Neutral Citation Number: [2019] EWHC 762 (Comm)

Case No: CL-2018-000122

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/03/2019

Before:

Lionel Persey QC sitting as a Judge of the High Court

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Between:

(1) Mr Paul Allen Levack
(2) APL Management Limited

Claimants

- and –

(1) Philip Ross & Co
(a firm)
(2) Mr John Bengt Moeller
(3) DDL 178 Limited

Defendants

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Andrew Hunter QC and Daniel Saoul (instructed by **Schofield Sweeney**) for the **Claimants**
Clare Stanley QC (instructed by **RPC**) for the **First Defendant**

Hearing dates: 7 February 2019

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Approved Judgment

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Mr Lionel Persey QC

Lionel Persey QC:

Introduction and Background:

1. In this application the Claimants (to whom I will refer as "**Mr Levack**" and "**APL**") seek summary judgment under CPR Part 24 in the principal sum of £5,171,705 against the First Defendants ("**Philip Ross**"). The claim is made in respect of Philip Ross's alleged breaches of trust which were committed, the Claimants say, through its consultant, Mr David Connick ("**Mr Connick**"). The Second and Third Defendants are not parties to this application.

2. The claim against Philip Ross arises in the following way. In late 2014, Mr Levack was introduced to Mr Chris Smith ("**Mr Smith**") and the Second Defendant, Mr John Moeller ("**Mr Moeller**"), by a Mr Vincenti of SJ Hambros, a private bank of which Mr Levack was a customer. Mr Smith acted on behalf of Mr Moeller. In early 2015, Mr Levack and Mr Moeller agreed jointly to acquire a property in Alie Street ("**the Alie Street Property**"), with each of them contributing 50 per cent of the purchase price. This agreement was not recorded in writing. Shortly thereafter, Mr Smith introduced Mr Connick of Philip Ross to act as the solicitor in relation to the Alie Street Property transaction.

3. In February and April 2015, Mr Levack's company APL paid a total of £5,171,705 to Philip Ross's client account as the Claimants' 50 per cent contribution to the purchase price of the Alie Street Property. The monies were paid in two tranches: £500,000 on 13 February 2015 ("**the Deposit Monies**"), and £4,671,705 on 8 April 2015 ("**the Completion Monies**"). It is common ground that these monies were held by Philip Ross on trust, although the nature of those trusts and their beneficiaries is in issue.

4. Philip Ross subsequently paid the Deposit Monies to fund the deposit payable in respect of an exchange of contracts in respect of the Alie Street Property. This payment was made in the name of Mr Moeller's investment vehicle, Katalina Global Limited ("**KGL**"). Mr Connick advised Mr Levack that the contract was held by KGL as nominee for a joint venture between Mr Levack or APL and KGL. Philip Ross later paid the Completion Monies out to the solicitors for the vendor of the Alie Street Property on behalf of the Third Defendant ("**DDL**"), an off-the-shelf company that had been acquired by Mr Connick on behalf of Mr Moeller/KGL in order to purchase the Alie Street Property. KGL became the sole registered shareholder and Mr Moeller became the sole director of DDL and, through that company with the assistance of Mr Connick, borrowed substantial sums against the Alie Street Property in order to fund his share of the completion monies. Mr Moeller/DDL then defaulted on these loans. The Alie Street Property was subsequently repossessed by DDL's lenders and then sold, with all proceeds of sale being paid to the lenders.

5. The Claimants contend that Mr Connick gave express commitments in his correspondence with the Claimants that Philip Ross would only pay the monies out when authorised to do so by the Claimants and for the purpose of funding the acquisition of the Alie Street Property for the joint and equal benefit of the Claimants and Mr Moeller (and his investment vehicle KGL). These commitments gave rise to *Quistclose* trusts which conferred upon Philip Ross the power to apply the monies, on the Claimants' order, for the purposes of acquiring the Alie Street Property for the joint and equal benefit of the Claimants and Mr Moeller/KGL.

