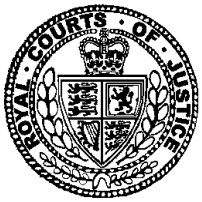

Neutral Citation Number: [2022] EWHC 3198 (Ch)

Claim No: BL-2022-MAN-000051
Application No. BL-2022-MAN-000037

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 15 December 2022

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

MARY SHOVLIN (AS SOLE SURVIVING TRUSTEE OF THE SPH TRUST)	**Claimant**
- and -	
(1) SITE CIVILS AND SURFACING LTD	
(2) GEORGE CROSBY	**Defendants**

- -
- -

Martin Budworth (instructed by **SAS Daniels LLP)** for the Claimant
David Uff (instructed by **Aughton Ainsworth Ltd**) for the Defendants

Hearing date: 23 November 2022

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.00 am on 15 December 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

HHJ CAWSON KC:

Contents

Introduction

1. I am concerned with the Claimant's application dated 19 August 2022 ("**the Amendment Application**") whereby she seeks permission pursuant to CPR 17.3 to amend her Particulars of Claim in the present proceedings.

2. By paragraph 1 of his Order dated 29 July 2022, HHJ Davies, sitting as a Judge of the High Court, struck out paragraph 14 of the Particulars of Claim, being the paragraph within the Particulars of Claim that pleaded the basis of the Claimant's case against the Second Defendant. By paragraph 3 of the same Order, HHJ Davies ordered that unless the Claimant did, by 4 PM on Friday, 19 August 2022, file and serve either:

    i) an application to amend the Particulars of Claim against the Defendants; and/or

    ii) an application to continue the claim against the Second Defendant under the jurisdiction in *TSB Private Banking International SA v Chabra* [1992] 1 WLR 231;

    then judgment should be entered for the Second Defendant on the claim against him, and he should be discharged from the undertaking at paragraph 3 of the Schedule to that Order.

3. The Amendment Application is made pursuant to paragraph 3 of the Order dated 29 July 2022, and in order to plead a new basis for the case that the Claimant seeks to pursue against the Second Defendant.

4. The Application is opposed by the Second Defendant on the basis that the new case sought to be advanced against him is one that, on proper analysis, discloses no reasonable basis for a claim and/or has no real prospect of success.

Background

5. The Claimant sues as sole surviving trustee of the SPH Trust ("**the Trust**"), a trust established by a Trust Deed dated 31 October 2016 of which the Claimant and one Austin Fergus were appointed as first trustees. Austin Fergus, now deceased, was,

together with his brother, a partner in the accountancy firm of Fergus & Fergus ("**the Firm**").

6. 7 January 2017, Philip Shovlin Plant Hire Ltd paid the sum of £2.5 million to the Trust, and this sum was credited to a bank account in the name of the Trust. It is the Claimant's case that instructions were given to Austin Fergus, and to the Firm, to invest the monies on behalf of the Trust.

7. It is the Claimant's case that, rather than causing the monies belonging to the Trust to be properly invested, Austin Fergus, in breach of his duties as a trustee of the Trust, and/or in breach of fiduciary duties owed by the Firm to the Trust, caused money standing to the credit of the Trust's bank account to be paid to a number of clients of the Firm, including the First Defendant, purportedly by way of loans.

8. In the case of the First Defendant, £525,000 was paid out of the Trust's bank account to the First Defendant on 5 January 2017. A further £120,000 was paid out of the Trust's bank account to Solicitors acting for one or both of the Defendants on 9 January 2019, it being the Defendants' case that these Solicitors were acting for the First Defendant alone.

9. The £525,000 was used by the First Defendant to fund its purchase, on or about 14 February 2017 of land at Mercury Park, Mercury Way, Urmston, Manchester, and the £120,000 was subsequently used in January 2019 to purchase a strip of land for the benefit of the land originally acquired (together referred to as "**the Mercury Way Land**").

10. The Mercury Way Land was subsequently sold by the First Defendant on 27 March 2020 at a price of £2.5 million to the fast-food restauranteur, McDonalds. The First Defendant thereby made a significant profit on the sale, there being an issue between the parties as to the extent of that profit having regard to the costs and expenses incurred by the First Defendant in bringing the Mercury Way Land to market.

11. The Claimant is elderly, and in early 2020 or thereabouts, her son, Philip Shovlin, began to investigate what had become of the monies paid away by Austin Fergus. In so doing, he made contact with the Second Defendant as a result of which, shortly prior to the sale of the Mercury Way Land, on 6 March 2020, the First Defendant repaid £650,000 to the Trust. The Second Defendant is a director of, and a shareholder in the First Defendant, and its effective directing mind.

12. The Claimant's case as against the First Defendant is that it was a knowing recipient of monies misapplied by Austin Fergus in breach of trust. In essence it said that the circumstances in which the monies were transferred to the First Defendant were such as to put it (by its directing mind the Second Defendant) on notice that the monies were being applied by Austin Fergus in breach of trust, in consequence of which the First Defendant became liable to account for the same to the Trust as constructive trustee.

