Neutral citation number: [2021] EWHC 1053 (Ch)

Case Nos: BL-2019-MAN-00134
E30MA305

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 10 February 2021

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

(REMOTELY VIA TEAMS)
- -

BL-2019-MAN-000134

Between :

(1) ASERTIS LTD
Claimant

- and –

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

Part 20 Claim:

MARK DAMIAN CLARKSON
Part 20 Claimant

-and-

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

(6) GMT GLOBAL (FZE)
(7) VIJAY PAL GANDHI
(8) RAJINDER KUMAR
Part 20 Defendants

E30MA305

MARK DAMIAN CLARKSON
Claimant

-and-

(1) FUTURE RESOURCES FZE
(2) MR PRADEEP SINGH
(3) HOLY GROUP LIMITED
(4) SURDASHAN SADANA
(5) WHITEACRES HOLDINGS LIMITED
(6) TEN ACRES HOLDINGS LIMITED
(7) ANDREW DAVID PICKLES
(8) CERTUS HOLDINGS LIMITED
Defendants

- -
- -

MR WILLIAM BUCK and **MISS KRISTINA LUKACOVA** (instructed by **TWM Solicitors LLP**) appeared for the Claimant and the First Part 20 Defendant in **BL-2019-MAN-000134**

MR WILLIAM BUCK and **MISS KRISTINA LUKACOVA** (instructed by **Fladgate LLP**) appeared for the Second to Eighth Part 20 Defendants in **BL-2019-MAN-000134** and the Second to Fifth Part 20 Defendants in **E30MA305**

MR MARK CLARKSON appeared in person

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APPROVED JUDGMENT

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[Paragraphs 135 – 142 below were missing from the transcript due to the recording being partially corrupted and have been reconstructed from the notes made by the legal and unaccredited media representatives and the Judge's reconstruction of the judgment.]

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JUDGE HODGE QC

1. This is my extemporary judgment in case numbers BL-2019-MAN-000134 and E30MA305. Over the last weekend Labour's Shadow Attorney-General described (in terms for which he later apologised) the coronavirus pandemic as a *"gift that keeps on giving for lawyers"*. The fact that this is the first of two cases in my list for this week that arise out of the concealment of the ultimate beneficial ownership of corporate property investment vehicles rather suggests that they can more properly be considered as the gift that keeps on giving for lawyers.

2. This is the hearing of a number of applications made in two sets of proceedings: claim number BL-2019-MAN-000134, which was transferred from London by order dated 6 October 2020 so that applications in that case could be heard together with an application in claim number E30MA305. I will refer to the former claim as *"the London proceedings"* and the latter claim as *"the Manchester proceedings"*.

3. Mr William Buck (of counsel) appears with Miss Kristina Lukacova (also of counsel) on behalf of Asertis Limited, the claimant and the first Part 20 defendant in the London proceedings (instructed by TWM Solicitors LLP). They also appear for the second to the eighth Part 20 defendants in the London proceedings, of whom the second to fifth Part 20 defendants (*"the lenders"*) are also defendants in the Manchester proceedings, instructed by Fladgate LLP.

4. In summary, the Manchester proceedings concerned claims brought by Mr Mark Clarkson, who is the first defendant to the London proceedings, seeking various declarations concerning a substantial short-term loan taken out by Ten Acres Holdings Limited (*"Ten Acres"*) from the lenders as to which default had occurred. As part of that claim, Mr Clarkson had asserted that he was the ultimate beneficial owner of a property in Manchester called Ten Acres which had been purchased using the lenders' moneys and was held in Ten Acres' name.

5. It is said by the lenders that Mr Clarkson had disguised his alleged ultimate beneficial interest in Ten Acres and the property from them having hidden behind a frontman, a Mr Pickles, in the knowledge that had Mr Clarkson been identified by the lenders as the ultimate beneficial owner, they would have lent no money to Ten Acres. That is because Mr Clarkson was married to a person who had been convicted of mortgage fraud. Mr Clarkson has pointed out that his wife had been sentenced only to two, consecutive, nine-month sentences, that she had been released after only nine weeks, and that her case is currently before the Criminal Cases Review Commission, having previously been to the Court of Appeal (Criminal Division).

6. In the Manchester proceedings, Mr Clarkson asked the court to recognise his alleged equitable interest as against the lenders. That led to an application by the lenders to strike out Mr Clarkson's claim. After one adjourned hearing, the matter was settled on the terms set out in the schedule to a Tomlin Order (*"the settlement agreement"*) which included a declaration, in effect, by Mr Clarkson that he had no beneficial interest in either Ten Acres or the property.

7. In respect of the settlement agreement, Mr Clarkson had been represented by his current solicitors, Taylors, and by leading counsel. The matter had returned to this court on 8 November 2019 after Mr Clarkson's refusal to comply with the terms of the settlement

agreement requiring him to remove certain unilateral notices in relation to the property at the Land Registry.

8. The lenders, having sought an order for specific performance, faced arguments from Mr Clarkson that the settlement agreement was unenforceable as a penalty, and he also complained that he had been the subject of a conspiracy against him.

9. As to that conspiracy, it was said that the lenders had colluded to obtain the property from Mr Clarkson for themselves by forcing him into the settlement agreement whilst then preventing him from obtaining further borrowings from a lender called FundingSecure Limited which would have allowed Ten Acres to pay off the lenders.

10. At that hearing I had rejected Mr Clarkson's arguments, holding that the settlement agreement was enforceable, and ordering its enforcement, and that, by the terms of that settlement agreement, Mr Clarkson had released any claim he might have had to the ultimate beneficial ownership of the property.

11. That should have brought an end to the Manchester proceedings. The property was subsequently sold by receivers, albeit the receipts did not cover the sums due to the lenders from Ten Acres under the terms of the settlement agreement. In other words, and contrary to Mr Clarkson's assertions, it is said that the lenders did not obtain any windfall.

12. As to the London proceedings, these were originally commenced by FundingSecure Limited, an online peer-to-peer lending platform, against both Mr Clarkson and a range of other defendants. Following the entry of FundingSecure into administration in October 2019, that claim was then assigned to the current claimant in the London proceedings, Asertis Limited.

13. What is alleged by Asertis is that Mr Clarkson, in conspiracy with others, fraudulently obtained large sums from FundingSecure and its customers, who were members of the public, by either simply taking money from FundingSecure's account and/or creating post-event loan agreements to cover unauthorised borrowings.

14. Mr Clarkson and the other defendants, being the second to fourth and the sixth to eighth defendants in the London proceedings, deny any wrongdoing, but they are said variously to admit to having received monies from FundingSecure. Mr Clarkson himself admits to owing FundingSecure (and now Asertis) the sum of £6,639,447.77, with the other defendants admitting separate, but lesser, sums.

15. There had been a fifth defendant to the London proceedings, a Mr Luxmore. The claim against him differed from those against Mr Clarkson and the other defendants in certain respects. The claim against Mr Luxmore was compromised and stayed by a Tomlin Order approved on 3 November 2020. Mr Luxmore thereupon disappears from the picture; and any reference to the defendants to the London proceedings in this judgment should be taken to exclude Mr Luxmore.

16. As part of the London proceedings, FundingSecure had obtained a freezing injunction against Mr Clarkson and Mr Luxmore alone in June 2019, which was granted by Mr Arnold J. Mr Clarkson issued an application to discharge that freezing injunction on 9 July 2019, but that application has continually been adjourned by consent. That

injunction was continued by Asertis, as the new claimant, by a consent order agreed with Mr Clarkson.

17. On 20 May 2020, Mr Clarkson, and the other defendants in the London proceedings, applied for permission to issue a Part 20 claim against Asertis and the Part 20 defendants, who were to be added to the London proceedings. That hearing was heard without notice by Master Kaye on 29 July 2020, with permission being granted.

18. A Part 20 claim, issued by Mr Clarkson alone, was served in September 2020. On 2 October 2020, Asertis and other Part 20 defendants issued various applications for strike-out and summary judgment, and to enforce yet again the terms of the settlement agreement. It should be noted that the Part 20 claim is advanced by Mr Clarkson only as a set-off against Asertis's claim. It is said that that is in circumstances where Mr Clarkson and the other defendants to the London proceedings have admitted substantial liabilities to Asertis.

