



Neutral Citation Number: [2023] EWHC 3313 (KB)

Case No: KA-2022-000206

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2023

**Before :**

**MR JUSTICE COTTER**

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**Between :**

**Hidayat Ullah**  
**- and -**  
**(1) Mohammed Anf Ullah**  
**(2) Mohammed Tarik Ullah**

**Claimant/Appellant**

**Defendant/Respondent**

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**Farhan Asghar** (instructed by **Asghar & Co Solicitors**) for the **Claimant/Appellant**  
**D Giles** (instructed by **ULA Solicitors**) for the **Defendant/Respondent**

Hearing dates: 19 October 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE COTTER

**Mr Justice Cotter :**

**Introduction**

1. This is an appeal against the order of His Honour Judge Dight made on the 20<sup>th</sup> September 2022 within which he refused the Appellant permission to re-amend the Particulars of Claim and stuck the action out.
2. Permission was granted in relation to six of ten grounds of appeal by Mr Justice Ritchie on 2nd February 2022 in relation to the claim against the Second Respondent. Permission was refused in relation to the appeal in respect of the claim against the First Respondent and it was certified totally without merit.
3. The Appellant has renewed the application for permission in relation to the four grounds in respect of which permission was refused (in the claim against the Second Respondent who I shall refer to as “the Respondent”).
4. There is a Respondent’s notice seeking to uphold the Judge’s decision on additional grounds, mainly that the claim is time barred. However this point was not pursued.

**Background facts**

5. As His Honour Judge Dight noted the central facts are within a relatively small compass.
6. The underlying claim which forms the subject of this appeal relates to seven properties and two in particular, specifically:
  - i) 61 Dudden Hill Lane, London NW10 1BD (“61DHL”) purchased in May 1995 and
  - ii) 91-93 Coldharbour Lane, Hayes, Middlesex UB3 3EF (“91-93 CHL”) purchased in February 1996 (“the two properties”) which were purchased in the name of the Respondent.
7. Between June 1995 and May 1999, the seven properties, including the two properties the subject of his appeal, were purchased by the Appellant but registered in the Respondent’s name, (the Respondent being his son). The Appellant ran a carpet business in which his sons worked. It is the Appellant’s case that from the retained profits of his business he was able to purchase the properties for investment purposes.
8. On 25<sup>th</sup> June 1997 a bankruptcy petition was presented against the Appellant.

9. On 2<sup>nd</sup> September 1997 the Appellant having been made the subject of a bankruptcy order, any interest which the Appellant might have had in the properties vested in the Trustee in Bankruptcy.
10. In October 1998 Mr Duncan Beat (“Mr Beat”) was appointed Trustee in Bankruptcy.
11. In 2001 the family relationship broke down and the Appellant left the family home (he was divorced from the Respondent’s mother in 2007).
12. On 24<sup>th</sup> June 2002 was Mr Beat released as Trustee. He was later to be reinstated in 2012.
13. In 2010; the Appellant brought proceedings against the Respondent seeking, inter alia, a declaration of his beneficial interest in all seven properties (“the Original Claim”).
14. Between 26-29<sup>th</sup> June 2012 the trial of the Original Claim was heard before Mr John Martin KC, sitting as a deputy judge of the High Court; judgment was reserved.
15. On 23 July 2012, whilst judgment was still awaited, the Respondent wrote to Mr Duncan Beat informing him that he was willing (together with his other brother Mr Arif Ullah) to purchase by way of an assignment of the rights of action, the benefit of any claims which Mr Beat may have in respect of the properties.
16. On 25<sup>th</sup> July 2012, there was a further hearing before Mr Martin KC at the conclusion of which the Judge concluded that the Appellant’s beneficial interest in two properties had vested in the Trustee in Bankruptcy and so, as things then stood, the Appellant had no right to the declarations which he was seeking. Mr Martin KC however gave the Appellant the opportunity to amend his Particulars of Claim and to seek the annulment of the Bankruptcy Order or to obtain an assignment from the Official Receiver and/or Trustee by 1<sup>st</sup> October 2012.
17. On 30<sup>th</sup> July 2012 the Secretary of State reappointed Mr Beat as Trustee, specifically to deal with the two properties. The Respondent’s solicitors also wrote to Mr Beat, making a claim that he was a creditor in the bankruptcy and provided a proof of debt of £23,940 purportedly representing 19 mortgage payments of £1,260 said to have been made by the Respondent and his brother from a bank account in their names on the Appellant’s

behalf. It was acknowledged that if the Appellant's case failed i.e. if it was found that he had no beneficial interest in the properties, the debt fell away.

18. Mr Beat obtained his own evidence that the properties were at that time valued at £500,000 for 91–93 CHL and £325,000 for 61 DHL.
19. On 24<sup>th</sup> August 2012 the Appellant applied to annul his bankruptcy (this was to ultimately be unsuccessful).
20. On 11<sup>th</sup> September 2012 it was asserted by the Appellant that the Respondent's request to register a claim was misconceived, and he denied that he owed any money.
21. On 14<sup>th</sup> September 2012 Mr Beat prepared his report in response to the application to annul, and objecting to it.
22. On 18<sup>th</sup> September 2012 Mr Beat's solicitor wrote to the Respondent's solicitor to say that there were ongoing negotiations with the Appellant for sale to him of the Trustee's rights in the properties. Proposals to buy the rights were then made by the Respondent's solicitors.
23. On 18 September 2012 Mr Beat's solicitor wrote to both sides to confirm that he was in negotiations with the Respondent in respect of the sale of the rights in respect of the properties.
24. On 19 September 2012, (in the course of the negotiations), the Appellant's solicitors provided the Trustee's solicitors with a copy of the trial bundle for the ongoing proceedings (judgment was still awaited).
25. On 25 September 2012 Mr Beat's solicitor wrote to both sides, subject to contract, as follows:

“Dear Both

I confirm that The Trustee is willing to assign whatever rights or interests he has in the schedule of properties attached to the highest bidder. The bids must be in the form of a simple offer of one amount in sterling. The withdrawal of any claim or any other contingencies attached to the offer will not be taken into account as part of the offer.

The draft contract for the assignment of his equitable interest is attached. A bid will only be valid for acceptance if the consideration offered is lodged in a solicitor's client account in cleared funds and the solicitor confirms this. The offer must be received by me on or before 4pm on Thursday 27 September 2012.”

26. On 26<sup>th</sup> September 2012 the Appellant's application for an annulment was (initially) struck out.
27. On 27 September 2012) Mr Beat's solicitor wrote to the Appellant as follows;
- “There is substantial risk therefore that unless the asset is assigned by the 1<sup>st</sup> October 2012, its value will be lost.”
28. On 27<sup>th</sup> September 2012 the solicitor acting for the Appellant wrote to Mr Beat's solicitor warning that if he proceeded to sell the interest in the properties he may have acted improperly/negligently.
29. On 28<sup>th</sup> September 2012 a binding contract was entered into, and on 2<sup>nd</sup> October 2012, Mr Beat assigned the Trustee's rights to the Respondent and his brother for a consideration of £55,000.00. Notice of the assignment was sent to the Appellant by the Respondent on 10<sup>th</sup> October 2012.
30. On 26<sup>th</sup> July 2013 Mr Martin KC handed down his judgment on the claim **[2013] EWHC 2296(Ch)**. He found that the two properties had been purchased with the intention that the Appellant would have the beneficial interest and that, but for his bankruptcy, the vesting of the properties in the Trustee in Bankruptcy and subsequent assignment by the Trustee, the Appellant would have succeeded in his claim in relation to the two properties. The Judge held:
- i) That until 1997 the Appellant's sons, the Respondent (and to an extent Arif) were working in their father's business;
  - ii) There was an understanding within the family that 91–93 CHL was owned beneficially by the Appellant even through rental payments for 91– 93 from 1999 onwards were paid out to Elite Carpets and ultimately to the Respondent;
  - iii) Whilst strictly speaking the Appellant's beneficial interest vested in Mr. Beat after his bankruptcy that would not have altered how 91 – 93 CHL was regarded as being held between the Appellant and his sons; and
  - iv) That 61 DHL was held by the Respondent on Trust for the Appellant, that being both understood and discussed between them.
31. The Judge stated:
- “Hidayat asserts that Tarik and Arif understood throughout that he was the true owner of the properties, and that they were acquired - and the charges serviced - primarily using moneys from his business or rents from properties previously acquired. The legal basis of his claim is accordingly a common intention constructive, or a resulting, trust.” (para 5)

And

“The starting point is that the beneficial interests are presumed to follow the legal title, so that the burden is on Hidayat to establish some sort of implied trust: see *Jones v Kernott* [2012] 1 AC 776 at [171]. In order to do so, he must show that the parties' actual shared intentions, whether expressed or to be inferred from their conduct, were that he should have a beneficial interest in the properties (*Jones v Kernott* at [131]) paragraph 6)”

With a few exceptions, I am reliant upon the oral evidence of the parties and their supporting witnesses; and, as will appear below, the quality of that evidence is often far from satisfactory.

