Neutral Citation Number: [2024] EWHC 2915 (Ch)

Case No: BL-2022-MAN-000113

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

15 November 2024

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

MALCOLM LIONEL ROBERT ROYLE	**Claimant**
- and –	
TOGETHER COMMERCIAL FINANCE LIMITED	**Defendant**

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Louis Doyle KC (instructed by **Horwich Farrelly Limited**) for the **Claimant**
Lesley Anderson KC and **Richard Tetlow** (instructed by **TLT LLP**) for the **Defendant**

Hearing dates: 2, 3 October 2024

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JUDGMENT

HHJ Halliwell :

(1) Introduction

1. There are two applications before the Court. By the first application ("**the First Application**"), the Defendant ("**TCFL**") seeks reverse summary judgment, under *CPR 24.2*, or an order striking out the Particulars of Claim, under *CPR 3.4*. By the second application ("**the Second Application"),** the Claimant ("**Mr Royle**") applies for permission to amend the Particulars of Claim pursuant to *CPR 17.1(2)(b),* adding two additional parties to the proceedings.

2. The First Application was issued as long ago as 27 November 2023. The Second Application was not issued until 30 September 2024 shortly before the hearing of the First Application, on 2-3rd October 2024. The additional parties are Mr Henry Moser ("**Mr Moser**") and Mr Eugene Esterkin ("**Mr Esterkin**").

3. Ms Lesley Anderson KC and Mr Richard Tetlow, of counsel, appeared on behalf of TCFL, and Mr Louis Doyle KC appeared on behalf of Mr Royle. On the first day of the hearing, Mr Mark Harper KC appeared on behalf of Mr Esterkin. Mr Moser did not attend the hearing nor was he represented.

4. At the commencement of the hearing, Mr Harper asked me to dismiss the Second Application, at least where applicable to Mr Esterkin. He did so on the basis it had not been served on his client personally and only been brought to his attention after it had been left at his professional offices. This was at 10.45am on 1st October 2024. Mr Harper submitted that the Second Application was procedurally flawed. He also submitted that, if the Second Application was not dismissed, his client required time to file and serve evidence in opposition.

5. I did not dismiss the Second Application but adjourned it pending the outcome of the First Application. Mr Royle was ordered to pay Mr Esterkin's costs. At this stage, Mr Harper ceased to attend the hearing.

6. Where the respondent to a Part 24 Application issues a cross application for permission to amend his statement of case, the two applications will generally be disposed of together. However, in the present case, there could be no question of adjourning the First Application given the delay since issue and amount of time

allocated to the hearing in the Court diary. In dealing with the First Application, at this stage, I have taken into consideration Mr Royle's draft amended statement of case and the issues to which it gives rise notwithstanding that the Second Application has itself been adjourned for future consideration.

(2) Background

7. Mr Royle is a property developer. He is the freehold owner of Daresbury Hall, Warrington ("**the Property**") encompassing historic buildings and neighbouring land earmarked for development. On 31 October 2006, he acquired the Property as a whole from a company then under his control, Daresbury Hall Developments Limited ("**DHDL**"). On 5 July 2007, Mr Royle was registered, at HM Land Registry, as freehold owner. He is still registered as such.

8. TCFL is a finance company. Its activities include lending funds for the development of property.

9. Mr Royle approached TCFL for funds in connection with the transaction. Agreement was reached in October 2006. Pursuant to this agreement, TCFL advanced £3,950,000. Of this amount, £2,167,576 was required for the repayment of the amounts secured on a prior loan from the Bank of Scotland. It was applied for this purpose. After provision for Stamp Duty and legal fees and expenses, the balance was credited to UK Mortgage Corporation Limited ("**UKMCL**"). This is significant since TCFL and UKMCL were associated companies and there is an issue between the parties as to why this was done. Whilst the Property had already been charged to UKMCL, Mr Royle contends UKMCL never advanced funds, whether to himself or DHDL. He says the charge was taken in contemplation of development and intended to secure an "upfront profit share" in the prospective development. He also contends the charge was not granted simply in anticipation that monies would be advanced by UKMCL to fund the development.

10. Mr Royle was provided with at least two redemption statements in respect of the amounts allegedly owed to UKMCL at the time of the transaction. The final statement showed that, as at 31 October 2006, the sum of £1,640,028.98 was owed to the company in respect of the "principal sum" of £1,500,000 together with a renewal fee

of £75,000, accrued interest on both amounts from 29 June 2006, but not before, and legal costs of £235. If the full amount was credited to UKMCL, this would have left a balance of £145,594. Mr Royle has exhibited a note suggestive of legal fees and Stamp Duty of £141,106.70 leaving upwards of £4,000 unaccounted for.

11. By a mortgage deed dated 31 October 2006 between Mr Royle and TCFL, Mr Royle charged the Property to secure all amounts owing to TCFL.

12. In 2009, TCFL advanced to Mr Royle, by way of loan, the additional sum of £250,000 secured by a legal charge dated 11 February 2009.

13. In May 2010, there was a theft of lead from the roof of the historic building. Mr Royle made a claim on the insurance policy and, in settlement of the claim, his insurer, New India Assurance Company, paid the sum of £210,000 to TCFL. However, he alleges that, contrary to an agreement with TCFL, the company declined to apply this amount to reinstate the roof; the building thus became uninhabitable.

14. On 8 June 2010, Mr Royle was adjudged bankrupt on a petition presented by the Bank of Scotland in the Warrington County Court. However, on 19 December 2011, he was given permission to appeal and, shortly afterwards, the Bank consented to an order setting aside the bankruptcy order with costs on the indemnity basis. This was apparently on the basis that his indebtedness to the Bank of Scotland had at all time been fully secured.

