Neutral Citation Number: [2020] EWHC 1937 (Comm)

Case No: CL-2019-000524

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 July 2020

Before :

Nicholas Vineall QC sitting as a Deputy High Court Judge

- -

Between :

(1) ELITE PROPERTY HOLDINGS LIMITED **(2) DECOLAVE PROPERTIES LIMITED** **(3) TRAVELFORCE LIMITED**	**Claimant**
- and –	
BDO LLP	**Defendant**

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- -

George Spalton (instructed by **RPC**) for the Defendant
Ian Mayes QC and Jonathan Miller (instructed by Kyriakides & Braier Solicitors) for the Claimants

Hearing dates: 1 and 2 July 2020

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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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 20 July 2020 at 10:30 am.

Nicholas Vineall QC sitting as Deputy High Court Judge :

1. In this claim the three Claimant companies assert that they have sustained loss and damage by reason of an unlawful means conspiracy between Barclays Bank plc ("Barclays") and the Defendant accountants BDO LLP ("BDO"), which led to Barclays foreclosing on various loans made to the Claimants. BDO applies to strike out this claim on each of three grounds, contending:

    i) that the claim is an abuse of process, because an earlier claim (which I shall call "the Barclays claim") was brought by two of the Claimants against BDO's alleged co-conspirator Barclays, alleging the same or a very similar conspiracy;

    ii) that the claim constitutes an impermissible collateral attack on various findings made in that, earlier, Barclays claim; and is for that reason an abuse of process;

    iii) that the statement of case discloses no reasonable grounds for bringing the claim cause of action, and/or that the claim has no real prospect of success, so that it should be struck out, or summary judgment should be granted in the Defendant's favour.

2. I begin with the history of events that are said to give rise to the present claim, and then deal with the rather proacted procedural history that followed in the Barclays claim. I shall then consider the pleading of the new claim, and then turn to the parties' submission on the three limbs of the application.

Events giving rise to the Claim

3. Here I shall draw in part on the helpful recitation of the facts in the judgment of HHJ Waksman, as he then was, in his decision in the Barclays' claim, [2017] EWHC 2030 (QB).

4. The first Claimant, "Elite" is a BVI company which holds property investments in the UK. Its business model was to acquire underperforming or distressed businesses in the care home sector, and to acquire acquisition of properties to be converted into care homes. Elite had a banking relationship with Barclays.

5. The Second Claimant, Decolace, is another BVI company also holding properties in the UK. Its business model was to acquire run down properties for modernisation with the potential of substantial capital gain; and the acquisition of properties and the establishment of a commercial business which Decolace would operate through a special purpose vehicle.

6. The Third Claimant ("**Travelforce**") operates the Skylark Hotel in Southend-on-Sea, near to London Southend Airport. Travelforce leases the Skylark Hotel from Elite.

7. All three Claimants are managed by Norm Consultants Limited ("Norm"), an English company. Norm's director is Mr Stavrinides. Norm also manages the affairs of Heath and Home Ltd ("H&H"), and Health and Home (Essex) Limited ("H&HE"). Together these companies have been called the "group", but they are not group companies in a Companies Act sense, and there is no clear evidence as to their ultimate beneficial

ownership. Mr Stavrinides says that they operated on a principal of mutual support, and the Statement of Claim alleges that whenever resources were needed by one company in the Group they would be provided by way of intercompany loans from another company with available cash.

8. The group banked with Barclays. H&H generated the bulk of the group's income by operating nursing homes, and had given Barclays a guarantee and debenture as secondary security, with the property owning companies providing first legal charges over freehold properties.

9. Between October 2006 and July 2008 Elite and Decolace (but not Travelforce) entered into three interest rate structured collars ("the collars"). The collars were terminated in August and September 2010 and replaced with interest rate swaps ("the swaps"). These interest rate hedging products ("IRHPs") were missold by Barclays to Elite and Decolace and as a result Elite and Decolace became entitled to redress under the compensation scheme agreed between Barclays and the FSA[1] in 2012. That scheme required Barclays to compensate customers to whom it had missold IRHPs for the direct consequences of doing so, and also required there to be an investigation of whether consequential losses were payable. As part of the scheme agreed by Barclays, it gave an undertaking to the FSA that it would

> "prioritise any Customers who are in financial difficulty and except in exceptional circumstances, such as for example where this is necessary to preserve value in the Customer's business, [Barclays] will not foreclose on or adversely vary, existing lending facilities (without giving prior notice to the Customer and obtaining their prior consent) until [Barclays] has issued a final redress determination …"

10. Barclays also agreed with the FSA that a system would be put in place whereby a "skilled person", KPMG, would have a role in checking to see that that undertaking was complied with.

11. This undertaking is at the heart of the Claimant's case because the Claimants say that Barclays and BDO unlawfully conspired together to mislead KPMG into allowing Barclays to foreclose when in fact there were no exceptional circumstances justifying that course. And that, the Claimants say, caused them loss and damage.

