Neutral Citation Number: [2019] EWHC 10 (QB)

Case No: HQ17XO2535

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 January 2019

Before:

DEPUTY MASTER HILL QC

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Between:

THE NATIONAL CRIME AGENCY

Claimant

-and-

(1) AMANDA NUTTALL
(2) STUART EVANS AND DIGBY ARMSTRONG AS TRUSTEES OF THE BEREWEEKE TRUST
(3) TOWERDENE ESTATES LTD
(4) THE WHITE HORSE ROMSEY LTD
(5) ERIC GROVE
(6) THE LAUNDRY HOUSE (ROMSEY) LTD
(7) THE ABBEY INN ROMSEY LTD
(8) RANGELEY LTD
(9) TIMOTHY BECKER
(10) 03261558 LTD

Defendants

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Andrew Sutcliffe QC and Anne Jeavons (for the **Claimant**)
Barry Stancombe (for the **Third Defendant**)

Hearing date: 6 December 2018

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Approved Judgment

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

DEPUTY MASTER HILL QC:

Introduction

1. By this Part 8 claim the National Crime Agency ("the NCA") seeks a recovery order under the Proceeds of Crime Act 2002 ("POCA"), s.266. The claim is valued at some £6,500,000 and relates to recoverable property said to be linked to a Mr Jonathan Nuttall. The NCA's claim is fixed to be tried by a High Court Judge for 13-15 days, commencing on or around 30 April 2019. The issue before me is whether to grant the NCA's application dated 8 May 2018 for summary judgment in respect of its claim against the Third Defendant ("Towerdene"), and thus whether to make a recovery order in respect of the property to which that claim relates.

The factual and procedural background

2. The NCA has carried out an extensive civil recovery investigation into the activities of Mr Nuttall and his family and associates. Its case is that he has benefitted to a very large extent from money laundering, mortgage fraud and contravention of the Company Directors Disqualification Act 1986.

3. In aid of its investigation, the NCA obtained two Property Freezing Orders under POCA, s.254A, one granted by Phillips J on 19 October 2015 (and subsequently extended by Garnham J) and one granted on 14 July 2017.

4. On 18 July 2017 these proceedings were issued. The NCA's Points of Claim against all the Defendants run to some 66 pages plus schedules. All the Defendants are said to be linked to Mr Nuttall. Mr Nuttall is not a Defendant himself, as he is said to have arranged his property in such a way that he does not hold legal title to it. The estimated value of the claim at around £6,500,000 comprises (i) Mr Nuttall's property portfolio (valued at around £5,500,000); and (ii) a further £1,000,000 that he is said to have paid to the Fifth Defendant.

5. At the time the claim was issued, Towerdene had been struck off the Companies House register and dissolved, such that its assets vested in the Bona Vacantia Division of the Crown ("the BVD").

6. On 8 May 2018 the NCA issued an application for summary judgment on its claim against Towerdene. The application was supported by the ninth witness statement of Ruth Davison of the NCA. At the time the application was made, although several of the other Defendants had served Points of Defence to the NCA's Points of Claim, Towerdene had not. The BVD and other Defendants had not sought to oppose the application. The Bereweeke Trust (the Second Defendant), which held the shares in Towerdene prior to its dissolution, had taken a neutral stance in relation to the claim.

7. On 11 June 2018 Master Davison granted the NCA's application and made the recovery order sought in respect of Towerdene on the papers.

8. On 9 July 2018 Towerdene was restored to the Companies House register.

9. On 10 July 2018 Towerdene issued an application to set aside the 11 June 2018 order on the basis that it did not appear that Master Davison had been made aware that it had in fact filed evidence in response to the application in the form of a statement from Timothy Becker (one of its former directors) and that the parties had thus sought to have the issues resolved at a hearing. Towerdene also argued that summary judgment was not appropriate because it had a real prospect of successfully defending the claim and because there were other issues that meant the case should proceed to trial.

10. On 16 July 2018, following receipt of the application, Master Davison stayed the power of the trustee under the recovery order.

11. The 10 July 2018 application came before me on 6 December 2018. By then it had become apparent that Master Davison had not in fact been fully apprised of Towerdene's position before making the 11 June 2018 order. Accordingly, at the outset of the hearing on 6 December 2018, the 11 June 2018 order was set aside by consent and I was invited to consider the 8 May 2018 summary judgment application afresh.

