Neutral Citation Number: [2021] EWCA Civ 1103

Case No: A3/2020/0946

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Dame Sarah Worthington QC (Hon) sitting as a Deputy Judge of the High Court
[2020] EWHC 951 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 July 2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

- -

Between :

KAUSA RAJA	**Claimant and Respondent**
- and –	
TERRY GODRICK McMILLAN	**Defendant and Appellant**

- -
- -

Mr Philip Coppel QC and Mr Zachary Kell (instructed by **Cavendish Legal Group**) for **the Appellant**

Mr Gabriel Buttimore (instructed by **Teacher Stern LLP**) for **the Respondent**

Hearing dates: 21 and 22 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 21 July 2021

Lord Justice Nugee:

Introduction

1. This is an appeal by the Defendant, Mr Terry McMillan, against an Order dated 22 April 2020 of Dame Sarah Worthington QC (Hon), sitting as a Deputy Judge of the High Court (**"the Judge"**). By her Order she dismissed an application by Mr McMillan for summary judgment on, or strike-out of, the claim.

2. In November 2011 planning permission had been granted by the London Borough of Southwark (**"LBS"**), the relevant planning authority, for the development of a site (**"the Signal site"**) at 89-93 Newington Causeway, London SE1 for mixed use including residential flats. LBS required a certain number of the flats to be allocated to affordable housing. This requirement was given effect to by a planning obligation under an agreement (**"the s. 106 agreement"**) made under s. 106 of the Town and Country Planning Act 1990 (**"T&CPA 1990"**).

3. Mr McMillan is a property developer, predominantly active in the London area. He operates through a number of companies and limited partnerships. Mr McMillan came up with a scheme to enable him to be able to take advantage of what he perceived to be a loophole in the affordable housing requirement. I give the details below, but in essence the scheme involved the developer granting leases of the affordable flats to a housing association, the housing association granting "shared ownership" sub-leases to tenants, the tenants "staircasing" to 100% ownership (the idea being that this would mean that the affordable housing requirement fell away), and the flats then being sold on the open market free of the restriction. The tenants, however, although the legal owners of the sub-leases of the flats, would not be the beneficial owners. Mr McMillan, through entities of his, would fund the acquisition of the flats by the tenants and own them, and so would profit from the open market value on sale.

4. Mr McMillan put this scheme into operation at the Signal site. The site was developed by erecting a building now called the Signal Building. There were 11 flats subject to the affordable housing requirement. In March 2015 they were leased to a housing association. Between March and December 2015 the housing association leased them to tenants who staircased them to 100%. In the case of the particular flat with which these proceedings are concerned, Flat 5, the lease to the tenant and the staircasing to 100% are said to have both taken place on 7 August 2015. The flats were then sold on the open market, ostensibly free from the affordable housing requirement.

5. One of the purchasers was the Claimant, Ms Kausa Raja. She bought Flat 5 for £714,350 in April 2016. That was considerably more than the flat would be worth if it were still subject to the affordable housing requirement. It appears that she then let out the flat at an open market rent.

6. The purchase however has been nothing short of disastrous for her. In June 2016 LBS brought proceedings against her (and the purchasers of other flats) asserting that Mr McMillan's scheme did not work and that the flats were still subject to the affordable housing obligation. LBS claimed a declaration to that effect, an injunction restraining her from using the flat otherwise in accordance with that obligation, and

damages. In July 2017 she settled those proceedings on terms that LBS could acquire the flat from her at a price of £283,657 (agreed to be the value of the flat subject to the affordable housing obligation), which in due course it did.

7. Ms Raja also made a claim against the solicitors who had acted for her on the purchase. That too was settled, in this case by payment of £470,693. But despite having received from the two settlements a total of over £750,000, she has been left significantly out of pocket, partly because of various associated costs, but mainly because she borrowed the monies for the initial purchase on bridging loans at a high rate of interest and was unable to remortgage.

8. In these proceedings she seeks to recover her remaining losses from Mr McMillan. She has pleaded two causes of action against him. Both have at their heart the allegation that she was deceived into buying the flat by certain fraudulent misrepresentations, namely that the flat had been leased to a tenant in need of affordable housing, that the lease had been staircased to 100% and that the flat was being sold free of the affordable housing obligation. Mr McMillan is not said to have made any of the representations himself. But it is said that he masterminded the entire scheme and that he is liable for them (i) because he was party to an unlawful means conspiracy (the unlawful means being the deceit) and/or (ii) because he is liable as a joint tortfeasor.

9. Mr McMillan applied under CPR r 3.4 and CPR r 24.2 to strike out, and/or for summary judgment on, the claims. In essence the basis for the application was that the conspiracy as pleaded was not a viable claim, and that the suggestion that he was liable for deceit was unsustainable, as he had advice, and believed, that the scheme was lawful and effective.

10. The Judge dismissed the application. She thought the claim raised triable issues on the facts and that points of law should be decided at trial.

11. Mr McMillan appeals on four grounds, the first three directed at the conspiracy claim, and the fourth at the claim that he is liable as a joint tortfeasor. These grounds were developed by Mr Philip Coppel QC, who appeared for Mr McMillan with Mr Zachary Kell, in a well-argued submission but in my view the Judge was right that the claims should both go forward to trial. I would dismiss the appeal.

Facts

12. The facts have of course not yet been found, but many of them are documented and not disputed, and Mr Coppel further accepted that for the purposes of the application the primary facts pleaded by Ms Raja in her Particulars of Claim, and in further information given under CPR Part 18, should be assumed to be correct. On that basis the facts are as follows.

13. On 16 November 2011 planning permission was granted by LBS to a developer called Neobrand Ltd (**"Neobrand"**) for the development of the Signal site by erection of a 22-storey mixed use building to include 38 residential flats. On the same day LBS and Neobrand entered into the s. 106 agreement. This was subsequently amended by two deeds of amendment, dated 30 March 2012 and 27 October 2014 respectively, of which only the second (**"the 2nd deed"**) is relevant for present purposes.

14. By cl 5.1 of the s. 106 agreement Neobrand covenanted to observe the obligations in schedule 2. Part I of schedule 2 contained obligations in relation to affordable housing. These included obligations to construct the Affordable Housing Units (11 flats), to have them completed and available for occupation no later than the other flats, and, by para 1.3 (in its amended form):

> "Subject to the provisions of clause 9 [Neobrand] covenants with [LBS] that Affordable Housing Units shall not be used for purposes other than by a Registered Provider providing housing accommodation to households in need of Affordable Housing in the London Borough of Southwark area in perpetuity."

The words "by a Registered Provider" were added by the 2nd deed. This also defined "Registered Provider" by reference to an approved list and provided that London District Housing Association (**"LDHA"**) should be deemed, for the purposes of the Signal site, to be included on the list. LDHA (properly London District Housing Association Ltd) is an industrial and provident society.

