

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**Business List (ChD)**

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

Date: 17 December 2024

**Before :**

**MASTER PESTER**

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**Between :**

<b>SOCIAL MONEY LIMITED</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>(1) ATTWELLS SOLICITORS LLP</b>	<b><u>Defendant</u></b>
<b>(2) PHILLIP HEWETT</b>	

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**NICOLE SANDELLS KC** (instructed by Brightstone Law LLP) for the **Claimant**  
**SIMON WILTON KC** (instructed by Browne Jacobson) for the **Defendant**

Hearing dates: 17 September 2024  
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**APPROVED JUDGMENT**

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 4pm on 17 December 2024.

**MASTER PESTER:**

1. This is my judgment on the Claimant's application, dated 3 May 2024, for summary judgment, alternatively, strike out, of the First Defendant's defence ("the Application").
2. The Claimant ("SoMo") is a company in the business of providing short term bridging finance on the security of first legal charges over property. It has been established since 2014. The First Defendant ("Attwells") is a limited liability partnership offering legal services, whose members and employees include solicitors. The Second Defendant ("Mr Hewett") is a solicitor employed by Attwells.
3. The case involves what all the parties now agree was probably an identity fraud whereby a person unknown borrowed monies from SoMo, having instructed Attwells to act as his solicitors. The person unknown pretended to be a Mr Linford Gayle, who was registered as the owner of two properties, 39 Lincoln Road, London SE25 4HG ("Lincoln Road") and 24 Buchanan Gardens, London NW10 5AE ("Buchanan Gardens"), collectively, "the Properties".
4. These proceedings were commenced on 31 October 2023. The claim is formulated as a claim for (a) specific enforcement of certain undertakings provided by Attwells to SoMo; (b) alternatively, damages and/or compensation for breach of undertaking; (c) in the further alternative, a declaration that Attwells has acted in breach of trust; (d) reconstitution of the trust fund, an account and payment of equitable compensation and/or restitution for breach of trust; and (e) damages for breach of warranty of authority and/or breach of warranty. Not all of these claims are being pursued on the Application. Attwells

asserts (albeit without prejudice to its contention that it is not required to achieve registration of any charge in favour of SoMo) that it is no longer capable of complying with any undertaking to register charges over the Properties. Accordingly, SoMo seeks damages to put it in the same position that it would have been in had Attwells complied with the undertakings. SoMo submits that two of its claims are eminently suitable for summary disposal: breach of contractual undertaking and breach of trust. The other claims raised in the Particulars of Claim regarding warranty of authority, and the claim in respect of solicitors' undertakings enforceable under the Court's inherent supervisory jurisdiction, are not pursued on the Application. However, SoMo submits that should it be successful on the Application, depending on the consequential relief, it is unlikely that the other claims will proceed to trial.

5. Attwells has commenced Part 20 proceedings against JMW LLP ("JMW"), who SoMo retained to act as its own solicitors in respect of the transaction. Attwells' case on the Part 20 claim is that if the transaction was a fraud then JMW acted in breach of trust by releasing the loan monies to Attwells, and Attwells accordingly seeks a contribution and/or a contribution amounting to an indemnity from JMW pursuant to section 1(1) of the Civil Liability (Contribution) Act 1978 ("the 1978 Act"). One of the reasons why Attwells submit that summary judgment is not appropriate is that the claim between Attwells and JMW raises "inter-locking issues" to the claim by SoMo against Attwells which it would be undesirable to resolve separately. It is further submitted that SoMo is advancing a case which differs in significant aspects from that of JMW, SoMo's former solicitors.

## Background

6. In this judgment, where I refer to Linford Gayle, or Mr Gayle, I am referring to the true owner of the Properties. Where I refer to “the Borrower”, I refer to the imposter who appears to have fraudulently deceived both SoMo and Attwells. I should also make it clear that there is no suggestion that Attwells or any of the legal professionals working there, or indeed any of the other legal professionals instructed on the relevant transaction, had any knowledge that the Borrower was anyone other than who he claimed to be at the time.
7. In about March 2022, SoMo and a mortgage broker were in communication. The mortgage broker sent to SoMo a certified copy of a passport and a credit report and redemption statement for the intended borrower. On or about 25 March 2022, SoMo offered to lend the purported “Linford Gayle”, that is the Borrower, £775,000. The terms of the offer are set out in three documents: a Facility Agreement, Loan Particulars and SoMo’s General Terms and Conditions.
8. Meanwhile, Attwells had indicated, by email dated 15 March 2022, that they were instructed on this matter. There then followed several communications between Attwells, acting for the Borrower, and JMW, acting for SoMo. These communications turned on the provision of satisfactory confirmation of the Borrower’s identity. I was taken to the following:
  - (1) On 24 March 2022, JMW sent an email identifying outstanding requirements in respect of its initial enquiries, including a requirement for certified evidence of residence and identity to be supplied, which certification needed to be done face to face.

