Neutral Citation Number: [2023] EWHC 1979 (Ch)

Case No: BL-2023-000067

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

Rolls Building
Fetter Lane
London, EC4A 1NL

31 July 2023

Before :

NICOLA RUSHTON KC

(Sitting as a Deputy Judge of the High Court)

- -

Between :

MR HITENDRAKUMAR PATEL

Claimant

- and -

MR MICHAEL JOHN PARKER

Defendant

- and –

SMARTWAY PW. HOLDINGS LIMITED

Part 20 Defendant

- and –

SMART MEDICAL CLINICS LIMITED

Proposed Second Defendant

- and –

ECHO TANGO (TRADING) LIMITED

Proposed Third Defendant

- and –

ECHO TANGO (HOLDINGS) LIMITED

Proposed Fourth Defendant

- -
- -

David Turner KC and **Stuart Benzie** (instructed by **Laytons LLP**) for the **Claimant** and the **Part 20 Defendant**
Robert Mundy (instructed by **George Green LLP**) for the **Defendant/Part 20 Claimant**
Natalie Kearney (instructed by **Bartons**) for the Proposed **Second** and **Third Defendants**
The Proposed **Fourth Defendant** was not represented and did not attend

Hearing dates: 11-12 July 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 31 July 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

NICOLA RUSHTON KC:

Introduction

1. In this case the Claimant, Mr Hitendrakumar Patel ("**Mr Patel**") is bringing a claim essentially for fraud against his former business associate, the Defendant, Mr Michael Parker ("**Mr Parker**"), arising out of a failed joint venture between the two of them to acquire and develop a site for a bariatric hospital in Battersea, London, in 2020-2021.

2. The claim was issued in the Technology and Construction Court on 22 July 2022 and was transferred to the Business List of the Chancery Division by an order of Mrs Justice O'Farrell of 19 December 2022.

3. There are before the Court 3 interim applications from Mr Patel:

    i) For delivery-up of documents, now limited to documents required for the maintenance of accounting records and preparation of the statutory accounts for the company, Smart Hospitals Limited ("**SHL**");

    ii) For permission to join 3 new defendants and to re-amend the Amended Particulars of Claim ("**APOC**"); and,

    iii) For summary judgment and/or strike out of Mr Parker's counterclaim, which relates to a personal guarantee executed by Mr Parker. This third application is also made by the Part 20 Defendant, Smartway PW. Holdings Limited ("**Smartway**").

4. This is the sequence in which the applications were presented, over the course of a two-day hearing on 11-12 July 2023 and, with one small exception, the order in which I will deal with them in this judgment.

Factual background

5. Sometime in mid to late 2020 Mr Parker approached Mr Patel with a proposal to acquire office premises at a site Mr Parker had identified at Oyster Wharf, Lombard Road, London ("**the Hospital**") and develop them into a bariatric hospital.

6. There is no dispute that Mr Patel and Mr Parker entered into an oral joint venture agreement ("**the JVA**") in about December 2020, agreeing among other things to set up a "PropCo" to own the site and an "OpCo" to lease the premises, develop them and operate the hospital. While there is some dispute about how their respective financial contributions were to be made and funded, in principle their contributions and interests were to be 50:50, and Mr Parker was to manage the development.

7. Consequently, two companies were set up in January 2021: DDET Properties Limited ("**DDET**") as the PropCo and SHL as the OpCo. Mr Patel and Mr Parker are the two directors of both companies, and have been throughout. Half the shares of DDET are owned by Mr Patel's two children and half by the Proposed Fourth Defendant, Echo Tango (Holdings) Ltd ("**ETH**"). ETH is owned by Mr Parker's two sons, who are also its directors. As to SHL, half the shares are held by Smartway and half, again, by ETH. The directors of Smartway are Mr Patel's wife Kirti Patel and his mother, Bhanumati

Patel, who are also shareholders. They and Mr Patel are registered as persons with significant control.

8. At the start of the project Mr Parker estimated to Mr Patel that the cost of the conversion would be around £3.4m, to which they agreed to contribute equally, i.e. £1.7m each. There is a dispute as to whether they also agreed to contribute 50:50 to the £3.5m cost of purchasing the Hospital (Mr Patel's case), or whether it was always intended that Mr Patel would finance the purchase, to then be refinanced with a commercial lender (Mr Parker's case). In any event, shortly before the purchase was due to take place, Mr Patel and Mr Parker agreed that it would be financed by a secured loan from Smartway to DDET. Mr Patel says this came about because Mr Parker said at the last minute that he did not have his half of the funds for the purchase.

9. Contracts were exchanged for the purchase of the Hospital by DDET on Friday 19 March 2021 with completion taking place on Friday 26 March 2021, for a price of £3,480,000.

10. Between exchange and completion, late in the evening of 19 March 2021, Mr Josh Cocklin, the Chief Executive of Smartway, sent an email to Mr Parker and Mr Patel which attached 4 draft agreements, described in that email. These were: (a) the facility agreement between Smartway and DDET; (b) a debenture in favour of Smartway over DDET's assets; (c) a legal charge in favour of Smartway over the Hospital; and (d) a personal guarantee by Mr Parker in respect of the facility agreement. The facility was for £3.66m. Mr Cocklin has acted extensively on behalf of Mr Patel throughout this matter, and has provided several witness statements in support of the 3 applications.

11. Mr Parker signed that personal guarantee ("**the Personal Guarantee**") on Tuesday 23 March 2021 at a meeting with at least Mr Cocklin, which it is now agreed took place at Smartway's offices. His signature was witnessed by Nicole Lyons, an employee of Smartway. There is a significant dispute between the parties as to the circumstances leading up to Mr Parker's execution of the Personal Guarantee and whether it is valid and enforceable, on which I will expand below in relation to the third application. Among other things, there is a dispute over whether Mr Patel was present or whether Mr Parker spoke to him on the telephone during that meeting.

12. Following the purchase of the Hospital, Mr Parker commenced the development works. SHL as OpCo was to carry out the development, and Mr Patel says that it was agreed that SHL would employ the contractors and be invoiced for goods and services. Mr Parker says it was agreed that another company, of which he is the sole director, Echo Tango (Trading) Limited ("**ETT**"), the Proposed Third Defendant, would be engaged as a main contractor, so contracts relating to the works would generally be with ETT.

13. Certainly in practice, all payments in connection with the development were made to and from ETT's bank account. However Mr Patel says this was because Mr Parker claimed to be unable to access SHL's bank account and asked that until he could, all contributions and payments be made through ETT's account, to which Mr Patel agreed as a temporary measure. Of the invoices said to relate to the development works which are now available and in the bundle, some have been rendered to SHL and some to ETT.

