Neutral Citation Number: [2022] EWHC 2186 (Ch)

Case No: BL-2021-CDF-000003

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 17/08/2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

(1) WILLIAM ALLAN JONES	**Claimants**
(2) LUDLOW STREET INVESTMENT CORP	
- and -	
ANDREW MCCARTHY	**Defendant**

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- -

Mr Fraser Campbell (instructed by **Burges Salmon LLP**) for the **claimants**
Mr George McPherson (instructed by **Blake Morgan LLP**) for the **defendant**

Hearing dates: 12-14 July 2022
- -

Approved Judgment

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

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC:

Introduction

1. In February 2008, the first claimant Mr Jones and the defendant Mr McCarthy orally agreed (the 2008 agreement) to exchange assets, whereby Mr McCarthy would obtain beneficial ownership of a yacht known as Biggest Buzz (the yacht) and registered in the British Virgin Islands (BVI), in exchange for Mr Jones acquiring a villa near Palma, Mallorca (the villa) and a mooring (the mooring) situated on mainland Spain. The yacht was registered in the name of the second claimant, a company owned and controlled by Mr Jones. The legal title to the villa was in the name of Mr McCarthy. The mooring was in the name of Mr McCarthy's father. There was at the time, a substantial mortgage on the yacht and another on the villa. It was envisaged by Mr Jones and McCarthy at the time that after the swap the yacht and the villa would be sold to third parties. It is also not in dispute that part of the reason for the swap was to enable Mr Jones to buy a bigger boat. When I refer in this judgment, to the parties, unless indicated otherwise, I refer to Mr Jones and Mr McCarthy, as the second claimant plays a minor part.

2. In the autumn of 2008, Mr McCarthy sold the yacht to a third party for around £1 million, having had the use of it since the 2008 agreement was made. The second claimant had cleared the outstanding mortgage on the yacht. Mr McCarthy retained the proceeds of this sale, as was envisaged by the parties. The villa was not sold until 2016, at a price of €1.1 million. The proceeds of that sale were also retained by Mr McCarthy, which was something not envisaged at the time.

3. The primary remedy sought by the claimants is damages for breach of the 2008 agreement on the part of Mr McCarthy, to put them in the position they would have been in if Mr McCarthy had complied with his obligations thereunder by selling the villa at the direction of Mr Jones at its market value of €1.58 million or at least the value for which it was sold at €1.1million.

4. Alternatively, the claimants say that they are entitled to an account of profits and a constructive trust over the proceeds of sale of the villa, if this provides a more advantageous remedy to the claimants than that available in contract. Mr McCarthy was paid €150,000 by a Brian Proctor in December 2014 under an agreement between them which related to the villa and the mooring, and then bought it back for €950,000. Mr McCarthy then sold the villa to a third party in November 2016 for €1.1 million, so the wrongful proceeds of sale amount to €1.25 million.

5. Mr McCarthy denies that the claimants are entitled to any such relief. He claims that Mr Jones told him that the yacht was mortgage free, and that he was expecting to be able to sell it on within a matter of days, but instead delays in providing the yacht's logbook and clearing its mortgage meant that a prospective buyer, Mr Bransgrove, did not complete an agreed sale for £1.386 million. Mr Jones says that he made clear to Mr McCarthy that the yacht was mortgaged which would have to be cleared, and that this was not the reason the sale to Mr Bransgrove fell through. Mr McCarthy accepts that he did not, as he could have done, check on the BVI register for any charged borrowing on the yacht, because he says past experience showed that this can take several weeks.

6. As for the villa, Mr McCarthy paid to Mr Jones a sufficient sum to discharge the mortgage and says that it was agreed between the two of them that he would do so. It is not in dispute that Mr Jones did not do so, and thus Mr McCarthy says as a result that he could no longer be required to transfer the unencumbered beneficial interest in the villa to Mr Jones. The latter says that it was always understood and agreed that he could use these monies to finance the purchase of another boat, and that he would take over the mortgage repayments, as in the event he did, until the market conditions improved so that he was better placed to arrange a sale to a third party and discharge of the mortgage.

7. Alternatively, Mr McCarthy says that his obligations under the agreement changed when Mr Proctor became involved a couple of years later. Mr Jones now accepts that from 2010 he owed money to Mr Proctor, something which he did not admit to in his pleadings. This is in respect of the sale of a property which they had bought together in Dubai, which debt he says at that time was in the order of €400,000, and that he had discussions with Mr Proctor about the possibility of using monies from a future sale of the villa to pay this debt.

8. Although Mr McCarthy was not involved in these discussions, he says that it is clear from emails passing at the time that by the end of 2010, Mr Jones had transferred any interest in the villa to Mr Proctor as part of a deal to discharge this debt. Mr Jones denies this and says that the amount of the debt was and is still unresolved between him and Mr Proctor. The determination of the amount of the debt depends upon a reconciliation of sums owed one to the other in complex business dealings between the two.

9. Thereafter, Mr McCarthy dealt with Mr Proctor concerning the villa and in 2014 transferred his obligations under the agreement to him in exchange for €150,000. In 2016 Mr McCarthy re-purchased the beneficial ownership of the villa for €950,000. Those proceeds were then treated as diminishing Mr Jones' debt to Mr Proctor. Mr McCarthy says that as the result of the foregoing, the claimants had no residual beneficial interest in the villa after 2016.

The witnesses

10. The only witnesses to file written evidence and to give oral evidence before me were Mr Jones, Mr McCarthy and Mr Bransgrove. On the face if it that is surprising. Although Mr Proctor was not involved in the agreement, he was involved in subsequent dealings with the villa. Another person who was heavily involved in the agreement and in events afterwards was Andy Mallett, a chartered accountant who had worked for both Mr Jones and Mr McCarthy. At the time of the 2008 agreement he was employed by a company controlled by Mr Jones. Mr Jones accepts that from 2003 to 2016, Mr Mallett was his "right hand man" whom he trusted and had the authority to sign contracts on his behalf, but maintains that he retained the ultimate decision making authority. That evidence rang true and I accept it. However, after the breakdown in the relationship of the parties, Mr Mallett went to work for Mr McCarthy, but subsequently left that employment as well. He is now engaged in litigation with Mr Proctor against Mr McCarthy.

11. Toni Serra is a lawyer based in Mallorca who acted for Mr Jones until 2016, and drafted documents for the parties at the time of the 2008 agreement, as referred to

below. However, he became in dispute with Mr Jones for what the latter says were unauthorised payments in respect of the mortgage on the villa. That dispute was settled in 2019, on terms which included that he would not declare himself against Mr Jones in litigation.

12. In light of that somewhat convoluted subsequent history of interwoven personal relationships, it is perhaps not that surprising that none of these three potential witnesses gave evidence in the present proceedings. Accordingly in my judgment it is inappropriate to draw adverse inferences against any party from any of those absences.

13. Mr McPherson, for Mr McCarthy, submits that the fact that Mr Jones did not call his wife to give evidence, even though she was involved in dealings with the villa from 2016, is a powerful indication that those closest to him are unwilling to support his version of events because it is untrue. She was not involved in the making of the agreement. In my judgment the fact that she had some involvement with the villa some eight years later when battle lines had been drawn does not give a sound basis for such an inference.

14. Battle lines remain firmly drawn. In these proceedings, each of the parties accuse the other of lying on oath, of giving evidence which is internally inconsistent and inconsistent with documentation, as well as inherently unlikely.