19. The following applications have been listed for determination at this remote hearing, which started on Monday 8 February 2021. First, there are applications by the Part 20 defendants in the London proceedings, dated 2 October 2020, for orders that Mr Clarkson's Part 20 claim be struck out pursuant to CPR 3.4(2) and/or the court's inherent jurisdiction. CPR 3.4(2)(a) and (b) enable a statement of case to be struck out on the ground that it discloses no reasonable grounds for bringing a claim and/or that it is an abuse of the court's process.

20. Further or alternatively, the Part 20 defendants seek summary judgment on the Part 20 claim pursuant to CPR 24.2. That enables a court to grant summary judgment if the court considers that a claimant has no real prospect of success on his claim, and there are no other compelling reasons why the case should be disposed of at a trial.

21. The application also seeks an order revoking or setting aside, pursuant to CPR 3.1(7) and/or the court's inherent jurisdiction, the order of Master Kaye dated 29 July 2020 on account of Mr Clarkson's asserted failure to comply with his duty of full and frank disclosure.

22. So far as material, that order had given Mr Clarkson permission to bring the Part 20 claim. Permission had been required under CPR 20.4(2)(b) because Mr Clarkson was seeking to advance a counterclaim against Asertis after he had already served his defence. He also required permission to bring the claim against the additional Part 20 defendants under CPR 20.5 because they were additional parties to the London proceedings.

23. Secondly, there is the lenders' application in the Manchester proceedings, also dated 2 October 2020, for an order requiring Mr Clarkson, who had been the claimant in the Manchester proceedings, to comply with the settlement agreement and the terms of the schedule to the Tomlin Order dated 15 November 2018 and, as a result, to discontinue, as against the lenders, his Part 20 claim.

24. Thirdly, there is an application by Asertis in the London proceedings, also dated 2 October 2020: (1) for summary judgment against Mr Clarkson and the other defendants in the London proceedings, pursuant to CPR 24.2, on a number of issues, or alternatively judgment based on admissions pursuant to CPR 14.3, or alternatively, an

order for interim payments pursuant to CPR 25.7(1)(a) and/or (c); (2) that paragraph 52 of the defence of Mr Clarkson and the other defendants to the London proceedings, which contains an allegation of set-off, be struck out, pursuant to CPR 3.4(2)(a) or (b), or the court's inherent jurisdiction, and/or for summary judgment thereon, pursuant to CPR 24.2. Again, there is an application that Master Kaye's order be set aside.

25. Finally, there is an application that the Part 20 claim be struck out pursuant to CPR 3.4(2)(a) and/or (b) and/or under the court's inherent jurisdiction.

26. There is also an application by Mr Clarkson and the other defendants in the London proceedings, by notice dated 26 January 2021, to re-amend their defence.

27. In summary, what is said by Asertis and the other Part 20 defendants is that when Mr Clarkson's Part 20 claim is considered, the allegations now being made by him are exactly the same as those he was advancing at the hearing on 8 November 2019 before me. Mr Clarkson is said to be regurgitating the same complaints he had made back in 2019, albeit that he has now thrown in both Asertis and Mr Kumar for good measure, conveniently, so it is said, thereby also setting up a set-off defence to the admitted liability to Asertis. The basis of the Part 20 claim is said to be unaltered and as hopeless as it was in 2019. It is on that basis that Asertis and the Part 20 defendants seek, in the London proceedings, to strike out Mr Clarkson's Part 20 claim on the basis: (1) that it is a blatant abuse of process as it is contrary to my existing finding that Mr Clarkson had lost any interest he may have had in the property; and (2) to the extent that there was anything new in what Mr Clarkson has to say, he could, and should, have brought that before the court in November 2019.

28. In any event, it is said that Mr Clarkson comes before the court with the dirtiest of hands. By his own evidence, he is said to be a fraudster who is coming to this court yet again asking it to recognise his alleged interest in the property despite having deliberately lied about that alleged interest to the lenders, thereby inducing them to lend money to Ten Acres. Without that interest in the property, it is said that he has suffered no loss.

29. It is also said that his claim in conspiracy is woeful, pleading no primary facts to allege dishonesty, and that it should be struck out. It is also said that his other so-called scattergun allegations have no merit.

30. In the Manchester proceedings the lenders seek an order for specific performance of the settlement agreement which had required Mr Clarkson not to seek to re-litigate matters as to which he had agreed that he had no interest in the property. It is said that in the absence of any Part 20 claim, Asertis is entitled to judgment on the admitted debts owed by Mr Clarkson. It is also entitled to judgment against the other defendants in the London proceedings. It therefore seeks such judgments in the London proceedings.

31. Also before the court are two applications in the London proceedings arising out of the freezing order granted by Arnold J on 4 June 2019. First, by application notice dated 5 June 2019, Asertis seeks the continuation of the freezing order; and, secondly, by application notice dated 9 July 2019, Mr Clarkson seeks the discharge of the freezing injunction.

32. In respect of both of these applications, Mr Clarkson and Asertis concluded a consent order by which those applications were to be listed at this hearing, but for directions only. It was only after the conclusion of that consent order that Taylors, on behalf of Mr Clarkson, have sought to have the discharge application listed for substantive hearing.

33. At the outset of this hearing on Monday, Mr Stephen Cogley QC, then appearing for Mr Clarkson and the other defendants in the London claim, applied to discharge, or alternatively to vary, the freezing order and then for the court to adjourn the further hearing of the other matters. For reasons that I set out in an extemporary judgment delivered on Monday morning, I dismissed that application, and I refused permission to appeal.

34. After I had declined the adjournment, Mr Cogley, expressly on behalf of Mr Clarkson and all the other defendants to the London proceedings (excluding of course Mr Luxmore) consented to Taylors coming off the record as their solicitors. Thereafter, as he had indicated that he would, Mr Cogley withdrew from the case and Mr Clarkson has continued as a litigant in person. I was told that the other defendants to the London proceedings were all aware of this hearing and that Mr Clarkson personally had received the skeleton argument from Mr Buck and Ms Lukacova. According to the solicitors, Taylors, the other defendants to the London proceedings have left it to Mr Clarkson to advance their defence. None of them has attended this hearing.

35. Mr Cogley's parting gift to the court had been to refer it to the decision of Mrs Justice Cockerill in the case of *Recovery Partners GB Limited v Rukhadze* [2018] 2918 (Comm) and reported at [2019] Bus LR 1166. He drew the court's specific attention to paragraphs 442 and following of the judgment on the requirements for a claim in conspiracy. Mr Cogley, as I say, then withdrew from the case.

36. Mr Cogley had, however, prepared and served a written skeleton argument in which he had briefly addressed the merits of the applications to strike out the Part 20 claim and for summary judgment (at paragraphs 13 to 20 of his skeleton). He had done so in order to counter any suggestion that the Part 20 claim was amenable to either strike out or summary judgment. He had identified the basis of the Part 20 applications at paragraph 16 and he had sought to provide a short answer to those points at paragraphs 17(c) to (g) and paragraphs 18 to 20. I have borne what Mr Cogley had to say in his skeleton argument firmly in mind in the course of these proceedings.

37. Since it was about 12.50 pm when Mr Cogley withdrew from the case, the court rose early for lunch, resuming at 1.40. Mr Buck then addressed the court for about three hours. Since Mr Clarkson was then unrepresented, and bearing in mind the requirement at CPR 3.1A(4) for the court to adopt such procedure as it considers appropriate to further the overriding objective, during the course of Mr Buck's oral submissions I sought to identify and articulate any points which Mr Clarkson or the other defendants to the London proceedings might seek to raise.

38. As I say, Mr Buck addressed the court for a little under three hours. The court then adjourned at 4.35 pm until 10.30 am on Tuesday 9 February. Mr Buck then addressed me for a further 25 minutes. I then heard from Mr Clarkson, and finally from Mr Buck. The hearing concluded at about 12 noon yesterday when the court adjourned until 10

o'clock this morning, Wednesday 10 February 2021, for me to map out this extemporary judgment.

39. The evidence on this application was extensive. Last Thursday I had been asked to download a PDF file containing 3,600 pages. On the following day, Friday, I was invited to download a replacement PDF file which had by then expanded to 4,036 pages. I was then presented with a supplemental bundle of a further 332 pages. I was provided with a joint authorities bundle of 1,262 pages. Further authorities, including that identified by Mr Cogley, were submitted during the course of the hearing. Mr Buck and Ms Lukacova had identified suggested pre-reading for the court at paragraph 22 of their skeleton argument. Mr Cogley had identified further suggested pre-reading at the beginning of his skeleton argument on page 2. Mr Buck provides a more detailed factual overview of the case at paragraph 25.1 of his skeleton argument onwards.