13. Although the misapplied £650,000 has been returned, it is the Claimant's case against the First Defendant that it is liable to account to the Trust for the profit that it made on the sale of the Mercury Way Land, reliance being placed upon, e.g., *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1577], as authority for the proposition that such a constructive trustee is liable to account in this situation.

14. Whilst the case as against the First Defendant is hotly disputed, it being denied, in particular that the Defendants knew, or are to be regarded as having the requisite knowledge of the breach of trust by Austin Fergus in misapplying the Trust's monies, the Defendants do not suggest otherwise than that the Claimant has a case with a real prospect of success as against the First Defendant. However, the case that the Claimant has sought to advanced against the Second Defendant is more controversial.

15. So far as the factual background is concerned, the following further matters are of relevance to the claim sought to be pursued as against the Second Defendant.

16. On 10 October 2019, the Second Defendant purchased the property known as Vinesgrove, High Legh, Near Knutsford, Cheshire ("**Vinesgrove**") at a price of £900,000 with the benefit of a bridging loan from a third party of £1 million made to the Second Defendant, secured upon Vinesgrove, but not the Mercury Way Land. It is the Claimant's case that Vinesgrove was purchased by the Second Defendant in anticipation of the imminent sale of the Mercury Way Land, and the profit from the sale thereof becoming available to discharge the bridging loan taken out to fund the purchase of Vinesgrove.

17. In order to fund the repayment of the £650,000 to the Trust on 6 March 2020, the First Defendant, itself, took out bridging loan finance from a third party secured upon the Mercury Way Land.

18. Upon the sale of the Mercury Way Land, the proceeds of sale thereof were applied in discharging the bridging loan taken out by the Second Defendant to fund the purchase of Vinesgrove, and the bridging loan taken out by the First Defendant to fund the repayment of the £650,000.

19. As a matter of accounting as between the First Defendant and the Second Defendant, the Second Defendant was recorded as owing the First Defendant £1,349,000 under a director's loan account on the basis that its monies (from the proceeds of sale of the sale of the Mercury Way Land) were used to discharge the loan taken out by the Second Defendant to fund the purchase of Vinesgrove.

20. Planning permission was obtained by the Second Defendant for the development of Vinesgrove by the construction of another dwelling in the grounds thereof. On 10 October 2021, the original house, Vinesgrove, was sold by the Second Defendant with some land at a price of £986,000, with the plot of land with the benefit of planning permission being retained. At some stage a house was built on the retained plot pursuant to the planning permission, which is known as Greenacres.

21. The Second Defendant applied the proceeds of sale obtained on the sale of Vinesgrove (£986,000), together with a further £339,000, in repaying his director's loan account with the First Defendant.

Procedural history

22. On 22 June 2022, at a hearing held without notice to the Defendants, I granted a Freezing Order in favour of the Claimant against the First Defendant and the Second Defendant. It is unnecessary to review the evidence relied on in support of there being a risk of dissipation by the Defendants for present purposes, save to say that I was

satisfied, on the basis of the evidence before me, that there was such a risk absent the grant of a Freezing Order, the evidence including evidence from Philip Shovlin as to what he said that he had been told by a Mr Joe Gillespie, and with regard to an imminent sale of Greenacres.

23. For the purposes of the hearing on 22 June 2022, the Claimant produced Particulars of Claim setting out the basis of her case against the First Defendant and the Second Defendant. The pleaded case as against the Second Defendant was articulated in paragraph 14 thereof as follows:

> *"14. Further the First and Second Defendants have (or it should be inferred that they have) combined, agreed, and entered into a common design or understanding to seek to put the First Defendant's profits of knowing receipt beyond the Claimants' easy reach. Such conspiracy by the Defendants is an actionable conspiracy to injure, having as its predominant purpose injury to the Claimants. Further or alternatively the combination is actionable as an unlawful means conspiracy, those means involving breach by the Second Defendant of his fiduciary duty to the First Defendant. In furtherance of their agreement the First Defendant has recorded in its accounts to year end 28 February 2021 an advance to the Second Defendant (and now outstanding on his director's loan that was previously clear) in the sum of £1,349,169. That the Claimants aver is a clear attempt to strip monies out of the First Defendant and frustrate the Claimants' primary action against it."*

24. Whilst I had reservations as to this case as so advanced in conspiracy, I considered there to be sufficient merit in it to warrant the grant of a Freezing Order against the Second Defendant over a comparatively short return day.

25. In the event, as I understand it by agreement between the parties, the Freezing Order was continued on the return day, 1 July 2022, when HHJ Halliwell, sitting as a Judge of the High Court, gave directions in respect of the application issued by the Claimant for the continuation of the Freezing Order, providing for the latter application to be heard on 29 July 2022.

26. On 19 July 2022, the Second Defendant issued an application seeking an order that the Particulars of Claim be struck out as against him pursuant to CPR 3.4(2)(a) on the basis that the Particulars of Claim disclosed no reasonable grounds for bringing the claim, and/or that the Second Defendant be granted summary judgment against the Claimant pursuant to CPR Part 24 on the basis that the claim against him had no real prospect of success. This application was also listed to be heard on 29 July 2022.

