Neutral Citation Number: [2022] EWCA Civ 1639

Case No: CA-2022-000866

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)
Mr Ian Karet (sitting as a Deputy High Court Judge)
[2022] EWHC 641 (Ch); [2022] EWHC 919 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2022

Before:

LORD JUSTICE COULSON
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE FALK

- -

Between:

TRAFALGAR MULTI ASSET TRADING COMPANY LIMITED (IN LIQUIDATION) — **Claimant/ Appellant**

- and -

(1) JAMES DAVID HADLEY
(6) CGROWTH CAPITAL BOND LIMITED
(12) PLATINUM PYRAMID LIMITED
(13) BENTLEY JARRARD THWAITE — **Defendants/ Respondents**

- -

Justin Higgo KC and **Belinda McRae** (instructed by **Kingsley Napley LLP**) for the **Appellant**
James Hadley appeared in person
William Wright appeared on behalf of CGrowth Capital Bond Limited
Bentley Thwaite appeared in person and on behalf of Platinum Pyramid Limited

Hearing date: 22 November 2022

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Approved Judgment

This judgment was handed down remotely at 2.00pm on 16 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archive.

Lord Justice Stuart-Smith:

Introduction

1. The Appellant ("Trafalgar") appeals against paragraph 3 of the order dated 11 April 2022 of Mr Ian Karet sitting as a deputy High Court judge. After a hearing that took place on 10-11 February 2022, the Judge refused to grant Trafalgar summary judgment or to strike out the Respondents' defences to bribery claims which Trafalgar has brought against them. The reasons for the Judge's order were set out in two judgments, dated 22 March 2022 ([2022] EWHC 641 (Ch)) and 11 April 2022 ([2022] EWHC 919 (Ch)).

The factual background

2. The facts can, for the most part, be lightly sketched, bearing in mind at all times that we are dealing with an appeal from applications for summary judgment or to strike out where any temptation to engage in a mini-trial was to be avoided both in the Court below and on this appeal.

3. Trafalgar is a Cayman subsidiary of Trafalgar Multi Asset Fund Segregated Portfolio ("the Fund"). Trafalgar carried out the primary trading activity of the Fund. Victory Asset Management ("VAM") was the Fund's investment manager. VAM was owned by Mr Hadley, the First Respondent, via a nominee shareholder. It is common ground for the purposes of this appeal that Mr Hadley owed Trafalgar the obligations of a fiduciary.

4. The bribery claims relate to bond transactions in March and June 2016, to which Trafalgar was committed by Mr Hadley. The bonds were issued by CGrowth Capital Bond Limited, the Second Respondent ("CGrowth"), of which Mr Wright has been a director at all material times. Trafalgar was introduced to CGrowth by CGrowth's introductory agent for the bond issues, Platinum Pyramid Limited ("PPL"), the Third Respondent. PPL's owner and director was Mr Thwaite, the Fourth Respondent.

5. The bond purchase documentation included a contract document entitled "Bond Purchase Agreement", which identified the three companies to which the proceeds of the bonds were to be paid ("the Borrowing Companies") and undertook that CGrowth would apply the proceeds of the issue of the bonds only for the benefit of the Borrowing Companies. Clause 3 stated that CGrowth would "contemporaneously with receipt of the Investor's subscription money … lend the monies to the Borrowing Companies".

6. What was not disclosed on the face of the contract documentation for the purchase of the bonds was that, as part of a consultancy agreement between PPL and CGrowth dated 4 November 2015 ("the 2015 Consultancy Agreement"), PPL was entitled to receive 29% of all bond subscription monies paid by Trafalgar; and, by a further agreement between the same parties on the same date ("the Receipt and Disbursement Agreement"), PPL was to receive the proceeds of CGrowth bond transactions on which it acted and was to pay only 70% of those proceeds to the Borrowing Companies. Trafalgar states (and it is not contradicted by the Respondents) that it was unaware of these commission arrangements until they were disclosed in the circumstances outlined below.

7. It is Trafalgar's case that whilst (a) Mr Thwaite was carrying out his mandate for CGrowth by negotiating with Mr Hadley to introduce Trafalgar as bond subscriber, and (b) Mr Hadley was engaged in committing Trafalgar to invest in CGrowth's bonds, (c) they also negotiated and agreed that Mr Hadley would sell VAM to PPL. As its owner, Mr Hadley was set to gain financially from the sale of VAM.

8. Trafalgar asserts that two bribes were paid. First, Mr Hadley (or his nominee) received £100,000 from PPL on 21 March 2016, 5 days after signing the contract that finally committed Trafalgar to purchase CGrowth bonds with a face value of £7.3 million, for which the consideration included payment of £4.1 million (which was to be paid to PPL) and the transfer of other assets to CGrowth ("the March Bond Transaction"). Second, Mr Hadley (or his nominee) received a further payment of £400,000 on 6 June 2016, 5 days after Mr Hadley had signed two CGrowth bond purchase forms which committed Trafalgar to pay £1.36 million to PPL in respect of two further CGrowth bonds ("the June Bond Transaction"). The Respondents' case is that these payments were a deposit for the anticipated sale of VAM to PPL. Trafalgar asserts that the payments were made from the traceable proceeds of the March and June Bond Transactions i.e. with its money.