15. Both parties made detailed submissions as to why his demeanour in giving evidence showed him to be a witness of truth, and that of his opponent showed the opposite. In *The Queen on the application of SS (Sri Lanka) v The Secretary of State for the Home Department* [2018] EWCA Civ 1391 the Court of Appeal considered the importance of the demeanour of a witness in assessing the credibility of that witness. Leggatt LJ, giving the lead judgment, said this at paragraph 41:

> "No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."

16. I gained the impression when each of the parties gave oral evidence that each of them now genuinely believes that his recollection is correct. The demeanour of each of them in trying to recall these points did not, in general, point in any meaningful way to which has the more reliable memory. In these circumstances, consistency and

inherent likelihoods are important. However, given that the parties are having to recall conversations and events which took place up to 14 years ago, which are not heavily documented as to the disputed points, and when the dispute first arose some five years later, some of the inconsistencies are no more than to be expected and I shall deal only with those that have some probative value as to what was agreed in 2008.

17. Mr McPherson relies on the fact that a formal letter of claim was not sent on behalf of the claimants to Mr McCarthy until March 2021, after the claim against Sr Serra was settled, as relevant to the overall assessment of the credibility of the claimants' claims. I do not accept that, in the convoluted history of dealings between the parties and other persons mentioned above, that is a proper inference to draw.

Documentation relating to the 2008 agreement

18. The claimants' pleaded case refers to this agreement being an oral one, whereas Mr Jones' witness statement refers to a sale contract being agreed.

19. There is not a great deal of contemporaneous documentation concerning the yacht. Mr Mallett in January 2008 requested Mr McCarthy's solicitor to draft a power of attorney permitting Mr McCarthy to call for the transfer at no consideration.

20. In February 2008, at a meeting which the parties and others attended at Sr Serra's Palma office, a power of attorney was produced, by which Mr McCarthy granted Sr Serra power to sell the villa and redeem the mortgage, and which was then notarised. Mr Jones says that he understood that this was intended to be an irrevocable power of attorney in his favour, allowing him to direct the sale of the villa to a third party. Mr McCarthy says that it was produced only for the purpose of transferring his beneficial interest in the villa to Mr Jones. The power of attorney did not specify either purpose. The originals of these documents are in Spanish, which neither party has a working knowledge of, but English translations were provided at the time.

21. For that meeting, purchase contracts were drafted for the legal transfer of the villa and the mooring. No signed or notarised copy of the former has been found. A separate legal transfer of the mooring, from Mr McCarthy's father to Mr Jones, was notarised. Mr McPherson submits that it's clear that what was intended was that this documentation should be finalised at that meeting and should govern the transfer of the villa, and the fact that a signed original or copy thereof cannot be found doesn't mean that one wasn't signed at the time.

22. It is common ground that the parties acted on some of the terms set out in the purchase contract. That referred to Mr McCarthy renting the villa for six months and paying €24,000 to Mr Jones, which is what happened.

23. However, there are several puzzling aspects to the drafting of the purchase contract for the villa. The first is that Mr Jones is expressed to be acting for a company named Can Allan SL based in Mallorca and owned by him. No one can give a reason for this, although the notarised transfer of the mooring is to Mr Jones in a similar capacity. Second, this draft also purports to transfer the mooring, when there was a separate notarised transfer of the mooring to be from Mr McCarthy's father. Third, the purchase price is expressed to be €1.5million for the villa and €150,000 for the mooring to be paid as to €890,000 by way of subrogation of the mortgage or in cash.

24. The remainder of the price is dealt with in the draft in a way which appears to make little if any sense, and in a way which is inconsistent with the undisputed agreement of the parties that the yacht should be exchanged for the villa and the mooring. However, the purchase contract provides:

> "The remainder, until the agreed price is reached by way of compensation on the part of the debt that Mr McCarthy has derived from the sale of the mooring of Mr Jones' company, the sale of the mooring will not be finalised in Spain as long as both parties accept the compensation of credit."

25. In my judgment, if the purchase contract was signed, it is likely that tax would be payable by Mr Jones on the transfer of the villa. I deal with this in greater detail later on in this judgment. It seems unlikely that there was time to notarise the power of attorney but not the purchase contract. For these reasons, together with the puzzling aspects of the draft as set out above, it is unlikely that the parties did sign this purchase contract or intend that it should then be notarised. I shall deal with the parties' evidence about the meeting in more detail later on.

26. In my judgment, the essence of these proceedings is what was orally agreed between Mr Jones and Mr McCarthy some 14 years ago. The contemporaneous documentation, in any event, is only of limited assistance on the disputed points. There is no reference in the documentation to the disputed facts until 2013, when the business relationship between the two deteriorated.

27. Mr McPherson attaches weight to emails in April 2016 and subsequently from Mr Mallett in which he sets out his version of the 2008 agreement, which supports Mr McCarthy's recollection. However, Mr Mallett makes clear that he was not involved in the making of the 2008 agreement. I accept Mr Jones' evidence that by then his relationship with Mr Mallett had begun to deteriorate, leading to his dismissal later that year. Mr Mallett's emails are not supported by a statement of truth, and are untested. In my judgment little weight should be attached to them.

A summary of subsequent events

28. The events which happened subsequently in respect of the yacht, the villa and the mooring are also somewhat convoluted and which involve several issues of fact between the parties. Where such issues involve other differences of recollection between Mr Jones and Mr McCarthy, there may be a degree of circularity, and it may not be necessary to resolve each of those differences unless they involve probative consistency or inconsistency with other evidence or with known or probable facts. I summarise the key differences in the following paragraphs.

29. Mr McCarthy says that in 2010, Mr Jones agreed with Mr Proctor that his beneficial interest in the villa would be transferred to Mr Proctor as security for the debt owed to Mr Proctor, but accepts that he was not "in the loop" on this. When asked in cross-examination whether he discussed this with Mr Jones at the time, he initially gave the impression that he had, but then added, to his credit, that he wasn't sure and wouldn't like to say. Accordingly, in my judgment it is likely that he did not. Mr Jones denies any such agreement, but accepts that Mr McCarthy was given the impression by Mr Mallett that Mr Proctor had acquired an interest in the villa. He maintains, however,

that he and Mr Proctor were always clear between themselves that Mr Jones was the beneficial owner.

30. In 2013 Mr McCarthy issued an unfair prejudice petition claiming that a joint venture healthcare business of himself and Mr Jones had been mismanaged. Mr Jones says that it was in this context that Mr McCarthy first claimed that he had suffered a loss on the abandoned sale of the yacht to Mr Bransgrove. In August of that year, Mr McCarthy purported to revoke unilaterally the 2008 power of attorney over the villa on the basis that he intended to recover the loss caused due to the delays that occurred in the sale to Mr Bransgrove.

31. On 11 February 2014, the parties met at a hotel in Cardiff in an effort to resolve their differences in respect of the healthcare joint venture and the 2008 agreement. Mr McCarthy wished to pursue his claim of a loss on the abandoned sale of the yacht. Mr Jones wanted to regain control of the villa after the revocation of the power of attorney. The parties managed to reach an agreement, which was reduced to a handwritten agreement at the meeting (the February 2014 agreement) whereby Mr McCarthy agreed to reinstate the power of attorney and Mr Jones agreed to release the mooring to Mr McCarthy. The second claimant also agreed to indemnify Mr McCarthy against any Spanish tax liabilities, and he agreed not to sue the claimants. Later, in May 2014, a professionally drawn demerger agreement was executed by the parties.

