Judgment Approved by the court for handing down.

Neutral Citation Number: [2022] EWCA Civ 230

Case No: CA-2021-000488
CA-2021-000509

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
His Honour Judge Hodge QC
Sitting as a Deputy High Court Judge
Business and Property Courts in Manchester
[2021] EWHC 1053 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 February 2022

Before:

LORD JUSTICE LEWISON
LADY JUSTICE SIMLER
and
LORD JUSTICE SNOWDEN

- -

Between:

E30MA305

BETWEEN:

MARK DAMIAN CLARKSON

Claimant/
Respondent

-and-

(1) FUTURE RESOURCES FZE
(2) PRADEEP SINGH
(3) HOLY GROUP LIMITED
(4) SUDARSHAN SADANA

Defendants/
Appellants

(5) WHITEACRES HOLDINGS LIMITED
(6) TENACRES HOLDINGS LIMITED

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(7) ANDREW DAVID PICKLES
(8) CERTUS HOLDINGS LIMITED

Defendants

BL-2019-MAN-000134

BETWEEN:

ASERTIS LTD — **Claimant/ Appellant**

- and –

(1) MARK DAMIAN CLARKSON — **Defendant/ Respondent**

(2) PAGEFIELD DEVELOPMENTS LIMITED
(3) GLENN THOMAS
(4) JOHN UNSWORTH
(5) RICHARD LUXMORE
(6) COLIN HOWARD BOSWELL
(7) MDSC (LIVERPOOL) LIMITED — **Defendants**
(8) TAYCO002 LIMITED

PART 20 CLAIM:

BETWEEN:

MARK DAMIAN CLARKSON

Part 20 Claimant/ Respondent

-and-

(1) ASERTIS LTD
(2) FUTURE RESOURCES FZE
(3) MR PRADEEP SINGH
(4) HOLY GROUP LIMITED
(5) MR SUDARSHAN SADANA
(6) GMT GLOBAL (FZE)
(7) MR VIJAY PAL GANDHI
(8) MR RAJINDER KUMAR

Part 20 Defendants/ Appellants

Judgment Approved by the court for handing down.

AND IN THE MATTER OF

IN CASE NO. CA-2021-000505

BL-2019-MAN-000134

BETWEEN:

ASERTIS LTD	**Claimant/ Respondent**
- and –	
(1) MARK DAMIAN CLARKSON	**Defendant**
(2) PAGEFIELD DEVELOPMENTS LIMITED **(3) GLENN THOMAS** **(4) JOHN UNSWORTH**	**Defendants/ Appellants**
(5) RICHARD LUXMORE	**Defendant**
(6) COLIN HOWARD BOSWELL **(7) MDSC (LIVERPOOL) LIMITED** **(8) TAYCO002 LIMITED**	**Defendants/ Appellants**

PART 20 CLAIM:

BETWEEN:

MARK DAMIAN CLARKSON

Part 20 Claimant

-and-

(1) ASERTIS LTD
(2) FUTURE RESOURCES FZE
(3) MR PRADEEP SINGH
(4) HOLY GROUP LIMITED
(5) MR SUDARSHAN SADANA
(6) GMT GLOBAL (FZE)
(7) MR VIJAY PAL GANDHI
(8) MR RAJINDER KUMAR

Part 20 Defendants

Judgment Approved by the court for handing down.

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Mr William Buck and Ms Kristina Lukacova instructed by **TMW Solicitors and Fladgate LLP**) for Asertis Ltd, Future Resources FZE, Mr Pradeep Singh, Holy Group Limited, Mr Sudarshan Sadana, GMT Global (FZE), Mr Vijay Pal Gandhi and Mr Rajinder Kumar

Mr Richard Bowles (instructed by **Taylors Solicitors**) for Mr Mark Damian Clarkson, Pagefield Developments Limited, Mr John Unsworth, Mr Colin Howard Boswell, MDSC (Liverpool) Limited and TAYCO002 Limited

Hearing date: 9 February 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Judgment Approved by the court for handing down.

Lady Justice Simler:

Introduction

1. These are appeals by both sides involved in the underlying litigation, from the order of His Honour Judge Hodge QC sitting as a Judge of the High Court in the Manchester Business and Property Courts ("the judge"). The three appeals arise from an ex-tempore judgment he gave on 10 February 2021 in relation to issues in two sets of connected proceedings – claim number E30MA305, "the Manchester proceedings" and claim number BL-2019-001045 (later transferred to Manchester as BL-2019-MAN-000134), referred to as "the London proceedings".

2. Both sets of proceedings arise in connection with the alleged fraudulent behaviour of Mark Clarkson, the sole shareholder and director of Pagefield Developments Limited (the second defendant in the London proceedings), MDSC (Liverpool) Limited (the seventh defendant in the London proceedings) and Tayco 002 Limited (the eighth defendant in the London proceedings) (who together with the other defendants, Glenn Thomas, John Unsworth, Richard Luxmore, and Colin Boswell are referred to as the "MC defendants"). There is a degree of factual complexity to the underlying transactions and the multi-party proceedings to which they have given rise. To assist in understanding the appeals and the issues raised by them, I shall provide a summary of the history and factual background before identifying the nature of the appeals themselves.

3. Mr Clarkson and the MC defendants (except Glenn Thomas) have been represented by Mr Richard Bowles. Mr Thomas has been declared bankrupt and the appeal is not pursued on his behalf. Mr William Buck and Ms Kristina Lukacova appeared for Asertis Ltd ("Asertis"), the claimant in the London Proceedings and first defendant in the Part 20 claim. They also appeared for the first to fourth defendants in the Manchester proceedings and for the second to eighth Part 20 defendants.

