



Claim No: G03CL042

IN THE COUNTY COURT AT BRISTOL

Wednesday 20th October 2021

B E T W E E N :

HESTER HELENA POTGIETER

Claimant

-and-

SIMON FREDERICK WILLIAM VILLAGE

Defendant

APPROVED JUDGMENT

Representation:

Claimant: **Geoffrey Zelin** instructed by **Dewar Hogan**

Defendant: **Christopher Stone** instructed by **Macfarlanes LLP**

(Hearing date: 13 October 2021)

This judgment has been handed down remotely by circulation to the parties' representatives by email on 20 October 2021 (at 4pm).

HHJ Russen QC:

Introduction

1. This is my judgment on the Defendant's application dated 29 June 2021 ("**the Application**") by which the Defendant ("**Mr Village**") seeks the striking out of, or

alternatively summary judgment against the Claim brought against him by the Claimant (“**Ms Potgieter**”).

2. The Application was heard remotely on Wednesday 13th October 2021 at which Mr Christopher Stone represented Mr Village and Mr Geoffrey Zelin represented Ms Potgieter.
3. I should say something about the time estimate given for the hearing, if only to make yet one more plea for litigants and their lawyers to put forward realistic time estimates which, on an application like this, should allow time for an extempore judgment. When it was issued the Application included a time estimate of 2½ hours. That was not in my view a realistic time estimate having regard to the issues raised. A week before the hearing I agreed to extend the time estimate (albeit with a start time of 11am to allow for pre-reading) in the light of the significant amount of documentation exhibited to Ms Potgieter’s witness statement dated 4 October 2021. One of the skeleton arguments suggested 1½ hours should be allowed for pre-reading whereas it took about twice as long. Allowing for the 11am start and a lunch break, the hearing lasted until 4.45pm when Mr Stone concluded his submissions in reply. It must be obvious that even a relatively rudimentary extempore judgment addressing the significant points in this written one would probably have taken 2 hours or so to deliver and that after pause for some reflection upon the significant number of points to be addressed (and it will be even more obvious that preparing this written judgment has taken considerably longer). The Application issued with a 2½ hour time estimate was really more like a 2 day application.
4. The evidence in support of the Application was contained in the witness statement and exhibit of Mr Simon Nurney, a partner in Macfarlanes LLP. Ms Potgieter made her witness statement in answer. At the hearing, I decided to admit in evidence a short witness statement in reply of Mr Village’s former wife, Cindy-Lee Village (“**Mrs Village**”) even though it had been served later than the deadline for evidence in reply stipulated by CPR 24.5(2).
5. Ms Potgieter’s Claim was issued (in the Central London County Court from where the proceedings have since been transferred) in December 2020 and was served on Mr Village in January 2021. By the Claim she seeks relief to the effect that she is (or, in the case of the second property since sold, was) entitled to a beneficial interest in two properties held by Mr Village.
6. The first property is Shilstone Manor, Chagford, New Abbot, Devon (“**Shilstone**”) and the second is No. 7 Yew Tree Mews, Market Square, Westerham, Kent (“**the Flat**”).
7. Shilstone was purchased on 1 September 2010 by Shilstone Holdings Limited (“**SHL**”) which Mr Village says was a company owned by acquaintances of his, though he accepts the property was acquired on the understanding that the property would be transferred to him at a later date. He did duly acquire it following his purchase of the share capital of Acorn Property Holdings Limited (“**Acorn**”, as SHL had become) in March 2017 for a price specified in the Share Sale Agreement dated 22 March 2017 to be £4.6m. Shilstone was subsequently registered in his name.
8. Ms Potgieter’s case is that she funded £305,000 (or the greater part of that sum) of the initial purchase price of £1.65m which SHL paid for Shilstone on 1 September 2010,

that price being recorded in the Office Copies at the Land Registry showing Acorn as the registered proprietor. She relies upon a bank transfer of £304,022.50 for the account of Mr Village on 19 April 2010, rounded up in the Particulars of Claim to £305,000. On that basis she claims an 18.48% beneficial interest under a resulting trust of the property. Paragraph 19 of the Particulars of Claim pleads that Mr Village took subject to that interest when he became registered as proprietor of Shilstone on 29 March 2017.

9. At the hearing, Mr Zelin said it remained to be established (at a trial) whether or not Mr Village did pay the £4.6m for the shares in Acorn (a company incorporated in the Marshall Islands) but, assuming as I do that that he should be treated as having given value for Shilstone in 2017, Ms Potgieter's pleaded position is that he was the other party to the understanding on which she says she paid the £305,000 in 2010 so that he should not be treated for present purposes as a bona fide purchaser for value taking free of any such beneficial interest. Instead, the focus of this part of the Application is upon SHL's purchase in 2010.
10. So far as that earlier purchase is concerned, Mr Village says that Ms Potgieter's assertions that the £305,000 represented her own monies and was used in the purchase of Shilstone are each baseless and worthy of being struck out or, alternatively, the grant of reverse summary judgment.
11. The Flat was purchased by Mr Village for £325,000 on 15 April 2012 and registered in his name. Mrs Potgieter says she funded the entirety of that purchase price (and associated purchase and conveyancing costs bringing the total required for completion to £337,376). On that basis, she seeks a declaration that prior to its subsequent sale the Flat was held on trust for her by Mr Village. Mr Village sold the Flat in June 2014 for £430,000. Accordingly, Ms Potgieter seeks an inquiry as to how sale proceeds were dealt with, together with all orders and directions necessary to trace them (possibly leading to a declaration of beneficial ownership of any replacement property acquired with them).
12. Mr Village does not dispute that the sum of £337,376 transferred on 17 April 2012 on the instructions of Ms Potgieter from an account with BNP Paribas went to the solicitors acting on his purchase of the Flat and was used to complete its purchase. However, as with the case against him on Shilstone, he says the money did not belong to Ms Potgieter.

Principles governing the Application

13. The Application is made under CPR Parts 3.4 and 24.2.

Strike-Out

14. The Application Notice itself does not identify CPR 3.4 but does refer to the striking out of the Particulars of Claim. The draft Order attached refers to striking out pursuant to CPR 3.4 on the basis that the Particulars of Claim "*disclose no reasonable grounds for bringing the claim*" and Mr Nurney's witness statement said the same. Although Mr Stone's skeleton argument had referred to the court's power to strike out under CPR 3.4(2)(b) – permitting the striking out of a statement of case which is an abuse of the

court's process or is otherwise likely to obstruct the just disposal of the proceedings – and to illustrations in paragraph 1.7 of Practice Direction 3A of cases within that limb of the rule (including the “*obviously ill-founded*”), Mr Stone confirmed that the application was made under CPR 3.4(2)(a).

15. CPR 3.4(2)(a) permits the striking out of a statement of case which “*discloses no reasonable grounds for bringing or defending the claim*”.

16. In the light of that wording, which requires analysis of the grounds disclosed by the statement of case under attack, I raised with Mr Stone the question of whether the court could consider evidence on that part of the application. I did so recognising that the point appeared to be of no real significance given his client's alternative reliance on CPR 24. My initial view was that a resort to evidence appeared to be beyond the exercise contemplated by the plain language of CPR 3.4(2)(a). That said, Mr Stone's mention of the *Libyan Investment Authority* case (see below) caused me to realise I might have brought to the question a bit too much baggage from the old RSC Ord. 18 r. 19 days. However, Mr Zelin's skeleton said that the strike-out application was brought only under CPR 3.4(2)(a), that Ms Potgieter's Particulars of Claim could not be said to be similar to any of the examples in PD3A para. 1.4 of the type of case falling within that rule, and (reinforcing my assumption) said that no evidence was admissible on this limb of the Application.