14. On 22 June 2021 the accountant to SHL and DDET, Mr Rohit Khandia ("**Mr Khandia**"), raised a concern by email to Mr Parker and Mr Patel that all assets be purchased only in

the name of SHL, even if payments were made through ETT's bank account. Mr Patel replied, asking Mr Parker to do this.

15. Substantial contributions towards the cost of the works were made by Smartway, which Mr Patel says were made on his behalf in accordance with the JVA. On 4 May 2021 Smartway paid £350,000 into ETT's account (by a payment of £250,000 and another of £100,000). On 2 June 2021 Smartway made a further payment into ETT's account of £500,000. There is also evidence that on about 9 August 2021 Mr Patel or Smartway made a further payment of £818,832.79 in respect of hospital equipment, direct to a supplier, Karl Storz.

16. Mr Cocklin says that in June 2021 Mr Parker asked Mr Patel to contribute a further £850,000, but that he and Mr Patel wanted more transparency on expenditure before Mr Patel did so. On 23 July 2021, a meeting took place between Mr Parker, Mr Patel and Mr Cocklin at which Mr Parker claimed he had contributed about £1.2m so far to the works, via ETT and ETH.

17. Between July and September 2021 Mr Cocklin says he became increasingly concerned as to whether Mr Parker had in fact made these contributions, whether the funds contributed by Smartway/Mr Patel were being spent solely on SHL's works and how the finances were being managed by Mr Parker, especially since Mr Cocklin had no visibility on them because all transactions were still being made through ETT's account. He says he struggled to get Mr Parker to provide copies of relevant financial records as he requested.

18. In August 2021 Mr Parker provided a spreadsheet to Mr Cocklin which was said to set out expenditure on the project up to July 2021, and totalled £1,460,109.58 including VAT, plus copy invoices and redacted bank statements from ETT's account. A further document produced by Mr Parker suggested he had spent a further £282,415.07 and had contributed £200,000 through ETH. Mr Cocklin says Mr Patel's trust in Mr Parker began to break down after analysing these documents since they included various items which clearly did not appear to be expenditure related to SHL's business.

19. Mr Patel and Smartway made no further contributions to the project. The development stalled and a proposal from Mr Parker that he buy out Mr Patel came to nothing.

20. On 16 May 2022, Mr Patel's solicitors, Laytons, wrote to Mr Parker saying that Mr Patel was rescinding the JVA.

21. Shortly thereafter in July 2022 Mr Patel issued this claim against Mr Parker, in which he claims damages and other relief for deceit, misrepresentation, breach of contract, breach of fiduciary duty, breach of trust and unjust enrichment in relation to alleged fraud in the management of the joint venture by Mr Parker.

22. Fixed charge receivers have since been appointed by Smartway in respect of the Hospital, under its legal charge. Mr Parker no longer therefore has any access to the premises. I am told it is unlikely that the development will ever be completed.

23. Given the dispute between Mr Patel and Mr Parker, SHL and DDET are now effectively deadlocked companies. Statutory accounts for both companies are overdue, both sets having been due for filing at Companies House by 18 October 2022.

Relevant procedural history

24. Following the issue of proceedings on 22 July 2022, on 24 August 2022 Mr Patel issued a wide-ranging application against Mr Parker for prohibitory and mandatory injunctions (with a penal notice) and for delivery up of a large number of documents, including all documents relating in any way to the conduct or management of the development, including any held by ETT. That application, in a greatly attenuated form, is the first of the applications now before me.

25. Following receipt from Mr Patel of responses to Mr Parker's Part 18 Request, on 16 November 2022 Mr Parker served his Defence and Counterclaim. On the same day he also issued a Part 20 Claim, joining Smartway as a defendant to his claim for rescission of the Personal Guarantee and/or for a declaration that it was unenforceable, on grounds of deceit and misrepresentation.

26. Following the transfer to the Business List, on 21 February 2023 Mr Patel and Smartway served their Reply and Defence to Counterclaim.

27. On 28 February 2023 Mr Patel and Smartway issued their application for summary judgment under CPR Part 24 on the Counterclaim and/or strike out of the same under CPR Part 3.4(2)(a).

28. On 18 May 2023, Mr Patel issued his application to re-amend the APOC (the Particulars of Claim having been amended prior to service, on 26 July 2022) and join the proposed Second to Fourth Defendants. I am told by Mr Stuart Benzie, junior counsel for Mr Patel, that this application was triggered primarily by Mr Patel's receipt from Mr Parker's son Thomas of copies of unredacted bank statements from 2 of ETT's accounts, said to evidence transfer out and misappropriation of much of the funds paid in by Smartway in May and June 2021.

29. Copies of those bank statements were in the bundle. They record payments from ETT's account of £250,000 (on 4 May 2021) and £250,000 (on 8 June 2021) to an account number ending 6943. Mr Robert Mundy, counsel for Mr Parker, confirmed during the hearing on instructions from his client that this was an account in the name of Smart Medical Clinics Limited ("**SMC**"), the Proposed Second Defendant. Ms Natalie Kearney, counsel for the Proposed Second and Third Defendants, told me that Mr Parker is one of several directors of SMC, and is its Managing Director.

1. Application for delivery up of documents

30. As presented before me by Mr David Turner KC, leading counsel for Mr Patel, this is now an application for delivery up by Mr Parker of the documents necessary for the preparation of the statutory accounts of SHL and maintenance of its accounting records. Although the skeleton argument filed on behalf of Mr Patel refers to seeking documents relating to both SHL and DDET, Mr Turner confirmed that draft accounts for DDET have now been prepared by Mr Khandia, although they have not been filed because Mr Parker has refused to approve and sign them. Certainly the revised draft order in the bundle refers to documents relating to SHL, and I did not understand Mr Turner to be pressing an application in respect of DDET as well.

31. The application is made under CPR 25.1(c)(i) and so as Mr Turner agreed, is an application for the delivery up of property, here copy documents, rather than for the provision of information. It is an application for a mandatory interim injunction, pursuant to the jurisdiction in *American Cyanamid Co. v Ethicon* [1975] A.C. 396, so the familiar three stage test applies:

    i) Is there a serious issue to be tried?

    ii) If so, would damages be an adequate remedy?

    iii) If not, where does the balance of convenience lie?

32. In *Nottingham Building Society v. Eurodynamics Systems* [1993] F.S.R. 468 at 474, Chadwick J. (as he then was) summarised the principles to be applied when considering balance of convenience in the case of a mandatory injunction as follows:

    i) The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense of granting an interlocutory injunction to a party who fails to establish their right to it at trial, or alternatively in failing to grant an injunction to a party who then succeeds.

    ii) In considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to be wrongly made than an order which merely prohibits action, thereby preserving the status quo.

    iii) It is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the claimant will be able to establish this right at trial. That is because the greater the degree of assurance the claimant will ultimately establish their right, the less will be the risk of injustice if the injunction is granted.

    iv) But even where the court is unable to feel any high degree of assurance that the claimant will establish their right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweighs the risk of injustice if it is granted.