27. The matter came before HHJ Davies, sitting as a Judge of the High Court, on 29 July 2022 when HHJ Davies made the Order referred to in paragraph 2 above, striking out paragraph 14 of the Particulars of Claim, but giving the Claimant an opportunity to apply for permission to amend the Particulars of Claim provided that any such application was issued by 4 PM on 19 August 2022.

28. HHJ Davies further ordered that any such application be heard at a Case Management Conference, which he directed to be heard on the first available date after 19 September 2022. The Case Management Conference was subsequently listed before me on 23 November 2022.

29. The Amendment Application was issued in time on 19 August 2022, and so was before the Court at the Case Management Conference on 23 November 2022. It was agreed between the parties that it was necessary to determine the Amendment Application before the Court gave any further directions.

30. Draft Amended Particulars of Claim had been exhibited to the evidence in support of the Amendment Application, and so were before me when I dealt with the matter on 23 November 2022.

31. It is fair to say that the Claimant's Skeleton Argument prepared for the hearing on 23 November 2022 was somewhat perfunctory as to the way in which it dealt with the somewhat complex issues of law raised by the draft Amended Particulars of Claim. The Skeleton Argument of the Defendants did take the following points, which were further developed by Mr Uff in submissions on behalf of the Defendants at the hearing:

> *"4. The sum received by D1 was repaid to C before any profit for which D1 might arguably be liable to account was applied with a resulting benefit to D2.*
>
> *5. It is trite law that beneficial receipt by D2 of monies belonging to C or the traceable proceeds of such monies is a necessary ingredient of a claim in knowing receipt against D2 - BCCI (Overseas) Ltd v Akindele [2001] Ch 437 at 448 B.*
>
> *6. Where (as here) the money belonging to C was repaid before any profit was applied with a resulting benefit to D2 there is no basis for a claim against D2 for an account of profits.*
>
> *7. Even assuming a proper basis of claim, any resulting benefit to D2 was not (even arguably) a sufficiently direct causal result of the use of C's monies - Novoship (UK) Ltd v Nikitin [2014] EWCA Civ 908 at paras. 94-115."*

32. In the light of observations that I made with regard to the contents of the draft Amended Particulars of Claim, Mr Budworth, on behalf of the Claimant, sought the opportunity to revise the draft before I determined the application. I decided to give Mr Budworth that opportunity, provided that a revised draft, together with any further written submissions intended to be made in support thereof, were filed by 4:00 PM on 25 November 2022, and provided that Mr Uff had an opportunity to respond to on behalf of the Defendants. I indicated that I would either deliver an oral judgment at an adjourned hearing of the Case Management Conference or would produce a written judgment in the meantime. I have opted for the latter.

33. Mr Budworth duly provided revised draft Particulars of Claim as an attachment to a fairly brief email that identified a number of textbook and case authorities, but without further significantly developing the Claimant's case on the proposed amendments. In response, Mr Uff has provided a rather more detailed, and helpful Supplemental Skeleton Argument on behalf of the Defendants.

The proposed amendments

34. The proposed amendments, as recast by Mr Budworth on 25 November 2022, are contained within a lengthy new paragraph 14, which reads as follows:

"14. ~~Further the First and Second Defendants have (or it should be inferred that they have) combined, agreed and entered into a common design or understanding to seek to put the First Defendant's profits of knowing receipt beyond the Claimant's easy reach. Such conspiracy by the Defendants is an actionable conspiracy to injure, having as its predominant purpose injury to the Claimant. Further or alternatively the combination is actionable as an unlawful means conspiracy, those means involving breach by the Second Defendant of his fiduciary duty to the First Defendant. In furtherance of their agreement the First Defendant has recorded in its accounts to year end 28 February 2021 an advance to the Second Defendant (and now outstanding on his director's loan that was previously clear) in the sum of £1,349,169. That the Claimant avers is a clear attempt to strip monies out of the First Defendant and frustrate the Claimant's primary action against it~~. Paragraph 14 is struck through as originally drafted because it became clear subsequently in the evidence filed by the Defendants for the return date on the freezing injunction that the loan account monies had been repaid to the First Defendant. It followed that such matter alone could no longer found an attempt by the Defendants to strip monies out of the First Defendant ~~and there is on present information and disclosure no alternative evidence to support an inference of conspiracy~~. The Second Defendant remains however personally liable alongside the First Defendant in any event because, on his own admission, he has personally profited to an extent from the receipt of the Claimant's monies (or the traceable proceeds of the Claimant's monies) and which he too knew or ought to have known had been originally misapplied by Fergus and Fergus in breach of fiduciary duty. By affidavit dated 13 July 2022 the Second Defendant has admitted that

a) *the Claimant's funds were used to buy the land at Mercury Way, Trafford Park in February 2017*

b) *it was the sale of that land to McDonalds in March 2020 which generated very substantial profit*

c) *he intended for the resale profit on the land purchased with the Claimant's monies to be used to purchase the property known as Vinesgrove*

