Neutral Citation Number: [2021] EWHC 650 (Comm)

Case No: CL-2019-000526

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

MARIA ALESSANDRA FOGLIA	**Claimant/ Applicant**
- and -	
(1) THE FAMILY OFFICER LIMITED* **(2) WECHSLER & CO LIMITED*** **(3) C&C FAMILY HOLDINGS LIMITED** **(4) MATTEO CERRI*** **(5) ITALIANS CLUBHOUSE LIMITED*** **(6) ITS FASHION STREET CAFÉ LIMITED*** **(7) SHIELD RISK MANAGEMENT LIMITED*** **(8) ST CHARLES LUXEMBOURG SA***	**Defendant/ *Respondents**

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Paul Lowenstein QC and Philip Hinks (instructed by **Fieldfisher**) for the **Applicant**
Tiffany Scott QC (instructed by **Withers LLP**) for the **Respondents**

Hearing dates: 04 March 2021
Draft sent to Parties: 15 March 2021

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Approved Judgment

I direct that 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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THE HONOURABLE MRS JUSTICE COCKERILL DBE

"**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 22 March 2021 at 10:00.**"

Mrs Justice Cockerill :

Introduction

1. In July 2019, the Claimant ("**Mrs Foglia"**) was the victim of a substantial fraud pursuant to which €15m was misappropriated from her account with a Cayman bank, CITCO Bank and Trust Company Ltd ("**CITCO**"). The account in question is held on Mrs Foglia's behalf by a very substantial Italian fiduciary nominee company named Unione Fiduciaria ("**UF**"). Someone impersonating an authorised signatory of UF gave fraudulent payment instructions to CITCO by telephone and later by fax. Those instructions directed CITCO to transfer €15m from Mrs Foglia's account to an English bank account held at Barclays Bank.

2. The instructions were honoured by CITCO and the transfer was made on 18 July 2019. The holder of the recipient bank account was the First Defendant ("**TFO**"), a company wholly owned and controlled by the Fourth Defendant ("**Mr Cerri"**).

3. Upon discovering the fraud, Mrs Foglia sought and obtained a series of non-party disclosure orders against various third parties and then as, facts emerged, a series of freezing orders and proprietary injunctions against the Defendants. With the assistance of those orders, which provide a striking illustration of the assistance which this Court is able to give to a defrauded party, she has so far successfully recovered the sum of €11,456,631 from the Defendants and from certain third party recipients of the proceeds of the fraud, leaving €3,543,368 (plus interest and costs) outstanding.

4. Mrs Foglia has brought this action against the Defendants advancing proprietary claims and claims in knowing receipt, dishonest assistance and unjust enrichment.

5. In the normal course of events such claims would proceed to trial. However by application notice dated 17 July 2020 ("**the Application"**), Mrs Foglia seeks summary judgment against Mr Cerri, TFO and other companies owned and controlled by him, namely the Second and Fifth-Eighth Defendants ("**the Cerri Companies"**). I will refer to these Respondents to the application compendiously as "Mr Cerri". Mrs Foglia says that the evidence firmly implicates Mr Cerri in the fraud, such that he and his companies have no real prospect of successfully defending the claim.

6. The essence of the case is that not only was his company, TFO, the direct recipient of Mrs Foglia's misappropriated monies, but immediately after receipt he proceeded to cause TFO to make substantial payments of Mrs Foglia's monies for the benefit of himself, his companies and his wife. In addition Mrs Foglia says that there are facets of the surrounding circumstances which Mr Cerri simply cannot explain and which are only consistent with his responsibility for the fraud.

7. Mr Cerri strongly denies any involvement in or knowledge of the fraud. He says that he too is a victim of it. His case is, implicitly, that he has been "*set up*" by the person or persons who carried out the fraud on Mrs Foglia. While he is unable to provide any positive explanation for how the moneys ended up in his account he says that the facts are most consistent with a hypothesis that the fraudsters are employees at or have inside information from UF or CITCO.

8. Mr Cerri says (in brief) that he believed the €15m received by TFO belonged to an Italian businessman named Mr Antonio Aloschi, and that the payments he caused TFO to make represented investments that he was making on Mr Aloschi's behalf pursuant to an agreement between them. He says that Mrs Foglia is unable to identify how Mr Cerri could have known details of her personal financial affairs, or those of Mr Aloschi, and how Mr Cerri had any of the information necessary to be in a position to engineer the payment of €15 million away from a bank account in the Cayman Islands.

9. With that brief introduction I turn to the nature of the application and the test which I have to apply, before proceeding to analyse the arguments in more detail.

Legal principles

10. CPR 24 sets out the Court's power to give summary judgment in respect of the whole or part of a claim if it considers that the defendant has no real prospect of successfully defending it and there is no other compelling reason why the claim should be disposed of at trial.

11. The classic statement of the test to be applied by the Court in determining whether a defendant has a real prospect of successfully defending a claim is that set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] which has been approved by the Court of Appeal (*inter alia* in *AC Ward & Sons v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]) and recited in countless applications at first instance. I need not reproduce it here.

