Neutral Citation Number: [2020] EWHC 1590 (Ch)

Case No:PT-2019-MAN-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TRUSTS AND PROBATE LIST

Date: 18 June 2020

Before:

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

LIV Bridging Finance Limited

Claimant

- and –

EAD Solicitors LLP (in administration)

Defendant

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Mr Martin Hutchings QC (instructed by **Gunner Cooke LLP**) for the **Claimant**
Mr Scott Allen (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 18th - 19th May 2020

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APPROVED JUDGMENT

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

HHJ Halliwell:

(1) Introduction

1. These proceedings arise from four loans relating to the development of land. The Claimant ("LIV"), as lender, sues the Defendants ("EAD") for equitable compensation on the basis that EAD acted for LIV as its solicitors and, in breach of trust, paid away the loan monies without obtaining proper security. LIV now seeks summary judgment.

2. EAD have gone into administration. They are seeking to defend the proceedings without the co-operation of the solicitor who handled the transactions, Mr Jonathan Gorman ("Mr Gorman"). However, they put LIV to proof on important aspects of its case, for example the issue of whether EAD was retained to act for LIV in relation to two of the loans, and, more generally, they defend the claim on the grounds it is misconceived in law and lacks a sound evidential basis. They also raise issues based on the principles governing the quantification of LIV's claim for equitable compensation. In particular, they raise an issue about the application of what has become known as the *SAAMCO* principle following *South Australia Asset Management Corporation v York Montague [1997] AC 191.*

3. On any analysis, EAD submit that they have a real prospect of successfully defending the claim so as to satisfy the modest parameters of *CPR 24.2(a)(ii)* and, if not, there are issues about the underlying transactions and, more specifically, the relationship between LIV's director, Mr Livingstone ("Mr Ian Livingstone"), Mr Gorman and the borrowers which require close examination. These issues are said to amount cumulatively to a "compelling reason why the whole case should be disposed of at trial" so as to satisfy CP*R 24.2(b).*

(2) Background

4. LIV is in business as a small finance company, specialising in the provision of short term business loans. Mr Livingstone is its sole director and shareholder. At all material times, EAD were a firm of solicitors. Their professional practice included commercial and residential property conveyancing and, at all times material to these proceedings, they employed Mr Gorman as a commercial property solicitor.

5. The four loans amounted to some £800,000, advanced over a period of some 10 months between May 2016 and March 2017. Mr Gorman is alleged to have handled each

transaction on LIV's behalf. The claim against EAD is based on the proposition that he paid away the loan monies contrary to his instructions without ensuring that they were secured by a first legal charge over specific properties. LIV's stated causes of action are breach of contract, negligence and breach of trust although it has focussed its summary judgment on its claimed for equitable compensation on the basis that this affords more generous parameters for the assessment of its losses.

6. LIV contends that it was induced to advance the monies as a result of fraud, orchestrated by a former solicitor and property developer, Mr Robert Ware ("Mr Ware"), and it is at least implicit that this was achieved with the assistance of Mr Gorman. It is also alleged that, in paying away the loan monies without security, Mr Gorman committed a breach of his duty of loyalty to LIV. However, LIV's stated cause of action is not fraud. Whilst the allegations of fraud are an important part of the factual context, they do not furnish LIV with its causes of action.

7. At one point, action was taken to prosecute Messrs Ware and Gorman for criminal offences. However, once the criminal proceedings were placed in the hands of the Crown Prosecution Service, a decision was apparently taken not to pursue these proceedings further. Messrs Ware and Gorman have not been convicted of a criminal offence.