The Manchester proceedings

4. On 18 August 2017, a short-term loan for £8.3 million was provided by various lenders (Future Resources FZE, Pradeep Singh, Holy Group Limited and Sudarshan Sadana, all defendants to proceedings later issued by Mr Clarkson, and together referred to as "the Lenders"). The loan was in favour of Ten Acres Holdings Limited ("Ten Acres") to enable Ten Acres to purchase a property in Newton Heath, Manchester (referred to as "the Property").

5. The sole shareholder of Ten Acres was Whiteacres Holdings Limited ("Whiteacres") whose shares purported to be held on trust for a Mr Pickles. Mr Clarkson admitted subsequently that Mr Pickles was a "*front man*" used to induce the lending because he knew that the Lenders would not have made the loans had they known of his own involvement, his wife having been convicted of mortgage fraud. Mr Clarkson claimed that he was the ultimate beneficial owner of the Property and the shares in Whiteacres.

6. On 18 February 2018, Ten Acres defaulted on the loan and pursuant to the terms of the loan agreement, the Lenders procured the appointment of new directors to Ten Acres exercising their rights to do so under the loan and security documents.

7. On 21 May 2018, Mr Clarkson issued the Manchester proceedings against the Lenders, seeking declarations recognising his beneficial ownership rights, including in the Property itself. The Lenders applied to strike out Mr Clarkson's claim. Mr Clarkson was represented by solicitors, Taylors Legal Services Limited ("Taylors") and leading counsel. The claim was settled on terms of a written settlement agreement set out in a confidential schedule to a Tomlin order dated 12 November 2018 ("the Settlement Agreement"). The Tomlin order stayed all further proceedings against the Lenders on the terms set out in the Settlement Agreement except for the purpose of enforcing those terms; and each of Mr Clarkson and the Lenders were given permission to apply to the court to enforce those terms without the need to bring a new claim.

8. The Settlement Agreement included a declaration that the Lenders had legal ownership of the shares in Whiteacres. It was implicit in the Settlement Agreement that Mr Clarkson agreed not to pursue any claims of beneficial ownership of the Property or the shares in either Ten Acres or Whiteacres.

9. Pursuant to the Settlement Agreement, Ten Acres agreed to repay the outstanding sums due on the loan to the Lenders (with payments to be made on a series of agreed dates) and Mr Clarkson undertook personally to remove unilateral notices in relation to his asserted interest in the Property from the Land Registry. The Settlement Agreement also contained an express release by Mr Clarkson of any claims that he might have arising out of or connected with his claim in the Manchester Proceedings and the underlying facts relating to that claim, defined as "the Released Claims". In particular, he agreed not to "*sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any of the first to sixth defendants any action, suit or other proceedings concerning the Released Claims in this jurisdiction or any other*" (clause 7).

10. On 1 March 2019, Ten Acres defaulted on the Settlement Agreement: apart from the first payment due, no further payments were made, whether on due dates or at all. Mr Clarkson also failed to comply with his personal obligations to remove the unilateral notices registered against the title of the Property at HM Land Registry. The result was that the Lenders became entitled to enforce the Settlement Agreement and continued to be the legal owners of the shares in Whiteacres.

11. On 28 October 2019, the Lenders applied to enforce the Settlement Agreement. Mr Clarkson opposed the application to enforce, alleging that clauses in the Settlement Agreement were unenforceable penalties.

12. The application was listed for a return date hearing by the judge on 1 November 2019 but was adjourned to 8 November 2019 at Mr Clarkson's request. Mr Clarkson was represented at the 8 November hearing by counsel. By this time, allegations of fraud/conspiracy had been raised by Mr Clarkson in his witness statement dated 6 August 2019, served in the London proceedings (referred to further below) and in his witness statement dated 4 November 2019, served in opposition to the enforcement application. The conspiracy was summarised as follows: the Lenders had colluded to obtain the Property from Mr Clarkson for themselves, by forcing him into the Settlement Agreement and then preventing him from obtaining further borrowings from FundingSecure Limited, which would have allowed Ten Acres to pay off the Lenders.

13. However, Mr Clarkson did not challenge the overall validity of the Settlement Agreement itself at the November hearing. Rather, his counsel sought an adjournment of that hearing in order to allow proceedings to be issued to challenge the overall validity of the Settlement Agreement. The judge recorded her submission that the Lenders "*had mounted a pincer movement to secure a stranglehold on Mr Clarkson's funds to enable the lenders to be repaid*." Draft particulars of claim were presented to the court on behalf of Mr Clarkson, and representations were made to the effect that he had been the victim of a fraud. As the judge observed at [53] of the judgment, his evidence included "*direct allegations … that he had been the subject of a fraud perpetrated against him, with the aim of depriving him of any beneficial interest in the property"*.

14. The judge rejected the adjournment application. He held that Mr Clarkson had bargained away his right to assert that he was the ultimate beneficial owner of the shares in Whiteacres as against the Lenders and accordingly, he had no standing to challenge the relevant provisions of the Settlement Agreement as a penalty. He held that Mr Clarkson had no interest in the shares in Whiteacres or the Property; the terms of the Settlement Agreement were enforceable; and he made an order for specific performance of the Settlement Agreement by the removal of the unilateral notices.

15. Mr Clarkson did not appeal the judge's order enforcing the Settlement Agreement. Rather, he complied with it by removing the unilateral notices. Subsequently, the Lenders appointed Receivers who sold the Property on or about 13 February 2020. The net sale proceeds, after deduction of professional costs, were a little under £13 million. That was less than the amount said to be due under the Settlement Agreement.