12. In this case Mrs Foglia places particular emphasis on the latter part of the *EasyAir* summary, and in particular the adjuration to the court *to* "*grasp the nettle*" in a suitable case. She points also to *Calland v Financial Conduct Authority* [2015] EWCA Civ 192, where Lewison LJ re-emphasised the need for the Court to carry out a "*critical examination of the raw material*" in order to determine whether a claim has a real prospect of success, noting that "*the fact that some factual or legal questions may be disputed does not absolve the judge from her duty to make an assessment of the claimant's prospects of success*" (at [28]-[29]).

13. This, of course, is a somewhat unusual application – an application for summary judgment in a fraud claim on the merits. As to this, the authorities (perhaps unsurprisingly) say that there is no bar to granting such an application, but that very considerable caution is required.

14. Thus, subject to being satisfied that the test in CPR 24.2 is met, there is no impediment to the Court granting summary judgment where dishonesty is alleged. Mrs Foglia produced examples of cases where this had been done, such as: *Hanco ATM Systems Ltd v Cashbox ATM Systems Ltd* [2007] EWHC 1599 (Ch), *Global Metals AG v Colony Capital Ltd* [2020] EWHC 3361 (QB) and *Burns v Burns* [2021] EWHC 75 (Ch). All of these are cases which turn on their facts and do not advance the matter.

15. As to caution, reference was made to the judgment of Mummery LJ at [4-18] of his judgment in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661 and in particular:

> "[5] ….The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials….
>
> [17] It is well settled by the authorities that the Court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given … A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.
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> [18] In my judgment, the Court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

16. The need to avoid a mini-trial at the interlocutory stage has also been recently emphasised by the Supreme Court in *Okpabi v Royal Dutch Shell* [2021] UKSC 3 at [21] (citing *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [94-5]) and [102-114], albeit there in the context of a jurisdiction dispute.

17. Mr Cerri also emphasises the caution needed in relation to claims in fraud more generally by reference to:

    i) The authorities on pleading, which establish that pleadings of fraud should be subjected to close scrutiny and state that it is not possible to infer dishonesty from facts that are equally consistent with honesty (including of course negligence): see *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [15]-[22] referring to *Three Rivers* at [186] per Lord Millett. Mr Cerri says that here there are facts equally consistent with negligence and honesty as with dishonesty.

    ii) *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm) at [1438]-[1439] per Andrew Smith J, a passage which describes how more serious allegations require more cogent evidence, how fraud has per se to be regarded as less likely than honesty and how this impacts the balance of probabilities standard of proof in civil cases.

18. A key passage relied on by Mr Cerri is from Sir Igor Judge PQBD in *Wrexham Association Football Club v Crucialmove Ltd* [2006] EWCA Civ 237 at [57]-[58] (later approved by Sir Terence Etherton CHC in *Allied Fort Insurance Services Ltd v Ahmed* [2015] EWCA Civ 841 at [81]):

> "[57] I do not underestimate the importance of a finding adverse to the integrity to one of the parties. In itself, the risk of such a finding may provide a compelling reason for allowing a case to proceed to full oral hearing, notwithstanding the apparent strength of the claim on paper, and the confident expectation, based on the papers, that the defendant lacks any real prospect of success. Experience teaches us that on occasion apparently overwhelming cases of fraud and dishonesty somehow inexplicably disintegrate. In short, oral testimony may show that some such cases are only tissue paper strong. As Lord Steyn observed in *Medcalf v Weatherill* [2003] 1 AC 120 at paragraph 42, when considering wasted costs orders:
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> 'The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the Court had allowed the matter to be tried'.
>
> And that is why I commented in *Esprit Telecoms UK Ltd and others -v- Fashion Gossip Ltd*, unreported, 27 July 2000 that I was
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> 'troubled about entering summary judgment in a case in which the success of the claimant's case involves, as this one does, establishing allegations of dishonesty and fraud, which are strongly denied, and which cannot be conclusively proved by, for example, a conviction before a criminal court.'
>
> [58] This collective judicial experience does not always, or inevitably, provide a compelling reason for allowing the case to proceed to trial, nor for that matter require the judge considering the application to reject the conclusion that there is no real prospect of a successful defence of the claim if he is satisfied that there is none. That is not what the Rules provide, and if that had been intended, express provision would have been made. It is however a factor constantly to be borne in mind, if and when, as here, the reason for concluding summary judgment is appropriate is consequent on a disputed finding, adverse to the integrity of the unsuccessful party."

The factual background

19. Mr Cerri's evidence is that he is a successful and respected businessman operating in the fiduciary market. He created The Family Officer Group of companies ("the Group") which provide a wide range of services in industries such as insurance, property and hospitality. The Group started trading in 1997 in Italy and in 1999 in the United Kingdom. In the early 2000s he became one of the co-founders of Shield & Co Merrill Lynch Bank & Trust, a multi-family office run under the umbrella of the American bank. In July 2006 the activities once owned by Shield Group and two other minor family offices merged into the Group.