    (Chadwick J's summary was commended by the Court of Appeal in *Zockoll Group Ltd v. Mercury Communications Ltd* [1998] F.S.R. 354 as "*all the citation that should in future be necessary"* to guide the court in respect of balance of convenience where a mandatory injunction is sought.)

33. On behalf of Mr Parker, Mr Mundy opposed the application wholesale. He said the court was dealing with the dregs of an unsustainable application, which was a procedural mess. He submitted that there was no serious issue to be tried, no real risk of loss and that the undertaking in damages offered was inadequate, although he accepted this was probably rectifiable.

34. On this last point, Mr Turner clarified that the undertaking offered by Mr Patel was in the following terms: "*If the court later finds that this order or carrying it out has caused loss to the Defendant, and decides that the Defendant should be compensated for that loss, the Claimant will comply with any order the court may make*." In principle, the terms of this undertaking are ones I consider acceptable. There is no dispute that Mr Patel is a man of considerable means who would be able to meet any order for damages on a cross-undertaking which might be made.

35. Turning therefore to the points of substance.

Is there a serious issue to be tried?

36. The claim as currently pleaded in the APOC does not include the legal right which is relied upon to ground the application for delivery up of accounting documents. The deceit and related claims are all ones where there will simply be disclosure in the proceedings in the usual way.

37. In the skeleton argument filed on behalf of Mr Patel, the legal obligations relied upon are (a) Mr Parker's director's duties under ss. 171-177 of the Companies Act 2006 ("**CA 2006**"); (b) the obligation on a company to keep adequate accounting records under s.386(1) CA 2006, failure of which renders officers of the company liable to criminal conviction under s.387(1) CA 2006; and (c) the obligation under s.388 on a company (i) to keep accounting records at its registered office or such other place as the directors think fit and (ii) to keep those records open to inspection by the company's officers at all times.

38. Mr Turner put his case on the basis that, despite requests, Mr Parker has failed to produce to Mr Patel and to SHL's accountant, Mr Khandia, many of the financial records necessary for Mr Khandia to prepare the statutory accounts, or for Mr Patel to understand the financial position of SHL. In the draft order these are said to include all relevant invoices, supplier accounts, VAT returns and bank statements from accounts through which payments relevant to the development were made.

39. This is therefore squarely a case based on an allegation of failure by Mr Parker to comply with his obligations as a director to maintain proper company records and provide them for inspection by his fellow director, Mr Patel, in accordance with the obligations in ss. 386 and 388 CA 2006, including for the preparation of statutory accounts.

40. Given that the basis of this particular claim is not pleaded, I required Mr Patel's representatives to submit a draft proposed amendment (in addition to the wider application to amend) dealing with the point. Such a draft was submitted by Mr Turner on the second day of the hearing, and I am proceeding on the basis of that draft.

41. The bundle includes a letter from Mr Khandia to both directors of SHL attaching a list of what he required in order to prepare the first year's accounts. This included items such as sales and purchase invoices, all VAT returns, bank statements, petty cash book and statements from suppliers.

42. It is submitted on behalf of Mr Patel that the disclosure of financial records by Mr Parker has been piecemeal and incomplete. In addition to the documents sent in August and September 2021, Mr Parker also sent Mr Patel 3 files of papers on 7 December 2022

(after the issue of proceedings and following, it is said, much prevarication); disclosed additional documents in the lead-up to an adjourned hearing of this application; and exhibited further documents to his third witness statement filed less than 3 weeks before the current hearing. I am told that a particular problem relates to the fact that all the transactions relating to SHL have been conducted though ETT's bank account. It is said that Mr Parker has been unwilling to disclose documents in ETT's name even though many of these may relate to SHL transactions. On this Mr Parker contends that he has provided certain documents in ETT's name, but he is unwilling to provide others on grounds of confidentiality.

43. Mr Mundy's position was that there could be no serious issue under ss.172-174 CA 2006 and related provisions since these obligations were owed to the company rather than to a fellow director. That submission is plainly correct (see s.170(1)) and Mr Turner did not press any case based on these provisions, saying they were included as "background".

44. Mr Mundy also contended that there was no serious issue to be tried under ss.386 and 388, but he accepted that under s.388 a director does have a right to access to a company's books and records held by other officers, although there is some debate in the authorities as to whether the provision recognises a common law right or creates that right. He referred me to the decision in *Conway v. Petronius Clothing Co. Ltd* [1977] 1 W.L.R. 72, in particular at 89G where Slade J. concludes that a director has a right to see his company's books of account, exercisable both in and outside meetings, for the purpose of enabling him to carry out his duties as a director. Slade J. considered this was a common law right which had been recognised by statute for the purpose of imposing criminal sanctions if proper books were not kept. Since it was a common law right, the judge's view was that the court had a residual discretion whether to order inspection, but where there was no reason to suppose a director was about to be removed from office, the discretion to refuse should be exercised very sparingly and a director should normally be presumed to be exercising his right to inspect for the benefit of the company, without having to give reasons.

45. Mr Mundy's main objection was that the claim was not pleaded, and the court should not indulge an application which was being made in breach of rules in Practice Direction 49A as to how applications under the CA 2006 should be brought. He said this should have been by a Part 8 Claim with SHL as a defendant, in the Companies Court, although he accepted that if the right was actually a common law one, these provisions might not strictly speaking apply. More broadly he also objected that Mr Parker could not be compelled to produce records which were ETT's accounting records, because his access to those was as ETT's director and not as SHL's. He said that Mr Parker had already provided the relevant documents and had also invited Mr Patel to inspect them at a board meeting which Mr Parker had proposed for 22 October 2022, but which had not taken place.

46. On this procedural point, Mr Turner's response was that since this was probably a common law claim, PD49A did not directly apply, and that in any event it was plainly inappropriate for this to proceed by way of a Part 8 claim given the live issues between the parties, and it was more convenient and efficient for the issue to be dealt with within the existing claim. Mr Turner also submitted that there was no purpose to joining the company since it could not be represented as it was deadlocked.

47. On the point that many of the documents requested were on the face of it ETT's financial records, Mr Turner's response was that there was a community of interest between ETT and SHL since not only did SHL need to establish the expenses which had been incurred on its behalf, but ETT would want to establish its right to be reimbursed.

48. On the initial point of whether there is a serious issue to be tried, I am satisfied that the proposed draft amendment submitted in respect of ss.386 and 388 CA 2006 does disclose an arguable claim by Mr Patel against Mr Parker for failure to maintain and to provide access to the financial records of both SHL and DDET. In view of the fact that Mr Khandia maintains that he cannot prepare the statutory accounts for SHL because he still does not have all of the necessary financial records, and it was Mr Parker who held those records, I consider that there is a good argument that Mr Parker is in continuing breach of his duty to provide access to Mr Patel to those records, which are needed by Mr Khandia, at any rate so far as SHL is concerned. The present position is different so far as DDET is concerned, where Mr Khandia has been able to prepare draft accounts.