40. He deals first with the Manchester proceedings. In 2017, Mr Clarkson, on his own account, wished to buy a potential development site in Manchester, but he needed the finance to do so, and so arranged for an approach to be made to the lenders, seeking funds to purchase the property. It is said that he hid his identity from potential lenders due to concerns that they would find out about his wife's mortgage fraud convictions. To this end, Mr Clarkson says he set up corporate structures involving a Belize company and a Nevis offshore trust; and he deployed a certain Mr Pickles as his *"front man"* (to use Mr Clarkson's own description). Mr Clarkson has told me that that is not a wholly accurate version of events.

41. Following a series of representations said to have been orchestrated by Mr Clarkson, and supported by documents as to the legitimacy of the proposed transaction, the authority of Mr Pickles to act on behalf of the purchasing entities, and Mr Pickles' asserted status as the ultimate beneficial owner of the entire scheme, rather than Mr Clarkson (of whom there had been no mention), the lenders provided short-term funding of about £8.3 million to Ten Acres to enable it to purchase the property. Ten Acres subsequently defaulted on the loan and the lenders pursued their rights pursuant to the loan documentation to take control of Whiteacres, the sole shareholder of Ten Acres. It is said that it is only at this point that Mr Clarkson came out of the shadows, alleging that it was he who was the ultimate beneficial owner of the issued shares in Whiteacres which were registered in the name of a Nevis entity known as TCP, and hence, in turn, of Ten Acres and the property.

42. Mr Clarkson commenced the Manchester proceedings seeking a series of declarations, including as to the alleged invalidity of the loan documentation. The lenders, as well as Whiteacres and Ten Acres, who were the fifth and sixth defendants in the Manchester proceedings respectively, and were then under the control of the lenders, applied for strike out and/or summary judgment given what they assert was Mr Clarkson's blatantly fraudulent conduct.

43. On 12 November 2018, Mr Clarkson, then represented by his solicitors, Taylors, and by Miss Lesley Anderson QC, together with the lenders, Ten Acres, Whiteacres and GMT Global (FZE), an assignee, entered into a settlement agreement pursuant to which Ten Acres agreed to make a series of payments to discharge its liability to the lenders. The settlement agreement provided that in the event of default, the lenders were to be the legal and beneficial owners of Whiteacres and thus, indirectly, of Ten Acres. The settlement agreement also contained an agreement by Mr Clarkson that he had no legal

or beneficial interest in any aspect of the corporate structure in existence which owned the property.

44. Importantly, it is said, the settlement agreement provided that if the debt to the lenders was repaid in full and on time by Ten Acres, the lenders would transfer their shares in Whiteacres back to TPT. It would then be a matter for TPT as to what it did with those shares. The terms of that settlement agreement were recorded in the schedule to the Tomlin Order dated 15 November 2018.

45. Ten Acres subsequently defaulted under the settlement agreement in March 2019. The lenders and Asertis say that this should have been the end of the matter in the light of the terms of the settlement agreement. It is Mr Clarkson's case that it was FundingSecure, in collusion with the lenders, who engineered a default under the settlement agreement with a view to the lenders' irrevocable takeover of Ten Acres and thus the property.

46. Turning to the London proceedings, these were issued by FundingSecure, an FCA-regulated online peer-to-peer lending platform which facilitated short-term loans matching borrowers with lenders. It is common ground that Mr Clarkson had dealings with FundingSecure between 2015 and 2018, both individually and through a series of nominees, arranging for Mr Clarkson to borrow money from FundingSecure and clients, who were members of the public. FundingSecure alleged and, following the assignment of its claim to Asertis, Asertis now alleges that the loans were obtained by fraud involving, amongst others, a conspiracy with a former director of FundingSecure, Mr Luxmore.

47. It is Asertis's case that Mr Clarkson dishonestly obtained some £8.155 million. It was in those circumstances that, in June 2019, FundingSecure issued the London proceedings and obtained a freezing order against Mr Clarkson and Mr Luxmore from Arnold J on 4 June 2019. That freezing order remains in place. It is said by Mr Clarkson that its continuation has considerably hindered his defence of the London proceedings and his assertion of his Part 20 claim.

48. In the autumn of 2018 FundingSecure had found itself in financial difficulty; it is said that this was as a result of the alleged fraud, although the cause of the financial hole was not then known. It was in need of external investment, which was provided by Mr Rajinder Kumar, the eighth Part 20 defendant. He became a director and shareholder of FundingSecure on 12 October 2018. Subsequently, there was further investment from a company called EZ Invest Limited, of which a Mr Vijay Gandhi, the seventh Part 20 defendant, was a director. He became a director of FundingSecure in May 2019. Mr Gandhi was also a director of Holy Group Limited, which was one of the lenders and a defendant to Mr Clarkson's claim in the Manchester proceedings.

49. It is said that Mr Gandhi and Mr Kumar have confirmed in evidence that they only came to know each other in mid-December 2018 when they were introduced by a solicitor, a Mr Chatrath. He is said to have confirmed that in evidence. That account is also said to be supported by contemporaneous evidence in various WhatsApp correspondence in relation to the introduction. There is said to be no evidence of the two of them having had any prior dealings with each other.

50. Mr Buck invites the court to note that Mr Clarkson expressly pleads in his Part 20 claim that by the end of March 2018, that is to say over eight months earlier, the lenders, Mr Rajinder Kumar and FundingSecure had entered into an agreement or combination to obtain the property for themselves. There are said to be several fundamental problems with this allegation; but Mr Buck invites the court to note at the outset: (a) that neither Mr Gandhi or Mr Kumar had become directors of FundingSecure at that point, and nor are they alleged to have exercised control over FundingSecure in any other way; and (b) Mr Kumar is not one of the lenders, he has no interest in any of the lender companies, he was not a party to the settlement agreement, and he is not alleged to have benefited from the alleged conspiracy in any way.

51. Mr Buck sets out to address Mr Clarkson's challenge in the Manchester proceedings. Following Ten Acres' event of default under the settlement agreement in September 2019, Mr Clarkson started to write to the lenders (through his solicitors) raising certain complaints, including that some of the terms of the settlement agreement were unenforceable penalties. Separately, the lenders sought to appoint a receiver to sell the property. Mr Clarkson has told me that the actual appointment came much later in time.

52. However, a number of unilateral notices which remained registered against the titles to the properties were posing problems for any disposal of the property. These should have been removed by Mr Clarkson pursuant to his obligations under the settlement agreement, but he had failed to do so. That led the lenders, on 28 October 2019, to issue an application to enforce the terms of the settlement agreement as recorded in the Tomlin Order, and to seek an order for specific performance against Mr Clarkson.

53. In response, Mr Clarkson sought to challenge the settlement agreement. Represented by solicitors and counsel, Mr Clarkson presented to the court a draft particulars of claim prepared by Mr Neil Berragan (of counsel) which he said he wished to pursue. He also made direct allegations, as set out in his evidence to the hearing in Manchester, that he had been the subject of a fraud perpetrated against him, with the aim of depriving him of any beneficial interest in the property. It is said that those are the same allegations that he now repeats in the Part 20 claim.

54. On 8 November 2019, at a contested hearing before me, I dismissed all of the arguments advanced by Mr Clarkson through his then counsel, Ms Tina Ranales-Cotos. I held that Mr Clarkson held no interest in Ten Acres, and thus no interest in the property, and that the settlement agreement was enforceable; and I granted the lenders' enforcement application. I am told that there was no appeal against my judgment.

55. Following Mr Clarkson's removal of the unilateral notice, receivers were appointed and the property was sold - it is said at arms' length - on 13 February 2020, for about £13 million. The net sale proceeds, after deduction of professional costs, were a little under £13 million. That was less than the amount said to be due under the settlement agreement at that point. In other words, it is said that the lenders did not recoup all the sums due to them under the settlement agreement, and they were left marginally out of pocket. Mr Clarkson questions the value for which the property was sold.