12. In addition to the contents of its 8 May 2018 application, the NCA relied on the fourteenth and fifteenth witness statements from Ms Davison, dated 15 and 28 November 2018. In addition to the contents of its 10 July 2018 application, Towerdene relied on witness statements from Dilipkumar and Ravin Kotecha dated respectively 14 and 15 November 2018, and two statements from Mr Nuttall dated 14 and 30 November 2018.

An overview of the parties' positions

13. The NCA's claim against Towerdene relates to (i) freehold property situated at Flats 2 and 3 Embley Green and Embley Kirby, Embley Park, Romsey SO51 6DL; and (ii) lease property situated at Embley Kirby, Embley Park, Romsey SO51 6DL (known collectively as "the Embley Park properties"). Towerdene is the registered owner of these properties. The NCA argues that:

    (i) The original purchase of the properties was funded by way of a £35,000 deposit (which the NCA contends was associated property) and a mortgage from Allied Irish Bank ("AIB") in the sum of £180,000 (which the NCA contends was obtained by fraud) (**"the mortgage fraud allegation"**); and

    (ii) The monies used to redeem the Embley Park properties in March 2014 (there being no capital repayments in the interim) were the proceeds of crime, principally funds that came from a Hong Kong company called Amerco International (Far East) Ltd ("Amerco FE") (**"the redemption monies allegation"**).

14. Towerdene denies both of the allegations. In summary, it avers that:

    (i) The original mortgage for the Embley Park properties was not obtained by fraud as the information provided was in material respects true; and

(ii) The monies used to redeem the properties were not the proceeds of crime, but were derived in large part (£100,000 of the £165,000) from a loan made by Dilipkumar Kotecha, to his nephew Ravin Kotecha (Towerdene's Company Secretary). The loan came from Dilipkumar Kotecha's savings, which had been largely accrued from his legitimate businesses in Scotland including a Tie Rack franchise and a health food shop. The loan was actually paid from the account of Ravin Kotecha's mother (Mrs S Kotecha), and he then loaned it to the Nuttall family trust.

The legal framework

15. There was no significant dispute between the parties as to the appropriate legal framework. As is well-known, CPR Part 24.2 provides that the court may give summary judgment against a Defendant on the whole of a claim or on a particular issue if "*(a) it considers that…(ii) that defendant has no real prospect of successfully defending the claim or issue, and (b) there is no other compelling reason why the case or issue should be disposed of at a trial*".

16. The notes to the White Book confirm that in order to defeat an application for summary judgment, is it sufficient for a respondent to show some prospect of success. That prospect must be "*real*", meaning that the court will disregard prospects which are false, fanciful or imaginary. A respondent has to have a case which is better than merely arguable (*International Finance Corp v Utexafrica Sprl* [2001] CLC 1361 and *ED and F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 470). A respondent is not required to show that the case will probably succeed at the trial, which is the criterion used to determine success at trial: rather, the criterion which the judge has to apply at the CPR 24 stage is "*the absence of reality*" (Lord Hobhouse of Woodborough, *Three Rivers DC v Bank of England (No. 3)* [2003] 2 All ER 513).

17. *ED and F Man Liquid Products Ltd* supports the proposition that the overall burden of proof rests on the applicant to establish that there are grounds to believe that a respondent has no real prospect of success and that there is no other reason for a trial. The court must apply a negative test. The standard of proof required of the respondent is not high. The respondent's case must carry some degree of conviction, but the court is not required to accept without analysis everything said by a party in his statements before the court.

18. An application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issues having regard to all the evidence (*Apvodedo NV v Collins* [2008] EWHC 775 (Ch)).

19. The parties agreed that it is relevant that this is a complex case of fraud. Counsel for Towerdene referred to the case law about the standard of proof imposed on a claimant alleging fraud in civil proceedings. *Phipson on Evidence* (19th Edition) at paragraph 6-57 indicates that where a serious allegation of fraud is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard but the civil standard is flexible in its application. This means that if a serious allegation is made, more cogent evidence may be required to overcome the unlikelihood of what is alleged, in order to prove the allegation (see, for example, the explanation of the

concept by Lord Nicholls in *H (Minors)* [1996] AC 563). It has also been held that the more serious the consequences for an individual if allegations are proved, the stronger the evidence must be before a court will find the allegation proved.