15. Mindful of the bankruptcy, Mr Royle contends that, in early 2011, he had already appointed TCFL to act as his agent in connection with the development of the Property and TCFL had agreed to protect the Property (including the historic buildings) and insure it for its full rebuild cost. Subject to his rights of appeal, his statutory estate, as a bankrupt, would of course have vested in the official receiver or his trustee in bankruptcy if appointed.

16. As it happens, the historic building was not restored or rebuilt nor was the Property developed. In July 2014, there was another theft of lead from the roof but TCFL contends that, when it submitted a claim, it was able to recover, under the insurance policy, a limited amount only in view of the recent claims history. Since, by then, the

Property was unoccupied, TCFL's insurers were willing to provide debris removal cover only.

17. This aspect of the case is disputed. Mr Royle contends that TCFL remained under a duty to insure the historic building for its full rebuild cost. If it could not obtain proper cover, it brought this on itself. He now contends that, in insuring the historic building for debris removal at a value of no more than £50,000 rather than for its full rebuilt value, TCFL committed breaches of its contractual and fiduciary duties to him. When, on 25 June 2016, the building was destroyed by a fire, he thus sustained a recoverable loss of at least £10,550,000 based on the difference between the amounts that would have been recovered had the Property been properly insured, £10,612,000, and debris removal, £50,000. He also incurred additional losses, also recoverable from TCFL, on the basis that planning approvals were lost in respect of the Property as a whole.

18. TCFL disputes each element of Mr Royle's case. It also contends that, throughout this period, Mr Royle's indebtedness to TFCL continued to grow. By 7 June 2023, his indebtedness had allegedly climbed to £22,717,702.52 made up of £20,995,110.45 under the 2006 agreement, £1,222,247.06 under the 2009 loan and £500,345 under a loan of 2017.

19. On 28 October 2020, Mr Royle entered into a settlement deed ("**the Settlement Deed**") with TCFL under which it was agreed he would make monthly repayments of £25,000 with provision for Mr Royle to make an additional payment of £5,000,000 – denoted as "the Redemption Payment" - by no later than 5pm on 30 September 2021. It was not expressly provided that TCFL's charge would be redeemed in the event Mr Royle made the Redemption Payment. However, elsewhere in the Settlement Deed, it was provided that, subject to receipt of all contractual monthly payments and "the Redemption Payment", TCFL would "discharge its security…" (Clause 11). By clause 17, it was provided that the deed "shall not constitute an admission of any kind by [TCFL] of any allegation by [Mr Royle]". By Clause 19, it was provided that "this deed constitutes the entire understanding and agreement between the Parties in relation to the subject matter of this deed".

20. By a deed of variation dated 11 February 2021, again between TCFL and Mr Royle, TCFL agreed to defer the monthly payments due on 25 January and 25 February 2021 and Mr Royle agreed to cede possession of the Property to TCFL in the event TCFL did not receive any of the other monthly payments in full.

21. On 10 February 2022, TCFL appointed receivers under the powers conferred by the 2006 mortgage deed and the Law of Property Act 1925.

22. By letter dated 10 February 2022, Mr Royle's solicitors, Horwich Farrelly, provided TCFL's solicitors with details of his prospective claim and, on 20 June 2022, the parties entered into a standstill agreement prior to the commencement of proceedings.

23. On 20 December 2022, the Claim was finally issued. On 6 April 2023, the Particulars of Claim was filed and served. On 7 June 2023, TCFL filed and served its Defence. There is a Reply dated 4 August 2023.

(3) The pleaded issues

24. By his Particulars of Claim, Mr Royle claims an account and inquiry in relation to "the *surplus proceeds* of the [2006] loan", namely £1,782,424. This is the entire balance of TCFL's overall advance of £3,950,000 once the sum of £2,167,576 was applied in redemption of the Bank of Scotland loan. It is at least implicit in the Particulars of Claim, when construed as a whole, that this was credited to UKMCL in respect of its "Anticipated Profit Share" in the prospective development since it is pleaded, in Para 4(8), that before the Property was transferred to Mr Royle, Mr Moser advised him the additional amount was required to fund a share of the anticipated profit which would be paid immediately to UKMCL. Elsewhere, it is pleaded, in general terms, that Mr Moser led Mr Royle to believe that the arrangement was "simply a mechanism for Mr Moser to take money out of [TCFL] and to take the Anticipated Profit Share via UKMCL…" (Para 4(11)(i)). It is also alleged that Mr Royle "understood this to mean that he did not have to repay interest on the £3,950,000 loan as the true amount…loaned to [Mr Royle] was £2,167,576 being the amount of monies…due to the Bank of Scotland" (Para 4(11)(ii)).

25. Mr Royle also claims damages for negligence, breach of contract and breach of fiduciary duty in relation to TCFL's failure to apply the proceeds of the 2010 insurance

claim to the reinstatement of the Property, its subsequent failure to insure the Property prior to the 2016 fire and, more generally, its failure to obtain and maintain planning consents in respect of the Property.

26. In its Defence, TCFL disputes Mr Royle's claim to an account on the basis *inter alia* that the sum of £3,950,000 was advanced to meet liabilities or commitments properly secured on the Property by the Bank of Scotland and UKMCL charges, and the claim was statute barred. It contends that it was entitled to apply the proceeds of the insurance policy as it sought fit under the mortgage conditions and Section *108(3*) of the *Law of Property Act 1925* and was never under any contractual obligations to the contrary.