8. In support of its application for summary judgment, LIV has filed evidence about the factual background. This is based, in particular, on Mr Livingstone's witness statement dated 25th October 2019 and a substantial amount of contemporaneous documentation. In defending the application, EAD has not filed evidence from Mr Gorman. Although it raises issues about the nature of the relationship between Mr Livingstone and Messrs Gorman and Ware, EAD's stance is effectively to put LIV to proof on the critical issues in these proceedings. Conversely, LIV contends that Mr Livingstone first became acquainted with Mr Ware in 2012 or thereabouts. Acting in his capacity as sole director of LIV, he started to make loans to Mr Ware or his associates in connection with the acquisition or development of property. Mr Ware is alleged to have introduced Mr Livingstone to Mr Gorman and recommended him as a conveyancing solicitor when Mr Gorman worked for Morecrofts Solicitors. Mr Gorman acted on Mr Ware's recommendation, following him from Morecrofts to Maxwell Hodge LLP. When Mr Gorman left Maxwell Hodge to join EAD, Mr Livingstone continued to instruct him as his conveyancing solicitor.

9. Although EAD do not advance a positive case, their solicitor, Mr Ian Frederick McConkey has made a witness statement confirming that, having re-possessed Mr Gorman's mobile phone following the termination of his employment, they discovered upwards of 4000 text messages between Mr Gorman and Mr Livingstone. It is submitted that EAD should be provided the opportunity to examine the relationship between Mr Livingstone and Messrs Gorman and Ware at trial. In his witness statement, Mr McConkey emphasises that EAD acted for LIV in connection with loan transactions other than the four disputed loans and, with reference to the limited information available to him, he surmises that LIV was ultimately repaid more than it initially advanced, when the transactions as a whole are taken into consideration.

10. The disputed transactions were conducted during 2016 and 2017. They include:

    10.1. a loan on 24th May 2016 or thereabouts, purportedly to "Kenneth Cooper", of £300,000 for the development of 43 Croxteth Road, Sefton Park, Liverpool ("the First Loan");

    10.2. a loan on 20th January 2017 or thereabouts to Sefton Street Limited of £100,000 for the purchase or re-development of land at 32-34 Wellington Road, Wallasey ("the Second Loan");

    10.3. a loan on 28th February 2017 or thereabouts to Sefton Street Limited of £150,000 for the purchase or re-development of The Bungalow, Redcliffe, Wellington Road, Wallasey ("the Third Loan"); and

    10.4. a loan on 31st March 2017 or thereabouts to five separate companies (Athena Property NW2 Limited, Metis Capital NW Limited, Opes Property Limited, Fast Track Completions Limited and Alexander Brooks Limited) amounting to some £250,000 for the purchase or development of properties at (1) 97-101 Soho Street, Liverpool, (2) Carr Mill Clinic, Ekdale Avenue, St Helens, (3) 2-4 Dacre Street, Birkenhead and Beechwood Road, Liverpool, (4) 355 Aigburth Road, Liverpool, (5) land on the West side of Laffak Road, St Helens; and (6) 7-9 and 13-15 Fairfield Street, Liverpool ("the Fourth Loan").

11. It is alleged that, in each case, Mr Ware introduced the transaction to LIV and the loan was at Mr Ware's request. In the case of the Second and Third Loans, Mr Ware was the

sole director of the borrower, Sefton Street Limited, at the time. It is also alleged that Mr Livingstone then engaged EAD, through Mr Gorman himself, to act as LIV's solicitors. The transactions each involved the advance of funds as part of a short-term bridging facility. However, it is alleged EAD allowed the loan monies to be advanced without obtaining proper security and, when the borrowers defaulted, LIV thus sustained significant losses.

12. Based on his own professional experience, Mr Allen observed that there has already been a significant amount of litigation arising from loans and property transactions involving Mr Ware. Mr Allen submitted that this would typically include applying monies from one creditor to meet his liabilities to another or "teeming and lading". On this basis, he submitted that it is conceivable, in at least one transaction in the present case, monies lent from other creditors were utilised to advance loans from LIV. However, in the face of objections from Mr Hutchings QC on behalf of LIV, it is inappropriate for me to admit, as evidence, Mr Allen's factual observations about these issues. In any event, there is no specific evidence that the loans from LIV were somehow diverted from other creditors.