12. Eventually, in June 2014 Barclays provided compensation by way of redress to Elite and Decolace amounting to £1,529,000 (I shall round figures to the nearest £1,000) , by way of writing off two loans worth nearly £800,000, and making a compensation payment of £730,000. Those sums did not include any compensation for consequential loss.

13. The critical events, which give rise to this claim, occurred in the period between the redress scheme being agreed between Barclays and the FSA, and the redress payment being made to Elite and Decolace.

[1] The FSA became the FCA on 1 April 2013 but to avoid confusion I shall continue to refer throughout to the FSA

14. On 2nd November 2012 and again on 30th January 2013 the Bank sent "reservation of rights" letters to Elite in respect of its breach of cashflow to debt ratios, which formed part of the loan facilities.

15. By early 2013 H&H, the group's main source of income, owed HMRC about £801,000 by way of corporation tax. £100,000 had been paid on account but H&H did not have further cash available and there was insufficient cash available in the other group companies to enable them to lend to H&H so that H&H could pay its tax bill.

16. On 7 May 2013 HMRC demanded payment of £700,000. On 18 May 2013 the assets of H&H were sold to H&HE for £171,000. It is common ground between the parties that Barclays' prior consent was required for this transaction, but was not obtained. On 20 May 2013 HMRC presented a winding up petition against H&H and that was due to be heard on 1 July 2013.

17. Mr Stavrinides approached Barclays for a loan to enable the group to enable H&H to meet its tax liability to HMRC.

18. Barclays referred Mr Stavrinides to something called the "Barclays Business Support Scheme", and stipulated that BDO be retained to report on the group's finances. Quite who it was that retained BDO is not entirely clear. The latest version of the appointment letter dated 25 June 2013 is marked "draft". As drafted it was to be an appointment of BDO by H&H and the three Claimant companies, but Mr Stavrinides signed it on behalf of only H&H and Travelforce, and there is no countersignature from Barclays. But this issue does not need to be resolved, (a) because it is clear from the terms of the appointment letter that BDO's task was to report on the financial affairs of the group as a whole, and it is clear that that is what in fact they did; and (b) because there is no claim in contract against BDO.

19. The appointment terms reserved a right in Barclays to withhold parts of the BDO report. Appendix 1 to the report set out the Services and Deliverables. It accurately recorded the background, and amongst the deliverables were a review of the financial position of the group at 31 May 2013, and to make recommendations and conclusions including in particular in relation to the debt due to HMRC from H&H. BDO's fee was estimated at £15,000.

20. Mr Stavrinides discussed a draft of the report (I shall call it v1) with Andrew Smith of BDO in the second week of July, and on 22 July 2013 Mr Nygate, the Partner at BDO with responsibility for the report, sent Mr Stavrinides a complete draft (v2). It contained a redacted section as part of the executive summary.

21. Mr Stavrinides responded later on 22 July 2013. One of the issues he raised related to hedging costs. V2 had said nothing about hedging costs. Mr Stavrinides wrote:

> "Hedging costs. This is a fundamental issue that has a substantial impact on the report as well as the financial information. This situation has been under investigation by FSA for a while., Although there are no firm assurances but it could very well be proved that we are entitled to a refund of this amount. Two of the loans totalling £1m are for financing breakage costs. The overall cost to the group is approximately £2m."

22. On 23 July 2013 Mr Nygate sent a revised draft, v3. V3 contained, for the first time, this text:

"Management note that two of the loans totalling c. £1m are for the financing of swap break costs. The selling of the swaps is currently under investigation."

V3 also gave a title to the redacted section, which was "Additional Conclusions for Bank Eyes Only".

23. On 24 July 2013 Mr Stavrinides sent Mr Nygate some details of the costs of interest rate hedging for Elite, totalling £1,226,000, and he said that, although did not have the figures for Decolace to hand, he estimated the costs at £750,000 of which £300,000 had been borrowed in 2010. He asked Mr Nygate to deal with that by way of a note.

24. Mr Nygate sent a further version of the report, v4, again marked draft, on 25 July 2013. Confusingly, it is still dated 23 July. V4 contains this text:

"Management note that two of the loans totalling c£1m are for the financing of swap break costs. Management believes that the break costs for the swaps were c. £2.0m and we understand that the selling of the swaps is currently under investigation."

25. On 25 July 2013 Mr Stavrinides responded to Mr Nygate and confirmed that BDO could now release the report as complete and final. In the event, no version, marked as final, was ever produced, and the v4 draft was in fact the treated as the final report.

26. It will be noted that Mr Nygate had faithfully recorded all that Mr Stavrinides had told him about the IRHP issues, and Mr Stavrinides had expressed himself content with the final version of the report, save, obviously, except to the extent that some of the content was redacted.

