



Neutral Citation Number: [2018] EWHC 3521 (Comm)

Case No: CL-2018-000431

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS OF ENGLAND & WALES**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/12/2018

**Before :**

**MR JUSTICE MALES**

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**Between :**

**GROVE PARK PROPERTIES LTD**  
**- and -**  
**THE ROYAL BANK OF SCOTLAND PLC**

**Claimant**

**Defendant**

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**Lance Ashworth QC and Philip Riches** (instructed by **Cooke, Young & Keidan LLP**)  
for the **Claimant**  
**John Taylor QC and Rupert Allen** (instructed by **Dentons UK & Middle East LLP**)  
for the **Defendant**

Hearing date: 6 December 2018  
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**Approved Judgment**

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MR JUSTICE MALES

## Mr Justice Males :

### **The issue**

1. This judgment deals with the question whether the claimant should be permitted to plead, either in its Particulars of Claim or its Reply and Defence to Counterclaim, that in other proceedings between the defendant bank and a director of the claimant company, the bank knowingly put forward a false and misleading case. At present the claimant has pleaded such a case in its Particulars of Claim, but the bank applies to strike out the relevant paragraphs. The claimant resists that application but in the alternative submits that it should be permitted to amend its Reply and Defence to Counterclaim to make the same allegations.

### **Background**

2. The claim arises out of loan and interest rate swap agreements concluded in or about late October or early November 2007 which were entered into between the claimant, a property investment and development company, and the bank.
3. On 30 October 2007 there was a meeting between the claimant's director, Mr Gary Wyatt, and Mr Derek Bradstock, an employee of the bank. It was agreed that the following agreements would be concluded:
  - (1) an interest only loan for £10.5 million ("the Primary Loan");
  - (2) an interest only loan for £1.9 million repayable by 1 May 2008 ("the Secondary Loan");
  - (3) an authorised overdraft facility of £100,000 ("the Overdraft"); and
  - (4) a 10 year interest rate swap ("the 2007 Swap").
4. There is, however, a dispute as to what was agreed about repayment of the Primary Loan. The claimant's case is that the parties agreed orally on a 10 year loan, repayable on 1 November 2017 and co-terminous with the 2007 Swap. The bank's case is that a five-year loan, repayable in 2012, was agreed.
5. It is common ground that the Primary Loan document then drawn up by the bank and dated 5 November 2007 provided, in clause 5.1, for repayment on 1 November 2012 and that this was altered in manuscript by Mr Wyatt to read 1 November 2017. The claimant's case is that Mr Wyatt drew the date to the attention of Mr Bradstock who said that "2012" was a typographical error and that Mr Wyatt should amend it to read "2017". Mr Wyatt did so by writing the number "7" over the number "2" in 2012. He then initialled this change, signed the document and retained a photocopy.
6. The bank does not accept that Mr Bradstock or anyone else on its behalf agreed to the change. Its case is that the loan document as drawn up and providing for repayment in 2012 correctly reflected the parties' oral agreement and that there was no agreement for Mr Wyatt to change it to 2017.
7. It is further common ground that the signed document was altered again, this time by changing the date of 2017 back to 2012. As I shall explain, this is the critical

alteration to the document. Following this alteration, at some point prior to drawdown of the loan funds on 19 November 2007 the altered clause, now reading “2012”, was initialled by Mr Daniels, another employee of the bank, who wrote his initial “D” in blue ink above the altered date. However, this final version of the document showing the change back to 2012 with Mr Daniels’ initial was not provided to Mr Wyatt.