And

“Hidayat's evidence was that it was he who decided that each of the seven properties should be purchased; that he put them into the names of one or both of his sons because they were younger and had better English (so that they would have better prospects of obtaining mortgages); that the balance of any purchase moneys not obtained by way of mortgage was paid by him, usually out of the takings of his business or from rent received in respect of others of the properties; that the costs of any repairs were similarly met out of the takings of his business; and that both Tarik and Arif understood that they held the properties on behalf of their father, this being a matter which was discussed between the three of them at the family home and at 61 DHL. In relation to this last point, Hidayat told me that when either CHL or 73 DHL was acquired Tarik and Arif offered to go to the solicitor before they opened the shop, but he refused, saying that they were "as good as gold" (meaning that he trusted them); and he also told me that on many occasions Tarik said to him that if at any stage he felt any doubt they would all go straight down to the solicitor. If I were able to accept this evidence in its entirety, the claim would succeed; but I cannot. Hidayat seemed to me a straightforward witness, so far as his evidence went; but he clearly had a strong sense of grievance, which caused me to treat his evidence with some caution, and - perhaps not surprisingly, given the passage of time - in some respects his evidence was simply inaccurate...

...Hidayat's evidence must be viewed with caution; and I am in general reluctant to accept his evidence unless there is other material to support it.”

32. The Judge found the supporting evidence of Mr Asghar's, the Appellant's solicitor, to be of considerable importance; specifically that it was always clear to him that the properties with which his firm was involved with were owned beneficially by the Appellant, and that his sons were fully aware of this and agreed with it.
33. The Judge was not impressed by the Respondent's evidence that he had built up a business and the properties were purchased from his own funds. The Judge stated:

“On one point, however, it seemed to me that he was plainly not telling the truth..... therefore reject Tarik's evidence about this bank account, and indeed about 61 DHL; and, once again, I find that I must treat his evidence with caution and cannot ordinarily accept it unless it is supported by other material” (paragraph 19).

And

“I am satisfied that the business account opened at National Westminster Bank plc on 25 January 1996 in the name of Tarik and Arif trading as Elite Carpet and Furniture was, until at least the beginning of 1997, a bank account of the business carried on by Hidayat, not by Tarik and Arif. I am satisfied, and so find, that 61 DHL was held by Tarik on trust for Hidayat, that being both understood and discussed between them. I accept the evidence of Hidayat, Mr Asghar and Mr Mahmood in this regard, and I reject the evidence of Tarik, Arif and Sughran that she provided money towards the deposit. To the extent that the presumption of advancement would otherwise apply, it is rebutted by the common agreement and understanding that Tarik would hold on trust for Hidayat.” (paragraph 20)

And

“I am also satisfied, and again so find, that CHL was held by Tarik on trust for Hidayat, that again being both understood and discussed between them; and the presumption of advancement is again rebutted. Where their accounts differ in relation to the process of identification and acquisition of CHL, I prefer that of Hidayat. Again, I accept Mr Asghar's evidence in this respect.” (paragraph 21)

And at paragraph 22; (in respect of the other properties)

“Up until the end of 1996, and possibly for a time in 1997, it seems to me that the position was this. Hidayat was the head of a traditional Pakistani family, was introducing his sons (and in particular Tarik) into the family business, and (following the custom described by Mr Asghar) was beginning to devolve the family wealth onto his sons. In 1997, however, it seems to me that a sea change occurred in the affairs of the family, when Hidayat was adjudged bankrupt. The debt on which the petition was based was one owed to a flooring supplier, which indicates that Hidayat's business was continuing - albeit ultimately unsuccessfully - up until about June 1997. The fact of the bankruptcy also indicates that Hidayat had become unable to maintain his role as head of the family. Both Tarik and Arif gave evidence that their father had become so bound up in his dispute with Mohammed Arshad that he was neglecting the business, and that seems to me a likely explanation of the bankruptcy (although I do not accept that this neglect had any adverse effects until 1997). It is noteworthy that neither Tarik nor Arif was able - or willing - to assist their father avoid bankruptcy, although the amount of the petition debt appears to have been only £7500. It seems to me impossible for Hidayat to suggest that after the bankruptcy his business continued to be the source of payments for the acquisition of future properties: he had no business, or at least no business that was solvent. I consider that the bankruptcy is the origin of Sughran's resentment at Hidayat's failure to perform his duty as husband; and I think that at that time Tarik effectively took over as head of the family. Thereafter, the only relevant business was his and Arif's, Hidayat's having failed. Although it was common ground that Hidayat continued to work to some extent in the business, I find that he was working in Tarik's and Arif's business, not in his own. It seems to me evident that by the time of the acquisition of LA in January 1999 and BR in February 1999 there was no longer an understanding that any property acquired would be held beneficially for Hidayat. It will be recalled that the transfers of both those properties contained a declaration that Tarik and Arif held them on trust for themselves as joint tenants. That is obviously inconsistent with any suggestion that in reality they were held on trust for Hidayat, as Mr Asghar accepted; and, despite the general thrust of his evidence, it seems to me that those documents, which were prepared in his office and must, I think, at least in the case of BR have been seen by him, genuinely reflect the position as it then stood in the family. In relation to LA, I accept Hidayat's evidence that he did some work on that property; but I consider that to be explicable on the basis that he retained an overall interest in the financial wellbeing of the family, and I do not regard it as an indication that he was intended to have a beneficial interest in the property.



23. It follows from what I have said that none of 73 DHL, 33-35 DHL and CR, which were all transferred to Tarik and Arif (or to Tarik alone) after the bankruptcy, was agreed or intended to be held on trust for Hidayat.”

And paragraph 25

“L recognise that it will be of little comfort to Hidayat to realise that, but for his bankruptcy and the subsequent assignment of his interest in 6l DHL and CHL to Tarik and Arif he would have succeeded in relation to those properties. A report provided to Slough County Court by Hidayat's trustee in bankruptcy on 14 September 2012 suggests that those two properties were worth together about f825,000. From the same report, it appears that the amount of unpaid debts, disbursements and costs of the bankruptcy do not exceed f,100,000. I do not know what if anything was paid by Tarik and Arif to the trustee for the assignment, but I rather doubt that it came anywhere near the surplus which, but for the assignment, Hidayat could have expected ultimately to receive, even after the making of adjustments to reflect mortgage payments made after September 1997 by Tarik and rent received by him in respect of the properties. It will be for Hidayat to consider whether or not he wishes to take this matter up with the trustee.”

34. On 6<sup>th</sup> March 2014 a decision was made to accept the proof of debt at which point it was met by payment of 33p in the pound in the total sum of £7,900.20. Given the content of the judgment this was a curious decision.
35. On 25<sup>th</sup> March 2015 Mr Beat was finally released from being the Appellant's Trustee in Bankruptcy. Thereafter the Official Receiver was the Trustee. The Official Receiver took no steps to accuse the Respondent of wrongdoing or to seek any redress.
36. On 1<sup>st</sup> October 2018 the Official Receiver assigned to the Appellant any causes of action that Mr. Beat may have against the Respondent arising from the 2012 assignment.
37. On 1<sup>st</sup> October 2018, the Appellant issued a claim alleging that the Respondent procured the assignment from Mr Beat at an undervalue and that as a result he has lost what would otherwise have been a substantial surplus returnable to him. The Particulars of claim alleged that in breach of fiduciary duty the Respondent had denied the Appellant's beneficial rights in the properties and benefitted at the expense of the

Appellant through the purchase of any rights held by the Trustee in bankruptcy. As regards what was to be referred to as the National Westminster Account it was pleaded:

“18. Further, and in order to obtain standing as purported creditors of the Claimant, the Defendants by their Solicitors wrote to Mr Beat, provided a proof of debt of £23,940 said to represent mortgage payments made by the Defendants on the Claimant’s behalf.

19. The proof was, as the Defendants well knew, in respect of a debt which the Claimant disputed and was subject to rights of set off for claims which the Claimant had against the Defendants. No Trustee acting reasonably and in possession of the relevant facts would have admitted the proof.

### **Procedural history**

38. The Respondent filed a defence to the claim on the merits.
39. The Appellant filed a reply in which fraud was alleged.
40. Both parties made CPR Part 18 requests for further information. In his Part 18 replies the Appellant gave further particulars as to how/why the fair dealing rule was breached.
41. In Part 18 Replies dated 10<sup>th</sup> October 2019 (at no’s (v), (ix), (x), (xv) and (xviii)), the Respondent expressly accepted that he owed a number of duties to the Appellant and/or to the Trustee in Bankruptcy. Specifically the Respondent has accepted that:
  - i) there was a duty on the Respondent to account to the Appellant/Mr Beat for all trust proceeds and property (subject only to any amounts owed to the Respondents and capable of being offset);
  - ii) he owed a common law duty of care to Mr Beat; and
  - iii) at least up until the making of the bankruptcy order, the Appellant had a beneficial interest in the trust, that thereafter the beneficial interest belonged to Mr Beat, that the Appellant had an interest in the residue of the bankruptcy estate and the proof of debt submitted would stand to be set off against sums which would have been accounted for to the Appellant/Mr Beat in the absence of the assignment to the Respondents by Mr Beat in October 2012.
42. In a response dated to 19<sup>th</sup> November 2109 to a request for further information, it was stated:

*Request*

“State whether it is alleged that, before the judgment was delivered in July 2013, the defendants knew that they had a duty to account to the claimant for rent received from any of the properties and, if so, describe the allegations of fact that it is claimed led to such knowledge and which properties are the subject of the allegation.”