27. The report summarised the financial position of the group entities in a table as follows:

Balance Sheet Summaries as at 30 June 2013:

£'000	H&H	Elite	Decolace	Travelforce	Total
Fixed Assets					
Freehold Properties	-	13,391	3,150	-	16,541
Property Improvements	80	-	-	-	80
Motor Vehicles	-	-	-	3	3
Total Fixed Assets	80	13,391	3,150	3	16,624
Current Assets					
Stock	–	–	–	18	18
Debtors					
HMRC VAT	-	15	- -		15
Trade & Sundry	-	55	- 21		76
Cash at Bank	8	3	6	10	27
Total Current Assets	8	73	6	49	136
Current Liabilities					

Trade Creditors & Accruals	-	-114	-	-30	-144
Sundry Creditors	-	-15	-	-	-15
HMRC VAT	-	-	-	-32	-32
HMRC - CT	-801	-	-	-	-801
H&H Essex	-108	-16	-	-	-124
Total Current Liabilities	-909	-145	-	-62	-1,116
Long Term Liabilities					
Barclays	-	-5,931	-785	-	-6,716
Grossack	-	-340	-	-	-340
Shareholders Loans	-	-2,997	-	-	-2,997
Intercompany Account	510	-450	36	-91	5
Total LongTerm Liabilities	510	-9,718	-749	-91	-10,048
Net Assets	**-311**	**3,601**	**2,407**	**-101**	**5,596**

28. On the basis of those figures the group taken as a whole was solvent, with net assets of over £5.5m, but it did not have cash available to meet the HMRC liability, with current liabilities (of about £1.1m) exceeding current assets (of only £136,000) by some £980,000.

29. These figures do not include any contingent sum in relation to future redress payments. Mr Mayes QC, for the Claimants, points out that if Elite and Decolace had already received the redress monies which they in fact received a year later, they would, all other things being equal, have had additional cash of somewhere in the region of £1.5m (although presumably in fact rather less than that because there would be one year's less interest accrued on the loan taken out to meet break costs), and on any view, the group would not only have been solvent but would also have had enough cash to meet the liability to HMRC.

30. In what is an apparent coincidence of timing, on 24 July 2013 Barclays' IRHP team wrote to Elite and Decolace stating that Barclays had determined that both were unsophisticated customers for the purpose of the sale to them of IRHPs. That meant that, under the redress scheme, they were bound to be entitled to a redress payment, and the only remaining question was how much.

31. On 2 August 2013 H&H submitted a proposal for a CVA.

32. On 5 August 2013 Barclays produced an initial escalation request, addressed to KPMG. An escalation request is a request to the skilled person for confirmation that, on the basis of the material submitted to them, exceptional circumstances exist permitting foreclosure notwithstanding the customer was the victim of misselling of IRHPs. But this escalation request was not in fact pursued because Barclays decided to await the outcome of the proposed CVA. This first escalation request described Health and Home in the context of the winding up petition, saying it was a trading vehicle and

> "While the directors purported a trade assets [sale] to a new company whose banking was with the Bank of Cyprus, outside

> the Bank's security network, and without our consent, the [care home operator] licences still sit with Health and Home Limited and if the company goes into liquidation the licences will be revoked and the nursing home will be shut down, leaving vulnerable people at risk. The appointment of administrators will enable the nursing homes to continue to trade and prevent the residents from being subjected to a distressing move, which may have a severe detrimental effect to the residents' health and wellbeing."

33. On 14 August Barclays again wrote to Elite reserving its rights arising from various alleged further breaches of the facilities agreements.

34. On 28 August 2013 HMRC rejected the proposed CVA and Barclays was told that it was intended to place H&H into a creditors' voluntary liquidation.

35. Then there is a side issue. At about the same time Barclays became aware that Decolace and Elite had been struck off the BVI Companies register for some sort of failure to file documents on time. This was promptly dealt by Mr Stavrinides and the two companies were soon restored to the register. In relation to Decolace, where this was the only breach relied on by Barclays, foreclosure was not pursued after the restoration to the Register, and in relation to Elite Barclays did not rely on this breach, after the restoration to the register, but relied instead on other breaches.

36. On 9 September 2013 Barclays made a renewed escalation request to KPMG. The escalation request is made on a template, and then at the end there is space for KPMG to give its response.

37. One box on the proforma says "Complaint/litigation in relation to swap (yes/no). If yes brief status of complaint/litigation." Barclays have completed the adjacent box by saying "No", despite the fact that by this stage Barclays had accepted that Elite and Decolace were eligible for redress.

38. The next box to be filled in is "Brief details of situation including reason for request for foreclosure/adverse variance without consent and customer response/position." There Barclays noted that the request was to appoint BDO as administrators over H&H and as LPA receivers of all the property assets of Decolace and Elite. The history is set out. Barclays say that the directors of H&H have purported to transfer the business assets of the nursing homes to H&HE (which Barclays refer to as Newco). The text continues

> "The contract of sale did not have Bank approval and [is] potentially subject to challenge by creditors. We believe the directors' motivation is to seek avoid the creditor action. Due to lack of engagement by the directors and limited information shared with the Bank we have not been able to establish whether the deferred consideration of £171,000 was paid for the transfer of assets. This may be a transaction at an undervalue.