32. However the parties disagree on the purpose of the reinstatement of the power of attorney. Mr Jones says this was to allow him to sell the villa in accordance with the agreement. Mr McCarthy says that what was intended was that the re-appointed attorneys would act on Mr Proctor's instructions as beneficial owner. However, Mr Proctor took no part in the negotiations and was not at the meeting. The power of attorney was not in the event reinstated in favour of Mr Jones.

33. There were further discussions in the summer of 2014, which this time involved Mr Jones, Mr McCarthy, Mr Proctor and Mr Mallett. Mr McCarthy said the mooring was worth €50,000 and not €150,000, as he had thought in February that year. The debt between Mr Jones and Mr Proctor remained unresolved.

34. In July 2014 Mr McCarthy emailed Mr Proctor with options to "by pass the hoodlums" by which he meant Mr Jones and Mr Mallett. In December 2014, they agreed that Mr Proctor would pay Mr McCarthy €150,000 and Mr McCarthy would transfer his rights and obligations under the agreement to Mr Proctor and reinstate the power of attorney in relation to the villa in Mr Proctor's favour (the December 2014 agreement). It was recorded that Mr Proctor was the owner of the villa and the mooring. This agreement was not notarised. It is not in dispute that Mr Jones was not a party to this agreement or that Mr McCarthy did not discuss it with him.

35. In March 2016, Mr McCarthy wished to purchase another property in Spain and emailed Mr Proctor to ask him to settle the mortgage on the villa to allow him to do so. Mr Proctor then emailed Mr Jones, who accepted that he, Mr Jones, had to sell the villa to allow this. In April 2016, Mr Jones applied to clear the mortgage and then to take out a new mortgage in his wife's name. Some €400,000 was transferred by or on behalf of Mr Jones into Sr Serra's client account, which was used to pay off the

existing mortgage. Mr Jones says that this was not authorised by him, and that he intended to replace it with a new mortgage in his wife's name.

36. In May 2016, Mr McCarthy agreed to pay Mr Proctor €950,000 for the latter's alleged beneficial interest in the villa. Mr Jones says that he was not aware of this. By email dated 9 May 2016 Mr Jones said to Mr Proctor that everything was up for discussion but "it does revolve around my retaining the equity*"* in the villa.

37. Mr McCarthy says that on 2 June 2016 Mr Jones and Mr Proctor orally agreed that the €950,000 would be applied to discharge Mr Jones' debt to Mr Proctor, something which Mr Jones denies. When Mr McCarthy became aware of the redemption of the mortgage, he sold the villa in December 2016 for €1,100,000. He says that Mr Jones has suffered no loss, because he received a benefit of €950,000 reduction in his debt to Mr Proctor, and that he, Mr McCarthy, made no profit because he spent a further €50,000 on legal fees and survey costs and €100,000 on works of renovation to the villa.

38. Mr Jones says that he made no agreement with Mr Proctor and the debt is still in dispute but is likely to be far less than €950,000, and that there is no documentary corroboration of expenditure on fees or costs.

The abandoned sale of the yacht

39. As the first major dispute in these proceedings to arise was in relation to the abandoned sale of the yacht to Mr Bransgrove, and as he, apart from the parties, was the only witness to give evidence, it is appropriate to begin the assessment of oral evidence here.

40. Mr McCarthy alleged in his amended defence that due to the mortgage on the yacht, and/or a delay in provision of its log book, he lost the opportunity to sell the yacht to Mr Bransgrove. However the skeleton argument filed on his behalf by Mr McPherson shortly before the hearing appeared to accept that it was Mr McCarthy who withdrew from the sale on 9 July 2008 when he sent an email to his solicitors on the basis that he had lost patience. In an email in reply, Mr Bransgrove set out the difficulties involved in the sale, including the fact that the yacht was registered in BVI in the name of the second claimant, and that he wanted to make the purchase in the most tax efficient way to him. However, he also said in that email that this work was ongoing when Mr McCarthy "withdrew from the deal."

41. Mr Bransgrove was called on behalf of the claimants and was the first witness to give oral evidence, which he did by video link. He had purchased boats on a couple of previous occasions. He accepted in cross-examination that the time it was taking to negotiate for the yacht was a long time in relative terms and that he would have preferred a quicker sale, but added that he was "pragmatic." He said he remembered the issue of the mortgage which was being resolved, and assumed it had been by July 2008. He confirmed the contents of his email.

42. When Mr McCarthy came to give his oral evidence, he maintained in cross-examination that Mr Bransgrove had reneged on the deal by introducing a demand for a personal guarantee from Mr McCarthy. This was not pleaded or in his witness statement, and had not been put to Mr Bransgrove in cross-examination. Mr

McCarthy accepted that his reference to the yacht's log book should have been to its blue book. That was provided to him around 6 May 2008, and he did not attempt to do anything with it. On 19 June 2008, Mr McCarthy's solicitor confirmed to Mr Bransgrove's solicitor that the mortgage had been discharged, and on 24 June 2008 it was confirmed to both that the mortgagee had received the discharge deed.

43. Mr McCarthy also said in cross-examination when being asked about his email of 9 July 2008 that Mr Mallett told him that the way to deal with Mr Bransgrove was to give him an ultimatum, or, in his words, to write a "do or die" letter. This again was not pleaded or in his witness statement.

44. In my judgment, the contemporaneous emails between the solicitors for Mr McCarthy and Mr Bransgrove strongly indicate that it is the recollection of the latter which is the more reliable on this point. Moreover the inconsistencies between Mr McCarthy's pleaded case and witness statement, against what is in his skeleton argument, and against then his oral evidence, are marked. They go beyond mere detail.

45. Although the parties agreed as part of the February 2014 agreement that Mr McCarthy would not sue the claimants, this is not an indication in my judgment that Mr Jones accepted that such a claim was a solid one. It is understandable why Mr Jones would not want any such claim hanging over him, even if he thought the claim was not soundly based.

46. For all those reasons, I prefer the evidence of Mr Bransgrove. This in my judgment was an important point in Mr McCarthy's case and the first of the issues in dispute before me which he raised. Accordingly, as I have found that his recollection is not reliable on this point, that is an important factor to take into account in assessing his overall credibility.

47. This matter does not end there however. Mr McCarthy in his oral evidence maintained that it was Mr Bransgrove who in effect reneged on the purchase of the yacht, even after being referred to the emails of 9 and 10 July 2008, by demanding a personal guarantee. Moreover, in order to explain his email to his solicitors the previous day, he said that Mr Mallett had suggested giving Mr Bransgrove an ultimatum. In my judgment it is surprising that he had not mentioned these points beforehand, given that this was an important part of his case. In any event, that does not explain his email, which was not an ultimatum but an instruction to his solicitors to withdraw from the deal and return Mr Bransgrove's deposit. Although I have already indicated that he seemed genuinely to believe that his recollection was correct, in my judgment, he raised these new points in his oral evidence in an attempt to explain away difficulties in his version. This causes me to be cautious about accepting his evidence generally at face value.