The London proceedings

16. On 3 June 2019, the London proceedings were commenced by FundingSecure Limited ("FundingSecure"), an online peer-to-peer lending platform. Following the entry into administration of FundingSecure in October 2019, that claim was assigned to Asertis, on 15 January 2020; and Asertis was substituted as claimant in the London proceedings by consent on 29 April 2020.

17. In the London proceedings, FundingSecure alleged that Mr Clarkson had dishonestly conspired with the MC defendants, including Richard Luxmore, a director of FundingSecure, and John Unsworth and Colin Boswell, to obtain £8.155 million from FundingSecure and its customers. It alleged that this was done through a combination of taking money from FundingSecure's client account without consent on a number of occasions, by creating post-event loan agreements to cover unauthorised borrowing which had already occurred and, in a few cases, by procuring loans that were genuine on the face of it but would never have been authorised by FundingSecure had the other unlawful conduct been known.

18. In support of this claim FundingSecure obtained a freezing order against Mr Clarkson and Mr Luxmore on 3 June 2019. It has since been discharged by consent.

19. Although all wrongdoing is denied by Mr Clarkson and the MC defendants, some have filed defences admitting that they received monies from FundingSecure. Mr Clarkson has himself admitted receiving £6,939,447.77 from FundingSecure, with other defendants admitting separate, but lesser, sums. Asertis has obtained summary

judgment on these admissions, albeit that part of the order relating to some of the MC defendants' admissions, is subject to appeal by the MC defendants as described below.

The Part 20 claim by Mr Clarkson and others

20. On 20 May 2020, Mr Clarkson and the MC defendants applied without notice for an order permitting them to issue a Part 20 claim against Asertis, the Lenders and other Part 20 defendants. Permission was granted by Master Kaye on 29 July 2020, and the Part 20 claim was issued on 30 July 2020 and served in September 2020.

21. In summary, the Part 20 claim alleges that the Part 20 defendants (other than Asertis) and FundingSecure had "*agreed, conspired and entered into a common design to obtain the Property for themselves"* before 29 March 2018, when the alleged conspiracy was said to have crystallised on Mr Clarkson's case. A lawful means conspiracy was also alleged, but that case was struck out by the judge. Mr Clarkson also made allegations of deceit and breach of contract. The judge held that these claims were "*inseparably bound up together"* with Mr Clarkson's unlawful means conspiracy claim.

22. On 2 October 2020, Asertis and the Part 20 defendants issued various applications for summary judgment/strike out and to enforce the Settlement Agreement. The relevant applications for the purpose of this appeal are as follows:

    i) An application for orders that Mr Clarkson's Part 20 claim be struck out on the ground that it was an abuse of the court's process and/or the pleaded claim of unlawful means conspiracy was defective.

    ii) Summary judgment against Mr Clarkson on the Part 20 claim pursuant to CPR 24.2.

    iii) An application by the Lenders in the Manchester proceedings for an order for specific performance of the Settlement Agreement.

23. In addition, Mr Clarkson and various MC defendants in the London proceedings (including Messrs Unsworth and Boswell) applied by notice to withdraw admissions about their receipt of monies from FundingSecure, made in the defences they had filed. (There were also applications relating to the continuation of the freezing order and an application by Mr Clarkson to discharge that order.)

24. These (and other) applications were heard and determined by the judge at a hearing on 8 to 10 February 2021.

25. At the hearing, Mr Clarkson and the MC defendants were represented by Taylors and Mr Cogley QC. However, Mr Cogley was only instructed to appear in relation to Mr Clarkson's application to discharge the freezing order and an application by notice dated 5 February 2021, but only issued on the first day of the hearing, on behalf of Mr Clarkson and the MC defendants, to adjourn all other applications.

26. The judge refused the adjournment (and gave directions in relation to the application to discharge the freezing order). Mr Cogley confirmed that Mr Clarkson and the MC defendants consented to Taylors coming off the record. That application was therefore granted. Mr Cogley then withdrew from the case and Mr Clarkson attended the

remainder of the hearing as a litigant representing himself, and purporting to represent the MC defendants. Notwithstanding his withdrawal, Mr Cogley had prepared and served a written skeleton argument in advance of the hearing, which addressed the substantive merits of the applications made by Asertis and the Part 20 defendants. This was expressly considered by the judge.

27. Relevantly to this appeal, by his judgment and order, the judge:

(1) refused to permit withdrawal by the MC defendants of the admissions in paragraphs 26(4) and 26(7) of the Amended Defence in the London proceedings, and allowed Asertis' application for summary judgment in part, including:

(i) at paragraph 12(a) granting judgment in the sum of £984,000 against the MC defendants "*based on admissions in paragraphs 26(4) and 26(7) of the Amended Defence";* and

(ii) at paragraph 12(b) granting interest sums against John Unsworth in the sum of £394,525.61 and Pagefield Developments Limited ("Pagefield") in the sum of £491,449.11. Both interest sums were ordered on the basis of the admission by these MC defendants in paragraph 50 of their Amended Defence.

(2) The judge rejected the arguments based on abuse in accordance with the principles in *Henderson v Henderson* (1843) 3 Hare 100. In short, he concluded that Mr Clarkson was entitled to raise the Part 20 claim as a challenge to the Settlement Agreement itself, despite having failed to raise such a claim in November 2019. He therefore dismissed the applications based on abuse (paragraphs 14 and 20 of the order) and dismissed the application by the Lenders to enforce the Tomlin order (paragraph 23 of the order).

(3) The judge struck out Mr Clarkson's claim of lawful means conspiracy (together with a claim pursuant to section 140A of the Consumer Credit Act 1974). The remaining claims of unlawful means conspiracy, deceit and breach of contract were not struck out and summary judgment on these claims was refused.