6. Philip Ross accepts that the Deposit Monies came to be held on trust for APL and submits that the Deposit Monies were held to Mr Levack's order with power to apply them in connection with the purchase of the Alie Street Property.

7. The Claimants submit that the terms of the trust and the context in which Mr Levack "*authorised*" the release of the monies fall to be considered, and can be decided, by reference to the contemporaneous documents and in particular the emails passing between the parties. The issues are therefore suitable for summary disposal. This is disputed by Philip Ross, who argue that is has good arguable defences

(by which I take it to mean that it has realistic prospects of success) on the terms of the trusts, that the payments out were authorised by the Claimants, and in relation to causation and quantum.

The applicable principles

Summary Judgment

8. The principles to be applied on an application for summary judgment have recently been helpfully summarised by Bryan J. in *The European Union and Anor v The Syrian Arab Republic* [2018] EWHC 1712 (Comm) as follows:-

(1) The Court must consider whether the defendant has a realistic, as opposed to a fanciful, prospect of success;

(2) A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable. (As Lord Hobhouse put it in *Three Rivers v Bank of England (No.3)* [2003] 2 A.C. 1 at [158]

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

(3) In reaching its conclusion, the Court must not conduct a 'mini trial' (see for example *Swain v Hillman* [2001] 2 All ER 91);

(4) This does not mean that the Court must take at face value and without analysis everything that a party says in its statements before the Court. In some cases it may be clear there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

(5) The Court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial;

(6) The Court should hesitate about making a final decision where reasonable grounds exist for believing that a full investigation into the facts of the case would add to or alter the evidence and so affect the outcome of the case;

(7) If the application gives rise to a short point of law or construction and the Court is satisfied it has before it all the evidence necessary for its proper determination, it should grasp the nettle and decide it.

Trusts

9. There is an issue between the parties as to the nature of the trust which arose upon payment of the monies to Philip Ross. The Claimants contend that it is common ground that monies paid to a solicitor in connection with a transaction are held on trust by the solicitor for the payor: *Twinsectra v Yardley* [2002] 2 AC 163. Philip Ross disputes this and submits that the default position is that monies held in a solicitor's client account are held on trust for the solicitor's client, and not the payor: *Bellis v Challinor* [2015] EWCA Civ 59. The judgment of Briggs LJ in *Bellis* at [78] makes it clear that this default position will apply in a situation in which a party to a transaction pays money at the other party's request to the other party's solicitor and that this will only be the default position in the absence of any agreement or arrangement to the contrary. I have considerable doubts as to whether it is correct to treat Philip Ross as having acted solely in the capacity of solicitors to Mr Moeller/KGL/DDL in the context of this particular transaction. It seems to me to be strongly arguable that the firm was acting on behalf of the joint venture. It is, however, unnecessary for me to consider the point further because it is common ground that the monies paid to Philip Ross were in fact subject to a trust or trusts. Ms Stanley QC accepted on behalf of Philip Ross that the beneficial ownership of the monies remained in the Claimants throughout until such time as Phillip Ross applied them in respect of the specified purpose. She further accepted that if the monies were paid away in breach of the specified purpose then the firm would be in breach of trust.

10. It was common ground by the time of the hearing that the appropriate remedy, if any, for breach of trust in the circumstances of this case is equitable compensation, and not reconstitution of the trust fund: see *Target Holdings Ltd v Redferns (A firm)* [1996] 1 AC 421 (HL), per Lord Browne-Wilkinson at 435D-H; *AIB Group (UK) v Mark Redler & Co Solicitors* [2015] AC 1503 (SC) at [134] per Lord Reed JSC. Philip Ross contends that equitable compensation should not be awarded because it has a good arguable case that the Claimants' claim for relief fails for want of causation.

The issues

11. The substantive issues for the Court to decide are:-

(1) What are the terms of the trusts? Have the Claimants shown that Philip Ross has no realistic prospect of success in showing that the terms of the trusts for which they contend were the terms actually agreed?