17. In submitting that it is permissible for the court to consider evidence on an application under CPR 3.4(2)(a) Mr Stone relied upon the decision of the Court of Appeal in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 and the decision of HHJ Keyser QC in *Maranello Rosso Limited v Lohomij BV and others* [2021] EWHC 2452 (Ch). Both were cases like the present where the defendant had applied to strike out the claim (relying on CPR 3.4(2)(a)) or for reverse summary judgment against it.

18. Mr Stone also relied upon paragraph 5.2 of PD3A which reads:

“While many applications under rule 3.4(2) can be made without evidence in support, the applicant should consider whether facts need to be proved and, if so, whether evidence in support should be filed and served.”

19. Although HHJ Keyser in *Maranello* viewed the decision differently, as I explain below, I do not read the judgment of Coulson LJ in *Begum*, at [20]-[21] as one bearing upon the question of whether or not the language of CPR 3.4(2)(a) creates an evidence-free zone.

20. It is the case that Coulson LJ said, at [21]:

“In a case of this kind, the rules should be taken together, and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see Global Asset Capital Inc v Aabar Block SARL [2017] EWCA Civ 37; [2017] 4 WLR 16 at [27].”

21. I do not read that passage as being directed at anything other than the test (the persuasive burden resting upon the defendant applicant) to be applied on a combined

strike out and summary judgment application. I deal with the merits test below (viewed from the perspective of the respondent seeking to resist the application) in addressing the Part 24 aspect of the Application. Coulson LJ was addressing and rejecting the judge's observation that the test under CPR 24 was less onerous from the applicant's perspective.

22. In my judgment it is difficult to read more into it than that. His lordship emphasised that his observation was directed to "*cases of this kind*". So far as the strike out limb of the application was concerned, he noted that the case on strike-out was based "*on the nature of the pleading*". The opening paragraph of the judgment in *Begum* shows that, in addition to a limitation defence under the law of Bangladesh, it was the duty of care alleged by the claimant which was being scrutinised against the merits test. Coulson LJ said (at [23]) that "*it is not generally appropriate to strike out a claim on assumed facts in a area of developing jurisprudence*" (my emphasis through underlining) and, having recited the factual assumptions governing the hearing of the application and the appeal, also said (at [35]) "*[f]or the purposes of these applications, any investigation of the actual facts, let alone a mini-trial on contested areas of evidence, is not only inappropriate, it is also unnecessary.*"
23. In the *Begum* case there clearly was evidence put before the judge at first instance (and presumably the limitation defence was required to be supported by evidence of the foreign law) but it is reasonably clear that it was used as the basis for assumed, as opposed to contested, facts.
24. At the hearing before me the parties did not refer to the *Global Asset Capital* case mentioned by Coulson LJ at [21]. I have since looked at the judgment of Hamblen LJ (as he then was) in that case for a potential correction of my assessment of the point Coulson LJ was making. Having done so, there is nothing in the earlier decision which causes me to view *Begum* differently. On the contrary, in *Global Asset Capital* the Court of Appeal approached the appeal on the defendant's summary judgment and strike out application on the basis (at [24]) that "*Aabar disputes Global's account of events, but for the purposes of their applications they do not seek to go behind Global's account of the facts as set out in their pleading.*"
25. However, in *Maranello* HHJ Keyser QC interpreted *Begum* differently. In doing so he reached the conclusion, at [25], that "*[o]n the current state of the Rules and the authorities a party who wishes to contend that the opponent's case has no real prospect of success on the facts may, in my view, apply under either r. 3.4(2)(a) or r. 24.2 – common practice, indeed, is to do so under both rules – and may adduce appropriate evidence in support of the contention whichever rule is relied on.*"
26. Although the adoption of that practice in the *Maranello* case meant that, as in the present case, "*little if anything turns on the point for present purposes*" (at [23]) what HHJ Keyser QC said at [25] is part of the ratio of his decision. In the absence of any conflicting High Court decision or higher authority it is binding on this court.
27. The judge relied upon three matters in coming to his conclusion at [25]:
 - a. the observation of Coulson LJ in *Begum* at [21];
 - b. the terms of PD3A, paragraph 1.7; and

- c. a preference for the dictum of Nugee LJ in *Libyan Investment Authority v King* [2020] EWCA Civ 1690, at [57(4)] over that of Arnold LJ, at [90], in the same case. It was on this basis that HHJ Keyser QC respectfully doubted the dicta of Marcus Smith J (with whom Lewison and Arnold LJJ agreed) in *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7, at [7].

28. I have already expressed my view on the point Coulson LJ was addressing in *Begum*.

29. As to paragraph 1.7 of the Practice Direction, this says:

“A party may believe he can show without a trial that an opponent’s case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate.”

30. As with the observation in *Begum*, paragraph 1.7 is directed to the potential overlap between Part 3.4 and Part 24. I do not read it as endorsing the idea that evidence directed to the merits (or suggested lack of merit) of the claim may be adduced in an application brought *only* under CPR 3.4(2)(a) and not also CPR 24. I also note that the paragraph refers to CPR 3.4 generally and identifies a ground of challenge (“*a point of law*”) which would fall within CPR 3.4(2)(a) and not justify evidence in support. I accept that the phrase “*has no real prospects of success on the facts*” does resonate most strongly with the ground for striking out in rule 3.4(2)(a) and that a claim which is caught by 3.4(2)(b) might otherwise (i.e. but for the abuse of process or vexation it carries with it) have a real prospect of success. However, in my judgment there are certain types of abusive proceedings, falling within rule 3.4(2)(b), which can be said to have no real prospect of success “*on the facts*”. The White Book 2021 at para. 3.4.5 gives the examples of proceedings caught by the doctrine of res judicata or the rule in *Henderson v Henderson* and I would have thought permissible evidence of the facts relied upon to strike out the claim on such grounds could fairly be said to be aimed at showing it therefore has no real prospect of success.
31. At this point I would make the same point about paragraph 5.2 of PD3A relied upon by Mr Stone. As Mr Zelin pointed out, that paragraph does not discriminate between the three classes of strike-out cases identified by CPR 3.4(2). Clearly this paragraph does not contain the express prohibition upon evidence on an application under what is now CPR 3.4(2)(a) which appeared in the broadly equivalent RSC Ord. 18 r. 19(1)(a) but neither does it say that evidence of contentious facts is admissible under that limb.
32. For my part, therefore, I see nothing in the language of Practice Direction 3A which widens the court’s remit beyond the consideration of whether or not “*the statement of case discloses no reasonable grounds for bringing or defending the claim.*”
33. The third reason HHJ Keyser QC gave for not following the obiter dicta of the Court of Appeal in *Allsop v Banner Jones* was, in essence, that he did not find the reasoning of Arnold LJ in the *Libyan Investment Authority* case, upon which the dicta was based, to be entirely convincing. This was partly because Arnold LJ, in the earlier case, had made his observations as if CPR 3.4(2)(a) imposed the test of “*bound to fail*” (when that was the language of PD3A para. 1.7) rather than “*no reasonable grounds*”. It was

also because Nugee LJ in the *Libyan Investment Authority* case had noted the looser language of CPR 3.4.2(a) compared with the former Ord. 18 r. 19(1)(a) “and, significantly, Ord. 18 r. 19(2) provided that on an application under paragraph 1(a) no evidence should be admissible”. Approaching PD3A para. 1.7 on the basis that all of it was applicable to an application under CPR 3.4(2)(a), HHJ Keyser QC said that the dicta of Nugee LJ clearly supported the making of such an application on the ground that (as Nugee LJ put it) “*the claim is factually hopeless*”.

