively, and the text of section 32(1)(a) which applies where “the action” is based upon the fraud of the defendant).
- 59 I also note that this approach is consistent with the Supreme Court’s analysis in *Test Claimants in the FII Group litigation v HMRC* [2022] AC 1, recently applied in the context of section 32(1)(b) by the Court of Appeal in *Gemalto Holdings BV v Infineon Technologies AG* [2022] EWCA Civ 782. See in particular the *FII* decision at [199] to [202]. The correctness of the approach is also supported by an authority that Mr Saifee did rely on, *Barnstaple Boat Co. Ltd v Jones* [2007] EWCA Civ 727; [2008] 1 All ER 1124 at [34].
- 60 The pleaded particulars of fraud were that Mr Salfiti falsely represented that he was personally loaning Mr El Gamal money for the purchase by him of the Property when the money belonged to Mr Abu Seedo, that it was Mr Salfiti who was entering into an agreement with Mr El Gamal rather than anyone else, and that Mr Salfiti created the Trust Deed which Mr El Gamal did not sign.
- 61 For completeness, the judge’s findings on those claims are at para. 126; namely:
- 1) that there had been a deliberate and fraudulent breach of an agreement that Mr El Gamal would become the sole owner with the balance of the funds being a loan from Mr Salfiti;
  - 2) that there had been a deliberate and fraudulent misrepresentation as to that loan; and
  - 3) that there had been a deliberate breach of the retainer in a failure to disclose the true nature of the transaction, advise as to the true beneficial ownership and a failure to act in Mr El Gamal’s best interests.

Clearly the judge did not accept part of Mr El Gamal’s case, namely, that he did not sign the Trust Deed, but he did accept the rest.

- 62 In the Addendum to his judgment, the judge did not accept that Mr El Gamal became aware of Mr Salfiti’s fraud as a result of the 2009 correspondence because he “deliberately concealed his fraudulent acts.” There is no specific ground of appeal against that finding. The judge made no finding that the Trust Deed had been sent to Mr El Gamal in 2009, Mr

El Gamal having denied that he saw it before it was sent with the claim form in 2016. In any event, it was not apparent from the 2009 correspondence that the story about a loan from Mr Salfiti was a lie or that the funds came from elsewhere and in fact were a contribution rather than a loan. There is no mention of the loan in the Trust Deed and Mr Abu Seedo's financial contribution to the acquisition of the Property is not mentioned in the correspondence. The 2009 correspondence related only to the Trust Deed.

63 The judge found that that correspondence did not make Mr El Gamal aware of Mr Salfiti's fraud. Instead, he concluded in the Addendum that:

“... the existence of the fraud and the true extent of the acts of the third defendant only became apparent when the claimant took over control of this claim from the third defendant and actively participated in the claim.”

64 Mr Salfiti maintains that the correspondence did provide actual or constructive knowledge of the fraud, because the Trust Deed was inconsistent with Mr Salfiti having led him to believe that he would be the 100 per cent owner of the Property. However, the correspondence did not give Mr El Gamal the knowledge of the particular cause of action he alleged against Mr Salfiti, which focused on the fraud in respect of the alleged loan and Mr Abu Seedo's financial contribution, the Trust Deed being alleged to be invalid and so of no effect.

65 The judge was entitled to conclude that Mr El Gamal could not determine simply from the correspondence, sent by or on behalf of a person with whom Mr El Gamal had evidently fallen out, that Mr Salfiti had been guilty of the fraud that was subsequently alleged against him, including his misrepresentations as to the source of the funds and as to the deal being done with him rather than with anyone else. In 2009, what Mr El Gamal knew was being alleged was that he was a trustee under the terms of a trust deed.

66 There is a separate question as to whether the 2009 correspondence should have put Mr El Gamal on enquiry such that (using the words of the section) he could with reasonable diligence have discovered the fraud or concealment. The relevant ground of appeal does not address this, simply saying that Mr El Gamal “had sufficient knowledge” to make a claim for fraud. There was no application to amend the grounds to cover the reasonable diligence test, and Mr Munro explicitly confirmed in response to my question that he was not seeking to rely on it.

*Additional ground*

67 Finally, I turn to the additional proposed ground of appeal.

68 Mr Salfiti maintains that this ground was omitted by mistake. I am prepared to consider this ground notwithstanding the fact that it was not properly raised before the judge at the PTA hearing, largely because it was reflected in the original grounds of the appeal before they were reformulated and because the respondents have had a chance to consider the additional ground and to address it.

69 I have decided not to grant permission in respect of this ground. First, it does not reflect the judge's judgment. He did not decide that there was a fraudulent scheme for Mr Abu Seedo and Mr El Gamal to enter into a 50/50 purchase, but rather that Mr Salfiti was playing both of them and engaged in his own fraudulent scheme. As already discussed, the judge found that the Trust Deed was intended to be kept in reserve. Mr Salfiti had got himself into

difficulty over the acquisition of the Property and he was attempting to ensure that he had a basis to pursue Mr El Gamal in future, including, it seems, for his own benefit. He was also attempting to create a possible exit route so far as Mr Abu Seedo was concerned.

- 70 Secondly, this ground to a large extent repeats the point made in other grounds about there being no reason for the Trust Deed. I have already addressed that point.
- 71 As to whether the judge's findings reflect a case that was properly put, fraud was clearly pleaded including that Mr Salfiti represented to Mr El Gamal that he was personally lending funds for the purchase pursuant to an agreement with him alone, and that Mr El Gamal would be the sole owner. It was also pleaded that Mr Salfiti created the Trust Deed. The part of Mr El Gamal's case that was not accepted was that the Trust Deed was not signed by him, but that does not mean that Mr Salfiti did not have a proper chance to respond to fully particularised allegations against him.
- 72 As regards Ms Adib, who was a trainee solicitor at the time she witnessed the signature, it was clear from her witness evidence that although she confirmed her signature and the fact that she would have witnessed Mr El Gamal's signature in accordance with her normal (quite proper) practice, she could not recall the particular incident.
- 73 It is also clear from para. 33 of the judgment that the judge gave proper consideration as to whether allegations were put with sufficient particularity to Mr Salfiti. There is no sufficiently arguable basis to justify interfering with his conclusion that they were. Mr Salfiti maintained his case that the Trust Deed reflected an agreement to which both Mr Abu Seedo and Mr El Gamal were party, a case which was rejected at trial. Mr El Gamal's case that the Trust Deed did not reflect his agreement with Mr Salfiti and that he had been misled was squarely put to Mr Salfiti.

*Conclusion*

- 74 In conclusion, the appeal is dismissed.
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