> "The transfer has been done without the Bank's consent (which was required) and any consideration paid should have been paid to the Bank. We have not received any proceeds. The effect of this transfer reduces the Bank's security interest in the nursing homes as the Bank no longer benefits from security over the value of the operating business. Newco also banks with the Bank of Cyprus in contravention of the Bank's debenture. The matter has been referred to our internal fraud department in line with our procedures."

Then Barclays refer to issues relating to continuity of care to the nursing home residents, and to the striking offs, and then there is a redacted section.

39. The next box is for Barclays to set out "Exceptional Circumstances supporting request for foreclosure/adverse variance without consent." The exceptional circumstances set out related to the administration of Health and Home Limited, and the winding up petition, the fact of the unauthorised transfer of assets, that an administration would enable the nursing home to trade with the intention eventually of achieving a going concern sale and preventing the residents from being subjected to unplanned rehousing at short notice. It would ensure continuity of staff. The administrators would have authority to investigate the sale of the business. It also said the director had been avoiding contact and had not responded appropriately. It said that BDO anticipated securing a licence to operate the nursing home. BDO had advised that the CQC may be hesitant to grant a licence until the administrators have authority to act in relation to the nursing home, so they may have to wait for the administrators to be appointed. Then as to the LPA receivers, it was noted that both companies had been struck off. The LPA receivers would allow collection of rent and continuance of landlord's responsibilities and would enable the sale of the nursing home. In conjunction with the administration the Bank would fund these.

40. The form noted that there was reputational risk to Barclays because of there being vulnerable people in the nursing home, and that the purpose of the appointment of receivers was to maintain the home as a going concern. It was urgent because of the creditors' meeting on 12th September.

41. KPMG approved the escalation request making these comments:

> "As Health and Home does not have an IRHP we consider it falls out of the scope of the exceptional circumstances procedures. "
>
> "In respect of Decolace and Elite, as both have been struck off the register, it is arguable that they also both fall out of scope. However, we confirm that, in our opinion, the Bank's proposed action is consistent with the decision-making approach the Bank has set out in respect of exceptional circumstances."
>
> So KPMG were saying that, leaving to one side the striking off, they considered that there were exceptional circumstances justifying the foreclosure.

> "Our review of the Bank's decision-making has been based on information provided by the Bank. We have not considered the accuracy or completeness of any such information, although no significant error was immediately apparent. You acknowledge that any decision taken, or not taken adversely, to vary your foreclosure is yours alone and that KPMG has not been, and will not be participating in the Bank's decision-making. The Bank has agreed that it will not convey to the customer any contrary impression."

42. There are some important points to note at this stage.

    i) Firstly, there is no evidence, and it is no part of the Claimants' case, that the BDO report was provided to KPMG.

    ii) Second, the escalation request does not refer to the BDO report.

    iii) Third the information in the escalation report about the state of play of IRHP redress was provided to KPMG by Barclays, not by BDO.

    iv) Fourth, there is nothing to suggest, and again it is no part of the Claimants' case, that BDO knew anything more about the IRHP redress situation than Mr Stavrinides had told them, and as noted already, BDO had faithfully recorded in its report what Mr Stavrinides had told BDO about IRHP redress.

43. The Bank did go on to foreclose on the Elite loan, and to appoint BDO as receivers.

44. In November 2014 redress agreements were entered into between Elite and Decolace and Barclays, in which redress worth about £1.5m was provided to Elite and Decolace.

45. Eventually the group raised money elsewhere and the receiverships were discharged, and I was told that all indebtedness to Barclays had been cleared by 2019.

The Barclays claim

46. I now turn to set out the history of the litigation with Barclays.

47. On 20 November 2015 Elite and Decolace sued Barclays. Particulars of Claim followed on 22 April 2016. Three claims were advanced.

48. The first asserted a misselling claim against Barclays in relation to the collars and swaps ("the advice claim"). The second alleged that Barclays was in breach of a duty which it owed to Elite and Decolace in relation to shortcomings in the conduct of its review into its own misselling (the "review claim"). The third, to which I shall return in more detail, was a claim that Barclays had conspired with BDO.

49. HHJ Bird [2016] EWHC 3294 struck out the advice and review claims in December 2016. He held that the advice claims were either time barred or settled by the terms of the 2014 redress agreements. He struck out the review claim on the basis Barclays owed no duty to Elite or Decolace in relation to its carrying out of that review,

whether in contract or in tort. The Court of Appeal ([2018] EWCA Civ 1688) dismissed an application for permission to appeal.

50. HHJ Bird held that the conspiracy claims needed to be repleaded. The Claimant repleaded them and because Barclays refused to consent to the amendments, a contested amendment application came before HHJ Waksman (as he then was) in July 2017.

51. The test on the application before Judge Waksman was whether the amended claim had any real, as distinct from fanciful, prospect of success.

