[2020] EWHC 3477 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. BL-2017-000459**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
B E T W E E N :

Date: 23 December 2020

Before :

James Pickering QC
(sitting as a Deputy High Court Judge)

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Between :

(1) SAMEERA ABDUL RASOOL TOORANI
(2) KHAIRIYAH ABDUL RASOOL TOORANI
(3) ROUHANGIZ ABDUL RASOOL TOORANI
(4) ZAINAB ABDUL RASOOL TOORANI
(5) MARYAM ABDUL RASOOL TOORANI **Claimants**

and

(1) THE ESTATE OF BEHROOZ ABDUL RASOOL TOORANI
(Represented by Badriya Abdul Rasool Toorani)
(2) BADRIYA ABDUL RASOOL TOORANI
(3) RABAB ABDUL RASOOL TOORANI
(4) MARKH ABDUL RASOOL TOORANI
(5) SADUKH ABDUL RASOOL TOORANI **Defendants**

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Richard Samuel (instructed by **Trowers & Hamlins LLP)** for the **Claimants**
W. H. Henderson (instructed by **Charles Russell Speechlys LLP**) for the **First to Fourth Defendants**

Hearing date: 2, 3 July, 23 December 2020

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APPROVED JUDGMENT

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James Pickering QC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION

1. I have before me three related applications, the principal one being an application for permission to file and serve a Re-Re-Amended Particulars of Claim. Those applications are made in the context of a hotly contested claim to set aside two transfers of property under the transaction defrauding creditors provisions contained in section 423 of the Insolvency Act 1986 ("**IA 1986**").

2. I shall start by setting out the background to the underlying dispute (Part II) and the procedural background (Part III). I shall then set out the relevant law both as to amendments generally (Part IV) and as to pleading dishonesty (Part V). I will then go on to set out my analysis (Part VI) and conclusion (Part VII).

PART II: THE BACKGROUND - THE UNDERLYING DISPUTE

The family

3. Abdul Rasool Toorani was a Bahraini citizen. He had two wives.

4. With his first wife, Mr Toorani had five children: one son and four daughters. The son ("**the Deceased**") has since died and it is his estate which is the First Defendant in these proceedings. The four daughters are the Second to Fifth Defendants.

5. With his second wife, Mr Toorani had seven children: one son and six daughters. Of these, five of the daughters are the First to Fifth Claimants.

The Company

6. The family business was a shipping business operating out of Bahrain. In 1978, that business was incorporated as A.R. Toorani & Sons Co ("**the Company**"). As for the shareholding in the Company, Abdul's daughters were each allotted 14 shares while his sons were both allotted 28 shares.

7. The Company was successful and in about 1980 obtained a lucrative contract with the US Navy to pilot its warships into harbour. It is uncontroversial, however, that the profits earned by the Company did not find their way to all the shareholders.

The 2002 Claim

8. In 2002, the First Claimant brought proceedings in Bahrain against, amongst others, the Deceased ("**the 2002 Claim**"). In October 2005, the Bahraini High Court gave judgment in the 2002 Claim ordering, amongst others, the Deceased to pay the First Claimant the equivalent of about £2.7 million[1].

The disputed transfers

9. As at the time of the above judgment, the Deceased owned two properties in England, namely, the long leasehold interest in Flat 5, Clunie House, 4-7 Hans Place, London SW1 ("**Clunie House**") and the freehold interest in Burwood House, Buckinghamshire ("**Burwood**").

[1] In March 2006, the sum was reduced to about £1.6 million but in November 2006 the original judgment sum of about £2.7 million was restored.

10. On 13 September 2006, the Deceased transferred his long leasehold interest in Clunie House to a Jersey based company called 5 Clunie House Ltd ("**5CL**"). The ultimate beneficial owners of 5CL were the Second to Fifth Defendants – in other words, the Deceased's full sisters. Importantly, the Form TR1 by which the transfer was effected stated that the transfer was for no consideration.

11. On 10 October 2006, the Deceased transferred the freehold in Burwood to Red Rose Ltd ("**RRL**"), another Jersey based company of which the Second to Fifth Defendants were again the ultimate beneficial owners. Again, the relevant Form TR1 stated that the transfer was for no consideration. A few weeks later, on 14 November 2006, RRL granted a leaseback of Burwood to the Deceased for a term of 20 years at a market rent of £15,000 a month.