d) *timing was such that the Defendants together had to take out short-term bridging finance personally pending the sale of the land to McDonalds. He took the first loan facility of £1m in his personal name and gave Vinesgrove as security for it even though it was the loan monies which were being used to buy Vinesgrove in the first place. A second facility was taken out for £650,000 on 6 March 2020. That was in the First Defendant's name but the Mercury Way land was given as security for it. That second facility permitted repayment of the Claimant's misapplied monies of £645,000 but the traceable proceeds of those monies (i.e. the Mercury Way land) remained the vehicle for a profit to be made by reason of receipt of the misapplied monies*

e) *but for the land purchased with the Claimant's monies, plainly no security could have been given for the second facility. No security could have been given for the first facility either because, as Mr Crosby admits, it was only the imminent resale proceeds/profits which were going to permit the purchase of Vinesgrove in the first place (the security which*

the bridging lender accepted for the first advance), merely the delays in effecting the sale to McDonalds led to Vinesgrove being purchased ahead of the McDonalds sale

f) *as soon as the McDonalds proceeds became available, the First Defendant applied them so as to clear both the First and Second Defendant's bridging finance. That finance had only been obtained with the benefit of the traceable proceeds of the Claimant's monies and it was only the profit gained from the use of the Claimant's monies which permitted the discharge*

g) *the Second Defendant was at that point left with the property Vinesgrove registered to himself despite him not having paid for it*

h) *he proceeded to sell Vinesgrove in order to discharge a debt which had been allocated to him under his director's loan account but he retained a portion of the Vinesgrove plot upon which the First Defendant then paid for the design and construction of a second dwelling, Greenacres*

i) *(as disclosed in his affidavit of assets) Greenacres is owned by him personally and is worth £900,000 less an amount of £300,000 recorded as being due to the First Defendant*

j) *on his own account, the Second Defendant's personal profit therefore is £600,000, all of which relates back to and is sufficiently causally connected to the original misapplication of the Claimant's funds rendering him liable personally to account for those profits*

k) *if and in so far as Mr Crosby would argue that he has no liability to account for profit (which has a sufficient causal connection to the original misapplication of the Claimant's funds) if he personally was not the original knowing recipient,*

(i) *firstly, there is material doubt (to be resolved at trial) about who the true recipient was (D1 or D2) given that Mr Crosby himself is equivocal in his affidavit evidence (paras.20 and 26) in respect of both cheques received and given that the second cheque was not even made out to D1*

(ii) *secondly, if he proves he was not the original recipient then he was nevertheless for the reasons above the knowing recipient of funds which were the traceable proceeds of monies belonging to the Claimant (in circumstances where he knew or ought to have known that the initial receipt was traceable to a breach of fiduciary duty by Fergus and Fergus). Given his knowledge both a) that he had received the traceable proceeds of original monies of the Claimant and b) that those original monies were the subject of the breach of fiduciary duty by Fergus and Fergus that is sufficient to give rise to a liability to account for profit notwithstanding that Mr Crosby was not the original knowing recipient*

(iii) *thirdly, any literal mismatch between the original knowing*

recipient and the resulting ownership of the profit made following receipt of the Claimant's funds does not in and of itself mean that Mr Crosby escapes a personal liability to account because the Court of Appeal's conclusion in Novoship (the authority which establishes the liability to account in respect of knowing receipt) was driven by deliberate policy considerations that liability should be regarded simply as a matter of equity. In the premises, by reason of his personal knowledge of the breach of fiduciary duty and his knowledge that the profit residing in his ownership of Greenacres cannot be divorced from the original misapplication of the Claimant's funds, the equitable result is for Mr Crosby to be liable to disgorge the resulting fruits of the breach of fiduciary duty. In particular, because the Court of Appeal expressly readopted the proposition that a liability to account in equity does not depend on receipt of trust property

(iv) *fourthly, in so far as disgorgement by a fiduciary is founded on a pre- existing duty owed by the fiduciary whereas disgorgement by a third party is founded (not on any pre-existing duty but) on equity regarding it as wrong that the gain should be kept, the order of an account of profits in the latter case is a matter of discretion (for example the remedy might ultimately be withheld on grounds of disproportionality) that discretion should be considered at trial with the benefit of tested evidence and submissions. The Claimant contends that Mr Crosby's resulting ownership of Greenacres is still an ill-gotten gain.*

l) *For the reasons above, as a matter of equity generally, Mr Crosby as a personal profiteer, where that profit is sufficiently causally connected with the breach of duty by Fergus and Fergus, a breach of which Mr Crosby himself knew or ought to have known, should be held to account as if he were a trustee*

m) *Further or alternatively, the Claimant contends that Mr Crosby is a trustee. He personally holds the £600,000 net profit sum on constructive trust for the Claimant because in the premises that profit accrued to Mr Crosby through the use of the Claimant's misapplied funds and traceable proceeds thereof:*

(i) *because the First Defendant, the original knowing recipient, should be held to account as if it were a trustee then the Claimant should be taken to have had an equitable proprietary interest in the Mercury Way land (the asset purchased with the Claimant's monies)*