34. In the *Libyan Investment Authority* case Nugee LJ expressly recognised that the court did not have to reach a concluded view on that point. However, he expressed his view that the judge below was probably entitled to strike out the claims (as opposed to granting summary judgment) on the ground that they had no reasonable prospect of success. Against that, Arnold LJ said: “*As is well established, under rule 3.4(2)(a) the facts pleaded must be assumed to be true and (unlike r. 3.4(2)(b) and (c)) evidence is inadmissible, whereas under rule 24.2 no such assumption is required and evidence is admissible to show that the pleaded allegations are fanciful.*”
35. It was the dictum of Arnold LJ which found favour with the Court of Appeal (including Arnold LJ) in *Allsop v Banner Jones*. Marcus Smith J, at [7], referred to it in saying: “*there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case.*” Having considered the judgment in *Allsop v Banner Jones* (where, as appears from footnote 3 in the judgment, the court was deciding an appeal from a decision on applications which sought reverse summary judgment and relied upon all three limbs of CPR 3.4(2)) I respectfully agree with HHJ Keyser QC that this does not form part of the ratio of the decision.
36. However, for the reasons set out in paragraphs 21 to 32 above I respectfully find the dicta of Arnold LJ in the *Libyan Investment Authority* case and the Court of Appeal in *Allsop v Banner Jones* more convincing than did HHJ Keyser QC. Ultimately, in my judgment, it is a case of the court heeding the clear language of CPR 3.4(2)(a).
37. I should, however, make it clear I do not take issue with what HHJ Keyser QC said at [23]: “*I am proceeding on the basis that, even if a statement of case contains all the factual averments necessary to establish a claim, yet it may be struck out under r. 3.4(2)(a).*” That is even clearer in the light of the language of CPR 3.4(2)(a) when compared to the old Ord. 18 r. 19 language of “discloses no reasonable cause of action”. Allowing for the fact that it involved a challenge by reference to a foreign law limitation period (presumably requiring evidence of that foreign law) the *Begum* case is a good example of such a situation. Other examples may be extracted from the notes in the White Book at para. 3.4.2. A defendant may challenge the viability of a claim not on the basis that the factual averments in support of it are somehow deficient but because, even assuming them to be true, they do not make up the components of a duty recognised in law or (see the change from the language of RSC Ord. 18 r. 19) because an otherwise viable claim is fatally holed beneath the waterline by an indisputable limitation defence. Paragraph 1.4 (and para. 1.6) of PD3A recognises both types of challenge under CPR 3.4(2)(a) and, if made good, the second would lead to the conclusion that *no reasonable grounds* for bringing (or defending) the claim have been disclosed.

38. However, the judge's observation at [23] does not go to the point of whether or not evidence on contentious matters between the parties is admissible on a challenge under CPR 3.4(2)(a) aimed at establishing the absence of such grounds.
39. The question is whether, despite my doubts about it, I am bound by the decision in *Maranello* because there is no contradictory authority that can be regarded as binding in the County Court.
40. Mr Zelin relied upon the decision of the Court of Appeal in *Bridgeman v McAlpine-Brown* (19 January 2000, unreported) in submitting that Mr Nurney's witness statement was not admissible on the application under CPR 3.4(2)(a). The decision does not appear to have been cited in *Maranello*. It is referred to in the White Book 2021 at para. 3.4.2 (in the notes addressing the jurisdiction under CPR 3.4(2)(a)) for the proposition that "[a] statement of case is not suitable for striking if it raises a serious live issue of fact which can only be properly be determined by hearing oral evidence."
41. That statement does not, without more, support Mr Zelin's submission that evidence going to the merits is not admissible under CPR 3.4(2)(a). However, the transcript of the judgment in *Bridgeman v McAlpine-Brown* reveals more.
42. The decision in January 2000 was so soon after the introduction of the Civil Procedure Rules that it was decided by reference to the transitional arrangements then contained in Part 51. The defendant's strike-out application had been issued before the CPR came into force but in her judgment, at [18], Hale LJ explained that it was governed by the provisions of CPR 3.4(2). The relevant point in issue on the appeal was whether the judge below was right to grant the application when the application was that the claimant had sued the wrong person (the defendant not his wife) in a claim arising out of a road traffic accident. The application asserted that the defendant had not been driving the vehicle at the time and that this was "*a fact that was known to the Plaintiff.*" However, that was a contentious matter as the Court of Appeal made clear in allowing the claimant's appeal and making observations, at [23]-[24] and [39], which support the note of the case in the White Book.
43. The judgment of Hale LJ addressed the provisions of CPR 3.4(2) (which was in the same terms as it currently stands) though not the provisions of any accompanying practice direction in whatever terms then expressed. Having done so, she said this:

"21. *The judge would not have been able to strike this claim out on those grounds, whether under the old rules or under the new. The essence of a strike out is that one does not look at the evidence on the claim. It is odd that the defendant's solicitors should have suggested this to the claimant. It [is] also odd that they should have put into their application that the claimant knew the identity of the driver - which might of course have made it an abuse of process - when the only evidence for that assertion came from the Browns and does not appear in any communication or disclosure to the other side.*

22. *Hence the learned judge could only dispose of the claim after a decision had been taken on the factual issue. It was, of course, open to him to decide that this was an issue which could be disposed of. He would be doing so, technically, not under a strike out application but under Part 24 of the Civil Procedure Rules which deals with summary judgment. For the first time it*

allows summary judgment to be given for the defendant as well as for the claimant. The grounds are set out in rule 24.2

44. Her ladyship's observation at [21] can be read as directed to all three limbs of CPR 3.4(2) just mentioned by her. At first sight, the statement that the court does not look at evidence on a strike-out application appears too sweeping (if it is taken to extend to the other two limbs). However, it is important to note that she referred to the court not looking at evidence "*on the claim*" and it is clear (and seems to have been read by the editors of the White Book in the same way) that the observations at [22] were drawing a distinction between the specific ground in CPR 3.4(2)(a) and an application for reverse summary judgment.
45. In my judgment, *Bridgeman v McAlpine-Brown*, at [21], is authority for the proposition that evidence going to the merits of the claim - which involves the applicant challenging the factual assertions made in the statement of case as fanciful rather than assuming them to be true for the purposes of the application - is not admissible evidence on an application under CPR 3.4(2)(a). The decision is binding upon me and I therefore follow it in preference to the decision in *Maranello*.
46. The factual assertions made in Ms Potgieter's Particulars of Claim (supported by a statement of truth made by her solicitor) *disclose* reasonable grounds, albeit succinctly expressed, for claiming beneficial interests in Shilstone and the proceeds of the Flat under resulting trusts of each property. The evidence in support of the Application is directed to establishing that, even though that may be the position at first sight, further inquiry beyond what is revealed by the pleading shows there to be no credible basis for those assertions. The aim is to establish that the grounds cannot be "reasonable" because they are untruthful and not realistically sustainable. In my judgment, this evidence (and indeed the evidence of Ms Potgieter which engages with it) is not admissible under CPR 3.4(2)(a).
47. The Application is also made under CPR Part 24.2. It is this which makes the point about CPR 3.4(2)(a) and the admissibility of evidence going to the merits a largely academic one, though it was appropriate for me to address it in the light of the parties' competing submissions.
48. Although the common practice recognised in paragraph 1.7 of PD3A means that the point will often be of little significance, the divergence of views in the recent *Libyan Investment Authority* perhaps indicates that first instance judges who are called upon to decide applications made *only* under CPR 3.4(2)(a) would benefit from a definitive ruling and confirmation or otherwise that *Bridgeman v McAlpine-Brown* (as I have interpreted the decision) correctly summarises current practice.

Summary Judgment

49. The principles governing a summary judgment application are now so commonplace that they hardly need repeating. In most summary judgment applications either or both counsel refer to the decision of Lewison J, as he then was, in *EasyAir Ltd v Opal Telecom* [2009] EWHC 339 (Ch), at [15], for his summary of the principles, expressed in terms applicable to a defendant's application for summary judgment. Mr Stone and Mr Zelin did so in the present case.

