



Neutral citation number [2023] EWHC 1851 (Ch)

IN THE HIGH COURT OF JUSTICE

**CASE NOS: BL-2022-001453
AND BL-2022-001438**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHD)**

Royal Courts of Justice,
Rolls Building
Fetter Lane, London
EC4A 1NL
19 July 2023

B E T W E E N:

**(1) ASTUTE CAPITAL PLC
(2) ASTUTE CAPITAL ADVISORS LIMITED**

Claimants

-and-

**(1) COUNTRYLARGE 444 LIMITED
(2) FINLAW PROPERTY LIMITED (NO. SC570539)
(3) MS LILY MARGARET LAWSON
(4) MS SANDRA SHELLEY COX
(5) MR TIMOTHY JOHN SMITH**

Defendants

**Before Mr Peter Knox KC
(Sitting as a Deputy Judge of the High Court)**

MR ADAM CHICHESTER CLARK and RICHARD BOWLES (instructed by **Roots Law Limited**) appeared on behalf of the Claimants

MR ALEXANDER BROWN (instructed by **Burgess Okoh Saunders**) appeared on behalf of the First and Fifth Defendants

Mr KISHORE SHARMA and Mr Jayesh Jotangia (instructed by **the Brooke Consultancy LLP**) appeared on behalf of the Second Defendant, Third and Fourth Defendants

Hearing date: 15 May 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on 19 July 2013 by circulation to the parties' representatives by email and by release to the National Archives

1. The First Claimant in this matter ("Astute Capital") lends money to third parties through the Second Claimant ("ACA"). The two of them claim that pursuant to various loan agreements, the Second Defendant ("Finlaw") owes to ACA the sum of £1,924,554.55 plus interest. They also allege that Finlaw and the First Defendant ("ARE") hold the proceeds of sales of flats at 1F Seely Road in Tooting, London ("the Tooting Property"), on actual or constructive trust for ACA, or at least for its benefit by way of proprietary estoppel.
2. In the alternative, the Claimants claim the sum of £1,024,554.55 against the Third and Fourth Defendants ("Ms Cox" and "Ms Lawson") by way of personal guarantees. As for the Fifth Defendant ("Mr Smith"), he was a director of the Claimants, and they claim an account from him on the basis that he acted in breach of his duties to them by causing ACA to give up its security over the Tooting Property in favour of ARE.
3. On 15 September 2022, Mellor J accepted undertakings from ARE that it would hold the sum of £750,000 received from refinancing secured over some of the flats at the Tooting property pending resolution of the Claimants' claim or further order. Subsequently, on 15 December 2022 the Claimants, having, they said, found out about more sales or potential sales, applied for an urgent order to restrain the disposition of their proceeds, and for information about the sales. On 20 December 2022, Meade J adjourned the application, on undertakings, this time from Finlaw, to provide some of the information requested, and not to dispose of any of the flats without first giving seven days' notice. This adjourned application is now one of the matters that has come before me.
4. In the meantime, the parties have set out their cases in some detail in the pleadings, which include, in the case of Finlaw, Ms Lawson and Ms Cox (collectively "the Finlaw defendants") a Counterclaim for declarations that they are not bound by the loans and guarantees alleged against them. The Finlaw defendants say that the Claimants failed to put in a Reply and Defence to Counterclaim in time, and they have therefore applied for an order that Finlaw is entitled to default judgment on the Counterclaim, and that all the Finlaw defendants, in consequence, are also entitled to have the claim form and particulars of claim struck out. The Claimants dispute this, but they have also issued cross-applications for an extension of time and relief from sanctions. They have also, since the applications, served and filed (or purported to file) a Reply and Defence to Counterclaim.
5. In addition, Finlaw has issued an application for reverse summary judgment under CPR rule 24.2, alternatively for the striking out of the Claimants' claim as an abuse of the process under CPR 3.4(2)(b) or under the court's inherent jurisdiction, on the footing that it has no real prospect of success, or is an abuse of the process.
6. Finally, Finlaw has issued an application to strike out what it has characterised as the separate proceedings in which, it says, Mellor J made the consent order by which he accepted the undertakings from ARE in September 2022, because they served and

serve no substantive purpose. The point, as I understand it, is that the application notice pursuant to which this order was made was stamped by the court with the BL-2022 number ending “001438”, whereas the claim form was issued with the number ending “001453”. In the alternative, Finlaw seeks an order that ARE should be released from the consent order. ARE, it should be observed, does not itself support that application, at least, not outwardly.

7. The following main issues therefore arise.
 - (1) Was there a default by the Claimants in serving their Reply and Defence to Counterclaim in time; and if so, should I enter judgment for Finlaw on the Counterclaim and strike out the claim form and Re-Amended Particulars of Claim against all the Finlaw defendants? Or should I extend time or give relief from sanctions to the Claimants? At the hearing, having heard argument from Mr Kishore Sharma for the Finlaw defendants, I indicated that I did not need to hear from Mr Adam Chichester-Clark, who appeared for the Claimants along with Mr Richard Bowles, and that I would not enter default judgment. However, given the shortage of time, I reserved my judgment on that matter, which I shall deliver as part of this judgment.
 - (2) Should I grant reverse summary judgment on Finlaw’s Counterclaim and strike out the Claimants’ claim?
 - (3) Should I grant injunctive relief to the Claimants on their December 2022 application notice against Finlaw, and if so in what terms? And should I make an order against ARE on that application notice that it provide the information sought in that application (ARE accepts that its previous undertaking should be increased in amount, but not that it should provide the information sought)?
 - (4) Should I, on Finlaw’s application, strike out the claim ending 001438 on the footing that it serves no purpose, and therefore release ARE from its September 2022 undertaking? Or should I at least release ARE from that undertaking on the basis that the Claimants made material non-disclosures in the witness statement which led to that undertaking being given by ARE?
8. I shall first set out the background, before turning to the issues.

The background

The companies and their directors

9. Astute Capital was incorporated on 3 October 2016, and ACA on 15 March 2017. In each case Mr Smith was a *de iure* director from the date of incorporation, up to 27 November 2018 in the case of Astute Capital, and up to 31 July 2017 in the case of ACA; and in each case, the Claimants say that thereafter he was a *de facto* director until June 2019. The other directors of the companies have been, at various times, Mr Alistair Moncrieff, Mr Adrian Symondson, and latterly Mr Richard Symonds.