48. Another point relied upon by Mr Campbell, for Mr Jones, was Mr McCarthy's explanation as to why, in his witness statement, he had included disparaging allegations about Mr Jones' wealth and business dealings, which had little if any relevance to the issues in the case. His answer was that these were in response to passages in Mr Jones' witnesses statement which he disagreed with. However, it was then pointed out to him that the witness statements were exchanged simultaneously. This in my judgment is a small point, but to that extent it is another reason to be cautious about accepting his answers at face value.

The 2008 agreement in more detail

49. Having made those findings I now deal with the evidence about the agreement in more detail. Mr Jones became semi-retired in 2007 and then moved to California. The yacht remained in Spain at that time. The conversations which he had with Mr McCarthy which led to the agreement were, he says, mainly by phone, but also via Mr Mallett. He could not remember which was which, or his precise location when the conversations took place. He did not accept that he met Mr McCarthy in a hotel in Dubai or in a bar in Cardiff to have some of these conversations, as the latter recalls. He denies, telling Mr McCarthy that "all my toys are paid for," referring to the yacht, as Mr McCarthy asserts.

50. In cross-examination he said that he vaguely remembers a meeting in Sr Serra's office, which did not appear in his written evidence. He said that as he recalled this meeting was to transfer the mooring to him. He doesn't recall the purchase contract for this or for the villa, or the power of attorney. He says that it was understood that he was to take over the mortgage repayments on the villa until the property market improved after the collapse in the market, when the villa would be sold. Everyone knew that the legal title would be left in Mr McCarthy's name, otherwise taxes would be payable. He accepts that Mr McCarthy transferred to him on the day of the meeting monies in the amount needed to pay off the mortgage, but says that it was clearly understood that he would be able to use those monies for other purposes, otherwise Mr McCarthy would have redeemed the mortgage himself.

51. Mr McCarthy says that the first conversations regarding the agreement took place in December 2007 in Mr Jones' office and then later that day in a couple of bars in Cardiff. This is when he says Mr Jones referred to all his toys being paid for and they shook hands on the agreement. He says that this was the first time he had heard of Skype and that Mr Jones explained it to him, adding "I remember this more than anything." It was put to him that in his amended defence, it was pleaded that it was in November 2007 in a hotel in Dubai that Mr Jones had said there was no finance on the yacht, to which he replied that Mr Jones then volunteered that his toys were paid for in the bar in Cardiff. It was in the hotel in Dubai that he had what he described as a "light bulb moment" of a possibility of an agreement. He accepts that he knew that Mr Jones wanted to buy a bigger boat.

52. He says that he checked about the finance with Mr Jones and Mr Mallett by emails, but these are on a server which they used in their joint business venture which Mr Jones retained control of when this ended and which he refuses to disclose.

53. Mr McCarthy also had difficulty recalling the documentation at the meeting in Sr Serra's office in Palma in February 2008. He says they signed over 15 documents in the Spanish language. He had flown in from the UK on a private plane with his father and young son to sign these and had to return to the UK that evening because the pilots had to go on to Frankfurt, and says that there was no time to have the transfer of the villa to Mr Jones notarised, which is why the power of attorney was notarised so that Sr Serra could execute the transfer. He chased Sr Serra by emails many times for this to be done. Again, he says that these are on the server in the control of Mr Jones.

54. When it was put to him in cross-examination that the reason the villa was to be retained in his name was to save on tax, he replied that that was "absolutely not true"

and that he was "liquidating" and "clearing out." He was then reminded that in his defence it is admitted that he agreed with Mr Jones to retain the legal title in his name in order to save tax. His answers to that were, in my judgment, not straightforward. At first he said he did not believe that he did agree this with Mr Jones, but then said that the timescale was wrong in the defence. He said that this was agreed later in August 2008, and not in February, at the behest of Mr Mallett who begged him to agree to this.

55. As for the monies paid to Mr Jones, he accepts that he received these monies, which he used as a down payment on another yacht, but says it was clearly understood by Mr McCarthy that he would use the monies in this way and that he would then be responsible for the mortgage repayments.

56. In his witness statement Mr McCarthy said that on the day of the meeting, two payments were made: one of €750,000 to Mr Jones' account in Spain and the other of €140,000 to his account in the UK, which were intended to be used by Mr Jones to redeem the mortgage on the villa on that day. In further information provided at the request of the claimants, he said that the mortgage was to be paid the following day.

57. In his oral evidence, the details changed somewhat. He said that it was a Friday and a festival day, when little work would be done. The bank manager in Palma was waiting and he wanted Mr Jones to go to the bank that day to redeem the mortgage on the villa. These latter details were not in his witness statement, which he explains by saying that dealt with specifics rather than what he called the build-up.

58. He also said that he could not remember whether he knew, by the time that he and Mr Jones met for a drink after the meeting, that the mortgage had not been redeemed, and added that there was no discussion then whether he had done so. Further information provided by him pursuant to a request from the claimants suggested that the reason Mr Jones was given the monies to redeem the mortgage rather than Mr McCarthy doing it directly was that the latter needed to return to the UK as his father was ill. When this was put to him in cross examination, he said that he only had six hours in Palma, that he had his young son with him and that his father was ill.

59. He says that he found out from Sr Serra on the following Monday that the money had not been paid, and Sr Serra told him that he would sort it out by the end of the week. As Mr Jones had not redeemed the mortgage as promised, he believed the money was going into an account administered by Sr Serra, which he assumed was a legal account and that Sr Serra would be the ultimate person by way of clearing the mortgage. This detail also was new. It was also put to him that there was no email raising any concerns about this. He said that he made a "huge complaint" about it as the property market was crashing, but all relevant emails are on the server controlled by Mr Jones.

60. He also says that he did not find out until July that the mortgage had not been redeemed. It was put to Mr Jones in cross examination that he did not make any re-mortgage payments until September 2008 and then he had to pay several months arrears. He accepted being chased if a repayment was late, but denied being this much in arrears and said that all mortgage statements went to Mr McCarthy who would have known if it was in arrears. In my judgment this answer had the ring of truth and I accept it. It is likely that Mr McCarthy did receive mortgage statements and unlikely

that nothing would have been said by him when he saw that mortgage had not been redeemed or that repayments were being missed.

61. He was also asked why he was prepared to enter a joint venture relationship with Mr Jones in 2011 if these monies had not been paid as intended. He replied that he would be dealing with Mr Mallett, who had a minority interest in the business, rather than with Mr Jones who was out of the country.

Missing emails

62. On the issue as to whether Mr Jones retains control of a server containing relevant emails, this was the subject of inter-solicitor correspondence in 2021 and 2022, in which this was denied on his behalf. A request was made for an independent search but that was not responded to. Mr McPherson points to other gaps in the claimants' disclosure. In emails in April 2016 and March 2020, Mr Mallett refers to emails in January 2008 which made it clear that the yacht was to be free of mortgage and saying that Mr McCarthy did his bit but Mr Jones (whom he referred to as "the Knob") did not. Sr Serra in a letter in 2017 referred to emails with Mr Jones in 2016 concerning the clearing of the mortgage in the villa, but the claimants' disclosure list suggests these may have been deleted by Mr Jones. Mr McCarthy's disclosure starts in February 2014.