“Reply

II. Yes, it is alleged the Defendants knew, and/or ought to have known, that they had a duty to account to the claimant for rent received from the Properties. The Properties were purchased by the Claimant through the retained profits from his businesses. Mortgages were taken out in the name of the 2nd Defendant primarily due to his age; the Claimant had been denied a mortgage for the property at 91-95 Coldharbour Lane. The Defendants made no contribution towards the purchase price for the Properties *and the mortgage was paid from the business takings from the business account*. The Claimant made all the business decisions in respect of the Properties. It was both discussed and understood between the parties that the Properties were held on trust for the Claimant. See further paragraphs 25 to 30 of the Particulars of Claim, paragraphs 20 to 21 and 24 to 25 of the Judgement of John Martin QC and paragraph 8 of the Reply to the Defences.” (italics added)

43. On 26<sup>th</sup> March 2020 an application was made to amend the Particulars of Claim and on 31<sup>st</sup> October 2020 District Judge Wilkinson handed down a judgment allowing the application in part but refusing it in relation to a proposed amendment alleging dishonest assistance.

44. The amended defence set out at paragraph 23(5) that:

“(5) It is averred that, *as any fiduciary or other duties were at the time of the assignment owed by the defendants or either of them to the Trustee and not to the claimant* (and reference is made to paragraph 20 above), the purchase of his said beneficial interests from him was made with his full knowledge. It is therefore denied that the defendants or either of them acted in breach of any such duties as alleged, whether owed to the Trustee or otherwise.” (Italics added)

45. By paragraph 24(5) it was averred that as any duty was owed to the Trustee and “the purchase of the said beneficial interests from him was made with his full knowledge” there was no breach of any alleged duty.

46. The Reply contained the following averments;

“8. The Claimant repeats paragraph 31(3) of his Particulars of Claim. At the time of the 2 October 2012 assignment, the Defendants were aware of and withheld from the trustee, the fact that they held the legal title to the properties on trust for him and/or the Claimant as was subsequently found to be the case by Mr John Martin QC.

9. Had the Defendants disclosed to the trustee the fact that they held the properties on trust for him and/or the Claimant, the trustee would not have accepted the Defendants’ offer of £55,000 for the purchase of the trustee’s interest in the properties because the interest was worth substantially more.

10. In the circumstances, the Defendants acted in breach of trust and in breach of fiduciary duty and have offended against the self/fair dealing rule(s).

11. Furthermore, by failing to disclose to the trustee that the Defendants held the properties on trust for him and/or the Claimant, the Defendants effectively represented to the trustee that they were both legally and beneficially entitled to the properties.

12. The representation aforesaid was made by the Defendants in order to induce the trustee to accept their bid of £55,000. Induced by, in reliance upon and believing the said representation to be true, the trustee accepted the Defendants’ bid for his interest in the properties.

13. The representation was made negligently or fraudulently in that the Defendants were at all material times aware that they held the properties on trust for the Claimant and/or the trustee.

14. Further or alternatively and even absent the 2 October 2012 assignment, the Defendants owed the Claimant ongoing duties as a beneficiary of the trust found to have previously existed between the Claimant and the Defendants and/or as the ultimate beneficiary of the residue of the estate in bankruptcy.”

47. Limitation was raised at paragraph 25 of the amended defence. In the Reply it was averred that the cause of action arose on 2<sup>nd</sup> October that being the date of the assignment. Further or alternatively section 21(1)(a) and/or (b) of the Limitation Act 1980 were relied upon as the Respondent acted fraudulently or in fraudulent breach of trust.
48. On 21<sup>st</sup> May 2021 directions for trial were given by District Judge Wilkinson (the order wrongly sets out the date of 25 November 2021 which was when the order was sent out).
49. On 27<sup>th</sup> September 2021 the Respondent made an application for summary judgment on the basis that the claim had no real prospect of success, alternatively that the claim should be struck out. It was stated that the Trustee was within his rights to assign the

beneficial interest in the Two Properties to the Respondent and that the Respondent did nothing wrong in acquiring the beneficial interest, and so the Appellant's claim was misplaced and had no real prospect of success; and/or that it was an abuse of process to bring the same claim again that was dismissed in previous proceedings against the Respondent

50. The application was supported by a witness statement of the Respondent. It was stated at paragraph 79 that;

“79. Based on the above facts, it is abundantly clear that the trustee's decision to sell his interest in the Properties was an exercise of the trustee's discretion and in compliance with his statutory function under the Insolvency Act to realise C's assets. The trustee acted through solicitors who must be taken to have provided legal advice and support to the trustee. It was the trustee who invited bids from C and Ds. The trustee knew that C and Ds disputed the beneficial ownership of the Properties. The trustee had seen the Order made on 25 July 2012. The trustee weighed up C's strenuous objections to assigning the interest to the third parties, i.e. to Ds. The trustee through Mr Judge explained to C in writing his reasons for proceeding with the assignment. The trustee knew that judgment following the trial of the Original Claim was pending, yet the trustee exercised his discretion to proceed with the assignment. The trustee took advice on the Properties' values. The trustee asked C to provide the statements of case, evidence and any counsel's advice in order to assist him in valuing the interest. The trustee was sent the entire trial bundle for the Original Claim. The trustee decided to invite bids and to proceed with the assignment. In so deciding, the trustee was acting in accordance with his statutory function.”

51. This was met by the Appellant's statement and also by an application to re-amend the Particulars of Claim (supported by a further statement from the Appellant). A breach of the fair dealing rule was raised at paragraph 31 of the amended Particulars of Claim and paragraph 10 of the Reply.
52. On 15<sup>th</sup> July and 20<sup>th</sup> September 2022 a hearing took place before His Honour Judge Dight CBE. Judge Dight struck out the Appellant's claim, finding inter alia that the Respondent did not cause Mr Beat loss and/or that Mr Beat did not rely on the misrepresentations.
53. At the hearings the Appellant had sought permission to re-amend his pleadings which was refused.
54. The Appellant had to apply to re-amend because it was accepted that without re-amendment his pleaded case was unsustainable (see paragraphs 13 and 14 of the

judgment). The Appellant's amended claim was accepted by C's counsel to be "*going nowhere*" (see paragraph 14 of the judgment) and contained what the learned Judge politely termed "*problems*".

55. The proposed re-amendments sought to add the following details to the particulars of claim:
- i) Particulars of duties relating to the duty of loyalty/ the fair dealing rule and breach of the same breaches which were either expressly or in substance already contained in the Appellant's part 18 further particulars dated and the reply to defence.
  - ii) Particulars as to why the Respondent's breach of trust/fiduciary duty was alleged to be deliberate and fraudulent.

### **Judgment**

56. As His Honour Judge Dight CBE set out at paragraph 2 of his judgment the hearing was split over two days as he allowed Counsel for the Appellant to draft further amendments to the Particulars of Claim. At the second part of the hearing the focus was on the proposed further amendments which contained "extensive further allegations which are said to arise out of some somewhat narrow facts".

57. The Judge found that despite the proposed amendments which "characterises the claim as breaches of the self-dealing rule or the fair dealing rule", the Appellant had:

"in my view found it impossible to find a sustainable claim."

58. The Judge set out that:

- (a) there was an amendment to the prayer to seek a declaration that the Respondent had acted in breach of the fair dealing rule in acquiring the beneficial interest in the properties (the existing prayer sought a declaration that the Respondent held the properties on trust for the Appellant which was an allegation which it was conceded "did not go anywhere");
- (b) The way that the claim was put:

"15. ...is to be found in para.31 of the proposed re-amended particulars of claim. He says that the defendants had, in breach of trust and in breach of fiduciary duty, denied the beneficial interest of the claimant and Mr Beat and failed to make proper disclosure to Mr Beat, provided a false proof of debt to enhance their negotiating position in bidding for the property, had benefitted at the expense of the claimant by making a bid of £55,000 for the trustee's interests, which was at a considerable undervalue and caused Mr Beat to transfer (to them) his causes

of action against them to avoid any proper enquiry of his rights against them and, lastly, failed to account for rent received for the letting of the properties.”