10. ARE (originally known as “Astute Capital Real Estate Ltd”, hence the acronym used in this judgment) was incorporated on 18 March 2018. It has at all material times been wholly owned and controlled, the Claimants say, by Mr Smith, in particular after he ceased to be one of their directors.
11. Finlaw is a company incorporated in Scotland. Originally its directors and owners (in equal shares) were Ms Lawson and Ms Cox, but on or about 5 December 2018 they transferred half their shares in the company to ARE. A few days later Mr Smith became another (*de iure*) director of it. This, as I understand it, has remained the position at all times since.
12. It will be seen from the above that although Mr Smith, by the time he became one of Finlaw’s directors in December 2018, had ceased to be a director of ACA for some time, and of Astute Capital recently, he continued, the Claimants say, nonetheless to act as a *de facto* director of both companies for another six months or so while he was also a director of Finlaw.

The acquisition of the Tooting property by Finlaw and the original lending arrangements

13. Ms Lawson and Ms Cox, it appears, wanted to buy the Tooting property through Finlaw and to develop it into eight separate apartments, but they needed to raise finance to enable them to do so. In September 2018, according to Mr Smith’s Defence, they were introduced to him, and on 4 October 2018, on behalf of Astute Capital, he proposed to them headline terms, under which a special purpose vehicle (SPV) jointly owned by Astute Capital and Finlaw would buy the property. Astute Capital would provide a loan facility to the SPV of £400,000, secured by a second charge over the property, and Finlaw would obtain further borrowing from a senior lender for 65% of the property’s gross development value.
14. Pursuant to this, ACA agreed to approve the initial steps towards the acquisition, and on 16 November 2018, an SPV called Brunswick Court Ltd, said to be controlled by Mr Smith (see paragraph 31 of Mr Symondson’s first witness statement), agreed to buy the Tooting property. Pursuant to drawdown requests made on Finlaw’s behalf by Mr Smith, ACA, it says, then paid over to it £50,000 on the same day, £30,000 on 11 December 2018, and £350,000 on 15 January 2019 (see paragraph 44 of Mr Symondson’s first statement): in other words, a total of £430,000 by mid January 2019.
15. In the meantime, on 11 December 2018, two draft heads of terms were drawn up. Under one of them ACA, and under the other ARE, agreed with Finlaw to be the lender to the SPV, but in the event, neither of these proposals was put into effect. This appears to be common ground. But ACA says that a binding facility agreement was agreed with Finlaw on 13 March 2019, by when it had already advanced the said £430,000 to it. Under this facility agreement (“the original facility agreement”) ACA agreed to lend £600,000 to Finlaw, to be secured by way of a second legal charge in ACA’s favour against the property, behind a first charge taken by the primary lender Bridge Co Ltd (whom I shall call “Octopus”, this being its trading name).
16. The agreement was signed for Finlaw by Mr Smith, but Ms Cox and Ms Lawson deny that they had any knowledge of it at the time or that Mr Smith had authority to enter

into it. Further, although the agreement provided for ACA to be granted a second legal charge, it is common ground that no such charge was executed or registered. The Claimants say that this was a paperwork error.

17. Before completion of the purchase, Mr Smith, according to the Claimants, in May 2019, sought on behalf of Finlaw to obtain further funding for the Tooting property, from Octopus in the sum of £1,245,000, and from ACA in the sum of £1,250,000. However, Octopus said that it was not prepared to make any further advance unless ARE was the lender instead of ACA. The reason appears to have been that it wanted a personal guarantee from Mr Smith, and it felt it would be easier to enforce one against him if the lending was to a company he controlled, that is to say ARE, than if it was to ACA.
18. Accordingly, on or about 22 May 2019, Mr Smith instructed Clarion Solicitors, who the Claimants say were acting for it on the transaction, or at least who had previously acted for it, to draw up a loan facility under which ARE, not ACA, would provide the proposed loan of £1,250,000 to Finlaw, with supporting charges over its assets and a second charge over the Tooting property. The Claimants say that in the course of conversations around this time, Mr Symondson told Mr Smith that they were prepared to go along with this, but only on terms that they were given adequate security by ARE in return, including rights under ARE's proposed charge. Mr Smith, they say, orally agreed to this.
19. There then followed a series of communications between Mr Symondson (for the Claimants), Mr Smith, and Clarion Solicitors from 24 to 29 May 2019. Their effect, the Claimants say, was that (a) ACA allowed ARE to be named as the lender in the loan documentation and to have a second legal charge over the Tooting property, but (b) ARE would in turn assign this legal charge, or its benefit, to ACA, and grant it a charge over ARE's shares in Finlaw and a debenture over Finlaw's assets by way of security for the funds advanced by ACA to Finlaw. Neither the Finlaw defendants nor Mr Smith nor ARE accept that there was an agreement to grant any such rights to ACA.
20. Although, according to the Claimants, these agreements had been reached in late May 2019, no documentation appears to have been executed until 27 June 2019, when, as I understand it, all the relevant documentation was executed for the lending to Finlaw by Octopus as first charge holder, and by ARE as second charge holder (in this latter case, with Mr Smith signing for ARE and Ms Lawson for Finlaw). In addition, a "cost overrun guarantee" was executed by ARE in favour of Octopus. By oversight, however, the Claimants say, no documentation was executed to reflect the further deal between ARE and ACA.
21. Further, on the same day, as I understand it, it is common ground that a side letter, required by Octopus, was signed by Ms Lawson and Ms Cox, under which they agreed that "the Astute loan" (which was defined as the loan facilities by ARE of up to £1.25 million to Finlaw), had not been guaranteed by either of them, and that there were no loan arrangements between Finlaw, Ms Lawson and Cox and "*any member of the Astute Group*" except for the Astute loan and charge. "Astute" was defined as ARE and any entity associated with it. Notwithstanding this, Ms Cox and Ms Lawson appear to have signed personal guarantees to ACA dated 10 June 2019, secured by a

legal mortgage over their home in Richmond, of all sums advanced by ACA to ARE under “the facility agreement” (which was defined as “*the facility agreement dated on or about the date of this deed between [ARE] and [ACA]*”). It appears to be common ground that they were told that the guarantees would be “kept in a drawer”: Ms Lawson and Ms Cox say that they were told this by Mr Symondson on 29 May 2019, and the Claimants that they were told this by Mr Smith much earlier, at a meeting in April 2019, and that what this meant was that they would be called on only if Finlaw could not pay.

22. In the event, on 8 July 2019, the SPV completed the purchase of the Tooting property, and a first charge was registered in favour of Octopus on that same day, and a second charge was registered in favour of ARE on 23 July 2019.