20. The Group co-ordinates and controls a number of different companies covering financial services, risk management and insurance, tax and legal planning, real estate planning, investments and property finding, media and events, private equity and venture capital with a focus on "Made by Italians", Insurance, Food & Beverage, Hospitality and Travel. In the last few years the Group has established a presence in other European countries, acted as direct investor (individually or as co-investor) in a number of businesses in the insurance, property and hospitality industries and entered into a considerable number of small ventures with Italian entrepreneurs in the United Kingdom. The Group now involves more than 100 professionals and is represented in nearly 20 countries around the world.

21. Mrs Foglia is the beneficial owner of monies standing to the credit of a bank account held at CITCO in the Cayman Islands. This account is held in the name of UF, a substantial Italian company that offers fiduciary and nominee services. One of UF's authorised signatories is an individual named Mr Lorenzo Sacchi. Mrs Foglia has no business connection to Mr Cerri or his companies.

22. The factual background to the fraud itself does not appear to be much in issue.

23. On 16 July 2019, CITCO received a telephone call from a UK mobile phone number ("**the Mobile Number"**). The caller identified himself as Mr Sacchi. He explained that he would be having dinner with Mrs Foglia in London that evening and that CITCO should expect to receive a payment instruction by fax the following day. It appears clear that this call was made by someone impersonating Mr Sacchi ("**X**"); the real Mr Sacchi says that he did not make this call and the suggestion of a meeting with Mrs Foglia was a lie.

24. On the morning of 17 July 2019, CITCO received a second call from the Mobile Number. Again, the caller identified himself as Mr Sacchi and he confirmed that the payment instruction had been sent by fax. This call was also apparently made by X.

25. The fax was received by CITCO later that day. It was printed on UF's letterhead and contained instructions purportedly signed by Mrs Foglia, Mr Sacchi and another UF signatory. It directed the transfer of €15m from Mrs Foglia's account to an account held with Barclays Bank in the UK. It is common ground that these payment instructions were fraudulent; the signatures were forgeries. It also appears that the document was not sent by any fax machine associated with UF. Inferentially it was put together by X and/or their associates.

26. The instructions were followed by CITCO and on 18 July 2019 a SWIFT transfer of €15m was made from Mrs Foglia's account with CITCO to the Barclays account. The Barclays account in question was an account of TFO.

27. The fraud was not discovered by UF until 29 July 2019 (a period of 11 days, it will be noted), when a UF employee received an account statement from CITCO and noticed that €15m had been debited from Mrs Foglia's account. UF informed CITCO that this transfer was unauthorised. Mrs Foglia was informed of the fraud the following day.

28. Upon her discovery of the fraud Mrs Foglia made a series of applications in this Court with a view to identifying the recipients of the proceeds of the fraud and preventing the dissipation of her monies. The timeline is as follows.

29. This matter first came before the Court on 21 August 2019. Carr J made a non-party disclosure order against Barclays and a proprietary injunction against TFO. On 22 August 2019, the Claim Form was issued.

30. On 28 August 2019, Phillips J made further proprietary injunctions against the Second ("**Wechsler**") and Third Defendants ("**C&C**"). On 10 September 2019, Mr Cerri and the Fifth ("**Italians Clubhouse**"), Sixth ("**ITS Fashion**"), Seventh ("**Shield Risk**") and Eighth Defendants ("**St Charles**") gave certain undertakings to the Court as regards dealings with their assets.

31. On 23 September 2019, I granted (until trial): (i) a WFO against Mr Cerri and TFO; and (ii) proprietary injunctions against all Defendants save for Mr Cerri.

32. As a result of the orders made in her favour Mrs Foglia discovered that the holder of the Barclays account into which the proceeds of the fraud were paid is TFO, an English registered company whose sole shareholder and director is Mr Cerri.

33. The evidence produced to me, and which is not disputed, is that:

    i) After the receipt of Mrs Foglia's €15m, Mr Cerri caused TFO to make a series of substantial payments to companies and individuals connected with him, and to third parties in satisfaction of debts he owed to them.

    ii) The Cerri Companies themselves received the following transfers of the proceeds of the fraud:

Defendant	Sum received	Repaid	Outstanding
D2: Wechsler & Co Ltd	£17,950 €56,416	£0	£17,950 €56,416
D5: Italians Clubhouse Ltd	£650,000	£586,999	£63,001
D6: ITS Fashion Street Café Ltd	£35,000	£0	£35,000
D7: Shield Risk Management Ltd	£12,575	£0	£12,575
D8: St Charles Luxembourg SA	£230,542	£40,000	£190,542

34. It is also common ground that Mr Cerri has the sole control of the bank accounts held by TFO and the Cerri Companies into which the proceeds of the fraud have been paid.

35. There are two further factual points to mention- the failed frauds. One feature of this case is the slightly strange situation whereby Mr Cerri's companies have been linked to at least one other fraud, and possibly two.