- (c) The allegations against the First Defendant were unsustainable.
- (d) That  
“Mr Beat was fully aware of the litigation and the issues within it at the point of sale of his interests in the property and his causes of action in respect of them and (sic) when he compromised any claims against the Defendants in respect of the properties (paragraph 17).
- (e) That Mr Beat has “acquiesced” in any breach.  
“19...It was entirely a matter for the trustee in bankruptcy to decide how to deal with the property. He was advised at the time by valuers and solicitors. The evidence shows that he knew the context of the in which he was making his decisions. The reality is that insofar as there is an argument that the second defendant was in potential breach of his duties Mr Beat, who knew what was going on, effectively acquiesced in any breach there may have been and compromised any related claim.”

And at paragraph 72:

“Those steps necessarily had the effect that he is to be taken ultimately to have acquiesced in any alleged breaches of duty owed to him and compromised any claims which he might have had against the defendants. After conclusion of the transaction he could not have pursued any alleged claims against the defendants.”

- (f) That as Mr Beat knew all relevant facts and was fully advised;

“20. Insofar as causation may be an issue, there is no evidence on which the claimant could possibly show on the original pleading that the defendants caused Mr Beat loss.”

His main focus had been on the economics of the situation.

- (g) Mr Beat was fully aware of the potential for a claim for rent if a beneficial interest was found (paragraph 21).
- (h) Mr Beat was forcing the pace of the negotiations (paragraph 55).
- (i) The Appellant objected to the proposed sale; but issued no proceedings to stop it (paragraph 57).

- (j) The factual basis for the allegations for breaches of the fair dealing rule and fraudulent misrepresentation were “surprising” and “thin”. They relied on the falsity of the proof of debt which the Trustee accepted (having full knowledge that it was disputed; see paragraph 50) being a decision that the Appellant had not challenged (see paragraph 23). As regards the Trustee’s approach to the debt he stated

“52. In the circumstances it is not open to the claimant to assert, with any prospect of success, either that the trustee in bankruptcy was not aware of the dispute or that he was misled in any way as to what was going on. Whether or not the statements that were made were true, as to which I cannot and do not form any view, the evidence shows that it had no impact on the trustee’s decision-making, who retained and consulted with relevant professional advisors throughout.”

- (k) The new particulars alleged a breach of trust in respect of certain monies in a National Westminster account; this being the source of the monies to pay the mortgage payments said to constitute the debt (paragraph 24 and 25). The Respondent argues that this claim should have been made in the original claim heard by Mr Martin QC. It was also the Appellant’s argument that the respondent used the false debt to prevent him being able to annul the bankruptcy order (this only becoming an issue once the debt was raised by the Respondent).
- (l) He expressly recognised that he was not conducting a mini trial (paragraph 35).
- (m) The Appellant would have “very considerable credibility problems to overcome if he were to give evidence at trial” (paragraph 41).
- (n) There was no evidence as to what had caused the annulment application to fail;

“63...It was suggested in the course of the hearing before me, by reference to the pleadings, that the defendants were instrumental in the annulment application not being dealt with but there is, again, an absence of reality in that assertion. There is no material that supports the contention that the defendants were in any way instrumental in preventing the annulment application from concluding and, indeed, there is no evidence before me as to how the application for the annulment was ultimately concluded, a matter which must be within the knowledge of the claimant but which was not explained to me.”

- (o) the Appellant could be in no better position than then the trustee in bankruptcy..



59. Judge Dight CBE addressed the legal tests to be applied on the applications as follows:

“69...I ask myself, for the purposes of CPR 3, whether the claimant has no (reasonable) grounds for bringing the pleaded causes of action, said formerly to have been held by the trustee, and separately, for the purposes of CPR 24, whether there is no real prospect of success in the proposed amended claim, reminding myself of what Lord Hobhouse said in *Three Rivers District Council v Governor and Company of The Bank of England* [2001] UKHL 16 at para.158, that:

“The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality.””

60. He then found as follows in respect of the National Westminster bank account

“70. Focusing on the current proposed draft version of the particulars of claim, I note that the claimant’s counsel has said in the course of submissions, quite frankly, that the current iteration of the claim against the defendants depends on the alleged constructive trust in respect of the funds in the NatWest account. On that constructive as opposed to express trust the claimant has sought to create a whole case which, in my judgment, the meagre factual allegations pleaded by him cannot bear. He is grasping at straws.

71. The fact that the defendants, taking the claimant’s case at face value, were constructive trustees of the monies in the NatWest account does not, in my judgment, mean that they were arguably in breach of either the fair dealing rule or the self-dealing rule in acquiring the properties which lie at the centre of this dispute as opposed to the funds in the NatWest account. They are separate potential trusts. The claimant’s argument based on the NatWest account simply cannot work, in my judgment, as a hook on which to claim ownership of or breach of duties in respect of the properties.”

61. He also stated that this separate allegation (that the Respondent misrepresented the position about the account and/or deliberately put in a false proof ) “adds nothing” as there is no evidence that the trustee placed any reliance on the alleged non disclosure or misrepresentations.

62. In respect of the purchase of the beneficial interest the Judge found that;

“72. In any event on scrutinising the evidence, the claimant’s case is speculative and, in my judgment, there is an absence of reality in the claimant’s proposed new case for the following reasons. As I have shown via my laborious trawl through the facts, the trustee in bankruptcy was at all material times advised by valuers and specialist solicitors. He had full knowledge of the first claim. He was aware of the claimant’s challenges to the defendants’ bid and their proof of debt. It was he who

started the process to sell the properties in the light of his knowledge. It was he who, for whatever reason, was, in my words, playing hardball during the negotiations and drove the pace of the negotiations and set a deadline for the sale. Those steps necessarily had the effect that he is to be taken ultimately to have acquiesced in any alleged breaches of duty owed to him and compromised any claims which he might have had against the defendants. After conclusion of the transaction he could not have pursued any alleged claims against the defendants.”

63. He stated that it was fanciful to suggest that the Trustee would have taken another course and put the properties on the open market if he had any further information than that which he already had. (paragraph 74)
64. As regards the res judicata argument raised by the Respondent was concerned, the exploration of the beneficial ownership of the monies in the National Westminster account and the pursuit of a duty to account belonged in the original action and fell within the wider doctrine of res judicata. It arose out of the same facts.
65. He stated that the proposed amendment was abusive and that the real claim was against the Trustee. The current claim was “speculative “and “clutching at straws”. The Claimant had a history of changing his position in order to try and get back to the same objective and was looking around “for something to hold onto to keep this claim afloat” without pleading it properly and without any substance in the allegations. Permitting the amendments would generate considerable delay and expenditure as the parties went through disclosure and witness statements again, it was to be borne in mind that the case was “ready for trial in June”. In the exercise of his discretion, he would not allow amendment as it was an abuse of process.

### **Grounds of appeal**

66. There were ten grounds of appeal; nine are still pursued.
67. In his skeleton argument Mr Asghar set out the grounds/issues as follows:
  - i) Ground 1 - Irrelevant matters - Was the Judge wrong to find there was no evidence that the Respondent caused the Appellant’s Trustee in Bankruptcy loss or that he relied on his misrepresentations?
  - ii) Ground 2 - Causation – Did the Judge apply the wrong test in terms of causation?
  - iii) Ground 4 – Did the Judge apply the wrong test in considering the fair dealing rule?
  - iv) Ground 5 – Reasons – Did the Judge fail to give proper reasons as to why the Appellant could seemingly resile from admissions made, why the claim was said to be abusive, and why costs alone meant the re-amendment should not be granted?

- v) Ground 6 – Acquiescence- Did the Judge err on the issue of acquiescence, particularly where fraud/lack of disclosure by a fiduciary is concerned?
- vi) Ground 7 – Mini trial - Was the Judge wrong to find the trustee in bankruptcy compromised his claims?
- vii) Grounds 8 and 9 – Was the Judge wrong in striking out the claim and/or refusing the amendment?
- viii) Respondent’s notice - Should the Judge’s decision be upheld on the additional ground that the claim is time barred by virtue of s.21 (3) of the Limitation Act 1980 (“the 1980 Act”) or is there no limitation period applicable by virtue of s.21 (1) or s.32e of the 1980 Act?

68. The reality is that grounds 1, 2, 4 and 6 overlap and largely collapse into one.

69. Mr Asghar then expanded upon the grounds as follows:

**Ground 1**

70. The Judge considered irrelevant matters; specially

- (i) that there was no evidence of loss caused to Mr Beat and/or that Mr Beat relied on the representations. The sole issue is whether the Respondent was in breach of the fair dealing rule by reference to their transaction (it was not the Appellant’s case that Mr Beat’s was not aware of the dispute rather that the Respondent should have disclosed the Appellant’s interest and not denied it).
- (ii) The A’s inconsistent knowledge of bankruptcy was irrelevant.