15. There was a lengthy definition of Affordable Housing, again amended by the 2nd deed. As so amended it defined Affordable Housing as follows:

> "affordable housing that is attainable for purchase and/or rent by those households who cannot afford to buy or rent anywhere in the Borough at market housing prices and in the case of Shared Ownership units shall refer to accommodation which will be given to households where the average total gross household annual income does not exceed £32,901 in respect of all 1 bed dwellings…"

It continued with income limits for 2, 3 and 4 bed dwellings, provisions for the figures to rise annually, and various ancillary provisions.

16. The 2nd Deed also defined "Shared Ownership Units": this meant the 11 Affordable Housing Units to be made available on Shared Ownership Terms. That latter expression was itself defined by reference to a standard form of lease. The standard form of lease is not in evidence but there is no dispute as to the basic structure of such a lease (and the sub-lease of Flat 5, which is in evidence, confirms this), which is that the lessee, instead of buying a flat outright, initially part owns and part rents. Thus for example a lessee might start with say a 25% ownership, paying a premium for the lease calculated at 25% of the value of the flat and paying a rent calculated at 75% of the headline rent for the flat. The lessee is entitled to purchase additional tranches so that by, for example, purchasing a further 10% the lessee can acquire a 35% ownership in which case the rent would be reduced to 65%; this can be repeated until the lessee has acquired 100% ownership. It is this process of acquiring further tranches of ownership that is known as staircasing.

17. The s. 106 agreement was, by cl 2.1, expressly made pursuant to s. 106 T&CPA 1990. That section makes planning obligations as defined enforceable by the relevant local planning authority against not only the person entering into them but any person deriving title from him. Planning obligations include obligations contained in a s. 106 agreement which restrict the use of land. The effect of para 1.3 of sch 2 of the s. 106 agreement was therefore to impose a restriction that was binding not only on

Neobrand but on anyone deriving title from it.

18. Para 1.3 of sch 2 was however subject to cl 9. This provided, so far as relevant, as follows:

> "9. Enforceability of obligations
>
> 9.1 The obligations contained in this Deed shall not be binding upon nor enforceable against:
>
> …
>
> 9.1.6 any tenant Staircasing to 100% pursuant to a shared ownership lease or any person deriving title through or under such tenant or any successor in title thereto and their respective mortgagees"

"Staircasing" was not initially defined, but a definition was added in the 2nd deed as follows:

> "the purchase by the owner of a Shared Ownership Unit of additional equity in the Shared Ownership Unit."

19. As can be seen, the effect of the s. 106 agreement was that the 11 flats allocated for affordable housing could only be used by a Registered Provider providing housing accommodation to households in need of Affordable Housing. This restriction was *prima facie* both permanent and binding on successors in title, but fell away if a tenant under a shared ownership lease staircased to 100%. Mr McMillan's scheme was based on the idea that there was nothing preventing him (or one of his entities) from providing the money to such a tenant to staircase to 100%, and nothing preventing such a tenant from holding his lease on trust for him (or one of his entities). In this way he hoped that he could effectively free the affordable flats from the affordable housing obligation and dispose of the flats on the open market.

20. The scheme was implemented as follows (this specifically relates to Flat 5, but similar arrangements applied to the other flats):

(1) By a declaration of trust dated 5 November 2012[1] LDHA agreed that it would hold headleases of the affordable flats on trust for a limited partnership called PGP Finance No 8 LP (**"PGPF"**). PGPF is said to have been ultimately owned by Mr McMillan and his wife, and entirely under his control.

(2) By an agreement dated 28 July 2014 Neobrand agreed to grant to LDHA a headlease of each of the affordable flats, and by a lease dated 4 March 2015 (**"the headlease"**) Neobrand demised Flat 5 to LDHA for a term of 125 years from 1 January 2013 at a premium of £326,174. This sum was provided by PGPF.

(3) PGPF subsequently transferred its rights to Mortgage & Equity Partners No 16

[1] There was some dispute at the hearing as to the date of this deed, but Mr Buttimore confirmed after the hearing that this is what the documentation appears to show; in any event it is the pleaded case which for present purposes is to be assumed.

LP (**"M&E"**), and by a Declaration of Trust dated 1 April 2015 LDHA declared it held all the headleases, including that of Flat 5, on trust for M&E. M&E is another entity said to have been ultimately owned by Mr McMillan and his wife, and entirely under his control.

(4) By an agreement for lease dated 31 July 2015 (**"the agreement for lease"**) LDHA agreed to grant to a Mr Craig Cooper-Attard a shared ownership sub-lease of Flat 5. Completion was to take place 10 working days after service of notice by LDHA that the flat had been completed. The premium payable on grant was the Initial Percentage (25%) of the Initial Market Value (£620,000), a deposit of 10% being payable on exchange, but clause 10 provided that between the date of the agreement and completion Mr Cooper-Attard could increase the Initial Percentage to up to 100%, in which case the premium payable on completion would increase to the revised percentage of the Initial Market Value, and the deposit would be increased to 10% of the increased premium.

(5) By a sub-lease dated 7 August 2015 (**"the sub-lease"**) LDHA demised Flat 5 to Mr Cooper-Attard for a term of 125 years less 3 days from 1 January 2013. This provided that the Initial Market Value was £620,000, the Initial Percentage 25%, and the Premium £155,000. It also contained Staircasing Provisions in schedule 1 under which the tenant could acquire further Portioned Percentages in tranches of at least 10% up to a maximum of 100% by paying the relevant percentage of the then market value of the flat.

(6) However by a Memorandum of Staircasing also dated 7 August 2015 it was recorded that Mr Cooper-Attard had paid an additional deposit of £46,500 under the terms of the agreement for lease and that the percentage he would acquire on completion would therefore be 100%.

(7) As with LDHA, Mr Cooper-Attard was not the beneficial owner of his interest in the flat. By clause 15 of the agreement for lease he had agreed to execute a Declaration of Trust; and by a Declaration of Trust dated 7 August 2015 he duly executed such a declaration in favour of M&E, which had financed the purchase and the staircasing to 100%. By clause 5.1 thereof he granted to M&E the absolute right to deal with the flat including its sale.

21. The thinking behind the scheme was that Mr Cooper-Attard would qualify as a "tenant Staircasing to 100% pursuant to a shared ownership lease" within the meaning of clause 9.1.6 of the s. 106 agreement (see paragraph 18 above), and hence that the affordable housing obligation would not be binding either on him or on his successors in title. The flat could therefore be sold on the open market. This would be for the ultimate benefit of Mr McMillan since the beneficial interest in the entire structure was held by M&E which he owned and controlled.

22. Ms Raja was introduced to Flat 5 in April 2016. She agreed to buy it for £714,350, both exchanging contracts and completing the purchase on 28 April 2016. By that stage Mr Cooper-Attard's interest in the Flat had been transferred to a Ms Chryso

Josephides.[2]

23. On 7 June 2016 however LBS issued proceedings against LDHA and a number of other defendants, including Ms Raja (and the purchasers of the other flats). LBS's contention was that Mr McMillan's scheme did not work and that the flats were still subject to the affordable housing obligation in the s. 106 agreement, and they sought to enforce that obligation against the purchasers, including Ms Raja.