The revised lending agreements

23. In July 2019, according to the Claimants, Messrs Glover solicitors reviewed the loans that Mr Smith had arranged for them, including the loans to Finlaw. This appears to have resulted in their noticing the lack of documentation recording ARE’s alleged agreements with ACA.
24. Accordingly, on 17 October 2019, ACA and Finlaw, the Claimants say, entered into an “Amendment and Restatement Agreement”, which had attached to it an amended facility agreement, also dated 17 October 2019. (I shall call these collectively “the October 2019 Amendment Agreements”.) Clause 5 of the Amendment and Restatement Agreement provided that Finlaw, as borrower, confirmed that ACA had a second ranking charge over the Tooting property for Finlaw’s liabilities to it, which was dated 27 June 2019. The amended facility agreement provided, in clause 2.1, that ACA as lender advanced to Finlaw as borrower a total principal sum of £1,152,000, which was to be secured by this charge. The repayment date was expressed to be 15 May 2020.
25. Mr Smith signed both agreements on behalf of Finlaw, and further, he signed a “Director’s Certificate” as its director, saying that:

“Each copy document [i.e. the second legal charge] that has been provided under Schedule 1 of the Amendment and Restatement Agreement is correct, complete and in full force and effect at a date no earlier than this certificate.”
26. Appended to this certificate was a copy of the minutes of a board meeting of Finlaw’s directors on 15 October 2019, again signed by Mr Smith, which said (or purported to say) that Mr Smith, Ms Lawson and Ms Cox had approved Finlaw’s entering into the October 2019 Amendment Agreements.
27. Ms Lawson and Ms Cox say that Mr Smith had no authority to enter into this October 2019 Amendment Agreement, nor did they have any idea about it, or about the director’s certificate, or minutes of board meeting, until they were informed about them on 14 February 2020, when it seems that Mr Smith provided the agreement as an attachment to an email which he sent to them on that day. They complained by email to this effect to Mr Smith on 20 February 2020, and said that they were operating on the basis of Finlaw’s agreement with ARE and Octopus, not this October 2019 Amendment Agreement. They also say that shortly afterwards, Mr Symondson and

Mr Smith, attended a site meeting with them at the Tooting property, but they both left together before the issue could be discussed with them.

28. According to Ms Lawson, a further discussion took place with Mr Smith on 27 May 2021, which led to the execution by Finlaw of a further Amendment and Restatement Agreement and facility agreement with ACA. The agreements are dated 16 June 2021 in handwriting, but it appears to be common ground in the pleadings that they were executed on 28 May 2021. I shall call them, therefore, the “May 2021 Amendment Agreements”. They were in all material respects in the same terms as the October 2019 Amendment Agreements, being for a facility, again, of £1,152,000 from ACA to Finlaw, and to be secured by a second legal charge over the Tooting property. The only material difference in the wording appears to be that the repayment date was expressed to be 21 November 2021 (see the definition of this phrase in clause 1.1 and clause 8.1).
29. Again, the agreements were signed on Finlaw’s behalf by Mr Smith, and this time Ms Lawson and Mx Cox accept that he had authority to sign them. However, they allege that they were induced to give him this authority by his misrepresentation that they were required to rationalise the position with “Astute”; and by his wrongful failure to inform them that they related to the original facility agreement with ACA which Finlaw had not authorised him to make. They also say that Mr Smith was acting as ACA’s agent in getting them to agree to these further agreements. They also point out that yet again, no legal charge was in fact executed by Finlaw in ACA’s favour, or registered over the Tooting property.

The Claimants’ demands for repayment.

30. Pursuant to these agreements, the Claimants say, ACA lent to Finlaw a total principal sum of £1,229,000. On 21 November 2021, the repayment date in the May 2021 amendment agreements, ACA demanded payment of this sum plus interest, which all in totalled £1,817,512.39.
31. It appears that by about April or Spring 2022, Finlaw had almost finished developing the eight apartments, but was having difficulty in attracting buyers, and so at a site meeting around this time Mr Symondson suggested that Finlaw should appoint three new agents, which it appears it did. Thereafter, he says, he kept in touch with Ms Lawson, speaking to her once or (later) twice a month to discuss progress as the project got close to practical completion. She would tell him about offers that were being received, but not about the legal side of things. Further, from May 2022 onwards, the Claimants say that ACA required Finlaw and ARE to tell them about any proceeds of sale that had been received, and asked that any such sums received under the second charge be paid to ACA.
32. On 14 June 2022, Ms Lawson by email to Mr Symondson offered to pay ACA £1.25 million in full and final settlement of its claim. However, on 10 July 2022, ACA rejected this offer. On 2 August 2022, Finlaw obtained financing from Aspen Bridging Ltd (“Aspen”), who registered a debenture at Companies House. Around the same time, Ms Lawson told Mr Symondson (he says) that Finlaw had received

£2,072,000 from Aspen, to cover (a) £1.8 million refinancing costs (including £958,000 to repay Octopus), (b) £750,000 which was to go to ACA., and (c) £92,000 was used to pay off contractors. Finlaw followed this up, the Claimants say, with a letter to ACA on 9 August 2022, offering payment of £1,152,000 in two instalments in full and final settlement, with a first instalment of £750,000 to be paid on that day, and the balance of £402,000 payable after the development and sale of all the units. By reply of 11 August 2022, Mr Symondson for ACA replied: “*this offer has been considered and we happy to proceed on this basis ... payment can be actioned on Monday*”.

33. However, by email sent on 12 August 2022, Ms Lawson revoked the offer, and said that ACA’s email of acceptance did not address various points in the offer. The Claimants believed that by now sums totalling £750,000 had been received by ARE, and through their solicitors they asked Finlaw, on three occasions in the second half of August 2022, for an undertaking not to dispose of this sum. Although neither ARE nor Finlaw was prepared to give one in unequivocal terms, ARE’s solicitors did indicate on 26 August 2022 that they held this sum in their client account, and that it represented the sums paid to ARE in satisfaction of its second legal charge dated 27 June 2019. The Claimants also asked ARE, without success, to tell them (a) what sums ARE had received from Finlaw, and (b) what sums Finlaw had received from the refinancing in satisfaction of ARE’s charge.

ACA’s application of 8 September 2022 and ARE’s undertaking

34. Accordingly, on 8 September 2022, ACA (on its own) issued an application against ARE and Finlaw for a proprietary injunction prohibiting ARE from dealing with any of the flats at the Tooting property without consent, and from disposing of any proceeds of sale. In the event, as I discuss in more detail below, this application was adjourned by Mellor J on 15 September 2022, upon ARE’s solicitors undertaking that they would not dispose of the sum of £750,000 until final resolution of the dispute or further order. In the meantime, the claim form was issued on 12 September 2022 and served, with particulars of claim, on 13 September 2022. I discuss the course of the pleadings when dealing with the first issue below.