50. The need for the respondent to a summary judgment application to show by reference to supporting evidence that his or her claim is realistic and carries “*some degree of conviction*” is fettered by the court’s need to recognise that it cannot conduct a mini-trial on the papers. It also needs to be mindful that the case might be one where there is a reasonable prospect of the existing documented evidence relied upon by the respondent being supplemented at trial by further persuasive evidence. The court should in such a case at the very least hesitate before granting summary judgment which precludes the prospect of that evidence being adduced. But mere Micawberism will not be enough and neither does the admonition against conducting a mini-trial mean that the court must take everything the respondent says at face value. The merits test (a *real* prospect of success) requires the respondent to back up what he or she says with some evidence.

51. One of the earlier authorities from which the *Easyair* principles were distilled was *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 where, at [10], the Court of Appeal said “[i]n some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.”

52. Mr Stone laid emphasis upon that and also the recent decision of HHJ Keyser QC in the *Maranello* case mentioned above, where the judge said, at [19] (with Mr Stone’s emphasis added):

“... However, and importantly, the court ought to carry out a critical examination of the available material and is not bound to accept the mere say-so of anybody; where it is clear that a factual case is self-contradictory or **inherently incredible or where it is contradicted by the contemporaneous documents**, the court, after careful consideration of the evidence that is currently before it and having regard to the nature of such further evidence as might reasonably be expected to be available at trial, is entitled to reject that case even on a summary basis. The court will not be dissuaded from giving judgment by mere Micawberism.”

53. These are all observations which serve to distinguish meritorious opposition to a summary judgment application from fanciful or speculative resistance, which will not do. However, in a case where the court considers that assertions in witness statements cannot stand in the face of the contemporary material then that conclusion needs to be reasoned through. Mr Mr Zelin cited the decision of the Court of Appeal in *Optaglio v Tethal* [2015] EWCA Civ 2002 where, at [32], Floyd LJ said:

“Given that nature of the summary judgment test, the court can only dispose of factual issues in this way when there is no real prospect of the evidence of one side on that issue being accepted. I would add that it is incumbent on a judge giving summary judgment on the basis that an account of a witness is to be disbelieved to explain with reasonable particularity what it is about the contemporary record or other evidence which justified rejecting his evidence.”

54. As to the level or standard of persuasion the respondent is required to meet on the merits test, Mr Stone also cited the decision of the Court of Appeal in *Kawasaki Kisen Kaisha Limited v James Kamball Limited* [2021] EWCA Civ 33, at [18]. In *Maranello*,

HHJ Keyser QC went on to cite that paragraph immediately after the passage in his judgment quoted above, so as to reinforce the need for the case under scrutiny to have a sufficient factual basis. In *Kawasaki* the court was considering the “*real prospects of success test*” to be applied on an application to amend. Popplewell LJ noted, at [16]-[17], that this was the same test as that which applies on an application to serve out of the jurisdiction as well as on a summary judgment application.

55. This shows that the merits test means that on this application Ms Potgieter shoulders the burden of establishing a good arguable case. Popplewell LJ (citing *ED & F Man v Patel*) said that the case must carry more conviction than simply being merely arguable. In *Allsop v Banner Jones*, at [7], Marcus Smith J referred to the threshold as being one of ‘*reasonable arguability*’ (thereby replacing the adjective ‘good’, in the service out context, with ‘reasonable’ for Part 24 purposes) and HHJ Keyser QC adopted that terminology in *Maranello*. On this Application, Ms Potgieter needs to persuade the court that her claims are more convincing than merely arguable even though she does not have to go so far as establishing they are likely to succeed.

General observations

56. I have summarised in the Introduction above the points of attack upon the Claim deployed by Mr Village and his legal team. They are that that the £305,000 transferred by Ms Potgieter in April 2010 (less an international bank transfer fee of £15) and the £337,376 transferred in April 2012 was not her money. In relation to Shilstone, there is the separate point that the monies were not used in the purchase of that property.
57. As I remarked at the outset of the hearing the key questions on the application were “whose money?” and (in relation to Shilstone) “where did it go?”.
58. I have emphasised this point because a significant part of Mr Zelin’s core submission that the dispute between the parties needed to be aired at a trial was built upon the suggested need for it to be decided by reference to a wider range of documents than those already relied upon by the parties in relation to those key questions. Yet much of what he said Ms Potgieter would wish to challenge at a trial struck me as a distraction from the analysis of these key questions which is required for a fair and (presumed to be) correct disposal of the Application.
59. Mr Nurney’s witness statement says that from 2009 Ms Potgieter worked for two companies owned by Mr Village: Specialised Consultancy Services (“**SCS**”, a company incorporated in the Dubai Multi Commodities Centre free zone) and Specialised Investment Solutions Ltd (“**SIS**”, an English company). Ms Potgieter was engaged in providing administration and operational services from Dubai. She says she began working for SCS in May 2008 (and was responsible for registering SCS in Dubai), and was the company’s only employee; and that, although Mr Potgieter behaved as if he owned SCS, the registered shareholder until the end of 2009 was one Stuart Thomas (“**Mr Thomas**”). Ms Potgieter’s witness statement says she handled the administration of SCS but Mr Village’s father (“**Stuart Village**”), did all the administration of SIS.

60. Mr Village and Ms Potgieter were also involved in a romantic relationship between 2010 and 2016 (with the exhibited documentation showing that they were often countries apart and also that the relationship had its ups and downs) but there is now no love lost between them. This is clear from what I say in the next two paragraphs.
61. In January 2017, after their relationship had broken down, they entered into a formal agreement documenting an outstanding loan of £23,500 owed by Ms Potgieter to Mr Village and containing an option for Ms Potgieter or her appointee to acquire Mr Village's property at 6 Carrington Road, Kimberley, South Africa ("**Carrington Road**"). In early 2019, Ms Potgieter and her mother brought proceedings against Mr Village in the High Court of South Africa by which they claimed an interest in Carrington Road. Those proceedings were subsequently withdrawn on terms that they would pay Mr Village's costs and in September 2019 a settlement agreement was concluded which provided for Ms Potgieter to purchase Carrington Road from him and to vacate that property (or pay rent thereafter) if a bank guarantee in respect of the purchase price was not furnished by the end of that year. Ms Potgieter has not yet managed to purchase Carrington Road and Mr Village says she has not paid the agreed rent in respect of her continued occupation. Mr Village's belief is that the claim in the present proceedings is aimed at putting pressure upon him in relation to the Carrington Road matter and paragraph 15 of his Defence refers to a statement made by the estate agent marketing that property to the effect that Ms Potgieter was planning to purchase Carrington Road using the hoped-for recovery in these English proceedings.
62. In her evidence in these proceedings Ms Potgieter has accused Mr Village of "*editing*" a document – the "Village Asset Schedule" which was prepared for the purpose of an ancillary relief hearing in late 2011 in the divorce proceedings between Mr and Mrs Village – which, Ms Potgieter argues, supports her case that the £305,000 transferred in April 2010 belonged to her. At the hearing of the Application, for reasons given during it, I decided to admit in evidence the witness statement from Mrs Village on this point. Mrs Village's statement went against that contention and I address it below. Ms Potgieter also said in her witness statement that Mr Village did not want Shilstone to feature in the context of the divorce proceedings "*so I believe it is likely that he had arranged things so that he would provide the funds (obtained in part from me) for the initial acquisition in a way that would enable him to acquire the property but pretend that it was owned by someone else until after the dust from his divorce had settled.*" This was disputed by Mr Stone on behalf of Mr Village. During the hearing Mr Zelin also said that Mr Village had in the divorce proceedings also concealed his interest in SCS which she said was evidenced by the terms of a Convertible Loan Agreement dated 15 September 2008 exhibited by her. In reply, Mr Stone said SCS had been wound up by the time of the hearing in the divorce proceedings in December 2011. He said SCS had ceased to operate in Dubai at around the time of the £140,000 payment to Ms Potgieter on 6 March 2010 addressed below. Ms Potgieter's witness statement says that "*most of the money in SCS was extracted to a company in Monaco during 2009*". I also note that the Consulting Agreement dated 1 April 2010, by which Ms Potgieter was appointed as a consultant to SIS, referred to the need for her assistance in managing and overseeing the liquidation of SCS.
63. These wider allegations made by Ms Potgieter might (if sustained) be embarrassing to Mr Village and perhaps even potentially significant to what I understand to be the otherwise fully concluded and determinative ancillary relief proceedings between him and Mrs Village. However, their marginal significance to the present proceedings, and

