[2022] EWHC 1234 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Case No: BL-2021-000020

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Friday, 4th March 2022

Before:
MASTER PESTER

B E T W E E N:

DISCOVERY LAND COMPANY LLC & ANOR

and

KAREN HUBBARD JONES

MS N RUSHTON QC appeared on behalf of the Claimants
MR A REZA-SINAI appeared on behalf of the Defendant

JUDGMENT
(Approved)

MASTER PESTER:

Introduction

1. I have before me an application dated 15 December 2021 by the defendant, "Mrs Jones", for permission to amend her defence.
2. There are two claimants in these proceedings, Discovery Land Company LLC, "DLC", a property development company based in Arizona, and Taymouth Castle DLC LLC, "TCD", a Delaware company.
3. The defendant, Mrs Jones, works as a teacher. As she admits, her direct knowledge of the facts underlying these proceedings is very limited. I quote here the proposed amended defence at paragraph five, which reads as follows:

> "In this amended defence, the defendant's personal knowledge of facts and circumstances pleaded is limited to events leading up to her receipt of the payment and second payment as trust distributions, and her belief that these monies belonged to her, and to which she is, and remains, lawfully and beneficially entitled, and that she had no reason, at all material times, to believe otherwise. The defendant has relied on the evidence of those involved in the administration, operations, and management of the relevant companies and/or entities, together with relevant supporting documentation with respect to the facts and circumstances giving rise to the making of the payment and the second payment to her as pleaded in this amended defence".

4. Mrs Jones' original defence did little more than refuse either to admit or deny paragraphs in the particulars of claim, and it was said this was appropriate while her Part 18 request of the claimant's was outstanding.
5. In actual fact whilst paragraph five says the defendant relies on the evidence of those involved in the administration, operations, and management of the relevant companies and entities, the fact is that she relies heavily on what she has been told by her husband, Mr Stephen Jones, "Mr Jones".
6. Mr Jones is a former solicitor, admitted as a solicitor in February 1986, who provided international legal and tax advice through Jirehouse, an unlimited company providing legal services regulated by the SRA.
7. In addition, it is important to note at the outset that following a trial before Zacaroli J held over, I believe, at least three days in June 2019, by a judgment handed down in August 2019 Mr Jones was found guilty of contempt of court in relation to breaches of undertaking and orders he gave to Nugee J in March 2019. He was sentenced to 14 months' imprisonment in relation to the contempts, which Zacaroli J found to have been established.
8. Furthermore, it appears to be openly acknowledged that Mr Jones had a very substantial hand in drafting the proposed amended defence, if he did not, indeed, draft the entirety of it.
9. The claimants, DLC and TCD, appear before me by leading counsel. Mrs Jones has instructed a counsel on a Direct Access basis.
10. The claimants have also applied to amend their particulars of claim. The proposed amendments are very minor, essentially limited to increasing the amount of the claim from US$600,000 to US$700,000.
11. This was initially opposed by Mrs Jones but is no longer. I understand that Mrs Jones originally indicated that she would only consent to the claimants' proposed amendments if they consented to her proposed amendments. That, in my view, was not the right stance to

take, but the issue is no longer live before me.

12. In this judgment, I will take it as read that the claimants can rely on their amended particulars of claim.

Evidence before the Court

13. The parties have exchanged the following witnesses statements:
    i) A first witness statement dated 15 December 2021 of Mrs Jones in support of her application.
    ii) A witness statement dated 16 January 2022 of Jeffrey Holland, who is General Counsel at DLC.
    iii) A second witness statement dated 17 January 2022 of Jessica Chappell, solicitor for the claimants.
    iv) A second witness statement dated 4 February 2022 of Mrs Jones.
    v) A short third witness statement dated 8 February 2022 again of Ms Chappell, which exhibits re-amended particulars of claim in what is being called, before me, the Jirehouse or main proceedings.
14. I also note that the day before the original hearing before me, Mrs Jones filed two further witness statements: a short third witness statement in her own name and a witness statement from Douglas Crane Broeker, a US-qualified attorney and member of the Florida bar. She did not have permission to file these additional witness statements, but I have read those statements and have regard to what is said in them.
15. While the witness statements range very widely and make a number of allegations and counter allegations, the actual issues, which I need to decide on this application, as presented by counsel for the parties, are comparatively narrow.