The appeals

28. The MC defendants were granted permission to appeal by Nugee LJ on two grounds in relation to the London proceedings. First, they contend that the judge should have permitted the withdrawal of the admissions in paragraphs 26(4) and 26(7) of the Amended Defence, as the admissions were made in error. An explanation for the error had been offered and was credible; it should have been considered by the judge, who wrongly stated that no explanation had been offered for the withdrawal. Secondly, the judge wrongly awarded Asertis interest on the judgment sum against Pagefield, in the sum of £491,525.61 and continuing at a daily rate of £490.61, and against John Unsworth, in the sum of £394,525.61 and continuing at the daily rate of £283.43.

29. Asertis and the other Part 20 defendants appeal with leave against the judgment and order on the following grounds. First, the judge erred in finding that the pursuit of the Part 20 claim in the London proceedings by Mr Clarkson did not amount to an abuse of process. Secondly, having correctly found that the Part 20 claim was defectively pleaded, the judge then erred in refusing to strike out Mr Clarkson's pleading of

unlawful means conspiracy. Thirdly and in any event, the judge erred in finding that there was a sufficient factual basis for an unlawful means conspiracy having been formed by October 2018. That was not Mr Clarkson's pleaded claim, and even if it had been pleaded, there would have been no adequate factual basis for it.

30. We heard argument on the admissions and interest appeal; and then on the abuse appeal. Having heard argument on those issues we informed the parties that we did not need to hear argument on the pleading point.

I. The refusal to permit withdrawal of admissions

31. The application to withdraw the admissions arose in the following way. Particulars of Claim were served on 12 July 2019 in the London proceedings, and were amended on 7 October 2019. The relevant part of the Amended Particulars of Claim alleged (at paragraph 22) that Richard Luxmore procured certain payments from FundingSecure's client account and (among other things) that sums totalling about £4m were wrongly dissipated by means of "Category 2 Advances" to Mr Clarkson and/or his associates. The particulars at paragraph 22.4 included allegations at sub-paragraphs 4 and 7 that: (4) £124,000 was advanced to Colin Boswell; and (7) £860,000 was advanced to John Unsworth.

32. The Defence of the MC defendants, originally pleaded by Neil Berragan of counsel, and the subsequent Amended Defence pleaded by Stephen Cogley QC, responded to the allegations made by Asertis, including those particular allegations as follows:

> "26. As to the Particulars under paragraph 22.4:
>
> (1) The MC Defendants admit receiving loans of £3,840,380, but dispute payments identified on annotated Annex 2A totalling £529,104.48.
>
> (2) …
>
> (3) …
>
> (4) It is admitted that the MC Defendants are liable for a payment of £124,000 to CB via his solicitors. …
>
> (7) It is admitted that the MC Defendants are liable to repay £860,000 paid to JU at his order by way of loan. …"

Although substantial amendments were made to parts of the pleaded Defence in the Amended Defence, no amendments were made to the paragraphs just quoted. By paragraph 26(4) and (7) the two relevant MC defendants admitted liability for £984,000.

33. Mr Clarkson and each of the MC defendants (including in particular, Mr Boswell and Mr Unsworth) signed a "Statement of Truth" dated 18 October 2019, in each case stating, "*I believe that the facts stated in this Defence are true*". In the Statement of Truth to the Amended Defence, signed and dated 19 May 2020, by Mr Clarkson, John Unsworth and Colin Boswell, in addition to confirming that the facts stated in the Amended Defence were true, they each stated: "*I understand that proceedings for*

contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

34. Asertis applied for summary judgment on 2 October 2020 pursuant to CPR 14.3 against Mr Clarkson and the MC defendants in the London proceedings, among other things based on the admissions made at sub-paragraphs (4) and (7) as set out above. The application was supported by a witness statement (also dated 2 October from Mr Simon Brew of TWM Solicitors LLP, the solicitors acting for Asertis). This referred expressly to the admission of liability for £984,000 in paragraphs 26(4) and (7). There was no immediate response from Mr Clarkson and/or the MC defendants to this application, and no prompt (or indeed, any) contention that the admissions had been made in error.

35. Instead, more than three months later, Taylors wrote to TWM Solicitors by letter dated 22 January 2021 stating that they had noticed a "*small number of minor errors in the Amended Defence*". They enclosed a Re-Amended Defence and requested consent to various amendments including an amendment to correct the admissions at paragraphs 26(4) and (7) to reflect that Mr Clarkson alone was liable for these two payments. Consent was not given. By an application notice dated 26 January made by Taylors under CPR 17(2)(b), permission to serve a Re-Amended Defence was sought. The application was not supported by any evidence but asserted within the body of the notice that, "*The amendments are confined to the correction of errors, together with the clarification of the admissions*" made by various defendants including Mr Boswell and Mr Unsworth. No explanation was given as to how or why the admissions were made, and how or why they were now regarded as made in error.

36. By letter dated 3 February 2021, (the letter relied on as providing the necessary full and frank explanation) Taylors acknowledged that the withdrawal of an admission is governed by CPR PD 14 paragraph 7.2 (though no application had been made under CPR 14.1 (5)) and continued:

> "You are aware (indeed have laboured the point) that the factual issues relating to the various … loans are very complex. An error was made by previous Counsel in drafting the two sub-paragraphs concerned which regrettably was not picked up at the time the pleading was approved by each of our clients
>
> The case is a long way from trial (assuming the summary judgment application is not successful) and there is little or no prejudice to the Claimant if the re-amendments are allowed, whereas (conversely) the degree of prejudice to the affected Defendants will be substantial.
>
> In the circumstances we consider the balance of prejudice clearly favours the re-amendments being permitted and invite your client to reconsider its position to avoid argument on the point."