13. Nevertheless, it appears to be accepted that legal claims amounting to at least £15 million have been advanced against EAD and it is suggested that a substantial number of the claims arise from fraudulent activities on the part of Mr Ware in which Mr Gorman is likely to have colluded.

14. On 13th September 2019, LIV issued the current proceedings for damages or equitable compensation limited to £1,000,000.

(3) The Claim

15. Each transaction had distinct features. It is alleged that LIV was induced to enter into the First Loan by an identity fraud. The registered owner of 43 Croxteth Road was called "William Kenneth Cooper"; the purported borrower "Kenneth Cooper" was in all likelihood fictitious. In any event, the First Loan was not made to the registered owner nor were the loan monies received by him. In the case of the other loans, there is no issue as to the identity of the Borrower itself. However, the Second and Third Loans were to a company under the control of Mr Ware with the intention that they would be secured over property which appears to have been in the ownership of a third party. The Fourth

Loan was apparently to a group of companies but it is unclear who received the loan monies.

16. Nevertheless, the Claim itself is generally founded on the following propositions.

    16.1. LIV engaged EAD as its solicitors to act on its behalf in connection with each transaction.

    16.2. EAD were under contractual duties to ensure that the borrower had or acquired a good marketable title and advise LIV of title defects. More specifically, they were under a duty to obtain and procure the registration of charges in priority to all other registered charges before loan monies were released. It was alleged to be "a condition precedent to the Drawdown of [each] Facility that the Borrower had executed" the charges and that "confirmation had been received from the Borrower's solicitor" that they had indeed "been properly executed and formed valid and binding obligations on the Borrower". More generally, EAD owed to LIV a duty to exercise reasonable skill and care.

    16.3. EAD also owed a duty of loyalty to LIV and it was precluded from "preferring the interests of Ware and/or his companies over those of LIV".

    16.4. In breach of their contractual duties and in breach of trust, EAD paid away the loan monies without obtaining or procuring the registration of first legal charges or advising LIV of their failure to do so.

    16.5. After crediting EAD with monies LIV has received in part repayment of the First and Fourth Loans, LIV had thus sustained a loss of £569,690.13 as at 12th June 2019. Its accumulated losses, with contractual interest, now amount to some £893,704.34.

17. LIV thus seeks summary judgment in the sum of £893,704.34. Alternatively, it seeks the total principal of the loans outstanding and unpaid in the sum of £450,161.92 together with statutory interest at 8% amounting to some £102,307.75. If not, it seeks summary judgment for an account with an interim payment, under CPR 25, of £275,000, ie 50% of its alternative claim.

(4) The test for summary judgment

18. The Court may give summary judgment against a defendant on the whole or part of a claim, under *CPR 24.2*, if satisfied that it has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at trial.

19. In *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)* at *[15],* Lewison J provided guidance as to the principles for determining whether a party to proceedings has reasonable prospects of success. This guidance has been approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301* at 24. It is as follows.

    i. The court must consider whether the respondent has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 1 All E.R. 91*;

    ii. A "realistic" claim or defence is one that carries some degree of conviction. This means a claim or defence 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 respondent 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] F.S.R. 3*;

vii. On the other hand it is not uncommon for an application under Pt 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*.

20. Summary judgment should not be given if there is some other compelling reason why the case should be disposed of at trial. Mr Allen referred me to *Miles v Bull [1969] 1 QB 258* as authority for the proposition, endorsed by Simon J in *JSC VTB Bank v Skurikhin [2014] EWHC 271 (Comm) at [15],* that this will be the case if there are circumstances which require close investigation at trial. In *Global Marine Drillshops Ltd v Landmark Solicitors LLP [2011] EWHC 2685*, Henderson LJ thus refused to give summary judgment on a claim arising from the misapplication of monies held subject to a solicitor's undertaking on the grounds that the case before him was not "an ordinary case and having reviewed the evidence" he was "left with the uncomfortable feeling that there may be more to it than meets the eye".