9. It is necessary to recount the chronology of various steps taken at or about the time of the March and June Bond transactions. The uncontroversial chronology is as follows:

   a. Mr Hadley and Mr Thwaite were in discussions about the purchase of CGrowth bonds from about January 2016;

   b. On 7 March 2016, Mr Hadley, acting on behalf of VAM (which was in turn acting for Trafalgar), sent a "Letter of Intent" to the directors of CGrowth confirming VAM's "intent, subject to contract, insurance and terms" to subscribe for CGrowth bonds. The letter asked CGrowth to "confirm receipt of this letter of intent and confirmation of acceptance of our terms which remain subject to contract and insurance";

   c. On 14 March 2016 Mr Hadley signed three CGrowth Bond Purchase Forms. These forms stated that the terms and conditions of the Bond Purchase Agreement, to which I have referred at [5] above, applied;

   d. On 16 March 2016 Mr Hadley signed the CGrowth Sale of Bonds (Form of Consideration) Contract undertaking to purchase the three CGrowth bonds for a total consideration of £4,100,000 plus the transfer of other assets to CGrowth, which came into force that day;

   e. On 17 March 2016 Mr Thwaite sent Mr Hadley an email at 2.38 pm setting out what he described as "Key points for H[eads] of T[erms]" for the sale and purchase of VAM, with a suggested intended execution date for Heads of Terms of 21-23 March 2016;

   f. On 18 March 2016 PPL received two payments in respect of the March Bond Transaction, the aggregate value of which was just over £1 million;

g. Also on 18 March 2016, CGrowth issued the first bond, which was effective from 21 March 2016. Further bonds were issued on 24 March 2016.

h. On 20 March 2016 Mr Thwaite sent Mr Hadley draft Heads of Terms for the sale of VAM;

i. On 21 March 2016 PPL paid £100,000 to Mr Hadley's company, Proactive Administration Solutions Limited. This is alleged to be the first bribe;

j. On 24 March 2016 Mr Thwaite, acting on behalf of PPL, and Mr Hadley signed the Heads of Terms for the Acquisition of VAM. The Heads of Terms were said to be subject to contract and to certain essential pre-conditions;

k. On 1 June 2016 Mr Hadley signed two further CGrowth Bond Purchase Forms, the purchase amounts being £230,493 and £1,360,000. These forms stated, as had the March 2016 forms, that the terms and conditions of the Bond Purchase Agreement, to which I have referred at [5] above, applied;

l. On 3 June 2016 the SPA for the sale of VAM was signed: the parties to the agreement were Mr Hadley and Victory Asset Management CI Ltd, a company recently incorporated by Mr Thwaite. As a result, Mr Thwaite became either the beneficial owner or controller of VAM. On the same day, Mr Hadley became a director of VAM. On the same day PPL received £1.36 million as part of the consideration for the June Bond Transaction and CGrowth issued an initial bond in consideration. A further bond was issued on 7 June 2016;

m. On 6 June 2016 PPL paid Mr Hadley £400,000, which is alleged to be the second bribe.

10. Trafalgar claims that Mr Hadley placed himself in a position of conflict when he committed Trafalgar to the bond transactions whilst also arranging the sale of VAM to PPL, and that the nature of the conflict was not disclosed to Trafalgar to enable it to consider whether it wished to proceed with the transactions notwithstanding the conflict.

11. All the Respondents assert that the March and June Bond Transactions were legitimate and commercial. They submit that the purchase of VAM by PPL was a wholly separate arrangement from the March and June Bond Transactions and that no conflict of interest arose. They submit that no funds were misappropriated or unaccounted for.

The procedural background

12. Trafalgar issued proceedings against the Respondents and nine other Defendants (including Mr Wright) on 14 February 2020. The claims as originally framed were far-reaching but do not need to be summarised here. What matters for present purposes is that, after reviewing the original Defences filed by the Respondents, Trafalgar sought and obtained their agreement to Trafalgar amending its Particulars of Claim to plead a bribery claim based on the payments of £100,000 and £400,000 made by PPL in March and June 2016. Trafalgar filed its amended Particulars of Claim on 19 May 2021.

13. On 30 June 2021 the Respondents other than Mr Hadley served Amended Defences. The Amended Defences addressed the bribery claim as then formulated. Because Mr Hadley has not amended his Defence, he has not addressed the bribery claim in a Statement of Case. The 2015 Consultancy Agreement and the Receipt and Disbursement Agreement were exhibited to the Amended Defence of PPL and Mr Thwaite and were quoted extensively in the Amended Defence of CGrowth. This was the first that Trafalgar knew of those agreements.

14. Further versions of the Amended Defences were served such that the Respondents' pleaded cases before the Deputy Judge were (a) Mr Hadley's Defence, dated 25 May 2020, (b) the Amended Defence of CGrowth (and Mr Wright) dated 26 July 2021, and (c) the Re-amended Defence of PPL and Mr Thwaite dated 9 August 2021. Shortly before the hearing before the Judge, on 2 February 2022, PPL and Mr Thwaite served a draft Re-re-amended Defence for which permission was ultimately given on 11 April 2022.

The application

15. On 20 September 2021, and in the light of the Defences and Amended Defences that had then been served, Trafalgar filed its application for summary judgment against the Respondents on its bribery claim. Alternatively, as was clarified in the supporting witness statement from Trafalgar's solicitor, Ms Young, it applied to strike out those parts of the defences of CGrowth, Mr Thwaite and PPL which addressed the bribery claims. From the outset, Trafalgar's application relied upon the fact of the commission payments as evidenced by the 2015 Consultancy Agreement and the Receipt and Disbursement Agreement.