52. Judge Waksman set out the amendments in full. For present purposes I can confine myself to three paragraphs:

> "40A. The Claimants' case is that on about 4 September 2013 the Bank combined with BDO with the purpose of engineering a position whereby the Bank could foreclose on or adversely vary the Claimants' existing facilities, thereby inflicting intentional harm on the Claimants and the Group. The Bank's foreclosure and adverse variance to the facilities, implemented by the appointment of BDO as LPA Receivers, amounted to unlawful means and resulted in unlawful interference in the Claimants' business. Alternatively, the Bank's combination with BDO was actionable as a conspiracy to injure the Claimants.
>
> "40O. For the avoidance of doubt, there were no "exceptional circumstances" within the meaning of the Bank's undertaking to the FSA which emerged in the month before the Bank purported to appoint BDO as LPA Receivers over the properties of the First Claimant which could justify any adverse variation in the Bank's facilities to the Claimants and H & H.
>
> "40P. In the circumstances, the Claimants contend that:-
>
> > 40P.1 On or about 4 September 2013 the Bank (by Ms McDonald) combined with BDO (by Mr Nygate), their mutual purpose being to deprive the Claimants of their source of free cash from which the Claimants' obligations to the Bank could be discharged.
> >
> > 40P.2 It is to be inferred (from the matters set out at paragraphs 40C and 40G-40M above) that the Bank and BDO thereby intended to injure the Claimants.
> >
> > 40P.3 It is to be inferred (from the matters set out at paragraph 40C and 40G-40M above) that in its variation of the facilities of the Claimants and the Group and its purported appointment of BDO as LPA Receivers the Bank acted in breach of its undertaking to the FSA which was protect the interests of the Claimants, this amounts to the use of unlawful means.
> >
> > 40P.4 In the premises the Bank is liable to the Claimants for conspiracy to injure by unlawful means, and/or for unlawful interference in the Claimants' trade or business.

> 40P.5 Alternatively, in circumstances where the Bank was subject to a bar on foreclosure and variation of facilities by reason of its undertaking to the FSA which was designed for the protection of customers such as the Claimants, there is a sufficiently high degree of proximity, targeting and blameworthiness in the Bank's conduct as to justify the imposition of liability on the Bank for loss caused by its breach of the FSA undertaking, even if that undertaking was only actionable by the FSA at the behest of the Claimants rather than by the Claimants themselves.

53. HHJ Waksman refused permission to amend. It is important to understand the basis on which he reached that conclusion.

54. He noted that in relation to unlawful means conspiracy the unlawful means alleged was that Barclays was in breach of its undertaking not to enforce, because, said the claimants, the circumstances were not exceptional. He said he thought it highly questionable whether that could ever amount to unlawful means, but assumed in the claimants' favour that it could. But he then held that there could be no serious argument that the circumstances were not exceptional, in other words, the claimants had no real prospect of showing that there was a breach of the undertaking given to the FSA. Between paragraphs 60 and 72 he dealt with the arguments to contrary advanced by the claimants. He gave his conclusion in paragraph 73: "… since there is no real prospect of showing no exceptional circumstances, neither the wrongful interference claim, nor the conspiracy to use unlawful means claims can be made, because there was no unlawfulness to begin with."

55. Judge Waksman also held at paragraph 85 that there was no realistic basis for saying that the Bank and BDO had intended to act in breach of the undertaking. Finally he went on to consider whether there was a reasonably arguable case that there was any conspiracy, or in other words any actual agreement between Barclays and BDO. He held at paragraph 89 that there was not. His conclusion was "For all those reasons, there is nothing in the unlawful means conspiracy claim either".

56. The claimants appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. The CA held (a) that the conspiracy claim was settled by the 2014 releases (#55) (b) that the Judge was right to refuse permission to amend because (inter alia) "nor is there a real prospect of showing that BDO conspired/agreed that KPMG's imprimatur should be obtained by unlawful means." (per Asplin LJ at 60, see also per Nugee J at #73). That must mean no real prospect of showing that BDO conspired/agreed with Barclays. The Court of Appeal left open (#68) whether Judge Waksman had been right to hold that there had been no prospect of showing lack of exceptional circumstances.

57. So the position is that, as between Elite and Decolace on the one hand and Barclays on the other, the CA has held that there is no real prospect of showing that BDO conspired/agreed with Barclays that KPMG's imprimatur, that is to say approval of the escalation request, should be obtained by unlawful means.

The present claim

58. I now need to describe the present claim in more detail. Mr Mayes accepts that it is, and is only, a claim for conspiracy to injure by unlawful means, and the parties agree that the elements of that tort are accurately described in Kuwait Oil v Al Bader [2000] 2 All ER (Comm) CA thus:

> "108. A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

59. So: if there is no combination or agreement, there is no tort.

60. Despite the guidance about pleading given by Judge Waksman in a postscript to his judgment, this new pleading is lengthy and difficult to follow. (I note that it was not settled by Counsel now involved in the case). It makes no attempt at all to quantify the claim it advances, and it fails clearly to plead the elements of the tort. Paragraphs 1 to 29 set out the facts. Then it is said

> > "40. In the premises, it is the Claimants' case that between June and 13 September 2013, the Bank and BDO wrongfully and with intent to injure the claimant by lawful and unlawful means conspired and combined together to engineer a position whereby:
> >
> > > 40.1 the Bank could foreclose on, or adversely vary, the Claimants' existing facilities in circumstances in which they were not entitled so to do given the terms of the [FSA undertaking] Letters; and
> > >
> > > 40.2 BDO would be appointed as Administrators and LPA receiver over the Claimants and their assets."