- (2) On 29 March 2022, JMW sent by email security documentation for execution and return, and also asked that a solicitor at Attwells should witness the client's signatures and complete a certificate annexing certified identity documents.
- (3) On 21 and 22 April 2022, Attwells and JMW exchanged further emails. Attwells asked whether a certified copy of a driving licence would suffice in place of a passport, indicating that the licence contained an incorrect date of birth, and JMW responding that it was not happy with a previously certified copy of a passport for the Borrower which it held, stating that a photo licence was not acceptable proof of identity.
- (4) In contrast, on 29 April 2022, JMW confirmed that a driving licence with a correct date of birth would be acceptable proof of identity.
9. On 6 May 2022, Mr Hewett of Attwells met with the Borrower and the loan and mortgage documentation was executed. Mr Hewett also completed SoMo's certificate of satisfaction, confirming that he was "satisfied" that the person who signed the documentation was the stated borrower and owner of the Properties, and that the signatures on the documents were authentic and genuine. The certificate also confirmed that Mr Hewett had seen (a) a personal driving licence and (b) a Starling bank statement and Thames Water bill. The certificate was sent by email on 6 May 2022 and by post on 11 May 2022.
10. On 26 May 2022, Nicholas Attwell, on behalf of Attwells, gave undertakings to SoMo set out in a letter on the firm's headed notepaper. He was plainly doing so on behalf of Attwells, and not in a personal capacity, and SoMo has not contended otherwise. The first part of the letter contains certain important

definitions. “The Borrower” is defined as “Linford Gayle”; “the Lender” is defined as “Social Money Limited, trading as SoMo”. There is then reference to Property 1 and Property 2, which are references to Buchanan Gardens and Lincoln Road respectively. “The Existing Charge” is a reference to the charge in favour of Topaz Finance Limited (“Topaz”), secured over Buchanan Gardens. “The Charge” is defined as “a legal charge between the Lender and the Borrower secured over Property 1 and Property 2”.

11. The terms of the undertakings, so far as are said to be material, are as follows:

*“In consideration of the provision of the loan facilities by the Lender to the Borrower for the Borrower’s business purposes (“the Transaction”), we undertake to you as follows:*

- 1. To use the loan advance solely for the Transaction.*
- 2. To immediately on completion pay the full redemption monies to redeem the Existing Charge.*
- 3. To immediately on completion date the Charge.*
- 4. Within 5 working days of completion to effect at the Land Registry against the title numbers of [the Properties]:*
  - a. the registration of the Charge as a first legal charge;*
  - b. The removal of all references to the Existing Charge*

5. *Within five working days of receipt to forward to you the up to date official copy entries in respect of the same evidencing successful completion of the above application.*

6. *On completion to pay the net advance to the bank account of the Borrower.*

...

8. *To forward copies of any requisitions raised by the Land Registry in respect of the applications to you within 2 working days of receipt and to use reasonable endeavours to deal with the same to ensure that cancellation of the applications does not take place.*

...

10. *To renew the OS1 searches as is necessary in order to maintain clear priority in the Lender's favour over [the Properties] at the Land Registry following completion and until registration of the application has been submitted to Land Registry (sic)."*

12. I note that the term "the Borrowers' (sic) business purposes" is not defined. "Completion" is not defined. Further, there is no indication of what is meant by "loan facilities".

13. Also on 26 May 2022, JMW emailed Attwells to procure further certification of the identity documentation by an independent professional and also querying the fact that the bank details provided for the Borrower differed from the details the Borrower had provided to SoMo. Accordingly, on 27 May 2022, another solicitor, Sam Ewo, from the firm of Harrison Morgan Solicitors, provided

further certification of identity. Mr Ewo signed the certificate stating that “I hereby certify that this provisional driving licence bears a true likeness of Mr Linford Gayle”.

14. On 30 May 2022, JMW indicated that it was satisfied with the evidence of identity. In that same email, JMW stated that the “only outstanding point is the bank details for the Borrower. On receipt of the same, we will request drawdown funds from our client.”
15. On 17 June 2022 a net advance of £701,500 was sent to Attwells. Of that sum, JMW used £60,757.20 to pay what was due to the existing secured creditor, Topaz, to vacate Topaz’ charge on Buchanan Gardens (“the Topaz Charge”). The balance was paid to the bank account in the name of the Borrower.
16. On 23 June 2022, Attwells applied to discharge the Topaz Charge and register the new charges in favour of SoMo at the Land Registry.
17. It only gradually became clear that the Borrower, Attwells’ client, was an imposter. On 14 July 2022, it appears that the real Mr Gayle contacted Attwells to ask why his mortgage on Buchanan Gardens had been redeemed. Subsequently, a direct access barrister wrote to Attwell, by letter dated 8 February 2023, denying that her client Mr Gayle had instructed Attwells or executed the mortgage documentation.
18. Eventually, identity documents were provided on behalf of Mr Gayle. It now appears to be agreed that the Borrower was, in fact, an imposter.