The 2007 Claim and the 2009 Claim

12. In 2007, the Second to Fifth Defendants brought their own claims against, amongst others, the Deceased in Bahrain ("**the 2007 Claim**") relying on substantially the same facts as the First Claimant had done in the 2002 Claim.

13. In October 2009, Suhaila Toorani – a full sister of the Claimants – similarly brought her own claim against the Deceased ("**the 2009 Claim**") – once again relying on substantially the same facts as the other claims. In June 2012, the Second to Fifth Claimants intervened in the 2009 Claim as additional plaintiffs.

14. On 30 January 2014, the Bahraini High Court gave judgment in the 2007 Claim against, amongst others, the Deceased in a total sum equivalent to about £5.6 million.

15. A few months later, on 14 May 2014, the Bahraini High Court gave judgment in the 2009 Claim against, amongst others, the Deceased, in a total sum equivalent to about £15.8 million.

The Deceased's death

16. On 8 July 2017, the Deceased died[2].

17. As at the date of the Deceased's death, the above judgments remained unsatisfied. Moreover, as a result of the transfers of both Clunie House and Burwood some 11 years earlier, there were no longer any assets of substance within the Deceased's estate against which to enforce.

PART III: THE BACKGROUND - THE PROCEEDINGS

The Particulars of Claim

18. Following correspondence between the parties, on 30 November 2017[3], the Claimants issued the present claim against the Deceased's estate and the Second to Fifth Defendants. They did so by way of a claim form supported by Particulars of Claim.

19. The cause of action relied upon was section 423 of the IA 1986. In broad terms, such a claim requires the claimant to show that (a) a person has entered into a transaction (such as a transfer of property) as a gift or at a significant undervalue, and (b) the transfer was carried out by that person with the purpose of putting assets beyond the reach of, or otherwise prejudicing, his or her actual or potential creditors.

20. In the present case, the case which was pleaded was relatively straightforward. In broad terms, it was alleged that (a) the transfers by the Deceased of Clunie House and Burwood to the Jersey based companies had been gifts (as evidenced by the Form TR1 in each case) and, (b) a purpose of those transfers had been to prejudice the Claimants (who at the time were, or were about to become, his judgment creditors) for the purposes of section 423 of the IA 1986.

The Defence

21. On 1 August 2019, the Defendants served their Defence.

[2] Under his will, the Deceased's estate passed to his full sisters (in other words, the Second to Fifth Defendants), with his half-sisters (including the Claimants) receiving nothing. In the circumstances, however, little would appear to turn on this.

[3] At the same time, the Claimants issued a claim seeking recognition of their Bahraini judgments in England

22. As to the allegation that a purpose of the transfers had been to prejudice the Deceased's half-sisters, this was – perhaps unsurprisingly - denied. Instead, so it was pleaded, the transfers had been carried out pursuant to a legitimate tax planning scheme with the purpose of avoiding inheritance tax. Indeed, it is uncontroversial that prior to effecting the transfers the Deceased had sought tax advice from KPMG which had put together the (not uncommon) scheme by which the Deceased was to gift his properties to his intended beneficiaries (in this case, the Second to Fifth Defendants via the two Jersey based companies) and to then take a leaseback of one of them at a full market rent.

22. As to the allegation that the transfers had been gifts, this was – perhaps surprisingly – also denied. Indeed – despite the fact that the transfers had each been effected by a Form TR1 stating that there had been no consideration – the Defence went on to plead the existence of an oral agreement under which, so it was said, the Deceased would transfer the properties to Second to Fifth Defendants (via the Jersey based companies) in consideration of the Second to Fifth Defendants supporting the Deceased for the rest of his life at Burwood ("**the Oral Agreement**"). In short, therefore, while the scheme put together by KPMG for tax purposes had involved the properties being transferred as gifts, according to the Defence the properties had in fact been transferred for valuable consideration.

The Reply

23. On 2 October 2019, the Claimants served their Reply which, amongst other things, responded to the Oral Agreement. In short, it was pleaded that the Oral Agreement amounted to a dishonest scheme and/or a sham.