37. No witness or other evidence in support of this application was supplied to the judge before or at the hearing on 8 February 2021. This is notwithstanding that witness

statements were served by the MC defendants in the days before that hearing, but addressed to other unrelated matters.

38. The judge dealt with the question whether or not to allow withdrawal of certain admissions at [133] and [134] of his judgment as follows:

> "133. To withdraw an admission made after the commencement of proceedings, a party requires permission pursuant to CPR 14.1(5). In deciding whether to give permission for an admission to be withdrawn, the court is required by Practice Direction 14, paragraph 7.2 to have regard to all the circumstances of the case, including the matters identified in that paragraph. The ground upon which the applicant seeks to withdraw the admission is an important consideration. As stated by Steel J in *American Reliable Insurance Company v CAN Insurance Company* [2008] EWHC (Comm) at [17]-[18], "… *the court is entitled … to receive a fairly full and frank explanation of how things went wrong, or at least appear to have gone wrong, namely to identify the basis upon which the background to the admission is to be withdrawn, the reason for it, how it came about that the admission was made in the first place, and so on*".
>
> 134. Mr Buck submits that the apparent position of the MC Defendants, that the court should simply wave through the withdrawal of formal admissions of liability of a total value just short of £1 million, without an application (or any explanation) is remarkable. No formal application for permission to withdraw the admissions has been made, and, in the absence of such, the application must fail. There is no witness statement in support of the application to amend and there is no witness evidence to support the withdrawal of the admissions. Mr Buck made the point that, apart from Mr Clarkson himself, the MC Defendants have filed no evidence at all. There is no proper basis upon which the admissions can be withdrawn and thus no basis upon which these two re-amendments should be allowed. I accept those submissions. I will not give permission in the absence of any explanation for the withdrawal of these admissions."

39. Mr Bowles challenged this decision, contending that the judge should have permitted the withdrawal. He submitted that the judge was misled and fell into error by overlooking the letter dated 3 February 2021 from Taylors to the solicitors acting for Asertis, stating that the admissions were made because of an error by counsel previously instructed. This explanation, which could not be amplified without waiving privilege, was inherently credible. However, the judge was led to believe that no explanation of any sort had ever been offered, as the last sentence of [134] of his judgment shows.

40. In Mr Bowles' submission, had the judge considered the letter of 3 February 2021, he would have been bound to conclude that it provided a frank and credible explanation.

The admissions were made by mistake. He would then have had to consider factors including the balance of prejudice to each side. While accepting that there was some prejudice to Asertis if the admissions were withdrawn, it was outweighed by the prejudice to the MC defendants in question. Further, the MC defendants have a valid defence to these claims: they contend that only Mr Clarkson is liable for the sums in question. This is important because Mr Clarkson has a set-off and judgment would not have been entered against Mr Clarkson for these sums.

41. I do not accept that the judge made any error or was wrong to refuse the withdrawal of admissions in this case. My reasons follow.

42. The withdrawal of an admission of liability to pay part of a claim for a specified amount of money is governed by CPR 14.1(5): the permission of the court is required to amend or withdraw an admission. The court has a wide discretion to allow withdrawal, and the Practice Direction lists specific factors that must be considered at CPR PD14 paragraph 7.2:

> "7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
>
> (g) the interests of the administration of justice."

43. These are all factors to be considered in accordance with the overriding objective, and no single factor carries greater weight than any other: see *Woodland v Stopford* [2011] EWCA Civ 226 at [26]. The weight to be attached to each factor will inevitably vary according to the particular circumstances of the case.

44. Given the judge's reference to the "*absence of <u>any</u> explanation*" (emphasis added) at [134] of his judgment, I proceed on the basis that the letter of 3 February 2021 was

not considered by him at all. The question for this court in those circumstances is whether the judge was wrong on the material available, including the letter of 3 February, to refuse to permit the withdrawal.

45. Leaving aside the absence of an application under CPR 14.1(5), it is fundamental to an application of this kind that the judge is given a full and frank explanation of how things have gone wrong, and the basis on which the admission is to be withdrawn. This should include how the admission came to be made in the first place and the grounds upon which the applicant seeks to withdraw the admission, including whether or not new evidence has come to light which was not available at the time of the admission.

46. The letter of 3 February simply did not begin to provide the full and frank explanation required. Indeed it begged more questions than it answered. The bare assertion that an error was made by previous counsel and was not picked up, did not begin to explain how the pleading came to be amended by subsequently instructed leading counsel without the error being identified, either by him or by Taylors. The pleading was verified twice, by each affected defendant, by a signed Statement of Truth (coupled with a contempt warning on the second occasion), but nothing was said to explain how this occurred without the error coming to light.

47. The signing of a statement of truth is no empty formality. Its importance is emphasised by the potential liability for contempt of court if signed without an honest belief in its truth. At interlocutory stages a statement of case, verified by a statement of truth, is itself evidence of the truth of the facts alleged in it: CPR Part 36 (2) (a). It therefore carries considerable weight. Conversely, the letter of 3 February carried no such weight. Furthermore, the fact that none of the affected MC defendants responded promptly (or at all) to the Asertis application for summary judgment on the admissions they had made, was never explained. If an error was made, it is inconceivable that this application did not alert the MC defendants to it. They had months to file witness evidence (verified by a signed statement of truth) but failed to do so.

48. Finally, there was nothing to explain the grounds upon which the withdrawal of the admissions was sought; the MC defendants (including Mr Boswell and Mr Unsworth) had admitted receiving the relevant funds, and they did not apply for permission to withdraw those admissions. Having admitted receipt of those funds, there was no explanation why they were not liable to repay them. The judge would have been entitled to understand the positive case being advanced by the MC defendants, who had admitted liability for almost £1m; but no explanation was ever provided.