56. I have already referred to the successful application to Master Kaye on 29 July 2020 for permission to bring the Part 20 claim. It is said that in that Part 20 claim Mr Clarkson is seeking to revive the allegations he had made in the Manchester proceedings of a conspiracy by the Part 20 defendants to obtain the property for themselves by, amongst

other things, preventing FundingSecure lending Mr Clarkson the necessary money to cover the instalments under the settlement agreement.

57. The first basis advanced for the Part 20 defendants' application to strike out the Part 20 claim, or for summary judgment against Mr Clarkson thereon, is that he is barred from pursuing the Part 20 claim by the doctrine of *res judicata*, or abuse of process. Mr Buck develops that argument at paragraphs 29 through to 46 of his written skeleton argument.

58. He refers me to Lord Keith's explanation of issue estoppel in *Arnold v National Westminster Bank* [1991] 2 AC 93 at 105D. He refers me to the well-known statement of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100. That concludes with the statement:

> *"The plea of* <u>*res judicata*</u> *applies, except in special cases, not only to the points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

59. Mr Buck also refers me to observations of Lord Bingham in *Johnson v Gore-Wood* [2002] 2 AC 1 at 31A-D. These include the statement that:

> *"... [The] approach... should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."*

60. Earlier in that short passage Lord Bingham had emphasised that the bringing of a claim, or the raising of a defence, in later proceedings may, without more, amount to abuse if the court is satisfied, the onus being on the party alleging abuse, that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.

61. Mr Buck points out that in *Johnson* Lord Bingham also held that the *Henderson v Henderson* principles apply with at least equal force where the first proceedings have been compromised by settlement.

62. He also emphasises, by reference to *Aldi Stores Ltd v WSP Group Plc* [2008] 1 WLR 748 at [6], that the *Henderson v Henderson* principle is not restricted to proceedings between the same parties.

63. Having set out what are said to be the relevant facts at paragraphs 35 through to 37 of his skeleton argument, and the events following Ten Acres' default at paragraphs 38 to 40, Mr Buck submits that by the time of the hearing before me on 8 November, the allegations now made in the Part 20 claim had been raised and articulated by Mr

Clarkson in his statement in support of the discharge application dated 6 August 2019 at paragraphs 31 to 35, and in his statement in opposition to the enforcement application, dated 4 November 2019, at paragraphs 12 and 16.

64. At the 8 November 2019 hearing, Mr Clarkson, through his then counsel, had presented the draft particulars of claim to the court and had sought an adjournment of the 2019 enforcement application so as to allow him to bring proceedings to challenge, as unlawful penalties, certain provisions of the settlement agreement. His counsel also submitted that the lenders had mounted a pincer movement to secure a stranglehold on Mr Clarkson's funds to enable the lenders to be repaid.

65. Mr Buck relies on the basis for my dismissal of Mr Clarkson's application to adjourn, and for my grant of the substantive relief sought by the lenders on the October 2019 application. He relies upon my finding that Mr Clarkson was no longer in any position to seek to rely upon his ultimate beneficial ownership of shares in Whiteacres, and thus the property, in order to challenge the settlement agreement. Since Mr Clarkson lacked the necessary standing to challenge the settlement agreement, because he was precluded from asserting that he was the ultimate beneficial owner of Whiteacres, then it had been pointless to prolong matters and to grant him an adjournment.

66. Mr Buck sets out his submissions at paragraph 44 through to 46 on *res judicata* and abuse of process. It is said that Mr Clarkson is barred from pursuing the Part 20 claim for the following reasons:

(1) Pursuant to the settlement agreement, it is the lenders who are the legal and beneficial owners of the shares in Whiteacres. That is said to have been the effect of my judgment.

(2) I also held that Mr Clarkson had released, and thus lost, any contention he might have had to be the ultimate beneficial owner of the shares in Whiteacres. By his own actions, Mr Clarkson was held to have walked away from any ability to later claim such an entitlement, and he cannot now be heard to seek to re-argue that contention.

(3) The current contention of Mr Clarkson that he has that entitlement is critical to his claim of unlawful means conspiracy and resultant financial loss. If that entitlement were lost, it was as a result of the settlement agreement.

(4) The issue of the enforceability of that settlement agreement was decided in November 2019. The lenders had applied to enforce the terms of the settlement agreement as recorded in the Tomlin Order. The enforceability (or otherwise) of that agreement was a necessary issue at the hearing before me; and the enforcement application succeeded before me. There was no appeal against my judgment.

(5) In the circumstances, the issue of Mr Clarkson's alleged entitlement as ultimate beneficial owner of the shares in Whiteacres, and of the enforceability of the settlement agreement, are matters of issue estoppel.

(6) To the extent that any issues relevant to the enforceability of the settlement agreement were not before me in November 2019, they could, and should, have been so raised by Mr Clarkson at that time. In particular, Mr Clarkson's own evidence in opposition to the enforcement application, and his earlier evidence in support of the

discharge of the freezing injunction in the London proceedings, had contained the allegations of conspiracy which are now made in the Part 20 claim. If they had been known by Mr Clarkson no later than 6 August 2019 - the date of his witness statement in support of the discharge application - they should have been pursued three months later.

(7) Separately, the draft particulars of claim presented to the court in November 2019 contained substantively the same allegations as those now made in relation to the Consumer Credit Act. In particular, in the draft particulars of claim Mr Clarkson had alleged that certain clauses of the settlement agreement were unenforceable penalty provisions. Those were the same terms that Mr Clarkson now alleges to be inherently unfair.

(8) Mr Clarkson is therefore barred from pursuing the Part 20 claim due to issue estoppel and/or the principles in *Henderson v Henderson*.

67. GMT, Mr Gandhi and Mr Kumar likewise rely on *Henderson v Henderson*, as they are entitled to do even though they were not party to the Manchester proceedings. This is said by Mr Buck not to be a case where there might be legitimate reasons for a claimant to bring an action against certain parties only in the first instance, and then to bring a further action against the other parties later. A conspiracy claim involves allegations of a single conspiracy between several individuals and entities and cannot be brought against some of the allege co-conspirators first and others later.

68. For all of these reasons, Mr Buck submits that Mr Clarkson is debarred from bringing the Part 20 claim on the grounds of *res judicata* and abuse of process and that the Part 20 claim should be struck out.

69. Mr Buck expanded upon those submissions orally. Mr Buck emphasised that Mr Clarkson's belief in the conspiracy, which he had advanced in his witness evidence in support of his application to discharge the freezing injunction, now formed the essential focus of his Part 20 claim. It is said that in that evidence Mr Clarkson had evidenced his knowledge of a coming together of Mr Gandhi and Mr Kumar, and of the lenders and SecureFunding, in an endeavour to take his alleged interest in Ten Acres away from him. In his witness statement for the November 2019 hearing, Mr Clarkson had alleged collusion between the conspirators and FundingSecure expressly in order to stifle his claim to challenge the settlement agreement, and to have engineered the previous act of default. Yet his draft particulars of claim, produced to the court in November 2019, had included no claim in conspiracy even though it had been identified in both the FundingSecure and the Manchester proceedings.

70. At the hearing on 8 November 2019, Mr Clarkson had sought an adjournment on the express basis that, as the ultimate beneficial owner of Ten Acres, he should be heard by the court and permitted to pursue the argument that the terms of the settlement agreement were penalty clauses. He would have had to assert some interest in the Ten Acres property. At that time he had knowledge of all the material details of the alleged conspiracy.

71. Why, Mr Buck asks rhetorically, could Mr Clarkson not have brought his present claim between August and November 2019? He had all of the basic factual material, and he had been aware of all material facts upon which he now relies. Mr Buck acknowledges

that the conspiracy did not give rise to an issue estoppel, but he submits that his clients were entitled to rely on *Henderson v Henderson* abuse of process. Mr Clarkson's ultimate beneficial ownership of the shares in Whiteacres was a critical aspect of his claim, and that itself was covered by the doctrine of issue estoppel.

72. I put to Mr Buck that at the time the matter came before me in November 2019, Mr Clarkson had not been challenging the validity of the settlement agreement. Mr Buck's response was that he was claiming to be the ultimate beneficial owner of Ten Acres, and so he was challenging the enforceability of the settlement agreement. The wider *Henderson v Henderson* abuse of process principle operated outside the bounds of issue estoppel. I was not simply determining whether there should be an adjournment. I went on to enforce the settlement agreement by granting the lender's application for substantive relief. I expressly determined that, by the settlement agreement, Mr Clarkson had walked away from any ability to claim to be the ultimate beneficial owner of Ten Acres. Mr Clarkson is now seeking to challenge the settlement agreement by claiming to be that ultimate beneficial owner. Those were the submissions.