63. No application has been made on behalf of Mr McCarthy in respect of this alleged non-disclosure. The important allegation that Mr Jones retains control of the server was not put to him in cross-examination. Even if there were gaps in disclosure of some emails, it is a more serious allegation that a server containing all the emails from Mr McCarthy complaining about the non-disclosure of the mortgage of the yacht and the failure to redeem the mortgage of the villa has been deliberately withheld by Mr Jones. In the absence of an application for specific discovery or of this allegation being put to Mr Jones in cross-examination, I proceed on the basis that these particular emails did not exist.

64. In assessing the evidence relating to the agreement itself, in my judgment given the factors set out in paragraph 16 above, inconsistencies or lapses in recall on the part of Mr Jones and Mr McCarthy as to the detail of who said what to whom and when in 2007 and 2008 do not assist significantly as to whose recollection on the disputed terms of the 2008 agreement is the more reliable.

The mortgage on the yacht

65. Of more significance as to what was said about whether there was at the time any charge on the yacht are the conclusions I have come to in paragraph 46 above concerning the evidence of Mr Bransgrove and the emails in July 2008. These conclusions point strongly to the recollection of Mr Jones in this regard being more reliable than that of Mr McCarthy.

66. Another strong indication in the same direction is the absence of any contemporaneous corroboration of Mr McCarthy's evidence that he complained about delays caused by the need to clear the mortgage. I have found that the first time this was raised in recorded form was in 2013 after the parties' business relationship broke

down. For the reasons already given, I do not accept that his recollection about such complaints is reliable and it is likely that none were made until 2013.

67. The likelihood of either recollection as to what was said about the yacht being encumbrance free does not take matters very much further. It is not suggested that Mr Jones was made aware of any waiting buyer and it is plausible that, perhaps as a matter of pride, he wanted to give the impression that it was not encumbered in the hope and expectation that the mortgage would be cleared by the time Mr McCarthy had agreed a sale. The evidence of Mr Bransgrove shows that a sale was unlikely to be a speedy process. On the other hand it is just as plausible that there was no real reason why he was not upfront with Mr McCarthy on this, given that it was known that there was a substantial mortgage on the villa.

68. In my judgment, on the balance of probabilities, and having regard in particular to the two indications referred to in paragraphs 65 and 66 above, it is likely that Mr Jones did tell Mr McCarthy that the yacht was encumbered. In any event, it follows from my acceptance of the evidence of Mr Bransgrove that it is likely that the delay in producing the blue book and clearing the mortgage did not lead to the loss of a sale, and that Mr McCarthy was able to sell later that year.

The mortgage on the villa

69. I turn now to deal with the villa. Although I have found that inconsistencies in recalling details are not generally probative in respect of the 2008 agreement, I consider the issue as to whether it was agreed that the villa should be retained as to the legal title in the name of Mr Jones, goes beyond mere detail, and is an important part of the 2008 agreement. In my judgment the inconsistency between Mr McCarthy's clear acceptance in his defence that the reason for this was to save tax, and his answers as summarised in paragraph 54 above are important factors in weighing up the oral evidence in this regard.

70. In my judgment, the inherent likelihoods in this regard also lend support to the evidence of Mr Jones rather than that of Mr McCarthy, in circumstances where both envisaged at the time that the villa would be sold on. Mr Jones' evidence that given the slump in the property market, as part of agreement it was understood that legal title would be retained in Mr McCarthy's name until sale is more inherently likely, than the oral evidence of Mr McCarthy. Having at first absolutely refuted the suggestion, his response after being referred to his defence appeared to be an afterthought. Even if it was not, in my judgment it is more likely that this was agreed at the time of the 2008 agreement rather than six months later, otherwise Mr Jones may be liable for tax. For this reason, together with the inconsistency referred to in the previous paragraph, I find that it is likely that this was agreed as part of the 2008 agreement.

71. This finding also impacts upon the issue as to why the power of attorney was signed. Given the finding in the above paragraph, in my judgment it is more likely that the purpose for this was as Mr Jones recalls, to allow him to direct a sale at an optimal time, rather than as Mr McCarthy recalls, that there was not enough time in February 2008 to have a transfer to Mr Jones notarised.

72. The next important issue as to the villa is whether it was intended the mortgage would be redeemed. In my judgment, the issue of how this would be done is an important issue. The inconsistencies between Mr McCarthy's written and oral evidence as to this are such as to cause me to be cautious about accepting this evidence. In my judgment, it is inherently unlikely that Mr McCarthy expected Mr Jones to do this rather than doing it himself or via an agent such as Sr Serra from the outset.

73. The absence of any record of complaints about this until the relationship of the parties broke down in 2013 is also an indication that there was no real basis for such complaint as to what occurred in relation to the mortgage and that that was as envisaged.

74. On the other hand, payment of sums to Mr Jones which totalled the amount needed to redeem the mortgage is an indication that it was to be used for that purpose. That in my judgment is not a strong indication. That was the sum which Mr McCarthy was obliged to pay to ensure that the villa was transferred mortgage free. As long he was not making the mortgage repayments thereafter there would be no loss to him and any loss caused by the falling property market would be that of Mr Jones. Mr McCarthy had use of the villa in the meantime on a tenanted basis, although eventually another tenant was found.

75. In my judgment, subsequent events do not provide strong indications the other way. I shall deal with these in more detail later in this judgment.

76. Heavy reliance is placed by Mr McPherson on the later emails from Mr Mallett saying that it was always intended under the agreement that the mortgage on the villa would be redeemed at the outset. However, for the reasons already given, in my judgment, little weight should be attached to those emails.

77. In my judgment, weighing up all these factors, it is likely that the parties intended as part of the 2008 agreement that the mortgage on the villa would be dealt with in the way that it was.

Transfer of the equity in the villa in 2010

78. Mr McCarthy's case that Mr Jones transferred his beneficial interest in the villa to Mr Proctor rests upon emails in November and December 2010, which Mr Mallett sent to Sr Serra's assistant and copied to Mr Jones. One dated 9 December 2010 reads as follows, with the original typing errors:

> 'We have agreed a property swap with Brian such that Brian now is the beneficial owner of number 22, the property that Toni dealt with as part of a property swap with Andre McCarthy.
>
> We have agreed that Brian will acquire the property (at a value of €1,200,000 and the latent debt €739,000 to La Caixa) in exchange for Brian's beneficial interest in a property in Dubai, apartment 3401, Saba II Jumeirah Lake Towers. Brian has no wish to transfer the title into his own name and will want to lave the property registered in Andrew's name but Brian will be responsible for the

> outgoings with immediate effect. Can you ask Toni what we need to do to record this transfer?'

79. Mr Jones accepts what the email says, but maintains it records only one of the proposals being discussed at the time, and that he would not have agreed this when the amount of the debt to Mr Proctor had not been resolved. He cannot explain why Mr Mallett wrote in the terms which he did.

80. Mr McCarthy accepts that he was not involved at this time, but maintains that Mr Jones' debt to Mr Proctor was then in the region of €1.2 million, although in another part of his evidence he says it was €1.5m. However in subsequent emails Mr Proctor continued to claim that the debt remained unpaid and put various sums on it such as €600,000 in 2014, €800,000 in 2016. In 2017 he said the figure was just over €1 million. Mr McCarthy suggested in cross examination that Mr Jones could have repaid some of the debt in the meantime, but there is no reference to this in the documentation.