## Legal test

19. SoMo's application for summary judgment under CPR rule 24.2 is brought on the basis that Attwells has no real prospect of successfully defending the claim and there is no other compelling reason for a trial. The principles applying when determining a summary judgment application are well-known. The classic statement of principle was set out by Lewison J (as he then was) in *Easy Air Ltd v Opal Telecom Ltd* [2009] EWHC Ch 339, at [15], in a passage which has been approved by the Court of Appeal in *A.C. Ward Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 (and applied at first instance on many occasions):

“(i) The court must consider whether the claimant (or defendant) has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

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

(iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: *Swain v Hillman*;

(iv) This does not mean that the court must take at face value and without analysis everything that a claimant [or defendant] 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] FSR 3;

(vii) On the other hand it is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for a 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 Chemical & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

20. Counsel appearing for Attwells also drew my attention to the case of *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715, referred to in the notes to the White Book, vol.1, 24.3.4. There, it was held that summary judgment for the claimant against the first defendant was inappropriate where similar issues remained to be determined at a trial, in that case causation, as between the first defendant and other parties. In all the circumstances, that constituted a "compelling reason" not to enter summary judgment, and it was emphasised that judges in a multi-party case must do justice as between all the parties to a case.
21. As to strike out, CPR 3.4(2) gives the court power to strike out a statement of case which discloses no reasonable grounds for bringing or defending a claim or a statement of case which is an abuse of process. Where, on the material before the court, there are disputed issues of fact, the court should not strike out a claim unless certain it is bound to fail: see per Peter Gibson LJ at [22] in *Colin*

*Richards & Co v Hughes* [2004] EWCA Civ 226. The point made in that case was that the relevant area of law was subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts. The test is similar but not identical to that for summary judgment where the court will not grant summary judgment, here in favour of SoMo, unless the defence has no real prospect of success.

### **The evidence**

22. There is a witness statement from Jonathan Newman, a senior partner at Brightstone Law, the solicitors acting for SoMo, filed in support of the Application. Mr Attwell, the founder and managing partner of Attwells, has provided a witness statement in response on behalf of Attwells, as has Mr Hewett, who provided the certificate of satisfaction to SoMo.
23. Finally, there is a witness statement from Roberto Francis, another solicitor at Brightstone Law. This witness statement is principally directed at establishing the quantum of SoMo's claim. It exhibits a redemption statement made up to 17 September 2024 (that is, the date of the hearing of the summary judgment application), in the sum of £1,637,345.87. The statement was served shortly before the hearing.

### **The issues**

24. The Application is limited to dealing with the points which SoMo submits are suitable for summary disposal, namely, breach of contractual undertaking and breach of trust. However, those two issues are in fact inter-twined. If SoMo is

correct, and Attwells was holding the advance on trust, then the terms of that trust are found in the undertakings. Moreover, it seem unlikely that Attwells assumed a more onerous obligation as trustee than it was prepared to assume through giving the undertakings. Attwells' point was that a professional is not ordinarily liable unless there has been a want of care, although it is of course possible for a professional to assume a stricter form of liability in contract or trust (subject to the possibility in the latter case of a possible defence under s. 61 of the Trustee Act 1925): see the discussion in *Nationwide Building Society v Davisons Solicitors* [2012] EWCA Civ 1626, at [51] – [57].

25. In relation to the contractual undertakings, SoMo seeks the summary enforcement of two of the undertakings given by Attwells, namely those requiring it to use SoMo's moneys only for specific purposes (undertaking 1) and to obtain registration of first legal charges over the Properties (undertaking 4). Attwells submits that undertakings 8 and 10 are also relevant.
  
26. SoMo's case is that the undertakings required Attwells to achieve registration of the charge as a first legal charge over the Properties at HM Land Registry and to (among other things) (a) make suitable application(s) to register the charge over the Properties within 5 working days of apparent completion and/or disbursement of the monies (or any part thereof); (b) answer any and all questions or requisitions raised by HM Land Registry in such a manner to avoid cancellations of those application(s); (c) take all steps necessary to remove the existing charge in favour of Topaz from the Land Registry; and (d) maintain priority until the Land Registry gave effect to the application(s). Had all that been done, supported by genuine documents of charge, then SoMo's charge

would have been registered over the Properties and given as the date of registration the date that the application was received by the Land Registry – in other words, that charge would, in accordance with the undertakings, have been registered within 5 working days of completion.