73. Mr Buck rightly points out that the whole of Mr Clarkson's Part 20 claim is predicated on the proposition that he was the ultimate beneficial owner of Whiteacres and, through it, of Ten Acres and the Ten Acres site. Without that assertion of ultimate beneficial ownership, Mr Clarkson can point to no loss that he has suffered as a result of the alleged conspiracy. The effect of my decision in November 2019 is that Mr Clarkson was precluded by the terms of the settlement agreement from asserting such ultimate beneficial ownership. Whilst the settlement agreement is valid and subsisting, the doctrine of *res judicata*, or at least the doctrine of issue estoppel, prevents Mr Clarkson from asserting his ultimate beneficial ownership of the Ten Acres site. However, in his present Part 20 claim Mr Clarkson seeks to challenge the validity of the settlement agreement. He claims to have it set aside. That was not a claim that was advanced before the court in November 2019. I think that Mr Buck recognised, correctly, that such a challenge falls outside the scope of *res judicata* and issue estoppel principles. It is for that reason that Mr Buck relies upon *Henderson v Henderson* abuse of process.

74. When dealing with that argument on abuse of process, it is, in my judgment, important to note the limited nature of the application and argument that was before the court on 8 November 2019. The skeleton argument of counsel then appearing for Mr Clarkson had sought an order adjourning the application pending the determination of Mr Clarkson's claim that the terms of settlement in issue were penalty provisions which were unenforceable and of no effect. At paragraph 16.3 of the skeleton argument, the issue at the heart of the prospective claim was said to relate directly to the enforceability of the settlement terms. It was said that they constituted an unlawful penalty.

75. My extemporary judgment bears the neutral citation number [2019] EWHC 3830 (Ch). It is to be found at pages 773 and following of the hearing bundle. At paragraph 12, I made it clear that for the purposes of the present application, I was content to proceed on the footing that the claimant, or someone entitled to challenge the settlement agreement, had an arguable case that the provisions were indeed unlawful penalties in accordance with the authoritative re-statement of the law by the Supreme Court in the conjoined cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172.

76. At paragraph 15, I made it clear that I rejected the application for an adjournment, and I set out my reasons. At paragraph 19, I made it clear that I approached the lenders' application to enforce the settlement agreement incorporated within the Tomlin Order on the footing that there was an arguable case that the relevant clauses were unlawful penalties. I went on to say that it did not seem to me, in the light of the provisions of the settlement agreement, that the claimant was in any position to contend that any of the provisions of the settlement agreement constituted unlawful penalties. That was because of the release in clause 6 and the agreement not to sue in clause 7, when read also with acknowledgment in the last sentence of clause 4.5 of the settlement agreement.

77. At paragraph 21 I said that it seemed to me that the assertion that Mr Clarkson was the ultimate beneficial owner of the shares in Whiteacres was an essential part of the claim which had been expressly released by clause 6. It therefore seemed to me that Mr Clarkson was no longer in any position to seek to rely upon his ultimate beneficial ownership of the shares in Whiteacres in order to challenge the settlement agreement.

78. At paragraph 24 I said that whether for good or ill, and whether or not the lenders might obtain a windfall, the fact was that by the terms of the settlement agreement, entered into it with the benefit of legal advice from solicitors and leading counsel, the claimant had bargained away his right to assert that he was the ultimate beneficial owner of the shares in Whiteacres as against the lenders.

79. At paragraphs 26 to 28 I said this:

> *"26. Miss Ranales-Cotos submitted that the lenders had mounted a pincer movement to secure a stranglehold on Mr Clarkson's funds to enable the lenders to be repaid. She submitted that an adjournment for a few short months would be proportionate, given: (1) The value attributed to the property, some £26·5m on a forced sale basis, and a residual value of in excess of £37m (which Mr Clarkson asserted was less than the true value, which he had put at £40m); (2) the fact that the lenders were adequately secured; and (3) the fact that interest continued to accrue. She also prayed in aid Mr Clarkson's concerns about money laundering.*
>
> *27. She submitted that the court should adjourn the matter to allow the issue concerning the penalty clauses to be determined. The fact is, however, that if Mr Clarkson lacks the necessary standing to challenge the settlement agreement because he is precluded from asserting that he is the ultimate beneficial owner of Whiteacres, then it would be pointless to prolong matters and to grant an adjournment. The lenders assert that they have a beneficial sale in view which may be lost if the hearing of this application is delayed.*
>
> *28. I therefore reject the application for an adjournment."*

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

81. I am not satisfied that the Part 20 claim should have been raised in the Manchester proceedings. I do not consider that it is an abuse on the part of Mr Clarkson to raise the Part 20 claim now, even though based on facts which he had already identified by November 2019 but which he had chosen not to pursue as a basis for a challenge to the settlement agreement at a time when he was seeking an adjournment of the application to enforce the terms of the settlement agreement.

82. The hearing in Manchester in 2019 was simply an application to enforce the terms of the settlement agreement. Mr Clarkson challenged it solely on the basis that it contained what he said were penalties. He was mounting no challenge to have the settlement agreement set aside. That is what he now seeks to maintain by the Part 20 claim.

83. I do not consider that it is an abuse of process for Mr Clarkson now to be raising that different claim when he did not do so in response to the lenders' application. In my judgment, it is not now an abuse of process for Mr Clarkson to seek to challenge the validity and enforceability of the settlement agreement.

84. The lenders who were applying in November 2019 to enforce the terms of the settlement agreement should consider themselves fortunate that Mr Clarkson did not choose to raise a challenge to the validity of the settlement agreement at that time; but I see no reason why Mr Clarkson should be prevented from raising that case now. I do not consider that Mr Clarkson is misusing or abusing the court's process by raising this challenge to the settlement agreement now, having failed to do so in November 2019. It is his misfortune that it he did not raise it then, and the good fortune of the lenders that he did not do so at that time. I see no reason why that should prevent him from bringing a challenge to the settlement agreement by this Part 20 claim.

85. It follows also that I consider that there was no material non-disclosure in relation to the application to Master Kaye for permission to bring the Part 20 claim. The Part 20 claim itself was challenging the validity of the settlement agreement. In oral submissions, Mr Buck accepted that if there was no abuse of process, then the challenge to Master Kaye's order on the grounds of material non-disclosure falls away.

86. I reject the challenge to the Part 20 claim on the basis of *res judicata* and abuse of process.

87. I turn then to Mr Buck's next challenge to the Part 20 claim, founded upon a lack of clean hands and/or the illegality doctrine. This is developed at paragraphs 47 to 54 of Mr Buck's skeleton. Mr Buck relies upon the familiar maxim of equity that *"he who comes into equity must come with clean hands"*. He cites the statement of Hildyard J in *CF Partners (UK) LLP v Barclays Bank Plc* [2014] EWHC 3049 (Ch) at [1133] that the principle applies to those who:

> *"… have put themselves beyond the pale by reason of serious immoral and deliberate misconduct such that the overall result of equitable intervention would not be an exercise but a denial of equity."*

88. Mr Buck also refers to the common law illegality defence as set out by the Supreme Court in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55 at [25], making it clear that the additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest, even in the context of purely civil disputes.

89. Mr Buck also cites the re-statement of the principle by the Supreme Court in *Patel v Mirza* [2016] UKSC 42 at [120]:

> *"It would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system ... In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."*

90. Mr Buck refers to the statement of the relevant facts at paragraphs 34 to 46 of Mr Buckley's first witness statement. The key point is said to be that on Mr Clarkson's own account: (1) He deliberately concealed his interest in Ten Acres from potential lenders, including the actual lenders, because he was aware that if they found out about his wife's criminal conviction for mortgage fraud, in particular for obtaining property by deception, they would not have lent any money to Ten Acres (which is said to have been correct). (2) Therefore Mr Clarkson *"conceived the idea of using Mr Pickles as a frontman for the Ten Acres mortgage facility"* (to use Mr Clarkson's own words). (3) Mr Clarkson accepts that, throughout the negotiations with the lenders, it was fraudulently represented to them that Mr Pickles was the claimed ultimate beneficial owner of Whiteacres. (4) Further, Mr Clarkson accepts that the solicitor acting for the lenders would have formed the understanding that Mr Pickles was the sole beneficial owner of Whiteacres.