20. *Esprit Telecoms UK Ltd v Fashion Gossip Ltd* (2000) LTL 27 July 2000 was a case which involved arguments around developing areas of law. Both counsel relied on House of Lords authority to support competing submissions as to the law of restitution and unjust enrichment. Judge LJ, with whom Ward LJ agreed, concluded that the legal issues needed to be considered and decided in light of the facts found at trial. He went on to say that "*while never suggesting that it may never be appropriate*" he was "*troubled about entering summary judgment in a case where the success of the claimant's case involves, as this one does, establishing allegations of dishonesty and fraud, which are strongly denied, and which cannot be conclusively proved by, for example, a conviction before a criminal court*". Ward LJ concluded that it would not be right to make findings that were tantamount to the carrying out of criminal offences without an oral hearing (transcript, pages 11-12). It was also a feature of that case that from earlier comparable cases there had been "*a demonstrable difference in the judicial reaction to very similar factual situations*" (page 14). Finally, there had been earlier cases involving the same protagonists on which some reliance was placed, but where it was noted that there had been no express finding of dishonesty against the key alleged perpetrator at which he had had the opportunity to give evidence orally (page 15). Ward LJ reiterated the key principle that summary judgment is appropriate in "*plain and obvious cases*" (page 15).

21. *The Director of the Assets Recovery Agency v Woodstock* [2006] EWCA Civ 741 established the proposition that summary judgment can be appropriate in recovery order cases. However the summary judgment that had been given at first instance was overturned by the Court of Appeal on the grounds that while there were "*certainly grounds for suspicion*" as to whether the source of certain income was criminal conduct, as Hughes LJ explained it was "*simply not possible to say that [the persons in question] were bound to be disbelieved or that the Director was bound to succeed on some other basis*". He continued that "*it may well be possible to say in some cases that a story which is advanced by a defendant is so obviously untrue that it is fanciful to suggest that it might be accepted*" and in such a case summary judgment would be appropriate. However, the case advanced in *Woodstock* was not such a case: rather, "*[t]his was a story which, however flimsy in might in some senses appear, needed to be tested at trial*" (transcript, page 6).

The NCA's submissions

22. In general terms, the NCA has referred to *SOCA v Azam* [2014] EWHC 272 in which Andrews J concluded at paragraph 157 that "*the evidence strongly points towards Mr Nuttall being a money launderer*", albeit that the NCA fairly points out that Mr Nuttall was not a party to that particular case.

23. As to the mortgage fraud allegation, the NCA submitted that:

    (i) The error in Ms Davison's witness evidence with respect to which of the Amerco companies was involved in the mortgage fraud allegation (see below)

was a simple typographical error of no consequence: it is accepted that Amerco 040 was the appropriate company for this allegation;

(ii) As explained in Ms Davison's ninth statement, a number of significant assertions made by Mr Nuttall and his brother Philip as to their connection with Amerco 040 (and in particular, as to their ownership of it, and that they were in receipt of dividends from it) are shown by documentary evidence to be demonstrably and completely false;

(iii) The AIB understood that the material it was providing (including in the crucial letter dated 24 January 2013, referred to further below) was in response to a court disclosure order, and has provided the NCA with the underlying documentation that can prove what it was told, albeit that these are not before the Court;

(iv) Jonathan and Philip Nuttall informed the AIB that they were co-owners of Amerco 040 but documentation shows that this was not correct, because Jonathan Nuttall was not a shareholder of Amerco 040 at all and Philip Nuttall was registered as owning only 1% which he said in interview was "*cosmetic*". A letter from the Nuttalls' accountants (Riches) dated 23 February 2007 to HMRC confirms that "*1% of the shares in Amerco are nominally in the name of P J N Nuttall as trustee*", with the remainder being held by Interport, whose sole owner was a Croatian individual named Velimir Novak. A declaration of trust signed by Phillip Nuttall said to be dated 18 January 2006 confirms that he held 3,000 shares in Amerco as "*nominee and trustee*" for Mr Novak. The NCA's position is that Mr Novak was using the company as a "*front*" to launder the proceeds of unlawful conduct on behalf of a Mr Tomljenovic, a former Croatian government minister who the NCA believes obtained his wealth by unlawful activity and whose money Jonathan Nuttall assisted in laundering;