16. Ms Young's witness statement summarised the factual background to, and the basis for, the bribery claim. As well as exhibiting documents that demonstrated the flow of monies in March and June 2016 (and supported Trafalgar's assertion that its monies were the source of the payments alleged to be bribes) it set out the explanations for the payments and the factual assertions advanced by CGrowth, Mr Thwaite and PPL in connection with those explanations. For present purposes it is sufficient to record that:

    a. The payments were admitted;

    b. PPL and Mr Thwaite's explanation for the payments was that they were made in connection with the intended purchase of VAM;

    c. Ms Young asserted that the consequence of PPL and Mr Thwaite's explanations and admission was that "Mr Thwaite was negotiating the sale of Mr Hadley's business (VAM) at the same time that he was acting for and on behalf of CGrowth to conclude bond transactions with Mr Hadley (who he believed to be acting through VAM as an agent for Trafalgar)… ."

    d. Ms Young set out the relevant terms of the 2015 Consultancy Agreement and the Receipt and Disbursement Agreement and pointed out that they were directly contrary to the terms of the Bond Purchase Agreement's undertaking that all invested funds would go to the Borrowing Companies;

e. Ms Young summarised Trafalgar's case as being that:

> "While acting in the course of their agency for CGrowth, and introducing, negotiating with and communicating with Mr Hadley on its behalf, Mr Thwaite was negotiating the purchase (through an entity owned and controlled by him) of Mr Hadley's beneficially-owned company, VAM, and paying Mr Hadley incentives (in the form of two payments comprising £500,000 derived from Trafalgar's own monies) to contract with CGrowth (thus earning PPL/ Mr Thwaite commission)." (paragraph 64.4)

f. In relation to Mr Hadley, Ms Young summarised Trafalgar's case as being that:

> "Mr Hadley, as the sole shareholder of VAM, was paid at least £500,000 from PPL/ Mr Thwaite in order to sell his business; at the same time (on CGrowth, PPL and Mr Thwaite's case), Mr Hadley was acting as agent for Trafalgar in negotiating the CGrowth bond transactions. Even leaving aside the coincidental fact that the money that Mr Hadley was paid was derived from Trafalgar, Mr Hadley was placed into a position of obvious conflict between his personal interest in the VAM sale and his duty of disinterested loyalty to Trafalgar when purporting to commit it to bond transactions with CGrowth." (paragraph 66.2)

g. Later in her witness statement Ms Young summarised Trafalgar's bribery claim against Mr Hadley once more:

> "… at the very time that Mr Hadley was organising to commit Trafalgar to contracts with CGrowth and obliged to act in the exclusive best interests of Trafalgar, Mr Hadley was seeking personally to benefit from the sale of VAM to the agent of CGrowth, with whom he was negotiating the CGrowth contracts. Mr Hadley put himself in a position where the personal benefits he stood to gain from the sale of VAM to PPL/Mr Thwaite conflicted with his fiduciary obligations to Trafalgar." (paragraph 93)

17. Ms Young addressed potential defences to the bribery claims, of which two are relevant to this appeal. They have been labelled "the timing defence" and "the knowledge defence":

a. The timing defence, as pleaded by Mr Thwaite and PPL in their Amended Defence at that time, was that the payments alleged to be bribes were made "after the CGrowth bond transactions were entered into and therefore it is denied that such payments could have amounted to an inducement in relation to

these transactions". Ms Young's response was that the timings showed that Mr Hadley and Mr Thwaite must have entered into negotiations before the execution of the contract for the March Bond Transaction on 16 March 2016 and that the second bribe was promised before the execution of the June Bond Transaction on 1 June 2016: see paragraph 74.2;

b. The knowledge defence, as pleaded by Mr Thwaite and PPL in their Amended Defence, was that Trafalgar was "aware of discussions to purchase VAM in early 2016 and the purchase of VAM in mid-2016. … the Claimant must have been aware that payments would be made towards the purchase of VAM … the Claimant was aware that VAM was being sold as it was required to co-operate in various processes for the sale" Ms Young's response was that these facts, even if true, "were insufficient… to satisfy the defence of informed consent in respect of Mr Thwaite's payment to Mr Hadley of funds derived from Trafalgar in connection with that intended sale": see paragraph 78.

PPL and Mr Thwaite's pleaded case

18. PPL and Mr Thwaite's Re-re-amended Defence to the bribery allegations includes the following:

a. "The CGrowth transaction [i.e. the March Bond Transaction] had already been agreed prior to PPL/Mr Thwaite and Mr Hadley entering into discussions in respect of the possible sale of VAM, viz., VAM's advice [via Mr Hadley] regarding the CGrowth transaction had already been provided to and agreed by Trafalgar on or before 7 March 2016. Mr Hadley's role in respect of the CGrowth transaction after 7 March 2016 was purely ministerial";

b. The sale of VAM to Mr Thwaite "was not a matter of discussion between Mr Hadley and Mr Thwaite until after VAM's and/or Mr Hadley's advice had been given to and/or accepted by Trafalgar and/or Trafalgar had agreed to participate in the CGrowth transaction. As a result of discussions on or after 7 March 2016, draft Heads of Terms were sent by Mr Thwaite to Mr Hadley on 20 March 2016 outlining the terms for the purchase of VAM …";

c. "The … discussions and agreement regarding … the sale and purchase of VAM … were made after the CGrowth bond transactions were entered into and therefore it is denied that such payments could give rise to a conflict of interest and/or could have amounted to an inducement in relation to those transactions";