8. The claimant’s case is that this further change back to 2012 (which I shall call “the Alteration”) was done by Mr Bradstock (or possibly another employee of the bank) without Mr Wyatt’s knowledge or authority and was concealed from him. The bank, on the other hand, says that it does not know whether the Alteration was made by Mr Wyatt or by a bank employee. Its case, however, is that if it was made by a bank employee there would first have been a conversation between Mr Wyatt and the bank to confirm that the term of the Primary Loan was indeed five years.
9. Thus the claimant’s case is that the initial correction from 2012 to 2017 reflected the parties’ oral agreement and that Mr Wyatt remained in ignorance thereafter of the changes which had been made to the document to provide for repayment in 2012. These were made for the bank’s own internal reasons without the claimant’s knowledge or authority and it did not discover that they had been made until 2012. Conversely, the bank’s case is that the agreement was always for a five-year loan repayable in 2012, that Mr Wyatt’s initial manuscript change of the date to 2017 was contrary to what had been agreed, and that the final version providing for repayment in 2012 was in accordance with what was agreed at the 30 October 2007 meeting.
10. About a year later, on 18 December 2008, there was a meeting between Mr Wyatt, two individuals who were considering an investment in the claimant, and Mr Bradstock and Mr Edwards of the bank. It appears from some minutes of this meeting which were signed by Mr Wyatt apparently without protest, as well as by the potential investors, that one purpose of the meeting was to clarify the term of the Primary Loan. The minutes record that “the facility was for 5 years maturing in November 2012”. Witness statements from the two potential investors confirm that this is indeed what was said. The claimant’s case, however, is that Mr Wyatt was taken by surprise when the bank’s representatives said that the Primary Loan was repayable in 2012, but that he did not want an embarrassing disagreement in front of the potential investors which would cause them to lose confidence and that the bank’s representatives were deliberately exploiting this.
11. It may be thought that on both sides this is a very odd story. However, where the truth lies will be for the trial. It is not a matter for determination on this application.

### **The issues in the action**

12. The claimant’s case in these circumstances is that the Primary Loan is void, and that the Secondary Loan, the Overdraft and the 2007 Swap are likewise void as they formed part of one overall transaction. It contends that it was and is under no liability to repay the principal totalling £12.5 million advanced to it under the Primary and Secondary Loan or interest thereon and is entitled to restitution of the payments which it has made under each of these agreements. It relies on the rule in *Pigot’s Case* (1614) 11 Co. Rep 27 that a material alteration in a deed will render it void and on what was said about this by Lord Kenyon CJ in *Master v Miller* (1791) 4 TR 320 at

329 when the principle was extended to “all written instruments”, although the case was actually concerned with a bill of exchange:

“That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for such an offence was compounded of those two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has since been increased, the principle still remains the same. ... The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they establish this principle, that all written instruments which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened.”

13. Lest it be thought that these are ancient cases which no longer represent the law, the claimant points to *Chitty on Contracts*, 33<sup>rd</sup> Edition, para 5-020, where the law is stated, citing *Pigot’s Case* and *Master v Miller*, as follows:

“**Material alteration** If a promisee, without the consent of the promisor, deliberately makes a material alteration in a specialty or other instrument containing words of contract, this will discharge the promisor from all liability thereon, even though the original words of the instrument are still legible.”

14. It is important to note that the rule in *Pigot’s Case* and the policy rationale described by Lord Kenyon are concerned with fraud. The rule does not apply to alterations which are accidental or merely mistaken: see *Chitty*, para 25-022 and the cases cited.
15. In response the bank contends that this case is misconceived. Although it accepts that an alteration of the date for repayment would be material, its case as summarised above is that the agreement between the parties was always for repayment in 2012 and that the Alteration of the Primary Loan document to make this clear was agreed, so that the rule in *Pigot’s Case* is not engaged. Alternatively it says that whatever may have been the position before the December 2008 meeting, the effect of the meeting together with Mr Wyatt’s signature without protest of the minutes of that meeting meant that henceforth the parties were agreed or must be taken to be agreed that the Primary Loan was for repayment in 2012. It counterclaims for the sums due to it on that basis which including interest currently amount to about £16 million.
16. In the further alternative the bank advances counterclaims in restitution and subrogation. These arise if, contrary to the bank’s primary case, the Primary Loan (and if necessary the further agreements) are rendered void pursuant to the rule in

*Pigot's Case* as a result of a material unauthorised alteration. In that event the bank says that it is entitled to recover the funds advanced by it as money had and received at common law. It says further that as the funds were used in part to discharge previous borrowings by the claimant under two secured loan agreements entered into in March and November 2006, it is entitled to be subrogated to its own rights under those previous agreements.