the key questions raised by the Application is illustrated by me focussing upon her suggestion that Mr Village concealed an interest in Shilstone from Mrs Village in the context of the divorce proceedings. I have already noted and it should be highlighted that this was disputed by Mr Stone on behalf of Mr Village and it is a statement of the obvious to say that the proper place for any further inquiry into the matter would be in proceedings between the former married couple. As Mr Stone submitted, it would be surprising if a disguised beneficial interest of Mr Village in Shilstone, as at 2011, passed the scrutiny of the forensic accountants and lawyers (including leading counsel engaged by Mrs Village) instructed on each side in the divorce proceedings; and the same applies to SCS if that was still a company of value. As I also noted during the hearing, on the assumption that the £4.6m Mr Village agreed to pay for Acorn in 2017 reflected the market value of Shilstone, Ms Potgieter's contention appears to involve him having paid for a beneficial interest he already held (and this in ignorance that Ms Potgieter would later claim an 18.48% beneficial interest in Shilstone). Mr Zelin said there was no evidence the £4.6m had been paid but one would not expect to see such evidence on the Application which turns upon a contested claim of beneficial ownership as between Ms Potgieter and Mr Village (rather than between him and the previous registered proprietor of Shilstone and those behind it) and there is certainly no evidential basis for even suspecting that Mr Village and the trust company who entered into the Share Sale Agreement in March 2017 were parties to a sham document.

64. Ms Potgieter's suspicions, upon which she bases the suggestion that Mr Village concealed an already acquired interest in Shilstone from Mrs Village, are really based upon some emails which Mr Village wrote (or forwarded) to her between 2009 and 2010 which show that Mr Village was interested in acquiring Shilstone as a home. She also points to the terms of an Assured Shorthold Tenancy Agreement dated 1 August 2012 by which it was agreed Mr Village should have a two year tenancy of Shilstone at monthly rent of £2,500. Mr Zelin pointed out that the agent for the landlord (SHL) was identified as "Mr Stuart Village (Father)", that the rent appeared to be quite low for a property of that size and worth, and that the failure to identify a landlord's address within England and Wales might mean (under statute) that it was not recoverable or even payable. Again, these are tangential matters which relate to position as between Mr Village and SHL/Acorn. Mr Nurney's witness statement had accepted that "*SHL was owned by acquaintances of [Mr Village] and purchased on the understanding that, at some future date, [Mr Village] would seek to acquire [Shilstone] from them.*" The emails and tenancy agreement are not particularly surprising when viewed in that light.
65. Ms Potgieter's own pleaded case is that Mr Village purchased Shilstone through an intermediary and I have already noted her position that he took the legal title to the property in 2017 subject to her pre-existing beneficial interest. Although the Defence denies the allegation that Mr Village was not a bona fide purchaser for value in 2017, that is first and foremost because of his denial that Ms Potgieter contributed to its initial purchase. Again, therefore, the focus on the present Application comes back to two the key questions in relation to the £305,000. Ms Potgieter's case on those two inquiries needs to have an evidential basis which is sufficient justify the conclusion that it carries a degree of conviction; and a prospect of success worthy of the epithet "real" rather than "fanciful". If she does not have the end product of a good arguable case on both points then her wider allegations against Mr Village are irrelevant.
66. However, the 2009 and 2010 emails, and later ones, upon which Ms Potgieter relies are potentially relevant to the key questions in relation to Shilstone which do arise on

the Application. I accept Mr Zelin's submission that Mr Village's pleaded defence that he and Ms Potgieter never seriously contemplated marriage or plan to have a home together in Devon is (allowing room for debate about the precise language used in the Defence) open to doubt.

67. Those emails might lend support to an explanation as to why Ms Potgieter might have contributed to the purchase of Shilstone in 2010 and the Flat in 2012. Nevertheless, her case based upon a resulting trust of each property rests upon her establishing that she did.
68. Before turning to the parties' rival contentions, I should make one further observation upon a point on which they were agreed. Obviously, they each did so with a view to saying, in conclusion, opposite things as to whether the Claim in its entirety should stand or fall. Both Mr Stone and Mr Zelin made the observation that at least some of the impact of my finding in relation to Shilstone should carry through to my finding in relation to the Flat.
69. I accept that the merit or absence of merit in Ms Potgieter's claim over Shilstone must feed into an assessment of the merits of her claim over the Flat. This is particularly so when neither claim was asserted until 2019. As Mr Nurney observed in his statement, the claim in respect of the Flat was first raised by Ms Potgieter in an affidavit served in the South African proceedings in February 2019 and the claim in relation to Shilstone was first mentioned in the letter of claim dated 29 October 2019.
70. However, I remind myself that the disposal of the Application in relation to Shilstone involves Ms Potgieter's case meeting the merits test on two key questions whereas the Flat raises just the one: see paragraph 57 above. Mr Stone correctly observed that the rejection of Ms Potgieter's case on the second question raised in relation to Shilstone does not involve any finding that she is to be disbelieved, as her case that the £305,000 which she transferred in April 2010 was then used in the purchase of Shilstone is one based upon conjecture. If the Application were to succeed in relation to Shilstone because Ms Potgieter did not have a good arguable a case for saying the £305,000 was used in that purchase, and not also because she lacked such a case for saying the monies belonged to her in the first place, then the lack of merit in the Shilstone claim would not carry through to the claim over the Flat where the use of the monies transferred by her in April 2012 is not in issue. [I should here note that Mr Nurney's witness statement made it clear that I am not asked to decide the Application by reference to the defence of laches which is pleaded by reference to Mr Potgieter's silence over both property claims until 2019.] Indeed, although her claim to ownership of the £337,376 calls for separate scrutiny, on that outcome the wind might be said to blow in the direction urged by Mr Zelin. Conversely, if Ms Potgieter's case fails the merits test on the first question raised in relation to Shilstone then there is no real escape from the conclusion that she has been disingenuous in a way which must cast doubt over the claim to the Flat's proceeds.

