Neutral Citation Number: [2019] EWHC 2071 (Ch)

Case No: E31BS029

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 2 August 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

Robert Sofer	**Claimant/ Respondent**
- and –	
SwissIndependent Trustees SA	**Defendant/ Applicant**

- -
- -

Richard Wilson QC and James Weale (instructed by **RadcliffesLeBrasseur**) for the **Applicant**
Leslie Blohm QC (instructed by **Burges Salmon**) for the **Respondent**

Hearing dates: 22-23 May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on two applications in this claim before the court. The first in time is an application by the defendant by notice dated 3 December 2018, for an order that the claim be struck out pursuant to CPR rule 3.4(2); alternatively that the defendant be granted summary judgment pursuant to CPR part 24; and in any event for the costs of the application. The second application is by the claimant, by notice dated 16 May 2019, for an order that the claimant be permitted to amend his particulars of claim pursuant to CPR rule 17.1(2)(b) in the form of the draft attached to the notice, and that the defendant pay the claimant's costs of the application.

2. Both applications arise in the context of a claim commenced by Part 7 claim form issued on 25 September 2018 by the claimant, who lives in the state of Victoria, in Australia, against the defendant, a Swiss incorporated and resident company carrying on business as a professional trustee. The orders sought by the claimant are (1) that the defendant be replaced as trustee of a trust called the Puyol Trust, (2) that the defendant pay compensation to that trust, (3) for declarations as to the nature of payments made out of the trust, (4) for further or other relief, and (5) for costs. The claim arises out of the defendant's trusteeship of the Puyol Trust following its creation by a settlement dated 25 July 2006, and what is alleged by the claimant to be the defendant's breach of trust.

3. The defendant's application is supported by the witness statement of Nigel West (its external solicitor) dated 3 December 2018, and two witness statements of Andrew Bayles (its general counsel) dated 10 May 2019 and 21 May 2019 respectively. It is opposed by two witness statements of the claimant, dated 11 April 2019 and 18 April 2019 respectively. The claimant's application is supported by written evidence from Kevin Kennedy (his solicitor) contained in the application notice itself. It is slightly complicated by the fact that, when these applications came on for hearing on 28 May 2019, I was given a *revised* draft amended particulars of claim. Mr Wilson QC, for the defendant, told me that this had been handed to him just a few minutes before I came into court, and that he had not at that stage had the opportunity to read it. Mr Blohm QC told me that he seeks permission to amend the particulars of claim in this revised form. I will have to come back to this development later.

4. I also record here that I was not asked to order cross-examination of any witness, and none was tendered for cross-examination. In the absence of cross-examination, the court is not entitled to reject any written evidence as being untrue, *unless* on the basis of all the evidence before the court it considers that that written evidence is simply incredible: see *eg Long v Farrer & Co* [2004] BPIR 1218, [57]-[61], applied in *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, CA, [56], *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [58]. I should say that I was not invited to disregard any of the written evidence on that basis, and do not do so.

Background

5. The background to this claim is to be found in the first witness statement of the claimant and also in the witness statement of Mr West. For present purposes, I can set it out as follows.

6. The claimant's father, Mr Hyman Sofer, was born in South Africa, where he was a successful bookmaker and investor. He married his first wife Sophie and had two children, a daughter, Tamara (now aged 72 years) and the claimant (now aged 69 years). Hyman Sofer divorced Sophie in 1966. She is now dead. He remarried in 1972 but divorced his second wife in 1987. Later that year, then aged 69 years, he moved to Australia, where he had a long-term relationship with another lady until 2014 (although they never married). Hyman Sofer died in Sydney, Australia, on 8 July 2016, aged 97 years.

7. Tamara married Kenneth Wolpert in about 1975. They have three adult children, all born in South Africa, all of whom now also have children of their own. They all moved to Australia in 1989. The claimant moved to Australia in 1987, where he married his wife Dorothy. They have no children, although his wife has two children from a previous marriage. Relations between the two siblings (and between their respective families) are cool. There is some evidence that they do not see eye to eye, though for present purposes nothing turns on that.

8. It appears that Hyman Sofer not only managed to make a good deal of money, but also at some point (like many South Africans at the time) to move it out of South Africa, in his case to Switzerland. The precise timing and method of doing this is not in evidence. He had a number of financial and other advisers in Switzerland, as well as in South Africa or (later) Australia.

The trusts

Creation

9. On 25 July 2006, when Hyman Sofer was 88 years old, he created a new trust structure to hold his wealth, replacing an existing trust structure that had been set up previously by an Australian law firm, and which pre-dated the involvement of the defendant as trustee. In the new trust structure, set up by a different Australian law firm, Clayton Utz, there were four trusts in all. These were named the Jordi Unit Trust, the Gabri Trust, the Puyol Trust, and the Xavi Trust. I am told that these trusts were named after footballers of the Barcelona Football Club. The defendant was trustee of all four trusts. A BVI company which Hyman Sofer controlled, Cilantro Holdings Ltd ("Cilantro"), acted as formal settlor, settling the sum of US$10 on the trusts of each trust, to which of course further assets would be added in due course. The Jordi Unit Trust was essentially a holding vehicle, whose function was to hold the investments. The assets from the earlier trust structure were transferred to the new one. Beneficial entitlement to share in the trust fund which the Jordi Unit Trust held was divided into units, which were initially allocated to Cilantro. The other three trusts were ultimately to hold the units in the Jordi Unit Trust for the benefit of the intended beneficiaries. I call these trusts the "beneficiary trusts".

10. On 8 September 2006 Cilantro transferred certain of its units in the Jordi Unit Trust to the defendant as trustee of the Puyol Trust (and similarly in relation to the other beneficiary trusts). Subsequently, these units were substituted by other units, but nothing turns on that. It is accepted that ultimately the Puyol Trust was entitled to one third of the value of the Jordi Unit Trust. Since about that time, Camelia Finance Holdings Ltd, a company incorporated and resident in the British Virgin Islands, has acted as the nominee of the defendant as trustee of the Jordi Trust, and in that capacity

has by virtue of an express written agreement held all of the assets of that trust on behalf of (and on trust for) the defendant.

11. The form of each of the three beneficiary trusts was entirely discretionary. No person had a fixed interest. Nevertheless, at the time of creation, the Puyol Trust was apparently intended to benefit the claimant and his wife, whereas the Gabri Trust and the Xavi Trust were apparently intended in the longer term to benefit Tamara and her husband on the one hand, and their children on the other. So Tamara's family would have twice as much as the claimant's. However, the casual reader of the trust documents at the time of execution would not have thought so.

Terms

12. The terms of the three "beneficiary" trusts provided for two classes of beneficiary, "Specified Beneficiaries" and "General Beneficiaries". When the trusts were executed, the class of "Specified Beneficiaries" consisted of the then youngest partner of the law firm of Linklaters in London, England, and the then youngest partner of the law firm of Blake Cassells and Gradon LLP in Calgary, Canada. The "General Beneficiaries" were essentially the closest relatives of the Specified Beneficiaries (although certain other persons connected with those relatives were also General Beneficiaries, and there was also power to appoint further such beneficiaries). It goes without saying that neither Tamara nor the claimant had any connection with the youngest partners in the law firms mentioned. However, the trustee of each trust had power, under clause Q1 of the terms of the respective trust instrument, to add further persons to the class of "Specified Beneficiaries". In relation to the Puyol Trust, that power was exercised by a deed of 23 August 2006 (*ie* less than one month after creation of the trust). This added Hyman Sofer as a Specified Beneficiary of the Puyol Trust, and thereby made the claimant, Tamara and their respective issue General Beneficiaries of the trust.

13. I should also mention that, in the event that there are no beneficiaries in the class when the trust comes to an end, the draftsman seeks to avoid a resulting trust for the settlor by providing for the remaining assets to be held on trust for "the Final Repository". This is the person (not being a member of the Excluded Class or an Excepted Beneficiary) who is the youngest partner at the date of the trust of two *other* London firms of solicitors, Freshfields Bruckhaus Deringer and CMS Cameron McKenna. Once again, there is no basis for supposing that either Tamara or the claimant had any connection with whoever turned out to be the youngest partner in the two law firms mentioned. There is also provision limiting any trustee's obligation of disclosure to the Final Repository of his or her interest in the trust until it has become absolutely vested and indefeasible. No doubt the purpose of this provision was to try to exclude any adverse tax consequences for the settlor by preventing any possibility of a resulting trust from arising.

14. The result of this elaborate structure was that neither Mr Hyman Sofer nor his children or remoter issue appeared in the original trust instruments as settlor or beneficiaries (though they all later became beneficiaries), and the persons who did so appear as beneficiaries have never benefitted, and indeed I imagine were never intended to benefit: *cf Re TR Technology Investment Trust plc* [1988] BCLC 256, 263-64, per Hoffmann J; *Re Gea Settlement* (1992) 13 Trust Law Intl 188, R Ct Jsy (Tomes DB). Moreover, the assets held on these trusts are not set out or referred to in

the original trust instruments. In other words, a person reading the original Puyol Trust instrument alone would learn almost nothing about what it involved. Curiously, however, such a reader reading the Trust instrument *would* see the name of Hyman Sofer, though without any explanation as to his connection with the trust, because there is a reference in clause M1(1) to his death as a watershed in relation to certain powers conferred on the trustee.

15. The Puyol Trust (like the Gabri and Xavi trusts) provided that the trustee may

> "lend any money forming the whole or any part of the assets of this Trust to any person who may for the time being be a Beneficiary upon such terms as to repayment and interest or interest free as the Trustees may in their absolute discretion think fit" (clause D3(3)).

On the other hand,

> "The Trustees must not pay convey or transfer any part of the corpus of the Trust to any Beneficiary for any purpose prior to the date of death of Hyman Sofer" (clause M1(1)).

16. The Trust also contains a trustee exoneration clause (F4), on which reliance is placed by the defendant. So far as material, this reads:

> "TRUSTEES' LIABILITY
>
> The Trustees shall not be liable for or responsible for –
>
> a) any loss or damage occasioned to this Trust or any assets of this Trust or to any person by the exercise or purported exercise of any power by this Deed or by law conferred on the Trustees or by any alleged failure to exercise any such power or
>
> b) any other loss or damage to this Trust or any assets of this Trust howsoever arising *except where the same shall be proved to have been caused by acts done or omissions made in personal conscious and fraudulent bad faith by the trustee charged to be so liable* or
>
> c) […]" (emphasis supplied).

17. It is not clear where this form of exoneration clause comes from. In *Baker v JE Clark & Co (Transport) Ltd* [2006] Pens LR 131, the Court of Appeal considered a pension trust deed containing an exoneration clause not structured as in our case, but nevertheless containing words equivalent to those italicised above:

> "None of the trustees shall be liable for the consequence of any mistake or forgetfulness, whether of law or fact of the trustees or their advisors, whether legal or otherwise, or any of them or for any breach of duty or trust whatsoever, whether by commission or omission *unless it shall be proved to be made, given, done or omitted in personal conscious or bad faith of the trustees or any of them*" (emphasis supplied).

18. Tuckey LJ (with whom Carnwath LJ and Bennett J agreed) did not discuss the meaning or true construction of these words, since that did not arise for decision, but commented nevertheless that:

> "Exemption clauses such as this are common in trust deeds nowadays."

It is not clear how specific the Lord Justice was intending to be in making this comment. He might have been referring to the precise phraseology used in this particular case, or he might have been referring to trustee exemption clauses more generally.

19. Counsel were able to cite only one case in which the critical words (italicised at [16] above) were to be found in an exoneration clause using the same structure and to more or less the same effect as in the present case. This is the decision of the Supreme Court of Western Australia (both at first instance and on appeal) in *Wilden Pty Ltd v Green* [2005] WASC 83, [2009] WASCA 38. I shall have to return to this case later. But, since this trust was drafted by Australian lawyers, it may be that an exoneration clause structured in this form, including the italicised words, is one commonly or at least sometimes used in Australia.