17. The claimant denies the bank's entitlement to rely on principles of restitution or subrogation, saying that this would subvert the policy that "no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected". It refers also to the note of caution sounded by Lord Sumption in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 at [255] when dealing with the relationship between illegal and unenforceable agreements and restitutionary claims:

"I say nothing about cases in which an order for restitution would be functionally indistinguishable from an order for enforcement, as in a case of an illegal loan or foreign exchange transaction. The traditional view is that if the law will not enforce an agreement it will not give the same financial relief under a different legal label: *Boissevain v Weil* [1950] AC 327. I am inclined to think that the principle is sound, but I should prefer not to express a concluded view on the point. It is not the position here."

18. The issues which I have described are not for determination on this application, but they comprise the framework within which this application arises.

### **The present application**

19. The claimant seeks to plead, and has pleaded in its Particulars of Claim, a case that in proceedings between Mr Wyatt and the bank ("the Wyatt Proceedings", commenced by Mr Wyatt in the High Court on 16 October 2013), the bank knowingly put forward a false and misleading case. Those proceedings arose in part because Mr Wyatt had guaranteed the claimant's borrowing under the Primary Loan. When the bank sought repayment of that loan, Mr Wyatt began proceedings for (among other things) a declaration that he was under no liability, contending on the same grounds as the claimant relies on in the present case that the Primary Loan was void.

20. The case which the claimant has pleaded and to which the bank objects can be summarised as follows.

- (1) The bank's initial position in the Wyatt Proceedings, in its pleadings and in witness statements by Mr Bradstock and Mr Edwards, was that Mr Wyatt had committed fraud and forgery by amending the original typed 2012 repayment date in the Primary Loan to 2017 and that he had done this shortly before the 18 December 2008 meeting, without the bank's knowledge or consent, in order to mislead the potential investors. The bank's case was that the change back to 2012 was made by it shortly after the December 2008 meeting.
- (2) This case of fraud and forgery by Mr Wyatt was maintained when the bank served an amended Defence.

- (3) Subsequently, however, the bank's case changed. A witness statement from Mr Daniels served in May 2015 accepted that Mr Wyatt's manuscript alteration of the typed 2012 date to 2017 had been made before Mr Daniels had initialled the change back to 2012 (which had not been done by him) and that this had occurred, not in 2008 but before drawdown of the loan on 19 November 2017.
- (4) This led to an amendment to the bank's Defence in which the allegations of fraud and forgery against Mr Wyatt were withdrawn. The bank served further witness statements in which Mr Bradstock suggested that Mr Wyatt had changed the original 2012 date to 2017 in early November 2007 and that it was Mr Wyatt who had then changed it back again to 2012.
- (5) On 6 July 2015 the bank agreed to settle Mr Wyatt's claim. The terms of the settlement are confidential and have not been disclosed to me although obviously both parties to the present action are aware of them.
21. Currently, while the claimant has asserted in its Particulars of Claim that the bank knowingly put forward a false and misleading case in the Wyatt Proceedings and has set out the history summarised above as particulars of that factual allegation, it has not sought to explain what if any legal consequences flow from that fact, or in what way that fact contributes to the causes of action on which it relies. It appears to be no more than a prejudicial factual narrative interposed between the claimant's pleaded case that the Primary Loan was altered by the bank without the claimant's authority and its case as to the legal consequences of the Alteration. On any view that is not satisfactory. If the allegation is to remain, its relevance must be explained so that the case can be understood.
22. On behalf of the bank Mr John Taylor QC submits that the way in which the bank conducted the Wyatt Proceedings is irrelevant to the issues in this action and that the paragraphs in question should be struck out. The bank denies that it knowingly put forward a false case in the Wyatt Proceedings, but Mr Taylor accepts that for the purpose of this application it should be assumed against it that it did. He accepts that it will be open to the claimant's counsel at the trial to cross-examine the bank's witnesses (including Mr Bradstock) about what they said in the Wyatt Proceedings and why their evidence changed, and to suggest that they were telling lies in the witness statements which were served in order to conceal what they knew to be the true position. However, he submits that the fact that the witnesses told lies in the Wyatt Proceedings (if that is what they did) is no more than a matter of credit which does not need to be and should not be pleaded.
23. Although Mr Taylor was content to argue this application on the assumed basis that the bank knowingly put forward a false case in the Wyatt Proceedings, it may be important to note that the primary facts pleaded against the bank appear to go no further than asserting that their witnesses in that action, in particular Mr Bradstock, gave evidence which they knew to be false. However, at the time of the Wyatt Proceedings, Mr Bradstock was no longer employed by the bank. He was just a witness. While it is not difficult to see that any fraud by Mr Bradstock committed in 2007 when he was employed by the bank can be regarded as conduct for which the bank is responsible, it is not obvious why the bank should be fixed with knowledge that the account of events given by a witness who was no longer employed by it was false. At present the only case about this advanced by the claimant is that the bank