(v) The Nuttalls also informed the AIB that they received dividend payments from Amerco 040 when this was not correct: neither declared such dividend income to the HRMC and Philip Nuttall stated in interview that his 1% shareholding in Amerco 040 was "*irrelevant*" because he never drew a dividend;

(vi) They also told the AIB that they received additional income from Amerco 040 but this was also incorrect;

(vii) The AIB has made clear in correspondence that had any of the statements made by either of Nuttalls as to their connection with Amerco 040 or its associated companies been false it would not have advanced monies under the mortgage (see the letter from the AIB dated 24 January 2013, paragraph 7); and

(viii) The evidence from Mr Nuttall on which Towerdene relies is "*unrepentant*" and "*remarkable*". The evidence in fact confirms that the information provided to the AIB was not true: Mr Nuttall simply seeks to suggest that if AIB did not identify the true position from the Annual Returns or the statutory accounts of the companies, then AIB was at fault; and argues that the NCA is

adopting a "*technical meaning of 'dividend'*" and that had AIB wanted a "*more faithful interpretation of the term*", it would have said so.

24. As to the redemption monies allegation, the NCA argued that:

(i) As Ms Davison had explained in her fourteenth witness statement, while a Mrs S Kotecha does appear to have advanced the sum of £100,000 into the Amerco FE account, these funds were transferred out of the Amerco FE account and into an account held in the name of Mr and Mrs Nuttall prior to the redemption of the mortgage over the Embley Park properties;

(ii) The Kotecha funds were used for other purposes (said to be related to Embley Manor, a separate property that is subject to the NCA's claim). The "Kotecha loan" therefore formed no part of the monies used in redemption of the Embley Park properties mortgage;

(iii) Rather, the Embley Park properties mortgage was redeemed almost entirely by Towerdene from two payments made into the Amerco FE account numbered 127-842045-838 on 20 and 24 March 2014 (of £85,994.93 and £84,994.70). These funds came from a Latvian account operated by Mr Nuttall in the name of Kentrinos Accumulation Ltd. There is a clear basis in the overall circumstances for regarding the remaining £3,115 used for the redemption monies as also being the proceeds of crime;

(iv) Generally, there is further evidence that the activity on account numbered 127-842045-838 is not consistent with legitimate trading activity, as set out in the NCA's Points of Claim, section C.3.3.2(c);

(v) In any event the Kotecha loan of £100,000 could not account for the full amount needed for the redemption of the Embley Park properties mortgage;

(vi) Mr Nuttall's evidence that the Kotecha loan was causative - in that the mortgage over the Embley Park properties would not have been repaid but for the knowledge of the incoming £100,000 from the Kotecha family - does not assist him, as the impending Kotecha transfer cannot "*clean*" the money that was actually used to repay the Embley Park properties mortgage;

(vii) Mr Nuttall's evidence suggesting that it was a surprise to him that Amerco FE, absent the Kotecha transfer, had sufficient funds to pay the Embley Park properties mortgage, cannot be true: if it was, and the Kotecha loan was needed solely to pay the Embley Park properties mortgage, then it would have been returned upon it becoming apparent that it was not needed. Rather, as set out above, on Mr Nuttall's case, it was the Embley Manor mortgage that 'but for' the Kotecha loan would not have been repaid;

(viii) Embley Manor is held in the name of Amanda Nuttall. Mr Nuttall has given a witness statement in support of her defence, addressing the Embley Manor mortgages, in which he makes no mention of the Kotecha transfer; and

(ix) The Kotecha loan has therefore been shown to be irrelevant to the redemption monies allegation.

25. To the extent that the NCA's investigation was challenged by Towerdene on the basis that it had relied on evidence provided by Philip Nuttall, an allegedly unreliable witness, the NCA stated that this was simply incorrect: Ms Davison had explained in her fifteenth statement that the NCA's investigation was not instigated in response to nor is it reliant upon Philip Nuttall's evidence at all.