The application to strike out the Reply

24. On 23 October 2019, the Defendants' solicitors sent a letter criticising the Reply on various bases including, in broad terms, that there was no evidence on which to base its pleas of dishonesty and, further, that any such pleas should in any event have been pleaded in the Particulars of Claim rather than the Reply.

25. On 5 November 2019, the Claimants' solicitors responded denying the above criticisms and suggesting that the sensible way forward would be either for the Defendants to plead to the Reply by way of a Rejoinder or alternatively for the Claimants to re-amend their Particulars of Claim to introduce the pleas of dishonesty (with a round of consequential amendments to follow).

26. Neither course, however, was attractive to the Defendants who instead, on 27 November 2019, issued an application to strike out certain paragraphs of the Reply. That is the first application before me.

The application for permission to file and serve a Re-Re-Amended Particulars of Claim

27. On 14 February 2020, the Claimants issued a cross-application for permission to file and serve a Re-Re-Amended Particulars of Claim[4]. The application attached draft Re-Re-Amended Particulars of Claim which, in addition to the original case, included two further cases based on dishonesty and/or sham (thereby incorporating much of the material which they had previously pleaded in their Reply). That, of course, is the second application before me.

The application to amend the application notice

28. Following the above, the parties entered into discussions which might have led to a compromise in relation to the above two applications under which the Claimants would have had permission to file and serve their Re-Re-Amended Particulars of Claim, with the application to strike out the Reply being dismissed. Unfortunately, however, the parties were unable to agree the position on costs and accordingly no such compromise was in fact reached.

[4] The Claimants had served an Amended Particulars of Claim in December 2017 and a Re-amended Particulars of Claim in June 2019

29. Following the above, on 26 February 2020, the Claimants issued a further application to amend the above typographical error in the application notice. That is the third application before me.

The approach to this hearing

30. In short, therefore, all three applications remain live before me. Shortly before the hearing, however, it was provisionally agreed between counsel that the hearing should focus principally on the second application, namely, the Claimants' application for permission to file and serve a Re-Re-Amended Particulars of Claim. I agreed that this was a sensible approach and accordingly it was in this way that the hearing proceeded.

PART IV: THE LAW – AMENDMENTS GENERALLY

31. The law as to amendments generally is uncontroversial and can be stated shortly. The procedure is contained in CPR 17.1(2)(b) and CPR 17.3. The jurisdiction is discretionary and the court, when exercising its discretion, must consider all the circumstances of the case with a view to dealing with the matter justly and proportionately.

32. It is also well established that where the proposed amendment involves the introduction of a new case[5], the court will require the applicant to show that the proposed new case has some prospect of success – indeed, it would be pointless to give permission to a party to introduce a new case where that new case is amenable to summary judgment and/or liable to be struck out. As Andrew Hochhauser QC said in ***SPI North Ltd v Swiss Post International (UK) Ltd*** [2019] EWHC 2004 (Ch) at [9]:

> "If the Court can see that an amendment has no real prospect of success, it will not flinch from disallowing the amendment, because a claim with no real prospect of success should not be allowed to proceed. Some analysis and evaluation of the case raised by the amendment objected to, whether it be a question of fact or a matter of

[5] And in the absence of special features such as the application to amend being made close to trial or after the expiry of a limitation period

law, must, therefore, be attempted, to see if it leads (without an unduly prolonged or difficult enquiry, bearing in mind that the procedure is a summary one) to the conclusion that the amendment has no real prospect of success."

33. Importantly, however, the Deputy Judge continued in the same paragraph:

> "But if the Court is not persuaded that the amendment has no real prospect of success, the ultimate decision maker should not be encumbered with a preliminary view on the point raised by the amendment, nothing like a probability of success being required for these purposes."

PART V: THE LAW – PLEADING DISHONESTY

34. Where the proposed amendments involve a plea of dishonesty, further considerations apply. The leading case is perhaps ***Three Rivers District Council v Bank of England*** [2001] UKHL 16 but for present purposes the position is best summarised in ***JSC Bank of Moscow v Kekhman*** [2015] EWHC 3073 (Comm) where Flaux J said at [20]:

> "…The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty."