27. SoMo submits that the claim for breach of undertaking is very simple. If the monies were not used for the purposes of the Transaction (as defined in the letter of undertaking) then Attwells were in breach of the undertakings by failing to do so. If, on the other hand, it could be said that the monies were used for the purposes of the Transaction (as defined) then Attwells is in breach of the undertakings by failing to comply with the steps set out to register the new charge in favour of SoMo. SoMo submits that the reference to “loan facilities” in the opening section of the undertakings, immediately beneath the definitions section, must be read as “the loan facilities on the securing of a first legal charge on the Properties”, or words to that effect.
28. As to the claim for breach of trust, SoMo submits that Attwells plainly held the advance on trust. SoMo says that the funds remitted were SoMo’s funds, and that Attwells was only permitted to deal with them in accordance with SoMo’s instructions. SoMo relies on two cases, *Lloyds TSB Bank v Markandan & Uddin* [2012] EWCA Civ 65 and *Dreamvar Mishcon de Reya* [2019] Ch 273, at [83] – [102]. In the absence of any genuine completion, Attwells had no authority to release the advance and were in breach of trust. Finally, SoMo submits that Attwells has not even begun to establish a possible case on relief from liability pursuant to s. 61 of the Trustee Act 1925.

29. Attwells submits that the matter is more complex, and not suitable for summary judgment at all. Counsel appearing for Attwells stressed that it was premature to decide questions of liability at this stage, given that the law relating to solicitors' undertakings can properly be described as still evolving and in somewhat of a state of flux. It was said that the precise factual pattern arising in this case had not been previously been considered by the courts, as this was a case where the defrauded lender was seeking to enforce undertakings from the borrower's solicitors, rather than proceeding against its own solicitors, and this was a remortgage transaction, and not a simple conveyancing. It was also submitted that, as Attwells has made a Part 20 claim against JMW, it was important that Attwells' outstanding claim against JMW should be resolved at the same time as deciding any question of Attwells' own liability to SoMo, in order to avoid the risk of conflicting judgments.
30. In relation to the case on contractual undertakings, Attwells submits that its primary position is that the undertakings are not enforceable at all, as they are either void either for lack of consideration, or for common mistake. In the alternative, Attwells has a "respectably arguable" case on the construction of the undertakings, to say that it is not liable. Attwells submits that the undertakings do not define "the Borrower" as "Mr Gayle the owner of the Properties"; nor does it define "the Transaction" as, for example, "the advance of loan monies to Mr Gayle in exchange for the taking of good security over the Properties". Still less does it say in terms that the money advanced was only to be used for the business purposes of the Mr Gayle who owned the Properties. It is submitted that upon its proper construction, undertaking 1 required Attwells to use the loan advance solely for the purposes of providing loan facilities to the

individual who identified himself as Mr Linford Gayle to whom SoMo had agreed to make its loan and for whom Attwells acted, for that individual's business purposes. Undertaking 1 did not go further and require Attwells only to use the loan advance for the purposes of providing loan facilities to the Mr Linford Gayle who was the owner of the Properties.

31. It is further submitted that on its correct construction undertaking 4 required Attwells within 5 working days of completion to make an application to register SoMo's charge over the Properties as a first legal charge and to vacate the Topaz Charge, as opposed to requiring Attwells to complete the registration of SoMo's charge and to vacate the Topaz Charge within 5 working days. This is what Attwells did. It is said that that construction also "fits" with the further undertakings at 8 and 10 which plainly contemplate that it could take much longer than 5 working days before the process of registration could be complete. Undertaking 4 is not a form of guarantee of title.
32. Accordingly, it is submitted that, construed properly, Attwells in fact complied with all the undertakings relied upon by SoMo in this case. Attwells also stresses that SoMo is not seeking summary judgment or a strike-out in respect of its allegation that Attwells was in breach of warranty of authority. It follows, submits Attwells, that SoMo recognises that it is "at the very least open to question whether any warranty was given that Attwells acted for the actual Mr Gayle who owned the Properties as opposed to a person identifying himself as that person."
33. Finally, in relation to the case on breach of trust, Attwells pleads that there was no trust of the advance paid to it, that if there was a trust there was no breach,

and finally that it is in any event entitled to relief under s. 61 of the Trustee Act 1925. Of course, all Attwells need do is establish that it has a real prospect of succeeding on any of those issues.