26. The NCA also placed reliance on Towerdene's conduct of the claim. It highlighted the fact that despite all persons with a potential interest in Towerdene defending the claim having been made aware of the claim from its issue in July 2017, it was only in its application dated 10 July 2018 that it asserted it had a substantive defence to the claim. Insofar as Towerdene suggested in the initial evidence of Mr Becker that it was struck off the Register as a result of the NCA's actions this was not correct and indeed his evidence that prior to the striking off, Towerdene had been entirely compliant, was not correct. The NCA indicated that it had been in correspondence with Towerdene for some time about its reinstatement to the Companies Register, which it was repeatedly said was not possible for financial reasons, but these appeared to be capable of prompt resolution once the summary judgment application was issued. The NCA submitted that Towerdene's reinstatement to the Companies Register was a calculated and transparent attempt to obfuscate matters and prevent judgment being entered. It was said that the late provision of Mr Nuttall's witness evidence in support of Towerdene's position underscored the suggestion that keeping Towerdene dissolved was a tactical decision, so that it could not take an active role in the claim at an earlier stage, rather than it facing any genuine hindrance to doing so.

27. Overall the NCA submitted that there was far more here than the "*fog of suspicion*" described in *Woodstock*; rather the documents showed beyond a shadow of a doubt that there had indeed been the mortgage fraud alleged and that the redemption monies were the proceeds of crime. The NCA only needed to prove one of the allegations, but they could in fact prove both. Towerdene had failed to advance any defence, let alone one with a real prospect of success, or any other reason why the matter should nevertheless proceed to trial.

Towerdene's submissions

28. Towerdene's counsel submitted that limited regard should be had to the observations of Andrews J in *Azam*, given that Mr Nuttall was not a party to the case. Instead, consideration should be given to the fact that has he has given signed witness evidence in these proceedings that bear directly on the issues in this application.

29. As to the mortgage fraud allegation, Towerdene submitted that:

(i) This was an atypical mortgage fraud allegation in that the mortgage was granted by the AIB to Towerdene as part of a commercial facility in the context of an ongoing business relationship between Towerdene and the AIB. The AIB also had a business relationship with the Bereweeke Trust;

(ii) Paragraph 28 of Ms Davison's fourteenth witness statement erroneously states that in the course of the mortgage application the AIB was informed that Jonathan and Philip Nuttall were joint owners of Amerco FE, when in fact the company in issue was Amerco 040 (Amerco FE being involved in the redemption monies allegation only). This is a significant error which illustrates the lack of care in the NCA's approach to its claim;

(iii) As explained in Mr Nuttall's first witness statement, he and Philip Nuttall beneficially owned the shares in Amerco 040, and ownership of those shares had changed many times since incorporation. The declaration of trust relied on by the NCA was dated 2006, some time before the grant of the mortgage in 2007. Philip Nuttall was the sole director of Amerco 040 and he prepared, signed and submitted all the relevant documents pertaining to the Towerdene mortgage to the AIB. They both benefitted from dividend payments made by Amerco 040 and monies from Amerco 040 were declared to HMRC for tax purposes;

(iv) Mr Nuttall specifically denies money laundering for Mr Tomljenovic. Given that Philip Nuttall was the sole director of Amerco 040, and the sole signatory on its accounts, Mr Nuttall questions why such allegations of money laundering are levelled against him alone and not Philip as well;

(v) The AIB's 24 January 2013 letter is key. In it, the AIB indicated that it would not have advanced the mortgage if it had any concerns about the assertions made by the Nuttalls. Without testing all the evidence at this stage, it must be assumed that the AIB had conducted extensive due diligence at the time of the mortgage being granted. Paragraph 5 of the 24 January 2013 specifically referred to Companies House and Equifax searches. The shareholding of Amerco FE would have been easily identified had there been any company search. It must therefore be assumed that in light of those checks the AIB had not identified any concerns about granting the mortgage in 2007;

(vi) At no point has the AIB made any complaints to the Nuttalls, Towerdene or the Bereweeke Trust;

(vii) Generally, there is a dearth of evidence on this allegation against Towerdene. In particular, it is notable that the NCA has not placed before the court the original mortgage documentation showing what was asserted and who signed it, or any witness evidence from the AIB, but simply the 24 January 2013 letter on which much reliance is placed; and

(viii) Despite other adverse conduct towards and allegations against his brother, in 2010 Philip Nuttall did not make any allegations to the AIB that the information provided to the AIB for any of the loans, including the Towerdene commercial loan facility was false.