The first issue: was there default in serving the Reply and Defence to Counterclaim, and what are the consequences if there was?

The facts

35. After service of the Claimant’s particulars of claim on 13 September 2022, the time for service of the Defendants’ defences was extended by agreement to 11 November 2022. In the meantime, the Claimants pressed Finlaw, on 27 September 2022, and again on 3 and 10 November 2022, for an explanation as to what had happened to the refinancing money and for an undertaking not to deal with the flats or their sales proceeds (in the latter case after they had recently found out that four more flats appeared to have been sold yielding a further £1,747,000). In the November letters the Claimants threatened to apply for a proprietary injunction if satisfactory undertakings were not offered, but Finlaw refused.

36. On 10 November 2022, the Claimants proposed some small amendments to their particulars of claim, and on 16 November 2022 Deputy Master Linwood approved a consent order granting permission and extending the time for the Defendants to file a defence to 25 November 2022, with the Claimants to serve a Reply by 16 December 2022. By the date of this order, the Finlaw defendants had filed a Defence and Counterclaim on 11 November 2022, and on 21 November 2022 it was agreed that the time fixed by Deputy Master Linwood for service of the Reply should apply to the Defence to Counterclaim as well. ARE and Mr Smith filed and served their Defence on 25 November 2022.
37. By letter sent by email on 13 December 2022, the Claimants informed the Defendants that they had re-amended their Particulars of Claim, albeit the alterations were not substantial. They attached a draft of the Particulars of Claim as re-amended and asked for the Defendants' consent to the re-amendments. They pointed out that the Defendants would need to amend their Defences, which would in turn affect the deadlines for the responses. Accordingly, they attached an unsigned consent order, which set out a new timetable for the pleadings, which provided for the re-amended particulars of claim to be filed and served by 19 December 2022, for the Defendants to file and serve an amended defence (and counterclaim in the Finlaw defendants' case) by 9 January 2023, and the Claimants to file and serve a reply by 30 January 2023.
38. In the same letter, the Claimants yet again asked Finlaw (and this time ARE as well) to provide an undertaking not to dispose of the properties without consent, and asked for the requested undertakings by 4 pm on the following day, 14 December 2022. No undertakings were given, and so on 15 December 2022, the Claimants issued the December 2022 application for an injunction which I consider below, indicating that they were seeking to have it listed for 21 December 2022 (i.e. so as to give three clear days' notice). The Claimants served this on the Defendants at 13.26 on the same day.
39. Shortly afterwards, at 13.35 on 15 December 2022, the Finlaw defendants wrote to the Claimants, refusing to provide the undertakings sought. However, they did agree to the new timetable and attached a signed copy of the Consent Order. They said:
- “We are in principle amenable to the directions and timetable you propose, and attach a copy of the draft Consent Order, signed on behalf of our clients accordingly.”
40. However, notwithstanding this expression of agreement, at 14.41 on the next day, 16 December, the Finlaw defendants withdrew, or purported to withdraw, their consent to the revised timetable. They wrote:
- “In the circumstances precipitated by Roots Law's application we hereby revoke our consent to the proposed directions, pending resolution of the application made by Roots Law In those circumstances we look forward to receipt of the Claimant's Reply and Defence to Counterclaim, by 4 pm today so that it will be available to the Court for the purposes of disposing of the instant application”.

41. At 17.03 on the same day, the Claimants replied that they did not accept that the Finlaw defendants were entitled to resile from their agreement; and at 18.58, they filed an application to reamend the particulars of claim, with a consequential timetable in substantially the same form as they had previously proposed, with service of the Reply by 30 January 2023.
42. In the meantime, and while the position on the pleadings was still unresolved, the Claimants' application for an injunction and information was heard by Meade J on 20 December 2022. At that hearing, the application was adjourned, upon the Finlaw defendants, after some prompting by the judge, agreeing on an interim basis to give undertakings to the court not to dispose of any of the flats without giving seven days advance notice, and to provide information about prices and the like that had been received on the four recent flat sales.
43. In response to an email from Master Clark asking whether the Defendants opposed the Claimant's application, the Finlaw defendants on 21 December 2022 explained that they did not oppose any of it, except the provision extending time for service of a Reply and Defence to Counterclaim. They took the point that the Claimants required relief from sanctions, because they had failed to serve this pleading on the date provided for by Deputy Master Linwood's order, namely 16 December 2022. Surprisingly, they did not inform Master Clark in response to her request that on 15 December 2022 they had said they were prepared to agree to the extension and had returned a signed consent order, only to withdraw it the next day. (They did, however, inform the Court of this in their skeleton for the return date of the injunction before Meade J on 20 December 2022.)
44. In response to this, it seems, the Claimants issued an application for relief from sanctions, seeking once again an order for the revised timetable which they had previously put forward. Subsequently, after the Defendants had filed their Amended Defences (and Counterclaim in the case of the Finlaw defendants) on 9 January 2023 as provided for in the revised timetable, the Claimants served and filed (or purported to serve and file) their Reply and Defence to Counterclaim on 27 January 2023.

Conclusions

45. The first question is whether there was a binding consent order. In my judgment, there was not, because although the Finlaw defendants had returned a signed copy of the consent order, it had not yet been signed and returned by the Claimants, nor had it been lodged with the court. Further, in the email under cover of which it had been returned, the Finlaw defendants said only that "*in principle*" they were amenable to the order being made.
46. Accordingly, as the Claimants accept in their skeleton for this hearing (if they were wrong on whether there was a binding agreement), they needed to apply for relief from sanctions under CPR Part 3.9, which provides:
 - "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case so as to enable it to deal justly with the application, including the need

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.”

47. It is common ground that I should apply the three stage test set out in *Denton and others v. T.H.White* [2014] 1 W.L.R. 3926, at paragraph 24.

“The first stage is to identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors(a) and (b)].”

48. In my judgment, the breach was neither serious nor significant: indeed in the old *pre-Denton* language, it was trivial. The short point is that as the Finlaw defendants had signed and returned a copy of the consent order on 15 December, indicating that they were in principle amenable to the proposed revised timetable, the Claimants were entitled in practice to rely on this and to assume that the Finlaw defendants would not suddenly revoke the consent just before the original deadline. Indeed, I have difficulty in understanding how the Finlaw defendants, or at least their solicitors, could have thought it proper in the circumstances to do so, bearing in mind the duty on parties under CPR rule 1.2 to further the overriding objective of dealing with cases expeditiously, fairly and at proportionate cost. Further, given that the Finlaw defendants revoked the consent just one hour 19 minutes before the time for service of the Reply and Defence to Counterclaim at 4pm that day, it is understandable that the Claimants were not in a position to comply by serving one by then, or by making an application for an extension of time by then rather than, as they did, by 18.58 that evening (Mr Korenkov, the Claimants’ solicitor, says that he was tied up at that point on the injunction application and on another urgent matter). Further, the application for relief from sanctions was issued the day after the Finlaw defendants took the point that it was necessary to issue one, rather than to rely on the extension of time application.