(2) Were the monies paid away in breach of the terms of the trusts? Have the Claimants shown that Philip Ross has no realistic prospect of success in showing that the monies were not paid away in breach of trust?

(3) If there was a breach or breaches of trust, have the Claimants shown that Philip Ross has no realistic prospect of success in resisting a claim for equitable compensation in the amounts claimed?

I will consider the issues in turn after first addressing a procedural matter that was raised for the first time, as I understand it, in Ms Stanley QC's skeleton argument.

The Procedural Matter

12. CPR 24PD 2(3) provides that the application notice or the evidence contained or referred to in it or served with it must state that "*it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim*". The Notes in the White Book at paragraph 25.2.5 comment that "*the essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial".*

13. Ms Stanley QC submits that the Claimants have not, whether in the witness statement of Mr Levack's solicitor, Mr Alistair Kennedy, which was filed in support of the application or in the Application Notice, complied with this requirement. The only statement of belief that has been expressed is that of Mr Kennedy. It was not entirely clear from her submissions as to what consequences were said to follow from this alleged failure.

14. It is regrettable that this point was only raised very shortly before the hearing of the application. The Application Notice was issued on 23 November 2018 and Mr Connick's two witness statements ("**Connick 1st**" and "**Connick 2nd**") were subsequently served on 8 January 2019 and 29 January 2019, the latter in response to Mr Kennedy's 2nd witness statement of 21 January 2019. The skeleton argument was filed with the Court on 5 February 2019.

15. Part A(3) of the Application Notice states that the Claimants seek summary judgment because, for the reasons set out in Mr Kennedy's First Statement ("**Kennedy 1st**"), Philip Ross has no real prospect of successfully defending the claim for breach of trust against it, and there is no other compelling reason for a trial. Kennedy 1st, which is based, inter alia, upon instructions given to him by the Claimants (ie Mr Levack), provides that all such matters in his instructions are true to the best of his information and belief. He records in paragraph 1 of Kennedy 1st that he was duly authorised to make the witness statement on behalf of the Claimants, and in paragraph 24 he expressly articulates his belief "*that Philip Ross has no reasonable prospect of successfully defending the Claimants' claims for breach of trust and that there is no compelling reason for a trial of those claims*".

16. In my judgment the Notice Application and Kennedy 1st do, by reason of the matters set out in paragraph 15 above, comply with the requirements of CPR 24PD 2(3) and they do sufficiently set out the Claimants' belief that Philip Ross has no defence. Mr Andrew Hunter QC told me in reply that he had sought instructions from Mr Levack, who was in Court throughout the hearing, and that Mr Levack had confirmed to him that Mr Kennedy's witness statements reflected his own beliefs. Mr Hunter also offered to call Mr Levack to confirm this in evidence if necessary. I did not consider this to be necessary, although if I had thought it was I would have given leave for him to be called or to put in a short confirmatory witness statement.

The Trusts

Approach to the evidence

17. The Claimants contend that this is a suitable case for summary judgment because the terms of the trusts fall to be considered by reference to contemporaneous evidence and, in particular, the emails passing between the parties. Philip Ross disputes that the only material relevant in this case is the written communications and asserts that there were a number of key conversations between the various actors which are "plainly relevant and important" and cannot be resolved without a trial. Five such conversations are referred to. Mr Levack was party to all of them. Mr Connick was party to one. Ms Stanley QC submitted that this is a case in which it is important for the witnesses to be tested in cross-examination.

18. Where, as here, there are relevant contemporaneous communications between the parties the Court will usually accord greater precedence to what the parties said and agreed in writing at the time than to witness testimony which is either inconsistent with, or simply does not engage with, the contemporaneous evidence. If there is good reason to believe that oral evidence would, or even might, affect the result then the Court should, as the cases show, hesitate before giving summary judgment. There is, however, no room for the application of Mr McCawber's principle that something may turn up (*Charles Dickens: David Copperfield* (1850) Ch. 1)[1].