27. Whilst TCFL accepts that it agreed to liaise with the local planning authority and seek planning permission, it had no wider contractual duties. In particular, it denies it was ever under a duty to insure the Property. It was fully entitled to take out insurance limited to debris removal at a value of only £50,000. More generally, it was not under any breach of duty to Mr Royle, whether in tort, contract, equity or otherwise. In any event, by entering into the Settlement Deed, Mr Royle agreed to compromise his claims against TCFL.

28. More generally, it is contended all claims against TCFL are statute barred and it is entitled to set off the amounts owed to it in the sum of £22,717,702.51 in diminution or extinction of its liabilities, if any, to Mr Royle.

29. In his Reply, Mr Royle takes issue with much of the Defence. He alleges that Mr Moser was and remains "the directing mind" of TCFL and UKMCL (Para 4(1)). He admitted the Property had already been charged to UKMCL by the time DHDL transferred the title to him personally. However, the charge is alleged only to secure "…a profit share which had not yet been achieved as planning permission…had not been obtained" (Paras 8(1) and (2)(g)).

30. In response to the allegation that his account claim is statute barred, he alleges that "despite exercising all reasonable diligence, [he] did not discover the fraud alleged in the Particulars of Claim until around January 2022" (Para 39(1)). Reliance is placed on *Section 32(1)(a)* of the *Limitation Act 1980*. Contrary to the Reply, no fraud is identified

in the Particulars of Claim. It can be surmised that Mr Royle contends that he did not discover the facts on which his account claim is based until January 2022.

31. Mr Royle also states that, following the bankruptcy, he advised TCFL that it was imperative for it to continue the insurance cover in respect of the Property and TCFL, through Mr Moser, confirmed it would do so (Para 10(5)).

(4) ***The draft Amended Particulars of Claim***

32. In support of the Second Application, Mr Royle relies on a draft Amended Particulars of Claim which is intended to replace the original Particulars of Claim in its entirety.

33. In the draft Amended Particulars of Claim, Messrs Moser and Esterkin are joined as additional defendants. New claims are advanced against them.

34. It remains Mr Royle's case that, in 2006, TCFL advanced or purported to advance substantially more than the amount secured by the Bank of Scotland loan. The additional amount is now calculated at "c1.775m" (Para 17). Again, it is stated that this was intended to fund "the Anticipated Profit Share" (Para 17) although there is some confusion as to whether this was based on net profit (Para 16) or total profit (Para 17). Whilst it is at least implicit that TCFL initially demanded the Anticipated Profit Share for itself (Para 16), Mr Moser is alleged to have stated, later, that it was to "be paid immediately to a company in which he had an interest, but not then identified in terms". Mr Royle then "came to believe that the company was…UKMCL" (Para 20).

35. In Paras 24-27 of the draft Amended Particulars of Claim, Mr Royle contends that he subsequently entered into the 2006 transactions and mortgaged the Property in reliance upon Mr Moser's assurance – denoted as "the Funding Representation" – that TCFL "would fund the development costs as and when those monies were required by [Mr Royle]" (Paras 24-27). However, this is allegedly "on the basis of the Anticipated Profit Share having been paid on completion of the 2006 Mortgage" (Para 24).

36. In Para 49, a new case is pleaded in relation to the appointment of TCFL as Mr Royle's agent in connection with the development of the Property encompassing obligations, on the part of TCFL, to protect and insure the historic building or buildings (Para 49.3). This is denoted as "the 2011 Agreement".

37. Having pleaded in Paras 8-9 that Mr Royle reposed trust and confidence in Messrs Moser and Esterkin, it is alleged, in Para 51, that by reason of the same and the terms of the 2011 Agreement, "there existed between those parties [and TCFL] a fiduciary relationship as between [TCFL] and Mr Moser and Mr Esterkin, as controllers of TCFL for present purposes, and Mr Royle as the purchaser… and the developer of [the Property]". The basis on which Messrs Moser and Esterkin might have assumed contractual duties to Mr Royle under the 2011 Agreement is obscure given that they were not parties to the agreement, at least as defined in Para 49. In Para 49, it is alleged Mr Moser entered into the 2011 Agreement on behalf of TCFL only and, whilst Mr Esterkin was aware of the 2011 Agreement, this was not as a contracting party.

38. In Paras 56-57, Mr Royle contends that, having visited Mr Moser at his offices in January 2011, he entered into an oral agreement with Mr Moser on behalf of TCFL under which it was agreed that, if he signed the "final discharge" form providing for the New India Assurance Company settlement monies to be paid directly to TCFL, TCFL would use the same to pay for the missing lead and roof repairs. This agreement is denoted in the draft Amended Particulars of Claim as the "Settlement Monies Agreement".

39. It is alleged Mr Royle signed the "final discharge" form (Para 58) and the proceeds of the insurance settlement, £210,000, were thus paid to TCFL (Para 59) but, in breach of the Settlement Monies Agreement, TCFL failed to apply the insurance monies on works of reinstatement (Para 60). Daresbury Hall was thus uninhabitable or at least became uninhabitable and Mr Royle and his family were forced to vacate (Para 60).

40. Elsewhere, it is pleaded that TCFL, Mr Moser and Mr Esterkin each owed contractual duties to Mr Royle under the 2011 Agreement (Para 62) in addition to their fiduciary duties (Para 64) and a duty of care to Mr Royle in tort (Para 63). This includes a duty to "exercise reasonable skill and care in protecting the Daresbury Hall Estate and its value and/or the development and its value and/or insuring the Daresbury Hall Estate for its full rebuild cost and/or obtaining and/or maintaining planning consents" (Para 62).