35. In the same paragraph, Flaux J continued:

> "At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge…"

36. The passage, so it seems to me, neatly encapsulates the issue which I have to consider in determining the present applications.

PART VI: ANALYSIS

37. The Defendants' objections to the draft Re-Re-Amended Particulars of Claim are many and far reaching. In total, some 18 objections are taken to over 35 paragraphs of the proposed statement of case. I am grateful to counsel for the Defendants for his "List of Objectionable Paragraphs" which succinctly summarises the position.

38. Those objections neatly fall into a number of categories as follows:

(1) A general objection that the proposed amendments are late in that they could have been included in the original Particulars of Claim.

(2) Some general objections that the proposed amendments are unnecessary.

(3) Some specific objections relating to the proposed amendments as to dishonesty and sham.

General objection that the proposed amendments could have been pleaded in the original Particulars of Claim

39. An overarching objection is that all of the proposed amendments are late in that they could all have been included in the original Particulars of Claim. In particular, reliance is placed on the fact that the Oral Agreement pleaded in the Defence did not come "out of the blue" but was instead foreshadowed in correspondence shortly before the issue of the claim. In response, the Claimants submit that they should not be criticised on the basis that when pleading a particulars of claim there is no obligation to anticipate a defence.

40. In my judgment, the position is slightly more nuanced than that. When drafting particulars of claim, the pleader may well suspect that a defendant will raise a particular defence. On some occasions, the pleader may choose to pre-empt that

defence by setting out what it is anticipated that the defendant will say, and then setting out the response to that anticipated defence. On other occasions, the pleader may elect not to pre-empt an anticipated defence. That may be because the pleader cannot be certain that that defence will in fact be raised or it may be because the pleader cannot be sure how precisely that defence is going to be put. Pleading a response to something which has not yet been pleaded can be a tricky process, particularly if there are several different ways in which that anticipated defence could be put. Keeping the particulars of claim simple by just pleading the basic case, allowing the defendant to plead their defence as they wish, and then responding by way of reply (or by amendment to the particulars of claim) may sometimes be the most appropriate way to proceed.

41. In the present case, the Defendants did indeed raise in pre-issue correspondence the Oral Agreement. This being the case, the pleader of the particulars of claim could have attempted to pre-empt the Oral Agreement by pleading that the Defendants had raised the Oral Agreement in correspondence and that, if the same were also to be raised in the Defence, they would plead in response in a certain way. Although that would have been permissible it would not necessarily have been a straightforward process, particularly if, when the Defence arrived, the Oral Agreement turned out to have been pleaded in a different way to how it had been presented in the correspondence.

42. Each case will no doubt have its own particular circumstances but it seems to me that, in general, it will be rare that a statement of case can be criticised for not pre-empting a defence but instead only pleading the basic case and waiting to see if and how the defence is in fact pleaded before choosing how to respond. As for the present case, I have no doubt that the pleader cannot be criticised for pleading the case as it originally was and then seeking to amend in the way now sought. I therefore reject the general objection to the proposed amendments on lateness.

General objections that the proposed amendments are unnecessary

43. The next general objection is that some of the material in the proposed amendments are already pleaded in the Reply and are therefore unnecessary. Another is that some

of the proposed amendments are "introductory" in nature and accordingly are once again unnecessary.

44. There are of course important requirements which have to be observed when drafting statements of case. CPR 16.4(1) provides that particulars of claim must include "a concise statement of the facts on which the claimant relies". Practice Direction 16 sets out certain matters which must be included in certain types of claim. There are of course others too. Subject to these important requirements, however, the drafting and content of statements of case is not an exercise in stylistics – even less an exercise in point scoring.

45. The purpose of a statement of case is to set out in a clear and concise manner the matters making out the cause of action or the nature of the defence relied on, as the case may be. This is for various reasons, the most important of which is to ensure that the other party knows the case it has meet. Importantly, however, as long as the above basic but important requirements are met, it will in general be a matter for the pleader how to plead the case. If the material is such that it does not meet the requirements – for example, if the pleading is rambling, vexatious or embarrassing in some way – it can of course be struck out or permission to amend can be refused, as the case may be. But if the above basic but important requirements are met, the court should be slow to interfere with a pleading which, in one view, could have been drafted in a different or better way. The court will be keen to ensure that the basic important requirements are observed but it is not otherwise to act as some form of drafting police.