49. I would also urge both parties to cooperate so far as preparing the statutory accounts of SHL and DDET are concerned, and filing them at Companies House. Regardless of the ongoing dispute between them, it is in neither side's interest for the directors to be potentially at risk of criminal sanctions for failure to maintain and submit both companies' accounts.

50. On the procedural question of whether this issue should have been raised by a separate Part 8 claim, my conclusion is (a) given that a director's right of access to a company's financial records is probably a common law right, it does not strictly speaking fall "under" CA 2006; (b) in any event, if this is wrong or if there is a concurrent right under that Act, a separate Part 8 claim would add unnecessary complication in this case, since Part 7 proceedings have already been started. Given the factual disputes between the parties, this is not in any case a claim suitable for Part 8 proceedings. Insofar as there would otherwise be a breach of paragraph 5(1) of PD 49A, I therefore waive that breach of procedure, applying CPR rule 3.10, and permit this claim to be brought by way of amendment to the existing claim.

51. I therefore give permission for the amendment on this point in the form submitted, which is in the form of a claim under CA 2006 and/or at common law.

52. I do also consider that, as submitted by Mr Mundy, SHL should be joined as an additional defendant to this claim (in line with paragraph 7(1) of PD49A). Although the company is deadlocked and will not take any active part in the case, it should be party to and bound by any orders made. Accordingly, I order that it be joined as a further defendant.

53. I also conclude that, so far as SHL only is concerned, there is a serious issue to be tried that Mr Parker is in continuing breach of his duty to make SHL's accounting records available to Mr Patel, and so also to Mr Khandia.

54. Where accounting records (including invoices, VAT returns and bank statements) are in the name of ETT, but include transactions which Mr Parker says relate to SHL and/or the development of the Hospital, then my conclusion is that there is at least a good claim that those are also accounting records of SHL, within the definition in s.386(3) CA 2006 as being matters in respect of which expenditure by SHL has taken place and/or as being

records of its assets or liabilities. Given the mixing of money and records as between SHL and ETT which has on the face of it taken place, these are probably also financial records of SHL, even if they are in the name of ETT.

Would damages be an adequate remedy?

55. Mr Turner's submission on this point is that given the criminal sanctions for failure to keep adequate accounting records, damages cannot be an adequate remedy. The practical point is that without all the records themselves, the statutory accounts cannot be prepared.

56. Mr Mundy says that the documents which have already been supplied are sufficient for Mr Khandia to prepare accounts for SHL and that where insufficient information is available, Mr Khandia should make prudent assumptions and if necessary qualifications to the accounts. Mr Mundy complains that when it comes to filing accounts, companies do not normally seek injunctions requiring delivery up.

57. On this point my conclusion is that damages are plainly an inadequate remedy where there has been a failure to produce accounting records as required. The risk that by failing to prepare accounts the directors will be exposing themselves to criminal sanction is in my view a sufficient answer on this point.

Where does the balance of convenience lie, given this is a mandatory injunction?

58. Mr Turner's submissions on behalf of Mr Patel are that it is in the interests of all parties for SHL's statutory accounts to be prepared, there is no prejudice to Mr Parker in providing the documents, and so far as documents in the name of ETT are concerned, Mr Parker is the sole director and there is no reason why he cannot produce copies of documents belonging to ETT if they relate to SHL's income and expenses. He says it is Mr Parker who has conducted the joint venture by using ETT as a vehicle to purchase goods and services for SHL, concealing how this was done as a consequence, and he should not be able to rely on this to resist producing relevant documents.

59. So far as ETT is concerned, reliance was placed in the skeleton filed on behalf of Mr Patel on authorities relating to disclosure including *Various Airfinance Leasing Companies and another v Saudi Arabian Airlines Corpn* [2022] 1 W.L.R. 102 at [21], to the effect that a "… *document is in the control of a party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access*…"

60. Mr Mundy's position in summary is that (a) invoices to SHL and statements of account relating to SHL have already been provided; (b) invoices addressed to others, ETT's VAT returns, and bank statements relating to others belong to that other company and so should not be provided; (c) the principles applicable to an application for delivery up are different from an application for disclosure, given the different purposes to which the documents produced can then be put; the issue was not whether Mr Parker had control over the documents but whether he had a right to access them on behalf of SHL; (d) Mr Patel has been invited to view financial documents at a board meeting but did not respond; (e) the forensic e-disclosure exercise which Mr Parker would be required to

undertake if the order is made is unduly onerous, especially as the documents and bank accounts may belong to other companies; and (f) the application as originally drafted was entirely inappropriate, had no legal basis and sought to upend the corporate structure of SHL and DDET and was in essence an attempted corporate coup. The court should not countenance this late attempt to recast it as a very different application.

61. Applying the principles set out in the *Nottingham Building Society* case as to balance of convenience, my conclusions are:

    i) A failure to provide Mr Khandia with the accounting records of SHL which are necessary to prepare that company's accounts, with the result that proper accounts are not prepared carries a much greater risk of injustice than delivering up records which ultimately prove unnecessary. I also do not accept that the exercise of locating and producing the relevant documents will be too onerous, now that the scope of the application has been properly limited: it will be a narrower exercise than the ordinary e-disclosure in this case will be.

    ii) While this is a mandatory injunction, the fact that Mr Parker and Mr Patel are under statutory and/or common law duties, backed by criminal sanctions, to maintain accounting records and provide access to them points in favour of compelling Mr Parker to take a step which on the face of it is needed to comply with that duty.

    iii) Now that the underlying claim and application have been strictly limited to enforcing the rights under ss. 386 and 388 (and/or the common law they reflect), the court can have a high degree of assurance that Mr Patel will establish at trial that he has these rights.

    iv) In circumstances where Mr Khandia still says that he has not received the documents necessary to prepare the statutory accounts, explaining in detail in his witness statement of 21 February 2023 why the documents supplied by that stage were insufficient, my conclusion is that the risk of injustice if the order is refused is significantly greater than if it is granted. Disclosure in the course of the litigation will not of course assist as preparing the accounts would not be part of the litigation.

62. As to documents in the names of others, my conclusion is that in circumstances where it is accepted that transactions were carried out by ETT and through ETT's bank account, and where there is strong evidence of a failure properly to distinguish between income and expenses of ETT and of SHL, which I consider there is (based on the spreadsheets from Mr Parker and the copy invoices in the bundle), delivery up should extend to those documents in the name of ETT which Mr Parker contends or accepts relate to the development. There is no positive evidence that I have seen that ETT was formally engaged as a main contractor, and ETT is a company wholly controlled by Mr Parker. In my view as a director of both companies he is able and entitled to deliver up all copy documents which relate to SHL transactions, assets and liabilities even if they are in the name of ETT.