### **Discussion and analysis**

34. I begin by considering Attwells' submission that, because this case merits further investigation and the fact pattern is unusual, this was not an appropriate case for summary judgment at all. Attwells further submitted that there was a real risk of inconsistent judgments, if summary judgment were to be granted now, and Attwells left to pursue its Part 20 claim against JMW at trial. In effect, Counsel for Attwells suggested that these factors, whether singly or taken together, amounted to a compelling reason pursuant to CPR Part 24, r. 24.3(b) why SoMo's case on breach of the contractual undertakings and/or breach of trust should be disposed of at trial, rather than summarily.
35. I am not persuaded that Attwells has shown a "compelling reason" why the matter should not be decided now. SoMo was provided with contractual undertakings, which it is entitled to rely on and seek to enforce (provided of course that there is no real prospect of Attwells succeeding on its defences at trial). As to the suggestion that there is a real risk of inconsistent judgments, I note that the Part 20 claim does not refer to the undertakings at all. Equally, I do not consider that this is really a case where the factual pattern is so unusual that the court should not attempt to grasp the nettle now. I will therefore consider the Application on its own terms, first as it relates to the contractual undertakings, before turning to the arguments on breach of trust.

#### *Breach of contractual undertaking*



36. It was common ground that this was not an attempt to enforce the undertakings pursuant to the inherent supervisory jurisdiction of the Court, or s. 50(2) of the Solicitors Act 1974, for the reasons given in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32; [2022] AC 1271. Because the undertakings were plainly given by Attwells Solicitors LLP, and not by Mr Attwell personally, the Court has no jurisdiction to enforce undertakings by an incorporated body like the jurisdiction exercised over individual solicitors. If the undertakings are to be enforced, they can only be enforced as a matter of contract.
37. I remind myself that this is an application for summary judgment. All Attwells needs to demonstrate is that it has a real, as opposed to a fanciful, prospect of succeeding at trial on its arguments on the proper construction of the undertakings. I also remind myself that, where the existence or construction of an undertaking is in doubt, it will generally be construed in favour of the recipient: see *Jackson & Powell on Professional Liability* (9<sup>th</sup> ed., 2024), at 11-073. The critical question is how it would reasonably have been understood by the recipient in the circumstances in which he received it. That inevitably means that consideration of the surrounding circumstances is important.
38. Ultimately, although Attwells may well face difficulties at trial, I find that the case put forward on behalf of Attwells on construction of the undertakings is properly arguable and has a real as opposed to fanciful chance of succeeding at trial. My reasons for so deciding are as follows:
- (1) The meaning of “the Transaction” in undertaking 1 must be a reference back to the form of words used in the opening section of the letter. The definition of Transaction does not expressly provide that at the end of the process

SoMo will receive valid security over the Properties. The definition of Transaction is not contingent or conditional upon SoMo's obtaining a valid charge, or upon the Borrower being the true owner of the Properties. It was submitted on behalf of SoMo that "the Transaction" must necessarily be read as including words "on the security of a first legal charge on the Properties", and that it is clear that the Transaction is referring to a loan facility which is secured. I do not see why that is necessarily the case. I accept that it was within the parties' contemplation that a first legal charge would be provided. However, it does not necessarily follow from that the defendant solicitors were contractually undertaking that SoMo would be provided with a legally enforceable charge as part of the Transaction. That is a different question.

- (2) There is thus nothing in undertaking 1 which expressly provides that Attwells is to procure a legally effective charge. It would have been a straightforward matter for the wording to make an express reference to the Transaction involving the provision of a secured loan. Alternatively, SoMo could have, but did not, define the Transaction as "the advance of loan monies to Mr Gayle in exchange for the taking of good security over the Properties". SoMo's construction of undertaking 1 necessarily involves reading additional wording into the terms of the undertakings.
- (3) Undertaking 1 is thus ambiguous, as SoMo in the course of its submissions appeared to accept. SoMo cited and relied on the decision of the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 ("Rainy Sky"). The central point made in *Rainy Sky* was that it is often the case that the

language used by the parties will have more than one potential meaning. Where the parties have used unambiguous language, the parties must apply it, but where there are two possible constructions the court is entitled to prefer the construction which was consistent with business common sense and to reject the other.

(4) I do not think that the principles propounded in *Rainy Sky* necessarily assist SoMo on its application. Attwells have put forward a different construction of what undertaking 1 required. It says that undertaking 1 required Attwells to use the loan advance solely for the purposes of the Transaction, as that word was defined, that is, for the business purposes of “the Borrower”, who in turn is the person to whom SoMo had agreed to make the advance, and solely for the purposes of providing loan facilities to SoMo’s borrower and for that individual’s business purposes. That is what was done. It follows from this that the paying of the monies to a person who turned out to be an imposter was not, or at least not necessarily, a breach of undertaking 1. Attwells have a real prospect of successfully contending at trial that their use of the monies advanced to discharge the existing Topaz Charge over Buchanan Gardens followed by payment of the balance to the bank account in the name of SoMo’s clients was all that undertaking 1 required.