49. Mr Sharma pressed upon me that the issue of the injunction application on 15 December 2022 changed things, and that the breach was serious because the Claimants knew that they had no real answer to the Finlaw defendants’ defence, and so what the Claimants were really doing when they proposed the revised timetable was trying to avoid a situation in which they would have to reveal their hand before the hearing of the urgent application which they had issued on 15 December 2022. Therefore, the Finlaw defendants were entitled to withdraw their consent so that the Claimants would have to put forward their Reply and Defence to Counterclaim before that hearing on 21 December 2022 (or 20 December 2022 as it turned out).

50. However, this is groundless speculation, and I reject it. The Claimants had made it clear in their 3 November 2022 and 10 November 2022 correspondence that unless

they received the requested undertakings they would apply for an injunction, and in their letter of 13 December 2022, in which they proposed the revised timetable, they repeated their demand for an undertaking, requiring that it be provided by 4pm on 14 December 2022. It was obvious, therefore, that they were likely to apply to the court either very soon, and in any event well before the proposed revised deadline of 30 January 2023. Further, they actually served the injunction application at 13.26 on 15 December 2022, and it was only after that the Finlaw defendants gave their consent to the revised timetable at 13.35. The Claimants, therefore, were open about their intentions when they proposed the revised timetable, and the Finlaw defendants knew what they were when they consented. So the injunction application provided no material change in circumstances or justification for withdrawing the consent. Nor is there any basis for supposing that the Claimants were concerned about revealing their hand by serving a Reply and Defence to Counterclaim. They had already fully set out their claim in the (draft) Re-Amended Particulars of Claim, and there was no particular allegation in the Finlaw defendants' defence that seriously undermined the Claimants' case, and all that the Counterclaim did was to repeat the Defence and claim consequential relief. The point, were this necessary, is now made good in the Reply and Defence to Counterclaim that the Claimants served on 27 January 2023, which contains nothing which undermines or damages their case.

51. There are two further points.

- (1) First, the Finlaw defendants suffered no prejudice from the breach. I note that at the hearing, they agreed, after, as I have said, some prompting by Meade J, to give interim undertakings, and there is no suggestion now that, given the nature of the Reply and Defence to Counterclaim, those undertakings would not have been given had it been served in time for that hearing. Nor has the further passage of time up to 27 January 2023 resulted in any prejudice to them.
- (2) Second, I do not accept the premise of Mr Sharma's argument, which is that if I refused to grant relief, it would follow that the Finlaw defendants would be entitled to judgment on the counterclaim and the striking out of the Claimant's claim. The short point is that even without a Reply, the Claimants would be taken to join issue with the Defence and to require proof of it (see CPR rule 16.7), and that being the case, they would necessarily be taken to join issue with the Counterclaim, which merely repeats the Defence and seeks consequential declaratory relief. In those circumstances, it would have been wrong to grant such relief, because the Claimants' claim, which contradicts the grant of such, would still stand.

52. Accordingly, for these reasons I grant relief from sanctions and order that the Reply and Defence to Counterclaim served on 27 January 2023 do stand as such as a valid statement of case.

The second issue: the Finlaw defendants' summary judgment application

53. CPR Part 24.2 provides:

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

- (a) it considers that –
 - (i) the claimant has no real prospect of succeeding on the claim or issue; or
 - (ii) the defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial”.

54. The test as to what is meant by “real prospect” of success, and what approach I should take to questions of construction, is set out in Lewison LJ’s judgment in *Mellor v. Partridge* [2013] EWCA Civ. 477.

“The correct approach on applications by defendants is, in my judgment, as follows:

- (i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v. Hillman* [2001] 2 All ER 91;
- (ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [8];
- (iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v. Hillman*.
.....
- (vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. ...”

55. The Finlaw defendants’ application for summary judgment does not specifically identify the particular basis on which it is said it should be entered, nor do the witness statements on which it relies do so (that is, Mr Pankaj Patel’s second witness statement, Ms Lawson’s first witness statement, Mr Symondson’s 8 September 2022 witness statement made in support of the initial injunction application, and Mr Pankaj Patel’s witness statement in the claim ending 001438).

56. However, Mr Sharma's skeleton argument contended (in the context of the injunction application) that there was no triable issue raised by the claim, and therefore it had no realistic prospect of success. This was essentially for the following reasons:
- (1) Under the May 2021 Amendment Agreements, it was a condition precedent to their validity that a duly executed charge was granted to the Claimants, but it was common ground that no such charge had ever been executed. Further, the May 2021 Restatement and Amendment Agreement itself was not signed, and the description in the May 2021 Amendment Agreements of the second charge to be granted to the Claimants was too vague and uncertain to be enforceable. Therefore these agreements were of no effect, and in any event they did not give rise to any claim to a proprietary interest in the proceeds of sale of the Tooting property.
 - (2) Mr Smith had no actual or ostensible authority to enter into either the October 2019 or the May 2021 Amendment Agreements, a matter of which Mr Symondson for the Claimants must have been aware, but which his second statement (of 17 February 2023) failed to deal with.
 - (3) Mr Symondson's witness statements, on which the Claimants relied, were not credible.
57. I reject each of these contentions, for the following reasons.

The first point: the proper construction of the May 2021 Amendment Agreements

58. Although Mr Sharma in his submissions commented on points arising in relation to the preceding agreements, the Claimants' claim is based on the May 2021 Amendment Agreements which superseded the previous agreements. Therefore it is to these agreements to which one must principally look in deciding whether they have a real prospect of success in proving their claim, that is to say, that the Finlaw defendants owe ACA the alleged debt of £1,924,554.55 plus interest, and that they hold the sale proceeds of the flats at the Tooting property on trust for the Claimants or for their benefit.
59. The preamble to the May 2021 Amendment and Restatement Agreement recites the background that Finlaw and ACA had entered into an agreement on 13 March 2019 under which ACA agreed to make available to Finlaw a secured loan of up to £1,152,000, which was subsequently amended and restated on 17 October 2019; and that the parties had now agreed "to amend and to restate" the original agreement. Clause 2 provides that "the Restatement Date", that is to say, the date on which ACA informs Finlaw that the conditions precedent in clause 2 have been satisfied, is conditional on ACA receiving the documents and evidence specified in Schedule 1 (that is to say, receipt of relevant company authorisations, payment by Finlaw of costs incurred in connection with the agreement and any other documents required by ACA). As I understand it, there is no issue on this clause (none is pleaded by the Finlaw defendants), and in any event, it is one for the benefit of ACA which ACA was entitled to waive.
60. Clause 3 provides that with effect from the "Restatement Date", the original facility agreement shall be amended and restated in the form set out in Schedule 2, which

contains the May 2021 Amended Facility Agreement. By clause 5, Finlaw confirms that the “Legal Charge” (which is defined as *“the second-ranking legal charge dated 27 June 2019 and made between Finlaw and ACA”*) *“ranks as a continuing security for the payment and discharge of the Secured Liabilities and ... shall continue in full force and effect in all respects and the Legal Charge and this agreement shall be read and construed together”*.