Paragraph 41 pleads their motivation, and paragraph 42 pleads how the conspiracy was to be implemented. Paragraph 43 pleads the particular matters from which it is said the conspiracy is to be inferred, and I shall return to this list of seven matters later. Finally paragraph 44 pleads

> > "44. The unlawful means pursuant to, and in furtherance of, the conspiracy pleaded in paragraph 40 above, were the breach by the Bank of the Undertaking given to the FSA."

61. I find this paragraph slightly difficult to follow but it is the only place where unlawful means is pleaded and I assume in the Claimant's favour that it is intended as an allegation that Barclays and BDO agreed with each other that Barclays would, unlawfully, breach its undertaking to the FSA, and in so doing injure the Claimants.

62. Mr Mayes contends that the pleading should be read as including a reliance on other unlawful acts as part of the conspiracy. He points to earlier paragraph of the POC and says that these plead unlawful acts which are intended to be relied on as part of the conspiracy, and not merely as background. I will revert to this point later.

63. The final point about the new (instant) claim is that there is a third Claimant, Travelforce, which was not a Claimant in the Barclays claim. It is entirely unclear from the pleading how (or even whether) it is alleged that Travelforce has sustained loss.

Abuse of Process

64. Mr Spalton's first submission was that the new claim is an abuse of process because it could and should have been brought in the earlier proceedings against Barclays. He did not suggest that there was a rule that co-conspirators must always be sued together but submitted that on the facts of this case it was abusive not to have sued BDO at same time as Barclays given that the claims are, or are essentially, the same, and it is not suggested by the Claimants that there is material new evidence available now that was not available when the Barclays claim was commenced. He submitted that a relevant factor was the fact that the Claimants had not alerted any of the previous courts to the possibility that they might start a fresh claim against BDO. I shall call this the "pure abuse" argument, for Mr Spalton advanced this ground without relying on the lack of merit of the claim, and, at least initially, without relying also on his collateral attack argument.

65. Mr Mayes submitted that this was a new claim against a new defendant, and there had been no trial of the issues in the Barclays claim, which had been resolved without any of the factual allegations ever being addressed by witnesses, so this was not a case in which the Courts would be hearing a contested trial of the same or very similar allegations. He suggested that the reason BDO was not sued with Barclays is that they added little from the Claimants' points of view unless and until the claim against Barclays had been dismissed, especially since Barclays was an obviously solvent defendant, and that it would have been a bold move to attempt to add a fresh Defendant after HHJ Waksman had ruled against the Claimants' amendments in the Barclays claim.

66. This is not the usual type of abuse of process case in which A has sued B and failed, and then A tries to sue B again. Here the Claimants have failed against Barclays and now seek to sue BDO instead. On other hand, the claim against Barclays and the claim against BDO are, for all practical purposes, exactly the same claim: a claim that they conspired with each other to mislead KPMG and that as a result Barclays got away with a foreclosure which they could not otherwise have achieved.

67. The main principles were set out by Lord Bingham in Johnson v Gore Wood 2002 AC 1 at 31.

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to

identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

68. In Aldi Stores v WSP Group 2008 1 WLR 748, the CA cited with approval the judgment of Clarke LJ in Dexter v Vlieland-Boddy, summarising the principles to be derived from Johnson, as follows:

"49. … (i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse of process is on B or C or as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

> "50. Proposition (ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary), against others.
>
> "51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in

efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.

"52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.

"53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

69. The Court of Appeal in Aldi also considered the failure to alert an earlier court of the possibility that there might be further separate proceedings in the future and said this at [31] per Thomas LJ (as he then was)

"for the future, if a similar issue arises in complex multiparty litigation it must be referred to the court seized of the proceedings. It is plainly not only in the interest of the parties but also in the public interest and in the interest of the efficient use of court resource is that this is done. There can be no excuse for failure to do so in the future."

70. In the Barclays case Judge Waksman was very critical of the fact that the Claimants had not informed BDO of the allegations of conspiracy that had been made against them. There is no suggestion that the Claimants responded by telling the judge that they were thinking of suing BDO in the future.

71. It is important to remember that if a claim is struck out on the basis of abuse of process, a party is precluded from bringing to court a claim which, ex hypothesi, has a reasonable prospect of success (for otherwise it will be summarily dismissed). Such a course is justified in some cases as being in the public interest, on the grounds that there should be finality in litigation and a party should not be vexed twice in the same matter.