(5) It was argued on behalf of Attwells that the force of undertaking 1 imposes a negative obligation, that is, Attwells cannot use the monies advanced for its own purposes, or for some wholly extraneous purpose, such as paying the Borrower’s wife; nor can Attwells pay it to the Borrower if on notice that the monies would not be used for business purposes. However,

undertaking 1 does not impose a positive obligation to ensure that the monies are paid for the Borrower's business purposes. That suggested construction is more than merely arguable.

(6) Attwells also have a real prospect of successfully contending for its construction of undertaking 4. It appeared to be common ground that, read literally, undertaking 4 could not be complied with, given the time frames required for the Land Registry to complete registration of SoMo's charge and the removal of all references to the Topaz Charge. Attwells submitted that the only sensible construction that could be put on undertaking 4 was to read it as though it required Attwells to make the application for registration within 5 working days. This is what Attwells did, so it contends that it is not in breach. SoMo appears to accept that the obligation was to make an application to the Land Registry within 5 days, but submitted that the effect of s. 74 of the Land Registration Act 2002 and the Land Registration Rules 2003, rule 20 is that an entry in the register pursuant to an application "has effect from the time of the making of the application". In other words, SoMo suggests that making of a proper application within 5 days of completion would achieve registration on the date of application, provided that the charge documents had not been entered into by an imposter. In this case, Attwells applied for the registration of the charge in favour of SoMo on 23 June 2022. Had a valid charge ever in fact been obtained, the charge would have been registered on 23 June 2022.

(7) It seems to me that the parties are in fact agreed that undertaking 4 cannot be read at face value. In so far as SoMo contends that the language of

undertaking 4 is unambiguous, and therefore the Court must simply apply it, there is another principle at play, which is that the Court will not require a party to perform the impossible. Attwells' suggested construction of undertaking 4 ties in better with the wording found in undertakings 8 and 10, which on a straightforward reading appears to envisage that registration might not in fact take place. After all, the obligation in undertaking 8 only requires Attwells to use "reasonable endeavours" to ensure that cancellation of the application for registration of the new charges does not occur.

39. The undertakings were prepared by SoMo's lawyers, JMW, who presumably are familiar with SoMo's standard terms of lending. I note, however, that Attwells raised the issue of disclosure of the client file in these proceedings with JMW. In an email dated 26 April 2024, JMW refused to disclose any part of the file, on the ground that the file contained a mixture of privileged and non-privileged documents, and that its client SoMo has refused to waive privilege, and refused to disclose those documents which are non-privileged but confidential. That response is surprising, because confidentiality is not usually a ground for resisting disclosure in legal proceedings. Further, it is at best somewhat difficult to see why the file would contain any privileged material. It seems to me that it is at least conceivable that further disclosure may tend to support one or other party's suggested construction of the undertakings. Given that, in my view, both undertakings on which SoMo relies are susceptible to more than one meaning, the matter should not be disposed of pending proper disclosure from all the parties.

40. A considerable number of authorities was cited to me on the enforcement of solicitors' undertakings (or in some cases a claim in professional negligence for a failure to obtain suitable undertakings). I found these authorities of limited assistance on the Application. This is because these proceedings will turn ultimately on the construction of the particular undertakings in this case. The Court of Appeal has previously referred to the "extremely limited value of precedent on a question of a construction of a document": see *Midland Bank plc v Cox McQueen* (CA) [1999] Lloyd's Rep PN 233, where Mummery LJ noted that:

*"As has been repeatedly remarked, every document must be construed according to its particular terms and in its unique setting. Detailed comparison of one document with another and of one precedent with another do not usually help the court to reach a decision on construction."*

Mummery LJ's warning about the value of precedent has particular force where issues of construction are before the court at the summary stage, rather than at trial.

41. Quite apart from the arguments on construction of the undertakings, Attwells submitted that it had open to it two other defences to the claim for summary judgment on the contractual undertakings. The Defence, paragraph 27 pleads that the purported consideration for the giving of the undertakings will have wholly failed and/or the undertakings are void on the basis that there was a common mistake to the effect that the borrower and Attwells's client was Mr Linford Gayle "who owned the properties". I will refer to these as the failure of basis and the common mistake defence respectively.