36. The first is what I shall term the March Aloschi Attempt. Through UF, Mrs Foglia has been provided with a copy of a letter dated 4 July 2019 sent by Mr Aloschi's English solicitors to Barclays Bank. In this letter, Mr Aloschi's solicitors inform Barclays of an unsuccessful fraud which was attempted on him 3 months before the fraud was carried out on Mrs Foglia:

i) On 29 March 2019, an individual pretending to be Mr Aloschi telephoned Mr Aloschi's Italian lawyers and requested that a payment be made.

ii) Later than day, someone pretending to be Mr Aloschi sent an email to those lawyers from the following account: antonio.aloschi@unionefiduciaria.it. That email gave instructions to make two transfers, of €4.1m and US$4.1m, from Mr Aloschi's accounts to two accounts held with Barclays.

iii) The destination accounts for those intended transfers were two of TFO's accounts with Barclays in England, one of which was subsequently used to receive the proceeds of the fraud on Mrs Foglia. These accounts had been created only four days earlier.

Mr Cerri's evidence is that on 4 April 2019 he had a suspicious contact from someone in relation to these bank accounts, which caused him to contact Barclays.

37. The second possible fraud relates to the fact that on 19 July itself Barclays sent Mr Cerri an email saying "*Just to inform you that The Family Officer has been deemed as unwitting beneficiary in a Fraud case. In this instance no further action has been taken in this matter however as a matter of courtesy, I am advising you of these details so you may consider your relations with the client in future.*" The account identified was not the account into which Mrs Foglia's money was paid.

38. One other facet of the timeline is worth setting out, that of this application itself. As to this:

i) Mr Cerri served a Defence on 10 January 2020. In it he denied the claim and flagged the apparent failure to investigate UF and CITCO. It also repeated the account which he gave in a witness statement of August 2019 that his understanding had been that the funds were a transfer from an investor, Mr Aloschi, made pursuant to an investment agreement between TFO and Mr Aloschi. A Reply was served in February 2020;

ii) Over the course of the next few months the solicitors for the parties corresponded. During April 2020 the solicitors for Mrs Foglia first notified Mr Cerri's solicitors that certain emails apparently coming from Mr Sacchi had been "spoofed" (see further below). Mr Cerri's solicitors responded to these emails on 20 June 2020 ("the 20 June letter") and continued to seek clarification as to why claims had not apparently been made against UF and CITCO;

iii) This application for summary judgment was made on 17 July 2020. The delay in the hearing has been due to getting a date to suit the parties' availability;

iv) Mr Cerri served his evidence in response to the application on 4 February 2021, some six months after the application was made.

The Submissions

39. As was noted in Mrs Foglia's skeleton, the scope of the dispute between Mrs Foglia and Mr Cerri is narrow. It is not in dispute that the €15m transferred to TFO's account belongs to Mrs Foglia, or that the said transfer was not authorised by her. Further, Mr

Cerri does not allege that he and his companies have any lawful entitlement to those monies (whether pursuant to an agreement made with Mrs Foglia or by way of gift from her), or that they gave any consideration in return for this receipt.

40. The case for Mrs Foglia is that investigations subsequently carried out by her team show that Mr Cerri's asserted innocent explanation for his receipt and use of the proceeds of the fraud is dishonest and fanciful. The key points made were that:

    i) First, disclosure given pursuant to *Norwich Pharmacal* orders made against Vodafone and Revolut Bank evidences the following:

        a) The mobile phone which was used to convey the fraudulent payment instructions to CITCO was purchased using a bank card belonging to a junior employee of TFO. The day before that phone was purchased, Mr Cerri transferred £200 to the account of that employee.

        b) When the calls were made to CITCO from this mobile phone, the caller's location was less than 100 metres from TFO's office.

    ii) Second, the emails relied upon by Mr Cerri were manufactured. They were not sent by Mr Aloschi or Mr Sacchi (each of whom is a genuine person); they were sent via a Czech website which allows users to send emails that appear to have been sent from any domain of their choosing (a practice known as 'spoofing').

    iii) Third, the "*investments*" that Mr Cerri claims to have been making on Mr Aloschi's behalf with Mrs Foglia's misappropriated monies are entirely lacking in commercial reality. They mainly consist of paying off debts owed by Mr Cerri and his companies, and making payments to his companies; there is no evidence of Mr Cerri giving Mr Aloschi anything (debt securities or otherwise) in return for the "*investment*" money. Had Mr Cerri believed this was a genuine multimillion-pound investment the lack of any due diligence carried out in respect of Mr Aloschi before the money was received is striking.

    iv) Fourth, the March Aloschi Attempt. This happened against a background where Mr Cerri was being pressed for repayment of monies by C&C and had assured the recipient that the money was on its way, when it was not.

41. The basis on which the claim is opposed is that Mr Cerri says that while he cannot explain why this fraudulently abstracted money should have landed in his accounts, he did not at the time realise it was not rightfully there. He believed that the monies in question belonged to Mr Aloschi – a new client for whom he was to make some investments - he therefore thought that the transfer to him was legitimate and he was acting under that belief when he applied Mrs Foglia's monies in the way that he did.