21. There is no longer any statutory restriction on applications for summary judgment based on allegations of fraud. Caution must be exercised where the allegations require factual inference, *JSC VTB Bank v Skurikhin [2014] EWHC 271 (Comm) at [15],* or cogent evidence to meet an inherent lack of probability, *Bank St Petersburg v Arkangelsky [2020] EWCA Civ 408 at [117]* (Males LJ). The factual allegations in the present case are redolent of fraud and LIV's case is presented on the basis that it is the victim of such fraud. However, Messrs Ware and Gorman have not been joined personally as parties to the proceedings and they have not filed evidence. The pleaded causes of action are not based on fraudulent misrepresentation and it is un-necessary for LIV to prove there has been fraud in order to establish its putative causes of action at law. On this aspect, EAD's case – as ably deployed by Mr Allen – is that these allegations are of such a nature, when considered in the context of Mr Livingstone's relationship with Mr Ware, that they call for close investigation at trial.

(5) Principles governing the assessment of equitable compensation for breach of fiduciary duty

22. LIV contends that EAD's putative breaches transcended their duties to LIV at common law. It is alleged that, in paying away the loan monies, without at least obtaining or procuring the registration of first legal charges, EAD committed a breach of its fiduciary duties to LIV. In this context, breach of fiduciary duty is generally taken to connote disloyalty, infidelity or intentional wrongdoing, see *Bristol and West Building Society v Mothew [1998] Ch* 1.

23. Equitable compensation for breach of trust is designed "to make good a loss suffered by the beneficiaries…" by restoring the trust fund to the position in which it would have been had it not been for the breach, *Target Holdings Ltd v Redferns [1996] 1 AC 421, 438D-439B.* The common law concepts of foreseeability and remoteness do not apply and a claimant "is not required to engaged in hazardous litigation in order to mitigate his loss", *Target (supra) 440B*. Moreover, the test of causation is not to be applied axiomatically in accordance with common law principles. However, it remains necessary to show that the breach is causative of the loss and, on analogy with common law principles, this can be achieved in an appropriate case by applying the "but for" test.

24. In *AIB Group (UK) plc v Mark Redler & Co [2015] AC 1503*, a bank's solicitors committed a breach of trust by releasing, to the borrower, some £300,000 that ought to have been applied in the discharge of a prior charge. In aggregate, they advanced the sum of £3.3 million. When the borrowers defaulted, the bank repossessed and sold the property for some £1.2 million but were only entitled to some £867,697 after accounting to the holders of the prior charge. The bank then claimed the full amount of its loan, £3.3m, less the amount recovered, £867,697. On appeal, the Supreme Court restored the judgment at first instance awarding the bank equitable compensation of £273,777.42, the amount ultimately secured by the prior charge, plus interest. This conclusion was reached by applying the *Target* principle notwithstanding that the underlying transaction had been completed. At Para 65, Lord Toulson said as follows.

> "The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about. To say that there has been a loss to the trust fund in the present case of £2.5m by reason of the solicitors' conduct, when most of that sum would have been lost if the solicitors had applied the trust fund in the way that the bank had instructed them to do is to adopt an artificial and unrealistic view of the facts".

25. In that case, the loss to the trust fund as a result of the solicitors' breaches was equal to the amount secured by the prior charge. The equitable compensation was thus calculated on this basis, not by restoring the full value of the trust fund.

26. Consistently with this approach, Mr Allen referred me to *Main v Giambrone & Law [2017] EWCA Civ 1193*, in which the Court of Appeal applied the *SAAMCO* principle in the context of an award of equitable compensation. In that case, the purchasers of some foreign apartments off-plan sued their solicitors for professional negligence and breach of trust in connection with the release of funds to the vendors upon issue of inadequate guarantees. The purchasers succeeded on their claim and were awarded equitable compensation for the full amount disbursed.