must be taken to know that Mr Bradstock's account given in his first witness statement in the Wyatt Proceedings was false because it is fixed with his knowledge back in 2007 that he had made the Alteration without the claimant's authority.

### **Legal principles**

24. If it will be open to the claimant's counsel to cross examine the bank's witnesses about the Wyatt Proceedings, it may be asked whether it matters whether the claimant's case about those proceedings is set out in the pleadings in this action. In my judgment it does. Statements of case should be as concise as the nature of the case allows and should plead only material facts, that is to say those which are necessary to formulate a cause of action or defence, not background facts or evidence: *Tchenguiz v Grant Thornton LLP* [2015] EWHC 405 (Comm), [2015] 1 All ER (Comm) 961. It is wrong in principle to plead matters which do not support or relate to any of the remedies sought and to plead immaterial matters with a view to obtaining more extensive disclosure than might otherwise be ordered: *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC) at (the second) [15]. To do so is likely to complicate or confuse the fair conduct of proceedings.
25. On the other hand it is well established that in cases where fraud is alleged, the plea of fraud must be made in clear terms and the pleader must set out the facts which are relied on to show that the defendant was dishonest and not merely negligent. As dishonesty is often a matter of inference from primary facts, this means that it is necessary to plead the primary facts which will be relied upon at trial to justify that inference. These principles were discussed by the House of Lords in *Three Rivers District Council v Bank of England* [2001] UKHL 16, [2003] 2 AC 1, most fully in the speech of Lord Millett. Lord Millett said:

“184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on Fraud and Mistake* 7th ed (1952), p 644; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. ...

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of

primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

26. In a sense the distinction between pleading evidence and pleading facts from which an inference should be drawn is elusive. It can fairly be said, for example, that the fact that a man was seen running from the house at dead of night wearing a balaclava, carrying a crowbar and with a bag over his shoulder is evidence that he was the burglar. But it is also a fact from which this inference can be drawn. In principle, however, the distinction exists. Evidence is the material by which the facts will be proved (documents, witness statements and the like), while facts are the facts which, once proved by evidence, will be relied upon as demonstrating that the defendant has committed fraud.
27. As the argument developed during the hearing of the application, it became apparent that there are four grounds on which the claimant contends that it is entitled to plead its case about the bank's conduct of the Wyatt Proceedings. I address them in turn.

**(1) A fact from which an inference of fraud can be drawn**

28. As explained above, the claimant's case is that the Alteration to the Primary Loan was made by the bank fraudulently. That has to be its case in order to engage the rule in *Pigot's Case*. The facts on which it wishes to rely from which an inference of fraud should be drawn include the fact that, as it says, the bank knowingly put forward a false case in the Wyatt Proceedings. It relies upon what is now accepted to have been a false allegation against Mr Wyatt (i.e. that he committed fraud and forgery by amending the original typed 2012 repayment date to 2017 shortly before the 18 December 2008 meeting) which it says that the bank or at least its witnesses must have known to be false. It says that the only, or at any rate the obvious, reason why such a false allegation was made was to cover up the bank's or its employees' own wrongdoing.
29. Mr Taylor submits that the issues which the court will need to resolve include who made the Alteration, why they did so and what was their state of mind at the time, all of which are concerned with events in October and November 2007, and that what the bank's witnesses said about these issues in 2015 in the course of the Wyatt Proceedings is relevant only to their credibility.
30. Undoubtedly the principal issues of fact which the court will have to resolve will be concerned with what happened in October and November 2007. There will be witness evidence from (at least some of) those who took part in those events and disclosure of whatever documents have survived from that period. However, this does not mean that later events will be irrelevant. For example, the bank will no doubt rely on the fact that Mr Bradstock said at the December 2008 meeting that the term of the Primary Loan was five years and that Mr Wyatt signed the minutes of the meeting recording that this was the position. That will be a fact on which the bank will rely to refute any allegation of fraudulent conduct in 2007.