19. In this application both parties have had a full opportunity to put the contemporaneous documentary evidence before the Court and to address it in their witness evidence. The Claimants lay considerable stress upon the fact that Mr Connick has not engaged with some of the important correspondence although he had a full opportunity to do so in his two statements. This was also the case with Ms Stanley QC's written and oral argument which focussed on some of the relevant emails but did not address the full run of relevant correspondence in its proper context.

20. There are two further matters that I should briefly mention:-

(1) First, Ms Stanley QC submitted that I should put aside any suspicions of wrongdoing and drew my attention to the speech of Lord Browne-Wilkinson in *Target Holdings* (above) at p.432B in which he said this:-

> *"... The transaction in the present case is redolent of fraud and negligence. But, in considering the principles involved, suspicions of such wrongdoing must be put on one side ..."*

The Claimants have pleaded claims in deceit against all of the Defendants. These have not featured in the present application and it is right that no account should be taken of them – I have put them on one side.

(2) Secondly, the Claimants have referred in their skeleton to the fact that Mr Connick was the subject of adverse findings by the Solicitor's Disciplinary Tribunal in November 2014. Ms Stanley QC submitted that this matter was irrelevant to the present case and that I should not take it into account when considering this application. I agree.

The Deposit Monies

The nature of the trust

21. The Deposit Monies were paid into Philip Ross' client account on 13 February 2015. On 16 February Mr Connick confirmed to Mr Smith that he was holding the monies to his order. That was an error and Mr Levack advised Mr Smith that the monies were to be held to his, Mr Levack's, order. This was subsequently confirmed by Mr Connick in an email sent on 17 February 2015.

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1 "... I have no doubt I shall, please Heaven, begin to be more beforehand with the world, and to live in a perfectly new manner, if - if, in short, anything turns up ..."

22. On 26 February 2015 Mr Connick sent an email to Mr Smith in which he advised that he would need Mr Levack to send him express authority to use the funds that he was holding to Mr Levack's order towards the deposit on Alie Street. The following emails were then exchanged on 27 February 2015:-

(1) At 10.14, Mr Smith emailed Mr Levack in the following terms: "*... Dear Paul, following our call, I can confirm that the contract is ready to exchange immediately and David Connick requires release of your monies held on deposit with him to assist doing so … Please rely to this email with your ok to do that ...*"

(2) At 10.31, Mr Levack replied to Mr Smith as follows: *"... Morning Chris, Thanks for the email please go ahead with the exchange ..."*

(3) At 10.34, Mr Smith forwarded the above email chain to Mr Connick.

The Deposit Monies were transferred from Philip Ross' client account to the sellers' solicitors later that day when contracts were exchanged. The relevant contractual documents identified KGL as the sole purchaser.

23. Philip Ross submits that the payment of the Deposit Monies to the firm created a bare trust to hold the monies to the Claimants' order. The Claimants say that any power conferred on Philip Ross to pay the Deposit Monies, and any consent given by Mr Levack to that effect, was conditional upon the monies being used for a purchase that was for the joint and equal benefit of the Claimants on the one hand and Mr Moeller/KGL on the other. This is because the very essence of the arrangement between the parties was a 50/50 joint venture between those parties. Mr Connick was aware of the joint venture arrangement from the outset of his involvement with the transaction (see paragraph 8 of Connick 1st).

24. The Claimants submit that no reasonable person in Mr Connick's position would have understood Mr Levack's email of 27 February 2015 as authorising the use of the trust monies to fund the payment of the deposit for an exchange of contracts in the name of a purchaser in which the Claimants had no interest and in circumstances in which the Claimants' interest in the purchase was not otherwise protected. This is a compelling submission, particularly given Mr Connick's knowledge of the nature of the joint venture arrangement between the Claimants and Mr Moeller. It is further buttressed by Mr Connick's email to Mr Levack of 2 March 2015 in which he referred to the authority conferred on him by Mr Levack to release the Deposit Monies and went on to say this:-