27. The Court of Appeal dismissed the solicitors' appeal on the basis it was un-necessary to assess the amounts to which the purchasers would have been entitled had the guarantees been issued correctly. Jackson LJ did not draw any material distinction between the

principles at common law and in equity. Indeed, at Para 63, he described the case as one "where equitable compensation and contractual damages run in tandem". He thus surmised, at Paras 78-87, that the purchasers were required to show that the loss fell within the scope of their solicitors' duty. Based on the formulation of Lord Sumption in *Hughes-Holland v BPE Solicitors [2018] AC 599*, this was said to depend on whether "D is guiding the whole decision making process or merely providing part of the material on which C will rely" (Para 81(ii)). However, Jackson LJ concluded that, in the case before him, the "loss clearly was within the scope of Giambrone's duty. It was Giambrone who explained to the claimants their rights, liabilities and protections under Italian law. Giambrone explained to the claimants that they would be adequately protected by [the relevant] guarantees…Having done all that, Giambrone proceeded to pay out the deposits when no such guarantees were in place".

28. In *Main v Giambrone & Law* (supra), the Court of Appeal were satisfied that, whilst the *SAAMCO* principle was applicable, it did not operate so as to limit or restrict the measure of damages recoverable. However, Jackson LJ's judgment must be treated as a persuasive statement of the law and, in quantifying the amounts, if any, to which LIV is entitled as equitable compensation, I must address the scope of EAD's duty and ask whether its role was to guide the decision-making process or merely to provide part of the material on which LIV was to rely. If it was the latter, equitable compensation must be limited to the ambit of the specific duty.

29. It was not submitted that it makes any difference that Mr Ware might have committed a fraud on LIV nor, indeed, that Mr Gorman might have assisted in him in carrying out the fraud.

(6) Liability and assessment

30. In its Defence, EAD admits the essential elements of LIV's case against it in respect of the Second and Fourth Loans.

    30.1. It is admitted that EAD was retained to act on LIV's behalf (Paras 43.1 and 73.1) in relation to each transaction and it is at least implicitly admitted that (1) it was a condition precedent to drawdown that the Borrower executed the relevant security documents including a first legal charge and issued confirmation of the same (Paras

26, 46, 77 and 84.4.3), and (2) EAD was under a duty not to release the loan monies until the loan conditions had been met (Para 43.2.6.3 and 73.2).

30.2. It is also admitted that the property at 32-34 Wellington Road, Wallasey was at all material times (1) in the ownership of 32 Wellington Road Limited (Para 41.2), not Sefton Street Limited for whom the Second Loan was advanced, and (2) subject to a prior charge to another company, Seneca Securities Limited ("Seneca") (Para 42.1). It is admitted the properties for which LIV earmarked the Fourth Loan were also subject to third party security (Para 82).

30.3. It is then admitted that, in breach of trust, EAD paid away the sums of £50,000 and £49,350 in respect of the Second Loan (Para 50.1 and 50.2) and the sum of £250,000 in respect of the Fourth Loan (Para 78 and 85.1) without ensuring (1) Seneca's charge was discharged or, indeed, securing the Second Loan (Para 52.2) and (2) the discharge of the third party security in respect of the properties for which LIV had earmarked the Fourth Loan (Para 82).

30.4. The relevant payments were respectively made on 20th, 23rd January and 31st March 2017.

31. Conversely, EAD denies or at least puts LIV to proof of its case on the First and Third Loans. However, in the absence of co-operation from Mr Gorman, it does not advance a positive case.

31.1. The First and Third Loans are admitted (Paras 26 and 60). However, EAD denies that it was retained to act for LIV in relation to the First Loan stating that it "has seen no evidence that any such retainer was entered into or that Gorman purported to carry out any work pursuant to such a retainer" (Para 35). EAD also makes "no admissions as to the scope of any retainer between LIV and EAD" in respect of the Third Loan (Para 56.2).

31.2. Since EAD challenges the proposition that it was retained to act for LIV in connection with the First Loan and the Third Loan, it takes issue with the terms of retainer and does not admit that it was under any duty to attend to the registration of charges over the relevant properties or, indeed, to ensure that the charges took effect by the time the monies were released.