**Ground of appeal 2 – (permission refused and renewed).**

71. The Judge held that the Respondent did not cause loss and /or he did not rely on the misrepresentations. However, the relevant equitable remedies ensure the fiduciary does not retain the profit he/she made, and are not necessarily to compensate the beneficiary for a loss. Causation of loss does not matter. It is trite law that a fiduciary liability to account does not rely on any notion of causation.

72. The fair dealing rule imposes stringent liability as a deterrent. The focus is on the conduct of the fiduciary as opposed to the hypothetical situation as to what would have happened had the fiduciary not acted in breach of duty.

73. A fiduciary may not place himself in a position of conflict or make an unauthorised profit, at least without full disclosure of all relevant facts. If they do, they are accountable, whether or not the beneficiary suffered any loss is altogether irrelevant. It is therefore trite law that a fiduciary's liability to account does not depend on any notion of causation. It is sufficient that the profit falls within the scope of his duty of loyalty to the beneficiary; per Arden LJ in **Murad v Al-Saraj** [2005] EWCA Civ 959.

**Ground of appeal 3 (permission refused and renewed)**

74. The Judge failed to take into account relevant matters; specifically:
- (a) that it was the Respondent who initially wrote setting out a willingness to buy;
  - (b) whether the Respondent could properly seek an assignment given that his stance was such that he were in breach of trust.
  - (c) the admissions that there was a duty to account.

#### **Ground of appeal 4**

75. The Judge wrongly placed the burden on the Appellant and wrongly focused on the actions of Mr Beat rather than asking whether the Respondent had taken advantage of his position and acted in breach of the fair dealing rule. It is for the Respondent to show that he did not breach the fair trading rule and that he had given full disclosure to the beneficiary and that the transaction was fair and honest.
76. It matters not if Mr Beat had advice or indeed may not have acted differently (which is not accepted). The simple question is whether the Respondent put himself in a position of conflict and failed to make disclosure of all relevant facts.
77. The Judge fell into error in finding that the Respondent had nothing more to disclose; he should have disclosed that the beneficial interest belonged to the Appellant.
78. The Judge also erred in finding that the monies in the National Westminster account were not related to the two properties as the monies from that account ended up in the equity.

#### **Ground of appeal 5**

79. The Judge failed to give proper reasons for striking the claim out. Specifically;
- a. There was no adequate consideration of the Appellant's case on fair dealing and whether this had a realistic prospect of success.
  - b. The only reason he gave why there had been no breach of the fair dealing rule was acquiescence.
  - c. The judge failed to deal with the issue of the duty of the respondent to inform the Mr Beat of the true position re the beneficial interest.
  - d. Also the Judge did not deal with the Respondent's express admission that duties were owed (admissions in the Part 18 reply),
  - e. The Judge did not say why the additional costs would be enough to refuse an amendment.

- f. The Judge failed to say why the proposed amendment was abusive or why the Appellant was seeking the same relief when the facts relied upon only arose after the trial.

### **Ground of appeal 6**

80. The Judge erred in finding acquiescence on the part of Mr Beat. There is no role for acquiescence if fraudulent breach of trust. The fact of the sale cannot be acquiescence without more; the issue is whether there was full disclosure by the Respondent.

### **Ground of appeal 7 (permission refused and renewed)**

81. The issue of acquiescence was a fact sensitive matter for the trial judge. It was impermissible to make findings on a disputed factual matter in a summary manner on a strike out application. In doing so he in fact conducted a mini trial. He used perceived inconsistencies against the Appellant without giving him the opportunity to respond such as would be afforded at trial.
82. The Judge was also wrong to find at that Mr Beat compromised his claims, he did not compromise legal proceedings (at least in the sense of a settlement of a claim) so that it bars these proceedings, he assigned his interest in the Two Properties, without full disclosure being made to him. The Respondents needed to disclose
- (a) The beneficial interest.
  - (b) The Nat West account.
83. If the fair dealing rule is breached, the claim succeeds. The assignment without full knowledge does not prevent a claim for breach of the fair dealing rule.

### **Ground of appeal 8;**

84. There was an obviously arguable claim given the (admitted<sup>1</sup>) duties owed; and taken at its highest the claim could succeed. Also it was not a repeat of the first claim (as it covered events post trial) or an abuse of process.
85. The findings about the Appellant's knowledge of bankruptcy did not detract from the cause of action.

### **Ground of appeal 9**

86. The extra costs of the amendments should not have been enough alone to justify their refusal.

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<sup>1</sup> From which they should not have been allowed to resile

87. The Learned Judge was wrong in law as regards the fair dealing rule and acquiescence and this vitiated the decision making process. He could only have properly exercised his discretion differently.

### Respondents submissions

88. Mr Giles submitted that with the benefit of professional legal advice the Appellant's Trustee in Bankruptcy decided that, pursuant to his statutory function, he would offer his interest in the two properties to the highest bidder between the Appellant and the Respondent. The Respondent followed the bidding rules laid down by the trustee in bankruptcy and his bid was the highest bid. Thus, the Respondent purchased the Trustee's interest in the Properties. The Appellant sought to attach to those simple facts an elaborate and unrealistic claim that by so acting the Respondent was in breach of trustee duties owed to the trustee in bankruptcy such that the trustee in bankruptcy had a claim against the Respondent which the Appellant had taken an assignment of. That claim lacked reality, had no real prospect of success and was rightly struck out/dismissed. The Appellant had no other viable claim against the Respondent.
89. It was unrealistic for Appellant to claim that by the Respondent accepting the Trustee's invitation to bid for his interest in the Properties there was breach of trust. As the judge said in paragraph 72 of his judgment:

*“As I have shown via my laborious trawl through the facts, the trustee in bankruptcy was at all material times advised by valuers and specialist solicitors. He had full knowledge of the first claim. He was aware of the claimant's challenges to the defendants' bid and their proof of debt. It was he who started the process to sell the properties in the light of his knowledge. It was he who, for whatever reason, was, in my words, playing hardball during the negotiations and drove the pace of the negotiations and set a deadline for the sale. Those steps necessarily had the effect that he is to be taken ultimately to have acquiesced in any alleged breaches of duty owed to him and compromised any claims which he might have had against the defendants. After conclusion of the transaction he could not have pursued any alleged claims against the defendants.”*

Put simply he went into the transaction with his eyes wide open.

90. The Judge considered the Appellant's case as set out in the proposed re-amended Particulars of Claim and fully appreciated that the Appellant's case was based on alleged breach of the fair dealing rule and fraudulent misrepresentation (see e.g. paragraph 14, 15, and 22 to 25 of the judgment). However, the Trustee well knew that the Appellant was claiming a beneficial interest in the Properties, and that the Respondent was the mere legal owner of the properties. He also knew that this claim to an interest in the Properties was liable to be dismissed for want of title unless the Appellant obtained an annulment of his bankruptcy or assignment of the cause of action. He had requested and been provided with the entire trial bundle and requested

Counsel's advices, no doubt for the purposes of understanding the dispute between the parties.

91. The Trustee obtained his own valuation of the properties and had access to his own independent legal advice in the form of Mr Judge his solicitor. There was no realistic basis for not assuming that the Trustee had carefully weighed up all the circumstance and what was the best course of action to take in the exercise of his statutory function and the discretion given to him by section 305 Insolvency Act 1986.
92. The documentary evidence as to what transpired between the parties and the Trustee was as complete as it would be if the matter went to trial. The facts of what transpired are clear. The court was in a position to consider all the circumstances. The Appellant had not served any evidence from the Trustee or the Official Receiver to the effect that he or she considered that, in deciding to act as they did, either were in some way disadvantaged or taken advantage of by the Respondent or that they considered that they were in a position to accuse the Respondent of a breach of trust and if so on what grounds.
93. Assuming the Appellant was correct in his case that Respondent owed trustee duties to the Trustee (when striking out the claim, the Judge did not rely on the Respondent not owing the Trustee any duties; rather the Judge dealt with the matter on the footing that duties were owed) the evidence shows that the Trustee and the Appellant concurred in the sale of his vested interest to the Respondent. Therefore, the Appellant's case that the Respondent breached the fair dealing rule had no realistic prospect of success.
94. The Appellant's claim existed, if at all, was against the Trustee. He had sued the wrong party.
95. The Judge's finding in paragraph 72 of his judgment is plainly correct.

“Those steps necessarily had the effect that he is to be taken ultimately to have acquiesced in any alleged breaches of duty owed to him and compromised any claims which he might have had against the defendants. After conclusion of the transaction he could not have pursued any alleged claims against the defendants.”

96. As for the National Westminster monies the Judge found that;

“The fact that the defendants, taking the claimant's case at face value, were constructive trustees of the monies in the NatWest account does not, in my judgment, mean that they were arguably in breach of either the fair dealing rule or the self-dealing rule in acquiring the properties which lie at the centre of this dispute as opposed to the funds in the NatWest account. They are separate potential trusts. The claimant's argument based on the NatWest account simply cannot work, in my judgment, as a hook on which to claim ownership of or breach of duties in respect of the properties.”