> "*... I confirm that the contract was exchanged in the name of [KGL] but that it is held as nominee for a joint venture between you (or APL Management or other appropriate entity) and [KGL] ...*"

This email shows that Mr Connick was well aware of the nature of the relationship between the Claimants and Mr Moeller and that it was therefore appropriate for the contract to be held as nominee for both joint venture parties. Mr Connick asserts that he wrote this email following discussions with Mr Moeller and Mr Smith and, therefore, on instructions from KGL and that it is of no relevance to the exchanges on 27 February. I do not agree. The 2 March email contains a clear statement to the effect that the Claimants' interest as a joint venture purchaser of a joint venture asset was being protected and reflects what a reasonable person in Mr Connick's position would have understood his duties to be. I do not accept Ms Stanley QC's argument that the 2 March email is irrelevant because it post-dated the instructions given by Mr Levack. It was part of a chain of correspondence relating to the Deposit Monies that has to be read as a whole and which, as the Claimants submitted, confirmed the pre-existing understanding of the parties that the Claimants' interests would be adequately protected upon exchange and, moreover, gave the clear impression that such protection had already been put in place.

25. Three of the five telephone conversations upon which Philip Ross rely as being "*plainly relevant and important*" took place on 25 and 27 February 2015 and are referred to in the list of email exchanges summarised in paragraph 22 above. The substance of the various conversations is set out in those emails and, as acknowledged in paragraph 41 of Ms Stanley QC's skeleton argument, there is no issue as to the subject matter of any of them. They have to be read together with the email of 2 March 2015. There is, in my judgment, an absence of reality in the submission that those telephone

conversations might provide some support for Philip Ross' suggestion that it was entitled to pay out the Deposit Monies without protecting the Claimants' position.

26. In her oral argument Ms Stanley QC submitted that APL acquired an interest in the contract for the purchase of the Alie Street Property. The nature of that interest was not clearly identified. Even if APL did have some equitable interest in the contract the fact of the matter is that its interest was either not protected, or not protected in the way that it should have been.

27. I am satisfied that the payment of the Deposit Monies to Philip Ross was impressed with a trust to the effect that they would be used for the joint and equal benefit of the Claimants on the one hand and Mr Moeller/KGL on the other. Philip Ross has no realistic prospect of success in showing otherwise.

Were the Deposit Monies paid out in breach of trust?

28. Mr Connick does not dispute that he transferred the Deposit Monies to the vendors' solicitors without taking any steps to ensure that they would be used for the joint and equal benefit of the Claimants and Mr Moeller/KGL. Indeed, he simply does not address this important matter in his evidence. Put shortly, Mr Connick did not do what he undertook to do in his email of 2 March 2015 and what, in all of the circumstances, he should have done. This was, in my judgment, a clear breach of trust.

The Completion Monies

The nature of the trust

29. There was no further correspondence of any significance between Mr Levack and Mr Connick until 24 March 2015 when Mr Levack asked Mr Connick what was happening, noting that there was still no paperwork and asking whether Mr Connick would require the Completion Monies on Thursday. Later that day Mr Vincenti emailed Mr Smith to seek an update regarding the transaction, observing that "*there has been no detail of the SPV…*" Mr Connick replied to Mr Levack at 10.23 on 24 March 2015, advising that:

> "*… I am awaiting full information on the purchasing vehicle, which is a company newly formed for the purpose. I am waiting to learn whether the beneficial ownership of that company is to be split between Katalina Global Limited and APL Management Limited or whether I need to produce a joint venture agreement and declaration of trust…I do not believe we will be in a position to complete this matter on Friday....*"

Later that morning at 11.11 he advised Mr Levack that he expected to be in funds for KGL's share of the acquisition costs, that he was clarifying the position regarding the acquisition of a suitable vehicle, and that he was in the meantime preparing a financial statement that would enable both APL and KGL to arrange the requisite funding for completion and the post completion formalities.

30. Mr Smith replied to Mr Vincenti on 25 March 2015 and told him that the SPV was ready and that there would be signing and shareholding formalities to follow.