46. In the present case, it is correct that some of the material which the Claimants now seek to introduce into their Re-Re-Amended Particulars of Claim already appears in their Reply[6]. For my part, I see no difficulty in this. It seems to me that it is entirely appropriate for the material in question to appear in the Re-Re-Amended Particulars of Claim and it does not seem sensible that they should not appear in their proper place merely because they are also set out in the Reply. Nor, so it seems to me, should I refuse to grant permission simply because some of the proposed amendments are

[6] See, for example, paragraphs 45 to 47 which, in relation to their original (now primary) claim, the Claimants set out their position in relation to the KPMG advice

"introductory" in nature[7]. Indeed, some might see those introductory paragraphs as useful in setting out the Claimants' case but, as I have already said, this is not an exercise in stylistics. Accordingly, to the extent that the objections are based solely on being unnecessary, I again reject the same.

Specific objections relating to the proposed amendments as to dishonesty and sham

47. Finally, I move on to the specific objections relating to the proposed amendments as to dishonesty and sham. Indeed, unsurprisingly, it was this category of amendments on which counsel for the Defendants largely focused.

48. In considering these specific objections, I take account of all of the various authorities to which I was referred but in particular, so it seems to me, I bear in mind the guidance of Flaux J in ***Bank of Moscow*** at [20] to the effect that when considering a plea of fraud at an interim stage:

> "…the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial."

and further that, when considering whether facts are pleaded which would justify a plea of dishonesty:

> "…The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty".

(a) Specific objection to the Claimants' secondary case

[7] See, for example, paragraphs 66 to 68

49. It will be recalled that the Claimants' original case was that (a) the transfers by the Deceased of the two properties to the Jersey based companies had been gifts (as evidenced by the Form TR1 in each case) and, (b) a purpose of those transfers had been to prejudice the Claimants. As stated above, in the draft Re-Re-Amended Particulars of Claim this relatively straightforward claim is retained (save that it is now described as being the Claimants' primary case).

50. The first specific objection to the amendment material, however, relates to what is described as the Claimants' secondary case. Under the secondary case, it was pleaded that the true agreement between the Deceased and the Defendants was that the Defendants would put the Deceased in funds to enable him to pay the rent under the lease to give the impression to HMRC that he was in fact paying a market rent (which in reality he was not, as he was receiving those funds from his sisters). In this way, the lease was in fact a sham (in that, on its face, it gave the appearance to the outside world that the Deceased was paying market rent, when in fact he was not) and the parties would receive the inheritance tax benefit of KPMG's advice without in fact following it.

51. On this analysis, so the Claimants pleaded, the payments made by the Defendants to the Deceased were not in consideration of the transfers of the properties to the Jersey based companies (as the Defendants had pleaded in their Defence) but were instead part of a dishonest scheme to evade the inheritance tax which would otherwise have become payable on the Deceased's death. This being the case, so it was pleaded, the transfers of the two properties by the Deceased to the Jersey based companies were still both gifts and (given that a purpose of those transfers had still been to prejudice the Claimants) still both caught by section 423.

52. The Second to Fifth Defendants, however, object to the amendments which introduce the Claimants' secondary case on various bases. Perhaps the key objection is that the funding by the Defendants of the Deceased's outgoings is, so they submit, more consistent with honesty than dishonesty.

53. Indeed, the Claimants' secondary case involves accepting the basic facts alleged by the Defendants (namely, that they would pay money to the Deceased) but instead

invites the court to draw a different legal conclusion to that suggested by the Defendants. To be precise, while the Second to Fifth Defendants say that the agreement to fund came out of a realisation that the Deceased would not be able to fund the rental payments (without any realisation of the impression that it would give to HMRC and the potential inheritance tax saving it would bring), the Claimants say that the more likely inference that can be drawn is that the Defendants – who would of course benefit from any non-payment of inheritance tax – were aware of the scheme.