81. Mr Campbell points to other indications which suggests that no transfer was made in 2010. These include an email in January 2014 to Mr McCarthy in which Mr Proctor says the villa was not his problem, Mr McCarthy's purported transfer of his rights to Mr Proctor in December 2014, and the fact that Mr Jones' continued to make mortgage repayments until 2016 when he attempted to re-mortgage the villa in his wife's name, an attempt in which Mr Mallett was involved. There is also the email to Mr Proctor in May 2016 in which Mr Jones asserts that he retains the equity. Whilst that to some extent may be seen as self-serving, it is consistent with his continued mortgage repayments and attempts at re-mortgage.

82. Whilst it is possible that Mr Jones may have agreed to transfer the beneficial interest in the villa to Mr Proctor while the debt remained in dispute, for example by way of security, in my judgment that is not very likely. Taking all these matters into account, in my judgment it is more likely that Mr Mallett's email refers to a proposal which was not finalised rather than evidencing a transfer. Although there is reference to Mr Proctor taking over outgoings with immediate effect, there is also a recognition that something needs to be done to finalise the transfer.

The 2014 agreements

83. Mr McCarthy accepted in cross examination that he revoked the power of attorney in 2013 in the context of his dispute with Mr Jones regarding the demerger of their healthcare business. Mr Mallett told Mr McCarthy in March 2014 that Mr Proctor needed the power of attorney reinstated and in June 2014 told Mr Proctor that Mr Jones was going to instruct Sr Serra that it should be in Mr Proctor's favour. Sr Serra then informed Mr McCarthy that he could sign such a power in favour of Mr Proctor so that he could sell the villa.

84. Mr McPherson properly accepts that emails after the February 2014 agreement are not strictly relevant to its interpretation. It is not in dispute that Mr Proctor had no involvement in this agreement and was not informed of it until June 2014. Moreover, Mr McCarthy accepted in cross-examination that he reneged on the February 2014 agreement.

85. In my judgment it is more likely that the February 2014 agreement was intended to restore the power of attorney in Mr Jones' favour as he says, rather than in favour of Mr Proctor, as Mr McCarthy contends.

86. Mr McCarthy also accepts that he then decided to cut out Mr Jones and deal directly with Mr Proctor. He added, for the first time, that this direct dealing was suggested by Mr Mallett. In my judgment this is inconsistent with his email in July 2014 to Mr Proctor where he referred to Mr Jones and Mr Mallett as hoodlums and to his intention to by pass them. The email also refers to Mr McCarthy's impression that the "Mallett/Jones gang is just as content to shaft you as they did me." When he then emailed Mr Proctor on 29 July 2016, copying in Sr Serra, confirming their agreement, he did not copy in Mr Jones or Mr Mallett or refer to either of them.

87. Mr McPherson submits that if Mr McCarthy and Mr Proctor wished to keep their agreement secret from Mr Jones it is surprising that they instructed the same lawyer as Mr Jones was using. There is some force in that submission. He also submits that Mr Jones' consent to this agreement should be inferred from email exchanges in July 2014, the terms of the agreement itself and the subsequent conduct of the parties. Mr Proctor's emails to Mr McCarthy suggest that any deal between them would have to be "okayed" by Mr Jones as he would pick up the shortfall. The response was forwarded to Mr Mallett, as other emails were. Mr Jones in cross-examination accepted that he was kept informed of discussions and that he spoke to Mr Proctor about them, which conversation did not "go very well." He maintained that he would not have consented to what was agreed. There is no email showing that he objected, but on the other hand there is none to say that he "okayed" this agreement.

88. That agreement was put into writing in December 2014, the draft having been prepared by Sr Serra. It included terms not to sue Mr Jones, releasing Mr McCarthy's rights under the purchase contract produced at the February 2008 meeting and providing that the power of attorney to Sr Serra to sell the villa could not be withdrawn. Sr Serra was at that time acting as the administrator of Mr Jones' companies in Mallorca. When it was put to Mr Jones in cross-examination that Sr Serra would have updated him about the written agreement, he replied that Sr Serra and Mr Proctor had common interests, and referred to his subsequent litigation with Sr Serra.

89. In January 2015 Sr Serra transferred €150,000 to Mr McCarthy. There is no documentary evidence thereafter of Mr Jones either objecting to or "okaying" the December 2014 agreement.

90. In my judgment the matters on which Mr McPherson relies are insufficient to infer Mr Jones' consent to the December 2014 agreement, given Mr McCarthy's intention to by-pass him, his instruction to Sr Serra that the agreement was between him and Mr Proctor without any reference to Mr Jones, and the absence of any documentation to show that the draft agreement was sent to him, let alone approved by him. In those circumstances, there is no basis on which to found a case of novation of the February 2014 agreement by that of December 2014.

Sale of the villa in 2016

91. Mr McCarthy also accepted in cross examination that when he learned in 2016 that Mr Jones had put Sr Serra in sufficient funds to clear the mortgage on the villa in order to re-mortgage in his wife's name, he instructed Sr Serra to use those funds to clear the mortgage. He maintains that Mr Jones agreed to this course so that the equity could be used to clear his debt with Mr Proctor.

92. There were numerous emails between Mr Jones and Mr Proctor in May and June 2016 concerning the repayment of the debt. On 4 May 2016, Mr Proctor told Mr Jones that he needed to be paid what was owed, namely €850,000 + by the following Friday, otherwise he would sell to Mr McCarthy for €950,000. Mr Jones replied that he was not comfortable with that sum and the deal that they agreed was €1million and nothing else. This is the context in which Mr Jones then said that everything was up for discussion but it revolved around his retaining the equity in the villa. Mr Proctor reply to that was "that's all well and good" but he did not want part of the debt paid now and some later, and that there was eight years of interest. Mr Proctor then said the property had passed to Mr McCarthy for €950,000, to which Mr Jones said that he was not sure how the figures were calculated and asked for proof of payment. Figures were then sent showing a net sum was owed of €129,000 once the sale proceeds of €950,000 were deducted. Mr Jones then commented on the figures but made no reference to that deduction. He then said all the toing and froing was going nowhere and suggested a meeting, to which Mr Proctor agreed.

93. This email trail stops there. However Mr McCarthy says that in June 2016 Mr Jones and Mr Proctor agreed that €950,000 was the amount of this debt. He says he heard Mr Proctor on the telephone to Mr Jones when this was agreed. However, when pressed he accepted that he did not believe that this phone call resolved the matters between the two of them, although he added that only €50,000 then remained in dispute.

94. Mr McPherson submits these exchanges give rise to an estoppel by convention applying the principles summarised by Lord Burrows in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, at paragraph 45, citing Briggs J, as he then was, in *Revenue and Customs Commissioners v Benchdollar Ltd* [2009]EWHC 1310 (Ch). He says that Mr Proctor's assertion that the villa had passed to Mr McCarthy gave rise to a shared assumption between them and Mr Jones that the latter had ceased to be the beneficial owner. Mr Jones assumed responsibility for the shared assumption by agreeing to accept the sum of €950,000 in diminution of his debt. Mr McCarthy relied upon that assumption by making that payment. There was subsequent mutual dealing because that sum was applied for the benefit of Mr Jones in extinction of his debt. It would be unjust for him now to assert that he was the true beneficial owner.

95. As Lord Burrows makes clear, any shared assumption must be expressly shared. The party sought to be estopped must convey to the other party an understanding that they expect the other party to rely upon the assumption.