31. On 26 March 2015 Mr Vincenti emailed Mr Connick, noting that nothing had been seen in relation to the transaction. Mr Vincenti emphasised that nothing should be put in place in which Mr Levack/APL did not have a full 50% and that no monies should be received for the sales of flats in the property unless deposited into an account over which Mr Levack/APL had signatory power.

32. Mr Connick responded to Mr Vincenti and Mr Levack later that morning and said this:

> "*... I can assure you that I am conscious of Paul's position and that all arrangements will fully protect his 50% interest in the transaction and any proceeds of sale(s).*
> *I am pressing for details of the SPV and the beneficial ownership. I am assuming that the shares will be owned 50% by Katalina and 50% by [APL] but if for any*

> *reason they are not then I will draw up a joint venture agreement and declaration of trust to ensure that all is properly regulated ...*"

33. During this period there were exchanges regarding the possibility of using a Jersey company as the vehicle to acquire the Alie Street Property. This possibility came to nothing and does not, in my judgment, have any bearing upon the nature of the trust that subsequently applied to the Completion Monies.

34. On 30 March 2015, Mr Connick sent a further email to Mr Levack, in which he again expressly assured him that the Claimants' position would be protected and that any monies paid to Philip Ross would be held until that was the case. Mr Connick's email, which enclosed a draft completion statement, said:

> "*... Whilst I await formal documentation relating to the acquiring vehicle, which I am told will indeed be owned jointly by Katalina Global Limited and APL Management I attach for your information a [completion] statement ...*
> *... I can confirm that any funds you send me in anticipation of completion will be held to your order until I am in a position to complete the matter with the position of APL Management protected ...*"

The completion statement identified that the amount due from APL in respect of completion was £4,671,705.

35. Pausing here, it is clear from this run of correspondence that Mr Connick was well aware of his firm's duty to protect the Claimants' interests in relation to the Completion Monies and the Alie Street Property. Philip Ross contends that these emails are irrelevant because they were not part of the firm's "invitation" to pay the Completion Monies. That contention is untenable for reasons I will give below.

36. On 1 April 2015 Mr Levack emailed Mr Connick seeking an update. Mr Connick responded the same day, providing an update and stating:

> "*... We are targeting a completion on Wednesday so you might like to prepare to transfer funds on Tuesday, in anticipation. I can confirm that any funds you transfer will be held strictly to your order until you authorise their release, either for return to you or, more likely, to complete ...*"

Mr Connick asserts (Connick 1st, paragraph 43) that his undertaking in this email "*... overrode what I had said in my email of 30 March 2015 ...*" In other words, that all of his previous undertakings that the Claimants' position would be protected were somehow set at nought by this email and that, as and when the Claimants authorised Philip Ross to pay the monies over, the firm would have no further obligation to take any steps to protect the Claimants' interest in the Alie Street Property. I find Mr Connick's assertion to be wholly unrealistic and devoid of any merit. The full chain of correspondence has to be read in sequence and in context. I agree with the Claimants' submission that "*completion*" in the 1 April email can only have been a reference to completion as described in Mr Connick's immediately preceding emails, i.e. *"completion ... with the position of APL Management protected"*.

37. On 7 April 2015 Mr Connick emailed Mr Levack stating "*I confirm that the funds I receive will be held to your order on behalf of APL Management Limited pending completion*".

38. Mr Connick refers to this email as a further undertaking. Ms Stanley QC submits that the 7 April email is to be read as Philip Ross' invitation to Mr Connick to pay over the Completion Monies to the firm and as defining the limits of the trust – the monies, she argues, would be held (a) on trust for APL, to be applied as directed by Mr Levack, but (b) with a power in Philip Ross to apply those monies towards completion of the Alie Street purchase (even absent any directions from Mr Levack). These assertions are, in my judgment, wholly unreal. The reference to "*completion*" in the 7 April email can again only be a reference to completion as described in Mr Connick's immediately preceding emails, in particular his emails of 26 and 30 March. As the Claimants submit, the