54. Having carefully considered the matter, it seems to me that on the primary facts pleaded, an inference of dishonesty is more likely than one of negligence or innocence. I take into account in particular that, on any basis, the Deceased sought advice from KPMG with a view to gaining a tax advantage, put together a scheme which appeared to comply with that advice for the purposes of that tax advantage, but then expressly departed from that scheme in a way which while still giving the impression of compliance to HMRC (and therefore still gaining the tax advantage), in fact resulted in the Deceased not having to pay (in any real sense) the rent which he was required to pay in order to gain that tax advantage. Those facts certainly give rise to an inference of dishonesty on the part of the Deceased and while it will be a matter for the trial judge as to the extent any of the Defendants were complicit in that scheme, I have no doubt that the matters pleaded are more than sufficient to enable the secondary case to go to trial. To find otherwise, so it seems to me, would be wholly artificial.

(b) Further specific objection to the Claimants' secondary case: the role of Nicholas Cawley

55. As stated above, the Claimants' secondary case is that the lease was a sham in that while it gave the ostensible appearance that the Deceased was paying a market rent, in fact he was not paying any such market rent because, in reality, the Defendants were funding those rental payments – something which (on this secondary case) they were doing as part of a dishonest scheme to evade the inheritance tax which might otherwise have been payable.

56. A further specific objection to the above secondary case arises in this way. The lease, so I was reminded, was executed by RRL as lessor and the Deceased as lessee. As for the execution by RRL, it was signed by three of its directors, namely, the Second Defendant, the Third Defendant and – importantly - Nicholas Cawley, of Jersey-based Bedell Secretaries Ltd.

57. I was then referred to ***Snook v London and West Riding Investments Ltd*** [1967] 2 QB 782 where, in a well-known passage at 802, Diplock LJ explained the meaning of sham as:

> "…acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create…"

58. Importantly, for present purposes, the above passage then continues (with underlining added):

> "But one thing, I think, is clear in legal principle, morality and the authorities… that for acts or documents to be a 'sham', with whatever legal consequences follow from this, <u>all the parties thereto</u> must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

59. In light of the above[8], I was invited to note that, in pleading their proposed secondary case, the Claimants say (in paragraph 55(b) of the proposed Re-Re-Amended Particulars of Claim) that it is to be inferred that the arrangement between the Deceased and the Defendants (that the Defendants would effectively fund the rental payments under the lease, thereby rendering the lease a sham) was not shared with Mr Cawley – in other words, that Mr Cawley was not part of the dishonest scheme.

60. This being the case, so the Defendants say, if Mr Cawley was not dishonest (as the Claimants have pleaded) then RRL can also not have been dishonest such that the

[8] And also the more recent authority of ***Shalson v Russo*** [2005] Ch 281

lease cannot have been a sham (as the Claimants have also pleaded). In short, so the Defendants say, the proposed amendments are internally inconsistent and thereby flawed such that permission should not be granted.

61. The key, so it seems to me, appears in paragraph 56 of the proposed Re-Re-Amended Particulars of Claim. In that paragraph, the Claimants plead:

> "As agents of RRL, the dishonesty of the Second and Third Defendants is attributable to RRL".

62. The question, then, is whether the fact that one of the signatories to the lease was not dishonest means that as a matter of law RRL necessarily cannot have had a dishonest intention such that the lease cannot have been a sham. If so, then it would follow that the pleading cannot stand as it is – the Claimants would either have to plead that Mr Cawley was also a party to the dishonest scheme (which would be expressly contrary to their current proposed pleading in paragraph 55(b)) or they would have to accept that because one of the signatories was not dishonest, as a matter of law there can have been no sham.

63. In my judgment, however, while it is no doubt correct that the parties to a sham document must have a common intention that the document in question is not to create the legal rights and obligations which it gives the appearance of creating (as per ***Snook***), it does not follow, so it seems to me, that the mere fact that one of the signatories acting on behalf of a corporate party to the relevant document was innocent of the dishonesty (and indeed had been deceived by others acting on behalf of the corporate party) has the effect that that corporate party cannot have had the relevant intention thereby preventing the finding of a sham.