41. Mr Royle does not advance a claim of lawful or unlawful means conspiracy. However, in Paras 71-78 of the draft Amended Particulars of Claim, it is alleged that, together with Messrs Moser and Esterkin, TCFL committed breaches of its contractual and fiduciary duties to Mr Royle and their duties of care in tort. This includes charging or, in the case of Messrs Moser and Esterkin, causing TCFL to charge interest on the entirety of the 2006 advance "notwithstanding [that he] only received a loan of £2,167,576 from [TCFL] to discharge the Bank of Scotland loan, with the £1,782,424 being paid away other than for [Mr Royle's] use or benefit" (Para 71.1). There is also a claim for their failure, in breach of the 2011 Agreement and their fiduciaries and duties in tort, to insure the Property for its full rebuild cost (Paras 73-78). This is alleged to have caused or at least given rise to the loss of planning approvals.

42. By reason of the putative breaches in relation to the misapplication of the 2006 loan monies, there is a claim for "an account and inquiry in relation to the 2006 Mortgage to ascertain how the £1,782,424…was applied by Mr Moser, Mr Esterkin and [TCFL] and the basis for the same" (Para 72.1) or equitable compensation in respect of "interest wrongly charged by [TCFL] on the £1,782,424 element of the £3.9m advance" and consequential losses (Para 72.2).

43. By reason of the putative failure to insure the Property, Mr Royle claims, in general terms, the cost of reinstating the old building and attendant loss of value of the Property (Para 79.1) and his losses attributable to the loss of planning approvals for the development of the Property (Para 79.2).

(5) Statutory jurisdiction

44. TCFL submits that the Particulars of Claim should be struck out, under *CPR 3.4(2)* on the basis (a) it discloses no reasonable grounds for bringing the claim or (b) is an abuse of the court's process or otherwise likely to obstruct the fair disposal of the proceedings. In any event, it contends it is entitled to summary judgment, under *CPR 24.2(a)(i),* on the grounds that Mr Royle has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial.

45. *PD3A Para 1.2* provides examples of the type of case capable of falling within *CPR 3.4(2)(a).* This includes a Particulars of Claim which is incoherent and makes no sense or, whilst based on a coherent set of facts, discloses no legally recognisable claim. CPR 3.4(2)(b) can be invoked where proceedings are being exploited for a collateral purpose or relitigating issues which ought to have been raised and dispose of before.

46. On an application for reverse summary judgment under *CPR 24.2(a)(i),* Lewison J (as he was) provided guidance, in *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch),* at *[15],* on the principles for determining whether a claimant has a real prospect of succeeding on the claim. This guidance has been approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301* at 24. It is as follows.

    i. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 1 All E.R. 91*;

    ii. A "realistic" claim is one that carries some degree of conviction. This means a claim or defence that is more than merely arguable: *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472* at [8];

    iii. In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

    iv. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

    v. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550*;

    vi. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts

at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3*;

vii. On the other hand, it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that, although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*."

47. In exercising its case management powers, the court must apply the Overriding Objective in *CPR 1.1.* This involves dealing with a case justly and at proportionate cost. However, if the claim is defective but can potentially be rescued by amendment, the court may give the claimant the opportunity to amend his statement of case if the amended case is likely to have a real prospect of success. In a suitable case, the claimant can thus escape summary judgment or an order striking out his statement of case under *CPR 3.4(2)(a*), *Soo Kim v Young [2011] EWHC 1781*.

(6) Analysis

48. There are defects in the Particulars of Claim, in its current form. This was not drafted by Mr Doyle. At the hearing before me, Mr Doyle did not seek to promote this version of the claim, rather he relied on the draft Amended Particulars of Claim as the foundations for Mr Royle's case. However, unless and until Mr Royle is given permission to amend, his case is founded on the Particulars of Claim in its original form supported by Mr Royle's statement of truth.

49. In its un-amended form, Mr Royle's claim for "an account and inquiry in respect of the *surplus proceeds* of the [2016 loan]" is based on the proposition that the surplus proceeds "[were] never received by the Claimant or otherwise accounted for". "The surplus proceeds" is not expressly defined but implicitly denotes the balance of the original £3,950,000 loan following payment of the amount required to discharge the Bank of Scotland loan. There is a potential ambiguity whether legal fees and expenses were also to be deducted and, if so, to what extent, but this does not have a material bearing on the outcome of the First Application.

50. As pleaded, there is a disparity between the relief sought and the factual allegations on which Mr Royle's case is based. On his case as pleaded, Mr Royle can be taken to have been aware that the "surplus proceeds" would be applied towards UKMCL's "Anticipated Profit Share" and it is implicit he authorised the money to be applied on this basis. Having authorised the funds to be applied on this basis, it is facile for him to advance a case based on the proposition that he did not receive the funds. The funds must be taken to have been credited to UKMCL on his behalf.