The payments to Hyman Sofer

20. Between 2006 and 2016 the trustee made considerable payments from the Puyol Trust (and similarly from the Gabri and Xavi Trusts) to Hyman Sofer, who was of course a beneficiary of those trusts. Because the trust funds consisted simply of units in the trust fund of the Jordi Trust, capital payments would first be made out of the trust fund of the Jordi Trust to each of the three other trusts, so that each had the liquid funds to advance to Hyman Sofer. (The evidence is that some of these monies were thereafter paid to the claimant, or used to pay expenses for the claimant, but nothing turns on this.)

21. These payments purported to be made pursuant to the power in clause D3(3) referred to above to lend trust assets to any Beneficiary, and followed requests from Hyman Sofer or others acting on his behalf. It is common ground that no security was taken by the trustee, no interest was charged, and no repayment dates were set. The defendant's evidence before me is that the directors of the defendant in so acting believed they were acting in the best interests of the beneficiaries, that they were acting in accordance with the terms of the relevant trusts and that they were acting in good faith.

22. The total paid to Hyman Sofer from the three trusts in this period amounted to US$61,504,763.55, divided equally between them. It is said that repayments were made by or on behalf of Hyman Sofer in the sum of US$3,946,402.82, leaving a balance due at his death of US$57,558,360.74. The share of that balance for the Puyol Trust is therefore US$19,186,120.24, which the deceased's estate cannot pay. The claimant says however that these payments were not loans at all, but gifts, and that (given the terms of clause M(1)(1)) there was no power to make them. Accordingly, the claimant says that the trustee has paid away these funds in breach of trust and must restore them or compensate the trust fund of the Puyol Trust accordingly. I add that I understand that no similar complaint has been made by any beneficiary of the Gabri and Xavi Trusts (that is, Tamara or any member of her family). I further add

that the claimant accepts that the Puyol trust is a genuine trust and creates genuine discretions conferred upon the defendant as trustee.

Dispute with the Australian tax authorities and the deeds of indemnity

23. In 2011, there was a dispute between Hyman Sofer and the Australian Taxation Office ("ATO") as to whether he was a resident of Australia for income tax purposes and whether he was liable to pay income tax in Australia on amounts paid from the Jordi Trust or accrued within it. Clayton Utz represented Hyman Sofer in the dispute, which was settled by an agreement dated 18 July 2012. This provided, inter alia, that Hyman Sofer would pay the ATO AUS$9,450,596.93 within a certain timescale, and (by clause 3.4) that, with limited exceptions, no further assessments or amended assessments would be issued to Hyman Sofer or any "Related entity at any time in relation to any income dealt with by this deed". For this purpose, the term "Related entity" included members of Hyman Sofer's family, including the claimant himself.

24. Before the funds necessary to pay the sum agreed to the ATO were released from Camelia Finance Holdings Ltd, the defendant sought the execution of a deed of indemnity by Hyman Sofer, the claimant and Tamara. On about 24 September 2012 that deed was received, duly signed by those three persons. It was also executed on behalf of the defendant and (in counterpart) by a John Doherty as "Guardian" under the trusts. A further deed of indemnity dated 26 September 2012, in materially the same terms, was executed not only by those same persons, but also by Tamara's three children. In the first deed Hyman Sofer was referred to as "the Beneficiary", and the claimant and Tamara were referred to as "the Potential Beneficiaries". In the second deed, the same definitions were used, but Tamara's children were included in the definition of "the Potential Beneficiaries".

25. So far as material, those deeds provided as follows:

> "WHEREAS
>
> (A) The Trustee is the present trustee of the Settlement Deeds dated 25 July 2006 made between Cilantro Holdings Ltd and SwissIndependent Trustees SA known as the Gabri Trust, the Puyol Trust and the Xavi Trust (together "the Settlements").
>
> (B) HYMAN SOFER ("Mr Sofer") is a member of the class of beneficiaries in respect of each of the three Settlements referred to in recital A pursuant to Deeds of Addition of a Specified Beneficiary dated 23 August 2006.
>
> (C) The Trustees have at the request of Mr Sofer previously advanced to him by way of loan the following sums in respect of each of the Settlements:
>
> - Gabri Trust: USD 10,223,073
> - Puyol Trust: USD 10,223,073
> - Xavi Trust: USD 10,223,073
>
> (together "the Existing Loans").

(D) The Trustees have been requested to exercise their powers to advance a further loan of AUD9,500,000 to Mr Sofer in accordance with the powers vested in the Trustees under clause D3 (3) of each of the Gabri Trust, the Puyol Trust and the Xavi Trust.

(E) The Trustee has agreed to make further loans to Mr Sofer of AUD 3,166,666.66 from each of the Gabri Trust, the Puyol Trust and the Xavi Trust ("the New Loans") so that the total advances made to Mr Sofer from the Settlements together will total approximately USD 40,603,000 subject to receiving the indemnities hereinafter set out.

NOW THIS DEED WITNESSES AS FOLLOWS

1. Application

The Trustees, in exercise of the powers conferred by clause D3(3) of the Settlements and of all other relevant powers, have hitherto agreed to advance the Existing Loans and agrees to advance the New Loans to the Beneficiary, these loans being unsecured, interest-free and repayable on demand.

[…]

6. Indemnity

In consideration of the advances of the Existing Loans and the New Loans to Mr Sofer, the Beneficiary and the Potential Beneficiaries hereby covenant with the Trustees and the Guardian at all times to fully and effectually indemnify the Trustees and the Guardian and any person that is from time to time an officer or employee of the Trustee and the heirs, assigns, personal representatives and estates of such officers and employees in respect of all liabilities, actions, proceedings, claims, demands, taxes and duties, and all associated interest, penalties and costs, and all other costs and expenses whatever arising out of the agreement of the Trustees to advance the Existing Loans and the New Loans to Mr Sofer."

Procedural questions

26. Although the defendant trustee has not yet filed a defence, it is clear from the material before me that it denies the allegations of breach of trust, asserting that the payments made to Hyman Sofer were loans rather than gifts, and that they were properly made in exercise of the relevant powers conferred on the trustee. In addition to that, the defendant relies separately on clause F4 (the trustee liability exoneration clause) and the deeds of indemnity referred to above, as defences to any residual claim there may be. The claimant accepts that clause F4 is part of the relevant trusts, but says that it has no application on the facts of this case. As to the deeds of indemnity, the claimant says that they are ineffective. Although the prayer for relief seeks orders going beyond compensation for breach of trust (*eg* to replace the defendant as trustee) the hearing proceeded on the basis that, if the claim as to breach of trust failed then the entire claim would fail. There was no separate basis advanced, for example, for contending that the trustee should be replaced.

Striking out and summary judgment

27. As I have already said, the first application (by the defendant) is one in the alternative to strike out the claim under CPR rule 3.4(2) or for reverse summary judgment under CPR part 24. As it was argued before me, in the former alternative the defendant relied on CPR rule 3.4(2)(a), that is, "that the statement of case discloses no reasonable grounds for bringing or defending the claim". In general, such an assertion is tested without the need of any evidence. The court assumes for the purposes of the argument the truth of the allegations made in the claim, and considers whether, as a matter of law, such allegations amount to a cause of action known to the law. If they do not, there are no reasonable grounds for bringing the claim and it is struck out.

28. But an application for summary judgment is different. Usually it is not so much about whether what is alleged amounts to a claim – or a defence – at all (though that is at least possible), but about *how strong* that claim (or defence) is. Even where the facts alleged amount to a claim, if the claimant has "no real prospect of succeeding on the claim" and there is no other "compelling reason" for a trial, summary judgment can be given for the defendant. This involves an assessment of the strength of the case. Here "real prospect" does not require a particularly high level of probability. "Real" is the antithesis of "unreal" or "illusory". So if the prospect of success is not so low as to be illusory, the claim cannot be shut out by summary judgment. As Lord Hobhouse put it in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [158],

> "the criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality".

The exoneration clause and the deeds of indemnity

29. The exoneration clause at F4 and the deeds of indemnity are facts. But they operate in different ways. The claimant brings his claim on the basis of the trust constituted by the trust instruments. This includes the exoneration clause. There is no suggestion that that clause is not part of the terms of the trust. So the totality of the trust relationship is qualified by that clause, and must be taken into account in considering what are the obligations and/or liabilities of the trustee towards the beneficiaries. Therefore, in order to avoid the risk of being struck out for failing to plead sufficient facts to amount to a cause of action, the claimant must allege conduct which would amount to such a cause of action even taking into account the exoneration clause.

30. In relation to the deeds of indemnity, these are not part of the claimant's cause of action as such. If these operate at all, it is by way of defence to a properly pleaded cause of action. The claimant says that, for various reasons, these deeds of indemnity are invalid, or otherwise do not operate as a defence to his claim. Part of this may be a question of fact, and part a question of law. As I have already said, on an application such as the present, where no cross-examination of witnesses has taken place, it is exceptional for the court to be in a position to disregard the written evidence. But the court may, without disregarding any evidence, still make an assessment of the strength of the case and in that way may be able to reach a conclusion as to whether or not summary judgment should be given.

The standard of proof

31. Mr Blohm QC raises a point about the standard of proof required in this case. He says that the allegations by the claimant have to be proved only to the civil standard of proof. The fact that (for example) an offence of some gravity is alleged is simply a matter to have regard to deciding whether that test has been satisfied. The more serious the allegation the less inherently likely it is to be true and the stronger the gravitational pull against it. He referred to *Re Dellow's Will Trusts* [1964] 1 WLR 451. I did not understand the defendant to argue against this view.

32. I agree with the claimant. Even if a party seeks to show that a crime, an act of dishonesty or some other morally reprehensible conduct has taken place, it is clear that in civil proceedings such as these the standard of proof is nevertheless still the civil standard, that is, the balance of probabilities. In particular, there is no intermediate standard between the criminal and the civil standards of proof, nor any sliding scale depending on the seriousness of the allegation. But common sense requires that the court should take account of the inherent probabilities of the situation. Thus, the more serious the allegation, the less likely it is that it will turn out to be true, and hence the more cogent should be the evidence in order to persuade the court that it *has* been established on the balance of probabilities: see the discussion in the speech of Lord Hoffmann in *Re B (Children)* [2009] 1 AC 11, [2]-[15].

Strike-out

33. CPR rule 3.4(2) provides:

> "The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

34. CPR Part 16 Practice Direction, para 8.2, provides:

> "The claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim:
>
> (1) any allegation of fraud,
>
> (2) the fact of any illegality,
>
> (3) details of any misrepresentation,
>
> (4) details of all breaches of trust,
>
> (5) notice or knowledge of a fact,
>
> (6) details of unsoundness of mind or undue influence,

(7) details of wilful default, and

(8) any facts relating to mitigation of loss or damage".

35. The Chancery Guide (March 2016), para 10.1, supplements this by providing:

> "In addition to the matters which PD 16 requires to be set out specifically in the particulars of claim, a party must set out in any statement of case:
>
> - full particulars of any allegation of fraud, dishonesty, malice or illegality; and
>
> - where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged."

36. In relation at least to allegations of fraud and dishonesty, these materials embody rules of pleading of long standing: *Hersi & Co v The Lord Chancellor* [2018] EWHC 946 (QB), [131]. In *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, for example, Lord Millett said:

> "183. Having read and re-read the pleadings, I remain of opinion that they are demurrable and could be struck out on this ground. The rules which govern both pleading and proving a case of fraud are very strict. In *Jonesco v Beard* [1930] AC 298 Lord Buckmaster, with whom the other members of the House concurred, said, at p 300:
>
> > 'It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, *as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires*' (my emphasis).
>
> 184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on Fraud and Mistake* 7th ed (1952), p 644; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney Genera; for Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

187. In *Davy v Garrett* 7 Ch D 473, 489 Thesiger LJ in a well known and frequently cited passage stated:

> 'In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent.'

This is a clear statement of the second of the two principles to which I have referred.

188. In *Armitage v Nurse* [1998] Ch 241 the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust. She pleaded that they had acted 'in reckless and wilful breach of trust.' This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: if proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they were charged with dishonesty rather than with honest incompetence.

189. It is not, therefore, correct to say that *if there is no specific allegation of dishonesty* it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud. If the observations of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd* (unreported) 21 July 1999 are to the contrary, I am unable to accept them.