The rival contentions

71. I now summarise the parties' respective cases on the two key questions identified in paragraph 57 above.

72. Although Ms Potgieter's Particulars of Claim referred to her contributing to an "as yet *unidentified property*" in Devon, her evidence is that as a result of discussions with Mr Village about the purchase of Shilstone in early 2010 (he having forwarded to her a marketing brochure for the property the previous year) she agreed to contribute £305,000 to its purchase. It was to be a family home for Mr Village and her.
73. Ms Potgieter says that the £305,000 was made up of two bonuses recently paid to her by SCS (£140,000) and SIS (£165,000) in March 2010. In support of the categorisation of these payments as bonuses, she relies upon the following:
- a. a bank statement from SCS's current account with HSBC's branch at Jumeirah Lakes Towers in Dubai showing the payment of £140,000 on 6 March 2010 to a bank account in the name of Ms Potgieter with the reference 'BONUS PYMTN'; and
 - b. a bank statement from SIS's account with HSBC's branch at Tottenham Court Road showing the payment of £165,000 on 24 March 2010 to a bank account in Jersey in the name of Ms Potgieter. That statement does not refer to a 'bonus' but the request for the payment to be made, signed by Stuart Village, contained the word 'Bonus' in the 'Message to Beneficiary' entry. The bank's debit advice also referred to it as a 'bonus'.
74. Ms Potgieter says the £140,000 was a bonus payment at the end of her contract with SCS and the £165,000 was a signing-on bonus from SIS.
75. Mr Village disputes this. Mr Nurney's witness statement says that the £140,000 represented sums extracted from SCS because of concerns that the Dubai bank account might be frozen due to the financial crisis. It was moved from Dubai for the benefit of Mr Village and his business partner Mr Thomas. Mr Village says the £165,000 came from an SIS bank account which represented his loan account with the company and held funds for his own use.
76. Mr Village says that neither payment was a bonus of the kind that Ms Potgieter only received in US Dollars. He points to her having just been paid one such bonus of US \$32,000 (to the Jersey bank account) by SCS on 4 March 2010. As for the suggested bonus of £165,000 paid by SIS, he relies upon the terms of her Consulting Agreement dated 1 April 2010 which provided for the payment of a bonus on the first anniversary of that agreement, not in March 2010. Rather than them being payments for her benefit, he says that both transfers were made to Ms Potgieter on the express understanding that she would then transfer the monies on to Pieter Theron ("**Mr Theron**") who was Mr Village's financial adviser. He relies upon the terms of emails exchanged between Mr Theron and Ms Potgieter in April 2010 which involved Mr Theron giving wiring instructions to her for the payment of the £305,000.
77. Through Mr Nurney, Mr Village says that in any event the £305,000 (or greater part of it) transferred back by Ms Potgieter was not used in the purchase of Shilstone. He says it was first paid into a general client account of the firm in Monaco at which Mr Theron worked. With the supporting evidence of Mrs Village, Mr Village says it was then paid into a Village family trust settled in the BVI ("**the NGR Trust**", representing the initials of their three children whose education was the primary purpose of the

trust). Mr Village said it remained in the NGR Trust where it remained at the time of the ancillary relief hearing in late 2011.

78. Ms Potgieter says she funded the purchase of the Flat in April 2012 because at that time she and Mr Village had planned she would move from South Africa to live with him, and that they would move between Shilstone, the Flat and other residences.
79. Ms Potgieter relies upon four advice notes issued in respect of a Sterling current account in her name with BNP Paribas in Monaco. Three record payments by SIS of £85,000, £85,000 and £80,000 on each of 26, 28 and 29 March 2012. Each advice note referred to "BONUS". The fourth related to a payment of £78,125 on 26 March 2012 and referred to "CONS.FEES NOV11 TO MAR12".
80. She also relies upon an email which she sent to BNP Paribas on 17 April 2012 enclosing a completion statement (for completion of the purchase on 20 April 2012) and the bank details of Abbott Law LLP who were acting on the purchase of the Flat. The email requested the payment of £337,376.16 (the amount shown in the completion statement) and stated: "*I am buying an apartment in England and would like to pay funds into the account of the lawyers who are handling it.*" It also said "*[t]he reference for the payment should be 7 Cudham Hall.*"
81. Ms Potgieter says that the amount sent to her represented monies owed to her at the time in respect of her consulting work for SIS. Her witness statement says they reflected consulting fees and a bonus payment. An RFI Response says that the £337,376 transferred by her to Abbott Law also included the sale of shares in a company called Banro Corporation.
82. Mr Village says that a total sum of £328,125 was transferred by him to Ms Potgieter for the express purpose of them being forwarded on by her in his purchase of the Flat. He says that they came from the same loan account with SIS that he had used to make the transfer of £165,000 to Ms Potgieter in March 2010. They did not represent a bonus or consultancy fee which, as I have already noted, he says were always paid in US Dollars and also says ceased to be paid by SIS in September 2011. The monies were therefore not from her personal resources. He says that the balance of the £337,375 remitted by her the next month to Abbott Law (the sum of £9,251, which I note approximates most closely to the Stamp Duty element shown on the completion statement even though it is £500 odd short) represented monies already owed by Ms Potgieter to him.
83. Mr Village relies upon an email sent by his father to Ms Potgieter on 15 April 2012 which said:

"Trust you are enjoying your break with your family and you are well.

Please find attached the completion statement for no. 7, would you please arrange to wire the total GBP funds to Abbott Law LLP per their bank details as arranged with Simon.

The funds are required by mid week, to enable completion this week. I am meeting the builder and kitchen people tomorrow and they will make a start next Monday 23rd April.

We look forward to spending more time with you on your next visit.”

84. Mr Village also says that he, not Ms Potgieter, paid for the building works and kitchen at the Flat and Ms Potgieter does not contend otherwise.

Analysis and Decision

85. There can be no doubt that, even on his version of events, Mr Village has become exposed to this Claim as a result of him routing through the accounts of Ms Potgieter monies said to belong to him. This is particularly so in relation to the purchase of the Flat, which was a purchase in his own name but where the monies coming from SIS did not go straight to the solicitors acting on the purchase.

Shilstone

86. Having given careful consideration to the evidence in the light of counsel's competing submissions I have no difficulty in concluding that Ms Potgieter has no real prospect of succeeding in her claim of a resulting trust of Shilstone. That claim is not seriously arguable and can be disposed of at the summary judgment stage.
87. This is because the evidence clearly shows that the £305,000 (or, strictly speaking, the greater part of it remitted by Ms Potgieter to Ms Theron) was not used in the purchase of Shilstone.
88. I should say at the outset that, although Mr Zelin submitted and Ms Potgieter said in her witness statement that further documentary evidence could be expected to be available at trial which would shed further light upon the use to which the money was put, I accept Mr Stone's argument that the court can proceed on the basis that she has deployed her 'best' documents in an attempt to defeat the Application. Ms Potgieter complained in her witness statement that Mr Village had adopted the tactic of pressing her for her account of events and to produce documents (probably not realising that she had retained emails) so that he could then tailor his own story accordingly. However, Mr Stone drew my attention to solicitors' correspondence in May and June 2021 which showed that Macfarlanes had proposed a stay upon the previously agreed (but not ordered) direction for disclosure on the basis that Mr Village intended to make the Application. However, Ms Potgieter's solicitors proceeded with the disclosure exercise and served her disclosure statement and list of documents.
89. One particular document upon which Ms Potgieter places great reliance in her witness statement is a version of a document headed 'Village Asset Schedule' which was prepared for the purposes of the divorce proceedings between Mr and Mrs Village. Ms Potgieter gave evidence in those proceedings. She says that, for these purposes, Stuart Village provided her with a list of fees paid to her in the financial year ended 31 March 2011 and about which she was likely to be asked on the basis that they were being challenged by Mrs Village. The list of payments totalled £825,000 which had been converted at the applicable rates to a total of £516,848. At first sight this list, beginning with a US Dollar payment on 29 July 2010, appears to have no bearing upon the Sterling payments made to Ms Potgieter in March 2010. However, she said that Stuart Village had told that the £165,000 was also being challenged by Mrs Village and that when that sum was added to the £516,848 it made up the figure of £681,849 in

the Village Asset Schedule. Ms Potgieter said the payment of £140,000 by SCS was not under scrutiny because (and I have already noted Mr Zelin's submission on the point) Mrs Village did not have access to SCS's financial statements as Mr Village was not a shareholder.