19. On page 9 of the Re-re-amended Defence PPL and Mr Thwaite set out their case about Trafalgar's knowledge. It concentrates on the actions of Mr Hadley and is evidently, in that respect, second hand. In general terms, it asserts that Trafalgar knew that Mr Hadley was proposing to sell VAM to PPL. The high water mark of the pleading is that:

> "on or after 7 March 2016, Mr Hadley informed members of the Board of Trafalgar that VAM would potentially be sold to PPL and a deposit would be paid. The Board of Trafalgar never raised any objections to or concerns with the sale of VAM to PPL;

> further [two of the directors of Trafalgar] expressed their satisfaction with the proposed sale to PPL."

Elsewhere, PPL and Mr Thwaite plead that it is to be inferred that the Board of Trafalgar knew at all material times that "(i) Mr Hadley intended to sell VAM; (ii) PPL/Mr Thwaite was the intended buyer and/or a likely buyer of VAM; and/or (iii) PPL/Mr Thwaite would make payment(s) to Mr Hadley pursuant to the sale."

Responsive statements

20. Mr Thwaite served a responsive witness statement to the summary judgment application on 15 December 2021. In relation to the timing defence, consistently with what is now his pleaded case, he says that:

    a. "as far as I knew, the advice from Mr Hadley to Trafalgar to invest in CGrowth was provided and accepted by Trafalgar before there was ever any intentions or discussions about the sale of VAM to PPL.";

    b. "On 7 March 2016, VAM provided a letter of intent to PPL who sent this to CGrowth which confirmed Trafalgar's desire to invest in the bond offering. … Later on 7 March 2016, I also confirmed to Mr Hadley that the terms in the Letter of Intent had been accepted by CGrowth. Therefore, as far as I was concerned, the deal between CGrowth and Trafalgar was agreed on 7 March 2016, … .";

    c. "Only after the CGrowth Agreements of 7 March 2016, did I begin holding discussions with Mr Hadley about PPL or associates acquiring VAM.";

    d. "On 17 March 2016 I emailed Mr Hadley my key points for a potential Heads of Terms Agreement."

21. In relation to the knowledge defence, Mr Thwaite says that "as far as I knew at the time, [Trafalgar's Administrator] was aware that PPL intended to purchase VAM. There was therefore no secret about this and, as far as I was concerned, [Trafalgar] did not have a problem with this." Elsewhere he says that "[b]etween the 11 March 2016 … and 23 March 2016, it is inconceivable that … [Trafalgar's Administrator] were not aware of the potential, likely sale of VAM and that Mr Hadley had not notified them of such intentions." Since he was not directly involved, the source of this information must be Mr Hadley.

22. Mr Hadley served a responsive witness statement dated 14 January 2021 (which should evidently have been 2022). He gave evidence in relation to the timing defence in terms that are very similar to Mr Thwaite's evidence as set out above. In summary, he refers to the letter of intent of 7 March 2016 and asserts that the CGrowth/Trafalgar deal was agreed "from at least 7 March 2016". He accepts that "after the deal between CGrowth and Trafalgar was concluded" he did engage in negotiations with Mr Thwaite for the purchase of VAM. Elsewhere he says that "only after the CGrowth Agreements of 7 March 2016, did Mr Thwaite begin holding discussions with me about PPL or associates acquiring VAM".

23. In relation to the knowledge defence, Mr Hadley says that he notified Trafalgar's Administrator of the potential sale of VAM to PPL and that a deposit was to be paid. It is his recollection that no objections were raised and that the directors of the Fund seemed pleased with this outcome. "There were many other instances where PPL's involvement in the purchase of VAM was discussed with Trafalgar and [its parent] in the run up to the disposal. Between the 11 March 2016 … and 23 March 2016, it is inconceivable that [the directors of the Fund] were not aware of the potential, likely sale of VAM and that I had not notified them of such intentions."

The hearing

24. Trafalgar's skeleton argument for the hearing before the Judge placed the commission arrangements at the centre of its case against the Respondents. At paragraph 142 it identified the information which it alleged had to be given to Trafalgar if it was to make an informed decision about whether to enter into the March Bond Transactions, as follows:

> "First, and most importantly, Mr Hadley intended to enter into the March bond transactions with CGrowth despite the suspension of the NAV, and transfer £4,100,000 from the accounts of Trafalgar and Momentum in order to finance them;
>
> Secondly, that CGrowth/ PPL would retain 30% of the face value of the bond, with 29% to PPL (of which 28% was commission), or at least £1,189,000 from the initial cash sum; and
>
> Thirdly, Mr Hadley was in discussions and intended in very short order to sell his business, VAM, for £1.2 million to PPL, who stood to take £1,189,000 from the March CGrowth bond transactions and were the introductory broker and company responsible for marketing and administering the bonds."

25. Trafalgar's skeleton argument also explicitly took the points that (a) the March Bond Transaction was not agreed or concluded on 7 March 2016 because the Letter of Intent was just that and was expressly subject to contract; and (b) neither the Respondents' Statements of Case nor the witness statements of Mr Hadley and Mr Thwaite either said or implied that Trafalgar was told about the commission arrangements pursuant to the 2015 Consultancy Agreement and the Receipt and Disbursement Agreement.