Background

16. As I have said, DLC is an American property development company based in Arizona, and the second claimant, TCD, is a Delaware company, which was used by DLC to acquire Taymouth Castle, a property situated on the south bank of the River Tay in the Highlands of Scotland.
17. In April 2018 DLC instructed Mr Jones and Jirehouse to advise it on the purchase of a castle on the south bank of the River Tay for some US$14 million. Furthermore, on 13 April 2018, TCD transferred the sums of US$9,950,000 and US$4.1 million to the client account of Jirehouse Trustees Limited, "JTL", for a total of US$14,050,000, which I will refer to as "the Initial Purchase". JTL is a regulated entity, and there are bank statements clearly showing these payments in.
18. Almost immediately, and the claimants say unbeknownst to them, the Initial Purchase funds were diverted out of the client account of JTL and dissipated to over 50 separate recipients. There are separate High Court proceedings commenced to recover these sums on proceedings under claim number BL-2019-000541, the "Jirehouse proceedings". Those proceedings are now concluded against nine out of 10 of the defendants to the Jirehouse proceedings.
19. On 3 May 2020, Jirehouse was intervened by the SRA.
20. The current proceedings before me relate to the claim to recover the US$700,000, which is now accepted was transferred to Mrs Jones on 19 April 2018, and Mrs Jones does not dispute, nor could she dispute, having receive those payments.
21. While initially the claim was for US$600,000, a second payment of US$100,000 was made on 19 April 2018, and it is those additional US$100,000 which are now claimed from Mrs Jones, following the amendments. This is which now not opposed.
22. Therefore, the route of the money, in a little more detail, is the initial US$14,050,000 was

paid to JTL, which was then passed to Jirehouse Secretaries Limited, and then into Mrs Jones' account, as well as to other recipients.

23. The claim in the amended particulars of claim itself is comparatively straightforward.

24. Turning to the key causes of action, we have, at paragraph 22, the following:

> "Accordingly, and in any event, the payment and the second payment were and are beneficially owned by the first and second claimants and were received and, at all material times, held by the defendant on construct of trust for the first and/or second claimants. For the reasons set out above, the first and/or second claimant are entitled to trace their beneficial interest in the purchase funds into the payment and the second payment, and further into any asset acquired or substituted by the defendant for the payment and the second payment. Any such asset also being held by the defendant on constructive trust for the first and/or second claimants."

Therefore, that is a straightforward proprietary claim for a breach of trust.

25. At paragraph 24 it says this:

> "Further, or alternatively, the defendant is accountable to the first and second claimants as a constructive trustee of the payment and the second payment, which she received as a volunteer and for no actual or purported consideration. The defendant received the payment and the second payment in circumstances which make it unconscionable for her not to repay the amount of the payment and the second payment to the claimants. If, which is denied, it is necessary for the Court to be satisfied of this, the claimants' position is that the defendant must have known that she was probably not entitled to the payment and the second payment, and that it was probably the consequence of a breach of trust or breach of fiduciary duty by her husband, Mr Jones, to his or Jirehouse's clients".

26. Then particulars of knowledge and unconscionability are set out.

27. As I read it, while it is a claim that Mrs Jones is accountable as a constructive trustee, another way of conceptualising is as a simple knowing receipt claim.

28. Paragraph 25, then, makes a further alternative claim for equitable compensation against Mrs Jones in the amount of US700,000 for the reasons set out above. So those are the three causes of action pursued.

29. The amendments to the defence seek to introduce three separate defences:
    i) illegality;
    ii) what is being described as ownership of the funds; and
    iii) change of position.

30. The change of position defence is not opposed. Therefore, to that extent, Mrs Jones is, in any event, entitled to amend her defence.

Legal Principles

31. This is an application under CPR Rule 17.3 for permission to amend. It is common ground that a defendant in these circumstances needs to show some prospect of success. That has been taken from *SPI North Limited v Swiss Post International UK Limited* [2019] EWHC 2004 (Ch) at paragraph five.

32. In addition, it is again not in dispute between counsel appearing before me that that is, effectively, the well-known test used for summary judgment, which is whether the proposed amendment have a real, as opposed to fanciful, prospect of success, see *Swain v Hillman* [2001] 1 All E.R. 91 at page 92 per Lord Woolf, Master of the Rolls, who said that "It must be a claim which carries a degree of conviction, and which is more than merely arguable".

33. Furthermore, the test for summary judgment is extremely well-known. I set it out here, just to remind all the parties of the principles as found in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15, where a number of propositions were laid out by Lewison J, as he then was:

    i) "The Court must consider whether the claim has a realistic, as opposed to fanciful, prospect of success. A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
    ii) In reaching its conclusion the Court must not conduct a mini trial.
    iii) This does not mean the Court must take at face value and without analysis everything that a party says in his statements before the Court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
    iv) However, in reaching this conclusion, the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.
    v) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into facts at trial than is possible or permissible in summary judgment.
    vi) On the other hand, it is not uncommon for an application under a 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 the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is simple: if the party's case is bad in law, he will then, in truth, have no real prospect of succeeding on the claim, or successfully defending the claim against him, as the case may be".

34. It also seems to me here that the guidance in Practice Direction 16 paragraph 8.2 must be in play, at least by analogy. Practice Direction 16, paragraph 8.2, under the heading, "Matters which must be specifically set out in the particulars of claim if relied on", is "any allegation of fraud or the fact of any illegality or notice or knowledge of any a fact". Of course, that is matters which must be specifically set out in the particulars of claim if relied on. However, it seems to me that, by analogy, that must equally apply when one is looking at proposed amendments to a defence.