42. Both defences face certain difficulties. The argument on failure of basis needs to address the submission that there is often little difficulty in finding

consideration for an undertaking: see *United Bank of Kuwait v Hammoud* [1988] 1 WLR 1051, CA. As to the contention that the undertakings are void due to common mistake, on the ground that both parties were mistaken about a fundamental fact (the identity of the person they were dealing with), the Court of Appeal has held that there are a number of elements which must be present before a contract will be avoided for common mistake: *Great Peace Shipping Ltd v Tsalviris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, at [76]. One of these elements is that “the non-existence of the state of affairs must render contractual performance impossible ...”. It is difficult to see how it can be said that mistake as to the identity of the purported client rendered contractual performance impossible. The correct analysis may turn out to be that this is not really a case about common mistake all, as opposed to it being a question of which of two innocent parties ran the risk of being wrong about the true identity of Attwells’ client.

43. However, as I have already held that there is a real issue to be tried on the construction of the undertakings, and the matter needs to be go to trial, I do not consider it necessary to say a great deal on these two further suggested defences of failure of basis and common mistake. Whilst both defences face difficulties, I am not prepared to determine them summarily, or to begin ruling on individual issues separately.
44. Even if I were wrong to hold that there is a real issue to be tried on the construction of the undertakings, I do not believe that quantum can be summarily determined. SoMo only served its evidence in support of quantum by way of reply evidence, just a week before the hearing of the Application. The

witness statement from Mr Francis confirms that Attwells did use the sum of £60,757.35 of SoMo's advance to redeem the Topaz Charge. However, Mr Francis indicates that SoMo is not in a position to ascertain what sum would be due to redeem the Topaz Charge as at the date of hearing of SoMo's application, or indeed to establish the terms of the underlying loan. To preserve its position, SoMo has registered a unilateral notice preserving any rights arising by way of subrogation in respect of the discharge of the Topaz Charge. Mr Francis indicates that the current balance outstanding to SoMo under its own loan is £1,637,345.87, exclusive of costs. This is a startling increase from the original sum advanced of £701,500 (consisting of the loan facility amount of £750,000, less the Retained Interest Amount (as defined in the Loan Particulars) and certain fees).

45. A number of point were raised on behalf of Attwells:

(1) If Attwells was in breach of a contractual undertaking, SoMo would be entitled to be put in the position in the position it would have been if the undertaking had been performed. That proposition reflects the general position when applying the contractual measure of damages. See also *Hole and Pugsley v Sumption* [2002] PNLR 20, at [33] (although this was not a case to enforce contractual undertakings at all).

(2) However, in this case, even if Attwells was in breach of the undertakings and undertaking 1 required Attwells only to use the monies advanced for the purposes of a loan to Mr Gayle who owned the Properties, then compliance with the undertakings (especially undertaking 1) would have required Attwells to return the advance to SoMo. Attwells submits that in



consequence the loss occasioned by breach of the undertakings would not have encompassed the sums repayable by SoMo's intended borrower.

(3) Attwells also submits, either further or in the alternative, that any loss in excess of the net advance received by Attwells was not caused by any breach of the undertakings and/or it was not within the scope of any contractual obligation undertaken by Attwells, and/or it was too remote.

(4) Thus, Attwells submits that SoMo is not entitled to be put in the position of benefiting from any contractual right to repayment or enduring security in respect of Mr Gayle or the Properties or some substitute form of compensation, even if the undertakings were enforceable and are to be construed as SoMo invites me to construe them.

(5) Finally, Attwells say that there is no possible basis upon which SoMo can be put into a position in which it is entitled to be repaid the full amount of its net advance plus the (very high) rate of interest at 1.10% per month chargeable to its borrower on what was intended to be a short term (6 month) bridging loan.

(6) SoMo would also have to give credit for the value of its subrogated rights to enforce the Topaz Charge. It is also said that SoMo would have to give credit for the value of its rights "against the Impostor", although it is not clear how those rights can be valued.

46. I received comparatively little by way of submission on the quantum of SoMo's loss, as most of SoMo's submissions before me were focussed on the question of liability. It seems to me that this is a matter which ought to go to trial or at

least to a further hearing, in any event, as the arguments raised on behalf of Attwells are not suitable to be determined summarily.