91. In his oral submissions, Mr Buck referred to a passage in Mr Clarkson's witness statement of 4 November 2019 where he had sought to put forward a different explanation for the concealment of his ultimate beneficial ownership of Whiteacres, namely, that it was an attempt to defeat the overage provisions in favour of the bank which had originally sold the property. Mr Buck submits that this in fact aggravates Mr Clarkson's position rather than excusing it.

92. Mr Buck submits that Mr Clarkson is a fraudster, happy to engage in deceitful and *prima facie* criminal conduct. In any event, and on any view, as a bare minimum Mr Clarkson's conduct was dishonest and therefore quasi-criminal. Mr Clarkson's conduct is said not to be somehow peripheral to what he is now seeking to achieve by his Part 20 claim but rather it goes to the core of that claim. His claim is that he has lost an alleged beneficial interest, an interest which only exists as a consequence, and for the purposes, of his dishonest conduct. Any honest person would simply have become the registered shareholder in either Ten Acres or Whiteacres. Mr Clarkson deliberately did not do so. Instead, on his own account, having hidden behind a sham trust of which Mr Pickles

was said to be the beneficiary, in order to prove his alleged lost financial interest under the Part 20 claim, Mr Clarkson has to plead and prove that beneficial interest which he says he dishonestly created.

93. For those reasons, the Part 20 claimants submit that Mr Clarkson is barred from pursuing the Part 20 claim in circumstances where:

(1) He does not come to the court with clean hands. On his own account, he is guilty of serious misconduct but for which the events giving rise to the Part 20 claim would not have occurred. For the lenders, who have only recently recovered most, but not all, of what they were due, to be sued by Mr Clarkson in those circumstances would, it is said, make a mockery of equity.

(2) The illegality defence applies. The underlying public policy against fraudulent conduct is self-evident, namely, the protection of individuals against fraud. That purpose would be undermined if, having finally recovered most, but not all, of the sums due to them, the lenders were then to be sued by the very person who had tricked them into providing the loan in the first place, and who had falsely induced them to believe that they were providing finance for the benefit of someone else. The denial of the Part 20 claim in those circumstances would not be disproportionate. The lenders have not obtained any windfall. In fact they remain marginally out of pocket. In the course of his oral submissions, Mr Buck elaborated upon these points. Mr Clarkson's entitlement to pursue the Part 20 claim is predicated upon his entitlement as the ultimate beneficial owner of Ten Acres and the property. His dishonesty in that regard is closely associated with the relief he now seeks.

94. Even assuming that there was misconduct on the part of the lenders, that does not operate to cleanse Mr Clarkson's own dirty hands. It just means that there may be dirty hands elsewhere. Mr Clarkson's hands were already sufficiently dirty. Things could only get worse for him. They would not get any better.

95. I reject Mr Buck's clean hands argument and his argument founded upon illegality as a sufficient ground for striking out Mr Clarkson's Part 20 claim or granting summary judgment in favour of the Part 20 defendants. In my judgment it is for the court to determine at trial whose hands are the dirtier, and whether the extent of the dirtiness of Mr Clarkson's own hands should preclude him from any relief on his Part 20 claim. The court will need to engage in an intense scrutiny of all the facts established at trial, including the relative merits and demerits of the conduct and position of, on the one side, Mr Clarkson and, on the other, of the alleged conspirators.

96. The lenders had compromised their claim in relation to Mr Clarkson's assertion of being the ultimate beneficial owner of Whiteacres, and thus of Ten Acres and the property, by the terms of the settlement agreement. By that time, they knew about Mr Clarkson's dirty hands; but it is now separately said by Mr Clarkson that the lenders, and Asertis' predecessor (through which Asertis now claims), had determined to get their own back on Mr Clarkson by compromising his claims by means of a settlement agreement, the terms of which they had hoped and intended to frustrate.

97. At trial, the court will need to undertake an intense scrutiny of all the facts, and the relative merits and demerits of the conduct of Mr Clarkson and the alleged conspirators.

In my judgment, such matters are not appropriate for either strike-out or a summary determination on the papers.

98. I therefore turn to the unlawful means conspiracy. I do so bearing in mind the terms in which the Part 20 claim is formulated. The statement of case begins at page 70. At paragraphs 53 to 70 the parties are identified and explained. The factual background is set out at paragraphs 71 through to 85. The settlement agreement is addressed at paragraphs 86 to 94. Implied terms of the settlement agreement are alleged at paragraph 95. Mr Clarkson's case in fraudulent misrepresentation and deceit is pleaded at paragraphs 96 to 104. The alleged conspiracy is pleaded at paragraphs 105 to 112. Paragraph 108 pleads an unlawful means conspiracy and paragraph 109 pleads a conspiracy to injure.

99. Paragraph 108 pleads:

> *"The conspiracy was [effected] by the use of unlawful means namely:*
>
> *(i) The deceit and breaches of contract above pleaded;*
>
> *(ii) The breaches of the fiduciary duties owed by the Directors [of] Ten Acres to it in failing to seek or secure any form of funding to repay the Lenders;*
>
> *(iii) In any event refusing to permit Pagefield Mill to be used as further security."*

The conspiracy to injure is pleaded at paragraph 109:

> *"Alternatively, and without prejudice to the foregoing, should it hereafter be asserted that there was no obligation on Funding Secure to provide funds to repay the original lenders and/or to pay the instalments and sums due [under] the settlement agreement, and/or the lenders were entitled to have recourse to their security under and in respect of the original Loan, nevertheless the purpose of the conspiracy was to harm MC by defeating any claim that he had to the shares in Whiteacres whether legally beneficially or otherwise."*

100. Loss and damage and the right of right to rescission are pleaded at paragraphs 113 to 117. The claim under the Consumer Credit Act section 140A is pleaded at paragraphs 118 to 122. I have had regard to the terms of this pleaded Part 20 claim.

101. The unlawful means conspiracy is addressed at paragraphs 55 to 61 of Mr Buck's skeleton argument. He submits that Mr Clarkson's unlawful means conspiracy case is defective and/or has no real prospect of success. The elements of unlawful means conspiracy are said to be: (1) a combination or agreement between a given defendant and one or more others; (2) an intention to injure the claimant; (3) unlawful acts carried out pursuit to the combination or agreement as a means of injuring the claimant; and (4) causing loss or damage. Mr Buck sets out the requirements of a valid plea of fraud at

paragraph 57, citing J*SC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20].

> *"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'. 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."*

102. Mr Buck says that it is Mr Clarkson's pleaded case that: (1) The Part 20 defendants agreed, conspired or entered into a common desire to obtain the property for themselves no later than the date of entry into the loan, alternatively, 29 March 2018. (2) FundingSecure became a party to the conspiracy when it came under the control of the lenders in March 2018. Mr Buck notes that whilst, at paragraph 8.4 of Mr Clarkson's third witness statement, he seeks to water his claim down to the bare assertion of some conspiracy forming by November 2018, his pleaded claim is that the conspiracy was formed by March 2018; and it is that allegation that is to be subjected to scrutiny. There is said to be no pleaded basis for the allegation that FundingSecure came under the control of the lenders in March 2018. None of the Part 20 defendants had any involvement in FundingSecure at that time, nor are they alleged to have had any. Mr Kumar and Mr Gandhi did not become directors or shareholders of or in FundingSecure until 12 October 2018 and 15 May 2019 respectively.

103. Further, insofar as Mr Clarkson has pleaded primary facts, none of those is said to justify any inference of fraud. By way of illustration, and in relation to Mr Kumar, the alleged primary facts are said to be as follows: (1) that he is a business association of Mr Gandhi (without pleading when the two of them became such); (2) that he became an investor, director and shareholder of and in FundingSecure on 12 October 2018; (3) that he told the incumbent directors and shareholders of FundingSecure that its lending business would continue to be undertaken by those directors; (4) that he communicated with Mr Gandhi in relation to ensuring that FundingSecure was not a source of funds for payment of the funds under the settlement agreement; (5) that he encouraged, caused or prevented FundingSecure from advancing funds to Mr Clarkson; (6) that he did not contact or cause others to contact Mr Clarkson to explain why FundingSecure would not advance funds to him; and (7) that he caused Mr Simon Brew, a solicitor for the lenders, to attend FundingSecure's premises in September 2018 with a view to trying to discover whether any form of proceedings could be commenced against Mr Clarkson, or any of his loans could be called in.