31.3. EAD makes no admissions about the identity of the Borrower under the First Loan; in particular, it is not admitted that "Kenneth Cooper" was or is a fiction. In Para 32, it is emphasised that "EAD has no record of being instructed in relation to this transaction, was not instructed to investigate or verify the borrower's identity and did not do so (or purport to do so)". However (as in the case of 32-34 Wellington Road) it is admitted that the Bungalow - the security intended for the Third Loan - was at all times in the ownership of 32 Wellington Road Limited (Para 64), not Sefton Street Limited, and it is admitted that this property was charged to Seneca (Para 65).

31.4. Nevertheless, it is denied that EAD ever held or paid away the First or Third Loans or the proceeds of the same (Paras 38, 39, 70, 71) and it is denied that EAD committed a breach of trust in relation to such loans.

32. Since EAD does not advance a positive case on these issues, I have assessed the strength of LIV's case and EAD's prospects of successfully challenging it without conducting a "mini-trial". Having done so, I am satisfied that EAD does not have any realistic prospect of successfully challenging LIV's case on these issues in the absence of evidence from Mr Gorman or, at least, one of his working colleagues at EAD.

32.1. In support of his case, Mr Livingstone has filed a witness statement, supported by exhibited documentation, in which he deals, at length, with the critical issues in relation to EAD's retainer, instructions and application of the loan monies. Mr Livingstone's witness statement is supported by a witness statement from LIV's solicitor, Mr Kenneth Charles Smith, exhibiting title documents and contemporaneous correspondence, and a witness statement from Mr Stuart Redbond explaining the treatment of each transaction in LIV's accounting records. Mr Redbond is a partner of Robert Lewis Accountants and, in that capacity, he provides accountancy services to LIV.

32.2. In response to the evidence of Mr Livingstone and Mr Smith, there is a witness statement from Mr Ian Frederick McConkey, a partner of DAC Beachcroft LLP, who are instructed on behalf of EAD. Mr McConkey exhibits contemporaneous documentation, including a selection of text messages between Mr Livingstone and Mr Gorman, from which he seeks to draw inferences and, more generally, to make

his own observations about the merits of LIV's case and the principles on which it is based. Although Mr McConkey's witness statement is skilfully presented, he is obviously not able to give direct evidence about the matters specifically in issue.

32.3. If instructed on a commercial conveyancing transaction, a solicitor's instructions should be recorded formally in a letter of retainer. In the present case, no formal letters of retainer have been adduced in support of LIV's case in relation to the First and Third Loans but it is apparent from the contemporaneous documentation that much of Mr Gorman's work was carried out in a loose and informal way. In support of LIV's case, reliance is placed on consistent contemporaneous documentation, including an email dated 17th May 2016 from Mr Livingstone to Mr Gorman referring to his intention to advance £300,000 and stating that he required "the new client Ken Cooper [to] give [LIV] first legal charge over the property" at 43 Croxteth Road and an exchange of emails between Mr Livingstone and Mr Gorman on 27th and 28th February 2017 in which Mr Livingstone asked Mr Gorman to use £297,000 of his funds in respect of a loan of £150,000 in respect of the Bungalow and, after attaching the loan documentation, Mr Gorman agreed to transfer the remaining balance of £147,000 so that it could be utilised on another transaction.

32.4. Consistently with the contemporaneous documents and the pattern of the other transactions, Mr Livingstone states (Para 48) that Mr Gorman confirmed he would "get a first legal charge and…register it before releasing the first money" in respect of the First Loan and, in his email dated 27th February 2017, Mr Livingstone specifically stated that, if wasn't possible to obtain a first charge over the Bungalow, he would "decline" the Third Loan.

32.5. Although EAD put LIV to proof as to the identity of "Kenneth Cooper" and, more particularly, the allegation that 43 Croxteth Road was at all material times in the registered ownership of a third party, they do not advance any specific challenge to this part of LIV's case. Some aspects of this issue are obscure. However, I am satisfied that the registered owner, Mr William Kenneth Cooper, was not a party to the First Loan.