35. In other words, one needs some evidence to support the applicant's versions of the facts. That is particularly so when considering any allegation of fraud, the fact of any illegality, or notice, or knowledge of the fact.

Analysis and Discussion

36. I have, in the papers before me, a copy of the proposed amended defence. This shows which of the proposed amendments are consented to, in green, and which are opposed, in blue.
37. I now turn to consider the two defences which Mrs Jones wishes to pursue, illegality and, what was called, ownership of the funds, in turn.

a) Illegality

38. The key paragraph for present purposes of the proposed amended defence dealing with the illegality is at paragraph 12, which reads as follows:

> "In spring 2018, Mr DeJoria remained keen to purchase the property and he, Mr Anderson, Mr Howard and/or Mr Wellington came to an arrangement that would result in a significant upside commission and/or side profit payment to Mr Wellington, payable in plots at the property and/or cash, and/or other consideration as he would direct (the inducement) if Mr Wellington could persuade the other sellers to sell the entire interest in the property for approximately £10 million. This represented a nearly 70%, or £22 million, reduction in the price agreed only some six months earlier. Whilst the other sellers would be significantly prejudiced, Mr Wellington, or whoever he would direct, would be significantly benefited".

39. Just to explain who the parties are who are mentioned in that paragraph which I have quoted from: Mr DeJoria is a wealthy entrepreneur and US national, who was interested in purchasing Taymouth Castle; Mr Anderson was the agent of DLC; Mr Howard was another agent of DLC; and Mr Wellington was one of several individuals behind the sellers of the castle, and indeed it is said that he is a particularly influential one, that, in a part of the pleading, which is not opposed, he is said to have had "significant influence among the sellers in the outcome of any sale". That is paragraph 11.
40. What paragraph 12 is alleging, essentially, is that Mr Wellington was induced by some form of side payment to lower the sale price of the castle.
41. This is a serious allegation, and the first point made by counsel for the claimants is that there is no evidence to support it. On an application to amend, as I have set out above, there must be some credible evidence to support a serious allegation of fraud before it can be allowed to go to trial.
42. Whilst I entirely accept that many cases involving allegations of fraud cannot be directly evidenced, certainly in an early stage in the proceedings, but depend, as a matter of pleading, on inferences, it does seem to me that Mrs Jones must be in a position to identify at least some primary facts from which it would be appropriate to infer the serious allegation made.
43. Accordingly, I pressed counsel for Mrs Jones to identify what primary facts it was that he identified from which the inference could properly be drawn. He relied on the following.
44. First, he pointed to the reduction in price at which the castle was eventually sold, compared to the price at which it was originally marketed. The castle was originally offered to Mr DeJoria for a price of US$40.5 million. I take this figure from paragraph seven of the particulars of claim in the Jirehouse proceedings. Those negotiations had broken down, and Mr DeJoria had walked away from the sale. This was in 2017.
45. By spring 2018, the sale price was reduced to US$14,050,000. Counsel for Mrs Jones alleges that this sharp reduction in sale price is inexplicable absent some sort of inducement being offered to one of the sellers, namely Mr Wellington.

46. I am far from convinced that this is correct. The point is the castle had not sold for the original proposed selling price of US$40.5 million.
47. Secondly, counsel for Mrs Jones relied on an email, which is in evidence before me. This is an email dated 5 April 2018 from one Henry Anderson to "Turbidy". Turbidy, as I understand it, is an individual called JB, who was a business associate of Mr DeJoria.
48. The email begins by saying, "Please find attached the marketing pack that is due to be going to a major UK agent".
49. In addition, after referring to various details relating to planning permission and various outcomes in relation to the proposed property purchase it says this, "Clynt [I interpose there that Clynt is Mr Wellington] is giving up his plot as part of the price and the tax attorney (who is owed £480,000 by Clynt) is relinquishing his that was held on collateral on the basis that he is not reliant on Clynt for his fees".
50. The email then continues as follows:

> "Clynt is under some pressure, and after today he wishes me to give him a decision that we are either proceeding or withdrawing. He has an agent ready to proceed and is busy approaching anyone who has shown an interest. He contacted JP on Monday, and said that the castle was about to be sold, and would JP buy into 50% of the castle at £12.3 million valuation."

51. Then it goes on to say:

> "We are to exchange contracts with some urgency, about seven to 10 days, and complete 28 days after that date. The tax lawyer has offered to structure the new company and move the shares into that with an undertaking that there is no historical liability of Clynt's underhand actions. This will legally save us over £0.5 million in Stamp Duty land tax. He does not trust Clynt as he has seen messages where Clynt tried to deprive him of shares he owns with Clint in a separate company. When confronted, Clynt blamed the drugs he was on. Clynt also confessed to him that he was going to try and 'chip' the people he owes money 'but not the tax lawyer'. The tax lawyer has therefore insisted with Clynt that the £480,000 he is owed should be deducted from the sale price, and paid to him by our lawyer, not through Clynt's hands. For this, he shall save us the £500,000 for free and relinquish his plot (held as collateral) anyway, as he knows he shall be paid and not cheated. Clynt agreed to this as in saying no he would admit he was going to cheat Mr Howard. This makes no difference to the price (£10.1 million), the only difference is we will pay £9.62 million to Clynt and £480,000 to the tax lawyer. The tax lawyer pointed out that he has agreed with Clynt that as he is being paid by us he will be working for us under the professional terms of conduct and insurance and not for Clynt. This is very good, as he knows all of Clynts (sic) gremlins, and debts/tricks and shall give us an undertaking that the company is clean and without liability".