104. In support of his assertion of the defective nature of the Part 20 claim, and by way of illustration, Mr Buck points to the following: (1) The pleaded facts in relation to Mr Kumar are consistent with innocence. The fact of becoming a director of a lending platform, or the alleged fact of preventing that lending platform from advancing funds to a person who, on any view, was a problematic borrower, in circumstances where the company was in financial difficulties, do not justify the inference of fraud, and nor do any of the other pleaded facts. That is particularly the case in circumstances where Mr Kumar would have had nothing to gain from Ten Acres' default under the settlement

agreement because he was not one of the lenders, he had no interest in any of the corporate lenders, and he is not alleged to have been promised a cut of the alleged windfall. (2) Mr Clarkson's allegation that FundingSecure was a participant in the conspiracy cannot succeed if Mr Clarkson's allegations against Mr Kumar fail. That is because: (a) the sole pleaded basis of control over FundingSecure is the fact that Mr Kumar and Mr Gandhi became directors and shareholders; however (b) Mr Gandhi did not become a director until 15 May 2019, which is after Ten Acres' default under the settlement agreement. Accordingly, on Mr Clarkson's own pleaded case, the only Part 20 defendant who could have caused FundingSecure to participate in the alleged conspiracy is Mr Kumar. However, the pleaded facts regarding him do not support any inference of fraud. Accordingly, the allegation that FundingSecure is a participatant in the conspiracy collapses with the allegation that Mr Kumar is a participant; (c) once the allegations against Mr Kumar and FundingSecure collapse, the entire unlawful means conspiracy collapses, and it should be struck out.

105. Once the allegations against FundingSecure and Mr Kumar fall away in terms of the pleaded allegations of unlawful means, this only leaves the alleged breaches of fiduciary duty by Mr Gandhi and Mr Sadana; but those allegations of breaches of fiduciary duty have no real prospect of success in light of the facts set out in paragraph 136 of Mr Buckley's first witness statement.

106. I accept that there is no sufficient pleaded factual basis to justify any inference of a conspiracy going back as far as March 2018; but, in my judgment, there is sufficient factual basis to justify the alleged conspiracy from about the time that Mr Kumar became a director of FundingSecure on 12 October 2018.

107. In arriving at that conclusion, I have had regard to the observations of Mrs Justice Cockerill in the *Recovery Partners* case under the heading *"Conspiracy"* at paragraphs 442 to 447. There Mrs Justice Cockerill was addressing in terms an unlawful means conspiracy and not a conspiracy to injure not involving unlawful means. She acknowledged at paragraph 442 that it was rightly not in issue that if liability was established in breach of fiduciary duty, or breach of confidence, those torts would be sufficient to establish the unlawful means so long as the other requirements of the tort were made out. It seems to me equally that the breach of an implied term of the settlement agreement would also constitute sufficient unlawful means.

108. At paragraph 443, Mrs Justice Cockerill recognised that so far as the requirement of combination was concerned, the claimants submitted that there was no requirement to show an express agreement, the possibility of doing so being rare. Mr Buck expressly accepted the correctness of that proposition.

109. At paragraph 444, Mrs Justice Cockerill recognised that the requirement to prove intention to cause harm does not require the claimants to show that harm was the main or predominant purpose of the combination. It is sufficient that the harm is a necessary consequence of something the conspirators wished to achieve.

110. At paragraph 445, Mrs Justice Cockerill referred to the submission that it is necessary to show both a combination and a common intention on the part of all those said to be part of the conspiracy. The defendants submitted that there was no evidence to support a case in unlawful means conspiracy. Liaison in co-ordinating emails or letters was not enough.

111. At paragraph 446, Mrs Justice Cockerill recognised that the claim in conspiracy might well not add much to the claims already considered, and that was certainly suggested by the relative lack of focus on this point in the submissions. Her conclusion was that although the case was certainly not very clearly put on behalf of the claimants, having done the best she could in the absence of full submissions, sufficient had been shown to amount to a combination for the purposes of conspiracy.

112. As to intent, whilst the case was not one where the primary purpose of the combination was to injure the claimants, it was one which was the obverse side of the coin. In the circumstances, she concluded that the requirements of conspiracy were made out as between the individual defendants.

113. In my judgment, the necessary elements of an unlawful means conspiracy, as set out at paragraph 56 of Mr Buck's skeleton argument, are sufficiently pleaded. I am satisfied that on the face of the pleading, whilst the case could be more clearly put on behalf of Mr Clarkson, it has been sufficiently pleaded so as to show a combination and a common intention on the part of all of those who are said to be parties to the conspiracy, at least from about 12 October 2018 and thus, and crucially, prior to entry into the settlement agreement.

114. I am satisfied that this is a matter that can only be investigated fully and properly on evidence at trial. I am satisfied that the necessary intention to injure has been sufficiently pleaded. An intention to injure, where unlawful means are involved, need not be the primary purpose of the combination or conspiracy. This is a case of the obverse side of the coin, as it has been expressed. The injury to Mr Clarkson is a necessary consequence of what the conspirators are alleged to have wished to have achieved, which was an inability on the part of the Ten Acres company to comply with the terms of the settlement agreement, giving rise to the irrevocable acquisition of control of the Ten Acres site, and the consequent ability to realise it for the lenders' own gain.

115. I am satisfied that sufficient unlawful means have been pleaded in terms of the tort of deceit, of breaches of fiduciary duty, and of breaches of the alleged implied terms of the settlement agreement. In his oral closing, Mr Buck acknowledged that the claims in deceit and for breach of the implied terms were really parasitic upon the conspiracy claim.

116. In my judgment, they are all, on the pleadings, inseparably bound up together. So long as Mr Clarkson is not precluded from asserting that he is the ultimate beneficial owner of Ten Acres, and thus the property, then there would be the necessary consequential loss or damage.

117. For the reasons I have given, so long as Mr Clarkson is able to have the settlement agreement set aside, then he would be in a position to seek to prove his ultimate beneficial ownership. In that regard, he points to the fact that Mr Pickles has renounced any claim to ultimate beneficial ownership; and Mr Clarkson says that as a result he is the only possible candidate. I would not strike out the claim for an unlawful means conspiracy.

118. In relation to the lawful means conspiracy, however, the position is, in my judgment, different. The relevant law is set out at paragraphs 63 to 65 of Mr Buck's skeleton

argument. Amongst other ingredients, a claim in lawful means conspiracy requires a predominant purpose to injure the claimant. It is well-established that the claimant cannot, as with a conspiracy involving unlawful means, establish a predominant purpose to injure simply on the basis that injury to the claimant is the obverse side of the coin to gain to the defendant. A proper basis for the allegation, necessary in lawful means conspiracy cases, that the defendants acted with the predominant purpose of injuring the claimant will generally be less easy to find. There must be sufficient material to support it; and, if the allegation is pleaded, it should be made clear that a predominant intention to injure is alleged.

119. As set out in paragraph 109 of the Part 20 claim, the pleaded case of Mr Clarkson is that the purpose of the lawful means conspiracy was to harm Mr Clarkson by defeating any claim that he had to the shares in Whiteacres, whether legally, beneficially or otherwise. Further, paragraph 105 says that the Part 20 defendants entered into a common desire to obtain the property for themselves; and, in order to do so, they needed to obtain beneficial ownership of the entire issued share capital of Whiteacres. I accept Mr Buck's submission that Mr Clarkson has omitted to plead, as is required for lawful means conspiracy, a predominant purpose to injure. The Part 20 claim on that basis should therefore be struck out.

120. Even though the conduct caused loss, it cannot be criticised in the absence of a predominant purpose to injure the claimant. Nothing is pleaded to show such a predominant intention. Paragraph 105 makes it clear that the common desire of the alleged conspirators was to obtain the property for themselves. The conspiracy to injure allegation should be struck out.