(ii) *given the Defendants' disclosed intention to use the profits on the resale of Mercury Way to purchase Vinesgrove, the Claimant follows and traces into the bridging finance*

monies (the first loan facility being in Mr Crosby's name, the second in the name of the company) because they were merely a device to permit the purchase of Vinesgrove before the profits had actually been realised (because the McDonalds sale was delayed). The first loan facility permitted the purchase of Vinesgrove and the second facility used Mercury Way as security for the advance

(iii) *thus the Mercury Way asset was effectively exchanged for or otherwise became represented in some way by the finance monies*

(iv) *further or alternatively, bypassing the finance monies, which were just a temporary device to abide by the delayed receipt of the resale profits, the Claimant follows and traces (because the property was put into Mr Crosby's name) in any event into Vinesgrove because, in accordance with the prior intention to use the resale profits to purchase Vinesgrove, as soon as the resale profits became available they were used to discharge the bridging finance and leave Vinesgrove free of the lender's charges*

(v) *the Claimant follows and traces in turn to the Greenacres dwelling constructed on the retained portion of the Vinesgrove land because, in the premises, the first asset in which the Claimant claims an equitable proprietary interest, Mercury Way, has, by the series of transactions set out above, effectively been exchanged for or come to be represented in some way by the resulting ownership of Greenacres. Greenacres is identifiable as having been paid for by the use of the profits on the Mercury Way asset in which the Claimant had an equitable proprietary interest. Equity permits the following and tracing of the Mercury Way asset and the profit enjoyed thereon into whatever form it may be found, not only in the hands of the First Defendant as the quasi-trustee but also in the hands of the Second Defendant who has acquired a legal title to Greenacres without being a good faith purchaser for value without notice; on the contrary, he knew or ought to have known at all material times that his resulting ownership of Greenacres is inextricable from the original misapplication of the Claimant's monies*

(vi) *The tracing (above) of the original asset as it was exchanged for or came to be represented in some way by a new asset; and the following (above) of the movement of those assets between the Defendants are evidential processes by which the Claimant seeks to identify its same original equitable proprietary interest, in Greenacres (the form it now takes).*

n) *Further or alternatively, for the reasons set out (and repeating in*

particular (k(ii)) above), the Second Defendant (despite not being the original knowing recipient of the Claimant's monies themselves) was nevertheless a knowing recipient of property impressed with a trust, because he knew or ought to have known that the First Defendant held Mercury Way on trust for the Claimant, and the Second Defendant therefore holds Greenacres on trust for the Claimant under the first limb of Barnes v Addy. The responsibility of a trustee may extend in equity to persons who are not properly trustees. That responsibility extends to the First Defendant as the first knowing recipient. The law does not contain the responsibility to only being able to be extended once. If, as the Claimant avers, the First Defendant was a quasi-trustee then the Second Defendant, who was not a stranger and had knowing receipt of assets impressed with a trust, was likewise in turn a quasi-trustee.

o) *Further or alternatively, in the premises the First and Second Defendants have (or it should be inferred that they have) combined, agreed and entered into a common design or understanding to seek to put some of the First Defendant's profits of knowing receipt (i.e. the profits on the resale to McDonalds) beyond the Claimant's easy reach by channelling a substantial part of those profits into Mr Crosby's personal ownership of Greenacres. Such conspiracy by the Defendants is an actionable conspiracy to injure, having as its predominant purpose injury to the Claimant. Further or alternatively the conspiracy is actionable as an unlawful means conspiracy, those means involving breach by the Second Defendant of his duty to promote the success of the First Defendant, established by its effective gift to him of the parcel of land at Vinesgrove and its payment of the construction costs of the Greenacres dwelling owned by him personally."*

The Defendants' case in respect of the amendments

35. It is, as I have said, the Defendants' case that the amendments proposed to be made to paragraph 14 of the Particulars of Claim disclose no reasonable grounds for bringing a claim and/or that the latter have no real prospect of success, and therefore should be disallowed on this basis. Bearing in mind that the Claimant is seeking to introduce a new case, I am satisfied that the correct test to apply is whether the amendments do, in fact, disclose reasonable grounds for bringing a claim against the Second Defendant and do have a real prospect of success - see the White Book 2022 at 17.36, referring to *Phones 4U Ltd (In Administration) v EE Ltd* [2021] EWHC 2816 (Ch) at [11].

36. The objections taken by Mr Uff on behalf of the Defendants are as follows.

37. Firstly, Mr Uff identifies that the constructive trusteeship imposed upon a knowing recipient such as that sought to be imposed upon the First Defendant, and also now the Second Defendant, falls within the second class of constructive trustee identified by Millett LJ (as he then was) in *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 at 408-409, where Millett LJ said this with regard to the second class of constructive trusteeship:

> *"The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person*

> *sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be "liable to account as constructive trustee."* *Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff.* *In such a case the expressions "constructive trust" and "constructive trustee" are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are "nothing more than a formula for equitable relief": Selangor United Rubber Estates Ltd. v Cradock [1968] 1 WLR 1555 at p. 1582 per Ungoed-Thomas J."* [My emphasis added].

See further *Williams v Central Bank of Nigeria* [2014] AC 1189 at [7] et seq, per Lord Sumption.