52. It is important to understand the provenance of that email. It is exhibited by the General Counsel for DLC, Jeffrey Holland, and it seems to me, as a starting point, it would be highly

unusual and, indeed, very surprising had Mr Holland chosen to provide an email at this stage, which served to advance the contentions made in the defence.

53. Ultimately, as I understand paragraph 12, and putting it at its highest in the proposed amended defence, the suggestion derived from the email is that one of Mr Wellington's debts was paid off in order to reduce the selling price to £10 million. That is how paragraph 12 puts it.

54. However, it is illogical to deduce from that that this was a bribe that had been offered for the selling price to be reduced, because the key point is, it seems to me, that by April 2018 the price had already been reduced to in the region of £10 million. There is, as I read the email, simply not sufficient evidence to credibly advance the contentions made in paragraph 12 of the amended defence.

55. In addition, I need also to take account of the fact that, although the sale of the castle eventually completed in 2019, I believe in March 2019, there is no suggestion that the sellers, even now, nearly three years later, have sought to bring any proceeding against the claimants, or indeed anyone else, such as Mr Wellington, in relation to any alleged bribe, or any alleged underpayment, and nor have they sought to resume the transaction.

56. I also note that in the run up to the hearing Mrs Jones, in her second witness statement, suggested that further evidence would be forthcoming from another potential witness, Mr Khurram Mian, who is of the trustees of the property, and, in fact, he is referred to by name in this email from which I have just quoted. Furthermore, Mr Mian appears to be one of the sellers, and that is how he is described by Mrs Jones.

57. In addition, it was said that a witness statement would be served from him, in order to support the application to amend the defence, and specifically in relation to the allegation of illegality. However, this evidence never materialised.

58. Throughout her second witness statement in support of the application to amend, Mrs Jones continues to refer to the evidence of Mr Mian saying that he confirms this or that. However, as I say, no signed witness statement ever came from him.

59. In Mrs Jones' witness statement, served just the day before the hearing, she explained that Mr Mian had not signed his witness statement because he was indisposed. However, I cannot, therefore, rely on it and so I have to take into account the fact that there has been no suggestion by any of the sellers that there is evidence that Mr Wellington was paid some sort of inducement in order to lower the price to £10 million.

60. In the circumstances, I am not persuaded that the allegation of illegality has real prospects of success and, on that basis, on the factual evidence, I refuse permission to amend to insert those paragraphs dealing with illegality or unclean hands.

61. However, on this question of illegality, counsel for the claimants had another string to her bow. She submitted that what Mrs Jones was alleging, this alleged inducement, this corrupt inducement to Mr Wellington, that even if there were sufficient factual material to plead it, it could not possibly give rise to any defence of illegality as a matter of law.

62. She explained that the claimants were suing in relation to the transfer of their funds to Jirehouse, and Mr Jones' dishonest misappropriation of that money was completely separate from, and not linked to, any corrupt inducement that may have been offered to Mr Wellington. In addition, she submitted that, as a matter of law, Mrs Jones would not be able to rely on such an allegation of bribery as a defence.

63. She relied, in her submissions, on the test as set out in the Supreme Court authority of *Patel v Mirza* [2017] A.C. 467. She submitted, applying the threefold test there, that it was clear that, as a matter of law, the proposed defence should not be allowed to go forward.

64. During the course of the hearing, I also heard further submissions from counsel for the claimants on another Supreme Court authority *Stoffel & Co v Grondona* [2021] A.C. 540. While this authority was only put forward during the actual course of the hearing, I am

satisfied that Mrs Jones' counsel had a sufficient opportunity to consider it and to make submissions on it.

65. Turning to the facts of *Stoffel v Grondona*, Mrs Grondona had obtained a £76,500 mortgage from a Building Society on the basis that it would be used to discharge a finance company's charge, and that a new charge would be executed in favour of a Building Society. However, it turned out that the mortgage was obtained by fraud. In fact, its purpose was not to fund Mrs Grondona's purchase of the lease, but to raise capital for a third party.

66. Furthermore, the appellant in that case, the firm of solicitors, negligently failed to register at the Land Registry a Form TR1 transferring the property from the third party to the respondent, Mrs Grondona. Therefore, the result was that the third party remained the registered owner of the lease, which continued to be subject to the finance company's charge.

67. In addition, when Mrs Grondona defaulted on the mortgage repayments the Building Society brought proceedings against her. She defended the claim, and she brought CPR Part 20 proceedings against the firm seeking damages for breach of duty and a breach of retainer.