61. The amended facility agreement in schedule 2 then provides, in clause 2:

“2.1 [ACA] grants to [Finlaw] a secured sterling term loan facility of a total principal amount not exceeding £1,152,000 on the terms, and subject to the conditions, of this agreement.

.....

2.3 The Facility and the Loan advanced by [ACA] to [Finlaw] and all interest and other sums payable under or in respect of this agreement shall at all times be secured by the Security Documents [that is to say, as defined in Schedule 1, *“a second ranking legal charge in the agreed form, duly executed by [Finlaw] in favour of [ACA] in respect of the [Tooting property]”*].

62. Clause 3.1 provides that Finlaw is to use the money borrowed for the acquisition and development of the Tooting property, and clause 4 provides for how the monies are to be drawn down.

63. Clause 5 goes on to provide:

“5.1 This clause 5 is inserted solely for the benefit of [ACA].

5.2 [Finlaw] may not give notice to draw the Loan, and the Lender is not obliged to lend, until [ACA] has confirmed to [Finlaw] that it has received all the documents and evidence specified in Schedule 1, in the form and containing the information, that it requires. [These documents are again the second ranking legal charge, and various constitutional documents and relevant company authorisations approving the transaction, but set out in more detail than in Schedule 1 to the Amendment Agreement itself.]

5.3 Subject to clause 5.2, [ACA] will only be obliged to make the Loan available if, on both the date of the notice to draw down the Loan and the proposed drawdown date of the Loan ..

5.3.1 no Event of Default or Potential Event of Default is continuing or would result from the proposed Loan; and

5.3.2 the representations and warranties in clause 11 are true in all material respects.”

64. Clause 8 provides that Finlaw shall repay the loan and all accrued interest and fees on the “Scheduled Repayment Date”, which, as said above, was 21 November 2021.

65. As I have said, Mr Sharma's point is that the May 2021 facility agreement is of no effect, because by clause 5.1, taken together with Schedule 1, it was a condition precedent that there be a legal charge, but none was ever executed.
66. However, in my judgment, this is wrong, because clause 5.1 provided that clause 5 was "*inserted solely for the benefit of [ACA]*". It follows that ACA was entitled to waive the requirements there set out, and therefore to lend money to Finlaw notwithstanding non-compliance with them. I note in this context that clause 17.2 of the amended facility agreement provides that "*Any waiver of any right or remedy or any consent given ... is only effective if it is in writing and signed by the waiving or consenting party*", but no argument was addressed to me on this point, and in any event, it would appear to be open to ACA to waive this provision orally or by conduct, precisely because it is one inserted for its benefit: compare *Hendry v. Chartsearch* [1998] CLC 1382 at p1393-4.
67. Mr Sharma's next point is that the May 2021 Restatement and Amendment Agreement itself as not signed by the parties. That is correct as far as it goes, but there is no space for a signature at the end of this agreement, and it expressly incorporates and has attached to it the amended May 2021 facility agreement, which was signed at the end by all the parties. The obvious intention, therefore, was that the two related documents should be signed in just one place, at the end of the amended May 2021 facility agreement, as it was. There is therefore nothing in this point.
68. Next, Mr Sharma says that the provision for the execution of a second ranking charge Legal Charge in "*the agreed form*" is too uncertain to have effect, so the entire May 2021 amendment agreements are too uncertain. However, this was a condition precedent whose fulfilment ACA was entitled to waive before lending (it could require it to be fulfilled afterwards), and so there is no uncertainty which affects the entire May 2021 Amendment Agreements.
69. Finally, Mr Sharma takes the point that in fact no second ranking legal charge was ever executed, and the only such charge was the one taken by ARE. Therefore, whether or not ACA has a claim in debt against Finlaw, it has no proprietary claim over the relevant sale proceeds: only ARE has. But the short answer to that is that it does not appear to be disputed that ACA in fact advanced the relevant sums to Finlaw (or at least, there is a real issue on this) with ARE's knowledge. Further, ACA's position is that it was orally agreed between 24 and 29 May 2019 that ARE would be interposed as the second charge holder only on condition that ARE assigned the benefit of that charge to ACA, as Finlaw knew, and this was the background to the subsequent October 2019 and May 2021 Amendment Agreements and the subsequent lending after May 2019. This is not a matter which I can resolve on the documents, but will turn on the oral evidence from Mr Symondson, Mr Smith, Ms Lawson and Ms Cox, and perhaps Clarion. Therefore, the Claimants have a real prospect of establishing that a constructive trust, whether by way of proprietary estoppel or otherwise, arose in ACA's favour, under which Finlaw, having received the proceeds of sale, is estopped from asserting ARE's rights thereto and denying ACA's,

notwithstanding that this was only an oral agreement. Therefore, by virtue of s.2(5) of the Law of Property (Miscellaneous) Provisions Act 1989, the agreement is not void under s.2(1) on the footing that it was not made in writing. See *Kinane v Mackie-Conteh* [2005] EWCA Civ 45.

70. In any event, as Mr Chichester-Clark submits, the May 2021 Amendment Agreements (as were the October 2019 ones) were in writing, and they provide expressly for the grant of a second legal charge by Finlaw to ACA. That being so, ACA has at least a reasonable prospect of success, once all the evidence has been assessed, of showing that to the extent Finlaw receives any money from the sale of the flats, then it must hold those proceeds in accordance with its promise to grant a second legal charge for ACA's lending to it, on the basis that equity treats as done that which should be done.