97. The Judge was correct to say that the issue of beneficial ownership of the monies in the National Westminster account and of a duty on Respondent to account for those monies, belonged to the original claim tried by Mr Martin KC. It arose out of the same disputed transactions. The Judge was correct to hold that the issue of whether the respondent was constructive trustee of the monies held in the National Westminster account was caught by the wider doctrine of *res judicata* as explained by Sir James Wigram V-C in **Henderson v Henderson** (1843) 3 Hare 100.

### **The Law**

98. Mr Asghar set out the relevant legal principles in relation to the duty of a fiduciary in his most helpful skeleton. Mr Giles took no issue with what he had set out.
99. Where a fiduciary contracts with his principle, the fiduciary is by nature of the transaction seeking the acquiescence of the beneficiary to what would otherwise be a breach of trust in the trustee acquiring trust property. It is a well established principle that the transaction is liable to be rescinded unless the fiduciary can positively prove that the principal consented to the adverse interest and that disclosure was made of all facts material to the principal's decision (see See Snell's Equity 15-007)
100. In **Tito v Waddell** (No.2) [1977] Ch 106 at [241] the Megarry V-C set out that beneficiaries can set the transaction aside unless the trustee can show that:
- i) They have not taken advantage of their position;
  - ii) They have made full disclosure to the beneficiary;
  - iii) The transaction is fair and honest.
101. This rule, which has its origin in the principle that equity is astute to prevent a trustee from abusing his position or profiting from his trust (the shepherd must not become the wolf), is known as the fair dealing rule and, importantly, the onus is on the trustee to show compliance with the fair dealing rule. The Trustee must establish that agreement with the concurring beneficiary was reached on full disclosure of material facts. As is set out in Lewin on Trusts (46-043)
- “There must be no suppression of the truth or suggestion of a false statement, and the beneficiary must be honestly acquainted with all material circumstances of the case.”
102. The beneficiary's knowledge of the transaction alone does not amount to acquiescence, or at the least informed acquiescence, unless the fiduciary has disclosed all material facts which might reasonably affect the concurrence of the beneficiary.
103. A fiduciary's liability to account does not depend on any notion of causation. It is sufficient that the profit falls within the scope of his duty of loyalty to the beneficiary. Arden LJ made this point in **Murad v Al-Saraj** [2005] EWCA Civ 959, [2005] WTLR



1573 at [57] [74]-[76] by reference to the judgment of Morritt LJ in **United Pan-Europe Ltd v Deutsche Bank AG** [2000] 2 BCLC 461:

"If there is a fiduciary duty of loyalty and if the conduct complained of falls within the scope of that fiduciary duty as indicated by Lord Wilberforce in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 then I see no justification for any further requirement that the profit shall have been obtained by the fiduciary "by virtue of his position". Such a condition suggests an element of causation which neither principle nor the authorities require. Likewise it is not in doubt that the object of the equitable remedies of an account or the imposition of a constructive trust is to ensure that the defaulting fiduciary does not retain the profit; it is not to compensate the beneficiary for any loss. Accordingly comparison with the remedy in damages is unhelpful."

104. As Arden LJ stated equity imposes this stringent liability on a fiduciary as « a deterrent pour encourager les autres »
105. In **Attorney-General v Blake** [2001] 1 AC 268 at 280 Lord Nicholls also said:

“Equity reinforces the duty of fidelity owed by a trustee or fiduciary by requiring him to account for any profits he derives from his office or position. This ensures that trustees and fiduciaries are financially disinterested in carrying out their duties. They may not put themselves in a position in which their duty and interest conflict. To this end they must not make any unauthorised profit. If they do they are accountable. Whether the beneficiaries or persons to whom the fiduciary duty is owed suffered any loss by the impugned transaction is altogether irrelevant.”

### **Analysis of the grounds**

106. The correct approach when considering the two applications made by the Respondent and also the application to amend made by the Appellant was to start with the relevant legal tests.
107. In respect of the power to strike out CPR 3.4 provides as follows;

“...

(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings”

108. Practice Direction 3A provides

“**1.2** The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):

...

(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.

**1.3** A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded.

..

**1.5** A party may believe they can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the interpretation of a document). In such a case the party concerned may make an application under rule 3.4 or apply for summary judgment under Part 24 (or both) as they think appropriate.”

109. Both grounds CPR 3.4(2)(a) and (b) cover a statement of case which contains claim which is unsustainable or is “unwinnable” in law. However the Court must be certain that the claim will fail which cannot be the case if the relevant legal principles, or their application to the facts of the case (taking the Claimant's case at its highest) are to any significant extent uncertain.

110. An application under CPR 3.4 should be brought as early in the proceedings as possible.

111. In respect of summary judgment CPR 24.3 provides:

“**24.3** The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—

(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

112. As Lewison J (as he then was) set out in **Easvair Ltd -v-Opal Telecom** [2009] EWHC 339(Ch) the Court must consider whether the claim or defence has a realistic as opposed to fanciful prospect of success (the overall burden being on the party seeking summary judgment). In answering this question, the Court must not conduct a mini trial. As Lewison J stated:

“...it is not uncommon for an application under 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 the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.”

113. As Chief Master Marsh observed in **Commerz Real Investmentgesellschaft mbh v TFS Stores Limited** [2021] EWHC 863 (Ch) quite where the boundary lies between a point with which it is acceptable for the court to deal on a summary basis, and one that is unsuitable, is not easy to draw. As the Chief Master also correctly stated the court regularly deals with points of law and of construction of real difficulty on the hearing of an application for summary judgment. However the Court must always have carefully in mind that it has not had the benefit of the full trial process.

114. The next step in the process should have been to consider the extant pleadings.

115. The Appellant had set out the that the claim was:

- (a) That the Respondent had acted in breach of fiduciary duty and the fair dealing rule as he had failed to disclose the matters which Mr John Martin KC found to be the case, specifically that he knew that he held the properties on trust for the Appellant (see paragraph 31-32 of the particulars of claim and paragraphs 8-10 of the reply)
- (b) That the Respondent negligently or fraudulently represented that he was the legal and beneficial owner of the properties.
- (c) The proof of debt was, as the Respondent knew, in respect of a debt which the Appellant disputed (particulars of claim paragraphs 18,19 and 31) and this prevented the Appellant purchasing the assignment (reply paragraph 2).
- (d) That what was sought (as set out in the prayer) included a declaration that the Respondent held the property on trust for the Claimant and/or the Trustee in bankruptcy absolutely.

116. As I have set out Part 18 Replies dated 10<sup>th</sup> October 2019 (at no's (v), (ix), (x), (xv) and (xviii)), the Respondent expressly accepted that he owed a number of duties to the

Appellant and/or to the Trustee in Bankruptcy. Specifically the Respondent has accepted that:

- iv) there was a duty on the Respondent to account to the Appellant/Mr Beat for all trust proceeds and property (subject only to any amounts owed to the Respondents and capable of being offset);

117. The extent to which the existence of a duty was considered at the hearing is unclear to me. His Honour Judge Dight CBE made reference to the Respondent arguing that:

“none of the alleged duties arose out of the facts relied on or were owed by the Defendants to the Trustee in Bankruptcy; that as a matter of undisputed...(fact)...all claims for the alleged breaches of trust vested in the trustee in bankruptcy were acquiesced in by him and compromised in full knowledge of the circumstances....”

118. His Honour Judge Dight CBE did not directly address the existence of a duty and it appears that he impliedly accepted that it was arguable that the Respondent was subject to one and concentrated upon the argument as to the Trustee in Bankruptcy’s acquiescence in any alleged breach. As Mr Giles conceded in his skeleton argument

“When striking out the claim the Judge did not rely on D not owing the TiB any duties. The Judge dealt with the matter on the footing that the duties were owed. The Judge did not permit D to resile from admissions or find that admissions could not stand.”

119. Given this background and that Mr Giles’s skeleton centred around a submission that;

*“Assuming C was correct in his case that D owed trustee duties to the TiB, the evidence shows that the TiB and C concurred in the sale of his vested interest to D. Therefore C’s case that D breached the fair dealing rule had no realistic prospect of success.”* (emphasis added),

and also that the Respondent’s notice made no reference to the lack of a duty as an additional ground upon which the order should be upheld, I was somewhat surprised that it was Mr Giles’ oral submission on appeal that the Respondent was under no fiduciary duty before/at the time of the assignment.

120. Mr Giles argued that no duty existed as;

- (a) the judgment of Mr Martin KC was not available as at September 2022 and the duty only arose once the facts had been determined by the Court as the “decision could have gone the other way”;

and/or

- (b) Not every constructive trust gives rise to all the fiduciary obligations and disabilities of a trustee.