*Breach of trust*

47. As to SoMo's claim for breach of trust, I accept the proposition that the advance paid to Attwells was held on trust. Monies held in a solicitors' client account are held on trust: see *Target Holdings v Redferns* [1996] 1 AC 421 and *Lloyds TSB Bank v Markandan & Uddin* [2021] EWCA Civ 65. The contrary does not seem to me to be seriously arguable. However, that is only the beginning of the analysis. Before it can be determined whether there was a breach of trust, it is necessary to determine the terms of that trust. In effect, the terms of the trust are set out in the letter dated 26 May 2022 which provided the undertakings.
48. As I have found that there are real issues to be tried on the construction of the undertakings, there is a real issue to be tried on whether Attwells, in paying the monies to their client, was in breach of trust. Attwells say that if there were a trust of the monies advanced when first received by it, then its terms were only to use the advance for the purpose of a loan to SoMo's borrower and Attwells' client, and those terms were fulfilled. The terms of the undertakings supply the terms of the trust. This is a matter which should go to trial.
49. SoMo's Counsel submitted that in context the multiple references to "completion" in the undertakings must mean "the completion of a genuine contract by way of an exchange of real money for real documents of charge ..." and that completion cannot occur if worthless forgeries are produced. A purported "completion" by Attwells based upon inadequate documents is not "completion" at all. That may very well be right, but that does not necessarily

mean that SoMo is entitled to the relief sought in the Application. Undertaking 1 specifically provides that the loan advance is to be used for “the Transaction”, which on one reading does not require the entering into of a valid charge at all. Arguably, at least, the advance was not conditional on a legally effective completion. If that is right, which is a matter for trial, then there would be no breach of trust. It all depends on the extent of Attwells’ authority to deal with the advance.

50. In any event, even if SoMo is right, and there was a breach of trust, a defaulting trustee can rely in principle on s. 61 of the Trustee Act 1925 (“the Trustee Act”) (power to relieve trustee from personal liability), which provides as follows:

*“If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.”*

51. What this requires is that the trustee show (the onus being on him) that he has acted both honestly and reasonably, and then the second main stage (usually described as discretionary) consists of deciding whether the trustee ought fairly to be excused for the breach of trust: see *Santander UK v RA Legal Solicitors* [2014] EWCA Civ 420, especially at [20] – [21], [33] – [34], and [107]. In the context of mortgage fraud, s. 61 of the Trustee Act has been interpreted as requiring the trustee to prove that he acted reasonably only in relation to those aspects of his conducts which are connected with the beneficiary lender’s loss. In many cases, a defence based on s. 61 is a matter which cannot be decided on a summary judgment application because it requires a close examination of all

the facts. The court is entitled to have regard to all the facts and matters before deciding whether to grant the defaulting trustee relief.

52. In this case, however, Counsel for SoMo submitted that Attwells had failed to set out properly an entitlement to rely on s. 61 of the Trustee Act in its Defence. Indeed, all the Defence states is that “... if, which is denied, [Attwells] was in breach of trust then it will seek an order it should be excused from liability in whole or in part pursuant to s. 61 of the Trustee Act 1925 on the grounds that it acted honestly and reasonably and ought fairly to be excused.” That is merely to repeat the words of the statute. SoMo submits that the pleaded defence is a prime example of a case that should be struck out pursuant to CPR Part 3, r. 3.4(2)(a) as not setting out any facts indicating what the assertion is about.
53. I agree that, as currently pleaded, very little in the way of particulars has been provided as to why Attwells ought to be excused, on the hypothesis that there was a breach of trust. However, the rather exiguous statement found in the Defence is supplemented by what is said in Mr Attwell’s statement. He says that Attwells acted not just honestly but also reasonably in all respects. He stressed that it sought evidence of identity and communicated with JMW about such matters in a way which was sufficient for SoMo to make its own decision as to whether or not the evidence of identity provided was satisfactory. Moreover, SoMo is a sophisticated lender. Its own documentation indicates that it is well aware of the risk of identity fraud and that it undertakes its own checks on borrowers to mitigate that risk.
54. I note that SoMo does not positively assert that Attwells acted improperly or unreasonably. SoMo’s Reply does not mention s. 61 of the Trustee Act at all. A

defence based on s. 61 is potentially available to Attwells, and is another reason for not deciding the matter on the basis of a summary judgment or strike out application now. In this regard, the notes to the White Book, vol. 1, at paragraph 3.4.2 make plain that even where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend.

55. My preliminary view is that Attwells should amend its Defence to set out further particulars as to why the power to relieve a trustee from liability should be exercised in its favour. It may be that Attwells will say that it cannot be expected to provide all such particulars in support of its claim pursuant to s. 61 of the Trustee Act, pending disclosure in these proceedings. I will hear further from Counsel on this matter at the hearing of any consequential matters following the formal handing down of this judgment.

## **Conclusion**

56. For the reasons set out in this judgment, it is appropriate to have the claim against Attwells go to trial, rather than decide the matter now on a summary basis. In other words, Attwells has at least a real, as opposed to fanciful, prospect of defending the case against it at trial, and no part of the case is suitable for striking out pursuant to CPR Part 3, r. 3.4(2)(a).
57. Accordingly, it seems to me that I should simply dismiss SoMo's application. I will hear from Counsel as to what further directions may be required to progress the proceedings.