51. However, it does form part of Mr Royle's pleaded case that he only signed the loan documentation (Para 4(11)) and thus authorised the transaction under which the funds were transferred to UKMCL in reliance upon an understanding, based on Mr Moser's assurances, that "he did not have to repay interest on the [whole of] of the £3,950,000 loan" rather he was required only to pay interest on the net amount applied to redeem the Bank of Scotland charge (Para 4(11)(ii) and (iii)). It is also pleaded that "[Mr Royle] relied on what Mr Moser led him to believe to his detriment and accordingly signed the loan documentation" (Para 4(11). Although this is not specifically alleged to furnish Mr Royle with a case based on promissory estoppel nor

is it specifically pleaded that Mr Moser made the relevant assurances in his capacity as a director of TCFL, these are minor defects which can be corrected by amendment. Alternatively, if Mr Moser's assurances were in the nature of a contractual promise on behalf of TCFL, it is more than conceivable they could have given rise to a collateral contract. Moreover, the disparity between the claim for relief and Mr Royle's case, whether based on estoppel or a collateral contract, can also be cured by amendments to the claim for relief by incorporating a claim for a declaration that TCFL is estopped from claiming interest on the net balance of the £3,950,000 after deducting the amount applied to redeem the Bank of Scotland charge. If he is entitled to advance a contractual claim, it would also be open to Mr Royle to seek a declaration that TCFL is not entitled to claim interest on the net balance. In addition to declaratory relief, it would then be open to Mr Royle to claim an inquiry or account to determine the extent to which his alleged indebtedness to TCFL is attributable to such interest. If and once the body of the Particulars of Claim and claim for relief are amended in this way, they will found a legally recognisable claim for such relief. Following amendment, Mr Royle would also have a real prospect of success on these parts of his claim subject to TCFL's statutory limitation defences and its contractual defence based on the Settlement Deed.

52. In the draft Amended Particulars of Claim, Mr Royle's case on loan interest is put differently. It is pleaded that, prior to the loan, Mr Moser orally advised Mr Royle as follows:

    52.1 Mr Royle should advise Bank of Scotland that TCFL was willing to offer Mr Royle the finance required to redeem the Bank of Scotland loan (Para 15);

    52.2 "[TCFL] would require a 50% share of the net profit derived from the [prospective] development…for which purpose [TCFL] would lend…£3.95m…notwithstanding that Mr Moser [was] aware that the outstanding Bank of Scotland loan stood at only c£2.175 and [the Property] was entirely undeveloped" (Para 16);

    52.3 "Part of the funding" was "a payment on account of 50% of the total profit to which the development…would give rise ("the Anticipated Profit Share" as Mr

Moser termed it) and…as part of the funding agreement with [Mr Royle], the Anticipated Profit Share would be immediately payable as soon as the £3.95m was advanced" (Para 17);

52.4 Out of the £3,95m advance, "the Anticipated Profit Share would be paid immediately to a company in which [Mr Moser] had interest", later identified as UKMCL (Para 20);

52.5 "the terms of the £3.95m advance…were…non-negotiable (Para 22); and

52.6 "[TCFL] would fund the development costs as and when those monies were required…on the basis of the Anticipated Profit Share having been paid on completion of the 2006 Mortgage" (Para 24).

53. It is pleaded, in Paragraph 27, that "by reason of the trust and confidence reposed by [Mr Royle] and Mr Moser's oral representations" in Paras 52.1-52.6 above, the £3.95m was advanced on the following basis.

53.1 "The payment of the Anticipated Profit Share (as Mr Moser called it) was no more than a commercial term and mechanism by which Mr Moser and Mr Esterkin could draw money out of [TCFL] by way of a payment into an entity under their control (believed to be UKMCL) prior to any development…" (Para 27.1)

53.2 "[Mr Royle] understood that he did not have to pay interest on the entirety of the £3.95m loan as the true amount that was being loaned to [him]…was £2,167,576…" (Para 27.2); and

53.3 "[Mr Royle] would therefore only have to pay interest on the sum of £2,176,576 to [TCFL] because any sum above that was not being advanced by [TCFL] under the control of Mr Moser and Mr Esterkin for [Mr Royle's] use or benefit" (Para 27.3).

54. In the draft Amended Particulars of Claim, Mr Royle's case in relation to the payment of interest has been modified since the understanding, in Paragraph 4(11) of the original Particulars of Claim, that he would not be required to pay interest on the balance of the loan is specifically alleged (Paras 27 and 27.2) to arise from "the trust

and confidence reposed by Mr Royle in Mr Moser" and Mr Moser's advice or representations to him, listed in Paras 52.1-52.6 above. However, this part of Mr Royle's case is still not properly pleaded as a case based on promissory estoppel. It follows that, if Mr Royle's case is to be modified on this basis, he will need to plead, in specific terms, the constituent requirements of such a case, specifying what Mr Royle is alleged to have done in reliance upon Mr Moser's promises or assurances and clarifying, for the avoidance of doubt, the nature and scope of his equity. The same is true if Mr Royle seeks to contend that TCFL is not entitled to such interest owing to a collateral contract.

55. However, Mr Royle's amended claim is not limited to interest. Having pleaded, in Para 24, that Mr Moser assured him TCFL "would fund the development costs as and when these monies were required by [Mr Royle]", it is pleaded, in Paragraph 25 of the Amended Particulars of Claim, that "no such funding was ever provided despite repeated requests". Again, the putative assurance is not alleged to have given rise to a collateral contract and, somewhat surprisingly, the putative obligation, if any, is for TCFL to fund the development costs not to procure that UKMCL do so. Moreover, if the allegation in Paragraph 25 is intended to identify a breach, no particulars of the breach are provided. There is a claim, in Paragraph 80.3 for loss of development profit owing to TCFL's breaches of contract. However, this is under the heading "Insurance Issues concerning the Daresbury Hall Estate" and the alleged losses are wholly unparticularised. Whilst it might be possible to reformulate the case in such a way as to found a recognisable cause of action in respect of TCFL's alleged failure to fund or procure that funds were advanced for the development, I am not persuaded that this could be achieved in the absence of a comprehensive series of amendments to the draft Amended Particulars of Claim. Moreover, in view of the fact that no such case has been pleaded until now, I have serious doubt whether it would be appropriate to grant permission to amend to advance such a case.