190. In the present case the depositors (save in one respect with which I shall deal later) make the allegations necessary to establish the tort, but the particulars

> pleaded in support are consistent with mere negligence. In my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to the court to draw the inferences necessary to find that the essential elements of the tort had been proved."

I add that Lord Millett dissented in the result, though not on this aspect of the case, and it is clear that his views set out above nonetheless represent the law: see *eg Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch), [63], per Lewison J (as he then was).

Timing of the application

37. I have already referred to the fact that no defence has yet been served to the claim made, and therefore the question whether clause F4 bars any such claim may be thought not yet to have arisen. Yet, on an application to strike out the claim, the defendant is entitled to rely on a trustee exoneration clause which on any view forms part of the terms of the trusts concerned. This is clear from at least two decisions of the Court of Appeal, binding upon me.

38. In *Baker v JE Clark & Co (Transport) Ltd* [2006] Pens LR 131, to which I have already referred, the trustee had applied to strike out the claim against it on the grounds that it disclosed no reasonable cause of action, because of the exoneration clause contained in the trust instrument. In fact the clause relied on by the trustee was not at that time pleaded in the existing defence in the proceedings, although it was referred to in a draft amended defence then available. The Court of Appeal held that this was sufficient:

> "12. … It was not a pre-requisite to strike out that the point should have been taken in the defence as the judge noted. …"

39. Secondly, in *Bonham v Fishwick* [2007] EWHC 1859 (Ch), [2008] EWCA Civ 373, Evans-Lombe J at first instance struck out a breach of trust claim against trustees on the basis of *draft* amended particulars of claim including particulars of matters which were intended to be pleaded in order to circumvent the provisions of the trustee exemption clause

> "as if the defendant trustees had filed a defence containing a plea that [that clause] afforded them an absolute defence to the claim" (see at [26]).

On appeal, the Court of Appeal affirmed the decision of the judge:

> "34. … the 2006 Action was rightly struck out on the ground that [the clause] was available as a complete defence to the [trustees] where there was no wrongdoing … "

40. Accordingly, in the present case Mr Blohm QC for the claimant did not seek to argue that it was premature for the defendant to submit that the clause covered the claim. Instead he argued that the claim as formulated (whether in the original or draft amended versions) was sufficient to overcome the effect of the clause. Whether this is so depends, first of all, on what limits the law relating to trustee exoneration clauses places on such clauses, then, secondly, on the true construction of the clause used in

this case, and, lastly, on what the claimant has actually alleged against the defendant. I deal with each of these three points in turn.

(1) The limits of trustee exoneration clauses

41. In *Armitage v Nurse* [1998] Ch 241, a beneficiary under a trust brought an action for breach of trust against trustees and was met with reliance on a trustee exoneration clause in the following terms:

> "No trustee shall be liable for any loss or damage which may happen to Paula's fund or any part thereof or the income thereof at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud . . . ."

42. Millett LJ (with whom Hirst and Hutchison LJJ agreed) held that it was possible in English trust law for an exoneration clause to exclude liability for any breach of trust except one of actual fraud or dishonesty. He set out the limits of such fraudulent or dishonest breach of trust as follows (at 251):

> "Breaches of trust are of many different kinds. A breach of trust may be deliberate or inadvertent; it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustees' powers; it may consist of a failure to carry out a positive obligation of the trustees or merely of a want of skill and care on their part in the management of the trust property; it may be injurious to the interests of the beneficiaries or be actually to their benefit. By consciously acting beyond their powers (as, for example, by making an investment which they know to be unauthorised) the trustees may deliberately commit a breach of trust; but if they do so in good faith and in the honest belief that they are acting in the interest of the beneficiaries their conduct is not fraudulent. So a deliberate breach of trust is not necessarily fraudulent."

43. Millett LJ went on to discuss the use of the phrase "wilful default", pointing out that it had two meanings. One was want of ordinary prudence, *ie* negligence. The other was more serious:

> "In the context of a trustee exclusion clause, however, such as section 30 of the Trustee Act 1925, ['wilful default'] means a deliberate breach of trust … Nothing less than conscious and wilful misconduct is sufficient. The trustee must be
>
> > 'conscious that, in doing the act which is complained of or in omitting to do the act which it said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not:' see *In re Vickery* [1931] 1 Ch. 572, 583, *per* Maugham J.
>
> A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default."

44. Thus, according to the Court of Appeal, a trustee who knows he is doing something in breach of trust but

> "consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries,"

whilst committing a breach of trust, is not committing a *fraudulent or dishonest* breach of trust, and hence may be protected by an appropriately drawn exoneration clause.

45. This position was glossed by the Court of Appeal in *Walker v Stones* [2001] QB 902. There a trust contained an exoneration clause which, so far as material, provided as follows:

> "15(1)(a) In the professed execution of the trusts and powers hereof no Trustee … shall be liable … by reason of any other matter or thing other than wilful fraud or dishonesty on the part of the Trustee whom it is sought to make liable…"

46. In an action for breach of trust brought against them, the trustees relied on this clause. The claimants then sought to amend their statements of case to allege further facts which they said got over the effect of the exoneration clause. The question was therefore whether the claimants were alleging "wilful fraud or dishonesty" against the trustees, in which case the clause would not apply. The trustees opposed the amendment, stating in written evidence that they had acted in good faith in the best interests of the beneficiaries. Rattee J at first instance refused permission for the amendment, on the basis that (at 938):

> "It seems to me impossible to call a trustee's conduct 'dishonest' in any ordinary sense of that word, even if he knew he was acting in breach of the terms of the trust, if he so acted in a genuine (even if misguided) belief that what he was doing was for the benefit of the beneficiaries."

47. On appeal, Sir Christopher Slade (with whom Nourse and Mantell LJJ agreed) was prepared to agree with the judge only subject to a qualification:

> "163. At least in the case of a solicitor-trustee, a qualification must in my opinion be necessary to take account of the case where the trustee's so-called 'honest belief', though actually held, is so unreasonable that, by any objective standard, no reasonable solicitor-trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries."

48. These cases were further considered in *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch), a decision of Lewison J (as he then was). This was a claim brought by the beneficiaries of two trusts of undivided shares in a residential block of flats in the West End of London against the trustees of those trusts in respect of alleged breaches of trust. The claimant sought to amend their statements of case, and the trustees resisted those amendments on the basis that the proposed amended cases were insufficient to get over a trustee exoneration clause contained in each settlement. In parallel, trustees also applied for reverse summary judgment against the claimants.

49. The clause concerned read as follows:

> "In the execution of these trusts no trustee shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or for the negligence board of any agent employed by such trustee or by any of the Trustees although the employment of such agent was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by such trustee or by any of the Trustees or by reason of any other matter or thing except wilful and individual fraud or dishonesty on the part of the trustee who is sought to be made liable."

It will be noted that this clause was materially the same as that in *Walker v Stones*. Lewison J pointed out that it was in a standard form, and owed its origins to *Prideaux's Forms and Precedents in Conveyancing*.

50. The judge considered the decisions of the Court of Appeal in *Armitage v Nurse* and *Walker v Stones*. In relation to the former, he observed (at [79]) that this required

> "that in order to establish dishonesty it is necessary to show that a trustee deliberately committed a breach of trust which he did not honestly believe was in the interests of the beneficiaries."

51. He also mentioned other decisions dealing with the legal definition of dishonesty. He noted that the parties

> "accepted that the law about the interpretation of exoneration clauses was still to be found in *Walker v Stones*"

and that there was no argument that a different standard should be applicable to a professional trustee as compared with a solicitor trustee. (In the present case the defendant was prepared to adopt the same position for the purposes of this hearing, though it has reserved the right to argue the contrary if the case goes further. For what it may be worth, for my part I consider that the claimant was right not to argue the point.)

52. On that basis, he held (at [81]) that:

> "what is required to show dishonesty in the case of a professional trustee is:
>
> i) A deliberate breach of trust;
>
> ii) Committed by a professional trustee:
>
> a) Who knows that the deliberate breach is contrary to the interests of the beneficiaries; or
>
> b) Who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or
>
> c) Whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no

> reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries."

53. In *Barnsley v Noble* [2017] Ch 191, a claim for breach of fiduciary duty, by way of acting in breach of the self-dealing rule, was made against one of the trustees of a will. The will contained both a clause permitting self-dealing in certain circumstances, and an exoneration clause which, so far as material, was identical to that in *Walker v Stones* and *Fattal v Walbrook Trustees*. At first instance it was held by Nugee J that the self-dealing clause did not apply to this claim, but that the exoneration clause did. The claimants appealed, and the trustee cross-appealed. However, the Court of Appeal dealt first, and indeed only, with the argument relating to the exoneration clause.

54. Sales LJ (with whom Sir Terence Etherton C and Patten LJ agreed) held that Nugee J was right, and that the exoneration clause barred the claim. He said that

> "38. … The phrase 'wilful fraud' means that it is a knowing and deliberate breach of a relevant equitable duty or reckless indifference to whether what is done is in breach of such duty which has to be shown. The word 'wilful' here does not carry the much weaker connotation of intentional action which Mr Tager proposes."

Sir Terence Etherton C added a number of observations emphasising that, for particular action intentionally carried out by the trustee to amount to 'wilful fraud' within the meaning of this exoneration clause, there must be "awareness by the trustee that it was wrongful": see at [53], [54], and [62].

55. However, none of this qualifies the requirement in *Fattal* (following *Armitage v Nurse* and *Walker v Stones*) that, in order to establish dishonesty capable of overcoming a trustee exoneration clause of the kind in that case, it would be necessary to show that the trustee did not honestly believe that his or her actions were in the interests of the beneficiaries.

56. I was also referred to the decision of the Supreme Court in *Ivey v Genting Casinos* [2018] AC 391. This was not a case about an exoneration clause, or even about trust law, but it was about the concept of dishonesty. There the claimant, a professional gambler, claimed to have won some £7.7 million at the defendant's London casino, playing Punto Banco, a variant of Baccarat. The defendant declined to pay, on the basis that the claimant had cheated. This is a criminal offence under section 42 of the Gambling Act 2005. But it was also common ground that there was an implied term in the gambling contract (enforceable in English law since the 2005 Act) that a gambler would not cheat. So if the claimant had cheated he had breached the implied term, and the defendant was entitled to decline to pay.

57. The defendant said that the claimant had cheated by using a technique known as "edge-sorting", enabling him to identify particular cards in the pack from minor imperfections on their backs, which thereby improved his chances of winning particular hands. Since gamblers in the defendant's casino did not touch the packs, edge-sorting depended on persuading the croupier to rotate cards in the pack without realising why she or he was being asked to do so. In this case the croupier had been persuaded to rotate certain cards on the basis that it would bring good luck to the claimant. The claimant then persuaded the croupier to continue using the same pack

during what became a lengthy winning streak. It was only by studying CCTV footage after the event that the defendant had concluded that this was what had happened.

58. The judge at trial held that the claimant had indeed used "edge-sorting", had therefore cheated in breach of the implied term and was disentitled to recover. The majority of the Court of Appeal affirmed this decision, and the claimant appealed to the Supreme Court. The claimant argued that cheating involved dishonesty, and that he had not been dishonest. Lord Hughes (with whom Lady Hale and Lords Neuberger, Kerr and Thomas agreed) held that the claimant *had* cheated, and that cheating did not require dishonesty in the criminal law sense. If he had himself rearranged the cards in the pack so that for him the element of pure chance was significantly reduced, that would have been cheating. It made no difference that he had tricked the croupier into doing it for him. In the words of Lord Hughes,

> "He took positive steps to fix the deck. That, in a game which depends on random delivery of unknown cards, is inevitably cheating. That it was clever and skilful, and must have involved remarkably sharp eyes, cannot alter that truth."

59. Accordingly, the court did not have to consider whether the claimant had also been dishonest. But Lord Hughes took the opportunity nonetheless to discuss the test for dishonesty as set out in *R v Ghosh* [1982] QB 1053. He focussed in particular on the so-called "second leg" of the test in that case. This is that, if the jury considers that the defendant's behaviour was dishonest by the lay objective standards of ordinary reasonable and honest people (the "first leg"), it must then ask whether the defendant must have realised that ordinary honest people would so regard his behaviour. Only if the answer was Yes could they convict.