64. Putting the above into the context of the present case, while I accept that in order for the lease to have been a sham it will be necessary to show that both the Deceased (as the lessee) and RRL (as the lessor) had the relevant dishonest intention, if it transpires to be the case that at the time that the lease was signed on behalf of RRL both the Second and Third Defendants had the requisite dishonest intention but Mr Cawley did not (as the true position was kept from him), it does not necessarily follow that RRL

cannot be attributed with the necessary dishonest intention to support the plea of sham. Whether or not RRL can be said to have that intention (and therefore whether or not the plea of sham can be made out) is something, in my judgment, which can only properly be argued at trial. Once again, therefore, I see no reason to refuse permission to allow the proposed amendments.

(c) Further specific objection to the Claimants' secondary case: uncertainty as to whether or not the scheme would work

65. A further objection raised by the Defendants in relation to the Claimants' secondary case relates to the plea in paragraph 49(c) of the proposed Re-Re-Amended Particulars of Claim to the effect that the true nature of the agreement between the Deceased and the Defendants was that the latter would put the former into funds to pay the rent under the lease "in order to give a false impression to HMRC" that it was the Deceased who was in fact paying the rent.

66. The Defendants object to the above plea on the basis that, in order for it to succeed, it would need to be established that (1) the arrangement would in fact have caused an inheritance tax charge to be payable, and (2) the Deceased and the Defendants knew that this was the case. Indeed, so the Defendants say, if they did not know, then quite simply it would not have been possible for them to give a "false impression" to HMRC.

67. As to whether or not the arrangement would in fact have caused an inheritance tax charge to be payable, counsel for the Defendants made submissions to the effect that it was far from clear whether or not this was in fact the case. As to whether or not the Deceased and the Defendants knew that this was the case, counsel for the Defendants submitted that there was simply no basis for such an inference.

68. In my judgment, however, the above argument confuses outcome with intention. It does not matter whether the arrangement would in fact have succeeded. What does matter is whether the Deceased and the Defendants thought that this was or might be the case – and, in the present context, whether the primary facts pleaded are sufficient to justify such a plea.

69. It is further my judgment that they are. As already explained, it is on any basis clear that the Deceased sought professional advice with a view to gaining a tax advantage, participated in a scheme which gave the appearance of complying with that advice, but then expressly departed from that scheme in a way which, while continuing to giving the appearance of compliance to HMRC, in fact resulted in the Deceased not having to pay in any real sense the rent which he was required to pay in order legitimately to gain that tax advantage. As I have already found, those facts certainly give rise to an inference of dishonesty on the part of the Deceased and, in my judgment, those primary facts are also sufficient to give rise on the part of the Defendants to an inference that dishonesty is more likely than negligence or innocence. Again, therefore, I see no reason to refuse the proposed amendment on this basis.

(d) Specific objections to the Claimants' third case

70. The Claimants' third case assumes that at trial it is found that the Deceased and the Defendants entered into the Oral Agreement on the terms set out in the Defence – namely, that the Deceased agreed to transfer the properties in consideration of the Defendants agreeing to fund the Deceased for the rest of his life. Given, however, that the transfers also involved the leaseback of one of those properties at a rent, the reality, so it is pleaded, is that the money simply went around in a circle – thereby giving the impression to HMRC that there was compliance with the KPMG scheme for tax purposes but with the reality still being that no market rent was in fact being paid. On this basis, so the Claimants plead, the Forms TR1 and the lease were all shams such that the Oral Agreement – although, on this hypothesis, entered into on the terms suggested by the Second to Fifth Defendants – would be void and unenforceable. This being the case, so the Claimants say, the transfers once again have to be treated as gifts for the purposes of section 423 of the IA 1986.

71. Again, however, the introduction of the third case is criticised on similar grounds as before but the key question, so it seems to me, is whether, on the primary facts pleaded, an inference of dishonesty is more likely than one of negligence or innocence.

72. In ***Ivey v Genting Casinos (UK) Ltd*** [2017] UKSC 67, Lord Hughes (with whom the other members of the court agreed) said at [74]:

> "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."

73. This being the case, the issue can be put this way: would ordinary decent people be more likely to consider the scheme described above – by which a sham lease was executed and sham Forms TR1 were submitted resulting in a potential inheritance tax saving – dishonest. In my judgment, it is plain that they would. Again, therefore, it seems to me that the Claimants' third case is sufficiently pleaded and that it should be allowed to proceed to trial.