68. The firm admitted negligence, a breach of retainer, but invoked an illegality defence asserting that Mrs Grondona had instructed it in order to further her mortgage fraud.

69. The judge, at first instance, held that Mrs Grondona's claim was not barred by the illegality defence. The Court of Appeal then dismissed the firm's appeal, and then it went to the Supreme Court.

70. The Supreme Court indicated, in dismissing the appeal, that underlying the illegality defence were the propositions that people should not be allowed to profit from their own wrongdoing, and the law should not condone illegality. Furthermore, in *Patel v Mirza*, the Court identified the central question as being whether allowing recovery despite some illegality would produce inconsistency and disharmony in the law, and so damage the integrity of the legal system. It set out three matters to be considered in answering that question:

    a) the purpose of the prohibition which has been transgressed and whether that purpose would be enhanced by denying the claim;
    b) other relevant public policies that might be rendered ineffective or less effective by denying the claim; and
    c) whether denying the claim would be a proportionate response to the illegality.

71. The Supreme Court said that consideration of those matters should not be mechanistic. The Court had to identify the relevant policies at a relatively high level of generality and determine whether allowing the claim would be inconsistent with them or, where they were competing, where the balance lay.

72. The Supreme Court, in dismissing the appeal, indicated that, whilst Mrs Grondona was dishonestly involved in a mortgage fraud, and she had retained the firm in order to facilitate it, but that underlying the criminalisation of mortgage fraud were policies of deterrence and protecting mortgagees. It would be doubtful whether the former would be significantly undermined by permitting a civil remedy to persons in the respondent's position, and it was difficult to see how refusing the respondent a civil remedy against the firm would enhance the protection afforded to the mortgagees. By the time the firm failed to register the transfer, the fraud was complete, and denying the respondent a remedy for the firm's negligence would not protect the building society.

73. Therefore, what counsel for the claimant said was, even assuming the central facts, as alleged by Mrs Jones, were correct (and, of course, as to that there has been no credible evidence adduced, in my view, to date) it does seem to me that applying *Patel v Mirza*, but even importantly, applying *Stoffel v Grondona*, establishes that as a matter of law, there is no

proper basis for running an illegality defence on the facts of this case before me. I consider that it is right to decide the point on this application.

74. Counsel for Mrs Jones was not able, it seemed to me, to persuade me that the principles there were sufficiently distinguishable. The main point that he made, and it is a fair one, is that *Stoffel v Grondona* was only decided following a trial. It was not decided on a summary judgment application, or any sort of permission to amend, but still it seems to me that that is a powerful indication as to the legal principles to be applied.

75. In addition, I simply do not see in a claim where the claimants are claiming to recover their own funds, as they would say, paid out in breach of trust, that it would be appropriate to say that an inducement, even a corrupt inducement, to Mr Wellington, as part of the sales transaction, would be sufficient to bar their claim. To deter the making of bribes or corrupt inducments, one has criminal penalties and one also has the option available to the sellers to bring a claim against Mr Wellington and, possibly, the claimants as well, and/or to make a claim for an undervalue, and/or to make a claim to rescind the transaction. That seems to me how the civil law would approach the matter.

76. Therefore, for that reason too, ultimately, I am persuaded it is appropriate to dismiss Mrs Jones' application to amend so as to raise an illegality defence.

77. I just also note here, almost by way of coda, that Mr Broeker's evidence, the Florida-based lawyer, he put forward evidence that on the facts as alleged by Mrs Jones that would amount to wire fraud or as being an offence under the Racketeer Influenced and Corrupt Organizations Act, or "RICO", as a matter of US law. Whether or not an illegality defence can be run in this case is going to be governed by English law, the enrichment on the part of Mrs Jones having been received in England, which points to English law being the applicable law.

78. In any event, I also note that Mr Broeker relies on an unsigned witness statement of Mr Mian, which, again, as I have explained above, is not in evidence. Ultimately, Mr Broeker's evidence does not take matters further, because it does not really matter, because if the facts, as alleged by Mrs Jones, could be made out, it seems to me it is highly likely that would be an offence under English law, in any event. Therefore, whether it is also an offence under American law does not seem to me to take matters any further.

79. However, as I have already explained, there is no sufficiently credible evidence, as a factual matter, to allow the defence to go forward and as a matter of law the alleged facts would not in any event give rise to a defence to the claim. Even if there were such evidence, it would not give rise to an illegality defence on the suggested facts.

b) Ownership of the Funds

80. Again, I begin my analysis by turning to how the matter is put in the proposed amended defence. The key paragraphs are as follows. First, paragraph 9b, under the heading, "Funds Ownership" reads as follows:

> "Further, or alternatively, the Payment and the Second Payment were at all times are and remain the lawfully and beneficially owned property of the Defendant in which the Claimants have no right, interest or title for two reasons:
>
> i. Claimants authorised Jirehouse and/or JTL to transfer the purchase of funds to the initial buyer of the property, Esquiline Asset Management Limited (now dissolved) ("EAML"), by way of an interest-bearing loan and so beneficial ownership of

the Purchase Funds passed to EAML immediately following transfer by the second claimant; and EAML and/or its associate, Esquiline Finance Limited, now in compulsory liquidation ("EFL") with the knowledge and consent of the Claimants' agent, Mr Anderson, invested the purchase funds on interest-bearing loans at the discretion of EFL for EAML, pending the proposed purchase of the property (the "Authorisation"), in order to give effect to the Artifice; and

ii. The Payment and the Second Payment were derived directly and indirectly and ultimately for full consideration by way of the indirect repayment of the investment loans made by JPF and its investment company, Jirehouse Investments LLC (the "Full Consideration")."