56. In addition to his initial claims for an account and inquiry in respect of "the surplus proceeds" of the 2006 loan (including his claims in respect of interest on the surplus proceeds, so-called) and his new claim in respect of TCFL's putative failure to advance funds for development, Mr Royle advances a series of claims based on its failure,

following the initial lead theft, to apply the proceeds of its insurance claim to the reinstatement of the roof and, thereafter, its failure to insure the Property for its full rebuild value. These claims are alleged to give rise to a claim for damages.

57. TCFL denies liability on the basis that it was entitled to retain the proceeds of the insurance claim in relation to the theft of lead under the mortgage conditions and the statutory scheme in *Section 108(3)* of the *Law of Property Act 1925.* Moreover, it denies the parties entered into an agreement with Mr Royle to apply the proceeds of the initial insurance claim on works to the roof. It also denies that it assumed duties to Mr Royle to insure the Property, whether contractual, fiduciary or otherwise. There is substance in each of the points taken on behalf of TCFL on this part of the claim. However, in my judgment they cannot be conclusively resolved without examining the evidence at trial. This is likely to include assessing the evidence of witnesses about their contemporaneous oral discussions. Consistently with the guidance of Lewison J in *Easyair Limited v Opal Telecom (supra),* it would inappropriate for me to conduct a mini-trial in relation to these issues based on the documentation currently before the court at this stage of the proceedings. It follows that, subject to TCFL's limitation defence and the merits of its case that Mr Royle is precluded from bringing such a claim under the Settlement Deed, I am not persuaded Mr Royle has no real prospect of success on this part of his case or that it does not disclose reasonable grounds for bringing such a claim.

58. In his draft Amended Particulars of Claim, Mr Royle again seeks to modify and develop this part of his case. However, it is again based on an oral agreement – denoted as "the Settlement Monies Agreement" – to apply the proceeds of the initial insurance claim on reinstatement works and arrangements under which Mr Royle subsequently appointed TCFL to act as his agent in connection with the development of the Property. It is alleged that, in breach of the Settlement Monies Agreement, TCFL declined to apply the proceeds of the insurance claim on reinstatement works and it is alleged that TCFL committed breaches of its contractual and fiduciary duties as an agent to exercise reasonable skill and care in protecting the Property, in particular by failing to insure the Property (including the historic building or buildings) for its full rebuild cost. It is also contended, in Paragraph 63 of the draft Amended Particulars of Claim that, in

breach of its contractual duties and a duty of care under the law of tort, TCFL failed to obtain or maintain planning consents. For obvious reasons, TCFL has not yet filed a detailed statement of case in response. However, if permission to amend is given, it can be surmised that Mr Royle's case on these issues will be challenged in its entirety. TCFL is likely to challenge the factual basis for the claim and the ambit of the legal principles on which it is based. However, in my judgment, it cannot reasonably be suggested – subject to TCFL's statutory limitation defence and its case based on the Settlement Deed – that Mr Royle has no real prospect of success on such claim nor that it does not disclose recognisable legal grounds for bringing such a claim.

59. In Paragraph 80 of its Defence, TCFL contended that, as at 7 June 2023, Mr Royle's accumulated indebtedness under the 2006 loan and subsequent advances was £22,717,702.51. This includes the full amounts advanced to Mr Royle together with contractual interest. In his Reply, Mr Royle simply put TCFL to proof that the overall amount was correctly stated and calculated. However, his claim for "an account and inquiry in respect of the surplus proceeds [of the 2006 loan]… never received by [Mr Royle]" is implicitly for a determination of the amount transferred to UKMCL, in 2006, together with contractual interest thereon. If he can establish that he is not liable to pay these amounts to TCFL, they must then be deducted from his overall indebtedness, if any, to TCFL in order to determine the amount necessary to redeem TCFL's security. Although his case is not presented in this way, the logic of his case is that the court must determine whether he is liable, in principle, to repay the amount transferred to UKMCL with interest, and, having done so, to assess the amounts payable, if any, to UKMCL. It is not suggested Mr Royle's equity of redemption has been extinguished, whether by foreclosure or otherwise. Since these amounts are secured by TCFL's charge over the Property, it follows that Mr Royle is *prima facie* entitled to a court order determining these amounts in support of his right to bring a redemption action.

60. TCFL contends that Mr Royle's claim to an account is statute barred. This is on the basis that *Section 23* of the *Limitation Act 1980* provides that an action for an account shall not be brought after the expiration of any applicable statutory time limit which forms the basis of the duty to account. To succeed on its claim for summary judgment

on this part of the case, TCFL must thus show that Mr Royle has no real prospect of successfully defeating his limitation defence.

61. In my judgment, this substantially overstates the strength of TCFL's case, at least in the event Mr Royle's Particulars of Claim is amended to reflect the substance of his claim. Firstly, although his pleaded case is obscure as to the legal basis on which he challenges his liability to TCFL for the sum transferred, in 2006, to UKMCL together with interest, it is consistent with a case based on promissory estoppel and, in the alternative, collateral contract. Promissory estoppel would, in principle, furnish him with an equity to which the *Limitation Act 1980* does not apply. No doubt, it would be open to TCFL to rely on laches as an answer to such a case but, in the event TCFL puts this in issue, it is inherently unlikely this could properly be determined on an application for summary judgment. To the extent Mr Royle's case is based on a collateral contract, the statutory six year limitation period in *Section 5* of the *Limitation Act 1980* would apply. No doubt, this commenced when TCFL first repudiated the collateral agreement, if any, and can be taken to have expired more than six years prior to the commencement of proceedings so as to preclude a free standing claim based on simple contract. However, it is at least arguable that Mr Royle can rely on this part of his case as an equitable set off. If so, it would thus remain open to him to seek a declaration to this effect. If he does so, this issue will have to be determined at trial. Again, in my judgment it is not suitable for determination on an application for summary judgment.