63. However, I do not consider that the same argument applies to any other company, and in particular SMC or ETH. While there is evidence that these companies received funds intended for SHL, there is no evidence that they were undertaking transactions relating to the development on behalf of SHL. While documents in the possession or control of

SMC and ETH may in due course be the subject of disclosure applications, I do not consider that there are good grounds for concluding that documents belonging to or in the name of those companies should be the subject of a delivery up order. In this context I note that Mr Mundy has confirmed that the three bank accounts listed at paragraphs 2.1 to 2.3 of the draft order belong to SMC.

64. Accordingly, in principle, the delivery up order will extend to the following sub-paragraphs of paragraph 1.2 of the draft order in the bundle: 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5, but excluding references to provision of information rather than documents. This will be insofar as Mr Parker says that payments or receipts shown in the ETT bank statements for the period from 18 January 2021 until the appointment of the receivers relates to SHL. While he is not compelled to list which transactions in the ETT bank statements relate to SHL, it will probably be more convenient for him in complying with the delivery up order if he does so. Given the appointment of receivers which effectively excluded Mr Parker from the site, I do not consider that there is a sufficient argument for delivery up of documents relating to the period after their appointment.

65. I invite counsel to agree, or provide submissions, on the timescale within which these documents should be provided.

2. Amendment of the APOC and joinder

66. The submissions on this application were made by Mr Benzie on behalf of Mr Patel. I have already indicated above that permission is granted in respect of the amendments relating to the ss.386 and 388 CA 2006 claims.

67. Ms Kearney on behalf of the Proposed Second and Third Defendants opposes the amendments relating to her clients. However she accepted that if the amendments relating to those parties were permitted, then it would be appropriate for her clients to be joined to the claim pursuant to CPR rule 19.2(2)(b), i.e. that there was an issue involving those parties and the existing parties which was connected to the matters in dispute in the proceedings, for which it was desirable to add the new parties so that the court could resolve that issue. I consider that the same conclusion would apply to the Proposed Fourth Defendant, ETH, which is not represented.

68. A number of the more minor amendments were not objected to by Mr Mundy. I requested the submission of a draft coloured to differentiate between the agreed and unagreed amendments, which was provided, agreed amendments being coloured blue and unagreed ones orange (save that Mr Benzie clarified that the proposed amendments to paragraphs 32 – 32F should have been orange). So far as is necessary, permission is granted for the agreed amendments which are and should be coloured blue in the draft submitted.

69. In summary, the proposed amendments to which objections were taken by Mr Mundy on behalf of Mr Parker and Ms Kearney on behalf of the Proposed Second and Third Defendants were those in the following categories, as set out in the statement of Mr Patel's solicitor, Mr Geraint Thomas, filed in support of the application and dated 18 May 2023:

i) Category 1, amendments said to arise from Mr Patel's discovery of the transfer of £500,000 from ETT to SMC of which Mr Patel was previously unaware. These are the transfers to which I referred at paragraph 29 above. The new proposed claims are against both Mr Parker (for dishonest assistance and unlawful means conspiracy) and also ETT and SMC (for unjust enrichment, breach of trust, restitution, dishonest assistance and unlawful means conspiracy).

ii) Category 3, amendments to join ETH, as the holder of shares in DDET and SHL, in relation to claims made against ETH for unjust enrichment and unlawful means conspiracy.

70. I remind myself that in relation to the contested amendments, the test is the same as for summary judgment, that is the proposed amendments must have a real prospect of success, this not being a late amendment. See the recent restatement by the Court of Appeal in *CNM Estates (Tolworth Tower) Ltd v. Carvill-Briggs* [2023] EWCA Civ 480 (majority decision) at [75] – [76], citing with approval the decision of HHJ Eyre QC (as he then was) in *Scott v Singh* [2020] EWHC 1714 (Comm) at [19], where he said:

"*The new case set out in the proposed pleading must have a real prospect of success …. The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success…*"

71. A general point which cut across many of the submissions of Mr Benzie on the one hand and Mr Mundy and Ms Kearney on the other was whether it is reasonably arguable that any losses resulting from the transfers from ETT's account to SMC's in May and June 2021, insofar as they were wrongful, were suffered by Mr Patel at all. Since it was Smartway who made the payments to ETT, the position of Mr Mundy and Ms Kearney is that it is not realistically arguable that any losses were suffered by Mr Patel. Mr Mundy took me to a number of documents in which Mr Khandia, Mr Patel and Mr Parker treated Smartway as being a creditor.

72. On this point Mr Benzie relied on the fact of the JVA, under which it was Mr Patel who had agreed to make the contributions to the development. As such, Mr Benzie's main response was that Smartway was making payments on behalf of Mr Patel. He also relied on the fact that in Mr Parker's own evidence and in correspondence, he referred on more than one occasion to *Mr Patel* having transferred funds or made a contribution, when those transfers were strictly speaking made by Smartway. As such, Mr Benzie argued, Mr Parker himself regarded those payments as having come from Mr Patel.

73. This issue as to who has suffered any loss is likely to be a significant one at trial. However my view is that given the central fact of the JVA and the references by both main protagonists to contributions made through companies as having been made by themselves, the claim that losses were suffered by Mr Patel personally passes the low threshold which applies on an application to amend. It is reasonably arguable that the payments by Smartway to ETT in May and June 2021 were made on behalf of Mr Patel.

It follows that I consider that it is reasonably arguable that these payments were sufficiently direct to allow Mr Patel to bring an unjust enrichment claim against the alleged recipients, applying *Investment Trust Companies v. Revenue & Customs* [2017] UKSC 29, in the judgment of Lord Reed at [48].

74. Turning therefore to the new proposed heads of claim against SMC, ETT and ETH, Mr Parker is the sole director of ETT and the Managing Director of SMC. There is therefore a good argument that his knowledge can be attributed to both of those companies.

75. However, the directors of ETH are his two sons and I have not been taken to any evidence of "guilty" knowledge on their part (on the contrary, it was Thomas Parker who provided the unredacted bank statements of ETT to Mr Patel), nor to evidence that Mr Parker was a shadow director of that company. Paragraphs 96A and 96B of the draft Re-Amended Particulars plead that ETH has the knowledge of Mr Parker, and paragraphs 100F – 100H plead that ETH was party to an unlawful means conspiracy, but no particulars are pleaded as to the basis upon which such knowledge can be attributed to ETH, or the basis upon which it is alleged ETH agreed to act in concert with the other conspirators. As emphasised by Lord Sumption and Lord Lloyd-Jones in *JSC BTA Bank v Khrapunov* [2018] UKSC 19 at [13], unlawful means conspiracy is a tort of intent. In *Kuwait Oil Tanker Co SAK v Al-Bader (No.3) [2000]* 2 All E.R. (Comm) 271 Nourse LJ observed: "*Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of*."