81. Going forward in the defence, under the heading "Funds Ownership" at paragraph 20, there is this pleading:

> "The Defendant asserts that the Payment and the Second Payment were on receipt her lawful and beneficially owned property in which the Claimants had no right, title or interest whatsoever on the basis:
>
> a) There was no breach of fiduciary duty or abuse of position giving rise to the misappropriation and a constructive trust as alleged by the Claimants as any transfer of the funds to EAML (and/or EFL) was authorised by the Claimants' agent, Mr Anderson; and
> b) The Payment and the Second Payment arose from Trust Distributions the source of which was the repayment of investment loans made by JLLC on behalf of JPF and for which full consideration passed."

82. Then, under the heading "Authorisation", at paragraph 21, we have this:

> "The First Claimant acting by its agent, Mr Anderson, arranged the transfer of the purchase funds to the JTL client account and which, prior to remittance, Mr Anderson was informed by Mr Jones, during a telephone call with Mr Jones during the week prior to 13th April 2018, that the funds would be treated as an on-demand loan by the lender (then thought to be the First Claimant but subsequently found out to be the Second Claimant) to EAML, the proposed independent buyer for the Transaction, in accordance with Mr Anderson's instructions as Agent for the First Claimant. This was subsequently confirmed by Mr Schuyller in a video call on or about late May 2018 (as referred to in the Jirehouse specific engagement terms of that date) that the First Claimant should not be visible or disclosable in the transaction until after the property had been purchased by EAML".

83. These points, using somewhat different language, are then repeated at paragraph 25.

84. In addition, at paragraph 53, we find this, "The transfer of the purchase funds was made with the instructions, and knowledge, and consent of the First Claimant and/or the Second Claimant acting through Mr Anderson as its/their Agent".

85. These particulars are certainly not a model of clarity. In his skeleton argument, at paragraph 40, counsel for Mrs Jones put the matter rather more pithily, as follows:

> "The issue here is the terms on which US$14,050,000 was paid to Jirehouse. Was it, as [the claimants] allege, a payment to be held on trust and which continued to be beneficially owned by [the claimants], or was it a loan to Jirehouse for the purchase of the Castle in the name of EAML as intermediary purchaser with the balance to be repaid with interest?"

86. Therefore, the starting point here in my analysis is that, as can be seen from the bank statements, the monies paid on 16 April 2018 were paid into Jirehouse's client account, in other words a trust account.

87. I was also taken to the specific engagement terms which have been referred to in the proposed amended defence, specific engagement terms dated 24 May 2018, which were entered into between DLC, on the one hand, and Jirehouse. In those specific engagement terms, there is nothing to support the points made on behalf of Mrs Jones that it was not intended that these funds were to be paid by way of trust.

88. Rather, we have this, at paragraph six:

> "We have received in our general client the purchase proceeds in the total sum of $14,050,000 from the Company [ie. Discover Land Company LLC] on 16 May 2018 [I interpose there to say that must have been 16 April 2018], and have entered into an exclusivity agreement **(EA)** on behalf of the special purchase vehicle employed on your behalf as a front-facing buyer for the transaction, Esquiline Asset Manager Limited and affiliated to this firm, with the Seller, represented by the Seller's solicitors, Brodies LLP. The purpose of the EA was to provide a sufficient lockout to enable us to undertake due diligence of the Property, the Seller, and related legalities. In order to undertake a proper due diligence on the title of the property (which is subject to Scottish law) we have instructed Mr Paul Donald … of Shepherd & Wedderburn LLP, a leading firm of Scottish solicitors, who are acting as agents on our behalf. We have worked with Mr Donald before on other client transactions".

89. At paragraph eight, there is reference to a video call held on 23 May 2018, which is also referred to in the amended defence, the paragraphs which I have quoted from, a video call taking place between Mr Joyner of DLC, and Mr Jones, and Ms Tohtayeva, who updated Mr Joyner on the transaction. What is said there is that the following was discussed on this call:

a) principal/agent relationship between the Company and (i) Mr Anderson and (ii) Mr Howard;
b) Mr Anderson and Mr Howard's fee arrangements with the company (which are said not to have been formally documented);
c) transactional and financial risks of the company following the exchange;
d) transactional and financial risks in respect of the proposed post-completion buy-out of the fractional ownership in 14 suites in the East Wing of the property; and
e) financial risk of the Agents' proposal to buy out from Mr Howard a £480,000 debt

secured against part of the Property [ie: the castle] prior to the completion of the purchase of the Property.