32.6. I am also satisfied that, contrary to its instructions, EAD paid away funds that it held on LIV's behalf without obtaining a first charge over the relevant properties. The application of the funds is recorded in LIV's accounting records - supported by the evidence of Mr Stuart Redbond - and LIV never obtained a first charge over the properties. Both properties were in third party ownership and remained as such.

32.7. In the case of the Third Loan, Mr Gorman was asked to apply £150,000 from the sum of £297,000 allegedly held on client account. No doubt this reflected the amounts which EAD had received on LIV's behalf and for which it was thus liable to account but, on this hypothesis, Mr Allen submitted that there remains a strong possibility EAD ultimately had recourse to third party funds when it paid away the sum of £150,000. However, there is no specific evidence this is the case. In any event, having purported to treat them as LIV monies, appropriating them to LIV's instructed purpose and applying them on that basis, it is not open to EAD to maintain that, when they were paid away, they were being held otherwise than on LIV's behalf subject to the terms of their retainer.

33. LIV's case is founded on the basis that, when Mr Gorman paid away the funds, he did so knowingly in breach of his instructions and the conditions upon which the funds were held. In my judgment, having established the relevant breaches, it is indeed an inescapable inference that Mr Gorman paid out the monies in the knowledge that this was contrary to his instructions and the conditions on which they were held so as to give rise to a breach of trust within the sense envisaged by the Court of Appeal in *Bristol and West v Mothew [1998] Ch 1.*

34. Nevertheless, it remains necessary for LIV to show that it has sustained a loss arising from one or more of the Loans for which it is entitled to equitable compensation. This is ascertained by calculating the loss to the trust fund by reason of the relevant breaches of trust in accordance with the above principles in *Target v Redferns [1996] 1 AC 421* and *AIB Group (UK) plc v Mark Redler & Co [2015] AC 1503.*

35. EAD's role in the present case, was to implement Mr Livingstone's specific instructions and, pursuant to such instructions, to provide specific advice by confirming LIV had acquired a first charge over the relevant properties. In Paragraph 14 of his witness

statement, Mr Livingstone states that he "totally relied upon [Mr Gorman] to do all [his] legal work and act in the manner, that so far as I was made aware, was normal practice for a solicitor in such transactions". However, in my judgment, this does not support any suggestion Mr Gorman was expected to guide the whole decision-making process. Consistently, with *Hughes-Holland v BPE Solicitors [2018] AC 599* and *Main v Giambrone & Law [2017] EWCA Civ 1193*, equitable compensation is thus limited to the losses falling with the scope of EAD's narrower duty to obtain a first charge and confirm that it has been obtained. LIV is not entitled to recover all the losses that it would have sustained on the hypothesis LIV had, indeed, obtained a first charge over the relevant properties and EAD acted consistently with their instructions.

36. In the present case, LIV advanced the sums of £100,000 and £150,000 to Sefton Street Limited under the Second and Third Loans without obtaining security. No sums have been repaid and Sefton Street Limited has been dissolved. There is no reason to believe that any amounts will be repaid. It is correct that LIV is not entitled to recover losses that it would have sustained in the event that it had obtained a first charge over 32-34 Wellington Road (under the Second Loan) or the Bungalow (under the Third Loan). However, in the hypothetical event LIV had obtained a first charge, there is no reason to believe LIV would then have sustained a loss. There is no evidence, for example, to suggest that the market value of the properties was less than the amounts advanced or subsequently diminished so as to be less than those amounts. Since it is LIV's stated case that, before advancing funds, Mr Livingstone took steps to satisfy himself about the sale value and development costs of each property and LIV was aware that the loan to site value was intended to be less than 50%, it is inherently unlikely that the market value was less than the amounts advanced and it is thus for EAD to suggest at least some reason to the contrary. Whilst LIV bears the persuasive burden of proof, there is at least an evidential burden on EAD to show that the market value of the properties might have been less than the amount advanced to advance such a case. In the present case, EAD has failed to do so. In my judgment, LIV can thus be taken to have sustained losses under the Second and Third Loans of £100,000 and £150,000, amounting in total to some £250,000.