62. Secondly, in my judgment Mr Royle has more than a real prospect of successfully establishing that, as mortgagor, he is entitled to an account of the amounts, if any, he owes to TCFL, as mortgagee. He is entitled to do so as an incident of his equity of redemption. However, in the hypothetical event this were not so and his underlying claims were statute barred, it is at least arguable that he would be able to deploy them as an equitable set off and pursue his claims for an inquiry and account on this basis.

63. TCFL also claims that Mr Royle's damages claims are statute barred, based primarily on TCFL's failure to apply the initial insurance claim in works of reinstatement of the roof and its failure subsequently, to take out a more comprehensive insurance policy in respect of the Property. Whether based on simple contract or tort, TCFL contends

that the limitation period is six years and the claims are statute barred. This is *prima facie* correct for any cause of action that accrued more than six years prior to the commencement of proceedings on 20 December 2022. However, in my judgment it is arguable that, in these respects, Mr Royle's case is sufficiently closely linked to his contractual liabilities to TCFL to furnish him with an equitable set off and seek declaratory relief to this effect. For this purpose, his case has real prospects of success, sufficient for *CPR 24.2(a)(i).* Moreover, Mr Royle has sought, in the alternative, to advance this part of his case as a claim for damages for breach of fiduciary duty. If, as Mr Royle alleges, he can show TCFL was appointed as his agent in connection with the management of the Property, it is at least arguable that the company would have assumed fiduciary duties to him, in equity, as a function of its office and these duties transcended its contractual obligations. If this is so and it can be shown TCFL is in breach of its fiduciary obligations to Mr Royle, it is again arguable his cause of action is not statute barred on the basis that the statutory limitation period for an action based on simple contract does not apply. Whilst not straightforward, in my judgment these parts of Mr Royle's case are not without a real prospect of success. It follows that they are not suitable for summary judgment under *CPR 24.1.*

64. TCFL also contends that Mr Royle gave up his right to bring his claim in these proceedings by entering into the Settlement Deed or failing to comply with his obligations under the Settlement Deed.

65. The Settlement Deed recorded that TCFL "has advanced loans to [Mr Royle] …secured on [the Property]" (Recital A). These undefined loans were then denoted, throughout the rest of the Deed, as "the Loan". In Clause 1, it was provided that Mr Royle would make monthly payments to TCFL of £25,000 and, by Clause 3, it was provided that "the entire balance of the Loan (including all capital, interest, costs and charges) will be payable in accordance with the terms of the loan agreements in the event that any of the Monthly Payments are not received within the relevant calendar month, are not received in full or are not received".

66. By clause 4, it was provided that Mr Royle would pay £5,000,000 in cleared funds by no later than 5pm on 30 September 2021. This payment was denoted as the "Redemption Payment" and the date for payment was denoted as "the Deadline".

67. By clause 6, it was provided that "…the entire balance of the Loan…will be payable in accordance with the terms of the loan agreements in the event that the Redemption Payment is not received…prior to the expiry of the Deadline".

68. By clause 8, Mr Royle agreed that if he committed a breach of the Settlement Deed, the entire balance of "the Loan" would become due and payable.

69. By clause 11, it was provided that, subject to payment of all the Monthly Payments and the Redemption Payment, TCFL would discharge its security over the Property.

70. By clause 17, it was provided that the Settlement Deed did not constitute an admission of any kind by TCFL and, by clause 19, that "this deed constitutes the entire understanding and agreement between the Parties in relation to the subject matter of this deed".

71. To obtain summary judgment on this part of its case, TCFL must show that, by entering into the Settlement Deed, Mr Royle unambiguously gave up his preceding rights or, at least, implicitly covenanted not to sue and thus has no real prospect of success in these proceedings. In my judgment, this substantially over-states the strength of TFCL's case. The Settlement Deed provided a contractual scheme for Mr Royle to make a series of payments and for TCFL to release its security in the event of full compliance with accelerated provision, in the event of default, for payment of the outstanding balance. However, it did not define or quantify Mr Royle's full indebtedness nor did it provide that the parties entered into the Settlement Deed in full and final settlement of all claims or cross claims. Whilst Clause 11 provided for TCFL to discharge its security once the Monthly Payment and Redemption Payment were made in full, the Deed did not expressly provide - or at least it so appears - that, upon payment in full, Mr Royle would be released from all liabilities in full. If either party seeks to submit otherwise, this will require discrete but comprehensive legal argument on another day.

72. It is arguable that, if Mr Royle's primary case can be substantiated, this must be taken to inform the surrounding circumstances when the parties entered into the Settlement Deed and "the Loan" should thus be construed so as to include only the amount transferred to the Bank of Scotland to redeem its loan and not the additional amount transferred to UKMCL. It is also arguable that the Deed should be construed on the

footing that the amount payable by Mr Royle is limited to his net indebtedness after crediting him with all amounts due to him from TCFL, including amounts payable to him, whether by way of damages, and indeed any amounts due to him under statute barred causes of action. These are all matters for trial following consideration of the evidence as a whole.