72. Clearly BDO could have been sued at the same time as Barclays but that is not in itself sufficient to constitute abuse. In my view the key factors that go into the balance in determining the "pure abuse" submission, are that:

(1) BDO has not been sued before;

(2) T he claim against Barclays did not proceed to trial, and BDO had no involvement in it: so quite apart from not having been sued before, BDO has not been "vexed" before;

(3) In m y view the decision to proceed only against Barclays in the earlier action was not unreasonable, if viewed without the benefit of hindsight: the Claimants had a solvent Defendant against whom to proceed, and there was no obvious reason to join BDO;

(4) Alt hough it is true that nothing was said about an intention to sue BDO, I find that the likely explanation for that omission is the simple and innocent one that Claimants were *not* at that stage intending to sue BDO. They were not intentionally holding the claim up their sleeve, as Mr Spalton puts it: what has happened is that, now that their claim against Barclays has been struck out, they would like, if they can, to sue BDO.

73. Although I am troubled by the omission to raise at an earlier stage the possibility of suing BDO, applying a broad merits-based judgment, I am not satisfied, taking into account in particular the four features that I have identified, that the failure to join BDO in the Barclays claim is, in and of itself, enough to render the instant claim an abuse of process.

74. Mr Spalton's first ground of attack therefore fails.

Collateral Attack

75. Mr Spalton's second line of attack is that the new proceedings constitute a collateral attack on the findings of Judge Waksman and the Court of Appeal. He points to two findings in particular, both of which, he says, the Claimants would have to overcome in order to succeed in their conspiracy claim: (a) the finding that the only unlawfulness relied upon is the alleged breach of the undertaking to the FSA, and Judge Waksman and the CA (Mr Spalton says) have held that there was no breach of that undertaking nor any real prospect of establishing that there had been; (b) the finding that there was no real prospect of showing that BDO conspired with Barclays: in short no unlawful act, and no conspiracy.

76. Mr Mayes' submission in response focussed on two points. First he submitted that there is evidence, in the form of redacted documents, available now which was not available when HHJ Waksman struck out the claim. Second Mr Mayes said that the new claim was not the same as the old claim, because the Claimants now rely upon some further unlawful acts.

77. There was no dispute between the parties as to the relevant law.

78. In *Hunter v Chief Constable of the West Midlands Police* [1982] A.C. 529 it was said that it was an abuse of process to initiate:

> *"... proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending (claimant) which had been made by another court of competent jurisdiction in previous proceedings in which the intending (claimant) had full opportunity of contesting the decision in the court in which it was made."*

79. The fact that a previous claim was struck out (rather than having the issues decided at trial) is no bar to the second claim being struck out as an abuse (see *Panton & Anor v Vale of White Horse District Council & Anor* [2020] EWHC 167 (Ch)).

80. The first of Mr Spalton's points was that the Court of Appeal has found there was no unlawful act. I am not persuaded that that is correct. In my view the Court of Appeal did not decide whether Judge Waksman had been correct to decided that there was no prospect of showing the existence of exceptional circumstances: see per Asplin LJ at [68]. I find it hard to see that if a point has been appealed against, and that appeal was not resolved, it can be an abusive collateral attack to take the point in subsequent proceedings.

81. But I agree with Mr Spalton that the Court of Appeal upheld Judge Waksman's finding that there was no real prospect of making good an allegation that BDO combined with Barclays to use unlawful means: see per Asplin LJ at [6]0] and Nugee J at [73].

82. In those circumstances it seems to me that the new claim, insofar as it relies on the same conspiracy as was alleged in the Barclays claim, is quite clearly a collateral attack on that finding. Indeed it is only collateral at all because BDO was not a party to the Barclays claim: that aside, the new claim is a full frontal attack on a critical finding made against Elite and Decolace in the earlier Barclays claim. This is therefore in my view a paradigm case of a collateral attack and it clearly renders the new proceedings an abuse of process unless the position can be saved by one or other of Mr Mayes' two points.

83. I begin with the argument about newly available redacted documents. This class of documents comprises BDO documents which were obtained by Mr Stavrinides when he made a subject access request to BDO under the GDPR legislation. He received a series of documents in which everything was redacted apart from passages referring to him personally, and the Claimants accept that that was an appropriate response by BDO to Mr Stavrinides' subject access request. I have read those documents in their redacted form. They show that there was lengthy correspondence between BDO and Barclays after the BDO report was produced. The non-redacted sections show that one of the topics under discussion was the propriety of the sale of assets of H&H to H&HEA, and whether Mr Stavrinides might incur personal liabilities for breach of his directors' duties. There is nothing in the unredacted sections which supports the alleged (or any conspiracy) between Barclays and BDO, and in fairness Mr Mayes did not suggest that there was. The mere fact that lengthy sections have been redacted seems to me to provide no support at all for the conspiracy claim. All that it shows is that there was correspondence between BDO and Barclays on an issue which did not concern Mr Stavrinides in his personal capacity– but that is surely to be expected at a time when Barclays was contemplating appointing BDO as receivers.