60. Lord Hughes considered a number of problems that had arisen in practice with the second leg in the criminal context. However, he also looked at cases in the civil law context. At [62], he quoted the statement of Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, [10], PC:

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

61. Lord Hughes expressed the view that there ought to be no difference between the test for dishonesty in the criminal law and in the civil law. He pointed out that there were not many occasions when the matter would arise for decision in a criminal case, because criminal judges currently directed juries in terms of the *Ghosh* second leg. Then he went in some detail through the history of the meaning of dishonesty in criminal cases.

62. He concluded his review in this way:

> "74. These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan*

> and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

63. It will be noted that Lord Hughes does not deal at all with the "judicious breach of trust" argument which was raised in *Armitage* and in *Walker*, and which led to the so-called second limb in *Fattal*, that is, the question of the belief of the trustee that he or she was acting in the best interests of the beneficiaries. The claimant argues that this shows that there is in fact no separate second leg to *Fattal*, and that the question of the trustee's belief about the beneficiaries' best interests is *inherent* in the concept of dishonesty. So it does not have to be separately addressed in the pleading.

64. The defendant responds by saying that merely because the Supreme Court removes from the definition of dishonesty the requirement that the defendant should appreciate that what he or she is doing is dishonest by the standards of ordinary honest people does not affect the possibility that the defendant might hold the (subjective) view that what he or she was doing was in the best interests of the beneficiaries, and that therefore this was not dishonest by such (objective) standards.

65. I agree with the defendant. A subjective belief about what is in the best interests of the beneficiaries is relevant to the objective standard of dishonesty. My conclusion accordingly is that the claimant's statement of case, or proposed amended statement of case, will allege a fraudulent or dishonest breach of trust for the purposes of the trustee exoneration clause if, and only if, it alleges that the defendant, being a professional trustee, both

> (1) committed a deliberate breach of trust, and
>
> (2) *either* (a) knew, or was recklessly indifferent as to whether, it was contrary to the interests of the beneficiaries, *or* (b) believed it to be in the interests of the beneficiaries, but so unreasonably that no reasonable professional trustee could have so believed.

(2) The true construction of the clause

66. I have already set out the whole of clause F4. But the material part is as follows:

> "The Trustees shall not be liable for or responsible for […] any other loss or damage to this Trust or any assets of this Trust howsoever arising except where the same shall be proved to have been caused by *acts done or omissions made in personal conscious and fraudulent bad faith* by the trustee charged to be so liable … " (emphasis supplied).

67. I mention in passing that there is a formatting issue with this clause. It is whether the words from "except where the same" to the end apply not only to sub-clause (b) of the clause (which is where they are located) but also to sub-clause (a). In *Wilden Pty Ltd v Green* [2005] WASC 83, [2009] WASCA 38, the Australian case in which a trust exoneration clause in similar terms appears, the formatting of the clause (as set out in the judgements both at first instance and on appeal) makes clear that the words equivalent to those from "except where the same" to the end in the present case apply to both subclauses (a) and (b). To my mind it makes little sense to limit the exoneration contained in subclause (b) so that it does not include breaches "in personal conscious and fraudulent bad faith" and yet allow the exoneration in subclause (a) to have free rein untrammelled by any question of fraudulent or dishonest conduct on the part of the trustee. As was common ground between the parties in the present case, that would mean that subclause (a) would fall foul of the decision of the Court of Appeal in *Armitage v Nurse* [1998] Ch 241.

68. Whilst not conceding the point, Mr Blohm QC said that he could see the force of the argument. If it mattered, I would hold that, as a matter of construction, the italicised words applied to both subclauses. In this respect, I note, but have not needed to rely on the discussion by Lewison J in *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch), [68]-[72]. But, in any event, as I understood the argument for the defendant, it relied on subclause (b) and there can be no question but that the italicised words apply to that subclause. So strictly speaking I need not decide the point.

69. The more important question is what the italicised words mean. As I have said, the only case cited to me using a similar form of words in a similarly structured trust exoneration clause is that of *Wilden Pty Ltd v Green* [2005] WASC 83, [2009] WASCA 38. Those being decisions of an Australian court are not binding on me sitting here. But coming as they do from a respected common law court with a long history of dealing with trusts and trust disputes, and, given the relative homogeneity of trust law in this and other Commonwealth jurisdictions, they are of considerable persuasive value: *cf Willers v Joyce (No 2)* [2016] UKSC 44, [12], dealing with the position of decisions of the Judicial Committee of the Privy Council. However, although counsel referred to this case in argument, the texts of the decisions were not in fact before me at the hearing. Having located them after the hearing, and having considered that they might be useful to me, I invited the parties to let me have any written comments or submissions on those decisions that they wished. The defendant made short written submissions, whereas the claimant preferred not to make any.

70. In *Wilden Pty Ltd v Green* the trustee of a unit trust owning a supermarket was alleged to have committed breaches of trust in the way that it obtained determinations of value for the purpose of repurchase of units, pursuant to the terms of the trust deed. The trustee denied the allegations, but in any event relied on the exoneration clause. There was argument about the meaning of the italicised words. At first instance, Hasluck J held that, on the basis of those words,

> "… The trustee can arguably be held liable not only for actual fraud (that is, for acts of dishonesty) but also for unconscientious conduct amounting to equitable fraud because it would be an act of bad faith to fail to comply with an obligation which is enforced by a court of equity".

71. On appeal this aspect of the decision was reversed. McLure JA (with whom Pullen JA agreed on this ground, and Newnes AJA agreed generally) said:

> "162. The trial judge erred in concluding that any failure to comply with an obligation enforced by a court of equity constitutes bad faith. Bad faith connotes conscious wrongdoing that is knowingly or recklessly inconsistent with the interests of the beneficiaries. Further, the words 'conscious fraudulent bad faith' in cl 13.4 are intended to be conjunctive not disjunctive. The clear but clumsily stated intention is that there only be liability for actual fraud not its equitable equivalent. Actual fraud in this context means dishonesty or bad faith (*Armitage*, 251)."

72. The defendant submitted that the essential purpose of the clause in that case was to exclude liability for all acts or omissions except for actual fraud or dishonesty. Accordingly,

> "for present purposes, the principal significance of *Wilden* is that it confirms that the exoneration clause in the present case extends to all acts/omissions save for actual fraud."

73. The defendant goes on to say that although the exoneration clause in that case was similar to that in the present case, there is no basis for concluding that this reflects any terms of art as a matter of *Australian* law. And, in support of this submission, the defendant refers to the English Court of Appeal decision in *Baker v JE Clark and Co (Transport) Ltd*, to which I have already referred, where a similar form of words to those italicised in the clause in the present case was used.

74. It is well known that the general law of trusts in England was in effect exported to Australia when courts having jurisdiction in equity matters were established in the several Australian colonies, and those courts applied English trust law: see *eg* Meagher, Gummow and Lehane, *Equity*, 5th ed 2015, Ch 1, [1-115]-[1-195]. This reception was subject of course to subsequent statutory intervention by the several states of the Australian Commonwealth. But, despite the abolition of appeals from Australian courts to the Privy Council in 1975 (for Commonwealth cases) and in 1986 (for states Supreme Court cases), and the consequent freedom to create an Australian common law, there still seems to be little or no divergence on general trust law principles between the English and the Australian jurisdictions. Moreover it is both a dynamic export and a two-way street, as both English and Australian trust laws have developed over the years with mutual reference and citation of authority. Subject to one point, on the material placed before me I have no basis for assuming that the italicised words have any special meaning in Australian trust law different from what they would mean in English trust law.

75. The critical words are "*acts done or omissions made in personal conscious and fraudulent bad faith*". The one point of reservation to which I alluded above concerns the statement which I have quoted from the judgment of McLure JA in *Wilden Pty Ltd v Green* that "bad faith connotes conscious wrongdoing that is knowingly or recklessly inconsistent with the interests of the beneficiaries". This may go too far for English law. There is English authority that bad faith on its own is not fraud or dishonesty for the purposes of private law: see the cases cited in *Devon Commercial Property Limited v Barnett* [2019] EWHC 700 (Ch), [180]-[186]. But, subject to that,

overall the meaning of the phrase is clear enough. The word "personal" makes clear that the phrase does not include any vicarious liability. The words "conscious and fraudulent" are the kernel of the expression. They operate to exclude the wider concept of equitable fraud and to restrict the meaning of the whole phrase to actual fraud or dishonesty. I therefore respectfully agree with the conclusion expressed by the Supreme Court of Western Australia, that this phrase refers to actual fraud or dishonesty.

76. Having come to that conclusion, I can turn to the third question, which is what is alleged by the claimant against the defendant. Here, of course, I bear in mind the rules of pleading which I discussed briefly earlier. These rules require not merely that the claim should allege fraud or dishonesty, but also must give sufficient *particulars* of that fraud or dishonesty. As Lord Millett said in *Three Rivers* (at [184]-[186]), this requires the pleading of the facts, matters and circumstances relied on to show that the defendant was dishonest, and which are not consistent with innocence. Moreover, the court will not allow any inference of dishonesty to be drawn from primary facts and matters (not themselves elements of the dishonesty alleged) which have not been pleaded.

(3) The allegations made, or proposed to be made, by the claimant against the defendant

77. The original and, strictly speaking, current version of the particulars of claim pleaded as follows:

> "29. In breach of trust in respect of each payment made by the defendant to Hyman Sofer out of the Puyol trust
>
> (1) Failed to exercise the power to lend money to Hyman Sofer;
>
> (2) Advanced the money to Hyman Sofer with the intention that Hyman Sofer should not have to repay the same if he did not wish to (and it is averred that Hyman Sofer also received the money on the footing that he would not have to repay it);
>
> (3) Failed to consider the exercise of the power to lend money to Hyman Sofer;
>
> (4) Advanced the money to Hyman Sofer at his direction;
>
> (5) Advanced the money to Hyman Sofer in breach of the prohibition at clause M(1)(1) of the terms of the trust;
>
> (6) Was recklessly indifferent to the requirement that the defendant lend and not advance the money to Hyman Sofer such that the defendant is not entitled to rely on the exclusion of liability contained in clause F4 of the trust;
>
> (7) Insofar as the monies were advanced to Hyman Sofer after 8 October 2015, the said payments amounted to a disposal of a trust asset at less than market value, and were therefore further in breach of the terms of the 2006 trust deed as amended."

78. A first draft amended statement of case was served by the claimant on the defendant under cover of a letter dated 16 April 2019, and was the subject of an application by

notice dated 16 May 2019 for permission to amend the particulars of claim. That notice and that draft amended statement of case were formally before the court at the same time as the defendant's application to strike out/for summary judgment. In order to distinguish it clearly from the further proposed amendment (mentioned below), this proposed amendment was referred to as version "A".

79. The claimant's proposed amendment in version "A" is to paragraph 29(6) of the particulars of claim, so that it reads as follows:

> "(6) Was recklessly indifferent to the requirement that the defendant lend and not advance the money to Hyman Sofer *alternatively advanced the money to Hyman by way of advance and not loan knowing that the said money was being provided by way of advance and not loan and contrary to the terms of the trust and (in the premises) in personal conscious and fraudulent bad faith by the trustee charged to be so liable* such that the defendant is not entitled to rely on the exclusion of liability contained in clause F4 of the trust…"

For the sake of clarity, I have italicised the proposed additional words.

80. In fact, and as already mentioned, a yet further proposed amended pleading was handed to the defendant's counsel outside court on the first day of the hearing. So far, this further proposed amendment has not been not the subject of any formal application to amend the particulars of claim, although it was the subject of comment at the hearing. This version was referred to as version "B" at the hearing, to distinguish it from version "A".