The second point: Mr Smith's authority to enter the May 2021 Amendment Agreements

71. Mr Sharma's next point is that Mr Smith made the 2019 October Amendment Agreements and the 2021 Amendment Agreements without Finlaw's authority, as ACA through Mr Symondson knew or should have known. However:

(1) As I have said, the relevant agreements are the May 2021 Amendment Agreements, and the Defence admits that these agreements were signed by Mr Smith with Finlaw's authority. The point therefore is hopeless. Of course, Finlaw says that it was misled into granting him such authority, as ACA knew or ought to have known, but this is not a point which can be decided on this application, as it will turn on disputed oral evidence. Nor, to be fair does Mr Sharma invite me to resolve that dispute. Nor can the allegation that Mr Smith acted as ACA's agent in making these alleged misrepresentations or non-disclosures.

(2) Further, so far as the October 2019 Amendment Agreements are relevant, Mr Smith not only gave a director's certificate confirming his authority to sign for Finlaw, but he attached a board minute of a meeting said to have attended by Ms Lawson and Ms Cox to verify this, albeit signed only by himself. ACA therefore has at least a real prospect of success in showing that he had actual or at least usual authority to enter into these agreements. Mr Sharma suggests that I can draw an adverse inference against ACA on the point about Mr Smith's lack of authority on these agreements, because Mr Symondson's second witness statement, made on 17 February 2023, does not deal with them. But that second statement was not specifically made in answer to the summary judgment application, and anyway, the point had not been taken by Finlaw in its summary judgment application.

72. Finally, Mr Sharma says that there is an insufficient evidential basis for the claim. But in my judgment, the points made in his skeleton at paragraphs 28 get nowhere near to showing this. In summary:

(1) There was no reason why Mr Symondson's evidence in support of the second injunction application should have been by way of affidavit rather than witness statement: it was not in support of an application for a freezing order.

And anyway, even if it should have been by way of affidavit, one cannot sensibly draw any adverse inference at this stage.

- (2) As to the suggestions that Mr Symondson's evidence is internally inconsistent or inconsistent with the documents:
 - (a) There is no reason why the Claimants' initial letter of 13 August 2022 should have mentioned the discussions in May 2019 which led to ACA agreeing to allow ARE to be interposed, on terms that ARE assign the benefit of its charge to ACA. At the time, as can be seen from the above summary of the background, Finlaw appeared to accept that it was liable (see in particular its 9 August 2022 letter).
 - (b) There is nothing particularly surprising in the evidence that an agreement was made to grant a second charge to ACA in March 2019, but no agreement was made with a senior lender until June 2019. Anyway, it is clear that the original facility agreement in March 2019 did provide for this; and the only question on that agreement is whether it was made with Ms Cox and Ms Lawson's knowledge and authority.
 - (c) Nor is it surprising that a second charge was not taken by ACA in March 2019 before the anticipated first charge had been granted by Finlaw later.
 - (d) The question of why ACA did not challenge Clarion in May 2019, or express consternation, if it believed that it already had a charge from March 2019, is a matter for trial.
- (3) There is no particular reason why Mr Symondson's second statement made in February 2023 should have addressed the point that, in February 2020, Ms Lawson and Ms Cox challenged the propriety of the October 2019 agreement. By that point, the matter had already been dealt with in the Claimants' Reply and Defence to Counterclaim, and anyway it is a secondary matter, given the Claimants' reliance on the May 2021 Amendment Agreements.
- (4) There is no necessary inconsistency in Mr Symondson's assertion at paragraph 26 of his witness statement that he was not aware of the sales of the flats or their purchase price, and the contemporary documents or Ms Lawson's evidence. As said above, he accepts that he knew broadly what was going on, but he did know the precise details. And anyway, this is not a summary judgment point.

73. Accordingly, I dismiss the application for summary judgment.

The third issue: the Claimants' injunction application

The position as between the Claimants and Finlaw

74. It follows from my decision on the summary judgment application that there is a real issue to be tried. Therefore, I must consider what the balance of convenience requires, or, perhaps accurately, which course of action “*is likely to involve the least risk of injustice*” (see *Zockoll Group v. Mercury Communications (No. 1)* [1998] FSR 354 at 365 per Phillips LJ), that is to say, the course which involves the least risk of irremediable prejudice (see *National Commercial Bank of Jamaica Ltd. v. Olint Corporation Ltd: Practice Note* [2009] 1 W.L.R. 1405 (paragraph 19) per Lord Hoffmann).
75. As to this, because of the shortage of time at the hearing, Mr Sharma and Mr Chichester-Clark made only very brief submissions before me, the main point being whether I should grant an order at all on the basis that there was no triable issue in the first place. Likewise, their written submissions on this issue did not descend into detail on the draft order for which the Claimants contend, although Mr Sharma’s submissions do take the point, in my judgment with some justification at first sight, that it is drafted too broadly and intrusively.
76. However, the conclusions to which I have so far come are as follows.
- (1) The Claimants are entitled to an order continuing until trial or further order the terms of the four undertakings given by Finlaw at the December 2022 hearing before Meade J;
 - (2) The Claimants are entitled to an order which expands the first two undertakings (i.e. nos (1) and (2)) so as to include within them the other flats which have been sold, in addition to the four flats mentioned in the first two undertakings;
 - (3) Finlaw must not dispose of or otherwise deal with any of the proceeds of sale from any of the flats.
77. As to the rest, I direct that the Claimants and Finlaw shall, within 14 days of this judgment, make written submissions on the orders sought by the Claimants, limited to three pages, and I shall then decide the precise terms of the order. In particular, I would like assistance from both parties as to why the Claimants say the further orders restraining sale are reasonably required to preserve their alleged rights over the proceeds (and why Finlaw says not); and why the Claimants say that they now require further information about the proceeds (and why Finlaw says not),
78. My reasons for going at least as far as set out above are that I do not see that any material injustice would result to Finlaw from its being subjected to an order in these terms, because the first two provisions merely expand the existing undertakings to the other flats, and there is no suggestion that the undertakings it has so far given have caused any prejudice that cannot be remedied in damages. As to the third, if Finlaw does receive any proceeds, I cannot see why the restriction would cause any prejudice, given the undertaking in damages. However, in my view, the undertakings should come from both the Claimants (at the moment the draft order provides only for ACA to give such an undertaking), and if there is an issue as to their adequacy, I give the parties liberty to make submissions on this point as well, to be limited to two pages, and delivered at the same time as the other submissions.