38. On this basis, not being a true trustee, the First Defendant was never a fiduciary, owing fiduciary duties to the Trust, and was therefore never in a position to misapply trust property *as trustee*. Thus the Defendants say that the Claimant merely has a personal remedy on behalf of the Trust as against the First Defendant for recovery of the funds that he received as knowing recipient, and potentially a claim to recover profits made by the First Defendant through the use of the money.

39. However, as to any liability of the First Defendant, or indeed the Second Defendant, to account for any profit, Mr Uff places reliance on the decision of the Court of Appeal in *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, where a claim for profits was pursued against a party who had dishonestly assisted a trustee to act in a breach of trust, and where a constructive trust falling within the second class of constructive trusteeship had therefore arisen. At [114], Moore-Bick LJ said this:

> *"For the reasons we have given we do not agree with the judge that the same considerations that apply to a fiduciary apply to a dishonest assistant who has no fiduciary duties. We agree with the judge that if Mr Nikitin (or his companies) had not entered into the Henriot charters, the profits would not have been made. In other words, ""but for"" entry into the charters the profits would not have been made. But in our judgment the simple ""but for"" test is not the appropriate test. In our judgment what Mr Nikitin acquired as a result of his dishonest assistance (and also as a result of Mr Mikhaylyuk's breach of fiduciary duty) was the use of the vessels at the market rate. That was merely the occasion for him to make a profit. The real or effective cause of the profits was the unexpected change in the market. As the judge recognised, at para 525, Mr Nikitin made the profits ""because he judged the market well"."*

40. As I have already identified, relying on *BCCI (Overseas) Ltd v Akindele* (supra), Mr Uff submits that it is trite law that beneficial receipt by the Second Defendant of monies belonging to the Trust, or the traceable proceeds of such monies is a necessary ingredient of a claim in knowing receipt.

41. The £650,000 has been returned, so, it is submitted, there can be no claim in respect of the receipt thereof as against the Second Defendant.

42. As to profits made though the use of the £650,000 are concerned, in reliance upon *Novoship (UK) Ltd v Mikhaylyuk*, Mr Uff submits that it is not enough simply to show that but for the receipt of the £650,000 the First Defendant would not have made a profit on the Mercury Way Land, but rather it must be shown the receipt thereof was a real or effective cause of the making of the profit on the sale thereof. As to this, the Defendant submits that the real or effective cause of the profit was the acquisition of the land itself, the planning and development work undertaken by the First Defendant, and unexpected interest in the land from McDonalds. On this basis, there can be no profit for which the First Defendant is liable and, ipso facto, for which the Second Defendant could be liable.

43. Further, it would be the Defendants' case that the Second Defendant cannot, himself, be a knowing recipient of funds as a result of any misapplication or misappropriation of the monies by the First Defendant as trustee as the First Defendant was never constituted as a trustee as such, but merely a constructive trustee falling within the second category thereof with a mere personal liability to account to the Trust.

44. So far as any claim based upon tracing is concerned, Mr Uff accepts that the Trust may have been entitled to follow its money into the Mercury Way Land so as to obtain reimbursement of the amount paid away, but he submits that this has nothing to do with any underlying claim or remedy. He submits that the principles appear from the speech of Lord Millett in *Foskett v McKeown & Others* [2001] 1 AC 102, where, at 128, he said:

> *"Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property ….*
>
> *The successful completion of a tracing exercise may be preliminary to a personal claim (as in El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717) or a proprietary one, to the enforcement of a legal right (as in Trustees of the Property of F C Jones & Sons v Jones [1997] Ch 159) or an equitable one.*"

45. As I understand his submission, Mr Uff's point is that whilst the Trust may have been able to trace into the Mercury Way Land in order to secure repayment of the misappropriated sum of £650,000, as this sum has been repaid there is simply no tracing claim available.

46. He would no doubt further argue that even if it were possible to trace further into the Mercury Way Land and the proceeds of sale thereof, then the right to trace will have come to an end when the proceeds of sale were applied in discharging the outstanding indebtedness of the Second Defendant and the First Defendant under the bridging loans that they had taken out prior to the sale of the Mercury Way Land, because payment into an overdrawn bank account or in discharge of a debt will generally bring a right to trace to an end – see *Re Diplock* [1948] Ch 465 at 521.

47. On this basis it is the Defendants' case that, however eloquently expressed, the new claims sought to be introduced by the Claimant simply do not get off the ground.

48. It is to be noted that the new paragraph 14(o) seeks to reintroduce a new conspiracy claim. Mr Uff does not address this in his Supplemental Skeleton Argument. However, I have a concern that this is an attempt to reintroduce the case that was struck out by HHJ Davies on 29 July 2022. I am unaware as to the circumstances in which the Order made that day by HHJ Davies came to strike out the existing paragraph 14, and as to whether there was any element of concession in respect of this. Further, I understood from what was said at the Case Management Conference that a transcript of the hearing on 29 July 2022 may be in the course of being obtained. In the circumstances, whatever I conclude in respect of the other amendments, I would wish to hear further argument in respect of the proposed new paragraph 14(o) before allowing an amendment to reintroduce a conspiracy claim.

Reasonable grounds/real prospect of success in respect of the new claims?