81. Version B of the amendment would build on version A (which is retained in version B) by adding new paragraphs 30 and 31 to the particulars of claim, as follows:

> "Particulars of dishonesty
>
> 30. The Claimant avers that the personal conscious and fraudulent bad faith, alternatively dishonesty of the Defendant in making the advances may be inferred from the following matters:
>
> > (i) the Defendant was a party to the Deeds referred to at paras 4, 11, 16, 19 (and purported to exercise its powers under the 2006 Trust Deed by the Deed dated 23 August 2006 exhibited at C.2; the Deed of Amendment dated 8 October 2015 exhibited at C.3 and the Deed dated 8 October 2015 exhibited at C.4). It was therefore aware of its express duties and the restrictions upon its powers set out in those documents.
> >
> > (ii) the Defendant was and is a professional trustee as pleaded at paragraph 3 above. As such it is to be inferred that it was aware both of its duties and the restrictions upon its powers contained within the trust documents, and the restrictions and duties imposed by law as set out at paragraph 18 of the Particulars of Claim.
> >
> > (iii) As set out at C.5 the Defendant made a number of payments at Hyman's request between 31 October 2006 and 30 November 2014.

(iv) As set out in paragraph 23 of the particulars of claim, and each and every occasion that Hyman requested payment from the trust, the Defendant made payment in the sum requested.

(v) The Defendants [sic] never made enquiry of Hyman as to the reason why payment was required (para 25(1) above).

(vi) The Defendant never made enquiry of the financial position of any beneficiary or of the financial position of any prospective beneficiary indicated in Hyman's letter of wishes (para 25(2) above).

(vii) The Defendant made no enquiry as to the ability of Hyman Sofer to repay the same, either at the time that the payment was made or at any time in the future after the making of the second payment (para 25(3) above).

(viii) it is to be inferred from this pattern of request and payment in conjunction with the other matters referred to herein that the payments were made as gifts and not loans; and that the Defendant did not consider the ambit of or restrictions on their powers and duties in making these advances; and did not consider whether the advances were for the benefit of the beneficiaries.

(ix) As set out in paragraphs 6, 23 and 24 of the Particulars of Claim, the total amount advanced was $57,558,360 out of a total of $78,000,000 held in the Jordi Unit Trust.

(x) The payments made to Hyman after 8 October 2015 were a disposal of a trust asset at less than market value and in breach of the 2006 trust deed as amended as set out at para 29(7) above. As a professional trustee and for the reasons set out above the Defendant would have been aware of that restriction and aware that in making the said payments it was acting in breach of trust.

(xi) Further, as set out in paragraph 22 above, Hyman was suffering from dementia and incapable of making a valid request for a loan. The Defendant would have been aware of Hyman's mental condition by its communication with him. That it continued to act on his instructions indicates that it was not performing its duties as a trustee.

(xii) The sums paid to Hyman were recorded in the accounts of the Defendant relating to the trust as loans made by the Puyol Trust to Hyman as set out at para 26 above. It is to be inferred from the fact that these payments were gifts, but were recorded as loans, that the Defendant was aware that it was acting in breach of trust and sought to hide the same from it is averred the beneficiaries and the Australian authorities.

(xiii) Further, as set out at para 31 below, the Defendant released Hyman from his purported obligation to repay the recorded loans on his death. There was in fact no release because there were no loans. This was both evidence indicating that there were no loans; and evidence that the

> Defendant's actions were dishonest in that it both created and mislabelled a false transaction that did not in truth or fact exist.
>
> (xiv) Further, as the Claimant avers at paragraph 29(3) above the Defendant failed to consider the exercise of the power to lend money to Hyman Sofer in making the payments aforesaid.
>
> 31. For the avoidance of doubt, the Claimant avers that the standard of probity and honesty reasonably required of an offshore alternatively Swiss trustee is the same standard required of any professional person administering trust funds as a trustee. To the extent that it may be inferred that the Defendant in making the payments to Hyman considered itself to be acting in the best interests of the beneficiaries, it is denied that the Defendant acted with that intention in fact, and it is averred that no reasonable professional trustee (or trustee in the same category as the Defendant) could reasonably have considered that it was so acting honestly and/or in the best interests of the beneficiaries in the particular circumstances set out at para 30 above."

82. The original (and current) statement of case pleads a case of recklessness against the defendant, but only as to the breach of trust: the defendant was "recklessly indifferent to the requirement that the Defendant lend and not advance the money to Hyman Sofer" ([29(6)]). Failure to comply with that requirement would make the act of paying the money to Hyman Sofer a breach of trust. The claimant argues that this by itself disentitles the defendant from relying on the exoneration clause. He argues that the claim "is not a claim in fraud; it is a claim in breach of trust" (C's skeleton, [36]).

83. The defendant however demurs, on the basis that

> "no allegation whatsoever is made as to whether the alleged breach was in the best interests of the beneficiaries, still less that [the defendant] had the requisite knowledge that its deliberate breach was contrary to the interests of the beneficiaries…" (D's skeleton, [38]).

84. In my judgment, in order for a statement of case to get over the exoneration clause in this case, it is first necessary to allege that the defendant *knew* it was a breach of trust, otherwise it cannot be a deliberate breach. He does not do so. Instead, he merely alleges that the defendant was "recklessly indifferent" as to whether it was a breach of trust. In my judgment, that is not enough. But, further, he must go on and allege that the defendant knew or was recklessly indifferent as to *whether it was contrary to the beneficiaries' interests*, or that if he believed it was not so contrary his belief was so unreasonable that *no reasonable professional trustee could have thought that it was in the interests of the beneficiaries*. But the claimant in his original statement of case does not do that either. So his claim is indeed (as he says in his skeleton) not a claim in fraudulent or dishonest breach of trust, but merely in breach of trust. If it is not amended so as to deal with these matters, therefore, it falls foul of the exoneration clause, and the claim as originally drafted must fail, and will be struck out.

85. I therefore turn to consider the amendment for which permission has been sought by application notice (version A). This would add the following words to para 29(6) of the particulars of claim:

> "alternatively advanced the money to Hyman by way of advance and not loan knowing that the said money was being provided by way of advance and not loan and contrary to the terms of the trust and (in the premises) in personal conscious and fraudulent bad faith by the trustee charged to be so liable".

86. The first part of this passage for the first time alleges that the defendant knew that what it was doing was a breach of trust. This is an allegation of a deliberate breach of trust. That is an advance on the original version. However, having done that, version A does not give any sufficient particulars of the allegation of deliberate breach of trust. Such a breach requires knowledge, and the pleading rules require particulars of knowledge to be given. These must include which individuals with the defendant are alleged to have known, which terms of the trust are alleged to have been breached, and in respect of which payments made by the defendant. So the first part of this proposed amendment remains demurrable, just like the claimant's claim in *Hersi & Co v Lord Chancellor* [2018] EWHC 946 (QB), [131]-[137].

87. The second part, consisting of the final words, from "in personal conscious and fraudulent bad faith" to the end, make clear that the *intention* is to make a case of fraudulent and dishonest breach of trust. This must include not only an allegation of a deliberate breach of trust (dealt with in the first part), but also an allegation relating to the belief of the defendant (or its lack) that its acts or omissions were in the best interests of the beneficiaries. The problem is that the pleading does not support this by stating the particulars required by the rules to do so. Indeed, there are no particulars given at all, save for a laconic reference ("in the premises") to everything that has gone before. This is not good enough. So the plea of fraudulent or dishonest breach of trust fails and the exoneration clause again covers the claim, which therefore fails. It follows that I should not give permission for the claimant to amend his particulars of claim in the form sought in the application notice of 16 May 2019, that is, version A.

88. Lastly, there is the further draft amended statement of case, or version B, served on the first day of the hearing. This proposes to add a whole paragraph of what are called "Particulars of dishonesty" and then a further paragraph "For the avoidance of doubt". I have already set these out in full (see at [81]). It is clear that, whatever was stated in the claimant's skeleton argument before the hearing, this is no longer just a claim in ordinary breach of trust. It is now intended to be a claim in fraudulent and dishonest beach of trust.

89. In the paragraph headed "Particulars of dishonesty" there are 14 sub-paragraphs from which the claimant avers that the "personal conscious and fraudulent bad faith" of the defendant pleaded in the first proposed amendment of paragraph 29 (version A) "may be inferred". It is however notable that, with one exception, all of these 14 sub-paragraphs are directed to whether or not there *were* breaches of trust of which the defendant was aware, and were therefore deliberate, and not to whether or not the defendant believed that it was *in the best interests of the beneficiaries* to commit such breaches of trust (or whether any such belief that there may have been was reasonable). With that one exception, all the allegations in para 30 are consistent with a belief by the defendant that in doing what it did it was acting in the best interests of the beneficiaries.

90. The one exception referred to above is contained in sub-para (viii). Here it is alleged that the defendant "did not consider whether the advances were for the benefit of the

beneficiaries". By itself however that is not sufficient. It is consistent with honest incompetence. But then paragraph 31 expressly denies that the defendant had the intention of acting in the best interests of the beneficiaries, and avers that no reasonable professional trustee "could reasonably have considered that it was so acting honestly and/or in the best interests of the beneficiaries" in the circumstances set out in para 30.

91. The problem is that this is mere assertion without particulars. The reference back to para 30 cannot supply the necessary particulars, because as I have said those particulars are not directed at belief in acting in the best interests of the beneficiaries, with one exception, and the exception does not take the matter any further. That means that this version too of the claim cannot succeed as against the exoneration clause, and to the extent that the claimant informally seeks permission to amend his claim in these terms I must refuse that also.

Summary judgment

92. Strictly speaking, that is enough to resolve this application by the defendant. The claim is struck out under CPR rule 3.4(2), and there is no need to consider whether, had it not been struck out, I would have given reverse summary judgment to the defendant under CPR rule 24.2. But the matter was fully argued, and because this case may go further I will express my views on that question also.

93. CPR rule 24.2 provides:

> "The court may give summary judgment against the claimant or defendant on the whole claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

94. The defendant relies on the deeds of indemnity to which I have referred, signed by the claimant. He says that they operate to deprive the claimant of any claim on three separate bases: estoppel by deed, estoppel by contract, and estoppel by convention. Hence the court should give reverse summary judgment in the defendant's favour. Even if they did not take away the claim, the deeds would still provide the defendant with a cross-claim under the indemnity equal in value to the claim itself, and hence the proceedings are circular and should not be allowed to go forward. So summary judgment would be justified on that ground. The claimant challenges these points. But there is a preliminary matter.

The possibility of further evidence

95. As I have already said, summary judgment is about assessing the strength of a claim, by reference to the materials available to the court at that time. Given that *ex hypothesi* this will be in advance of any trial, and in most cases in advance of disclosure and the service of witness statements and so on, there is the question whether and how far the court should be influenced by the possibility that further evidence or other material will become available so as to give a different complexion to the case.

96. In *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, three of their Lordships commented on this problem. Two (Lord Hope and Hutton) formed part of the majority which allowed the appeal. One (Lord Hobhouse) formed part of the minority which would have dismissed it. This was a case involving not only summary judgment but also striking out, and their lordships are not always as clear as they might be which aspect of the case is under consideration. Nevertheless, in broad terms, there is a danger that summary judgment against a party will deprive that party of the real benefits of disclosure, requests for further information, witness statements and cross-examination at trial, and thereby make a difference to the result.

97. Lord Hobhouse put it this way (at [160]):

> "Therefore the courts have in the present case recognised that they must have regard not only to the evidence presently available to the plaintiffs but also to any realistic prospect that that evidence would have been strengthened between now and the trial."

On the other hand,

> "The hope that something may turn up during the cross-examination of a witness at the trial does not suffice."

98. In *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J said

> "15. The correct approach on applications [for summary judgment] by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

This statement of the relevant principles was approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [24]. It is points (v) and (vi) that are particularly relevant in the present case.

99. The claimant here makes the point that summary judgment is sought without the defendant having provided a defence, let alone disclosure and all the other things. He complains that it has not volunteered much, if anything at all. He says that

> "the court must also consider the possibility that the evidence that might become available to establish (or reinforce) the claim if the parties comply with the usual pre-trial processes; and whether the making of an application at this very early stage, where there has been very limited pre-action disclosure or disclosure in the course of the application by the defendant, is not rather an attempt to strangle the claim before that evidence is disclosed."