The judgments below

26. In his first Judgment, at [73] the Judge correctly identified the Respondents' case before him as being:

> "i) Mr Hadley had agreed to commit Trafalgar to the March CGrowth bond transactions by 7 March 2016 and any dealings after that time were administrative only;
>
> ii) discussions about the sale of VAM to PPL between Mr Hadley and Mr Thwaite commenced after that date;

> iii) Mr Hadley was not therefore in a position of conflict before having agreed to commit Trafalgar to the March CGrowth bond transactions;
>
> iv) At some time between 11 March and 23 March 2016 Mr Hadley notified Trafalgar of the potential sale to PPL and that a deposit was to be paid;
>
> v) Mr Hadley discussed the sale of VAM around the time of a Trafalgar Board meeting scheduled on 29 March 2016;
>
> vi) Mr Hadley discussed the completion of the sale (to a different company: Victory Asset Management CI Ltd) with Mr Butler, a director of Trafalgar, on 2 and 3 June 2016;
>
> vii) there were other instances where PPL's involvement in the purchase of VAM was discussed with Trafalgar and Custom House in the run up to the disposal; and
>
> viii) Trafalgar did not object to or raise any concerns about the sale."

27. After setting out the applicable principles, the Judge discussed the knowledge defence and the timing defence in turn.

28. The Judge considered the knowledge defence at [100]-[108]. He summarised the Respondents' case that Trafalgar was aware of the discussions to sell VAM in early 2016 and of the purchase in mid-2016 and had not complained; and he referred to Mr Hadley's evidence (which I have summarised above at [23]) that he notified the Fund's directors of the likely sale in March 2016 and that a deposit would be paid. He also summarised Trafalgar's position which had two limbs. The first was that documents showed that Mr Hadley's evidence was untrue. The second was that the Respondents would have had to give Trafalgar full details of the CGrowth bond transactions, including the financial details revealed by the 2015 Consultancy Agreement and the Receipt and Disbursement Agreement, and that it was clear that this did not occur.

29. The Judge was not persuaded by Trafalgar's reliance on the documents. He did not address the second limb of Trafalgar's position. He held that the knowledge defence was suitable to be examined at a trial, taking the view that to hold otherwise would require him to conduct a mini-trial to resolve what he perceived to be at least potential conflicts of evidence.

30. Turning to the timing defence, which relied upon the March Bond Transaction having been provided to and agreed by Trafalgar on or before 7 March 2016 and Mr Hadley's role thereafter being "purely ministerial", he concluded that "although Mr Hadley and Mr Thwaite may have considered the March 2016 CGrowth bond a done deal, … it seems clear that there was further work to do".

31. The kernel of the Judge's reasoning on the timing defence and his ultimate conclusion on the application was set out at [112]-[113] as follows:

> "112. It is possible that the position might be assessed differently at different dates between 7 and 16 March 2016, and this might be significant given findings yet to be made about communications between Mr Hadley and Trafalgar which are part of the Knowledge defence.
>
> 113. The Timing argument seems unlikely to succeed on its own, but when it is coupled with the Knowledge defence (which I have already concluded should go to trial) it is sufficient also to proceed to trial."

Although it may not matter, I regard [113] as meaning that, if the timing defence had stood on its own, the Judge would have held that it had no realistic prospect of success so that it would not have been a bar to summary judgment or striking out the relevant pleadings. This is supported by the second judgment, in which the judge stated at [18]:

> 18. The judgment does not proceed on the basis that [the knowledge defence and the timing defence] are legally related. It says that the so-called "knowledge defence" should proceed to trial. The "timing defence" appears weak, but in exercise of my residual discretion to decide on case management I decided to allow it to proceed alongside the knowledge defence. The two defences are separate."

32. In the light of his conclusions on the timing and knowledge defences, the Judge did not need to decide the separate issue of the vicarious liability of CGrowth for the actions of PPL, which he said should be addressed at trial.

33. Trafalgar pointed out that the Judge's first judgment did not deal expressly with the question of the second alleged bribe. It also applied for permission to appeal. This led to the second judgment, in which the Judge provided some further clarification and refused permission to appeal. On 15 July 2022 Andrews LJ gave permission to appeal, but stipulated that the appeal should not encompass the issue of CGrowth's vicarious liability for the actions of PPL, as it had not been dealt with in the Court below and this Court would not have the benefit of knowing how the Judge would have dealt with it.

After the judgments

34. Trafalgar requested further information or clarification of PPL and Mr Thwaite's Re-re-amended Defence. Amongst the questions it asked was for clarification of the pleaded statement that "the sale of VAM to Mr Thwaite was not a matter of discussion between Mr Hadley and Mr Thwaite until after VAM's and/or Mr Hadley's advice had been given to and/or accepted by Trafalgar, and/or Trafalgar had agreed to participate in the CGrowth transaction". In answer to the question "on which precise date did Mr Hadley and Mr Thwaite begin discussing the sale of VAM?" the reply (which was given by Mr Thwaite on 30 July 2022) was "The earliest indication of discussions starting would have been on 16 March 2016".