42. Mr Cerri says that he also relied on a series of emails he received during this period from someone he understood to be Mr Aloschi's representative, Mr Sacchi of UF.

43. He now accepts that he had no agreement with the real Mr Aloschi, though he relies on the Investment Agreement which he says was reached with someone representing themselves to be Mr Aloschi. That agreement was in substance a refinancing of Mr Cerri's business and involved a plan for Mr Cerri to make on behalf of the "faux-

Aloschi" certain investments, largely in Mr Cerri's companies. Although the emails he had formerly relied on are not genuine, he says that he believed them to be so at the time he received them and he points to certain handwritten notes from one of his Moleskine notebooks as evidencing the negotiations for that agreement.

44. Inferentially he submits that the "faux-Aloschi" is X and that their plan was to send the money to Mr Cerri's account and then instruct him to pay it onwards. While he cannot explain what did happen - nor why X did not in the event follow whatever plan they had through to completion - he was innocently caught up in events.

45. He says that while his position is not readily explicable, it is more improbable that a successful and respected businessman operating in the fiduciary market with an established reputation in that field to uphold would have sought to defraud Mrs Foglia. He says that it is doubly inexplicable that he should have:

    i) Attempted to do so by engineering a payment of millions of Euros into the client account of his own fiduciary business and then used a small proportion of the money to make a series of modest payments (in some cases very small indeed) towards the refinancing of his own perfectly legitimate and successful businesses;

    ii) Taken his time in doing so over a period of days while retaining the remainder of the funds intact.

46. As Ms Scott QC put it: "*A powerful reason for being very cautious before inferring dishonesty in relation to Mr Cerri, or from any of the evidence or the circumstances, is the extreme unlikelihood that if he were the fraudster he would have come up with a scheme or scam quite as poor as this one*". She also submits that had Mr Cerri been the real fraudster he would surely not have made the relevant call from so close to his office and would have arranged for Mrs Foglia's money to be paid to a bank account with which he had no connection and swiftly disappear thereafter.

47. Mr Cerri says that these facts, what Ms Scott terms the "*clash of improbabilities*" and the unknowns which remain, are sufficient to lead to a situation where I should allow the case to proceed to trial. He points to a portfolio of issues which he would like to investigate further and to be allowed to test at trial.

Discussion

48. I will take first (but in a slightly different order) the key features on which Mr Lowenstein QC for Mrs Foglia relied in support of his contention that, critically examined, Mr Cerri and his companies have no real prospect of successfully defending this case at trial. If those cannot bear the weight put on them, the application cannot succeed.

The March Aloschi Attempt

49. One point relied on by Mrs Foglia is the March Aloschi Attempt.

50. Mr Cerri's evidence is that he had nothing to do with this fraud. Rather, he suggests that a third party had somehow obtained the details of TFO's bank accounts and had used the information in an attempt to defraud Mr Aloschi.

51. I am not minded to give this factor any weight. Apart from the fact that it is not pleaded, there is too little detail in the evidence to draw any safe conclusions from it. I agree that it would be an unusual fraud where the proceeds are directed into the bank account of an innocent third party. I also agree that one possible explanation is that offered on behalf of Mrs Foglia. But it is possible that someone else had access to those accounts, or indeed that there was an attempt to scam Mr Cerri. Far less is known about the circumstances of this attempt than of the actual fraud on Mrs Foglia.

52. This is a matter I would certainly be happy to take into account at trial, but I do not think that it would be right to do so at this stage.

The commerciality of the arrangement with Mr Aloschi

53. Mrs Foglia makes a number of points about the commercial side of the arrangement which Mr Cerri asserts he had (or thought he had) entered into.

54. The first is that while according to Mr Cerri, the negotiations relating to the investments to be made by TFO on Mr Aloschi's behalf commenced on 6 February 2019, more than five months before the €15m was credited to TFO's account, there is no trace of this in the documentary record. The entirety of Mr Cerri's communications with Mr Aloschi and his representatives are said to have taken place by wholly unverifiable means.

55. All of Mr Cerri's dealings with the supposed Mr Aloschi's representative, Mr Colombo, are said to have taken place in person or by telephone. He claims to have met or spoken with Mr Colombo on about five occasions before the written agreement ("**the Alleged Agreement"**) was signed by Mr Aloschi on or about 31 May 2019.

56. The wire instructions informing Mr Cerri that the investment monies were about to be transferred are said to have been sent via a social media platform called Telegram, with messages set to self-destruct a few seconds after they are sent. Mrs Foglia submits that all of this is inherently incredible.

57. I do not regard this as a point of any significance. Businessmen operating outside major corporate structures often do leave little fingerprint in terms of records of negotiations. I do not find the use of Telegram and other such modern means of communication as a route for confidential negotiations remotely as lacking in credibility as Mrs Foglia would suggest. I give this no weight.