121. I have little hesitation in finding that, at the least, there is a very good prospect that any Court will find that these arguments are wrong. It was the finding of Mr Martin KC that a trust had existed since purchase of the two properties and that this was “understood and discussed” between the Appellant and Respondent. He rejected the Respondent’s evidence. So given the Judge’s findings the Respondent must have appreciated from the outset that he held the two properties on trust for his father (and it was wrong of him to have asserted otherwise within the proceedings). All the judgment did was to declare that a trust had existed since the mid 1990s; it did not create it. I do not see how it can be realistically argued that it was only when a Judgement was handed down finding that he had wrongly advanced a case that no trust existed that duties arising from the trust arose.

122. In support of the second element of his submissions Mr Giles relied upon the judgment of Millet J (as he then was) in **Lonrho-v-Fayed** [1992] 1 WLR 1;

“...A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. The representee may elect to avoid it, but until he does so the representor is not a constructive trustee of the property transferred pursuant to the contract, and no fiduciary relationship exists between him and the representee: see *Daly v. Sydney Stock Exchange Ltd. (1986) 160 C.L.R. 371, 387–390*, per Brennan J. It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim. But the representee's election cannot retrospectively subject the representor to fiduciary obligations of the kind alleged. It is a mistake to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee. Even after the representee has elected to avoid the contract and reclaim the property, the obligations of the representor would in my judgment be analogous to those of a vendor of property contracted to be sold, and would not extend beyond the property actually obtained by the contract and liable to be returned.”

123. However I fail to see how the position in relation to a voidable contract has any application to the facts of this case which concerned a trust which was found to have been in existence (and known by the Respondent to have been in existence) from the date of purchase of the relevant properties. It is an entirely different situation. As the Court of Appeal recognised in **Paragon Finance PLC -v-Thakerar & Co** [1999] 1 All ER 400 at 408-409 and **JJ Harrison (Properties) Ltd -v-Harrison** [2001] EWCA Civ 1467 (paragraphs 28-29) there are two types of constructive trust. The first is where a party has assumed the duties of a trustee through a lawful transaction (as was found to be the case here by Mr Martin KC) and the second category is where the trust obligation

only arose as a direct of the unlawful transaction which is being impeached (such as was argued in Lonhro).

124. I reject Mr Giles' submission that His Honour Judge Dight CBE should have found that no duty existed and turn to breach.
125. Throughout the Judgment reference was made to the alleged breach of the Respondent. During submissions Mr Giles conceded that if the Respondent owed a fiduciary duty to the Appellant as at the time of the October 2012 assignment then it was at least arguable that the fair dealing rule had been breached. However it was his submission that the Trustee in Bankruptcy was fully aware of the potential findings of Mr Martin KC and in deciding to proceed to the assignment had acquiesced in any breach.
126. In my judgment Mr Giles' submissions before the Judge and on appeal failed to deal adequately with the nature, extent and effect of the breach which occurred before the Trustee in Bankruptcy accept the offer to purchase the assignment. Mr Giles was keen to concentrate on the indisputable fact that at the time the assignment was entered into Mr Beat well knew of the rival contentions of the parties in the trial which had taken place before Mr Martin KC and that, in exercise of his statutory powers, he sought to achieve what he considered the best commercial outcome for the creditors. This he characterised as acquiescence in any breach of trust; a characterisation which was accepted and formed the main pillar of the conclusions of His Honour Judge Dight CBE. Mr Giles suggested that it was fanciful to suggest that a court would allow Mr Beat to set aside the transaction that he entered into with "full knowledge" of all the relevant arguments and circumstances and that the Appellant, which now had the assigned rights, could be in no better position than Mr Beat.
127. It is correct that Mr Beat knew of the issues in the trial and that a reserved judgment was awaited. He was also aware of the fact that it was the order of Mr Martin KC made on 25<sup>th</sup> July 2012 that:

"if the Claimant has not procured either annulment of the bankruptcy of the assignment of the cause of action concerning...(the properties)...by 1<sup>st</sup> October 2012 the claims herein to those properties will fail for want of title..."
128. It would have been a very reasonable expectation that if the Appellant could not comply with the order that the action would fail without the judgment descending (as it was in fact to do) into detailed findings as to the existence of a trust and concluding that, but for a want of title, the Appellant would have succeeded in his claim in the respect of the two properties the subject of this claim. If the action failed without a detailed determination of the issue then the pragmatic reality would be that the trustee in bankruptcy would have no beneficial interest (or potential right to a beneficial interest) with any realistic value. Not surprisingly the Trustee in Bankruptcy forced the pace (as the Judge found) to achieve the sale of any rights to a beneficial interest before, in effect, it was likely to disappear. His options were limited given that the trial had already taken place and only judgment was awaited and against this background he entered into the assignment.

129. Mr Giles's submissions repeatedly returned to the argument that the Trustee in Bankruptcy was fully informed of the issues before the Judge at the trial, had taken his own legal advice, had statutory powers to act and faced with a very difficult situation reached a binding agreement that he could now later set aside. However during submissions it was notable that he was somewhat reluctant to engage with the question of who put the Trustee in the difficult position he was in. This is because the answer could only be that it was the Respondent (save for any issues arising out of the Appellant's failure to disclose the bankruptcy within the action).
130. As I indicated during submissions given the factual findings of Mr Martin KC the analysis must surely be ( or at least must be taken to be for the purposes of the applications before His Honour Judge Dight CBE) that although he well knew that he held the properties on trust for his father the Respondent wrongly asserted in his defence of the claim that he did not (as opposed informing the Trustee in Bankruptcy that the trustee had a beneficial interest in the properties). He created a dispute that he knew should not have existed. When the Trustee came back into the fray, he then put in a proof of debt which, on the findings of Mr Martin KC, related to sums paid from an account which he knew contained sums he held on trust for his father. Having created this state of affairs the Respondent then took advantage of his position and put in an offer to purchase any right that the Trustee in bankruptcy had which was neither fair or honest. If this analysis is considered against the clear principles in the authorities to which I have already referred, then it is clearly arguable that everything that subsequently occurred can be set aside. It is an established maxim of equity that a wrongdoer should not be allowed to profit from his own wrong. Consideration of issues of causation of the extent of the beneficiaries loss should play no part in the approach of the court which should focus on the breach by the fiduciary.
131. I accept Mr Asghar's submission that the Judge's analysis failed to engage with the existence and effect of the Respondent's breach, rather proceeding directly to consider the issue of the Trustee in Bankruptcy's acquiescence in the breach and in so doing he fell into error. The Appellant had a strong case a fortiori an arguable one with a realistic prospect of success that:
- (a) The Respondent could not show (the burden being on the Respondent) that he had not taken advantage of his position, that he had made full disclosure (as he had clearly not informed the Trustee in Bankruptcy of what he knew to be the true position i.e. that he held the properties on trust and had no beneficial interest in them) and that the transaction was fair and honest (it being anything but as he had wrongly created a dispute and in so doing had suppressed the truth);
  - (b) The Respondent obtained profit by virtue of his position (although it this is not a prerequisite to seeking a remedy).
  - (c) As a result of (a) and (b) above the assignment is liable to be rescinded unless the fiduciary can positively prove that the beneficiary consented to the adverse interest having had the benefit of full disclosure of all facts material to the beneficiary's decision; disclosure of  
  
"every circumstance of which he is aware, or which in his capacity as agent it would be his duty to ascertain, which is of

such a nature that it might reasonably affect the acquiescence of the principal, upon treaty for sale”<sup>2</sup>

- (d) Given that (as Mr Martin KC found) the Respondent knew that he held the property on Trust and failed to inform the Trustee in Bankruptcy of this fact, he had failed to make full and adequate disclosure of matters which would obviously affect acquiescence. It is wholly wrong to proceed on the basis that the Respondent had to await the judgment to be told what the Judge found he already knew. Merely disclosing that there was a dispute (which he had wrongfully created) could not be enough of itself as this would mean that he benefited from his own wrongful conduct in creating the dispute. It is fanciful to suggest that if the Trustee in Bankruptcy had been informed (as he should have been) that he held the full beneficial interest in the properties that he would have proceeded as he did. In any event the Respondent’s liability to account does not depend on any notion of causation; it is sufficient if the profit lay within the scope of the fiduciary’s duty; which it clearly did.
132. I also accept the submission that the Judge fell into error in finding the fact that the Trustee in Bankruptcy was “fully aware of the litigation” and “knew the context” axiomatically amounted to him having full and adequate disclosure of matters which would obviously affect acquiescence and that the contrary was obviously unarguable. In my judgment the Judge was wrong to hold that the Trustee in Bankruptcy’s knowledge “necessarily had the effect that he is taken ultimately to have acquiesced in any alleged breaches of duty owed to him and compromised the claims which he might have against the Defendants” and that there was “an absence of reality” in the Appellant’s claim such that it should be struck out. To the contrary the Appellant has a strongly arguable claim that the assignment should be set aside.
133. Mr Giles submitted that the Judge’s analysis was correct as it would be obviously wrong in law to allow the Trustee in Bankruptcy to resile from an agreement he reached after advice, knowing all the details of the dispute before the Court and “with his eyes wide open”. However this argument is blind to its full effect; that a Fiduciary can wrongfully create a dispute which places the beneficiary in a perilous position and then take advantage of the beneficiary’s dilemma to strike a bargain from which he profits. It is strongly arguable that it matters not how much advice the beneficiary was able to take or whether the beneficiary is acting under statutory powers or not, he should never have been placed in the position that he was.
134. As I stated during submissions this is an appeal from the strike out of the claim and it is not a determination of a preliminary issue. The question on appeal is whether the Judge was wrong to find that the claim advanced had an absence of reality, fanciful and “clutched at straws” had no real prospect of success and was not one which could “properly be pleaded such that it should be struck out and/or summary judgment entered. In my judgment he fell into error in so finding. Grounds 1, 2, 4, 6 succeed.
135. If a finding had been made, as it should have been, that the Appellant’s claim as set out in the body of the extant pleadings set out a case which was “winnable” on the core

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<sup>2</sup> Per Mayo J in Re James [1949] SASR 143



issue of whether the assignment should be set aside, then matters had to switch to the proposed amendments to the pleading.