96. In my judgment the factual scenario falls short of the required express sharing of assumptions, a conveyance of expected reliance, of reliance, or of an unjust element. It is clear that in his last email in this chain, Mr Jones stated that all the toing and froing was going nowhere, and suggested a meeting to which Mr Proctor agreed. However, if an agreement was then reached with Mr Jones, it is surprising that this is not recorded. As that was the end of the email chain, it is more likely that no

agreement was achieved and that Mr McCarthy pressed on to by-pass Mr Jones as he had set out to do and to come to an agreement with Mr Proctor only, as he says in his email to the lawyers. As Mr Jones did not consent to this, it is not unjust that he should now seek damages from Mr McCarthy.

97. Mr Jones maintains that he put Sr Serra in funds in order to further his attempt to re-mortgage. That is consistent with an email which he sent to the bank in April 2016 saying that he was arranging to transfer funds to Sr Serra to clear the mortgage on the villa "so that in the meantime we can transfer" it into his wife's name. A bank valuation in the name of Mrs Jones was then completed which valued the villa at €1.58 million. Mr Jones in cross-examination said that later on, he and his wife had a meeting with Mr Proctor and asked him for an explanation of what had happened and why, to which Mr Proctor replied that he saw his chance and took it.

98. In my judgment the contemporaneous documentation is more consistent with the recollection of Mr Jones as to dealings with the villa in 2016 than with that of Mr McCarthy, and the former recollection is likely to be the more accurate. I accept Mr Jones' evidence in this regard.

99. In the absence of any documentation to support Mr McCarthy's claim that he spent €150,000 on the costs of surveys and legal fees in respect of the villa and the cost of renovating it for sale, I am not satisfied that that sum was so spent or that it was authorised by Mr Jones, although it is likely that some sums were spent on a survey and legal fees. The points relied on by Mr McCarthy to show that Mr Jones was aware of this renovation, namely that he used the same decorator and was then living a short distance from the villa, do not in my judgment provide a sufficiently strong basis on which to draw such an inference.

Breaches of the 2008 agreement

100. Accordingly in my judgment, Mr McCarthy's dealings with the villa in 2013 and/or 2016 amount to a breach by him of his obligations under the 2008 agreement, by which it was intended that Mr Jones, and not Mr McCarthy, would sell the villa onto a third party. His revocation of the power of attorney, his reinstatement of it in favour of Mr Proctor, and the sale of the villa in 2016 all amount to breaches of the 2008 agreement.

The amended claim for equitable relief

101. It is not in dispute that matters of contract concerning the villa are governed by the law of England and Wales. Several weeks before the hearing was due to start, the claimants applied to amend their claims to include equitable remedies in respect of the villa. This gave Mr McCarthy little time to seek a report from an expert in Spanish law as to such remedies, as it was contended on his behalf, somewhat unusually, that despite the position regarding contractual remedies as set out above, any equitable remedies would be governed by Spanish law. This was not accepted by Mr Campbell, but he indicated that if the amendments were allowed, and if it was eventually determined that equitable remedies were governed by Spanish law, the claimants would rely solely on their claims in contract. This concession was referred to in the order made allowing the amendments, and repeated in Mr Campbell's skeleton argument for the substantive hearing.

102. Accordingly it is necessary for me to determine which is the applicable law in respect of such remedies. Section 3(3) of the Contracts (Applicable Law) Act 1990 enacts the Rome Convention which applies to the 2008 agreement. Article 4 provides that if the parties have not chosen the applicable law, a contract will be governed by the law of the country with which it is most closely connected. In respect of immovable property, there is a presumption that that country is the country in which the property is situated, but that presumption must be disregarded if is appears from the circumstances as a whole that the contract is more closely connected with another country (see also *GDE LLC v Anglia Autoflow Limited* [2020] EWHC 105 (Comm)).

103. Mr Campbell submits that in this case the 2008 agreement is most closely connected with Wales. Both Mr Jones and Mr McCarthy are Welsh and the 2008 agreement was finalised (and on Mr Jones' case negotiated) in Wales. The intention of the parties to maximise Spanish tax efficiency cannot be the centre of gravity of the agreement. The location of the villa is not determinative, as the 2008 agreement also included the yacht which is registered in BVI. The February 2014 agreement specified that it was governed by the law of England and Wales, although it is to be noted that that dealt with the parties' joint healthcare business in the UK.

104. Mr McPherson included the following points in reply. The parties instructed a Spanish lawyer to draft documents and attended his office in Palma where documents were signed. The purchase contract applied the law of Mallorca and the power of attorney referred to provisions of Spanish law. The 2008 agreement as to the villa was intended to avoid Spanish tax liabilities. The villa and the mooring were situated in Spain.

105. Although I have found that the draft purchase contract was not signed, in my judgment as the villa and the mooring were situated in Spain and the parties instructed a Spanish lawyer to draft documentation which referred to Spanish law as applicable and/or referred to Spanish law, the country with which the 2008 agreement is most closely connected to is Spain.

106. Accordingly as a result of Mr Campbell's concession, the claimants are limited to their contractual remedies in respect of the villa.

Damages

107. The normal measure of damages where a seller fails to transfer land in breach of contract is the market value at the time for completion less the contract price. The resale price obtained by a seller has been taken as evidence of the market price at the time due for completion (see McGregor on Damages, 21st edition, paragraph 27-006). In this case, the consideration to be received by Mr McCarthy was the yacht, which he has received and sold and retained the proceeds.

108. Mr Jones relies upon the valuation obtained by the bank in his attempted re-mortgage in April 2016 in the sum of €1.58million. Mr McCarthy put the villa on the open market for €1.3-€1.35million the following month. There was some interest from potential purchasers but no sale was then achieved. Mr Campbell submits that the eventual selling price of €1.1million was the result of a rushed sale between September and November 2016, in circumstances where a higher price might have shown that Mr McCarthy had profited from his purchase from Mr Proctor. He wanted

to sell, and to retain the €150,000 which he had received from Mr Proctor the previous year.

109. Mr McPherson submits that this valuation is inconsistent with the contemporaneous emails. These suggest that a potential buyer in April 2016 was "wobbling." Mr Jones told the bank at about the same time that his wife proposed that they buy the villa for €850,000 and that is the price which was inserted in his wife's mortgage application. In May 2016 Mr McCarthy told Mr Proctor that he would be comfortable to pay him €950,000 for the release of the power of attorney and that it would be necessary to spend €150,000 to achieve a sale price of €1.1million.

110. In my judgment, taking all these matters into account, it is likely that the valuation of the villa at the time it was sold is the price that was achieved, namely €1.1million.

111. Mr McPherson submits, however, that such a valuation is not the correct measure of damages. The loss must be calculated on the basis of what Mr Jones would have done, not on what Mr McCarthy did do. There is no written evidence that his wife's mortgage application was or would have been approved. The amount of borrowing sought in that application was €575,000, which was not enough to pay the sum which Mr Proctor was demanding. It is unlikely that Mr McCarthy would have agreed to transfer legal title without the debt to Mr Proctor being settled. Even if he did, stamp duty of €85,000 and legal fees of €15,000 would have been payable, making the taking of the legal title commercially unattractive. Moreover, the claimants' pleaded case is that Mr Jones would have then kept the villa in the Jones family.