100. This submission goes too far. At least in the ordinary case, the court cannot simply make the assumption that there exists a "smoking gun" in the defendant's files, which

will be disclosed at a later stage in compliance with the defendant's ordinary disclosure obligation, and which would make a difference to the result. If it did that, the court would never be able to grant reverse summary judgment at all. So, as Lewison J says, it is necessary to have reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

101. Those reasonable grounds must be based on more than just the fact that the application for summary judgment is brought at an early stage, and that the pre-trial processes have not yet been gone through. In the present case the claimant relies on the assertions that the payments made to Hyman Sofer were advances (for which there was no power) rather than loans (for which there was), or if loans then without complying with its fiduciary obligations, and hence (either way) a breach of trust. He further asserts that it must be inferred that the defendant acted dishonestly, so as to get over the exoneration clause. But these are just the elements of the cause of action itself. There is nothing inherent in these to justify the view that a fuller investigation would be likely to reveal additional material helpful to the claimant.

102. As I have said, the defendant relies on the deeds of indemnity to resist the claim. If it is right about these, and on their true construction they bar the claim, or provide an effective cross-claim, then the rest of the case, and what the other evidence may in due course show, does not matter. So, to make good his argument that the application is premature, the claimant must demonstrate that there are reasonable grounds for believing that helpful material *in relation to the deeds of indemnity* will emerge in due course. This he has not done. The material dealing with the deeds of indemnity and the circumstances in which they were made, is set out in the evidence put forward on both sides. Unlike the administration of the trust (with which the claimant had of course nothing to do), the deeds of indemnity involved a transaction between the defendant and the claimant, and the claimant can (and does) give direct evidence of what happened. There is no basis that I can see for not deciding this application for summary judgment on the basis of the material currently before the court.

103. If the payments were advances and not loans, and so prima facie breach of trust, the defendant argues (in summary) a series of points based on the deeds of indemnity:

1. The claimant by entering into the deeds of indemnity acquiesced in or consented to the breaches of trust and cannot now complain of them.

2. The claimant by entering into the deeds of indemnity is estopped from denying that the payments were loans, by virtue of three different kinds of estoppel: estoppel by deed, contractual estoppel and estoppel by convention.

3. The claimant by entering into the deeds of indemnity owes an obligation to the defendant to indemnify him against the consequences of a breach of trust, so that *either* there is a set-off which amounts to a defence *or* at the least there is a cross-claim which creates a circularity of action amounting to an abuse of process.

In response the claimant makes a number of attacks on the deeds of indemnity, and I deal with these and the defendant's further arguments below. But first I must summarise the evidence about the deeds of indemnity themselves

The claimant's evidence

104. In his written evidence, the claimant says that he signed the deeds because he was asked to by Hyman Sofer's accountant, Vernon Sachs, and was told that they were required for the tax settlement with the Australian authorities, and that it was urgent. He says that he had not seen either the trust documents or the financial statements relating to the trusts. He says he was

> "not aware that the 'loans' described in the Deed were not loans but were in reality absolute transfers to my father in breach of the terms of the trust."

He goes on to say that he was not aware that the defendant did not appear to give any consideration to the making of these payments, but simply made them when asked. He then says that if he had known this he would not have signed the documents.

105. The claimant says that it was not suggested that he obtain any legal advice before signing the documents, although he now understands that over two years later the defendant regarded the claimant and his sister as not "financially sophisticated". He believes that the defendant knew it was acting wrongly and knew it should not be paying the money to Hyman Sofer. Indeed he goes so far as to say (at [50]) that

> "I believe that I was tricked into signing the deeds without having any opportunity to seek independent advice".

However, it is right to say that at the hearing Mr Blohm QC was clear that the claimant did not seek to rely upon any such doctrine as that of *non est factum*.

106. The claimant's further evidence is that the deeds were signed in the state of Victoria in Australia, without any seal being attached, and without the word "sealed" being included in the document next to the signature. The claimant denies that he delivered the documents to the defendant. He says that he emailed and posted them to Vernon Sachs. But he gave no authority to Vernon Sachs to deliver the deeds to the defendant. He says that the defendant gave him no consideration, and that the indemnity was predicated on the defendant having made loans to Hyman Sofer, and on making further such loans in the future, but these conditions in his view were never satisfied. Finally, he says that the recitals in the deeds were not drafted by him and he had no knowledge of any of the facts stated in them at the time to sign the documents. He also says that he made no request to the trustee to advance the further loan of AU$9.5 million to Hyman Sofer.

The defendant's evidence

107. The defendant's evidence on these matters is that it had no reason to doubt that the claimant fully understood the contents and effect of the deeds of indemnity. No questions or concerns were raised by him at that time or afterwards: see Mr Bayles's second witness statement, [32]. Moreover, the defendant relied on the deeds of indemnity in making further payments to Hyman Sofer. If it had not thought they were valid and effective, it would not have made those further payments: *ibid*, [33].

The claimant's arguments

108. Based on the evidence, the claimant puts forward a number of arguments about the deeds of indemnity. These are:

1. The deeds do not amount to a waiver or consent to any breach of trust.

2. The deeds of indemnity were not executed by the claimant as a deed because they do not comply with the requirements of Victorian law.

3. The deeds do not take effect, having at best been executed in escrow, because the Guardian to the trust has not executed them.

4. The claimant is not estopped from denying that the execution of the deeds was invalid.

5. The claimant is not estopped from denying that the payments made by the defendant to Hyman Sofer were loans.

6. In any event, any estoppel binding the claimant affects only payments already made at the date of the deeds, and not those made subsequently.

7. On the true construction of the deeds, the indemnity is joint rather than joint and several, and is given only in relation to loans made, and the payments in this case were not loans but advances.

8. Even to the extent that there is an obligation to indemnify, it is only an indemnity against losses arising from *loans* made to Hyman Sofer, and is subject to an implied exception where the defendant has acted dishonestly. Moreover, it cannot create a set-off in law or in equity, and so is simply a cross-claim, and not a defence to the claim.

I will deal with each of them in turn.

A pleading point

109. The defendant takes a pleading point in relation to the deeds of indemnity. It says that the claim form and the particulars of claim do not seek any relief in relation to those deeds, and the claimant would not be allowed to do so in any reply, because that would amount to a new claim: see the note in the White Book at paragraph 16.7.3 and *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514. Therefore, it says that the claimant cannot in this application rely on any alleged formal or substantive defect in the deeds such as to justify their being set aside or declared to be void.

110. I reject this argument. The deeds of indemnity are no part of the claim made by the claimant. The claimant does not need to rely on them in order to make good his cause of action. It is the defendant who wishes to rely on them, by way of defence. But those deeds are not yet formally part of the defence, because the defendant has not so far pleaded one. The claimant cannot therefore be reproached for not having formally attacked documents on which he does not need to rely and the defendant has not yet chosen to. At this stage the defendant is putting forward arguments based on the exoneration clause and the deeds of indemnity as a kind of informal defence, in order to obtain summary judgment. The claimant in resisting that application must be allowed the same latitude. If the pleadings were closed there might be something in this objection. But, as the matter stands, the defendant's objection is premature.

1. Waiver or consent to breach of trust

111. I turn to the claimant's first point, namely that the deeds do not amount to a waiver or consent to any breach of trust. The claimant says that the defendant cannot show that he as a beneficiary was aware of the matters alleged to constitute a breach of trust, and that without that awareness any consent inherent in these deeds of indemnity cannot operate as a waiver of the breach. He says that there is no evidence that the claimant was aware that the payments were advances or that, if they were loans, the defendant had not exercised its fiduciary duties in making the loans.

112. He relies on the statement of Wilberforce J at first instance in the case of *Re Pauling's ST* [1961] 3 All ER 713, 730, [1962] 1 WLR 86, 108 (not discussed on appeal, [1964] Ch 303), that

> "it is not necessary that [the beneficiary] should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."

113. I reject this argument. As Wilberforce J said, it is only necessary for the beneficiary to know the *facts*, not the legal consequences of the facts. It is perfectly clear from the deeds of indemnity themselves, as well as the defendant's evidence, that the claimant was well aware that payments had been made in the past, and that more (amounting to AUS$9.5 million) were intended to be made in the future to Hyman Sofer. The claimant was also aware that he was being invited to indemnify the defendant against the consequences of these payments out of the trust fund turning out to be a breach of trust. It is not necessary that the claimant should have understood exactly what was the character of the payments, or whether or not the defendant was complying with its fiduciary duties in making them, only that they were being made by the trustees apparently under the terms of the trust, and that the claimant could not thereafter complain that these payments amounted to a breach of trust. On the other hand, we must note the limits of these deeds. They do not license or consent to payments to Hyman Sofer beyond those already made and the further AUS$9.5 million. At the dates of execution of the deeds of indemnity the claimant could not have known the details of any other future payments.

2. Formal invalidity

114. The second point taken by the claimant is that the deeds of indemnity were not validly executed by the claimant *as a deed* because they do not comply with the requirements for deeds of the law of the state of Victoria. Victorian law is said to be the governing law of the deeds because the state of Victoria is stated to have been the place of their execution by the claimant: see his witness statement, [51(a)]. The claimant says that Victorian law requires that a document requires a seal, or to be expressed to be sealed, in order to constitute a deed. But his evidence (witness statement, [51(b)-(d)]) is that, when he signed them, these deeds did not bear a seal, not have a space for one, nor was so expressed. And indeed, looking at the copies provided to the court, there is no space for a seal, no statement on the document that such and such a space is the place for the seal, and no statement that the document has been "sealed".

115. The defendant complains that the claimant has not pleaded foreign law. In my judgment the claimant does not need to. He has not pleaded the deeds of indemnity at all, for the reasons already given. It is *the defendant* that has placed reliance on the deeds of indemnity for the purposes of this application, without having pleaded them, and the claimant must be allowed to respond without having formally to plead that foreign law applies to them, and what he says that law is. However, that is not the end of the story. The claimant still has to give *admissible evidence* of what the foreign law is in order to get over the presumption that there is no significant difference between foreign law and English law: see *eg Concord Trust v Law Debenture Trust* [2005] 1 WLR 1591, [44], per Lord Scott of Foscote.

116. The problem is that there is no evidence before the court from an expert witness qualified to give evidence of Victorian law. The only evidence placed before the court is that of the claimant himself, who is not a Victorian lawyer. His witness statement (at [51(e)]) refers in general terms to advice from his unnamed "legal advisers" as to the effect of Victorian law. This is a wholly insufficient way for the court to receive evidence of the substance of the relevant foreign law. The fact that the defendant has not sought to put in evidence to challenge it (as Mr Blohm QC reminded me) is irrelevant. If there is no admissible evidence, the presumption is not displaced. In my judgment therefore the claimant's objection to the deeds based on Victorian law fails at the outset for want of appropriate evidence.

117. But, in case I am wrong about that, and this matter goes further, I shall deal with the further objections made by the defendant to the claimant's argument. The defendant says that the deeds of indemnity are governed not by Victorian law but by English law, as the proper law of the Puyol trust, because that is the law with which those deeds of indemnity (as contracts) are most closely connected. That was the test at common law (*Dicey, Morris and Collins on the Conflict of Laws*, 15th ed, [32-006]), and also under the Rome I Regulation, article 4. I agree. Whilst it would be possible to draft deeds of waiver or of indemnity governed by Victorian law in relation to breach of trust liability arising under the English law of trusts, these deeds contain no such express statement, and the law with which they are most closely connected is plainly English law, being the law of the trust concerned, and under which this liability is said to arise. Moreover, of the several parties executing the deeds, only the claimant did so in Victoria. Other parties appear to have executed the deeds in New South Wales or in Switzerland, and there is no basis for favouring Victoria as the implied governing law over that of any of the other places of execution.

118. I therefore proceed on the basis that the governing law of these deeds is English law. In English private international law, a contract is formally valid if it is made either in accordance with the law of the place where it is made or in accordance with its governing law (see *Dicey Morris and Collins on the Conflict of Laws*, 15th ed, [32-008], [30 2R-127]). The deeds comply with the formalities required by the relevant English law, contained in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. There is therefore nothing in the claimant's Victorian law point.