31. Conversely, I see no reason why the claimant should not rely on the fact, if it can prove it, that the bank knowingly advanced a false case in the Wyatt Proceedings and that its witnesses told lies in the witness statements which were served. That is or may be a fact from which an inference is capable of being drawn. Mr Lance Ashworth QC for the claimant referred to the *Lucas* direction (*R v Lucas* [1981] QB 720) which is given to juries in criminal cases when the defendant has told a lie. It explains the dual relevance of such a lie. First, as with any witness, it may damage the witness's credibility. Second, however, it may – depending on the circumstances and if other explanations can be excluded – constitute some evidence of guilt or, as it might equally be put, a fact from which an inference of guilt may be drawn.
32. A claimant is required to plead the facts on which it relies and is entitled to rely on facts which are more likely than not to justify an inference of dishonesty. This was explained by Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] in a passage which has been followed in later cases (*Portland Stone Firms Ltd v Barclays Bank Plc* [2018] EWHC 2341 (QB) at [29] and *Cunningham v Ellis* [2018] EWHC 3188 (Comm) at [42]):

“... The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact ‘which tilts the balance and justifies an inference of dishonesty’. At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge.”
33. Although the focus of some of these cases has been whether a plea of fraud can be justified at all, an issue which does not arise here, I consider that they are helpful in addressing the present issue which is whether the bank's conduct of the Wyatt Proceedings can be properly pleaded as a fact from which an inference of fraud may be drawn.
34. I consider that it can. In the absence of any explanation of why a false allegation against Mr Wyatt was made, it is a reasonable (although not necessarily an inevitable) inference that this was done knowingly (and in any event Mr Taylor accepts that this should be the working assumption for the purpose of this application) and that the reason why this was done was in order to conceal reprehensible conduct. Whether it is right to draw that inference will be a matter for the trial judge in the light of all the evidence in the case, including what at present appears to be the puzzling evidence (from the claimant's point of view) about the December 2008 meeting. But in my judgment the point can be pleaded.
35. Mr Taylor expressed a concern that the claimant is seeking to plead the bank's wrongful conduct of the Wyatt Proceedings in order to obtain wide-ranging disclosure to which it would not otherwise be entitled. I make clear, however, that I am deciding nothing at present about the scope of disclosure. That is a separate topic which will need to be addressed on its own terms.

## (2) Illegality and public policy

36. The second ground on which the claimant contends that it is entitled to rely on the bank's wrongful conduct of the Wyatt Proceedings is as a defence to the bank's counterclaim in restitution to recover the sums advanced by it. It contends that the counterclaim in restitution must fail as a matter of illegality and public policy and that it is entitled in this connection to rely not only on the bank's wrongful conduct in making the Alteration in 2007 but also on the fact that it knowingly put forward a false case in response to Mr Wyatt's invocation of the rule in *Pigot's Case* in the Wyatt Proceedings where he sought a declaration he was not liable on his guarantee. It relies on the "flexible approach" to questions of illegality and public policy described by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.
37. It is sufficient to quote from the concluding summary of Lord Toulson's leading judgment:
- "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."
38. It is necessary to recall the circumstances in which an illegality defence to the bank's restitution counterclaim may arise. That counterclaim will only arise if the claimant is successful in establishing that the Primary Loan is void because the Alteration was made fraudulently by the bank. In that event there will be a question to be decided whether the bank's fraudulent conduct in 2007 was such as to bar it from a claim in restitution. The claimant's case is that any claim in restitution would be (in Lord Sumption's language at [255] of *Patel v Mirza*) "functionally indistinguishable from an order for enforcement" of the loan and that the law will not "give the same financial relief under a different legal label", here the label of restitution.
39. The bank's conduct of the Wyatt Proceedings can only be relevant to that issue if it is held that the bank does in principle have a valid claim for restitution, that is to say that public policy and the integrity of the legal system are not offended by allowing the bank to recover the sums which it has advanced pursuant to a loan which has been rendered void by its fraudulent conduct. If the bank does in principle have such a valid claim, and would have been entitled to judgment on that claim if (for example) it had brought proceedings in 2013 acknowledging that the Primary Loan was void, the