84. There is further point which is that it is not suggested by the Claimants that these documents could not have been obtained prior to HHJ Waksman's decision.

85. In any event, in my view the existence of these redacted documents are irrelevant to the question of abuse of process because they do not in any way assist with establishing that there was a conspiracy – an agreement – between Barclays and BDO.

86. Mr Mayes' second point was that the new claim is materially different to the Barclays claim. He suggests that the unlawful means alleged go beyond those alleged in the Barclays case.

87. I reject this submission for two reasons. First, I do not accept that the new claim does adequately plead any unlawful means beyond the breach of the undertaking, I have already quoted paragraph 44 of the POC in the instant action, and it seems to me that the only fair reading of the pleading is that that sets out what is being alleged as unlawful means. The only thing it pleads is breach of the undertaking. Secondly, the earlier paragraphs which Mr Mayes says expand the unlawful means are paragraphs which alleged that the BDO report was deliberately inaccurate. (paragraphs 13 to 17 of the POC). Even if that was part of the pleading of unlawful acts, and were true, I do not see that that has any bearing on the question of whether there was in fact a conspiracy or agreement between BDO and Barclays: it is the absence of any such agreement which is the critical feature of the CA decision and also therefore the critical feature in the collateral attack point.

88. I therefore conclude that the new claim alleges in substance the same conspiracy as the Barclays claim, that that claim has been found to have no reasonable prospect of success because of the absence of any such conspiracy, that the new claim is a collateral attack on the CA findings to that effect, and that it is as a result an abuse of process. I therefore strike it out.

89. Finally, I should add that had I not struck out the claim on the basis of it being an abusive collateral attack, I would have given judgment against the Claimants on the reverse summary judgment application, on the basis that the claim has no reasonable prospect of success. It is important to remember that the claim depends on an agreement between BDO and Barclays to mislead KPMG into permitting Barclays to foreclose. Yet Mr Stavrinides accepted at the time that the BDO report could be issued to Barclays, and his only real complaint now is that the report did not in terms attribute value to the group's redress claims. But the BDO report did not go to KMPG. Barclays was responsible for what KPMG was told about the situation, including what was said about redress: and Barclays knew about the redress position, whereas BDO was entirely reliant on what M Stavrinides told it (and BDO accurately reported what it had been told by Mr Stavrinides).

90. As I noted above, the present pleading at paragraph 43 relies on seven particular matters on the basis of which it says a conspiracy can be inferred and I will deal with each briefly in turn:

    (1) *The fact that the BDO report contained a redacted section*. This cannot assist the Claimants. The mere fact of redaction does not assist, because there was a contractual right of Barclays to redact; and speculation as to what the redaction might have been does not assist either because there are many things with which the redacted section might have been dealing, in particular the possibility that the H&H assets sale was improper.

    (2) *The fact that the report did not make a provision for the redress that was to be paid.* There is no reason why BDO would have known what redress was to be paid. This was their report to Barclays, who did know that. The BDO report

did not go to KPMG. This point cannot assist at all with inferring a conspiracy.

(3) *The fact that the Bank did not promptly tell Mr Stavrinides when it discovered about the BVI striking off.* That may or may not be right but I cannot see how it has any bearing on a conspiracy between BDO and Barclays.

(4) *The fact that BDO concealed from the Claimants that it had assisted in the preparation of the escalation request, that it was having what is described as private contact with the Bank, and thar the Bank had agreed that BDO would be the Administrators and LPA receivers.* Even if true, I do not see how these facts, which seem to me unsurprising in themselves, can give rise to any inference of a conspiracy to injury by unlawful means.

(5) *The fact that the Bank filed the escalation request the same day as a meeting with Mr Stavrinides, revealing (it is said) that the meeting was not a genuine attempt to resolve matters with Mr Stavrinides*. It seems to me that the timing of the escalation request is amply explicable by the impending CVL, but even if that is not the explanation, this complaint, which is about the Bank's behaviour, does not in my view give any support to the idea of a conspiracy with BDO.

(6) *The fact that the Escalation Request continued in formation that was untrue misleading and false.* Supposing, in the Claimant's favour, that this were true, I do not see how it would assist at all in supporting an inference of a conspiracy with BDO. Barclays produced the escalation request, not BDO.

(7) *The hurried appointment of BDO as administrators of H&H in advance of the appointment of liquidators.* Again, I do not see how this can assist at all with an inference of a conspiracy between BDO and Barclays, especially given that the situation was urgent.

91. For these reasons, which are not I think, materially different from the views on the earlier Barclays claim expressed by Judge Waksman, nor the views summarised by Nugee J in the Court of Appeal at [72], I find that there is no reasonable prospect that the Claimants will succeed at trial in demonstrating a tortious agreement between BDO and Barclays of the type pleaded. It was not suggested that there should be a trial for any other reason, and so, had I not struck the claim out as an abusive collateral attack, I would have given summary judgment in the Defendant's favour.