24. Those proceedings were compromised, so far as Ms Raja was concerned, by a consent order in the Tomlin form dated 25 July 2017 and made by Rose J. By that Order Rose J declared that Ms Raja as owner of Flat 5 was bound by the affordable housing obligation and stayed the proceedings on agreed terms. These included the grant by Ms Raja to LBS of an option to buy the flat for £283,657, which was agreed to be the value of the flat subject to the affordable housing obligation. Under that option Ms Raja sold the flat to LBS in October 2018.

25. Ms Raja also settled a claim against the solicitors who had acted for her on the purchase of the flat, which resulted in a recovery of £470,693 in or about September 2017.

The proceedings

26. Ms Raja issued the present proceedings against Mr McMillan on 22 February 2019. She claims damages for the balance of her losses from Mr McMillan, consisting of interest payments, charges, penalties and legal costs arising out of bridging loans taken out by her to purchase the flat, together with other legal costs. Despite payments being made to the lenders when her other claims were settled, she has a continuing liability to them, and her claim is particularised at nearly £1m, with further losses still to be incurred.

27. Two causes of action are relied on against Mr McMillan, namely unlawful means conspiracy and deceit. Both rely on what are said to have been a series of fraudulent misrepresentations made to Ms Raja. The specific representations relied on are as follows. At paragraphs 43 to 48 of the Particulars of Claim a number of documents are pleaded which were said to have been provided to Ms Raja's solicitors during the conveyancing transaction and which referred to the staircasing as having taken effect. Paragraph 49 then pleads:

> "It is averred that the matters set out in paragraphs 43-48, against the background of the S.106 Agreement, amounted to and/or contained the following representations made by LDHA and/or M&E and/or Mr Cooper-Attard and/or Chryso Josephides:
>
> a. a representation that the lease of Flat 5 had been granted to a tenant (namely Mr Cooper-Attard) who was in need of Affordable Housing in the London Borough of Southwark and/or that he had been assessed as meeting and/or did meet the specified income criteria in the S.106 Agreement;

[2] There is some confusion in the documents whether this was a Ms or a Mr Josephides, but the ledger for Darlingtons, the solicitors who acted on the purchase of the flat, refers to their client as Ms Josephides, and I assume this is correct.

> b. a representation that the sub-lease of Flat 5 had been staircased up to 100% (within the context of the S.106 Agreement) thereby triggering the Shared Ownership Lease Exemption;
>
> c. a representation that the sub-lease of Flat 5 was accordingly being sold free of the Affordable Housing Obligation."

The representations are said to have been false, and the various representors to have known them to be untrue, or reckless as to their truth, and Ms Raja to have relied on them in purchasing Flat 5. It is worth noting that in the case of M&E, its knowledge or recklessness is said to be "via the Defendant", and he is personally alleged to have known that representation (a) was untrue and to have been reckless as to whether representations (b) and (c) were untrue. He is not alleged to have made any of the representations himself, but is said to be liable as a conspirator or as a joint tortfeasor.

28. The conspiracy claim is pleaded in Paragraph 37 of the Particulars of Claim as follows (where PGPL and TPIL refer to two companies called Protected Growth Plan Ltd and Trademark Property and Investments Ltd respectively, each of which is again said to be ultimately owned by Mr McMillan and his wife and controlled by him, and AHUs refers to the affordable flats):

> "On dates unknown to the Claimant but prior to 19 September 2012 the Defendant, LDHA, [PGPF], PGPL, TPIL and (from around 14 January 2015) M&E with the predominant intention of harming, amongst others, the purchasers of the AHUs (including the Claimant) by causing them to purchase AHUs in the mistaken belief that the Shared Ownership Exemption applied and that the AHUs were being purchased free of the Affordable Housing Obligation, conspired and/or combined together with another person or persons unknown to the Claimant and/or with the nominees referred to below … to…"

Various acts are then alleged, namely (a) to recruit paid nominees to act as tenants who were not in need of affordable housing in Southwark; (b) to cause LDHA to grant sub-leases to them; (c) to prepare and execute documentation designed to give the appearance to prospective purchasers that the sub-leases had been granted to individuals in need of affordable housing in Southwark and had been staircased to 100%, and that the flats were being sold free of the affordable housing obligation; and (d) to use the unlawful means of the fraudulent misrepresentations which I have already referred to.

29. The joint tortfeasor claim is pleaded at Paragraph 52 of the Particulars of Claim as follows:

> "The Representations were in furtherance of the conspiracy. Further or alternatively they were orchestrated and/or facilitated and/or instigated by the Defendant in furtherance of a common design with LDHA and/or M&E and/or Mr Cooper-Attard and/or Mr Chryso Josephides knowingly or recklessly to deceive the Claimant into purchasing Flat 5. In the premises, in addition to his liability in conspiracy to injure, the Defendant is liable in deceit jointly with LDHA and/or M&E and/or Mr Cooper-Attard and/or Mr Chryso Josephides as a joint tortfeasor."

The application

30. On 18 November 2019 Mr McMillan applied for summary judgment pursuant to CPR Part 24 or to strike out the claim pursuant to CPR Part 3. The essential basis on which the application was brought was that even on the assumption that the primary facts alleged by Ms Raja were correct, neither cause of action was viable because each was missing one or more essential elements.

31. That application came before the Judge in February 2020. On 22 April 2020 she handed down a characteristically detailed and erudite judgment at [2020] EWHC 951 (Ch) (**"the Judgment"** or **"Jmt"**) rejecting Mr Coppel's arguments and by her Order of the same date dismissed the application and refused permission to appeal. I do not attempt to summarise the Judgment here, but will refer as necessary to her views on the particular points raised on appeal when I deal with each Ground of Appeal.

32. Permission to appeal was granted by Newey LJ on 10 August 2020.

Grounds of Appeal

33. Four Grounds of Appeal are relied on. In summary they are as follows:

    (1) It is not possible for a director to conspire with a company that is his alter ego.

    (2) If the unlawful means relied on for conspiracy is fraudulent misrepresentation, that conspiracy cannot be formed without any of the conspirators intending, knowing or believing (or having reason to know or believe) at the time of conspiring that what they propose to do would involve a fraudulent misrepresentation.

    (3) It is not enough, for the purposes of an intention to harm by an unlawful means conspiracy, that the conspirators should have known that injury to the claimant was likely.

    (4) The Judge erred in concluding that legal advice obtained by, and believed by, Mr McMillan did not give him a defence.

Ground 4

34. Although Mr Coppel argued the grounds in that order, I prefer to start with Ground 4, which is the only ground which seeks to dispose of the claim that Mr McMillan is liable as joint tortfeasor for deceit.