112. In my judgment, had not the funds transferred on behalf of Mr Jones to Sr Serra been used, at the direction of Mr McCarthy, to pay off the mortgage without reference to the re-mortgage, it is likely given the valuation obtained of the villa at that time, that such a mortgage would have been granted and taken. Whether the villa would then have been sold by Mr Jones or his wife or kept in the family, upon sale by Mr McCarthy in November 2016, the loss to them in my judgment is its value at that time. The fact that Mr Proctor has in writing given credit of €950,000 for the debt he says he was owed, does not impact upon the extent of such loss, given that as I have found Mr Jones has not agreed to the debt in that sum and maintains that the debt is less than half that amount and needs to be calculated taking into account other business dealings. That is not a benefit to Mr Jones.

Deductions

113. The issue then arises as to whether there should be deductions from the damages. The first potential deduction is the amount of the debt which Mr Jones admits he owes to Mr Proctor. In my judgment there should not. That is a matter between him and Mr Proctor. I have found that Mr Jones did not consent to the sale to Mr McCarthy and that the amount of the debt remains unresolved. Although Mr Jones put a figure on the debt in his evidence, he made clear that no precise calculation has been undertaken, and that it involves complex business dealings between him and Mr Proctor. I accept that evidence.

114. Mr McPherson submits that any damages should be deducted to take account of legal and survey and refurbishment costs which Mr Jones would have had to pay to achieve a sale price of €1.1million, in the same sum as claimed by Mr McCarthy. However as

I have found, I am not satisfied that the sum he claimed to have spent was, in fact, spent.

115. Mr McPherson also claims that Mr Jones would have incurred taxes and legal expenses of around €100,000 to obtain legal title. That is on the basis of a calculation of a Jordie Falceto, a Spanish lawyer instructed on behalf of Mr McCarthy. I deal with this in more detail below. That calculation is based on the purchase price of €1.5 million stated in the purchase contract, and as I have found that that was not signed and did not govern the 2008 agreement, in my judgment that is not an appropriate sum. The consideration for the villa and the mooring, was the yacht, later sold for £1 million. That is likely to be nearer to the purchase price of the villa at the time. Doing the best I can on the evidence before me, in my judgment if any deduction is to be made for fees and taxes, the appropriate figure is €75,000.

116. I was not referred to authority on whether, as a matter of principle, such a deduction is appropriate. In *Ridley v De Geerts* [1945] 2 All ER 654, Lord Greene MR, on the particular facts of that case, did not deduct stamp duty which the purchaser would have had to pay in respect of a purchase in the UK. However, he made it clear that that was because on the facts of the case, the market was such that the purchaser could have resold for a profit even before completion. He observed that there may well be cases where such a deduction is appropriate.

117. In the present case, at the time of 2008 agreement, the market was falling. In my judgment in the present case, a deduction of €75,000 is appropriate.

Illegality

118. Mr McPherson next takes the point that a decision not to pay tax under Spanish law engages the principles of illegality, and a breach of such law may be sufficiently serious that it would be contrary to public policy to allow a person to profit from his wrongdoing. In *Patel v Mirza* [2016] UKSC 42, Lord Toulson at paragraph 101, considering this common law illegality, said:

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy."

119. In *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) Cockerill J dealt with that approach when applied to illegality under foreign law at paragraph 331:

> "One does not specifically invoke proportionality, because that assumes an understanding of the questions of weight and gravity which may not be available in respect of a foreign court's or

> foreign judicature's priorities. But where the clear answer is not given by either of the main principles, one balances the relevant factors discernible from the case law in the light of the underpinning principle."

120. That approach was adopted by Zacaroli J in *Haddad v Rostamani* [2021] EWHC 1892 (Ch)). At paragraph 87, he observed that there may be cases in which there is a sufficiently serious breach of foreign law which reflect important policies of state to make it contrary to public law to enforce a contract. However, he also said that not every breach of foreign law would come into this category. At paragraph 88, he said this, referring to Cockerill J's analysis in in *Magdeev*:

> " I respectfully adopt Cockerill J's analysis. Lord Toulson's comment in ***Patel v Mirza***, justifying a more flexible approach in the context of domestic illegality, that "we are, after all, in the area of public policy" holds good in the case of foreign illegality. It is just that the public policies are different."

121. Sr Falceto is a lawyer and litigation manager at Spanish lawyers Blas De Lezo. His report was not in dispute. He says that in Spain there is only one owner of land and that is the registered owner at the Spanish Land Registry. It is necessary to use a notary public to give full effect where one party agrees to transfer land to another. Once notarised, the contract becomes a public document and cannot be contested by the parties or a third party. Where change of ownership is not registered, the contract remains valid and enforceable between the parties but not against third parties acting in good faith. A purchaser must pay ITP tax, equivalent to stamp duty, of 6-10% of the value of the property bought, and ADJ tax, for the registration of the purchase, of 0.5-1.5%. This becomes payable on the date of the contract, or, if different, the date the parties have agreed that the transfer of ownership will take place. Liability is not conditional upon registration, but registration will not take place until the taxes have been paid.

122. In respect of the villa and the mooring, Sr Falceto makes calculations of the tax that Mr Jones was due to pay on the villa and the mooring. In doing so, he takes the purchase price of the villa as stated in the purchase contract as €1.5 million and of the mooring as €150,000. The present claim seeks damages only in respect of the former. Sr Falceto calculates the ITP as €75,000 and ADJ as €22,500.

123. He also reports that if the agreement is not notarised, it may be possible for the purchaser to "avoid" payment of these taxes, but that involves four risks. The first is that the agreement will be enforceable between the parties but not against third parties acting in good faith. The second is that if the Spanish tax authorities discover the agreement, they may bring action to recover the taxes due. The third is that if a purchaser has sought to avoid payment, surcharges, penalties and interest may be imposed on the purchaser, as well as upon other parties involved in the agreement to avoid payment. Fourth, if the total amount of ITP and ADJ exceeds €120,000, then under the Spanish Criminal Code failure to pay amounts to a criminal offence. There is a four year time limit on proceedings to recover taxes, but this runs not from the date of the private agreement, but when the agreement becomes public.

124. Mr McPherson's points on illegality are put on the basis that Mr McCarthy did not intend to avoid tax himself and Mr Jones deliberately concealed from him the mortgage on the yacht and his intention not to redeem the mortgage on the villa when paid the monies sufficient for him to do so in February 2008. However, I have already found against Mr McCarthy on these issues.

125. I do not consider Sr Falceto's report gives a clear understanding of questions of weight and gravity of Spanish priorities in this regard. In my judgment it is of relevance in the present case, as I have found, that Mr McCarthy agreed to the arrangement to avoid the payment of such taxes. Moreover, in cross-examination he accepted that on his purchase of the villa from Mr Proctor, he paid no such taxes because he remained the registered owner.

126. In those circumstances, in my judgment as a matter of public policy the defence of illegality should not defeat the claim for damages in respect of the villa. That would provide a windfall for Mr McCarthy, who agreed to the avoidance, and who has profited by not paying taxes when he repurchased. It seems at least possible that he and Mr Jones may yet have to pay surcharges, penalties and interest.

Conclusion

127. Accordingly, the claim for damages succeeds in the sum of €1,025,000. I invite the parties to agree a draft order and to file the same, together with written submissions on consequential matters which cannot be agreed, within 14 days of handing down judgment. If necessary a supplementary judgment will be handed down in writing on the basis of such submissions.