90. I interpose that that last subparagraph (e) seems to be a reference to what was being discussed in the email of 5 April 2018, which I have discussed under the heading of "Illegality".
91. However, what is striking about these specific engagement terms, on Jirehouse's headed note paper, is there is no suggestion there that the initial purchase monies are to be held on any other basis than being paid into the general client account. One looks at this contemporaneous document and finds nothing to support the proposed defence on ownership of funds.
92. I have also quoted paragraph 21 of the amended defence, which refers to that telephone call. In addition, Mrs Jones, in her witness statements, has complained that no evidence, disputing what is said there has been obtained from Mr Anderson, but it seems to me that is not the right way to approach matters. The burden, it seems to me, is on Mrs Jones to adduce sufficient evidence as to raise "some prospects of success", and not for the claimants to seek to disprove Mrs Jones' account of events relying on what her husband has told her.
93. I also take account of the fact that, despite Mr Jones being a solicitor, no contemporaneous attendance notes have been evidenced either in relation to the conversation said to have been held with Mr Anderson in the week before 13 April 2018, nor in relation to this video call that took place on 23 May 2018.
94. It can be seen from the passages in the amended defence that I have quoted, that reliance is also placed on a much later loan facility agreement dated 6 December 2018. That loan facility agreement is entered into between Esquiline Asset Managers Limited, described as the borrower, and DLC, and it refers to, just under the parties and the date, "the term loan facility in the amount of up to US$25,350,000 made available to you", that is, Esquiline, "under the terms of the facility agreement".
95. How that figure of US$25,350,000 is made up is as follows. It includes the initial purchase price of US$14,050,000 paid in April 2018. It also takes into account two payments of US$1 million each paid in November 2018, one of which, I think, was paid by TLC and the other by Mr DeJoria, and then a further payment of US$9.3 million paid in December 2018.
96. Therefore, the suggestion being put forward in the amended defence, as I understand it, and as was submitted to me by counsel for Mrs Jones, is to say that the earlier payment out of the client account in April 2018 was not actually a breach of trust, because this is expressly contradicted by the loan facility agreement of December 2018.
97. I have no hesitation in rejecting that allegation as fanciful for the following reasons.
98. First, the loan facility agreement includes within it the purpose, and the purpose, at clause two of the loan facility agreement, is described as being:

> "To provide the borrower", so that is Esquiline, "with funds to provide financing for:
>
> i) the purchase of the Property" [so that is the castle] and its sub-sale to the ultimate owner …;
>
> ii) the building and construction required at the Property; and
>
> iii) dealing out of various persons holding membership interest in the Fractional Companies which hold the interests in the suite situated at the property".

99. That is the purpose for which these funds are being paid, as shown in the contemporaneous

document, rather than monies being advanced to Esquiline to do with whatever it liked.

100. It seems also to me that the existence of the loan facility agreement could only support an argument as to there not having been a breach of trust in April 2018, provided that there was some material at least to suggest that Mrs Jones had a real, as opposed to fanciful, prospect of showing that DLC were aware, as of December 2018, that the monies that they had paid, in April 2018, were no longer there in the client account, but instead they had been paid away.

101. There is absolutely no material to support such an allegation. In addition, as counsel for the claimant puts it, it is not possible to ratify something, which is what is suggested in the amended defence, if one does not know about it.

102. Secondly, it is said by Mr Holland, whose witness statement I have on behalf of the claimants, that this attempted amended defence as to the ownership of the funds is, "… fundamentally inconsistent with Zacaroli J's findings, and so cannot be credible".

103. Therefore, I need, it seems to me, given that is the way that is the way the point is put, to consider the relevance for the issues before me of Zacaroli J's findings.

104. I will deal first with a point raised by counsel for Mrs Jones. He said that the trial before Zacaroli J was conducted "on paper". That is plainly incorrect. The hearing before Zacaroli J was held over at least three days and resulted in a reserved judgment. Mr Jones filed a number of affidavits, but then he chose, as was his right, not to give any oral evidence and attend for cross-examination.

105. This is shown at paragraph 82, where Zacaroli J indicates that Mr Jones' failure to offer himself for cross-examination led him to infer that Mr Jones would not do so because he cannot honestly resist each of the inferences that Zacaroli J drew.

106. Furthermore, Zacaroli J listed at that paragraph 82 five specific inferences that he drew. In particular, he drew the inference that Mr Jones consistently gave explanations for the delay in transfer of the surplus funds between December 2018 and March 2019 which he must have known were false and has admitted, in one respect, misleading the Court on 15 March 2019.

107. Zacaroli J then said "This behaviour itself raises a serious question over the extent to which his evidence can be relied on, to require the gaps in it and the obvious inference as to his knowledge of EAML's and EFL's activities, which were pointed out to him, to be addressed".