35. No criticism is made of the adequacy of the pleading of this claim (see paragraph 29 above). Instead Mr McMillan's application is based on the submission that it can be seen at this stage that the claim has no real prospect of success and hence that summary judgment should be given in his favour. Mr Coppel submitted that the alleged misrepresentations, none of which was made by Mr McMillan personally, were not of fact but of the legal effectiveness of what was done, and that what was fatal to the claim was that Mr McMillan thought the scheme worked – indeed Mr McMillan's position in the substantive proceedings is that the scheme did in fact work, although that is not a point that has been argued on this appeal. In support of his submission he relied on the fact that Mr McMillan had obtained various Opinions

from counsel, and he submitted that in the light of those it was untenable to contend that Mr McMillan knew that the scheme was legally ineffective or was reckless as to whether it was.

36. Mr Gabriel Buttimore, who appeared for Ms Raja, pointed out that the evidence as to the advice that Mr McMillan had obtained from counsel came late in the day and in a piecemeal fashion, as follows:

(1) A letter of claim was sent to Mr McMillan on 29 September 2017. No substantive response was received to this, or to other pre-action correspondence.

(2) The claim form, with Particulars of Claim attached, was issued on 22 February 2019. The Defence, dated 25 April 2019, denied that Mr McMillan knew that, or was reckless as to whether, the alleged representations were untrue, and pleaded that at all material times he believed, and had reasonable grounds to believe, (a) that LDHA was responsible for vetting prospective tenants and had satisfied itself that Mr Cooper-Attard had met all applicable criteria; (b) that Flat 5 was staircased up to 100%; and (c) that the affordable housing obligation had ceased to apply to it. No reliance was however placed in this context on any legal advice, and indeed the Defence expressly stated that it was not intended to waive privilege.

(3) Mr McMillan's application was brought on 18 November 2019, supported by a witness statement from him of the same date. He exhibited three Opinions from counsel dated 5 June 2009, 20 January 2010 and 3 March 2014.

(4) Evidence was served on behalf of Ms Raja in opposition to the application on 7 February 2020. Among other things this took the point that the Opinions did not relate to the Signal site. In response Mr McMillan made a second witness statement on 17 February 2020 which exhibited a fourth Opinion, this time from leading counsel, dated 17 November 2014, which was concerned with the Signal site. Mr Buttimore pointed out that that statement came very late, being made on the very day that skeleton arguments were exchanged and only 2 days before the hearing started on 19 November.

37. Mr Buttimore also referred in rather more detail to the facts. He pointed out that although cl 9.1.6 of the s. 106 agreement referred to a "tenant Staircasing to 100%" there was initially no definition of "Staircasing". This was not introduced until the 2nd Deed of 27 October 2014, which defined it as the purchase by the owner of a Shared Ownership Unit of "additional equity" (paragraph 18 above). Mr Buttimore suggested that was a significant amendment, as any scheme that relied on the tenants of the sub-leases holding them on trust for one of Mr McMillan's entities was susceptible to attack on that ground alone as such a tenant never had any "equity" in the flat at all.

38. He next referred to the agreement for lease (see paragraph 20(4) above):

(1) Completion was to be 10 working days after service of notice that the flat had been completed. No such notice had been seen, but completion appears to have taken place early as there were not 10 working days between 31 July and

7 August.

(2) The initial premium due on completion was £155,000, ostensibly payable by Mr Cooper-Attard, and the total payable after staircasing was £620,000. But he was not expected to pay any of it himself, being a trustee for M&E who was to fund the payment; and the money effectively went round in a circle as it was payable to LDHA which was also holding its interest for M&E. In those circumstances Mr Buttimore described the payment as effectively fictional. Indeed cl 2.4 of the agreement contained a most unusual provision under which LDHA agreed that if Mr Cooper-Attard failed to complete, he would be released from all liability and LDHA would have no claim against him for damages, specific performance or otherwise. That could be said to support the case that Mr Cooper-Attard was a pure nominee (or "stooge") who agreed to lend his name to the transaction but had no real interest in it at all.

(3) Cl 6 provided that LDHA should give Mr Cooper-Attard vacant possession on completion. Mr Buttimore submitted that this was another provision that was essentially fictional. The reality was that Mr Cooper-Attard was never intended to take up occupation of the flat, or LDHA to give vacant possession of it. The flat had in fact been let on 23 March 2015 on an assured shorthold tenancy to four other individuals for a term of 12 months (with a break clause exercisable after 6 months).

(4) Cl 4.1 provided for Mr Cooper-Attard to pay a 10% deposit, that is of £15,500. Cl 11.4 and cl 11.6 provided for him to pay LDHA on completion the sums of £150 towards LDHA's solicitors costs and £1000 in respect of the first service charge respectively. There was no evidence that any of these sums had been paid. The ledger for Darlingtons, solicitors acting for Ms Josephides, showed movements of funds back to August 2014 but did not contain any entry corresponding to payment of the deposit on 31 July 2015, or indeed to the payment of the sums necessary for completion, or for staircasing to 100%, on 7 August 2015.

39. The assured shorthold tenancy of Flat 5 granted on 23 March 2015 was granted by TPIL, that is another company owned and controlled by Mr McMillan. TPIL had no apparent legal or equitable interest in the flat, but this illustrated that in practice Mr McMillan was in control of the whole structure. There was evidence that suggested that the tenancy was let at an open market rent not an affordable rent, and that all the affordable flats had been similarly let; this illustrated Mr McMillan's willingness to ignore the affordable housing obligation even before any ostensible staircasing had taken effect.

40. It was admitted that Mr Cooper-Attard had been paid £3,000, and Ms Josephides £2,500, for their services. Mr Buttimore submitted that this was in effect paying bribes to them to pretend to be tenants in need of affordable housing, and the suggestion that Mr McMillan did not know what steps LDHA had taken to vet them as prospective tenants was incredible – he devised and controlled the whole structure. Mr Coppel said that, as pleaded in the Defence, the whole plan was that LDHA would identify individuals who qualified as tenants: there was no difficulty in finding people living in Southwark who met the income requirements, and no reason for Mr McMillan to think that LDHA had failed to do so. But quite apart from the point

that that raises issues of fact which are not suitable for determination on a summary basis, it is not obvious that it is an answer to the pleaded case. The representation alleged (representation (a)) is that Mr Cooper-Attard was a person "in need of Affordable Housing in the London Borough of Southwark" (see paragraph 27 above); and one of the points taken on behalf of Ms Raja is that Mr McMillan would have known that the Flat was not going to be used to provide housing accommodation to Mr Cooper-Attard as he was never intended to live there, not least because the flat had been let by Mr McMillan's company TPIL to others. The requirement in the s. 106 agreement was that the flat should not be used other than for "providing housing accommodation to households in need of Affordable Housing" (see paragraph 14 above), and it is certainly arguable that it was not enough for these purposes for Mr Cooper-Attard to have met the income requirements, but to have actually needed accommodation, and to have been granted a Shared Ownership Lease by way of providing housing accommodation to him.