49. For all these reasons, I have no doubt that the judge was correct to reject this application for the reasons he gave, and I would therefore dismiss this ground of appeal.

II. The interest calculation

50. The application for summary judgment by Asertis included an application for judgment on the admitted claim for contractual interest due under the loan agreements between FundingSecure on the one hand, and Pagefield and Mr Unsworth on the other. The application was supported by Mr Brew's third witness statement. At paragraphs 28 to 30, he set out the interest rates (as he understood them) under the Pagefield

Development Ltd loan agreement and made the corresponding calculations. He set out the rates cumulatively at paragraph 28 as follows:

> "(i) 12% per annum ("Interest rate", under "Financial Details");
>
> (ii) Additional 0.5% per month ("Administration Fee", also under "Financial Details"); and
>
> (iii) additional 1% per month following default (section 8)."

Mr Brew then dealt with the Unsworth loan agreement, setting out the interest rates at paragraph 33 and the corresponding calculations at paragraph 35. The cumulative interest rates were set out by him as follows:

> "(i) 13% per annum ("Interest rate", under "Financial Details");
>
> (ii) 0.52% per month ("Administration Fee", also under "Financial Details"); and
>
> (iii) additional 1.2% per month following default (section 8)."

51. Notwithstanding that Taylors were acting for Mr Clarkson and the MC defendants in the period between 2 October 2020 (service of the summary judgment application and Mr Brew's third statement) and 8 February 2021, there was no challenge to these passages in Mr Brew's evidence and no response provided by the MC defendants contradicting them in any way. Rather, there was a resounding silence on the question of interest until the point was raised on this appeal.

52. It appears from the transcript of the hearing that the interest sums due were dealt with in submissions towards the end of the hearing after judgment had been given:

> "MR BUCK: … we also seek as per my submissions earlier the entitlement to contractual interest in respect of the two specifically identified arrangements.
>
> JUDGE HODGE: Yes, that must follow as well.
>
> MR BUCK: In respect of that interest calculation it is set out in the third witness statement of Mr Brew. We have updated those figures to today's date, my lord, and we have also provided those to Mr Clarkson, so he has seen those additional figures. Again, we will seek that the judgment records those additional [sums] being due and owing."

53. There is no dispute accordingly, that the cumulative interest rates and the corresponding calculations provided by Mr Brew were relied upon by the judge and both interest sums were ordered "*based on the admissions in paragraph 50 of the MC Defendants' Amended defence".*

54. However, as paragraph 50 makes clear, the admission was simply to the effect that FundingSecure was "*entitled to interest on loans, either in accordance with the signed*

loan agreements, or pursuant to s.35A of the Senior Courts Act 1981, as appropriate". There was no admission as to the rate of interest due.

55. In respect of Pagefield a contractual interest rate of 12% per annum, an administration fee of 0.5% per month, giving an interest rate of 6% per annum, and an additional default fee of 12% produced a total interest rate of 30%, which was applied by the judge. In respect of Mr Unsworth, a contractual interest rate of 13% per annum, an administration fee of 6.24% per annum, and a default interest rate of 12.24% produced a total interest rate of 31.48% which was applied by the judge.

56. Mr Bowles submitted that these calculations were wrong and were based on a misinterpretation of the relevant contractual provisions.

57. The relevant contractual provisions are contained in sections 1 and 2 of the Master Facility Agreements entered into between Pagefield and FundingSecure on 23 February 2018, and between Mr Unsworth and FundingSecure on 30 January 2017. Section 1 of both agreements set out "Key Terms" including:

> "Administration fee: the Borrower shall pay to the Lender an administration fee of [0.52%] per month of the Loan (Administration Fee) which is to be calculated on a pro rata basis by reference to the amount of the Loan outstanding from time to time and the number of days that the Loan is outstanding. The Administration Fee shall be paid in full on the Repayment Date.
>
> If the Borrower fails to repay the Loan on the Repayment Date, the Administration Fee *will continue to be charged* at the rate specified until the Loan (and all other sums outstanding under this Agreement) are repaid in full." (emphasis added)

Clause 8 in section 2 defined the "Default Fee":

> "If the Borrower fails to pay any amount payable by it under a Finance Document on its due date, a default fee shall accrue on the overdue amount from the due date up to the date of actual payment (both before and after judgment) at a rate which is [0.5] per cent per calendar month higher than the Administration Fee *which would have been payable* pursuant to section 1 (Key Terms) if the overdue amount had, during the period of non-payment, constituted the Loan. Any default fee accruing under this clause 8 shall be immediately payable by the Borrower on demand by the Lender." (emphasis added)

58. Mr Bowles submitted that the rates for the administration fee and the default fee are not cumulative, and Mr Brew was wrong to suggest otherwise. Clause 8 makes this clear by the use of the emphasised words. On this basis he submitted that the correct interest rates applicable are, for Pagefield (i) the contractual interest rate is 12%; (ii) the administration fee is 6%; and (iii) upon default the administration fee ceased to be

applicable, and was replaced by a default fee of 6% per annum plus a further 6% per annum. Accordingly, the correct total interest rate was 24% and not 30%. For Mr Unsworth, he submitted (i) the contractual interest rate is 13%; (ii) the administration fee is 6.24%; and (iii) upon default the administration fee ceased to be applicable, and was replaced by a default fee of 6.24% per annum plus a further 6% per annum. Accordingly, the correct total interest rate was 25.24% and not 31.48%.