76. In the absence of any pleading or evidence as to the basis on which ETH is said to have either been party to Mr Parker's alleged guilty knowledge or had any intention to injure Mr Patel, I do not consider that the heads of claim which rely on his knowledge are reasonably arguable as against ETH. I refuse permission therefore for the amendments alleging that ETH had the knowledge of Mr Parker or the knowledge of the deceit of Mr Parker in the middle of paragraphs 96A and 96B, and the inclusion of ETH in the allegations of unlawful means conspiracy at paragraphs 100F to 100H.

77. As to the new claims of dishonest assistance and unlawful means conspiracy against Mr Parker, and the new claims of unjust enrichment, breach of trust, restitution, dishonest assistance and unlawful means conspiracy against ETT and SMC, Mr Benzie submits that this is a fraud case where Mr Parker was the perpetrator and Mr Patel the victim, and it is necessary to stand back and take an overall view. He says we now know that £500,000 of Mr Patel's contribution went straight to SMC via ETT and was not on the face of it used for the purposes of the development. A further new allegation of deceit (an amendment which is not opposed - paragraph 86.10A) is that Mr Parker misrepresented a £189,000 credit from HMRC for VAT as having been a payment to HMRC.

78. Ms Kearney accepts, drawing my attention to the decision in *Raja v. McMillan* [2020] EWHC 951 (Ch) at [33] – [35] that it is at least arguable that an individual can conspire with his one-man companies; *a fortiori* where, as here, one of those companies has other directors. She objects though that there is no pleading as to whether it is alleged for example that ETT and SMC were involved in the alleged altering of invoices by Mr Parker or his alleged pre-contractual misrepresentations.

79. However, I consider the fact it is alleged, on evidence from bank statements, that £500,000 passed through ETT's account to SMC in circumstances where it is well arguable this was inexplicable except as fraud, passes the low threshold of meaning the resultant claims are reasonably arguable. This applies to the allegations of dishonest assistance, breach of trust, unlawful means conspiracy, restitution and unjust enrichment against Mr Parker, ETT and SMC.

80. Finally, so far as ETH is concerned, I do accept that the unjust enrichment claims against ETH made by the proposed amendments to paragraphs 91 and 92 and the "Share Trust" allegations that the shares in SHL and DDET are held by ETH on trust for Mr Patel, are reasonably arguable on the alternative basis that no consideration was provided.

81. In conclusion therefore, I grant the application for permission to amend the APOC as presented in the draft before me, except for:

    i) The allegations against ETH based on the knowledge of Mr Parker at paragraphs 96A and 96B; and,

    ii) The inclusion of ETH in the allegations of unlawful means conspiracy at paragraphs 100F to 100H

82. It follows that I also conclude that SMC, ETT and ETH should all be joined as additional defendants to the claim and I so order.

83. Mr Patel through his representatives should accordingly file and serve suitably modified Re-Amended Particulars of Claim. I also invite the parties to submit suitable proposed directions, to follow the joinder of the additional defendants.

3. Summary judgment and/or strike out on the Counterclaim

84. The third application before me is for summary judgment and/or strike out of Mr Parker's Counterclaim, by which he seeks rescission or a declaration that the Personal Guarantee signed by him on 23 March 2021 is unenforceable, on grounds of misrepresentation and deceit by Mr Patel. This is therefore a specific issue relating to the circumstances in which that guarantee came to be executed.

85. The application was presented and defended very much as an application for summary judgment rather than strike out. There are no allegations of any abuse of process by Mr Parker. The issue is therefore whether the Counterclaim has a realistic prospect of success, that is more than merely fanciful.

86. Both parties agreed that the test to be applied on summary judgment was that conveniently summarised by Lewison J. (as he then was) in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (against a claimant), and approved on many occasions since, including by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2010] Lloyd's Rep. I.R. 301, viz:

    i) "The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 2 All ER 91;

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

iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman

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

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

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) *On the other hand 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. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

87. There is no dispute that the signature on the Personal Guarantee is Mr Parker's, and that this was witnessed by Ms Lyons of Smartway. Mr Parker confirmed his handwriting on the document through his counsel at the hearing.

88. There is also no dispute that Mr Cocklin emailed the draft guarantee to Mr Parker late on Friday 19 March 2021, as part of a pack of draft agreements relating to the loan of £3.66m that Smartway was making to DDET to finance the purchase of the Hospital. At that stage the parties' expectation was that that loan would be refinanced with Barclays, but in April 2021 Barclays declined to do so (Mr Patel says that this was because of the poor credit record of ETT and/or ETH). The loan was therefore never refinanced, but remained owed by DDET to Smartway. The loan term was 9 months, and by its terms the Personal Guarantee guaranteed the whole of the £3.66m loan.

89. In those circumstances, the grounds on which the Personal Guarantee could be declared unenforceable or rescinded are very limited, as submitted in Mr Patel's skeleton. Where a party was not induced to sign a document by fraud, they are bound by their signature, regardless of whether they have read it – *L'Estrange v. F. Graucob Ltd* [1934] 2 KB 394. The well-known case of *Saunders v. Anglia Building Society* [1971] AC 1004 confirms that the plea of *non est factum* (or "not my document") is not available to a person who signs a document without reading if they are aware even in only a very general sense what the document is; to rely on that defence of mistake, the document must be fundamentally different from what they thought they were signing.

90. As Mr Turner submitted, Mr Patel's case as to how and why Mr Parker signed the Personal Guarantee is very straightforward. On Mr Patel's account, after Mr Parker said he would not be able to contribute his 50% to the purchase costs, Mr Patel and Mr Cocklin arranged for Smartway to provide a loan to DDET and take security. Since Mr Parker was not contributing, they wanted him to provide a personal guarantee. After contracts had been exchanged, Mr Cocklin therefore prepared the four documents which he sent to Mr Parker late on 19 March 2021. The intention, as reflected in text messages between Mr Cocklin and Mr Patel which were in the bundle, was that Mr Parker would come in to Smartway's offices on the Monday and execute those documents together with a shareholder agreement, prior to completion on the Friday. In the event, the meeting was pushed back to the Tuesday. By sending the documents late on Friday, with a cover email which made it perfectly clear that they included a personal guarantee, Mr Cocklin says he was intending to give Mr Parker a proper opportunity to review them before signing them. He says Mr Parker brought his own copies of the documents to the meeting. Mr Patel and Mr Cocklin say they were both at the meeting, and Mr Parker signed the Personal Guarantee, witnessed by Ms Lyons, without raising any concerns about it. The Personal Guarantee stated very prominently on its face and on the signature page that it was a personal guarantee.