41. Mr McMillan had used similar schemes before. The Particulars of Claim allege that 12 previous similar schemes had been undertaken by him or his companies or associates across London between 2010 and 2015. One of those schemes (**"the Jam Factory scheme"**) was on a site in Southwark called the Jam Factory. On 5 June 2015 LBS commenced proceedings in relation to the Jam Factory scheme against LDHA and other defendants alleging that the scheme was ineffective and seeking an injunction to return the affordable housing flats at the sites to affordable housing use. On 3 August 2015 LBS obtained an interlocutory injunction restraining disposal of the Jam Factory flats.

42. Mr McMillan was not himself a party to those proceedings but Mr Buttimore submitted that it was inconceivable that he was not aware of them. Moreover:

(1) On 14 August 2015 LBS sent Mr McMillan personally a pre-action letter asserting that a similar scheme at another site in Southwark called South City Court was one where the flats had not been granted to individuals entitled to affordable housing, that they had not been legitimately staircased, and that they had been subject to a similar device or sham transaction to those employed at the Jam Factory, and at another Southwark site called Wanley Road, to avoid the affordable housing obligations. The letter explained the claims that LBS intended to make, including claims for injunctive relief, and claims against Mr McMillan personally for damages.

(2) On 7 September 2015 a Mr David Gape of Independent London Estate Agents sent Mr McMillan an e-mail in relation to one of the Wanley Road flats, which read:

> "Just spoke with the buyer, he says his solicitor has advised him against buying it because there is a legal action pending against the property from Southwark Council regarding the affordable housing element of the building and his solicitor thinks he may become liable as the new owner…
>
> What do you want me to do, re-market?"

Mr McMillan replied (6 minutes later) "yes".

43. Mr Buttimore also relied on material which he said suggested that Mr McMillan must have known that LBS were closing in on the Signal site as well, and that the game was up:

(1) On 9 October 2015 LBS added a note to the local land charges register to the effect that it was investigating a potential breach of the s. 106 agreement affecting Flats 1 to 11 at the Signal site.

(2) On 23 November 2015 LBS wrote to LDHA to the effect that it was amending its claim in the Jam Factory proceedings to include the South City Court and Wanley Road sites, and to add allegations that at each site a series of sham transactions had been entered into in order to create the false impression that the affordable housing obligations had been satisfied, this being done in order to deceive purchasers of long leases of the flats into believing that the affordable housing obligations were no longer binding and in order to make a profit.

(3) On 30 November 2015 LBS followed this up with a further letter to LDHA in relation to the Signal site to the effect that it had grounds to suspect that the pattern of transactions at the Signal site was similar to that at the other three sites, and asking for disclosure of various documents, failing which it would apply to the Court for pre-action disclosure.

(4) On 16 December 2015 LDHA (acting by Mr Philip Butt) replied to LBS denying that it had been involved in any sham transactions. Among other things this letter said that LDHA was not aware of any declaration of trust over the sub-leases and could not comment on the assertion that a number of units were occupied under assured shorthold tenancies. Mr Buttimore characterised this letter as containing lies, and suggested that Mr Butt must have spoken to Mr McMillan before it was sent.

(5) On 9 February 2016 LBS wrote to PGPF to the effect that it considered that it had a claim against it on similar grounds to the claims in relation to the other sites and seeking pre-action disclosure. PGPF was under the control of Mr McMillan. The evidence is that it did not reply.

44. There is also evidence that Mr McMillan sought to dispose of the affordable flats at the Signal site as quickly as possible:

(1) A property agent, Mr Biju Ramakrishnan, who gave evidence by witness statement for Ms Raja, said that Mr McMillan contacted him in February 2016 wanting a quick sale of the affordable flats, explaining that he owned LDHA and urgently needed funds to invest in another development.

(2) Mr Ramakrishnan contacted another property agent, Mr Vidya Sharma, who also gave evidence by witness statement for Ms Raja. He said that he had met Mr McMillan in late February 2016 who had repeatedly told him that the opportunity to buy the flats (supposedly at discounted prices) was only available for a short period and that any purchaser would have to move quickly; he insisted on the urgency of the sale, and on exchange and completion within days.

45. Against that background, although Mr Buttimore had a series of points on the four Opinions relied on by Mr McMillan, he had one further submission which was that even if Mr McMillan had previously believed that his scheme was watertight, he cannot have continued to believe that by the time that LBS were threatening him personally with litigation, and pursuing LDHA and PGPF in relation to the Signal site. He must have realised that there was a real problem with the scheme. One would have expected him to obtain further advice (and there is no evidence that he did not do so – Mr McMillan did not say that he had disclosed all the advice he had had); but over and beyond that Mr McMillan could not have honestly believed that the scheme was legitimate and effective at the time of the sale to Ms Raja.

46. The question of what Mr McMillan believed as to the legality and effectiveness of his scheme at the time of the sale to Ms Raja in April 2016 is self-evidently a question of fact. I accept Mr Buttimore's submission that it cannot be answered simply by pointing to Opinions previously given by counsel, most recently in November 2014; and I also accept that the facts that he relies on – the Jam Factory litigation in June 2015, the threatened claim against Mr McMillan in August 2015, his instructions to Mr Gape to re-market the Wanley Road flat despite the pending litigation in September 2015, LBS's note on the local land charges register in October 2015, the requests for pre-action disclosure against LDHA in November 2015 and PGPF in February 2016, and Mr McMillan's apparent insistence to Mr Ramakrishnan and Mr Sharma in February 2016 on urgent sales – are facts that at least raise real doubts as to what Mr McMillan did think about the lawfulness and effectiveness of the scheme by April 2016 when Flat 5 was sold to Ms Raja and the representations relied on are said to have been made. That seems to me plainly to raise a triable issue that is unsuitable for summary judgment, and that can only be decided after full disclosure and oral evidence with cross-examination.

47. That to my mind is sufficient to dispose of Ground 4. Mr Coppel said (by reference to the pleaded claim in conspiracy) that Ms Raja's case was that Mr McMillan had conspired to tell lies back in 2012 when the conspiracy was initiated, and that no attempt had been made to amend to allege, even in the alternative, that if Mr McMillan initially thought the scheme was effective, he had ceased to believe that by April 2016. So far as concerns the claim in conspiracy that is a point which I return to below; but so far as concerns Mr McMillan's liability as joint tortfeasor, I do not think this point assists him. The representations pleaded are said to have been made "during the course of the conveyancing transaction" (that is the purchase by Ms Raja of Flat 5), and since she was only introduced to the potential purchase in early April 2016, they were necessarily made between then and the exchange of contracts (and completion) on 28 April 2016. The pleading of joint tortfeasorship in paragraph 52 of the Particulars of Claim simply alleges that Mr McMillan orchestrated and/or facilitated and/or instigated the representations knowingly or recklessly to deceive Ms Raja into purchasing Flat 5: see paragraph 29 above. It is entirely consistent with this pleading for Ms Raja to establish at trial that Mr McMillan orchestrated, facilitated or instigated the representations in April 2016 and that, whatever his previous understanding, he knew by then that it was untrue (or was reckless as to whether it was) to say that the Flat had been properly staircased and was being sold free of the affordable housing obligation.