59. Mr Buck resisted this challenge on the basis that this argument is being raised for the first time on appeal, not having been raised below, and in effect, there was a concession that the interest as claimed was owed. He relied on *Jones v MBNA International Bank Limited* [2000] EWCA Civ 314, where at [52] May LJ emphasised the importance of legal certainty, not just as a matter of efficiency, expediency and cost but also of "*substantial justice*":

60. He submitted that the MC defendants had the opportunity to respond to Mr Brew's evidence, served long before the hearing, but chose not to do so. In any event, he submitted that the calculations by Mr Brew were correct as a matter of construction of the relevant terms of the loan agreements: the administration fee continues to apply on default and is not replaced by the default fee. Although in writing he submitted that there was no ambiguity between the two clauses, in oral submissions he accepted at least, some ambiguity or tension between these clauses. He nevertheless maintained that they are cumulative, and the judge's order was accordingly correct.

61. I have concluded that the submissions of Mr Bowles are to be preferred on this issue. There is and can be no criticism of the judge in adopting the unchallenged calculations set out in Mr Brew's witness statement in October 2020, which went unanswered, both in the months before the hearing and at the hearing itself, notwithstanding that Taylors were on record until the hearing. However, there was no admission or concession as to the rate of interest to be applied. The rate depended entirely on the proper interpretation of the contractual interest terms. This appeal therefore depends on a pure question of construction of the two contractual provisions set out above. This is not a point on which any evidence could now be called; nor is any factual investigation required, as Mr Buck accepted. In these circumstances, and despite the chronology, I am persuaded that it is a point that should be entertained.

62. There is undoubtedly a tension between the two clauses in sections 1 and 2 of the Master Facility Agreements: the definition of administration fee in section 1 states that this fee "will continue to be charged" until the loan is repaid in full. However, that definition does not address the possibility of a default event. The specific provision made in clause 8, dealing with default, is clear. The specific provision prevails over the general provision in circumstances of default. The words "would have been payable" in clause 8, mean that the administration fee is no longer payable once the borrower is in default. Instead the default rate is payable. These rates are not cumulative. Had the drafter intended that the default rate and the administration fee should be payable at the same time, different words would have been used. That was not done, and the drafting makes clear that one (the default rate) takes the place of the other (the administration fee) in the event of default. The interest calculation was made on a cumulative basis and was therefore wrong.

63. Accordingly, I would allow this ground of appeal. If my Lords agree, the interest due to Asertis will have to be re-calculated on this basis.

III. The abuse appeal

64. The legal principles that apply when a party seeks to strike out a claim for abuse of process on the basis that the claim could and should have been brought in earlier litigation are not in dispute. Rather it is their application to the circumstances of this case that gives rise to this challenge. In short, in *Johnson v Gore-Wood* [2002] UKHL 65, [2002] 2 AC 1, Lord Bingham of Cornhill summarised the approach at page 31 as follows:

> " … The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive… [The approach]… should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

65. Asertis and the Part 20 defendants advanced their abuse of process application below on the basis that, by the time of the hearing on 8 November 2019, allegations that were later made in the Part 20 claim had been raised and articulated by Mr Clarkson. To the extent that any issues relevant to the validity and enforceability of the Settlement Agreement itself were not raised by Mr Clarkson at the 8 November 2019 hearing, they contended that they could and should have been raised at that hearing. Mr Clarkson was therefore to be prevented from pursuing the Part 20 claim as against the Lenders under the principle in *Henderson v Henderson*, and was likewise prevented from pursuing the Part 20 claim against the sixth to the eighth Part 20 defendants even though they were not parties to the Manchester proceedings, since they could and should have been, had he wished to pursue his allegations of fraud and conspiracy (see *Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748).

66. The judge rejected the abuse argument at [80] to [86] of his judgment as follows:

> "80. I have already cited from Lord Bingham's speech in *Johnson v Gore-Wood.* I have referred in particular to the need for the applicants, the onus being on them, to satisfy the court that the Part 20 claim should have been raised in the earlier proceedings in Manchester if it was to be raised at all.

> 81. I am not satisfied that the Part 20 claim should have been raised in the Manchester proceedings. I do not consider that it is an abuse on the part of Mr Clarkson to raise the Part 20 claim now, even though based on facts which he had already identified by November 2019 but which he had chosen not to pursue as a basis for a challenge to the settlement agreement at a time when he was seeking an adjournment of the application to enforce the terms of the settlement agreement.
>
> 82. The hearing in Manchester in 2019 was simply an application to enforce the terms of the settlement agreement. Mr Clarkson challenged it solely on the basis that it contained what he said were penalties. He was mounting no challenge to have the settlement agreement set aside. That is what he now seeks to maintain by the Part 20 claim.
>
> 83. I do not consider that it is an abuse of process for Mr Clarkson now to be raising that different claim when he did not do so in response to the lenders' application. In my judgment, it is not now an abuse of process for Mr Clarkson to seek to challenge the validity and enforceability of the settlement agreement.
>
> 84. The lenders who were applying in November 2019 to enforce the terms of the settlement agreement should consider themselves fortunate that Mr Clarkson did not choose to raise a challenge to the validity of the settlement agreement at that time; but I see no reason why Mr Clarkson should be prevented from raising that case now. I do not consider that Mr Clarkson is misusing or abusing the court's process by raising this challenge to the settlement agreement now, having failed to do so in November 2019. It is his misfortune that he did not raise it then, and the good fortune of the lenders that he did not do so at that time. I see no reason why that should prevent him from bringing a challenge to the settlement agreement by this Part 20 claim,
>
> 85. It follows also that I consider that there was no material non-disclosure in relation to the application to Master Kaye for permission to bring the Part 20 claim. The Part 20 claim itself was challenging the validity of the settlement agreement. In oral submissions, Mr Buck accepted that if there was no abuse of process, then the challenge to Master Kaye's order on the grounds of material non-disclosure falls away.
>
> 86. I reject the challenge to the Part 20 claim on the basis of *res judicata* and abuse of process."