58. The second point concerns the conclusion of the Alleged Agreement and the absence of any evidence of transmission back to Mr Cerri; together with the oddity of it being sent by post when time was critical. This again strikes me as being a point for trial, not for summary judgment; I give it no weight

59. The third point is the submission that the arrangements – culminating in the Alleged Agreement – that Mr Cerri claims to have made with Mr Aloschi are wholly unrealistic. Mrs Foglia makes five principal points in this regard.

i) First, for a multimillion-pound investment agreement of the kind Mr Cerri claims to have concluded with Mr Aloschi, the dearth of documentary evidence is striking. In particular:

a) As noted above there is no documentary record of any negotiations.

b) Mr Cerri does not contend that he has ever met Mr Aloschi in person.

c) Mr Cerri has produced no documentary evidence of any due diligence carried out in respect of Mr Aloschi before receipt of the €15m.

d) Mr Cerri claims to have only received copies of Mr Aloschi's identification documents on 1 August 2019, two weeks after receipt of the €15m.

ii) Second, the payments that Mr Cerri claims to have agreed would be made with Mr Aloschi's money do not resemble investments at all and no documentary evidence has been produced showing how these unusual transactions came to be agreed with Mr Aloschi – the only evidence being the agreement itself. In particular:

a) On the face of the Alleged Agreement, £4.4m was to be 'invested' in the Eighth Defendant, St Charles, another company owned and controlled by Mr Cerri. The essence of this was that Mr Aloschi's money was simply to be used to pay off those debts. Mr Aloschi was to receive nothing in return for this; on the face of the Alleged Agreement, St Charles would only issue "*CPECs*" (apparently a type of bond) in his favour, conveniently, two months later.

b) Again, on the face of the Alleged Agreement, a further £1.1m of Mr Aloschi's money was to be used to purchase "*convertible debt*" in two other companies that are also owned and controlled by Mr Cerri: the Fifth and Sixth Defendants. A debt investment of this size in these two companies is, Mrs Foglia says, devoid of reality. Their filed accounts for the period in question show that they were both balance sheet insolvent and had little by way of assets.

c) Mr Cerri has produced no evidence at all of how these bizarre "*investments*" are said to have been agreed with Mr Aloschi. Only a draft of the Letter of Engagement has been produced and this draft was a blank pro forma.

60. Similarly in relation to this third submission I am not persuaded that there is anything in it which should be given real weight at this stage. Mr Cerri says that he persuaded (or thought he had persuaded) Mr Aloschi to refinance his (Mr Cerri's) business. It is certainly an unusual transaction, but it is not beyond the bounds of real possibility and it is the kind of issue which might possibly gain in nuance and credibility via further evidence.

61. My views are similar on two of the other "commercial" points made for Mrs Foglia, namely that:

i) There is no evidence of Mr Aloschi receiving anything in return for the "*investments*" that Mr Cerri apparently made with his money. No debt securities or shares were ever issued by Mr Cerri or his companies in favour of Mr Aloschi despite those companies receiving payments.

ii) Despite the Alleged Agreement referring to an "*amount agreed for investments*" of £7.5m, the sum in fact received into TFO's account was €15m. The explanation he says he received from Mr Sacchi for this massive overpayment was simply that "*there had been a mistake in the amount*".

62. Mrs Foglia says that none of this is realistic or credible. I do not entirely agree. While much of this looks somewhat implausible, I would not brand it (ahead of trial) incredible or devoid of a real prospect of being true. Certainly there are, apart from the Alleged Agreement, those pages from Moleskine notebooks produced by Mr Cerri. Those are capable of being consistent with negotiations as described. On the other hand those notebook entries cannot make good the case advanced by Mr Cerri, because they are equally consistent either with not being genuine documents, or with being discussions with someone else as to the use of abstracted monies. But they do provide some evidence capable of being consistent with Mr Cerri's case.

63. As for due diligence, I am not intimately familiar with the world of Family Office business, but I would not be entirely surprised if in some cases it is relatively informal, and that due diligence might be carried out and not contemporaneously documented. Nor would I be surprised if in this (very affluent) world a new client might unexpectedly transfer a few million more than had been pre-agreed. One might say that that is the nature of the business.

64. Therefore none of this is in my assessment material which should be given weight at this point in time, absent other more compelling material to indicate Mr Cerri's narrative to be fanciful.

The phone mast evidence

65. The fraud was initiated by two calls which were made to CITCO on 16 and 17 July 2019 from the Mobile Number, during which fraudulent payment instructions were conveyed to CITCO by someone pretending to be Mr Sacchi of UF. Fortuitously CITCO captured the mobile phone number.

66. Upon Mrs Foglia's application, Carr J ordered Vodafone to give disclosure pursuant to the *Norwich Pharmacal* jurisdiction. That disclosure revealed that: (i) the handset and SIM card associated with the Mobile Number were purchased on 3 May 2019 from a Vodafone shop on Oxford Street, London, which is 600 metres from TFO's offices; and (ii) a bankcard issued by Revolut Bank was used to make that purchase.