136. It was conceded before the Judge that what was sought in the prayer within the amended particulars of claim was wrong/inadequate and by re-amendment alternative declarations were sought. Putting to one side the claims in relation to the National Westminster bank account to which I shall turn in a moment, Mr Ashgar conceded before me that the proposed re-amended pleading not only set out the amended prayer but also set out considerable extra detail as regards the claim of breach of the fair dealing rule and fraudulent breach of trust. On reflection he accepted that several pages of the proposed re-amended particulars of claim produced to the Judge were unnecessary and he produced a draft with much more limited proposed amendments.
137. Mr Giles conceded that the claim as regards breach of fiduciary duty/fair dealing was raised in the extant pleadings and that if there was merit in the arguments advanced the Judge had to allow the claim to go on.
138. His Honour Judge Dight CBE stated that the proposed amendments to the Particulars of claim were abusive and also that permitting them would generate considerable further delay and expenditure as the parties go through the process of disclosure and witness statements again.
139. Given my findings as to the cause of action the finding that the proposed amendments relating to the breaches of the fair dealing rule/fiduciary duty were abusive is not sustainable. I also accept that as the Judge's exercise of his wide discretion as to amendment was obviously very largely influenced by his finding that the amended claim lacked any merit (and was an abuse), and as I have found that he was wrong to so find, the exercise of his discretion was fatally flawed.
140. In any event there would be no delay or any need to revisit disclosure or witness statements as a result of the proposed amendments to the prayer and in light of the limited extent now suggested by Mr Asghar, save, potentially, in relation to the issues raised in relation to the National Westminster Bank account.
141. As the Judge's exercise of his discretion to amend must be set aside it falls to me to consider the issue afresh. Given the limited extent of the proposed amendments in relation to the breaches of the fair dealing rule/fiduciary duty I allow the relevant amendments. However the position in relation to the amendments concerning the National Westminster Bank account requires separate consideration.
142. His Honour Judge Dight CBE was faced with an application to amend the particulars of claim to add allegations in relation to the submission of the proof of debt on 3<sup>rd</sup> September 2012 (for nineteen payments of £1,260 made by the Respondent prior to 2<sup>nd</sup> September 1997). As I have set out it was already pleaded that the submission of the proof of debt was in breach of fiduciary duty. The proposed amendments set out additional allegations that:
  - (a) As a result of the proof of debt the Appellant had to find an additional £53,449.82 to annul his bankruptcy (which he needed to do to comply with the order of 25<sup>th</sup> July 2012); which was not possible;
  - (b) That the findings of Mr Martin KC were that the bank account whilst in the

Respondent's name was a bank account of the Appellant's business at least until the beginning of 1997 and that it was implicit from the finding that the Respondent held all the monies in the National Westminster Account on trust for the Appellant and therefore all monies paid in to the account prior to the bankruptcy in September 1997 were paid/received for the Appellant's benefit. The alleged mortgage payments were therefore made from funds belonging to the Appellant;

- (c) The Respondent was in breach of trust/fiduciary duty/made false and fraudulent representations, in that he artificially and wrongly increased the amount the Claimant would have to pay to annul his bankruptcy so as to create a shortfall and prevent annulment.

- 143. These allegations went significantly further than the existing pleaded case.
- 144. Mr Giles argued before His Honour Judge Dight CBE, and also before me, that the claim in relation to the National Westminster account should have been made in the original claim heard by Mr Martin KC and as subject to the res judicata principle. The obvious problem with that submission is the claim which was sought to be advanced was that the submission of the proof of debt on 3<sup>rd</sup> September 2012 was in breach of fiduciary duty and/or a false/fraudulent representation. This could not have been included in the original claim as it post-dated it. The Appellant's argument is that the Respondent used the false debt to prevent him being able to annul the bankruptcy order.
- 145. Mr Giles also submitted before me that the proposed amendments were an "unnecessary add on" to the main element of the claim which was the allegation of breach of fiduciary duty in relation to the assignment; so the Judge was in any event acting well within the discretion afforded to him to refuse the proposed amendments.
- 146. His Honour Judge Dight found in respect of the proposed National Westminster account claim that;
  - (a) There was no material to support the assertion that the Respondent was instrumental in the annulment application not being dealt or how/why it was concluded with and there was an absence of reality in the arguments advanced;
  - (b) The fact that (taking the Appellant's case "at face value") the Respondent was a constructive trustee of the monies in the National Westminster account does not arguably mean that they were in breach of the fair dealing rule; as they were "separate potential trusts".
  - (c) The allegations add nothing to the case and there was an absence of reality in the argument that the trustee placed any reliance on them.
  - (d) The exploration of the beneficial ownership of the monies in the National Westminster account and the pursuit of a duty in relation to it belonged in the original account; so the wider doctrine of Res Judicata applied.
- 147. Mr Asghar conceded that the National Westminster account claim was not crucial to the case in respect of assignment. He submitted that the issue of the proof of debt had been raised in the extant pleadings, that the claim primarily relied on the finding of Mr John Martin KC and that the account had been a live issue before the Judge in that claim, all necessary disclosure had been given and no significant further witness evidence would be required.

148. I pause to observe that it is, to say the least, curious that notwithstanding the content of the judgment of Mr John Martin KC that;

“I am satisfied that the business account opened at National Westminster Bank plc on 25 January 1996 in the name of Tarik and Arif trading as Elite Carpet and Furniture was, until at least the beginning of 1997, a bank account of the business carried on by Hidayat, not by Tarik and Arif.”

the Trustee in Bankruptcy eventually paid out in respect of this disputed debt. However that payment was never challenged.

149. The Appellant’s case as set out in the proposed amendments rests in the main upon the finding made by Mr John Martin KC. Given his findings I cannot accept His Honour Judge Dight CBE’s analysis that averment lacks reality. As with the assignment generally the Appellant’s case is that the Respondent well knew what the true position was in relation to the operation of the bank account up to the beginning of 1997; so the proof debt was submitted in breach of fiduciary duty. Given the legal principles which I have set out and also given the position adopted by the Respondent in denying any trust, the Respondent will arguably be subject to a burden in relation to the submission of the proof of debt. However the proposed amendment goes further than alleging a breach of fiduciary duty in respect of the making of the debt claim and alleges that it was for the purpose of and/or had the effect of preventing the annulment of the bankruptcy. This element cannot be caught by the doctrine of res judicata as it only occurred after the trial in the original action.
150. His Honour Judge Dight CBE found that there was no evidence that the proof of debt was instrumental in the annulment proceedings not succeeding. It is to be noted that the Appellant has dealt with the effect of the proof of debt, and that the likelihood of such effect would have been known by the Respondent in his witness statement (paragraph 72).
151. Allowing the amendment is unlikely to result in significant further disclosure (as the issue of the debt was already raised in the pleadings), but the Respondent would have to re-consider the matter. The matters relied on by the Appellant were already set out in his witness statement of 8<sup>th</sup> November 2021 (see e.g. paragraph 72) although the Respondent should have to have the opportunity of addressing in a further witness statement if so advised.
152. Although I well recognise that the Judge had a very wide discretion, I again find that he fell into error in his approach to the proposed amendment in relation to the National Westminster Account. I accept Mr Asghar’s submission that the Judge was clearly influenced by his view about the main element of the claim. He held that if that claim had no realistic prospect then the National Westminster account allegation could not provide a hook upon which to hang a claim. Had the position been that the main claim was to proceed to trial then the exercise of discretion would have necessarily been different.
153. As result it falls to me to exercise the discretion afresh and I allow the amendment as proposed.

## Conclusion

154. In conclusion the learned Judge was wrong to have struck out the claim. I need not and do not go no further than that finding. There may be further relevant evidence (although I should make it clear that the prosect of evidence has not formed part of my reasoning) and further/refined argument before the trial Judge.
155. I leave it to the parties to draw up an appropriate order.