48. In those circumstances I do not think it necessary to consider Mr Buttimore's detailed

analysis of counsel's Opinions. He made various points such as that the earlier Opinions were concerned with rather different schemes and other sites; that the instructions, save insofar as referred to in the Opinions, had not been disclosed; that so far as the 4th Opinion was concerned (which did concern the Signal site and was particularly relied on by Mr Coppel) counsel does not appear to have been told either of the definition of staircasing introduced by the 2nd deed, or of the fact that LDHA held its interest on trust for one of Mr McMillan's entities; nor does he appear to have been told that the nominee tenants were not in fact intended to take up occupation of the flats – indeed none of his Opinion is addressed to the question whether the tenants qualified as being in need of affordable housing. These points, and others like them, can no doubt be deployed at trial if they still appear to Ms Raja's advisers, in the light of the fuller picture that will then be available, to assist her case; but I do not see that it would serve any useful purpose to consider them now.

49. Nor do I think it necessary to address the specific points relied on in support of Ground 4 by Mr Coppel. He criticised the Judge for saying (Jmt at [76]):

> "This claim rests on D's assertion that the representations all concerned matters on which he had secured advice from counsel. But to have that whitewash effect the advice must be firm and on point, even if it is judged by later courts to be incorrect: see *Meretz Investments*."

Mr Coppel said that to describe counsel's advice as having a whitewash effect was an unjustified slur on counsel. That submission must be premised on the suggestion that it implies counsel was being asked, and agreed, to do something of dubious propriety. But I do not think that was what the Judge meant. I think all she meant was what she had previously referred to (Jmt at [60]) as follows:

> "D's receipt of appropriate legal advice that covers the issues in play and advises on the legal standing of the parties and indicates that the proposed course of conduct is lawful may be used by D in an effort to rebut any inference that D (or any DX in a similar position) intended to misrepresent the relevant facts to C in a manner amounting to deceit."

(DX here refers to Mr McMillan's alleged co-conspirators or joint tortfeasors). Mr Coppel also said that the case she referred to (*Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303) did not lay down any requirement that advice had to be firm and on point; he further criticised the Judge for the fact that she gave specific consideration to the 3rd Opinion of March 2014 but not to the 4th Opinion of November 2014.

50. But even if there were anything in these points, they do not in my judgment undermine her overall conclusion. At [79] she said:

> "Further, and regardless of any benefits delivered by earlier legal advice, C suggests that by the time the representations were made to C, D had the necessary actual or reckless knowledge that the representations were untrue. … C suggests that by April 2016 D cannot possibly have honestly believed that the flats, including Flat 5, were being sold free of the affordable housing obligation. Not only that, but he must also have known that his gain from the sale would inevitably expose the purchaser, in this case C, to potential loss.

> This, C argues, is because other developments in which D was interested (including "the Jam Factory development") were the subject of claims in respect of similar schemes, and it is impossible that these failings were not brought to D's notice such that D knew the risk at the time the relevant representations were made. That means that at the time the representations were made to C, and regardless of D's legal advice, D must have had either actual or reckless knowledge that the representations were untrue. Instead, various WS produced in evidence by C for this hearing suggested that D sought to offload the flats as rapidly as possible onto unsuspecting purchasers (including C). This issue goes not only to the deceit claim, but also to the intention to harm aspect of the conspiracy claim."

Then, having considered some other points she gave her conclusion at [83] that:

> "I find no support for D's application for summary judgment or a strike out: there are neither legal nor factual issues that would warrant a finding that C's claim is bound to fail or has no real prospect of success."

In context that conclusion must I think be based, among other things, on the factual matters she has referred to at [79]. I agree, for the reasons I have already given, that such matters do raise triable issues that are unsuitable for summary judgment and that Ground 4 of the Grounds of Appeal therefore fails.

The conspiracy grounds (Grounds 1 to 3)

51. Grounds 1 to 3 all concern the claim in conspiracy alone. It follows that even if any or all of them were well founded, the action would still go forward for trial on the joint tortfeasor claim. In those circumstances I think it highly doubtful whether there is any practical benefit to anyone in striking out the conspiracy claim. In the circumstances of the present case this is simply another legal route to making Mr McMillan liable for the allegedly deceitful representations made by others in the course of the scheme which he devised and implemented. Indeed in the course of argument Mr Coppel accepted a proposition put to him by Popplewell LJ that where the claim is for an unlawful means conspiracy, and the unlawful means relied on is a tort, the conspiracy claim does not really add anything much to the allegation of joint tortfeasorship.[3] Leaving the conspiracy claim to go forward to trial seems to me unlikely to change the shape of the trial in any significant way: the disclosure, evidence and issues are likely to be very much the same.

52. In those circumstances I think the Court should be slow to strike out the claim. No doubt if there is a short and straightforward point of law, or if there are incontrovertible facts that demonstrate that the claim is doomed to fail, it can be appropriate to remove the claim from the proceedings, but if there is anything in the nature of a difficult point of law, or facts that require detailed analysis, I think it is preferable to leave such matters to be raised at trial where the facts will be fully investigated.

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[3] This is not to suggest that conspiracy is simply a form of joint tortfeasance. It is a tort of primary liability, not secondary liability: see *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19 (***"Ablyazov"***) at [9] per Lord Sumption and Lord Lloyd-Jones JJSC.

53. I agree with the Judge that none of the points relied on by Mr Coppel are so simple and straightforward as to require the Court to strike out the claim. In those circumstances I can give my reasons for agreeing with her quite shortly.

Ground 1

54. Ground 1 is that a director cannot conspire with a company where that company is its *alter ego*. Mr Coppel submitted that a conspiracy requires a combination or agreement between two or more persons acting autonomously, and that this requirement is not met when a puppet conspires with its puppet-master.

55. The Judge dealt with this point at [31]-[35] of the Judgment. At [32] she said she did not accept the analysis which would seem to ignore the separate legal personality of companies; at [33] she said that it was contrary to the "persuasive analysis" of Gloster J in *Barclay Pharmaceuticals Ltd v Waypharm LP* [2012] EWHC 306 (Comm) at [220]-[229] (***"Barclay Pharmaceuticals"***); at [34] she distinguished, on the basis that it was a criminal case, *R v McDonnell* [1966] 1 QB 233, where Nield J held that a director could not be found guilty of a criminal conspiracy with a company where he was the sole person responsible for the company; and at [35] she expressed her conclusion as follows:

> "In short, I am not persuaded by the argument that C's PoC cannot possibly disclose a conspiracy where the conspirators are D and his alter egos. This, then, is not a basis for summary judgment or strike out. To the extent that the point of law might be arguable despite the authorities noted above (see **Clerk & Lindsell on Torts 22nd Ed**. para 24-96), those arguments should be advanced in a full trial, not in an application of this nature: see *AAH Pharmaceuticals v Birdi* [2011] EWHC 1625 (QB) at para 31 (Coulson J)."