67. Following a further application for *Norwich Pharmacal* relief, by order dated 24 October 2019, Jacobs J ordered Revolut to give disclosure to Mrs Foglia. That disclosure revealed that: (i) the bankcard used to purchase the phone handset and SIM card belongs to Mr Federico Balestra, a junior employee of TFO; and (ii) the day before that purchase, Mr Cerri transferred £200 to Mr Balestra's Revolut account.

68. Disclosure given pursuant to Carr J's order of 3 October 2019 also showed the identity of the Vodafone cell towers through which the two calls to CITCO were transmitted, being the cell towers to which the caller was closest at the time of the calls.

    i) At the time of the first call on 16 July 2019, the caller was closest to the Vodafone cell tower on Farm Street, London. That tower is less than 100 metres from TFO's office, and it is the closest cell tower to that office.

    ii) The second call on 17 July 2019 lasted just under 4 minutes. At the start of the call, the caller was closest to the Vodafone cell tower on Saville Row, London, which is less than 650 metres from TFO's office. By the end of that call, the caller was again closest to the cell tower on Farm Street (i.e., less than 100 metres from TFO's office).

69. That evidence certainly provides a real inferential link between Mr Cerri (or someone acting at his direction) and the making of the relevant calls to CITCO.

70. Mr Cerri accepts that Mr Balestra purchased the phone handset and SIM card which were used to make the calls to CITCO. However, he says that these purchases were for Mr Aloschi's representative, Mr Colombo, this being a service which he performs as part of his Family Office service. He says that he believes that the handset and SIM card were given to Mr Colombo on 10 May 2019 by himself or Mr Balestra. He puts forward an alibi for his whereabouts on 16 and 17 July 2019 when the calls to CITCO were made. The explanation he gives for why the calls were made in the vicinity of his office is that he has either been "*set up by the fraudster*" or else "*it is a coincidence that the fraudster when making the call ended up close to my office*".

71. I agree with Ms Scott that this material is not a "smoking gun" capable of sustaining a summary judgment application by itself. I would be prepared to agree that the narrative that the handset and SIM card were purchased for Mr Colombo is well arguable. That may well be a facet of family office work. I am also prepared to see that the top up may be capable of innocent explanation.

72. I would also accept (allowing the caution necessary for present purposes) that Mr Cerri's alibi is perfectly arguable, though lacking in detail and corroboration. I would also be prepared to accept that it is not absolutely beyond the bounds of possibility that a fraudster might have operated close to Mr Cerri's office – either coincidentally (as I observed in argument, Mayfair is fairly built up and well-populated) or because there was an intent to implicate Mr Cerri.

73. The mobile phone evidence is therefore of some weight but cannot by itself clear the hurdle requisite at the summary judgment stage.

The spoofed emails

74. Mr Cerri rests heavily on the spoofed emails which on their face appear to be from Mr Sacchi and Mr Aloschi. He says he received these emails and had no reason to believe that they were anything other than genuine.

75. The first email that Mr Cerri claims to have received from any representative of Mr Aloschi is dated 19 July 2019. That email explains the difference between the sum

which Mr Cerri says he was expecting to receive to invest for Mr Aloschi and the sum in fact sent to the TFO account. On its face, the email in question appears to have been sent by Mr Sacchi from Mr Sacchi's genuine account.

76. Mr Cerri originally relied upon it as evidence of the *bona fides* of the transaction in which he was involved. He now relies on this email as evidence at least of his own belief that the €15m received by TFO belonged to Mr Aloschi.

77. Mrs Foglia says (and this is not in issue) that the email is a fake. Despite its appearance, it was not sent from Mr Sacchi's UF email account; the IP address associated with the email comes from a website hosted in the Czech Republic called "Emkei's Mailer". The website allows a user to input any email address and to cause emails to be sent that appear to have been sent from that address/domain. The email is therefore "spoofed".

78. The same is true of each of the other emails that Mr Cerri claims to have received from Mr Sacchi's UF email account and from Mr Aloschi at info@aloschibros.com.

79. Mr Cerri does not seek to dispute that the emails in question are fakes. His position is simply that "*I was not aware of this at the time*." He says each such email looked legitimate to him.

80. Should I accept the case for Mrs Foglia that that account should not be accepted even at this stage?

81. As for the first email I can quite understand the point being made by Mr Cerri. There is nothing which would tip off an innocent recipient of that email that it was spoofed.

82. However, two of the emails (dated 30 July and 2 August 2019) ostensibly sent by Mr Sacchi to Mr Cerri reproduce in the threads beneath them earlier emails ostensibly sent by Mr Cerri to Mr Sacchi. In other words, the emails received from Mr Sacchi give the appearance of being responses to emails sent by Mr Cerri. Like the other emails from Mr Sacchi's account, these two emails were also spoofs sent from Emkei's Mailer.

83. Mr Cerri says he could not be expected to check that the emails were genuine via any technical means. Again, I have a lot of sympathy with this. But that does not deal with the point that these two emails appear to contain emails from him. How did that come about? The evidence of Mrs Foglia's solicitor Mr Capone (based on his own use of the site in question) is that any reply sent by Mr Cerri to a spoofed email would have gone to Mr Sacchi's real account. There therefore appear to be two logical possibilities: the first is that Mr Cerri did not send any of the emails which appear on the "spoofed" email. If that were the case he could very easily have ascertained that the emails were fakes by looking at them because he would see emails supposedly from him which he had not sent. In that case his explanation does not bear scrutiny.