121. The claim under the Consumer Credit Act section 140A is addressed at paragraphs 69 to 71 of Mr Buck's skeleton. In my November 2019 judgment, I made it clear that I was not deciding the unlawful penalty point. By extension, I did not decide any point that might be taken under the Consumer Credit Act, section 140A. It therefore seems to me that it cannot be said that there is any abuse of process on the part of Mr Clarkson in raising the matter now. Had it been raised in November 2019, it would not have been considered at all relevant to my decision; and therefore, there is no question of *Henderson v Henderson* abuse of process applying.

122. However, the objection to the section 140A claim is the lack of any standing on the part of Mr Clarkson, even if he can establish ultimate beneficial ownership of Ten Acres, to advance such a claim. That is because of the terms of section 140B(2) of the 1974 Act. This provides that:

> *"An order under this section may be made in connection with a credit agreement only—*
>
> *(a) on an application made by the debtor or by a surety;*
>
> *(b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or*
>
> *(c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related*

agreement is relevant."

123. The persons on whose application, or at whose instance, any order under the section may be made is expressly limited to the debtor or any surety. It does not extend to a shareholder, whether direct or indirect, of the debtor. Even if Mr Clarkson is the ultimate beneficial owner of Ten Acres, he is neither the debtor nor a surety; therefore he lacks the necessary standing to pursue any claim under section 140A of the 1974 Act.

124. The relevant parts of the Part 20 claim should be struck out.

125. Since the enforceability of the settlement agreement is a live issue on Mr Clarkson's Part 20 claim, which I have allowed to go forward, it follows that the application to enforce the Tomlin Order must fall to be dismissed.

126. At paragraph 78 of Mr Buck's skeleton, he refers to the fact that in paragraph 52 of the amended defence not only Mr Clarkson but also the other Part 20 defendants have sought to plead a set-off. Given that the Part 20 claim is brought by Mr Clarkson alone, there can be no basis for any set-off in favour of the other relevant defendants to the London proceedings. The reference to *"the MC defendants"* in paragraph 52 of the defence in the London proceedings should therefore be struck out.

127. That does however leave the pleaded claim to a set-off by Mr Clarkson, which does not fall to be struck out.

128. In the course of submissions, I queried with Mr Buck whether Mr Clarkson could rely on the principles of set-off in relation to his Part 20 claim, but Mr Buck did not pursue that matter.

129. I will strike out paragraph 52 insofar as it asserts a set-off by the MC defendants, but not insofar as it asserts a set-off by Mr Clarkson.

130. I then turn to the application by Mr Clarkson and the other defendants to the London proceedings to re-amend the amended defence. Two of the proposed amendments are accepted as uncontroversial, namely the minor amendments to paragraphs 37(3) and 40 of the amended defence. Paragraph 37(3) substitutes a reference to paragraph 30(2) for a reference to paragraph 31(2). That is clearly the correction of a typographical error of cross-referencing following an amendment to the paragraph numbering. The amendment to paragraph 40 is also a pure tidying up amendment. I will allow both of those.

131. However, the application to re-amend is opposed by Asertis in relation to the proposed amendments to paragraph 26(4) and 26(7) of the amended defence. They involve the deletion of admissions by the MC defendants, limiting the admissions to admissions by Mr Clarkson alone.

132. Mr Buck objects that the relevant defendants refer to these in their application notice as the clarification of admissions made by Mr Clarkson and the MC defendants, but I am satisfied that they do involve an attempt to withdraw admissions of liability on the part of the defendants other than Mr Clarkson

[AUDIO CORRUPT AND UNPLAYABLE: Paragraphs 135 – 142 below were missing from the transcript due to the recording being partially corrupted and have been reconstructed from the notes made by the legal and unaccredited media representatives and the Judge's reconstruction of the judgment.]

133. To withdraw an admission made after the commencement of proceedings, a party requires permission pursuant to CPR 14.1(5). In deciding whether to give permission for an admission to be withdrawn, the court is required by Practice Direction 14, paragraph 7.2 to have regard to all the circumstances of the case, including the matters identified in that paragraph. The ground upon which the applicant seeks to withdraw the admission is an important consideration. As stated by Steel J in *American Reliable Insurance Company v CAN Insurance Company* [2008] EWHC (Comm) at [17]-[18], *"… the court is entitled … to receive a fairly full and frank explanation of how things went wrong, or at least appear to have gone wrong, namely to identify the basis upon which the background to the admission is to be withdrawn, the reasons for it, how it came about that the admission was made in the first place, and so on".*

134. Mr Buck submits that the apparent position of the MC Defendants, that the court should simply wave through the withdrawal of formal admissions of liability of a total value just short of £1 million, without an application (or any explanation) is remarkable. No formal application for permission to withdraw the admissions has been made, and, in the absence of such, the application must fail. There is no witness statement in support of the application to amend and there is no witness evidence to support the withdrawal of the admissions. Mr Buck made the point that, apart from Mr Clarkson himself, the MC Defendants have filed no evidence at all. There is no proper basis upon which the admissions can be withdrawn and thus no basis upon which these two re-amendments should be allowed. I accept those submissions. I will not give permission in the absence of any explanation for the withdrawal of these admissions.

135. Asertis seeks summary judgment or judgment on admissions or an order for interim payments in relation to the formal admissions of liability by Mr Clarkson and the MC defendants. So far as Mr Clarkson is concerned, Mr Buck relies on the admission by Mr Clarkson in paragraph 42 of the amended defence. As is confirmed in paragraph 10.1 of Mr Clarkson's witness statement of 29 January 2021, there is an admission in relation to some £6.6 million. In fact, Mr Buck points out that the admission extends to a further £300,000 because the second sentence of paragraph 42 was introduced without the court's permission. The amended defence was served pursuant to an order granting permission for consequential amendments. The apparent reduction by £300,000 is not such a consequential amendment and was therefore made without permission, and the court should therefore disregard it.

136. Since I have declined to strike out the Part 20 Claim, I should not accede to any application for formal judgment in relation to the admitted liability of Mr Clarkson, even if it extends to the full £6.9m, in advance of the determination of the Part 20 claim. It would be wrong to enter a formal money judgment. I am concerned, in the light of the way the matter has been conducted, in particular the apparent co-operation between the solicitors representing Asertis and the solicitors (Farleys Solicitors LLP) who have been acting for the petitioning creditors seeking Mr Clarkson's bankruptcy, that if I were to enter any enforceable money judgment against Mr Clarkson, it might be utilised as a means of stifling any Part 20 claim by him. It would be wrong, in those circumstances,

and where Mr Clarkson is in any event asserting a set-off, for any money judgment to be entered against him.

137. In relation to the other defendants in the London proceedings, Asertis seeks summary judgment, judgment on admissions and interim payments in relation to their admitted liabilities. The relevant paragraphs are set out at paragraphs 97 and 98 of Mr Buck's written skeleton argument. Mr Clarkson has made the point in his submissions that the liabilities of Mr Unsworth, of Pagefield and of MDSC are all secured. He therefore submits that the court should not grant any money judgment founded upon those liabilities. In those circumstances, it does not seem to me to be right that I should enter money judgments whilst the claimant, Asertis, is still relying upon its security in respect of those sums; but that is not a matter upon which I have been fully addressed, and therefore I will deal with it after any further submissions by Mr Buck. But it does seem to me that in relation to the other admitted liabilities, there would appear to be no reason why money judgments should not be entered against the relevant defendants.

138. So far as interest is concerned, Mr Buck seeks judgment for interest in relation to the Pagefield and Unsworth loans for the reasons set out at paragraph 99 of his skeleton argument. Once again, it seems that is a matter that requires further submissions at the end of this judgment in relation to the assertion that those loans are secured.

139. So far as directions in relation to the freezing order are concerned, it seems to me that it would be desirable for Mr Clarkson to set out the precise basis on which he says that the freezing injunction should be discharged and the evidence on which he relies in support and for him to serve any further evidence within a particular period of time. Asertis should then set out its response to the points on which discharge is sought and should identify the evidence on which it relies and serve any further evidence. The matter should then be brought back before the court.

140. This morning, shortly before coming into court, I was forwarded a document setting out Mr Clarkson's proposed reasons for seeking a discharge of the freezing order. I will hear further arguments in relation to that matter after the conclusion of this judgment. I think that that deals with all of the points that I needed to address and that therefore concludes this judgment.

(Proceedings continued, please see separate transcript)

This Judgment has been approved by the Judge.

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