The issues on this appeal

35. The issues on this appeal emerge from Trafalgar's formulation of the conflict of interest that confronted Mr Hadley. Shortly stated, Trafalgar submits the conflict to have been that:

    a. In March 2016, Mr Hadley was proposing to (and did) commit Trafalgar to invest £4,100,000 in CGrowth's issued bonds, which would generate a payment of £1,189,000 by CGrowth to PPL. At the same time he was in discussions with Mr Thwaite to sell VAM to PPL (which Mr Thwaite controlled) for a provisional sum of £1,200,000.

    b. In June 2016, Mr Hadley was proposing to (and did) commit Trafalgar to invest a further £1,360,000 in CGrowth's issued bonds, which would generate a further payment of £394,400 by CGrowth to PPL. At the same time he was finalising the sale of VAM to Mr Thwaite or his nominee, for a consideration including a further payment of £400,000.

36. Trafalgar submits, as it did to the Judge, that it would not have been sufficient disclosure for Mr Hadley to disclose that he intended to dispose of VAM, or even that he was proposing to dispose of VAM to Mr Thwaite or his nominees. In order for Trafalgar to give informed consent, as contemplated by the authorities, it was necessary for Mr Hadley to disclose to Trafalgar the benefits that Mr Hadley's purchaser, PPL, would obtain from the CGrowth bond transactions to which he proposed to and did commit Trafalgar. Trafalgar submits that, although Mr Hadley has given some evidence of a general nature about the possibility or even likelihood of him selling VAM, he has never suggested that he explained the nature of his conflict as summarised above. Accordingly, Trafalgar was never in a position to give informed consent.

37. The Respondents, in written and oral submissions, contend that the Judge was right for the reasons he gave and that the present appeal is an attempt by Trafalgar's liquidator and lawyers to avoid a proper trial of the issue, while generating additional and unwarranted fees for themselves.

The applicable principles

Summary judgment and strike out

38. The principles that govern an application for summary judgment pursuant to CPR Part 24 are very well known and do not require to be set out again here. The Judge set out the familiar summary by Lewison J in *Easyair Limited v Opel Telecom Limited* [2009] EWHC 339 (Ch) at [15]. He also cited [21]-[25] of the judgment of Cockerill J in *King v Steifel* [2021] EWHC 1045 (Comm) on the proper approach to evidence, including where fraud is alleged, and the fact that, if the underlying allegation of fraud is true, the Defendant will have tried to shroud his conduct in secrecy. These were appropriate citations, as was the citation from the judgment of Foskett J in *BFS Group Limited (t/a Bidvest Logistics) v Foley* [2017] EWHC 2799 (QB) cautioning against conducting a mini-trial. I bear these principles in mind without setting them out again here; nor is it necessary to make any separate reference to principles that govern applications to strike out.

Bribery

39. The principles relating to bribery and informed consent are also well established and well known and can be summarised relatively shortly for present purposes. They rest on and arise out of the stern approach that the law takes towards the duties owed by a fiduciary to their principal.

40. The essential character of a bribe is that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal: *Novoship (UK) Limited v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [106] per Christopher Clarke J. The payee of the bribe or secret commission must owe a duty to provide honest and disinterested advice or recommendations or information: *Wood v Commercial First Business* [2022] Ch 123 at [92] per David Richards LJ. What matters is the existence of a potential conflict of interest, because the principal must be confident that the agent will act wholly in his interests: *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004 at [204] per Briggs J; *Airbus Operation Limited v Withey* [2014] EWHC 1126 (QB) at [121]. It follows that it does not matter whether the profit is given to the fiduciary in return for services which he performs for the third party or whether it is given on any other ground at all: *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, 363-364 per Bowen LJ. Equally, it does not matter whether the payer and recipient are not aware that they are committing a legal wrong: *Ross River Ltd* at [218]. Nor does it matter whether the recipient's mind has actually been affected: *Logicrose v Southend United* [1988] 1 WLR 1256, 1260H per Millett J.

41. In *Eze v Conway* [2019] EWCA Civ 88 at [35], Asplin LJ cited with approval [104]-[110] of the judgment of Christopher Clarke J (as he then was) in *Novoship*, including where he said at [109]:

> "It is sufficient if the agent is tainted by the bribery at the time of the transaction between the payer of the bribe and payee's principal. If that is so, the agent's conflict of interest means that the principal has been deprived by the other party to the transaction of the disinterested advice of his agent and is entitled to a further opportunity to consider whether it is in his interests to affirm it. It follows that subsequent transactions may be tainted by payments linked to an earlier transaction between the parties, or by a payment not linked to any particular transaction. "*If a secret payment is made to an agent, it taints future dealings between the principal and the person making it in which the agent acts for the principal or in which he is in a position to influence the principal's decisions, so long as the potential conflict of interest remains a real possibility*": see *Fiona Trust v Privalov [2010] EWHC 3199 (Comm)* at para 73."

Informed consent

42. The defence of informed consent is only available if all facts are disclosed that are necessary to enable the principal to fully understand the proposed transaction so that they may provide fully informed consent to it. In other words, there must be full disclosure of everything material about the proposed transaction. The burden of proving full disclosure lies on the agent and it is not sufficient for him merely to disclose that he has an interest or to make such statements as could or should put the principal on enquiry; nor is it a defence to prove that had he asked for permission it would have

been given: *Dunne v English* (1874) LR 18 Eq 524, 533 per Sir George Jessel MR; *Hurstanger v Wilson* [2007] 1 WLR 2351 at [35] per Tuckey LJ.