commercial context had not changed – the transaction remained a 50/50 arrangement between the Claimants and Mr Moeller/KGL – and the need for the Claimants' interest to be protected had not been diminished in any way. The Claimants correctly observe that the contention that Mr Connick's emails of 1 or 7 April 2015 had the effect that, notwithstanding Mr Connick's express assurances, the Claimants paid the Completion Monies to Philip Ross on the basis that they could legitimately be paid out to fund a purchase in the name of a company wholly owned by Mr Moeller / KGL without the Claimants' position first being protected in any way is at odds with the contemporaneous documents, is inherently improbable and flies in the face of commercial common sense.

39. On 8 April 2015 APL transferred the Claimants' 50 per cent share in the Completion Monies (£4,671,705) to Philip Ross.

40. Following a telephone conversation on 10 April 2015 Mr Smith emailed Mr Levack and asked for authority to release the monies to DDL. He stated that Mr Levack's "*... interest in that company at fifty per cent will be held by APL Management Ltd as you requested, which David Connick is emailing to you in confirmation ...*" Mr Levack replied shortly thereafter and authorised the release of the monies "*re purchase of Alie Street*". Mr Smith forwarded this exchange to Mr Connick. This exchange cannot be reconciled with the case that Philip Ross now seeks to run and is inconsistent with Mr Connick's evidence. The same goes for Mr Connick's email to Mr Levack sent on the same morning (and before Mr Levack authorised the release of the monies) in which he attached incorporation documents for DDL and stated that "*... I confirm that this will be held as to 50% for APL Management and the directorships and shareholdings will be regularised shortly ...*" This is entirely consistent with the Claimants' case and shows that Mr Connick's understanding at the time was very different to the evidence upon which he now seeks to rely.

41. Ms Stanley QC submitted that the telephone conversation on 10 April 2015 between Mr Smith and Mr Levack was material and important and needs to be investigated in cross-examination. I reject this submission. The email exchanges on 10 April followed this telephone conversation and the Claimants' case is consistent with what Mr Levack was being told by Messrs Smith and Connick. I also reject Ms Stanley QC's submission that Philip Ross has a good arguable case that, as from the time of the transfer of the Completion Monies, those monies belonged to DDL and were held on trust by the firm for DDL. This argument fails to address, let alone grapple with, the clear statements by both Mr Connick and Mr Smith that the monies would be held as to 50 per cent for APL.

42. In my judgment the payment of the Completion Monies to Philip Ross was impressed with a trust to the effect that they would be used for the joint and equal benefit of the Claimants on the one hand and Mr Moeller/KGL on the other and that the Claimants' interest would be fully protected. The trust is, not unsurprisingly, similar to that in relation to the Deposit Monies. Philip Ross has no realistic prospect of successfully showing otherwise.

Were the Completion Monies paid out in breach of trust?

43. On 16 April 2015, the day before completion, Mr Connick emailed Mr Levack as follows:

> "*... Expect to be able to complete this tomorrow…I am assuming that the shares will be issued 50% to [APL]. Can you please confirm its company number and registered office … I am also arranging for you and John [Moeller] to be appointed as directors ...*".

Mr Connick asked Mr Levack for information that was required for the purposes of appointing him a director of DDL 178. Mr Levack provided this information on the following morning and Mr Connick acknowledged receipt.

44. Mr Connick did not, however, arrange for Mr Levack to be appointed a director of DDL or take any other steps to protect the Claimants' interests in the property. To the contrary. Some 34 minutes after receiving Mr Levack's details on 17 April 2015 he wrote to Mr Moeller in the following terms:-

> *" ... I can confirm that the purchasing entity set up to acquire the above property has now been established and that company is called DDL 178 Ltd; you are now being appointed as sole director and [KGL] the sole shareholder ..."*

45. No credible explanation has been put forward by Mr Connick for his failure to do what he had undertaken to do, and what he should have done, in order to protect the Claimants' position. Mr Connick asserts that he did not arrange for the appointment of Mr Levack as a director of DDL prior to completion because Mr Levack had demonstrated a lack of willingness to share information with third parties which could have created an obstacle to completion and a potential loss of the deposit. This excuse is irreconcilable with the matters set out in paragraphs 41 to 42 above. Mr Connick has also asserted that he acted as he did because he was instructed by Mr Smith that KGL should be registered as sole shareholder and Mr Moeller as sole director. Even if correct, this is not a defence to the Claimants' claim for breach of trust.