question then arises whether there is a real prospect that it should lose that claim because of its wrongful conduct of the Wyatt Proceedings.

40. That question must be answered by reference to the three considerations identified by Lord Toulson. The first consideration is the underlying purpose of the prohibition and whether it will be enhanced by denial of the claim for restitution. If the relevant prohibition is the prohibition on the unauthorised alteration of contractual documents, its purpose as described by Lord Kenyon is to punish and deter fraud in commercial dealings. However, at this stage of the argument, the working assumption is that the bank has in principle a valid claim in restitution, so that denial of that restitutionary claim is not required by reason of the Alteration itself. If alternatively the relevant prohibition is the prohibition on fraudulent claims or defences in legal proceedings, the position which the law generally adopts is that such conduct does not debar a valid claim and can be both punished and deterred in other ways, for example in costs or by proceedings for contempt of court: *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004.
41. Turning to the second consideration, whether there is any other relevant public policy, the policies which are relevant are those already identified (punishment and deterrence of fraud and good faith in the conduct of legal proceedings). It is not suggested that there is any other policy on which denial of the claim in restitution would have an impact.
42. Finally, the third consideration is proportionality. Here too the stage at which the argument arises is important. If it is assumed that the claim in restitution is not barred as a result of the fraudulent alteration of the Primary Loan document in 2007 itself, to hold that the bank must be deprived of an otherwise valid claim for £16 million in this action as a result of the conduct of (albeit closely related) proceedings to which the claimant was not a party would inevitably be a severe and disproportionate punishment. That is particularly so when what is assumed to be the particularly egregious conduct of the bank, the making of a false allegation of forgery and fraud against Mr Wyatt, was eventually withdrawn and the case settled on terms which, although not disclosed to me, can be taken to have been satisfactory to Mr Wyatt.
43. Mr Ashworth submits that the illegality/public policy defence arises in a developing area of law which is now characterised by flexibility, and that this is a reason why permission to amend should be given. He cites Lord Toulson's reference in *Patel v Mirza* at [107] to the difficulty of laying down a definitive list of the factors which may be relevant to such a defence because of "the infinite possible variety of cases". However, this does not mean that permission to amend must always be given when it is proposed to advance an illegality/public policy defence. Despite the flexibility of the doctrine, it cannot be stretched to breaking point. Hence Lord Toulson's insistence in his concluding comment on deciding such cases in a disciplined, principled and transparent way.
44. I appreciate that at this stage the issue is whether the claimant should be allowed to amend its pleadings to rely on the bank's conduct of the Wyatt Proceedings as part of its illegality/public policy defence to the bank's restitution counterclaim, and that for this purpose it only needs to show that the point has a realistic prospect of success. However, on the only basis on which this issue could arise, that the bank would otherwise have had a valid claim in restitution to recover the funds advanced to the

claimant notwithstanding its fraudulent Alteration of the Primary Loan document, I cannot see that it has. That would be, if not quite to strain at a gnat while swallowing a camel, something not far off. This applies with even greater force if, as currently pleaded by the claimant, the only basis on which it can be said that the bank was knowingly advancing a false case in the Wyatt Proceedings is because it is fixed with knowledge of its ex-employee's fraudulent conduct in 2007 which conduct, *ex hypothesi*, is not sufficient to exclude a claim in restitution.

45. Accordingly I refuse permission to amend for this purpose.

### **(3) Unclean hands**

46. The next ground on which the claimant seeks to rely on the bank's wrongful conduct of the Wyatt Proceedings is as a defence to the bank's counterclaim in subrogation. The argument here is that subrogation is (or is to some extent) an equitable remedy and that the bank as a counterclaimant must come to the court with clean hands.