43. What is material is to be assessed on the basis of whether it might (not would) have affected the principal's decision. What is required will therefore depend upon the facts of any given case. That does not, of itself, preclude an order for summary judgment or striking out provided that the factual basis for the order is clear and there is no realistic prospect that it would be subject to change if the case were to go forward to a trial.

Discussion

44. I have set out the relevant facts as pleaded and evidenced by the Respondents in some detail because of what they do not include as much as for what they do. Having done so, I have reached the conclusion that the appeal must be allowed, for reasons that can be stated quite shortly.

45. As a preliminary point, Mr Thwaite submitted that the Court should not hear Trafalgar's appeal because the basis of the conflict on which it relies (i.e. the payment of commission by CGrowth to PPL) had not been pleaded. In my judgment, there is no substance in this submission. I have set out the procedural background at [12] ff above, which charts the development of Trafalgar's case. While it is correct that the payment of commission by CGrowth to PPL does not feature in Trafalgar's Amended Particulars of Claim, that was because the 2015 Consultancy Agreement and the Receipt and Disbursement Agreement had not been disclosed. Trafalgar was unaware of the commission arrangements until service of the Amended Defences on 30 June 2021. It thereupon issued its application, supporting it with Ms Young's witness statement which made plain the significance that Trafalgar was attaching to the commission arrangements. Its reliance upon the commission arrangements as forming an important part of its case was also made clear by its skeleton argument for the hearing before the Judge, including paragraph 142, which I have set out at [24] above. The significance of the commission arrangements cannot have been lost on the Respondents, even allowing for the fact that Mr Hadley was unrepresented at the hearing. It does not appear that objection was taken before the Judge and it is clear that the issue was before him. In such circumstances there is no unfairness to the Respondents and it would be quite wrong to exclude this appeal on a pleading point.

46. I remind myself of the high bar that must be surmounted if an order for summary judgment or striking out is to be made; and, once more, I remind myself that it would be inappropriate to resort to anything resembling a mini trial or to attempt to resolve material conflicts of evidence.

47. There can be no doubt at all that Mr Hadley would be in a position of conflict if (i) PPL and Mr Thwaite were engaged by CGrowth to market its bonds, (ii) VAM and Mr Hadley were (on Mr Hadley's case) acting for Trafalgar in negotiating with PPL and Mr Thwaite for the purchase of CGrowth's Bonds, (iii) Trafalgar thought that it was entering into Bond Transactions that would see 100% of its investment passed to the Borrowing Companies, (iv) Trafalgar was not aware of the 2015 Consultancy Agreement or the Receipt and Disbursement Agreement, (v) PPL was entitled to receive 29% of whatever sums Trafalgar paid for CGrowth's Bonds, (vi) PPL and Mr Thwaite were negotiating with Mr Hadley for the purchase of VAM at a time when they were also negotiating for Trafalgar to purchase the CGrowth Bonds, (vii) if PPL were to

obtain its 29% commission from Trafalgar's payment for CGrowth's Bonds, it would receive a financial advantage that would or could assist it to finance the purchase of VAM, and (viii) Mr Hadley would or might benefit from the sale of VAM to PPL.

48. Trafalgar recognises that it has to prove a breach of duty by Mr Hadley in order to establish its non-proprietary claims against him; but it does not have to do so for its proprietary claim to the bribes, the constituent elements of which are as I have just set out. For that reason, its application against Mr Hadley on this appeal is limited to establishing liability to account to Trafalgar for the bribes. The only possible factual dispute relates to element (vi) of the constituent elements: did PPL and Mr Thwaite negotiate with Mr Hadley for the purchase of VAM *at a time when they were also negotiating for Trafalgar to purchase the CGrowth Bonds?* This leads straight into the timing defence: Trafalgar says that the answer to the question is "yes"; the Respondents say that it is "no". Trafalgar goes further, as it must in order to obtain summary judgment, and says that there is no realistic prospect that the answer would be anything other than "yes" if the case were to go to trial, having full regard to the principle established by *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550 that 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.

49. In my judgment the Judge was right to hold, as I understand his judgments, that the timing defence was not realistic: see [31] above. That also was the approach adopted by Trafalgar, whose grounds of appeal concentrated solely on the knowledge defence. That does not mean that the timing defence was not properly before the court on this appeal. PPL and Mr Thwaite raised it as a reason why permission to appeal should not be given; and Andrews LJ in giving permission said that the timing defence would not stand on its own and was therefore not a bar to the appeal.

50. We have, in any event, considered the timing defence in order to see if there is any merit in the Respondent's continued reliance upon it. This can have caused no unfairness to the Respondents who had the opportunity to make whatever submissions they wanted and did make submissions on the timing point at the hearing of the appeal. In my judgment, if the Judge did not mean that the timing defence was not realistic when he described is as weak, his conclusion was wrong. In addition to Ms Young's articulation of the case against them (see [16] above), the terms of Mr Thwaite's email to Mr Hadley of 17 March 2016 timed at 2.38pm support the inference that they had been discussing terms for a period measured in days or even weeks rather than hours. PPL and Mr Thwaite provided their (draft) Re-re-amended Defence and Mr Hadley and Mr Thwaite responded to the allegation that they were negotiating the sale of VAM at the same time as they were negotiating for Trafalgar's investment in the CGrowth Bonds by their responsive witness statements. Both in their witness statements and in PPL and Mr Thwaite's (draft) Statement of Case they responded in terms that were consistent and compelling both in what they said and in what they did not say. Neither specified a date on which the negotiations for the purchase of VAM started. Each adopted the formula that the discussions or negotiations started "on or after" 7 March 2016, in the apparent belief that 7 March 2016 was the critical date in order to avoid the possibility of conflict: see [18], [0] and [22] above. The only reasonable interpretation of their evidence and Statement of Case was that they had started discussing the sale of VAM on or shortly after 7 March 2016.