30. As to the redemption monies allegation, Towerdene submitted that:

(i) It is notable that until Towerdene's application of 10 July 2018, the NCA had made no mention of the Kotecha family loan of £100,000, despite this being an obviously important matter;

(ii) Towerdene's case with respect to the loan, as set out in the witness statements of Dilipkumar and Ravin Kotecha and Mr Nuttall, could be tested at trial by them being cross-examined about their accounts;

(iii) For the purposes of this application, the NCA cannot challenge or ignore that the loan was made in the manner described. It is tolerably proximate in terms of chronology: the demand for repayment of the mortgage was made by letter dated 1 November 2013, £99,994.86 (the £100,000 Kotecha loan less bank charges) was paid into the Amerco FE account on 5 February 2014, and the payment to redeem the Embley Park properties mortgage was made on 25 March 2014. The fact that there was a further payment out to Mr and Mrs Nuttall on 28 February 2018 (said to be used towards Embley Manor) and further payments in on 20 and 24 March 2014 (in the sum of £170,989.93) does not mean that the Kotecha loan was not in fact used to redeem the Embley Park properties mortgage. There was no circular movement of funds for the purposes of money laundering as alleged by the NCA; and

(iv) The 24 January 2013 AIB letter is also significant here, as it was written prior to the redemption of the mortgage on the Embley Park properties in March 2014. The AIB therefore knew of the NCA's concerns prior to accepting the redemption monies. It must therefore be assumed at this stage that the AIB did not have concerns about the source of the redemption monies or they would not have accepted them.

31. Counsel for Towerdene also noted that although similar allegations of mortgage fraud and regarding the redemption monies had been made against Mrs Nuttall, despite her bare denial to the allegations, the NCA has not sought summary judgment against her.

32. Overall Towerdene submitted that the NCA's case on the mortgage fraud allegation is demonstrably weak and that it had a reasonable prospect of defending that and the redemption monies allegation, such that summary judgment was not appropriate.

33. Counsel for Towerdene also argued that in practice courts are particularly reluctant to grant summary judgment in fraud cases, because of the difficulty in establishing that the respondent has no real prospect of successfully defending the claim or issue. He submitted that the tenor of the judgment in *Esprit Telecoms* is to the effect that an allegation of fraud or dishonesty may itself provide a compelling reason why the case should be disposed of only after consideration of all the evidence at trial, for the purposes of CPR 24.2(b). This, he argued, provided a further basis for denying the application for summary judgment.

Discussion and conclusions

34. The case law on summary judgment applications in fraud cases, as summarised above, makes clear that (i) the issue for me to determine is whether the NCA has proved that the points now advanced by Towerdene in its defence have no real prospect of

success, in the sense that they are merely false, fanciful or imaginary, have "*the absence of reality*" and/or have no real degree of conviction; (ii) if there remain complex questions of law and/or fact, summary judgment is not appropriate; and (iii) where, as here, serious allegations of fraud are made, with potentially significant consequences for an individual, more cogent evidence than usual is required to meet the civil standard of proof.

35. Overall, having considered all of the evidence and submissions in the context of that legal framework I am not satisfied that the NCA has discharged this burden. I consider that significant factual disputes remain that can only properly be resolved at trial. In light of those disputes, I cannot say at this stage that the NCA has proved that Towerdene has no real prospect of success.

36. First, with respect to the mortgage fraud allegation:

(i) The Court has not been provided with the initial mortgage application material. It is therefore not possible to be clear at this stage as to who made the application, although Mr Nuttall's evidence is that it was his brother Philip and not him;

(ii) It is also not possible to be clear as to exactly what the AIB was told about the ownership of Amerco. Although the NCA has put its case on the basis that the bank was told that the brothers owned it on a 50:50 basis, this does not appear to chime exactly with the 24 January 2013 letter from the AIB. Paragraph 3 of this letter refers to the bank's understanding being that the shareholders in Amerco were Philip Nuttall and Interports Contracts LLC (and that Interports Contracts LLC was ultimately owned by the Bereweeke Trust which is owned by the Nuttall family);