47. Again, however, it is important to note the only circumstances in which the subrogation claim (which is a claim to recover the lesser sums advanced under previous borrowings and not the totality of funds advanced pursuant to the 2007 agreements) may arise. These are that (1) the Primary Loan and perhaps also the other agreements were void as a result of the bank's fraudulent Alteration of the Primary Loan document, (2) the bank's claim in restitution has failed because, as a result of that Alteration, to allow such a claim would be contrary to public policy, (3) the bank is therefore driven back to its lesser claim in subrogation, and (4) despite the failure on illegality/public policy grounds of its claim in restitution, the bank would but for its wrongful conduct of the Wyatt Proceedings have a valid claim in subrogation. This would be an extraordinary scenario. The reality of this litigation is that the decisive issues will be (1) whether the Alteration was made by the bank fraudulently and (2) if so, whether that has the effect of barring a claim in restitution. If the bank succeeds on these issues, it will not need a claim in subrogation. If it fails on these issues, a claim in subrogation is unlikely to help it.

48. Nevertheless the claimant seeks to plead the bank's conduct of the Wyatt Proceedings as part of its defence of "unclean hands" to the subrogation claim and cites the discussion of the maxim that "he who comes into equity must come with clean hands" in *Snell's Equity*, 33<sup>rd</sup> Edition, at para 5-010 (omitting footnote citations):

"This maxim is clearly similar to the previous one [i.e. 'he who seeks equity must do equity']: it differs as it looks to the past rather than the future. Again, the question is not whether any general moral culpability can be attributed to B, the party seeking relief, but is rather whether relief should be denied because there is a sufficiently close connection between B's alleged misconduct and the relief sought. The maxim is therefore applicable only in relation to conduct of B which has 'an immediate and necessary relation to the equity sued for', and is not balanced by any mitigating factors."

49. For the purpose of this application I proceed on the basis that subrogation is an equitable remedy and that "unclean hands" is a potential defence. However, the defence is of limited scope, as Aikens LJ explained in *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328, [2013] 1 CLC 596 at [159]:

“It was common ground that the scope of the ‘unclean hands’ doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in *Dering v Earl of Winchelsea* (1787) 1 Cox Eq Cas 318, the misconduct or impropriety of the claimant must have ‘an immediate and necessary relation to the equity sued for’. That limitation has been expressed in different ways over the years in cases and textbooks. Recently in *Fiona Trust & Holding Corp v Privalov* [2008] EWHC 1748 (Comm) Andrew Smith J noted that there are some authorities in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief. *Spry: Principles of Equitable Remedies*, 8<sup>th</sup> Edition, suggests that it must be shown that the claimant is seeking ‘to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief’. Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought.”

50. What is required, therefore, is a sufficiently close or immediate connection between the misconduct and the relief sought. Here the bank’s misconduct is said to be the putting forward of a false case in the Wyatt Proceedings during 2014 and 2015, while the relief which it seeks is the exercise of rights of subrogation enabling it to recover sums due under loans concluded in 2006 as a result of advancing funds to the claimant in 2007 from which those loans were repaid. However, the question whether the connection is sufficiently close or immediate to bar the bank from equitable relief necessarily arises on the assumption that the grime undoubtedly on the bank’s hands as a result of its fraudulent Alteration of the Primary Loan does not bar it from such relief. If it is, the claimant has no need to rely on the Wyatt Proceedings. But if, *ex hypothesi*, that close connection does not afford the claimant an unclean hands defence, it is hard to see why the bank’s conduct of the Wyatt Proceedings will make a difference.
51. The connection between the conduct of the Wyatt Proceedings and the bank’s exercise of rights of subrogation is much more remote. The bank is not seeking to derive any advantage from its misconduct. It does not refer and does not need to refer to the Wyatt Proceedings at all in the current proceedings. Rather it is the claimant which seeks to introduce that misconduct in other litigation to deny the bank (what for this purpose must be assumed to be) an otherwise valid claim. The misconduct in question occurred in proceedings to which the claimant was not even a party, albeit that its director was and that some of the issues were essentially the same. Those proceedings were settled by Mr Wyatt after that misconduct was brought to an end. The misconduct and the relief sought are also remote from each other in time. The misconduct occurred (if it did) in 2014 and 2015 while the events relevant to the relief sought occurred in 2007.
52. Mr Ashworth relies in particular on Aikens LJ’s reference to the need for examination of all the relevant factors in the case. However, in the *Fiona Trust* case to which Aikens LJ referred, the misconduct was misconduct by the claimant in the very litigation in which it was seeking equitable relief, but Andrew Smith J was