90. In the version of the Village Asset Schedule exhibited by Ms Potgieter she referred to line 21 for the entry "*Esti Potgieter payments – 681,849 – 2010-2011 payments*". This was an "*Add on sought*" by Mrs Village (as an addition to Mr Village's deemed assets) but resisted by Mr Village. In her witness statement Ms Potgieter suggested that a different (and redacted) version of the Village Asset Schedule dated 16 December 2011 and exhibited by Mr Nurney had been "*edited*" to show something different. She questioned that date when she had saved her version of the document on 5 December 2011 (the day the ancillary relief hearing commenced) and said the hearing had concluded on 9 December 2011. Ms Potgieter said of her version that "*none of the 'add backs' sought by his ex-wife were agreed by the court and it was found that the monies were properly due to me.*" Therefore, in relation to the £165,000, she said Mr Village was now running a case inconsistent with his position in the divorce proceedings. She suggests that Mr Village would also have resisted the add back of the £140,000 if Mrs Village had known about it because that too belonged to Ms Potgieter. When I pointed out to Mr Zelin that Ms Potgieter appears not to have given evidence of the most obvious defence to the suggested add-back – that she had used the £165,000 to acquire a beneficial interest in Shilstone – he reminded me of her case that Shilstone, as an asset of Mr Village, had been concealed from Mrs Village.
91. However, the difficulty with Ms Potgieter's explanation of the divorce documentation is that it has imploded with the evidence of Mrs Village. Mrs Village refers to an unredacted version of the Village Asset Schedule dated 16 December 2011. She explains by reference to lines 18 and 21 of the Schedule that she was not challenging the £305,000 remitted to Ms Potgieter on the basis that it should be regarded as excessive remuneration and therefore treated as an asset of Mr Village. This was because she can "*say with certainty that the sums I sought to challenge did not include the £305,000 that had been transferred by [Ms Potgieter] to the [NGR] Trust. That is what is meant by the note 'March 2010 payments accounted for in NGR Trust assets.'*"
92. Mrs Village is there referring to line 21 of the Village Asset Schedule dated 16 December 2011 (which she confirmed to be the last day of the ancillary relief hearing). Line 18 of the schedule referred to the cash of £326,368 in the NGR Trust (as recognised by both parties to the schedule) and cross-referred to that entry in line 21. In identifying the payments to Ms Potgieter which were claimed as an add-back by Mrs Village (but not recognised by Mr Village) line 21 referred to the sum of £681,849 as "*July 2010 – September 2011 Payments under 'consulting agreement'*". That date range is further confirmation that the March 2010 payments were not in issue in the way Ms Potgieter suggests.
93. Mrs Village has explained that she did not challenge the March 2010 payments "*because of how the Judge dealt with the Trust's assets, given that the money remained in the Trust's assets at the date of the divorce.*" This is supported by a note of the judgment in the ancillary relief proceedings which was exhibited in evidence and show that the judge treated the trust as a matrimonial asset from which Mrs Village should benefit.

94. In my judgment, this is compelling contemporaneous evidence (supported by the witness statement of Mrs Village which Ms Potgieter probably did not anticipate) that undermines the suggestion that Mr Village defeated an attempt by Mrs Village to recover the £305,000 by saying it properly belonged to Ms Potgieter.
95. Mr Zelin said it was still too much of a coincidence that an amount of £165,000 made up the difference between the figures of £516,848 and £681,849. However, this ignores the clear distinction made in the Village Asset Schedule between the March 2010 payments (plural) and those made in the period July 2010 to September 2011. Mr Nurney exhibited a summary of US Dollar payments to Ms Potgieter by SIS. They show 3 further payments between May and September 2011 which were not shown on the list she says Stuart Village gave to her for the purposes of giving evidence in the divorce proceedings, though I recognise their total amount (US \$175,000) is unlikely to convert to £165,000 at the currency conversion rates used in the less comprehensive one.
96. In any event, that the £305,000 had been paid into the NGR Trust is clear from a further contemporaneous document. This is a redacted 'NGR Trust Asset Summary -21st April 2010' which Mr Nurney says was prepared at that time by Mr Theron. It records separate payments from "Elgin client a/c" (see below) converted from dollars to sterling to show the amounts of £165,000 and £140,000 as "cash on hand" in the NGR Trust. Allowing for the rounding up of the next sums transferred by Ms Potgieter to Mr Village's financial adviser (also see below) this was a piece of contemporaneous bookkeeping which shows the true ultimate destination of the sums which SCS and SIS had paid to Ms Potgieter.
97. Mr Stone made the persuasive point that, in the face of this contemporaneous evidence, Mr Zelin was driven in his skeleton argument to questioning the reliability of all those involved in the suggested attribution of the monies to the NGR Trust, including Mr Theron and Mrs Village. That does strike me as a bit of Micawberism in a case where Ms Potgieter's case is that her 'purchase monies' were used in the acquisition of Shilstone rather than misappropriated for some other use.
98. For these reasons, I conclude that Ms Potgieter's claim that the £305,000 went into Shilstone Hall is fanciful.
99. At first sight, the first key question in relation to Shilstone ("whose money?") appears to be less straightforward and worthy of greater hesitation before summary judgment is granted against Ms Potgieter, by reference to the merits test, on the basis that the monies plainly were not hers.
100. It is obviously necessary to address this question in relation to Shilstone not only because it has been fully argued but also because a finding that her claim to the ownership of those monies is not seriously arguable also has real significance for the claim in relation to the Flat: see paragraphs 68 and 69 above.
101. Of course, the two key questions in relation to Shilstone are interlinked. I have taken the second question first because it is decisive on the claim to a resulting trust. However, the answer to it also informs the first. I have just noted that Ms Potgieter rests her case upon the existence of a beneficial interest in Shilstone since 2010 and not her discovery (after only recently asserting that claim) that she has been swindled

out of the £305,000. If she did play her own part in a transaction which resulted in the monies becoming a 'Village Asset' through their addition to the NGR Trust, with her first protest about the consequences only really emerging in her evidence on this Application, then that will illuminate the inquiry on the first question.

102. Obviously, Ms Potgieter is able to point to the description of the payments as 'bonuses' in the contemporaneous bank documentation and, although the evidence indicates that she would have been responsible for this label in the case of the SCS payment, Stuart Village used it in the case of the SIS payment.
103. It is obvious that Mrs Village and her advisers in the divorce proceedings doubted the genuineness of many such 'bonus' payments. The question I have to decide is whether or not Ms Potgieter's assertion that they were genuine bonus payments to her is one that is contradicted by other contemporaneous documents.
104. In my judgment her assertion is undermined by the contemporary documentation.
105. I say that not only because Mr Theron received the monies on the basis that he then felt able to put them into his client's family trust. In my judgment, it is also clear enough for the purposes of a reverse summary judgment application that Ms Potgieter knew they were not being sent as her own monies.
106. This is clear from their email exchange in April 2010. It is important to note that again Mr Theron was Mr Village's financial adviser.
107. On 12 April 2010 (at 11:42, Dubai time) Ms Potgieter sent an email to Mr Theron which referred to a recent meeting between them and Mr Theron's wife. It seems obvious that they had discussed "wiring instructions" (the subject matter of the email) because Ms Potgieter said: "*Kindly let me have wiring instructions (US\$ and GBP) for SV and ST. Will send you an email with the accounts that I will transfer by tomorrow.*" The initials referred to Mr Village and Mr Thomas. As the details of the receiving account do not emerge from their email exchange, it can be inferred that Ms Potgieter was given these separately, either at the meeting or by a separate message not in evidence.
108. On the same day, Mr Theron replied by email (at 1:55pm, presumably from Monaco) saying: "*Will this be a business to business transfer or will these funds come from your personal account? Just to anticipate the kind of paperwork that we will need to put in place trying to avoid the previous little ordeal.*" That previous ordeal was not explained in evidence but Mr Theron's assumption that the funds might equally have come from a business account, rather than Ms Potgieter's personal account, is telling. Ms Potgieter responded by an email that day (at 11:02 her time) saying: "*The funds will come from my personal account.*"
109. By 19 April 2010 the monies had been transferred to the account of Elgin Holdings Limited which Mr Nurney says was the general client account of the firm for whom Mr Theron worked (and which was the account identified in his NGR Trust Asset Summary dated 21 April 2010. The next day Ms Potgieter's bank confirmed to her that the sum of £350,000 less an electronic transfer fee of £15 had been transferred to that account. On 19 April Mr Theron and Ms Potgieter exchanged further emails in

Afrikaans (of which informal and agreed translations were given at my request during the hearing).