37. However, the position in relation to the First and Fourth Loans is very different. LIV has itself filed accounts showing that, having advanced the sum of £300,000, under the First Loan, and £250,000, under the Fourth Loan, LIV has been repaid £318,874.19 and £287,320.30 respectively. LIV has treated as repayments of the First Loan, the receipt of £61,874.19 from an alleged over-payment in respect of "Truman" and bank receipts from EAD of £100,000 and £157,000 on 4th May 2017 and 19th May 2017. Similarly, it has treated as repayments, the sum of £200,133.67 and £87,186.63 received as "Bank receipts Ashford client account" and "funds received from receivers - Carr Mill Clinic".

38. Notwithstanding the receipt of these amounts, LIV contends that, as at 31st July 2019, some £127,734.14 was due under the First Loan and £182,320.30 under the Fourth Loan by applying arrangement fees of £3,000 and £5,000, and debiting interest calculated in accordance with the facilities under which the First and Fourth Loans were originally advanced. However, there can be no room for contractual interest given that LIV's losses are to be calculated so as to put it in the position in which it would have been had it not been for EAD's negligence or, alternatively, to restore the trust fund to the position in which it would have been had it not been for the material breaches of trust. In either hypothetical event, the sums of £300,000 and £250,000 would not have been drawn down under the relevant facilities nor would they have been paid away and Sefton Street Limited, the borrower, would not have incurred a contractual liability to pay interest. Moreover, LIV does not suggest that EAD purported to make any kind of contractual warranty in relation to the transactions. Nor, indeed, was any explanation provided as to why EAD should be held responsible for the payment of the arrangement fees. In my judgment, LIV's claim for contractual interest is misconceived and the basis for recovery of the arrangement fees has not been properly substantiated.

39. It is at least implicit in LIV's case that it is open to me to award equitable interest or, indeed, statutory on the amounts outstanding from time to time under the First and Fourth Loans having accounted for the value of the repayments. However, I am satisfied that I should not give judgment for LIV on this basis. This is so regardless of whether, by doing so, it is possible to achieve a positive balance on either loan in favour of LIV. Consistently with Mr Allen's submissions (see Para 20 above) based on *Miles v Bull [1969] 1 QB 258* and *JSC VTB Bank v Skurikhin [2014] EWHC 271 (Comm) at [15],* there are aspects

of LIV's case in respect of the First and Fourth Loan which require investigation at trial, including issues as the origin and calculation of the amounts that have been applied towards these loans and the calculation of the expenses incurred and, apparently deducted, in realising them.

40. By contrast, having concluded that EAD has no real prospect of defending LIV's claim in relation to the Second and Third Loans, I can see no compelling reason why LIV's claim in relation to the same should be disposed of at trial. EAD has admitted the essential parts of LIV's case in relation to the Second Loan, including the allegation that the sum of £100,000 was paid away in breach of trust. There is no such admission in the case of the Third Loan under which EAD is alleged to have paid away the sum of £150,000 but this is on the footing that there was no contract of retainer and EAD has not shown this was LIV's money. However, I am satisfied, for the reasons already given, that EAD has no real prospect of successfully defending the claim on these issues. More generally, there is nothing in EAD's pleaded case to suggest that it might be furnished with a good defence to the claim based on the Second and Third Loans if the underlying issues in relation to such loans or the relationship between Messrs Livingstone, Gorman and Ware are submitted to further investigation.

(7) Disposal

41. I shall thus give LIV judgment summary judgment for £250,000.

42. In principle, I am satisfied that LIV is also entitled to equitable or statutory interest on the sum of £250,000. Following the delivery of written submissions on (1) the assessment and calculation of interest on this amount; and (2) all consequential matters, including costs, I shall deal with these aspects of the case on paper.