56. I readily accept that the point of law is arguable. The distinctive feature of a conspiracy (whether criminal or civil, and whether a lawful means conspiracy or an unlawful means conspiracy) is the agreement or understanding between the parties: see *Ablyazov* at [9]. It is the combination which, if it is acted on and causes loss, makes the conspiracy actionable: *ibid*. It is not obvious that there is the requisite combination if all that happens is that a person uses his company to commit an unlawful act. This is the basis of Nield J's decision in *R v McDonnell*: see at 245C-D where he said that where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds, and that if it were otherwise it would offend against the basic concept of a conspiracy, namely an agreement of two or more to do an unlawful act. Although a criminal case, it is not obvious why the same should not be true in a civil conspiracy: see eg *AAH Pharmaceuticals Ltd v Birdi* [2011] EWHC 1625 (QB) at [31] where Coulson J described such a radical distinction as in principle unattractive. Mr Coppel was also able to point to *Bowstead & Reynolds on Agency* (22nd edn, 2021) at §9-119 which describes the idea that a company may commit the tort of conspiracy by conspiring with its sole director as "a difficult notion". He also cited decisions from Australia (*O'Brien v Dawson* (1941) 41 SR (NSW) 295, and on appeal to the High Court (1942) 66 CLR 18) and Canada (*Lehndorff Can Pension Properties Ltd v Davis & Co* (1987) 10 BCLR (2d) 342) which support the view that it is not possible.

57. However there are arguments the other way. It is established that a contract can be

made between a person and a company of which he is the sole director: *Lee v Lee's Air Farming Ltd* [1961] AC 12; and a contract requires an agreement just as much as a conspiracy does. Mr Coppel said that that was different as where a director contracts with his own company, he is acting in two different capacities: when he agrees on behalf of the company he is acting qua director and his act is attributed to the company, but when he agrees for himself he is acting on his own behalf and not on behalf of the company. Here, he said, everything that Mr McMillan was said to have done was said to have been done on behalf of and through his companies; there was complete congruence between what he did for his companies and what he did; all his acts were attributed to the companies and that meant they were not his acts. He accepted that it was legally possible for a director to conspire with his own company if they were to carry out different acts; but he said that where all the acts of the director were attributed to the company, they were exclusively acts of the company and not also his own acts. I have considerable doubts about that last proposition: see *Standard Chartered Bank v Pakistan National Shipping Corpn (Nos 2 and 4)* [2002] UKHL 43 where a director (a Mr Mehra) wrote a fraudulent letter on behalf of a company (Oakprime Ltd), and Mr Mehra's contention that he was not liable in deceit because he made the representation on behalf of Oakprime received very short shrift in the House of Lords (see per Lord Hoffmann at [20]).

58. There is Irish Supreme Court authority holding that a director can be liable for conspiring with two companies controlled by him: *Taylor v Smyth* [1991] IR 142 (followed by Gloster J in the High Court here, albeit without full argument, in *Barclay Pharmaceuticals* at [229]). There McCarthy J said at 166 that he saw no reason in principle why the mere fact that one individual controls a company should give them both immunity from suit "in the case of an established arrangement for the benefit of both company and individual to the detriment of others." Mr Coppel said that that was distinguishable on the ground that in the present case the arrangement was not for the benefit of both company and individual, but if the question turns on whether Mr McMillan's arrangements benefited him as well as his companies, it seems very doubtful to me that the claim can be struck out: as Popplewell LJ said in argument, it is a difficult proposition to make at this stage of the case that Mr McMillan was not making arrangements for his own benefit.

59. I have already said enough to show that the point is one of some difficulty. I think that by itself justified the Judge in declining to reach a concluded view and deciding to leave the argument for trial, but there is another consideration which to my mind is conclusive. That is that this is not a simple allegation of a conspiracy between a director and one of his companies.

60. There are in fact two points. First, the alleged parties to the conspiracy include multiple entities of Mr McMillan's (PGPF, PGPL, TPIL and M&E). Even if it is right that there is no conspiracy if all that happens is that a director gets his company to do something, it does not follow that the same is true where the director gets two separate corporate entities of his to agree to do things. If he gets company A to do certain things, and company B to do other things, all as part of one overall scheme, it does not seem at all artificial to attribute his acts to company A and company B respectively and to conclude that he has caused A to combine with B, and if there is a conspiracy between A and B it seems quite a small step to hold that he himself, having masterminded the whole scheme, is also a party to the conspiracy. I do not

propose to decide the point, but it certainly seems to me quite an arguable one.

61. The other point seems to me even stronger. The alleged conspirators include (i) LDHA; (ii) another person or persons unknown; and/or (iii) the nominee tenants such as Mr Cooper-Attard and Ms Josephides: see paragraph 28 above. None of these are entities wholly owned and controlled by Mr McMillan. Mr Coppel pointed out that in the evidence for Ms Raja it was said that Mr McMillan "effectively controlled and/or exerted enormous influence over the actions of LDHA and the sub-lessees". But that does not seem to me to mean that they could not conspire with him. The whole basis of Mr Coppel's argument on this ground is that a conspiracy requires a combination between at least two different actors, such that agreeing with oneself cannot amount to a conspiracy, or as Nield J put it in *R v McDonnell*, there must be two minds. But LDHA did not act through Mr McMillan: the pleading is that it acted through Mr Butt and a Mr Fraser Allen, and however much they did what Mr McMillan wanted them to, they still have separate minds. So of course do the nominee tenants. I do not think it matters whether Mr Butt and Mr Allen, or Mr Cooper-Attard and Ms Josephides, were under Mr McMillan's influence, enormous or otherwise; even if they agreed readily to play the part Mr McMillan told them to, they still agreed. One can compare *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 441 per Viscount Simon LC where he rejected the suggestion that there could not be a combination between the Scottish area secretary for a trades union and someone in the more lowly position of branch secretary for Stornoway as follows:

> "The respective position of the two men in the hierarchy of trade union officials had nothing to do with it. Even if Mackenzie could be regarded as only obeying orders received from his superior, the combination would still exist if he appreciated what he was about."

For similar reasons I do not see that this ground, even if otherwise sound, would afford any basis for striking out the pleaded conspiracy insofar as it alleged a conspiracy between Mr McMillan, LDHA, person(s) unknown and/or the nominee tenants. So even if Mr Coppel's legal point were decided in his favour, it would not dispose of the conspiracy claim.

62. Mr Coppel said that one could still strike out the claim insofar as it alleged a conspiracy between Mr McMillan and his companies. But I do not see that that would serve any useful purpose. The claim would still go forward to trial on exactly the same material.

63. In those circumstances I would dismiss Ground 1 of the appeal. The Judge was in my view not only entitled but right to take the view that however interesting the point of law identified by Mr Coppel the appropriate course was not to decide it finally on an application to strike out but to leave it to be advanced at trial where the facts could be fully explored.