3. Non-execution by Guardian

119. The third point is that the deeds do not take effect, having at best been executed in escrow, because the Guardian to the trust has not executed them. The claimant relies on the decision in *Re Morton* [1932] 1 Ch 505. That however was the case of a deed

of family arrangement for the division of an intestate estate, where one member of the family was not a party and did not sign, but was referred to in the deed so as to make it plain that it was made upon the supposition that he would ultimately concur. The judge held that in those circumstances the arrangement was subject to an implied condition which had not been satisfied, and hence was not binding on any of the parties. That seems to me to be a rather different case to the present.

120. But in the circumstances I do not need to resolve this question. The claimant's point arises from the fact that, as explained by Mr Andrew Bayles in his second witness statement dated 21 May 2019, John Doherty, the Guardian to the trust executed a *counterpart* to each deed of indemnity, rather than the original. Copies of those counterparts were exhibited to Mr Bayles's witness statement. Mr Bayles also explains that there were very minor differences between the two copies of each deed signed, as a result of amendments made by Vernon Sachs in Australia. But none of these small differences makes any difference to the substance of the deeds, and I am satisfied that there is nothing in this point.

4. Estoppel as to formal invalidity

121. The claimant's fourth point is that, contrary to the defendant's argument, the claimant is *not* estopped from denying that the execution of the deeds was invalid. This point is made because the defendant says that, even if the deeds were governed by Victorian law and hence formally defective, the claimant is estopped from disputing their validity in these proceedings, because he has represented to the claimant that they are valid, intending the defendant to rely on them, and the defendant has relied on them, in particular by making the further loans to enable the Australian tax authority to be paid.

122. In this respect, the defendant relies on the decision of the Court of Appeal in *Shah v Shah* [2002] QB 35. In that case, the claimant sued the defendants on a document described as a deed and on its face complying with the relevant formalities in the 1989 Act. The defendants claimed that the signature of the witness attesting to their own signatures was added shortly after they had signed, *but not in their presence*. Hence the formality requirements of the Act were not complied with, and the document was not a deed. The judge at first instance however held that the defendants were estopped from denying its validity, and an appeal against that decision was dismissed.

123. The defendants argued that, as a matter of public policy, estoppel could not be invoked to render valid a transaction which section 1 of the 1989 Act provided was invalid. Pill LJ (with whom Tuckey LJ and Sir Christopher Slade agreed) said:

> "33. Having considered the wording of section 1 in the context of its purpose and the policy consideration which applies to deeds, I am unable to detect a statutory intention totally to exclude the operation of an estoppel in relation to the application of the section or to exclude it in present circumstances. … For the reasons I have given the delivery of the document, in my judgment, involved a clear representation that it had been signed by the third and fourth defendants in the presence of the witness and had, accordingly, been validly executed by them as a deed. The defendant signatories well knew that it had not been signed by them in the presence of the witness, but they must be taken also to have known

> that the claimant would assume that it had been so signed and that the statutory requirements had accordingly been complied with so as to render it a valid deed. They intended it to be relied on as such and it was relied on. In laying down a requirement by way of attestation in section 1 of the 1989 Act, Parliament was not, in my judgment, excluding the possibility that an estoppel could be raised to prevent the signatory relying upon the need for the formalities required by the section. …"

124. In that case, the representation held by the court to have been made was that the defendants' signatures had been written in the presence of a witness (a matter of fact), as required by the statute. Because of the estoppel, the defendants were not allowed to assert thereafter that the witness had *not* been present, and that therefore the deed was invalid. The present case, however, is different. The defendant does not argue that the claimant has represented that there was in fact a seal on the document. Even if the claimant had so represented, it would not avail the defendant, because it is obvious on its face, and the defendant must have realised, that the document in fact did *not* bear a seal, and never had borne one: *cf Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, 56, per Lord Wright. Instead, the representation apparently argued for by the claimant is that the deeds are valid, and therefore that the claimant "is estopped from disputing their validity in these proceedings".

125. It is now the law that there can be a representation of law, *eg* that a document is legally valid, to found an estoppel by representation. But I reject this particular argument nonetheless. First, the claimant signed the documents presented to him at the request of the defendant, whose lawyers had prepared them. The claimant is not a lawyer, and has only since been advised as to whether the documents would be deeds or not (see his witness statement at [51]). If therefore anyone was representing that the documents would be valid as deeds if signed, it was the defendant, and not the claimant, who merely signed what he was asked to sign.

126. Leaving that on one side, however, in order for there to be a representation that a deed is valid as a matter of law, the deed must appear to comply with the 1989 Act on its face. In *Briggs v Gleeds* [2015] Ch 212, pension scheme deeds prepared by the trustees' agents showed on their faces that the trustees' signatures had not been attested. The trustees argued that by executing the deeds the employers and scheme members were estopped from denying the validity of the documents as deeds. Newey J considered *Shah v Shah* and concluded:

> "43. In the end, I have concluded that estoppel cannot be invoked where a document does not even appear to comply with the 1989 Act on its face or, at any rate, cannot be so invoked in the circumstances of the present case. …"

127. This may be simply an example of the principle that, even if there is a representation, there can be no estoppel by representation unless the representation misleads the representee, *ie* induces him or her to act to his or her detriment in reliance on it. And where it is obvious on its face that the representation is false the representee will have great difficulty in showing that he has been misled by it. In my judgment, the claimant in the present case would not be estopped from denying the validity under Victorian law of the documents he signed as deeds. However, since I have held that Victorian law is irrelevant in considering their validity, this point does not in fact matter.

5. Estoppel as to the character of the payments

128. The claimant's fifth point is that he is not estopped from denying that the payments made by the defendant to Hyman Sofer were loans. The defendant argues that the deeds both in the recitals and the operative provisions describe the disputed payments as loans rather than advances, and that the claimant as a party to those deeds is estopped from asserting now that they are other than loans. For this purpose the defendant relies on three doctrines of estoppel, estoppel by deed, estoppel by convention, and contractual estoppel. The claimant denies that any of them can apply here.

129. I will shortly say something more about each of these three types of estoppel in due course. At this stage I will just sketch out how they differ in principle. Estoppel by convention *resembles* estoppel by representation in requiring that one party rely in some way on the convention, so that it be considered unfair for the other party to resile from it. But it *differs* from estoppel by representation in not requiring that the relying party should have been misled into believing that the convention was true. In other words, the parties could be both well aware that the convention is untrue, and there can still be an estoppel. Estoppel by deed and contractual estoppel are similar to estoppel by convention in that same respect, but by contrast do not require any detrimental reliance or any unfairness. They take effect because the party concerned has in effect *promised* that it shall be so, in the former case being enforceable by virtue of being incorporated in a deed, and in the latter as part of an ordinary contract for consideration. I add only that each of these three kinds of estoppel arises (or not) at common law, and not in equity. Equitable considerations are therefore irrelevant.

130. I have already set out *in extenso* the relevant parts of the deeds, but repeat here the key elements for this part of the argument. Recital (C) in each deed refers to payments to Hyman Sofer at his request "by way of loan". These are collectively defined as "the Existing Loans". Recital (D) refers to a proposed exercise of trustee powers "to advance a further loan of AUD 9,500,000" to Hyman Sofer. Recital (E) says that the defendant "has agreed to make further loans to [Hyman Sofer] … subject to receiving the indemnities hereinafter set out." These further loans are collectively defined as "the New Loans". Clause 1 refers to the defendant, in exercise of trustee powers, having "hitherto agreed to advance the Existing Loans and [agreeing] to advance the New Loans" to Hyman Sofer, "these loans being unsecured, interest-free and repayable on demand." Clause 6 also refers to the making of the "Existing Loans" and the "New Loans" as consideration for the indemnities given by the other beneficiaries (including the claimant).

131. **Estoppel by deed** was stated by Lord Maugham in *Greer v Kettle* [1938] AC 156, 171, to be

> "a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies and therefore as not admitting any contradictory proof."

For this purpose it no longer matters whether the statement concerned is contained in a recital or an operative provision: *Prime Sight Ltd v Lavarello* [2014] AC 436, [31], per Lord Toulson, giving the advice of the Judicial Committee of the Privy Council.

132. However, as the editors of *Spencer-Bower: Reliance-Based Estoppel*, 5th ed 2017, [8.86], make clear, there is a significant limitation on estoppel by deed:

> "The operation of an estoppel by deed is limited to actions founded on the deed because the agreement of the parties made by assent to the relevant recital is interpreted as agreement to admit the proposition recited only for the purposes of the deed and the transaction effected thereby."

For this proposition they cite a number of authorities, including *Re Simpson, ex p Morgan* (1876) 2 Ch D 72, 89, 92-93 (which was cited to me), and more recently *Sydenhams (Timber Engineering) Ltd v CHG Holdings Ltd* [2007] EWHC 1129, [102] (TCC) (which was not).

133. The present claim is not however brought on or under the deed, but instead on a cause of action collateral to that, namely, breach of trust. As things stand, therefore, no estoppel by deed can avail the defendant in the breach of trust claim. If the defendant seeks hereafter to bring a cross-claim for indemnity under the deed, then *in relation to that cross-claim* there could in principle be an estoppel. I deal with the question of any cross-claim below.

134. Moreover, it is not every statement in a recital which is binding on a party. In the words of Patteson J in *Stroughill v Buck* (1850) 14 QB 781, 787 (approved by the House of Lords in *Greer v Kettle* [1938] AC 156):

> "When a recital is intended to be a statement which all parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument."

135. More recently, in *Earl of Cardigan v Moore* [2012] EWHC 1024 (Ch), Newey J (as he then was) said:

> "23. … if a recital contains a statement which a party to the deed is taken to have agreed to admit as true, the statement is binding on him."

And, in *Prime Sight*, Lord Toulson said

> "32. Whether a recital in a contract is intended to be binding on either or both parties involves a question of construction."

136. The claimant argues that it is inherently unlikely that he would be taken to have agreed to be bound by statements as to the legal nature of payments made by the defendant to his father, being transactions in which he was not involved. I see the force of this, as far as it goes. But in fact that is not the complete or indeed the correct question. The claimant was being asked to give an indemnity in return for the defendant trustee's providing enough money to his father to fund a settlement with the Australian tax authorities, so that his father bore no further liability for what had been paid in the past, and neither would he. He did not have to agree to give this indemnity or sign these deeds. He chose to do so in order to help his father with his own significant tax problems, and to prevent it spilling over into a possible claim against himself.

137. Nevertheless, I accept that it did not matter to the claimant whether the payments bore one character in law rather than another. The tax problem for his father (and potentially for him) was the same either way. There was no issue at the time between the parties to the deeds as to the nature of the payments. "Loans" was what the defendant in the drafts prepared by its lawyers called them, and that was enough for him. In these circumstances, I do not think the claimant was *promising* that he would not in future seek to treat the payments as advances rather than loans. So there can be no estoppel by deed for that reason also.

138. In *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, Lewison LJ explained the concept of **contractual estoppel** as follows:

> "47. It is now firmly established at this level in the judicial hierarchy that parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue. This is a particular form of estoppel which has been given the label 'contractual estoppel'. Unlike most forms of estoppel it requires no proof of reliance other than entry into the contract itself. Thus as a matter of contract parties can bind themselves at common law to a fictional state of affairs in which no representations have been made or, if made, have not been relied on. Aikens LJ put the point thus in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221; [2010] 2 CLC 705 at [143]:
>
> > 'If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless *Lowe v Lombank* is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties.'
>
> 48. He concluded on this point at [144]:
>
> > 'So, in principle and always depending on the precise construction of the contractual wording, I would say that A and B can agree that A has made no precontract representations to B about the quality or nature of a financial instrument that A is selling to B'."
>
> Leggatt LJ and Sir Colin Rimer agreed with Lewison LJ, although Leggatt LJ also gave a short judgment to the same effect.

139. It is clear that contractual estoppel is closely related to estoppel by deed. Indeed, estoppels based on recitals have been described as "part of a sub-species of estoppel known as contractual estoppel": see *Richards v Wood* [2014] EWCA Civ 327, [16], per Lewison LJ (with whom Aikens and MacFarlane LJJ agreed). And, in *Prime Sight*, Lord Toulson said

> "46. … there is no logical reason to treat declaratory statements in a deed which are intended to be contractually binding as less effective than any other express or implied contractual convention."