51. In fact, that apparent belief was mistaken. The 7 March 2016 Letter of Intent was not contractually binding and Trafalgar could have walked away from the March Bond Transaction at any time before, at the earliest, execution of the CGrowth Bond Purchase Forms on 14 March 2016. However, their mistaken belief does not undermine the clear meaning of their evidence, namely that they started discussing or negotiating for the sale well before then. In the light of that evidence and Statement of Case it is, in my judgment, fanciful to suggest that the discussions did not start until after 14 March 2016. Nor is that conclusion altered by the terms of Mr Thwaite's answer to the request for clarification on 30 July 2022, for three reasons. First, it is vague in its reference to when the "earliest indication" of discussions "would have been" rather than identifying an actual time or date when they started; second, it is inconsistent with what he had been saying before; and, third, by then the significance of placing the date of discussions as late as possible must have been apparent to him.

52. Turning to the knowledge defence, as I have set out at [19], [21] and [23] above, there was evidence that disclosure was given of a possible prospective sale of VAM to PPL and that a deposit might be paid. What is conspicuously absent is any suggestion from either Mr Thwaite or Mr Hadley that Trafalgar was told of the commission arrangements or that (on one view at least) Trafalgar's money would or might be used to fund the deposit and other payments (or, putting it at its lowest, PPL's financial ability to purchase VAM would or might be enhanced if Trafalgar invested in CGrowth's bonds). The Judge did not grapple with this omission and, in my judgment, it is critical. In the absence of any evidence from the Respondents (on whom the burden lies), it is irrelevant that Trafalgar did not file evidence to rebut an assertion that the Respondents had not made. Without knowing of the commission arrangements, Trafalgar could not reach a fully informed view on whether or not to invest in CGrowth's bonds. It follows that full disclosure was not given and the Respondents cannot rely upon the informed consent defence.

53. I am unable to accept that the knowledge defence should have been allowed to go to trial. The Respondents had ample opportunity to assert, if it was true, that Trafalgar was told of the commission arrangements and they did not do so. Furthermore, Trafalgar's assertion that it was unaware of the 2015 Consultancy Agreement and the Receipt and Disbursement Agreement until they were disclosed by the Respondents in the course of these proceedings has not been disputed or contradicted. It is therefore not necessary to resort to an analysis of the documents on which Trafalgar relied in the Court below since there is no material conflict of fact, no reason or need to conduct anything approaching a mini-trial, and no reason not to accept Trafalgar's assertion that it was not told of the commission arrangements. In the circumstances, there is no reason to suppose that further evidence proving the necessary elements of the knowledge defence would become available if the issue were allowed to go forward to the trial, which is presently scheduled to take place at the end of February 2023.

54. For the avoidance of doubt, the knowledge defence cannot run in relation to the June Bond Transactions, which are tainted by the earlier failure to give full disclosure: see [41] above. The Respondents have referred to a report prepared by BDO, which we have seen and read. Leaving aside the question whether the report could have done more than put Trafalgar on enquiry (which would not amount to full disclosure) that report was not provided to Trafalgar until after the completion of the June Bond Transactions. No other information has been identified that could have constituted the

giving of full disclosure before the June Bond Transactions. For completeness, the Court asked Mr Higgo KC, who represented Trafalgar here and below, whether he was aware of any documentation that demonstrated knowledge on the part of Trafalgar sufficient to provide a basis for informed consent. His reply, with knowledge of the documentation that has now been disclosed, was that he was not aware of any such documentation.

55. At the hearing of the appeal, all three Respondents appeared in person, and each of them addressed the court. In addition to the main points noted above, Mr Hadley and Mr Thwaite raised two other matters: an argument that there had been no net benefit to the Respondents as a result of the alleged bribes, and a criticism that Trafalgar had not put in any evidence of its own. Neither of these points went anywhere. The no net benefit allegation had been deleted by amendment from Mr Thwaite's Re-Re-Amended Defence, so it was not open to him. Mr Hadley had not put in a defence at all to the bribery claim and his statement did not address the topic. It was likewise not a matter identified in the Respondents' initial documents responding to the appeal, which (with the exception of Mr Hadley's) were drafted by counsel. On the second point, it was not for Trafalgar to put in any evidence at all if, as it maintained, the Respondents' defences, even taken at their highest, had no realistic prospect of success. That being its case, which I would uphold, there was no need for Trafalgar to put in evidence to gainsay anything that the Respondents had said.

56. I would therefore hold that the timing and knowledge defences are fanciful in relation to both the March and the June Bond Transactions. In relation to the timing defence, my conclusion is in accordance with what I understand the Judge's finding to have been. If I am wrong about that, I consider that the Judge's finding to have been plainly wrong. He was prepared to let the timing defence go forward because he considered that there was substance in the knowledge defence. However, for the reasons I have given, there was no evidence to support the assertion that full disclosure had been given and the Judge was wrong to let that defence go forward.

57. For these reasons, I would allow the appeal.

Lady Justice Falk

58. I agree.

Lord Justice Coulson

59. I also agree.