Ground 2

64. Ground 2 is that it is wrong to suggest that an unlawful means conspiracy can be formed without an intention to do anything unlawful at the time of entering into the conspiracy.

65. Mr Coppel said that the conspiracy that was pleaded was pleaded as having been formed prior to 19 September 2012. If at that date there was no agreement to use unlawful means there was no unlawful conspiracy; an unlawful means conspiracy required an agreement to use unlawful means, and an agreement that the flats be sold as having been staircased to 100% and hence freed from the affordable housing obligation did not involve anything unlawful if the scheme was believed to be effective.

66. Mr Buttimore had two answers to this submission. One was that a conspiracy is not like a contract that is made at a single point in time. A conspiracy is a continuing state of affairs in which the parties are combining to do things. In the present case it is indeed pleaded that the conspiracy was incepted by September 2012, and it was Ms Raja's case that the plan was to pull the wool over the eyes of the purchasers such as Ms Raja from the outset. That was sufficiently pleaded and could not be struck out. But even if that was wrong, the conspiracy was pleaded as continuing up to January 2015 when it is pleaded that M&E joined it (see paragraph 28 above). He might have added that it is also in effect alleged that it continued up to April 2016 given that the representations, which took place in April 2016, are pleaded to have been in furtherance of the conspiracy (see paragraph 29 above). It was therefore irrelevant whether Ms Raja could make out her case that the scheme was intended to involve deceitful statements from the outset; it was enough that the scheme involved a combination to tell deceitful statements by the time that they were made.

67. I accept Mr Buttimore's submissions. The pleaded case is that there was a conspiracy to deceive from the outset. That is sufficient to allege a conspiracy by unlawful means from the inception, and cannot be struck out on a point of law. Mr Coppel said, as he did on Ground 4, that it was clear as a matter of fact that Mr McMillan had no intention to deceive at the outset. I am rather doubtful, even with the benefit of seeing the legal advice that Mr McMillan received, that that is something that could be safely resolved at this stage. But even if that were the case, the entire purpose of the scheme was to market and sell the flats as free from the affordable housing obligation and I do not see why the conspiracy claim would not lie if the parties to the scheme had come to appreciate, before this was done, that it would involve making untrue statements as to the legal position – or were reckless as to whether such statements would be untrue. Take a simple example. A and B agree that they will carry out a development which involves knocking down a wall. At the time they believe the wall to belong to A. By the time it comes to it however they have been told that the wall actually belongs to C. They proceed to knock it down anyway, knowing that what they are doing is unlawful. I do not see why they are not liable for conspiracy to injure C by unlawful means, and the fact that at the inception they did not intend to do anything unlawful would be no defence; indeed I understood Mr Coppel to accept that this would be so.

68. Mr Coppel said that was not the case pleaded against Mr McMillan, and that Ms Raja had not sought to amend her claim. I am not at all sure that she needs to, but do not propose to resolve whether it would technically be open to her to succeed on her presently pleaded case if what was established at trial was that Mr McMillan initially believed the scheme to be effective but had come to appreciate by April 2016 that it was not, or might not be, the case. Mr Buttimore accepted that the current pleading of the conspiracy in paragraph 37 of the Particulars of Claim was, in the Judge's words,

"not elegantly drafted" (Jmt at [41]), and I have little doubt that Ms Raja's legal team will want to revisit the drafting in any event after disclosure, as is very common in fraud claims. But even if there were a pleading point open to Mr McMillan, I do not think that it would make it appropriate to strike out the conspiracy claim; the whole question of what Mr McMillan believed about the effectiveness of the scheme, and when, will necessarily be in issue at trial in any event.

69. For these reasons I would dismiss Ground 2 of the appeal. I only add that it is not clear to me that the Judge ever said that one could form a conspiracy without intending to use unlawful means, but I need not lengthen this judgment with an examination of the point.

Ground 3

70. Ground 3 is that the Judge mis-stated the requirement in an unlawful means conspiracy for the defendant to intend to harm the claimant, saying that it was sufficient that the defendant act with knowledge of the consequences.

71. I can deal with this very shortly. The Judge discussed the question under the heading "The necessary intent to harm" at some length (Jmt at [47] to [59]), describing it as the most difficult issue of law in the hearing. As her heading shows, the whole discussion starts from the premise that the tort of unlawful means conspiracy requires the conspirators to act with the intention of causing damage to a third party, and there is no doubt that she appreciated that this was what was required. The subsequent discussion is an attempt to tease out what this requirement amounts to.

72. I do not propose to consider this passage, or the various criticisms that Mr Coppel made of it, as I do not see that it goes anywhere. There is no doubt that the pleaded claim in conspiracy does allege that the conspirators intended to harm the purchasers of the flats, including Ms Raja: see paragraph 37 of the Particulars of Claim which, as the Judge points out (Jmt at [57]) in fact alleges that the conspirators had a predominant intention to harm the purchasers despite the fact that it is unnecessary to allege this. So the claim cannot be said to be inadequately pleaded.

73. Nor do I think it can be said that the claim is hopeless on the facts. Mr Coppel said that there was never any intention to harm the purchasers: the purpose of the scheme was not to cause loss to them as the scheme was believed to be effective and it was intended that they would indeed take the flats free from the affordable housing obligation. But as can be seen this again depends on Mr McMillan's case that he continued to believe that the scheme was effective. If, which is Ms Raja's case, he knew, at the latest by April 2016, that the scheme did not work, or was reckless as to whether it did, then this point disappears. His intention in that case would no doubt have been to maximise his own profit, but the way in which he would do that would be by deceiving the purchasers into thinking that the flats were free of the affordable housing obligation and hence into paying more than they were worth. If that case is made out, then that seems to me amply sufficient to establish that he intended to harm the purchasers, whatever the precise ambit of this requirement.

74. The Judge's overall view on this aspect of the case was as follows (Jmt at [47]):

> "There is considerable debate over the meaning of "intent to cause damage", or "intent to harm or to injure". Here the parties disagree on the law. They also disagree on whether certain facts set out in the PoC provide support or deliver a rebuttal of this aspect of C's claim. In such circumstances the proper response is surely that seriously contested issues of law and fact should be aired fully, with all the relevant detail before the court after full discovery and cross-examination, and not by way of an application such as this. That is my view. However, the parties addressed the issues in some detail, so I provide a response."

As that makes clear, the ensuing discussion, detailed and erudite as it is, does not purport to decide anything finally; nor is it the basis on which she refused the strike out, which was the simple one that seriously contested issues of law and fact should be determined at trial.

75. I agree. At the very least it is impossible to say that she was not entitled to come to that view. I would dismiss Ground 3 of the appeal.

Conclusion

76. For the reasons I have given I would dismiss the appeal.

Lord Justice Popplewell:

77. I agree.

Lord Justice Underhill:

78. I also agree.