73. Ms Anderson sought to rely on Clause 17 which provides, in terms, that the Settlement Deed did not constitute an admission of any kind of any allegation on the part of Mr Royle. However, it was not expressly provided that Mr Royle was deemed to make no allegation or, indeed, that Mr Royle was not to be credited with amounts to which he might lawfully entitled.

74. Ms Anderson also sought to rely on the entire agreement clause (Clause 19). In *Inntrepreneur Pub Co v East Crown Ltd [2000] 3 EGLR 31 at [7]*, Lightman J observed that "…such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document." This could potentially preclude Mr Royle relying on representations, promises and assurances during the negotiations leading to the Settlement Deed itself. However, Mr Royle's indebtedness, at the time of the Settlement Deed, plainly cannot be determined without extrinsic evidence. This includes extrinsic evidence about the amounts advanced and repaid together with interest. Since I can see no obvious reason why this should not include the amounts for which Mr Royle was entitled to be credited, he has a real prospect of successfully arguing that this could potentially include amounts to which he was entitled by way of equitable set off.

75. There is no obvious allegation of fraud in the Particulars of Claim or the draft Amended Particulars of Claim. Had there been such an allegation, Mr Royle could have been expected to provide particulars of the allegation so that it could be properly understood and answered by TCFL. It is thus surprising that, in response to TCFL's Defence based on limitation, it is pleaded, in Paragraph 39(1) of the Reply, that

"despite exercising all reasonable diligence, [Mr Royle] did not discover the fraud alleged in the Particulars of Claim until around January 2022 which is within 6 years before the action brought". No such allegation should be made lightly and, in her submissions for TCFL, Ms Anderson rightly deprecated this part of Mr Royle's case. Since it will be necessary for Mr Royle to amend the Particulars of Claim and, indeed, it is currently envisaged that the Particulars of Claim will be replaced by an entirely new statement of case, the current Reply will itself be entirely superseded if and once TFRC files a new Defence. However, if Mr Royle is to seek permission to bring a new case based on fraud, it will be necessary for him to provide detailed particulars of the fraud. Compelling reason will have to be given to warrant such permission at this stage of the proceedings if he is to have any prospect of obtaining permission to do so.

76. I am thus persuaded that, whilst there are serious defects in the Particulars of Claim and, indeed, the draft Amended Particulars of Claim, it would be inappropriate to give summary judgment for TCFL or, indeed, make any order striking out the Claim without giving Mr Royle a final opportunity to amend the Particulars of Claim incorporating, to the extent he can do so, each of the elements identified in this judgment in respect of his case against TCFL. For the avoidance of doubt, this includes amendments to comprehend the aspects which I have referred in Paras 51 and 54 above (promissory estoppel and collateral contract), 59 and 61 (claim for account in support of equity of redemption) and 62 (equitable set off). If properly formulated, it can be taken that they will arise out the same facts or substantially the same facts as already in issue so as to satisfy *CPR 17.4(2).* However, these amendments relate only to the case against TCFL. They do not involve any claim against Messrs Moser and Esterkin and nothing in my judgment should be taken to endorse such a claim.

77. I have adjourned Mr Royle's application for permission to add Messrs Moser and Esterkin as parties with attendant amendments to the Particulars of Claim. It thus remains open to Mr Royle to pursue this application once Messrs Moser and Esterkin have been provided with sufficient notice of the application together with the opportunity to file evidence in response. It is not for me to prejudge the outcome of such an application at this stage. However, it certainly cannot be assumed that such an application has good prospects of success. There are significant differences

between Mr Royle's prospective claims against Messrs Moser and Esterkin personally and his case against TCFL. He does not have an obvious case against them for an account or declaratory relief based on a right of set off. This is likely to be significant if Messrs Moser and Esterkin seek to rely on the statutory defence of limitation. If it is reasonably arguable his case against them is statute barred, Mr Royle will be expected to issue fresh proceedings in which their limitation defence is properly evaluated. In any event, no convincing explanation has been provided as to why Mr Royle has not sought to join Messrs Moser and Esterkin as parties until now.

78. Subject to the issues in relation to the addition of Messrs Moser and Esterkin, I am satisfied Mr Royle should be given a final opportunity to amend the Particulars of Claim on the basis to which I have already referred. I have taken into consideration the procedural history and the requirements of the Overriding Objective. So far as possible, the case must be dealt with at proportionate cost, saving expense and allotting to it an appropriate share of the court's resources. However, the case is of significant value and importance to each of the parties and it is important for Mr Royle to be given a final opportunity to put his full case before the court. Moreover, whilst the proceedings were issued as long ago as December 2022, the case remains at a formative stage only owing, in part, to the delay in listing the First Application for a final hearing. I shall thus make directions for Mr Royle to submit a new form of Amended Particulars of Claim, in draft. This must be supported by a statement of truth. However, I shall hear from counsel in relation to the time scale for doing so. I shall then consider whether Mr Royle should be given permission to amend and I shall adjourn the First Application for determination at the same time.

(7) Disposal

79. The First Application shall be adjourned for further consideration to allow Mr Royle the opportunity to file and serve a draft Amended Particulars of Claim, in revised form, in respect of his case against TCFL only. If he does so, he should take into consideration the guidance in this judgment.

80. If Mr Royle intends to pursue the Second Application for Messrs Moser and Esterkin to be joined as additional parties, he will need to file and serve an alternative draft

Amended Particulars of Claim. The adjourned hearing of the Second Application shall then take place at the same time as the adjourned hearing of the First Application.