The position as between the Claimants and ARE

79. The main point taken by Mr Brown, on behalf of ARE, is that it was not open to me to make the order sought as against it, because the Claimants' original injunction application issued on 8 September 2022 sought exactly the same relief as the December 2022 application, and it was compromised on the terms of the undertaking then given by ARE. Therefore, he said, relying upon *Chanel Ltd v. F.W. Woolworth & Co Ltd* [1981] 1 W.L.R. 485 at 492-3, and *Woodhouse v. Consignia plc* [2002] 1 W.L.R. 2558 at paragraph 55, the second application was an abuse of the process of the court, because there was no material change in circumstances outside the Claimants' control which now justified it.
80. In my judgment, this argument is misconceived. The short answer is that the Claimants' 8 September 2022 application, pursuant to which ARE provided its undertakings, was adjourned upon those undertakings, not withdrawn, with liberty to apply. It was therefore open to the Claimants, as Mr Brown candidly accepted, to reinstate that application for a further order, in which case the *Chanel Ltd* principle would have no application. Mr Brown says that as the Claimants have sought to bring a new application, rather than to restore the old application, they are bound by that choice, and must face the consequences. I disagree. First, the very fact that the original application was adjourned, rather than withdrawn or otherwise dealt with, means that it was envisaged that (leaving aside the technicalities) it would be open to the Claimants to come back later seeking a further order in line with what they were asking for in that application. That being so, I cannot see that it makes any material difference that the Claimants have issued a fresh application, rather than restored the old one. The *Chanel* principle is that a party should not be able to re-fight old interlocutory battles which have been decided or settled; but it has no application when the original order allows for this, as the provision for adjournment did here. In particular, I see no reason why it should apply here, in the light of the discussion of the principle by Mr Justice Nugee in paragraph 17 of *Holyoake v. Candy* [2016] EWHC 3065, [2016] 6 Costs L.R. 1157, in which he pointed out that in *Woodhouse v. Consignia* [2002] EWCA Civ 275, the Court of Appeal held that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 was not applied so strictly in interlocutory matters.
81. Mr Brown also relied on what he characterised as the Claimants' unreasonable demands and conduct in the course of the correspondence from January 2023 onwards after the issue of the Claimants' application. However, there is nothing particularly unreasonable in it, and anyway, I do not see how it can affect the merits of the current application. Further, I do not accept (as Mr Smith's statement in opposition to the application says) that the Claimants already know all the relevant information. As said, Mr Symondson has been given some information by Ms Lawson, and subsequently, pursuant to Meade J's order, Finlaw have provided more information on the sales of four of the flats. But that is no substitute for information directly from ARE, backed by its records.
82. Accordingly, I shall make an order against ARE in the same terms as I have proposed against Finlaw, but limited to the provision of information, since ARE has already provided undertakings in relation to the proprietary relief sought against Finlaw, which it increased to the sum of £889,000 at the hearing before me. I shall invite

submissions on whether I should make any further orders against ARE, as in the case of Finlaw, and on the question of the Claimants' undertaking in damages.

The fourth issue: Finlaw's application to strike out claim 001438 or to set aside ARE's undertakings

The numbering of the application notice and the claim form

83. As I have mentioned, the court number stamped on the application notice of 8 September 2022 ended "001438", whereas the number stamped on the claim form issued on 12 September 2022 ended "001453". Further, the parties named in the application notice were just ACA (not Astute Capital), ARE and Finlaw. In his written submissions, Mr Sharma characterised the first application as a "free standing" application, which fell to be struck out, as it went nowhere and was not made in support of any substantive claim. However, in his oral submissions he barely pressed the point, in my judgment correctly. It is evident that the reason for the different numbers is that the application notice was issued a few days before the claim form, and the court office gave the two documents two different numbers, perhaps because more parties were named on the claim form. Further, when Mellor J's order was drawn up on 14 September 2022, the order itself, before it was stamped, had the number of the claim form (001453) typed on its heading; and it was only after it had been approved that the court stamped it with the different number ending "001438". In short, it is clear that in substance the application notice was made in support of the claim form, although there has been a confusion in the numbering. So Mr Sharma's first point falls away.

Should I set aside ARE's undertaking in any event?

84. Mr Sharma says that in any event, I should set aside ARE's undertaking because of material non-disclosures by the Claimants in the evidence in support of the September 2022 application. However, the short answer to this is that no order was made against Finlaw as a result of that application, nor even is ARE seeking to set aside the undertaking. Therefore, Finlaw has no business, or locus, to make this application. Mr Sharma said that Finlaw had been put to considerable cost by virtue of the application and so it did have an interest in the matter. But that is a matter that goes to costs, which can be dealt with, if appropriate, at the end of trial.

85. Further, in my judgment, there was no material non-disclosure by the Claimants in their evidence which led to Mellor J's order. In this context, it is important to remember, as I have said before, that Finlaw had not raised any particular defences in the correspondence leading up to the September 2022 application, and it appeared to admit the claim, subject only to the amount to be paid. As to Finlaw's particular complaints:

- (1) As I have said above, there was no reason why Mr Symondson should have mentioned that in February 2020 Ms Cox and Ms Lawson denied all knowledge of the October 2019 Amendment Agreements: they were not relevant to the issue in hand.
- (2) There was no reason why he should have drawn attention to the point that Ms Lawson's and Ms Cox's personal guarantees to ACA were inconsistent with

Octopus's requirement in 2019 that they should not give personal guarantees, and that this had been pointed out to him by the time they were taken; or to the point that Octopus (it is said) therefore advanced its money as first charge holder under a misapprehension as to the correct position. The application did not relate to the guarantees, nor had Finlaw or Ms Lawson or Ms Cox taken any point on them in the correspondence leading up to the application. Nor did the application relate to Octopus's lending.

- (3) It is true that Mr Symondson said that Mr Smith, rather than, as was the case, ARE was the owner of 50% of Finlaw's shares. But Mr Smith owned ARE, and further it appears that Finlaw's confirmation statements at Companies House show that Mr Smith was the 50% shareholder. In any event, nothing turned on this.
- (4) As to the point that Mr Symondson did not draw the court's attention to the (allegedly) inadequate undertaking in damages, or to certain aspects of Astute Capital's accounts, this is irrelevant, as no undertaking in damages was sought or given from the Claimants.

CONCLUSION

86. In the result, and notwithstanding the careful way in which Mr Sharma presented his submissions:

- (1) I grant the Claimants relief from sanctions and order that the Reply and Defence to Counterclaim served on 27 January 2023 stands as such.
- (2) I dismiss the Defendants' summary judgment application.
- (3) I shall grant, to the extent mentioned above, an order restraining Finlaw from dealing with the properties and sales proceeds and requiring Finlaw and ARE to provide information; and I direct that the parties to provide submissions with 14 days on the outstanding aspects of the Claimants' application, if the Claimants wish to pursue them, and in any event on the question of the Claimants' undertaking in damages.
- (4) I dismiss Finlaw's application to dismiss claim no. 001438, and I dismiss its application that ARE be released from the September 2022 undertakings.