(iii) It is also not possible to be clear as to the exact sources of the bank's understanding of the ownership of Amerco. Although the NCA has put its case on the basis that the Nuttall brothers provided this information to the bank, again this does not tally completely with the AIB's letter. Paragraph 3 of this letter confirms that at least some of the bank's understanding came from the Amerco International's Directors' Report and Financial Statements for the year ended 31 December 2005. The letter also confirms that some of the information came from its own searches: paragraph 4 of the letter states that the Companies House and Equifax searches were the source of the information relating to Amerco, under the heading "*Confirmation of who provided the information relating to Amerco*";

(iv) In light of Jonathan Nuttall's evidence that the ownership of Amerco changed regularly, it cannot be said with confidence that the declaration of trust said to be dated 18 January 2006 and the letter from Riches to the HMRC dated 23 February 2007 represent the final position on ownership at the time the representations were made to the AIB for the mortgage: it may be, for example, that Mr Novak was no longer part of the picture by the time the application was made;

(v) It remains unclear to me on the evidence what the AIB was told as to what the Nuttalls had received from Amerco by way of dividends or income. Moreover, there are clear factual disputes as to whether if the Nuttalls did receive any such monies, they were declared to the HMRC, and whether if, as Jonathan Nuttall suggests, a less technical definition of "*dividend*" is applied, there was no mis-representation;

(vi) The lack of apparent concern by the AIB at not only granting the mortgage (having plainly carried out some checks), but also accepting the redemption monies could, in the fuller context of all the evidence at trial, prove Towerdene's point that there was in fact no fraud with respect to the mortgage; and

(vii) Further documentary and/or witness evidence from the AIB itself may well be available at trial which would assist on some of these issues, but there is no such evidence before me at present.

37. I note in this regard that the parties relied for opposing propositions on the 24 January 2013 letter from AIB: the NCA argued that it was proof of the fraud, whereas Towerdene submitted that it showed the reverse, and that the AIB had no such concerns. In this regard the case seems similar to *Esprit Telecoms UK Ltd*, where summary judgment was held to be inappropriate in part because both counsel relied on House of Lords authority to support competing submissions as to the law, and because different judges in some of the earlier cases had reached different conclusions on very similar factual situations.

38. Second, with respect to the redemption monies allegation, while I have found this a harder issue to decide, on balance it seems to me that this matter is not capable of summary determination. Both parties agree that the chain of transactions suggests that chronologically the Kotecha funds left the account before the redemption monies were paid. However I consider that the "*tracing*" issue of whether the Kotecha funds were *de facto* used to pay the redemption monies (because it was in the knowledge that they were coming/had come in that other payments were made), or whether they are properly regarded as used for something entirely separate (namely a payment towards Embley Manor, or indeed something completely different), is one that can only be determined by the trial judge who has access to all the evidence.

39. On the latter issue, I note that the NCA may wish to question Mr Nuttall at trial as to his potentially conflicting accounts in this claim and the claim against the First Defendant as to whether the monies paid out shortly after the Kotecha loan came in were used for Embley Manor or not. Although the NCA rightly accepted his evidence on this issue for the purposes of this application, this dispute illustrates the general complexity of this case and the need for the evidence to be fully tested, including with oral evidence, at trial. That principle carries over, as I have said, to the issue of what the Kotecha loan was properly regarded as being used for.

40. In light of the fact that Mr Nuttall was not a party to the *Azam* case, in accordance with the approach taken in *Esprit Telecoms*, it does not seem fair to give significant weight to the observations made about him in that case at this stage.

41. Overall this case seems to me on all fours with *Woodstock*, where although there are "*certainly grounds for suspicion*", it is not possible to say at this summary stage that Towerdene has no real prospects of success. Accordingly, I am not persuaded that summary judgment is appropriate under CPR 24.2(i)(a).

42. Given my conclusions on limb (a) of CPR 24.2(i), it has not been necessary to give detailed consideration to the further arguments advanced under limb (b). However, it could also be said that the factual disputes referred to above are in themselves a reason for the matter to go forward to trial. The fact that this is a fraud case, alone, would not in my view have provided such a reason.

43. The parties will now need to agree directions for the trial of the claims against Towerdene. I am told by counsel for Towerdene that these directions should be straightforward. This issue should not therefore put the trial fixture, which plainly affects all the other Defendants as well as Towerdene, at any risk.