nevertheless prepared to give summary judgment dismissing an “unclean hands” defence when there was no real prospect of a sufficient connection being shown. In my judgment that is the position here. I refuse the claimant permission to amend to rely on the bank’s conduct of the Wyatt Proceedings by way of an “unclean hands” defence to the bank’s subrogation counterclaim.

#### **(4) Notice of the case to be put in cross examination**

53. Finally the claimant says that it is required and therefore entitled to give notice in its pleadings of the case which it proposes to put to the bank’s witnesses. It cites in this connection the judgment of Carr J in *Baturina v Chistyakov* [2017] EWHC 1049 (Comm) at [126]:

“I accept the submission on behalf of Ms Baturina that there is an extent to which it is permissible to pursue unpleaded general challenges to credibility. But where it is intended to advance specific matters of dishonesty based on a particular set of facts, such matters should, as a matter of fairness, be pleaded.”

54. In my judgment there is no general principle that notice of cross examination as to credit must be given in a party’s pleading when it is proposed to challenge the honesty of a witness’s evidence. If there were, pleadings would be unacceptably cluttered with unnecessary and irrelevant material and, because witness statements come after pleadings, a whole series of amendments might be necessary once witness statements had been served. Nor was Carr J suggesting otherwise. She was concerned with an unpleaded case of deceit which began to emerge for the first time in the claimant’s written opening submissions and which was then elaborated in the claimant’s cross examination when the claimant gave evidence about a meeting which had not previously featured in the pleadings or evidence. This version of events was then put to the defendant by the claimant’s counsel in cross examination. It is not surprising that this was found to be unfair. The unfairness consisted of advancing in this way an entirely new and unpleaded case of deceit which was not open to the claimant.
55. In any event the bank’s witnesses in this case will be well aware of what is going to be put to them about their evidence in the Wyatt Proceedings and Mr Taylor accepts that this will be a proper subject for their cross examination.
56. Accordingly I would not permit the claimant’s allegations about the Wyatt Proceedings to be pleaded for this purpose.

#### **Conclusion**

57. In the result I have concluded that the claimant is entitled to plead its case that the bank knowingly put forward a false and misleading case in the Wyatt Proceedings as being a fact which (if it can be proved) is a fact from which an inference may be drawn that it was the bank which made the Alteration in 2007 and that it did so fraudulently, but that this is the only legitimate basis on which that case can be pleaded. Accordingly the bank’s application to strike out the relevant paragraphs of the Particulars of Claim will be dismissed, although the Particulars will need to be clarified to make clear that this is the alleged relevance of the Wyatt Proceedings.

58. The claimant's application to amend its Reply and Defence to Counterclaim to plead the bank's conduct of the Wyatt Proceedings as a defence to the bank's counterclaims in restitution and subrogation is dismissed.
59. I have considered whether, since my decision means that the conduct of the Wyatt Proceedings is now going to feature as an issue in the case on the limited basis which I have explained, permission should be granted to the claimant to rely on that conduct for other purposes, essentially on the basis that if the issue is going to be considered anyway, that will do no harm. I am not prepared to grant permission on this basis. If the claimant does not have a real prospect of success on the issues on which I have refused permission, the proceedings and the trial should not be over complicated.
60. The parties will now need to review the pleadings in the light of this ruling and the other rulings which I made at the CMC on 6 December 2018. The question of disclosure of documents relating to the Wyatt Proceedings will then need to be addressed. As I have said, this decision does not touch on that question.