110. Mr Theron's email said: "*I have received 304,985 pounds – let me know the split if any.*" Ms Potgieter replied: "*I have transferred: GBP 304,022.50 for Simon and GBP 977.50 for Stuart. I have also transferred \$16,000 – the full amount for Stuart. It will be two working days before you receive the US \$.*"
111. In her witness statement Ms Potgieter says she was happy to act upon Mr Village's request that part of the £305,000 should be used to pay some expenses of Mr Thomas who was visiting Monaco but, as she also says that she understood she was contributing to the purchase of Shilstone, one would expect her to have pointed out to Mr Theron that she should be credited with the amount paid to Mr Thomas. Instead, the emails show her simply acting upon wiring instructions given by Mr Village's financial adviser as if she had no interest in the monies.
112. In my judgment, the nature and terms of these emails show that Ms Potgieter knew that the monies being transferred were not her own monies, to be received by Mr Theron for her account, but were instead being transferred for the benefit of the 'owners' of SIS including, notably, Mr Thomas. They show that it was not the least bit surprising that Mr Theron then arranged for the sum transferred by Ms Potgieter for Mr Village (made back up to the £350,000) to be paid into the NGR Trust.
113. In conclusion, Ms Potgieter's case for a resulting trust of Shilstone is not an intelligible and apparently credible one. It fails the test of being reasonably arguable.

The Flat

114. I have already noted that both parties recognise that my finding in relation to Shilstone has an impact upon the claim in relation to the Flat.
115. However, the claim over the Flat cannot fairly be said to be fatally infected by the conclusion upon Shilstone without separate consideration of the evidence in relation to the Flat.
116. I have already noted that Ms Potgieter relies upon the categorisation (by Stuart Village) of the sums received by her in March 2012 as either 'bonus' or 'consultancy fee' and also upon the explanation she gave to PNB Paribas when asking for funds to be remitted to Abbott Law the following month.
117. In her witness statement Ms Potgieter says that Mr Village's explanation of the transaction makes no sense when "*[i]f I had owed him £9,251, and if he was providing the £328,125 from his own sterling resources, why would he not just have sent his £328,125 to Abbott Law and asked me to send them the £9,251.*"
118. A large part of the answer to this rhetorical question emerges from my finding (in relation to Shilstone) that Ms Potgieter knew that, for whatever reason, Mr Village did route payments of money intended for his own use through her bank accounts. On this aspect, the email which Stuart Village sent to Ms Potgieter on 15 April 2012 (see

paragraph 83 above) is entirely in keeping with the email exchanges between her and Mr Theron two years earlier.

119. The four payments made to Ms Potgieter over the four days in March 2012 were made in Sterling not US Dollars. The schedules exhibited in evidence show that all payments acknowledged by Mr Village to have been bonus payments to Ms Potgieter were made in US Dollars (I refer to those mentioned in paragraph 95 above).
120. Mr Stone pointed out that Ms Potgieter's pleaded claim in relation to the Flat rests simply upon the assertion that she provided the sum of £325,000 (the relevant amount was in fact £337,375) used to fund the purchase of the Flat. He made the powerful point that Ms Potgieter has not sought to rely upon any request by Mr Village that she should fund his purchase. I note that her witness statement does not explain the particular circumstances in the Spring of 2012 which are said to have motivated her prompt use of monies received by her only the previous month. Instead, the focus is upon her entitlement to those monies and the rhetorical question mentioned above.
121. Ms Potgieter did not challenge Mr Nurney's evidence that Mr Village saw the Flat advertised for sale in the estate agents' window on the evening of 10 March 2012. He was with his parents at the time. He wanted a home close to his parents and the Flat was in the same complex as their home. By an email sent by him to the agents the next day Mr Village offered £325,000 for the Flat against an asking price of £350,000 and their 'Offer/Sale Sheet' shows that offer was accepted with exchange and completion scheduled for 25 April 2012.
122. As Mr Stone submitted, on Ms Potgieter's case it is a matter of pure coincidence (and nothing to do with the purchase of the Flat) that the four Sterling payments were then made in a total amount which covered the purchase price of the Flat and other incidental expenses save for the Stamp Duty payable. In the light of the closeness in time between her receiving the monies and then acting on the request of Stuart Village to send them to the solicitors acting on Mr Village's purchase, her position is not credible. In my judgment, the chronology and contemporaneous documents show that both parties knew that payments to Ms Potgieter marked as 'bonus' or 'consulting fee' represented monies that Mr Village was to use (as his own) in the purchase of the Flat.
123. As to the additional £9,251 remitted by Ms Potgieter, Ms Potgieter is correct to say that no details of a then outstanding loan have been provided by Mr Village. However, I do note from the terms of the formal loan agreement they concluded in January 2017 that (whilst recognising the loans in question were made in 2016) Mr Village did lend monies to Ms Potgieter. This is also clear from certain emails passing between them in January 2015 and March 2016.
124. In conclusion, and also having regard to the case she has been prepared to advance in relation to Shilstone, I also find that Ms Potgieter's claim in relation to the Flat is not seriously arguable.

Generally

125. When reaching such conclusions which are determinative of the Claim on a summary basis it is sometimes important to stand back and conduct a sense-check

against the wider circumstances of the dispute between the parties. Doing so in the present case only reinforces my conclusion that Mr Village is entitled to summary judgment.

126. In paragraphs 14 to 16 of his skeleton argument Mr Stone referred to a number of matters which he rightly submitted were wholly inconsistent with a genuine belief on the part of Ms Potgieter that she had an interest in either property.
127. Those matters include a promise by Ms Potgieter in an email dated 28 March 2016 that she would repay loans to Mr Village and their entry into the January 2017 loan agreement without any mention by her of an entitlement to a financial interest in Shilstone or the Flat. They also include a reference in a letter from her solicitors dated 10 March 2021 which referred to Ms Potgieter having to sell her home in South Africa in order to finance work upon Carrington Road, apparently without it occurring to her to ask for a return of monies paid towards Shilstone or the Flat.
128. I accept the submission that Ms Potgieter's failure to speak up about an entitlement in respect of either property further undermines the genuineness of the Claim. Ms Potgieter says in her witness statement that she did raise the issue of the monies in late 2013 when it looked as if the relationship was ending before things later improved. I do not find that evidence convincing (when an email she wrote on 4 September 2012, in similar circumstances, made no mention of the monies) and it prompts the question as to why she did not raise it when the time came for her and Mr Village to record matters more formally.
129. By themselves, these matters would not justify the dismissal of the Claim but they do support my conclusions based upon the contemporaneous documents.

Disposal

130. I therefore grant summary judgment against the Claim.
131. This judgment has been handed down remotely by its circulation to the parties. I will determine the consequential issue of costs on the basis of brief written submission if it cannot be agreed. Allowing a period for discussion, those submissions should be lodged by 4pm on 10 November 2021
132. In order to preserve Ms Potgieter's position on any application by her for permission to appeal, the handing down of the judgment is adjourned for that limited purpose in accordance with the procedure in *McDonald v Horn* [2019] EWCA Civ 4, [21]. The adjournment for that purpose will be until 10 November 2021, with Ms Potgieter filing any application for permission to appeal by 4pm on 3rd November and Mr Village making any written submissions in response by 4pm on 10 November 2021. In my decision on the application for permission (if made) I will make provision for the time for the filing of an appellant's notice in accordance with CPR 52.12(2)(a).
133. The filing of a minute of order can await any further determination of costs and/or application for permission to appeal.