46. During this period Mr Connick was in correspondence with Edwin Coe, the solicitors for KGL / Mr Moeller's lenders. There is no suggestion in the correspondence that Mr Connick ever advised Edwin Coe of the Claimants' interest in either the purchase monies or the property. To the contrary. On 17 April 2015 he forwarded an email from Mr Moeller in which the latter stated that the balance of the purchase funds had come from KGL's resources and later that day he represented that Mr Moeller funded KGL.

47. The Completion Monies were paid over to the vendors on 17 April 2015. They were paid out in clear breach of trust, with no steps being taken to ensure that the Claimants' interest was properly protected. Philip Ross has no realistic prospect of showing otherwise if the claim against the firm were to be allowed to go to trial.

Quantum and causation

48. Philip Ross does not dispute that the Claimants paid over a total of £5,171,705 in respect of the Deposit and Completion Monies. Nor does it dispute that this is the measure of APL's loss, subject to its arguments on causation.

49. Philip Ross contends that no loss was in fact caused by the breaches of trust because Mr Levack would have acted no differently and given his authorisation to release the monies from the firm's client account in any event. Philip Ross posits the following counterfactual in support of this argument, namely that Mr Levack was aware of the borrowing by DDL and was nevertheless willing to invest in an undocumented joint venture with Mr Moeller, knowing that it was undocumented and involved substantial sums of monies. The firm asserts that Mr Levack trusted Mr Moeller and was not much bothered by the formalities and Ms Stanley QC submitted that Mr Levack would have agreed, had he been told, that APL would not become a shareholder and that Mr Levack would not become a director until after completion.

50. There is an issue as to whether Mr Levack was aware that DDL was going to make substantial borrowings to cover Mr Moeller's/KGL's investment and, if so, when he became aware. The suggestion that he was so aware appears in the Defendants' version of a summary note of a meeting between the parties on 18 October 2016 (ie 18 months' later) the contents of which are disputed by the Claimants. In the Defendants' version of that note it is recorded that Mr Moeller said "*... that from his email records the funding of [Mr Moeller's] participation has always properly informed to [Mr Levack]. PM agreed but argued that he was not aware of the amount, (in excess of £5 million)* ..." The disputed passage in the note is inconsistent with the surprise that Mr Levack expressed to Mr Connick on 30 November 2015 when he learned that there was a charge over the property which put DDL's lender in prime position.

51. However this may be, I do not regard this issue as germane to the issues that I have to decide. The relevant counterfactual is, what would Mr Levack have done had he been informed of the true

position prior to arranging the transfer of the Completion Monies? In other words, informed that whilst giving him assurances that his interests were being, and would be protected, Philip Ross was at the same time actively taking steps to ensure that DDL was put in to the sole ownership and control of Mr Moeller so that it could be used as a vehicle to enable Mr Moeller to raise his share of the purchase monies. The suggestion that Mr Levack would have been willing to pursue what the Claimants correctly describe as a commercially irrational transaction involving the investment of £5 million with no legal interest or protection and the immediate encumbrance of the purchased asset is unreal.

Conclusions

52. It follows from the above that I am satisfied that Philip Ross has no real prospect of successfully defending the claim against it. There is no other reason, let alone any compelling reason, why the claim for breach of trust should be permitted to go trial. [L SEP]

53. The parties should seek to agree an appropriate draft order reflecting my findings. My present view is that it is appropriate for me to give declaratory relief in favour of both Claimants and a monetary judgment in favour of APL although the parties have leave to address me on this should they disagre