67. Mr Buck submitted that the judge erred in finding that Mr Clarkson's pursuit of the Part 20 claim in the London proceedings did not amount to an abuse of process. He emphasised that Mr Clarkson was well aware of all relevant facts, but chose not to

challenge the validity of the Settlement Agreement in November 2019. His election was a point against him and not a point in his favour as the judge appeared to find. He submitted that there was no good reason to allow the Part 20 claim to proceed. It constituted a collateral attack on the judge's order enforcing the Settlement Agreement, and was an abuse of the process.

68. Against those arguments, Mr Bowles contended that the judge made no error in rejecting the abuse of process claim. He submitted that the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by each case. Here, the judge carefully considered the narrow ambit of the November 2019 hearing and the reasons he had refused the adjournment application. That hearing did not concern the validity of the Settlement Agreement. Mr Clarkson was merely applying for an order that would allow him time to advance his own claim without the Lenders enforcing the Settlement Agreement in the meantime. The judge was correct, at [81] and [83] of the judgment to bear this in mind: no court of competent jurisdiction has ever considered Mr Clarkson's claims in relation to the Settlement Agreement. Indeed, the first time Mr Clarkson has advanced any claim in relation to the Settlement Agreement (other than in support of a procedural order) was the Part 20 claim. Simply because Mr Clarkson was aware of the facts of the claim at the November 2019 stage (and could have brought the claim then) does not mean that he should have done or was under any obligation to do so in the circumstances. Further the relief now sought is different to the relief which might have been sought in the Part 20 claim. Mr Clarkson is not seeking to unravel what has happened, but rather is bringing a claim for damages. Accordingly, he submitted that the judge considered all of the relevant factors and came to the correct decision, having been addressed by counsel, considered the authorities, and the previous hearing and correctly identified the issues before the court at that hearing.

69. It is not in dispute that a decision taken by the court on abuse of process is not an exercise of discretion. There can only be one correct answer (see to this effect *Aldi* at [16]). Accordingly, as a matter of general principle, an appellate court will only interfere with an abuse of process determination where the judge's conclusion is plainly wrong; in other words, "… *where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him.*": *Aldi* at [16].

70. I have come to the conclusion that the judge's decision that the Part 20 claim was not an abuse of process was plainly wrong in this case.

71. There is no dispute that Mr Clarkson *could* have run the arguments he now wishes to run, in November 2019. After all, the material facts were known to him by then and were trailed in his witness statement for the November 2019 hearing and in the course of submissions made by his counsel. The only question is whether those arguments *should* have been run.

72. The reason the arguments were not run was a matter of choice. Mr Clarkson elected not to advance a case challenging the validity of the Settlement Agreement itself. He did so in the first place by limiting his opposition to the Lenders' enforcement application in November 2019 to a narrow argument that certain terms of the Settlement Agreement were unenforceable penalties. Secondly, he failed to appeal

the judge's refusal to adjourn that hearing (an appeal that could have been coupled with an application to stay the enforcement of the Tomlin order meanwhile) to enable him to advance this case. There was nothing to prevent Mr Clarkson from challenging the validity of the Settlement Agreement. His case was always that he was the ultimate beneficial owner of Whiteacres and the Property: the whole purpose of the Manchester proceedings (subsequently compromised by the Settlement Agreement) was to obtain declarations recognising his beneficial ownership rights. He could have advanced the validity challenge at any point before the November 2019 hearing. The only purported explanation given for not doing so at that hearing is the assertion that the hearing was not the correct forum for this challenge to be considered. But that is without factual or legal foundation. The fact is he chose not to do so, and the judge made an order enforcing the Tomlin order and the Settlement Agreement, with which he later complied (including by lifting the Land Registry notices which acted as a block on sale of the Property).

73. That a different remedy is now sought is irrelevant. The claim and any remedy awarded, is founded on the self-same argument. The Part 20 claim form asserts that Mr Clarkson is the sole beneficial owner of the entire issued share capital in Whiteacres. To pursue that argument Mr Clarkson must attack the validity of the Settlement Agreement by which he is precluded from asserting that he is the ultimate beneficial owner of Whiteacres. That involves a collateral attack on the judge's order enforcing the Tomlin order.

74. The judge gave two reasons for his conclusion that there was no abuse in the circumstances of this case. First, the limited nature of the application and argument addressed at the November 2019 hearing in circumstances where Mr Clarkson simply sought an adjournment. Secondly, the fact that Mr Clarkson chose not to run these arguments. Neither provides a good reason for the judge's conclusion: the limited scope of the arguments advanced by Mr Clarkson at the November 2019 hearing was a matter of choice by him. That he made this choice is a reason for finding abuse and not the contrary as the judge appeared to conclude. The time to raise Mr Clarkson's current claim was at the November 2019 hearing at the latest, when the question of enforceability of the Settlement Agreement was before the court. He could and should have done so then, if he was going to do so at all.

75. The same conclusion follows in relation to the Part 20 claim defendants (GMT, Mr Gandhi and Mr Kumar) who were not party to the original proceedings. There is no legitimate basis for any distinction between these parties: the alleged conspiracy claim should have been brought against all of the alleged co-conspirators at the same time.

76. Accordingly, I would allow this appeal and hold that the Part 20 claim is an abuse of process and should be struck out in its entirety. That conclusion renders the challenge to the conspiracy pleading academic and it is unnecessary to deal with it.

Conclusion

77. For these reasons, I would allow the interest calculation and abuse appeals, but dismiss the admissions appeal for the reasons which I have given.

Judgment Approved by the court for handing down.

Lord Justice Snowden

78. I agree.

Lord Justice Lewison

79. I also agree.