108. Plainly, the findings made by Zacaroli J, to which I am coming in a little more detail in a moment, are not binding on Mrs Jones. Mr Jones is not her privy.

109. The findings made by Zacaroli J do not give rise to an issue estoppel.

110. However, it does seem to me that I can and must have regard to the fact that there was a fully contested hearing before Zacaroli J, at which Mr Jones was represented by very experience counsel, and Zacaroli J made a number of findings proven to the criminal standard.

111. If I turn to those findings in just a little more detail. Zacaroli J referred, at paragraph 12, to the purchase price of £9.62 million, excluding VAT, being agreed, and that, as I have referred to above, TCD wiring US$14,050,000 to Jirehouse's trustees client account in two tranches on or around 16 April 2018.

112. Then he refers to the fact that Mr Jones advised that, for reasons of anonymity, as Mr DeJoria wished to conceal his interest in coming back for a second time to acquire the property, that the acquisition of the property would take place through a special purpose vehicle, and Mr Jones recommended Esquiline Asset Managers Limited as that special purpose vehicle.

113. Furthermore, Zacaroli J went on to find later in his judgment that Mr Jones was the one who controlled Esquiline Asset Managers Limited.

114. In addition, Zacaroli J also indicated that the funds by the claimant ought to have been held in Jirehouse's trustees client account pending completion of the transaction. However, as has already been explained both by Zacaroli J and myself, it is plain that, almost immediately upon receipt of those monies, they were leant out by EAML to EFL as well as other borrowers

and other parties.

115. Zacaroli J, at paragraph 16 of his judgment, indicated that whilst completion of the transaction was due to take place in December 2018, but at that point Jirehouse had a problem, because it did not have the money it was supposed to have in order to pay the sellers.

116. Furthermore, then Zacaroli J says this, at paragraph 17, "There began, therefore, an elaborate series of excuses from Mr Jones. I will summarise these, which are clearly established by the contemporaneous documents I have seen".

117. Zacaroli J was clearly making a finding there, and he held that the findings and the excuses, that were being put forward by Mr Jones, were clearly established by the contemporaneous documents.

118. He refers to the fact that Mr Jones indicated in December 2018 that whilst he had originally understood that the funds provided in April 2018 had not come Mr DeJoria, he now said that he understood that they had, and compliance checks had to be carried out.

119. Zacaroli J said that was a bogus reason, because Mr Jones had known since at least June that Mr DeJoria had provided the funds, and, in any event, the money paid in April 2018 had long gone.

120. Then Jirehouse, in December 2018, required that that further US$9.3 million be paid in order to complete the transaction, and Jirehouse gave an undertaking that, once checks and compliance had been completed, it would repay the sum of US$9.3 million within two working days.

121. In addition, Zacaroli J then indicated that Jirehouse should now, that is in December 2018, have been holding US$9.3 million more than it needed to complete the transaction, and that is the surplus funds.

122. Then jumping ahead to the next finding of Zacaroli J, he indicates at paragraph 74 what he described as "… compelling evidence that EAML and EFL were, effectively, controlled by Jirehouse". Furthermore, he refers to the retainer letter of 24 May 2018 to which I have referred above.

123. He then says at paragraph 79:

> "… this is, in any event, the obvious inference from the series of excuses given by Mr Jones between December 2018 and March 2019 for the inability to transfer the surplus funds. I asked rhetorically, 'why lie about the existence of client monies held in an account for the benefit of EAML and why create elaborate excuses for the non-transfer of funds unless he knew that funds had already been removed? Given the relationship between Jirehouse and the Esquiline companies, as described above, if Mr Jones knew the money was not where it should have been then it beggars belief that he did not know what had happened to it".

124. I make it clear that although the arguments sought to be run by Mrs Jones before me does not seem to have been considered in terms by Zacaroli J, I accept that it is fundamentally inconsistent with the various findings of Zacaroli J, which I have just quoted, findings which Zacaroli J had found proved to the criminal standard. In addition, as I have already pointed out, Mrs Jones relies, as she acknowledges, on the evidence of Mr Jones.

125. Furthermore, it seems to me correct that had the loan agreement of December 2018 to EAML operated, insofar as to extinguish the earlier breaches of trust, this is something that Mr Jones would have been shouting about from the rooftops before Zacaroli J. The fact that he did not is powerful evidence that it is not true, and that it does not surmount the admittedly low legal

threshold to be advanced by way of a purported amendment to a defence.

126. It seems to me that it is just another bogus excuse, which the Court is entitled to dismiss at this stage, and thereby refusing permission to Mrs Jones to amend her defence so as to plead it. So I refuse permission to Mrs Jones to plead those paragraphs in her draft amended defence relating to the "funds ownership" defence.

Conclusion

127. Accordingly, for the reasons set out in this judgment, I will dismiss Mrs Jones' application to amend her defence insofar as the illegality and the funds ownership defence are engaged.

End of Judgment

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This transcript has been approved by the judge.