(e) A final overarching objection based on an alleged internal consistency

74. The final objection on the part of the Defendants is an overarching one and relates to an alleged inconsistency between, on the one hand, an essential element of the Claimants' claim and, on the other hand, the allegations of dishonesty and sham which the Claimants now seek to introduce by way of amendment.

75. The Defendants' argument is as follows. An essential element of the Claimants' claim under section 423 of the IA 1986 is that, when the Deceased transferred the properties to the Jersey companies, he did so for the purpose of putting those assets beyond the Claimants' reach. It therefore follows, so the Defendants argue, that it is also an essential element of the Claimants' claim that the Deceased knew of the Claimants'

actual or probable judgment debts at the time of the transfers. What the Defendants then go on to say is that, if the Deceased had in fact known of the above actual or probable judgment debts, he would necessarily also have known that his estate was (and would have been) worthless such that there would have been no inheritance tax payable whether or not he gifted the properties to the Jersey companies. Accordingly, so the Defendants say, either there can have been no dishonest scheme to evade IHT or sham lease – or, alternatively, if there was such a dishonest scheme, the Deceased cannot have appreciated the Claimants' actual or probable judgment debts against him such that he cannot have had an intention to put assets beyond the reach of the Claimants.

76. In my judgment, however, this argument has little or no merit. As at the time of the transfers of the properties, the Deceased had one judgment against him (in favour of the First Claimant) to the value of approximately £1.6 million[9]. That was less than the value of the properties at the time of the above transfers and accordingly, if he had died very shortly after the transfers, inheritance tax would (but for those transfers) have been payable. Importantly, however, even if he had contemplated that further judgments would follow, it is far from clear to me that it would have been obvious to the Deceased – as at the date of the transfers - that those potential judgments would be of a level sufficient to render his estate as at the date of his death worthless such that no inheritance tax would be payable. In general terms, it is far from clear to me that the Deceased was not trying to adopt a "belt and braces" approach to ensure that his assets did not fall into the hands of those he did not want to have them while at the same time ensuring that no IHT would become payable on his death.

77. In short, therefore, I do not agree that there is any internal consistency or logical flaw in the proposed introduction into the Re-Re-Amended Particulars of Claim of the allegations of dishonesty and sham.

(f) Other specific objections

[9] As stated in paragraph 8 (and footnote 1) above, in March 2006 the judgment sum was reduced to about £1.6 million before being restored to about £2.7 million in November 2006. Accordingly, as at the time of the transfers (in September and October 2006), the judgment debt stood at about £1.6 million.

78. As to the other specific objections raised by the Second to Fifth Defendants, these too, so it seems to me, can be approached on a similar basis. The primary facts can be analysed in various different ways but - given that on any footing they arise in the context of the Deceased taking tax advice in order to obtain a tax benefit, setting up a scheme which gave the appearance of complying with that advice (such that the tax benefit would be likely to be received), yet in fact blatantly ignoring that advice by way of an arrangement between the Deceased and the ultimate beneficiaries of the scheme – whichever way those facts are looked at, so it seems to me, an inference of dishonesty is more likely than one of negligence or innocence such that the pleas ought to be allowed to stand and the matter proceed to trial.

PART VII: CONCLUSION

79. In conclusion, therefore:

(1) As for the Claimants' application to amend, I find that the proposed amendments are unobjectionable. I therefore grant permission to the Claimants to file and serve Re-Re-Amended Particulars of Claim in the form attached to their application notice.

(2) As for the Defendants' application to strike out certain paragraphs of the Reply, it seems to me that this was effectively superseded by the Claimants' application to amend. I will therefore simply make no order on that application.

(3) As for the Claimants' application to amend the typographical error in its earlier application notice, no realistic objection was (sensibly) taken to this and so I will grant permission.

80. The parties are invited to agree the terms of an order. In the event that an order cannot be agreed, a short consequentials hearing will take place to deal with any outstanding matters including as to costs.

81. Finally, I conclude by expressing my gratitude to both counsel and their respective legal teams for the clear and helpful way in which the case was presented.

JPQC

December 2020