91. Mr Parker's position as to exactly what he knew and believed when he signed the Personal Guarantee has fluctuated somewhat, but in essence he contends that he had two conversations with Mr Patel, one before 19 March 2021 and one by telephone on the 23 March, in which Mr Patel told him that he needed Mr Parker to sign the Smartway documents to prove to some American investors his financial interest in the joint venture, and documentation of Smartway's lending, to show it had the benefit of the £3.66m loan. He says Mr Patel had no intention of relying on the documents and said they could "rip them up" after they were signed, and that on that basis Mr Parker agreed to sign them. Mr Parker claims that as a rule he does not enter into personal guarantees. He says that at the meeting on 23 March 2021 he was uncomfortable signing what looked like heavyweight legal documents without legal advice and he phoned Mr Patel, who said they were "bog standard" for the bank and he would not use or rely on them other than

to satisfy the bank. Mr Parker says he trusted Mr Patel and took his word for this, and in reliance upon what Mr Patel said, he signed the guarantee, without reading it.

92. In his Defence Mr Parker says he signed the documents at SHL's office, but he later says in his witness evidence that was a typo, and he agrees the meeting was at Smartway's offices. He pleads in his Defence that he did not read the documents. In his first witness statement dated 16 November 2022, he says he did not read the documents and he "… *did not knowingly give a personal guarantee for a loan from Smartway…*".

93. Mr Parker emphasised in his witness evidence, as Mr Mundy pressed in submission, that the guarantee was for the whole of the loan, whereas he was only ever intended to contribute 50%. It is said this is evidence that the Personal Guarantee was not intended to be relied upon. In his second statement dated 24 April 2023, Mr Parker says he does not recall bringing his own pack of documents or reading them before the meeting, and that he does not recall receiving Mr Cocklin's email or reading it, although he does not dispute that he received it.

94. During the hearing I asked Mr Mundy what precisely his client's case was about his knowledge when he signed the Personal Guarantee. Mr Mundy replied (on instructions from his client, who was present at the back of the court) that Mr Parker did not know what the documents that he signed were, and that he did not read them because they were to be ripped up so it didn't matter. Mr Mundy said that was his client's primary case, but that it would be open to a judge to find he must have known it was a personal guarantee but did not care.

95. After the hearing, Mr Mundy sent an email to me (copied to all counsel) to say he needed to correct an error, saying:

"*During a discussion following the second day of the hearing last week, I became concerned that, in response to a question upon which I took whispered instructions, I may have (inadvertently) given a misleading account of Mr Parker's case about signing the guarantee. Having sought clarification, I remain so concerned, and so am obliged to correct the position.*

Mr Parker's case is not that he did not know the word "guarantee" was written on the document he signed. His case is that, while he saw the word "guarantee" and knew what that meant, he did not believe that he was actually guaranteeing anything because Mr Patel had said he would not rely on the guarantee."

96. In his submissions Mr Turner emphasised that I would need to be satisfied that the argument that the Personal Guarantee had been obtained by fraud had a realistic prospect of success, and that I was not required to take Mr Parker's assertions at face value but should consider them against the contemporaneous documents.

97. He said Mr Parker's case was effectively that the facility documents were a sham, and the only reason they were prepared was to mislead lenders in the context of a US investment. He submitted that the court should reject the suggestion that the Counterclaim had any realistic prospect of succeeding, saying the allegation of a sham was inherently improbable and no evidence to support the suggestion had been identified by Mr Parker. He said there was a good explanation for why Mr Parker was willing to

give a guarantee for a 9-month loan of £3.66m, which was that both parties then anticipated that loan would be refinanced by Barclays (for a longer term), and that they expected the Hospital would be a good earner. He said the fact that Mr Cocklin sent the documents openly, explaining what they were, well in advance of the meeting where they were to be signed, was consistent with them being documents which were intended genuinely to be effective, not with a sham. Once the documents were executed, they were sent by Mr Cocklin to the conveyancing solicitors, Austin Moore, copied to Mr Parker, which also indicated they were intended to be relied upon.

98. Mr Turner also emphasised that it was obvious from its underlined heading and the text immediately above the signature box that this was a personal guarantee, so any suggestion from Mr Parker that he did not know what he was signing was not credible. He also referred to emails concerning a US opportunity, which he said was the one Mr Parker must be referring to, but said this did not come up until 6 months after the Personal Guarantee was signed. As to Mr Parker's claim that he had spoken to Mr Patel on the phone on 23 March 2023, this was contradicted not only by the statements of Mr Patel, Mr Cocklin and Ms Lyons, but also by a statement from a Mr Chotaliya, who had examined emails sent by Mr Patel on that day and stated that the metadata from these confirmed that Mr Patel had been in Smartway's office.

99. Finally Mr Turner placed particular emphasis on two communications which were sent a year later from Mr Parker's side, after the dispute had arisen between the parties. These followed a letter from Mr Patel's solicitors, Laytons, of 5 April 2022, following the breakdown of negotiations for a buy-out, in which Laytons referred at sub-paragraph (7) to Mr Parker having failed to repay £3.33m pursuant to his personal guarantee. In response to this letter Mr Parker sent a long letter direct to Mr Patel personally on 6 April 2022 which set out his position as to how and why their relationship had broken down. As Mr Mundy emphasised, it is expressed in quite emotional terms. It is still seeking some kind of resolution without litigation.

100. Mr Turner emphasised that despite the fact that Mr Parker's letter refers to Mr Patel having agreed to lend Mr Parker half of the money for DDET, nowhere does it dispute that Mr Parker is liable under the personal guarantee referred to in Laytons' letter. Mr Turner submitted that this was a very surprising omission, if Mr Parker's case on the Personal Guarantee was true.

101. Shortly afterwards on 12 April 2022, Mr Parker's solicitor at Penningtons, Charlotte Hill, emailed Mr Thomas at Laytons. Mr Turner also seeks to rely on the contents of that email as rendering Mr Parker's position not credible.

102. Before I refer to this email, it is necessary to deal with an objection raised by Mr Mundy that it is subject to without prejudice privilege. He submits that this email was a genuine attempt to settle the dispute, in that it proposed a without prejudice ADR meeting.

103. Mr Turner disputes that the email was without prejudice, submitting that the proposal of ADR does not in itself render the whole of an email without prejudice, especially where it is not marked as such. He also submits that if it was privileged, this has been waived in circumstances where the email was referred to in Mr Patel's APOC, and Mr Parker did not object to this reference but rather responded to it in the Defence. Mr Mundy submits that such a defensive response cannot be considered a waiver.