49. Whilst taking on board the cogent submissions made on behalf of the Defendants, and whilst recognising that such a case is not without its difficulties, I am satisfied that the proposed Amended Particulars of Claim do disclose reasonable grounds for bringing a claim with a real prospect of success against the Second Defendant.

50. I accept Mr Uff's submission that there is no real scope for a claim based simply upon the Second Defendant having shared or had the ultimate benefit of any profit made by the First Defendant as a constructive trustee (within the second class) by virtue of the First Defendant having knowingly received the £650,000 applied in breach of trust by Austin Fergus.

51. However, I consider that the approach taken by Mr Uff insufficiently recognises the scope of the tracing remedy that may be available to the Trust, particularly in circumstances where the Second Defendant, as the directing mind of the First Defendant, was, as I see it, as tainted with any knowledge of the misapplication of the £650,000 by Austin Fergus in breach of trust as was the First Defendant.

52. I consider that there is a cogent argument that stands a real prospect of success as against the Second Defendant along the following lines, which essentially reflects the substance of the case as now proposed to be pleaded as against the Second Defendant by the revised paragraph 14 of the proposed Amended Particulars of Claim:

    i) Lewin on Trusts, 20th Ed, at 42-054 suggest that if trust property is knowingly received by a company directly or indirectly from the trustee acting in breach of trust, and is followed by a receipt of that property or the traceable proceeds thereof by a director who owns or otherwise controls the company (i.e. is its directing mind) then the requirement of receipt by the latter is satisfied since there is no need for the defendant director to be a direct recipient from the trustee, and the director will be fixed with the same knowledge as to the application by the trustee in breach of trust as was the original recipient, the company. This must, as I see it, be right, and is consistent with *BCCI (Overseas) Ltd v Akindele* (supra) at 448B referred to by Mr Uff.

    ii) This does then beg the question as to what (if any) traceable trust assets or proceeds thereof there are or were in the present case.

iii) There is no inherent difficulty in tracing into land. As Lewin (supra) points out at 44-024, where the beneficiary asserts a proprietary remedy in relation to land purchased with trust money, he is entitled to do so not because some new trust has been created but because the land represents money or property which was previously validly settled.

iv) For the purposes of a proprietary tracing claim, purchasers or volunteers with notice, as the Defendants were on the Claimant's case, are treated as akin to wrongdoers, like a trustees, and are therefore subject to the same alternative remedies of a claim to a proprietary interest, or a lien securing the personal remedy against the trustees in breach of trust, with such a purchaser or volunteer being subordinated to the interests of the claimant beneficiaries – see Lewin (supra) at 44-042.

v) As Lord Parker of Waddington put it in *Sinclair v Broughan* [1914] AC 398 at 442:

> *"The principle on which, and the extent to which, trust money can be followed in equity is discussed at length in In re Hallett's Estate [13 Ch. D. 696] by Sir George Jessel. He gives two instances. First, he supposes the case of property being purchased by means of the trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. 'The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded."*

See also *Re Diplock* (supra) at 534, and *Foskett v McKeown* (supra) at 109, per Lord Browne-Wilkinson.

53. In the present case, the evidence suggests that the whole purchase price of the Mercury Way Land may well have been funded out of the £650,000 that was paid over, allegedly in breach of trust, by Austin Fergus, including the addition strip of land acquired in 2019 – see paragraphs 17 to 27 of the Second Defendant's witness statement dated 13 July 2022. The passage from the speech of Lord Parker in *Sinclair v Brougham* at 534 referred to above suggests that, in these circumstances, it may be open to the Claimant to have traced into the entire property. In any event, *Foskett v McKeown* (supra) arguably provides some authority for being able to trace rateably into the relevant property acquired, as in the case of the policy and the proceeds thereof in that case.

54. In the circumstances, and whilst recognising that the First Defendant may have a claim for credit for expenses incurred in improving the Mercury Way Land, I consider that there is an argument that stands a real prospect of success that, subject thereto, the Trust was entitled to trace into the proceeds of sale of the Mercury Way Land over and above the £650,000 representing the monies belonging to the Trust used to purchase the same, but of course giving credit for the £650,000 that has been repaid. In other words, I consider that the Claimant has an argument with a real prospect of success that the Trust

had a tracing claim against the balance of the proceeds of sale of the Mercury Way Land on the sale thereof, subject to a well arguable claim for reimbursement of expenses incurred by the Defendants in obtaining planning permission and improving the property for market.

55. The question then arises as to whether any such tracing claim would have been lost once the proceeds of sale were applied in discharging the liabilities of the First Defendant and the Second Defendant in respect of the bridging loan facilities that they had taken out. Ordinarily, that would be the effect of the proceeds of sale being applied in that way – see Lewin (supra) at 44-112, and *Re Diplock* (supra) at 521.

56. This is relevant because if a tracing claim did survive the discharge of these liabilities, then it might be possible to show that the tracing claim could be pursued into some other asset or assets and/or that the Second Defendant knowingly received traceable proceeds of the money originally misapplied.