The difference between them lies in the *source* of the contractual obligation (deed or consideration), and not in the nature or extent of the obligation itself.

140. So as it seems to me, a contractual estoppel, being produced in and for the purposes of a particular contract, should be limited in its operation to claims based on that contract, in just the same way as an estoppel by deed is limited to claims on that deed, at all events unless it can be shown that the estoppel contracted for was to have some wider application. Accordingly, just as I have said that estoppel by deed cannot avail the defendant in this claim for breach of trust brought by the claimant, so neither can contractual estoppel assist. The contract was one of indemnity, and the claim is not brought on that contract.

141. Moreover, for the reasons given already in relation to estoppel by deed, I do not think that the claimant was promising not to seek to treat the payments as advances rather than loans. So in my judgment, even if the claim were brought on the contract in which the alleged contractual estoppel arose, it would not in fact protect the defendant against this claim.

142. Lastly, I turn to consider **estoppel by convention**. As I have said, this is different from both estoppel by deed and contractual estoppel. In *The Indian Endurance* [1998] AC 878, 913, Lord Steyn (with whom the rest of their lordships agreed) said:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption … It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

143. As is clear from this passage, estoppel by convention does not derive its force from any contractual obligation undertaken in a deed or other document. Instead it is the result of the unfairness that would result if one party were able to depart from a shared assumption as to the state of the facts or law, on the basis of which the parties have transacted together. So unlike estoppel by deed and contractual estoppel it can confer protection beyond the contract or other context in which it arises.

144. There can be no doubt in the present case that the parties to the deeds of indemnity shared the assumption at that time that the payments to Hyman Sofer were loans rather than advances. On the evidence (which, as I have already said, on this application I am not entitled to reject) the defendant was advised and intended to make, and thought it was making, loans: see Mr Bayles's first witness statement at [24]-[28]. Although the claimant now takes a different view, at the time he executed the deeds he had not seen the trust documents or the financial statements, and went along with the assumption that the payments were as they were described in the documents. It is only later that he has come to believe that they were not loans at all: see his witness statement at [43]-[47]. But, as Lord Steyn says, it is enough if the defendant puts forward its assumption and the claimant by signing the deeds acquiesces in it.

145. I have already held that as a matter of construction the claimant was not *promising* that the payments would be treated only as loans and that he would never seek to argue otherwise. But that is quite different from the assumption being made in entering into the deeds of indemnity that that is what they were. On the basis of that shared assumption at the time, the defendant thereafter acted to its detriment in paying over a further AUS$9.5 million to Hyman Sofer. That seems to me to be a classic case of estoppel by convention. In my judgment, having allowed the defendant to act to its detriment on the faith of the assumption that the payments were loans, the claimant is now estopped from asserting otherwise in bringing this claim for breach of trust.

6. What payments are covered by the deed

146. The claimant's sixth point is that any estoppel binding the claimant affects only payments already made at the date of the deeds, and not those made subsequently. He says that payments made to Hyman Sofer after the dates of the deeds cannot be covered by any estoppel useful to the defendant. Insofar as the deeds relate to the payments contemplated, but not yet made, at the time that the deeds were entered into (the three payments amounting to AUS$9.5 million) then the claimant could be estopped from denying that the defendant as a matter of fact *intended to make a loan* as at that time. But he says that he is not estopped from denying that the payments made by the defendant thereafter in fact *actually were loans*. And, as to subsequent payments to Hyman Sofer, not referred to or contemplated by the deeds, he says there can be no estoppel at all.

147. The defendant says that, since the claimant has not sought to differentiate between the various payments made by the defendant to Hyman Sofer, but instead treats them all as of the same nature, so the defendant too is entitled to treat them all as the same. If the former payments are loans, then logically the latter must be so too. An example is a payment by the defendant to Hyman Sofer in April 2014 of US$142,106, and on from Hyman Sofer to the claimant. Hyman Sofer originally requested the defendant to pay this sum to the claimant direct. But the defendant told him that it would prefer to make an "additional loan" to Hyman Sofer, which he could then use to pay the claimant. And that is what appears to have happened.

148. In my judgment, it is not as simple as the defendant claims. Each payment is a separate potential breach of trust. The intention to make each payment (and in what character) is formed at a distinct time. Whether the defendant complied with its fiduciary duties in making a payment is a separate question for each payment. If the claimant agrees that all payments are to be treated as the same in character, or an estoppel prevents him from denying that they are to be so treated, that is one thing. But, in the absence of either of these, each payment must be considered separately. Merely pleading that all the payments are advances and not loans, and therefore breaches of trust, does not change matters. The estoppel created by the deeds and the payments of AUS$9.5 million in reliance on them is such as to prevent the claimant denying that the previous payments and the payments of AUS$9.5 million were loans. I do not accept therefore that the estoppel was operative only as to the defendant's intention to make further loans amounting to AUS$9.5 million. But I do agree that it does not cover payments thereafter.

7. Joint or joint and several liability?

149. The claimant's seventh point is that, on the true construction of the deeds, the indemnity is joint rather than joint and several, and is given only in relation to loans made, and the payments in this case were not loans but advances. The consequence of this would be that the defendant would have to join all of the parties to the deed as defendants to its claim for an indemnity: see *Kendall v Hamilton* (1879) 4 App Cas 504, 542-44, per Lord Blackburn.

150. In support of his construction of the indemnity, the claimant points out that there are no words of severance used in clause 6 of each of the deeds. He refers to paragraph 17-005 of *Chitty on Contracts*, 33rd edition, which says (footnotes omitted):

> "The presumption is that a promise made by two or more persons is joint so that express words are necessary to make it joint and several. There are one or two special cases in which equity treats as joint and several an obligation which at law is joint, but they do not cover much ground and are of slight importance in the law of contract. The liability of partners for partnership debts is a good example of joint liability, but it differs from the ordinary case of joint liability in that the estate of a deceased partner is liable for partnership debts (after satisfaction of personal debts) if the firm is unable to satisfy them itself. So also the liability of two or more acceptors, drawers or indorsers of a bill of exchange to the holder thereof is joint. In the case of promissory notes the liability is joint, or joint and several, according to the 'tenor' of the note; but if the note runs 'I promise to pay' and is signed by two or more persons the liability is joint and several. In the absence of words of severance, the liability of principal debtor and surety on a single promise is joint, but if there is not one single promise the general rule is that liability is several. Consequently the liability of a principal debtor and surety is prima facie joint and several."

151. The defendant says that it is not necessary to join all the parties to the deeds of indemnity in order to enforce them against the claimant. But in any event the problem of joinder is not an answer to the question of abuse of process. Moreover, the claimant makes a claim against the defendant in relation to the trust of which he is a beneficiary. He thereby causes loss to the defendant. In these circumstances, says the defendant, he should be held 100% liable under the Civil Liability (Contribution) Act 1978.

152. In my judgment, the defendant is right to say that the question whether it is necessary to join the other parties in an action to enforce the indemnity is distinct from the question whether the claimant can properly bring the claim for breach of trust without its being an abuse of process. The question of the correct constitution of the claim by the defendant for indemnity can be dealt with on the occasion that it arises. As it happens, I am not sure that the claimant is right about the need to join all those giving the indemnity. They are such an amorphous collection that it is difficult to see why it should have been thought that the indemnity was available to the defendant only if everyone was joined. But in my judgment it does not matter for present purposes anyway.

8. The contractual indemnity

153. The claimant's eighth point concerns the argument based on the contractual indemnity, and is in three parts. The first is that, even to the extent that there is an

obligation to indemnify, it is only an indemnity against losses arising from *loans* made to Hyman Sofer. The second part is that it is in any event subject to an implied exception where the defendant has acted dishonestly. Thirdly, it cannot create a set-off in law or in equity, and so is simply a cross-claim, not a defence to the claim.

154. As to the first part, the claimant says that, if the payments were not loans, then the indemnity is not engaged, and it cannot be a defence to the claim. The claimant refers to *Greer v Kettle* [1938] AC 156, 164, where Lord Russell of Killowen held that a recital in a contract of surety that the loan which was to be guaranteed had been advanced on the security of a charge on certain shares, but which, it turned out, had never been issued at all, did not refer *either* to the mere existence of a piece of paper answering the description given (but not in law amounting to a charge of the shares), *or* to the existence of a different security than that mentioned. So there could be no liability on the guarantee.

155. In fact, the indemnity under clause 6 of each deed is in respect of liabilities arising out of the agreement of the defendant "to advance the Existing Loans and the New Loans" to Hyman Sofer. In recital (C) to each deed the definition "the Existing Loans" is applied to the phrase "the following sums" (which are then set out for each trust). These are said to have been paid to Hyman Sofer "by way of loan". In recital (E) to each deed the definition "the New Loans" is applied to the phrase "further loans," meaning three further payments of AUS$3,166,666.66, totalling the $9.5 million requested in recital (B).

156. In my judgment, as a matter of construction, the indemnity is given in respect of payments made by the defendant which the defendant asserts are loans. It is not necessary that they should actually *be* loans. That is simply their description in the document. The reason for having the indemnity is precisely in case the payment turns out to be unlawful or a breach of trust in some way. To construe the terms of the indemnity as restricted only to the case where the payments concerned ultimately turn out to have been loans (and nothing else) would significantly reduce the width, and therefore the value to the defendant, of the indemnity. That would be uncommercial.

157. The second part is that the indemnity must be subject to an implied term that it does not apply to any underlying transaction where the defendant had acted dishonestly. I do not need to decide this aspect, as I have already held that no allegation of dishonesty is made by the current or proposed particulars of claim.

158. The third part is that the indemnity cannot create a set-off at law or in equity. It is simply a cross-claim, and so not a defence to the claim. I agree. Instead, it gives rise to an ordinary cross-claim, at least in relation to the payments made before the deeds of indemnity were entered into. Those deeds were made on an occasion subsequent to the establishment of the trusts and indeed following the bulk of the payments complained of: *cf Hanak v Green* [1958] 1 QB 9, 25-26 (Morris LJ), 31 (Sellers LJ). It might be different in relation to the further loans totalling $9.5 million, because they were made shortly after the deeds (which contemplated them), and expressly subject to the indemnity given. However I need not pursue the point as it makes no difference to the result.

159. Normally, where the claimant has a money claim and applies for summary judgment, but the defendant has a cross-claim rather than a defence by way of set-off, the court

would have the power to give summary judgment, but order a stay on the execution of that judgment pending the trial of the cross-claim: see *eg Rainford House Ltd v Cadogan Ltd* [2001] BLR 416.

160. But this case is the other way round. The claimant is not seeking summary judgment. Instead, it is the *defendant* who is seeking (reverse) summary judgment on the claimant's claim. All the claimant's relevant complaints about the deeds of indemnity have been rejected, and so I must proceed on the basis that, if this claim goes further, the defendant will deploy the deeds of indemnity as the source of a right to indemnity, and that there will be no real prospect of the claimant successfully defending that cross-claim. In these circumstances, the indemnity would cover the claim, and it would therefore be an abuse of the process now to allow the claim for breach of trust to continue. On the other hand, the indemnity is expressed to be given only in respect of the past payments and the contemplated further payments of AUS$9.5 million. It therefore does not cover any payments made by the defendant to Hyman Sofer thereafter.

Conclusion

161. In my judgment, for the reasons given, the defendant succeeds in striking out this claim on the pleadings. As to the application for summary judgment, if the claim were not struck out I would give reverse summary judgment for the defendant on the claimant's claim in respect of all the payments made to Hyman Sofer prior to the deeds of indemnity being executed, and also the $9.5 million paid thereafter, on the grounds of waiver and consent by the claimant, but also on the grounds of estoppel by convention. In addition, it would be an abuse of process to make that part of the claim when there would be an indemnity for the defendant under the deeds. As to payments made after the $9.5 million, in my judgment the defendant would not be entitled to summary judgment, and that part of the claim would have had to go to trial.