104. As observed by Lord Hope in one of the leading cases on "without prejudice" communications, *Bradford & Bingley plc v Rashid* [2006] UKHL 37 at [23], the fact that a communication is not marked "without prejudice" is not conclusive of whether it is so: the question is whether the correspondence was sent in an attempt to compromise actual or pending litigation and if so, whether it can be inferred from its terms and context that it contained an offer of settlement for which the party who made the offer can claim privilege. However, this does not mean it is irrelevant whether the correspondence is marked "without prejudice": as Lord Mance noted in the same case at [84], the express use of the phrase not only puts the matter beyond doubt but is also capable of throwing light on whether such a situation existed.

105. In the present case, Penningtons and Laytons are both experienced firms of solicitors whom one can infer would most probably have headed their correspondence "without prejudice" had they intended it to be so. Laytons' letter is plainly one setting out their client's case in an open way, and is not an attempt to compromise pending litigation. Penningtons' email is expressly stated to be in response to Laytons' letter and so one would expect it to be written on the same, open basis. The fact that Ms Hill's email is not marked "without prejudice" is therefore a strong indicator that this is because the writer was not intending it to be "without prejudice". Furthermore its contents are for the most part a summary of her client's position, rather than containing an attempt to offer a compromise. Towards the end of the email, Ms Hill proposes that the parties meet for a settlement meeting on either an open or a without prejudice basis. It is this proposal which Mr Mundy relies on as making the email settlement correspondence.

106. I do not accept this. Offers to meet for ADR or a settlement meeting are frequently made on an open basis, especially as parties may wish subsequently to rely on their willingness to enter into ADR on arguments about costs. The fact such a suggestion is made in an email which is not marked "without prejudice" and does not otherwise contain a compromise offer does not in my view render the email as a whole privileged. In my view the email was clearly intended by Ms Hill to be open correspondence. In those circumstances, I do not consider it necessary to go on to consider whether any privilege was waived.

107. The key sentence in the email of 12 April 2022 on which Mr Turner relies is in the third paragraph where Ms Hill says: "*It is 50% of this sum that Mike Parker provided a Personal Guarantee for and it is accepted that this sum remains outstanding (the reason for which, we understand is because your client had intended to refinance the loan to Prop Co, but has failed to do so)*."

108. Mr Turner submits that it is inconceivable that Ms Hill would have written in these terms if she knew her client was contesting whether the Personal Guarantee was enforceable at all, for reasons of fraudulent misrepresentation. The first time that Mr Parker raised the defence of fraud was in the Defence, served in November 2022. Penningtons' email is also relied upon by Mr Patel as an affirmation if the Personal Guarantee was susceptible to rescission.

109. In his submissions opposing the application, Mr Mundy emphasised that the test on a summary judgment application was one of absence of reality. He submitted there should be no weighing of evidence or drawing of inferences – that would be to engage in the mini trial that judges on summary judgment applications are warned against. Mr Parker

had provided witness evidence as to what he says led him to sign the Personal Guarantee, and it was only in clear cases where all the contemporaneous documents contradicted a factual statement that it might be appropriate to reject such a statement on summary judgment. He relied in this context on the judgment of Lord Hamblen JSC in *HRH Emere Godwin Bene Okpabi v. Royal Dutch Shell Plc* [2021] UKSC 3 at [110] – [111] (concerning service out of the jurisdiction, where an equivalent test to summary judgment applies), emphasising that it was only in such a clear case that the possibility of rejecting factual assertions in a witness statement could be contemplated and that very powerful cross-examination material should not be equated with this kind of "knockout blow".

110. Mr Mundy submitted that the contemporaneous documents raised question marks such as why Mr Parker would sign a personal guarantee on a loan repayable in 9 months where there was no possibility of it being repaid in that time, and why he would have agreed to guarantee the whole loan rather than 50%. He said that on any view Ms Hill's statement, that Mr Parker had provided a guarantee for 50% of the loan, represented no one's case. The fact that Mr Patel had produced email correspondence suggesting an American opportunity which was 6 months later did not mean there might not have been an earlier one. He submitted that the point about Mr Cocklin having sent out the documents a few days beforehand carried much less force where Mr Parker's case was that he already knew the documents would not be relied on, that they were in effect a sham. He also objected that Mr Chotaliya's evidence was impermissible expert evidence for which permission had not been obtained.

111. Mr Mundy submitted that the points relied upon by Mr Turner were all classic cross-examination material, and credibility points for a final trial. As to the letter from Mr Parker of 6 April 2022, he submitted this was a deeply personal one, trying to reach out to Mr Patel, in which it would have been quite inappropriate and counterproductive to have accused Mr Patel of sham or deceit.

112. In considering whether the Counterclaim has a realistic as opposed to a fanciful prospect of success, I remind myself of the exhortations that a judge on an application for summary judgment should not conduct a mini-trial, reemphasised again by the Supreme Court in *Okpabi*. This claim is one in which Mr Parker is making counter-allegations of deceit against Mr Patel's allegations of deceit. As such it is the archetypal kind of case where witness evidence should be subjected to cross examination and testing against contemporaneous documents, previous statements and inherent probabilities.

113. Mr Turner makes a number of powerful points about the inherent improbability that points would not have been taken in correspondence, that Mr Parker's account has shifted, and that Mr Cocklin would not have handled the documentation as he did if Mr Patel did not intend to rely upon it. However in my view it is essentially impossible to weigh the merits of those points without engaging in exactly the kind of weighing of evidence that is the job of the trial judge. At the time the Personal Guarantee was executed Mr Parker and Mr Patel had a relaxed relationship where they trusted each other and where important matters – such as their JVA – were never reduced to writing. To reject either man's account of what happened in that week in March 2021 requires in my view an assessment of their evidence in the round, following rigorous cross-examination and with a full examination of all the relevant documents and circumstances.

114. Nor do I consider that the email of 12 April 2022, which on any view contained an inaccurate description of the Personal Guarantee and was primarily aimed at setting up a settlement meeting, can be so clearly regarded as an affirmation as to equate to a "knockout" blow.

115. As Colman J said in De Molestina v. Ponton [2002] 1 Lloyd's Rep. 271 at [3.5] (approved by Carnwath LJ in the Court of Appeal in *Mentmore International Ltd v Abbey Healthcare (Festival) Ltd* [2010] EWCA Civ 761 at [21]) "…*Where, in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to a trial*." My conclusion is that the Counterclaim is an example of just this situation.

116. Finally, although Mr Mundy did not contend that this was a case where there was some other compelling reason why this issue should be disposed of at trial (pursuant to CPR 24.2(b)), I also note that there will in any event need to be a trial, at which it can be anticipated that the lead-up to and history of the development will be examined in detail. As such, disposing of the Counterclaim now would be unlikely to save much in the way of court time, although it would naturally leave Mr Parker exposed to a claim on the guarantee.

117. Accordingly I refuse Mr Patel's application for summary judgment on the Counterclaim.