57. Lewin (supra), at 44-113, states the general rule that where trust money goes into an overdrawn bank account so as to reduce the overdraft, and the trustee or other recipient of trust money is in substance enabled to purchase an asset by reason of the overdraft and not the trust money which goes into the bank account, the trust money cannot be traced into the asset. However, Lewin, ibid, goes on to postulate the case of a trustee or other recipient, who has an overdraft facility from his bank of £10,000 and is £10,000 overdrawn, but who pays £5,000 of trust money into the account and then, the next day, buys an asset for £5,000 out of the account. The difficulty is that the money went into the account to reduce the debt to the bank and not pay for the asset. Nevertheless, Lewin considers it *"an open question in English law"* whether the money can be traced into an asset in a case such as this.

58. Further, at 44-114, Lewin (supra) refers to the concept of *"backward tracing"*, i.e., where trust money is used to discharge a debt incurred by the trustee for the purpose of acquiring an asset, for example where the trustee raises a secured loan for the specific purpose of acquiring the asset, and the debt or the loan is repaid out of trust money. In *Federal Republic of Brazil v Durant International Corp.* [2015] UKPC 35, [2016] AC 297, the Privy Council held that backward tracing is permissible where there is a close causal and transactional link between the incurring of a debt for the purpose of acquiring property in circumstances where the debt is incurred for the purpose of acquiring the property and the debt is intended to be repaid at the time of acquisition of the property, and is subsequently repaid from the relevant trust monies or the traceable proceeds thereof – see per Lord Toulson at [34]-[40].

59. Assuming that the proceeds of sale of the Mercury Way Land, after giving credit for the £650,000 repaid and any just expenses that the First Defendant might be entitled to, represented an asset against which the Trust had a tracing claim, then I consider there to be an argument with a real prospect of success to the effect that the tracing claim would, on the present facts, have survived with the traceable proceeds of the misapplied monies belonging to the Trust being applied in discharging the bridging loans taken out by the First Defendant and the Second Defendant, so as to be traceable into Vinesgrove and any assets now representing the same in the Second Defendant's hands, and that a knowing receipt claim lies against the Second Defendant for having received the same

with the requisite knowledge of the circumstances behind the original misapplication thereof by Austin Fergus.

60. This is on the basis of the matters referred to above, and pleaded in paragraph 14 of the proposed Amended Particulars of Claim, namely that Vinesgrove was acquired by the Second Defendant with the benefit of bridging finance in anticipation that the proceeds of sale of the Mercury Way Land would be available in the comparatively near future, upon the sale of the latter, to fund the purchase of Vinesgrove, the key point being that the bridging loan discharged using the proceeds of sale was incurred for the purpose of acquiring Vinesgrove.

61. There is, as I see it, a real prospect at least of the Claimant, on behalf of the Trust, showing that there was a close causal and transactional link between the incurring of the bridging loan by the Second Defendant for the purpose of acquiring Vinesgrove and this bridging loan being intended to be repaid at the time of the acquisition of Vinesgrove, and being repaid using the traceable proceeds of the relevant trust monies. The position is complicated by the fact that the tracing remedy, if it existed, would not have extended to the whole of the proceeds of sale bearing in mind the repayment of the £650,000, but that would not, as I see it, necessarily defeat the claim.

62. The close causal and transactional link that one is concerned with here is, as I see it, very different from that under consideration in *Novoship (UK) Ltd v Mikhaylyuk* (supra), which was concerned with the extent of the personal remedy against the accessory, i.e., the knowing recipient or the dishonest assister, rather than the proper extent of a tracing remedy.

Conclusion in respect application to amend

63. In short, therefore, I do consider that elements at least of the proposed Amended Particulars of Claim, whilst very much open to argument, do stand at least a real prospect of success such that the Claimant ought, in my judgment, to be permitted to amend in order to pursue her claim as against the Second Defendant.

64. The maintainable claims are, as I see it, a tracing claim against Vinesgrove, or any asset now representing the same, such as Greenacres, given that the main property at Vinesgrove has now been sold, and a personal claim for knowing receipt as against the Second Defendant.

65. Other claims do appear in the new paragraph 14 of the proposed Amended Particulars of Claim where the focus is upon the making of profits rather than the availability of a tracing claim or a claim of knowing receipt against the Second Defendant – see e.g., subparagraphs 14(j), (k)(iii) and (iv), (l) and aspects of (m). I would not presently be minded to permit the amendments proposed thereby. I would invite Mr Budworth to reconsider these particular proposed amendments, and I will hear further short submissions on them at the adjourned hearing of CMC if required

66. Further, subparagraph 14(o) seeks to resurrect a conspiracy claim rather similar to that struck out by the Order dated 29 July 2022. That Order was made by HHJ Davies. As I have said, Mr Uff does not address this particular proposed amendment in his Supplemental Skeleton Argument, and, again, I would wish to hear further submissions

in respect of it at the adjourned CMC before deciding whether or not it ought to be allowed to stand.

67. I have handed down this judgment remotely by providing same by email to the parties, and to the National Archives. Contemporaneously therewith I have adjourned all matters arising consequential upon this judgment, including costs and any application to me for permission to appeal to the adjourned hearing of the CMC.