84. The other possibility (and the one adopted by Mr Cerri) is that he had sent such emails to Mr Sacchi; in which case they would have gone to Mr Sacchi's genuine account at UF. There are two problems with this. The first is that it follows that the person constructing the spoofed email would not have had them (unless they were indeed Mr Sacchi), and so could not have appended them to the bottom of the spoofed email.

85. The second is that while Mr Cerri has indeed asserted that he did send these emails (i) UF has confirmed in correspondence which has been put before me that Mr Sacchi's account has never received any emails from Mr Cerri and (ii) Mr Sacchi has himself also denied any knowledge of Mr Cerri. It follows that the second possible explanation does not work, either.

86. No innocent explanation for this has been suggested by Mr Cerri. He has known that the emails were spoofed since the middle of last year. While Mr Sacchi's in person denial is very recent, UF's position has been clear since last month. He had made no investigations prior to that. He has apparently made none since.

87. There is therefore a very strong inference from the primary evidence that Mr Cerri (or someone acting at his direction) spoofed the emails that appear to have been sent by Mr Sacchi, and manually typed out text in the body of those emails to look like earlier emails had been sent by Mr Cerri to Mr Sacchi to create the appearance of a chain of correspondence.

88. I note that the above only deals with the UF end of the equation. One way that this could easily have been dealt with by Mr Cerri, if he had sent such emails, would be to disclose them in native format. Mr Cerri produced native versions of other emails sent by him during the same period taken from his computer's 'sent items'. But he has not voluntarily produced native copies of these emails. Further, such native copies of those emails have been requested of him, by seven separate letters between mid-2019 and mid-2020.

89. Mr Cerri has instead produced a screenshot which appears to show such emails were sent. However what that screenshot shows is of no real value or support to his case, for a variety of reasons (and Ms Scott quite rightly placed no reliance on it). There is therefore an oddity as to why these native format emails were not produced. Mr Cerri's answer is simply that he has been unable to locate them. His evidence does not deal with why this is. Ms Scott was also unable to assist me on this point on instructions.

90. As I have noted, Mr Cerri has said that he was unable to produce the emails. However late on the Friday before the hearing, Mr Cerri's solicitors produced a copy of one of the two emails "*in native format*". That document was not formally in evidence. However a variety of points were made in correspondence in the short period before the hearing which raise serious questions as to whether what has been disclosed is truly in native format or shows what it purports to show. But what is clear is that it does not say it has been sent, and there is no metadata to show it has been sent.

91. It therefore remains the position that on the face of it Mr Cerri did not send emails to Mr Sacchi. This together with the failure of the explanations given above drives an inference that he was the person who spoofed the emails including the apparent chain emails. He has produced no evidence which produces any sort of a conflict of evidence on that point.

92. In relation to this topic I therefore do substantially accept the points made by Mrs Foglia and I accept the key submission. Mr Cerri's explanation on this point appears to be, clearly, false and incompatible with the documentary record. The emails appear only to be consistent with Mr Cerri being either X or involved in the fraud with X.

Cui bono?

93. One aspect of the "commercial" evidence which does strike me as requiring a better explanation than that given by Mr Cerri, and thus as harmful to his case is the very solid evidence of what was done with the money.

94. As noted above an analysis of the payments made in the days following TFO's receipt of the €15m shows that they were in fact made for Mr Cerri and his companies' benefit, and primarily for the purpose of paying off their debts. Although some of these payments figure as agreed investments under the Alleged Agreement, and thus should at this stage be taken to be arguably genuine, absent other indications there are a number of significant issues. These fall into two groups.

95. The first group of issues concerns aspects of sums which can (just) be seen as falling within the umbrella of a refinancing of Mr Cerri's debts as set out in the Alleged Agreement:

    i) €2,269,350 was used to pay off a debt allegedly owed by St Charles to the Third Defendant, C&C. Documents disclosed by C&C in these proceedings show that it had been chasing Mr Cerri for this payment since April 2019. The interesting point here is timing: the alleged debt owed by St Charles to C&C was therefore three months overdue by the time TFO received Mrs Foglia's monies and there is an appearance from the correspondence that Mr Cerri had been saying that he had made a payment which had been rejected, and was re-sending the same monies, when this was not true.

    ii) €800,000 was used to pay off a debt owed by Mr Cerri and TFO to Mr Cerri's erstwhile friend and best man Marcello de Cristofaro. Mr de Cristofaro issued a claim against Mr Cerri and TFO in this Court in 2018, which claim was ultimately compromised by a settlement agreement dated 8 February 2019, pursuant to which a settlement sum of €800,000 was to be paid by 20 April 2019. Even within the narrative of a refinancing of Mr Cerri's businesses, and given a general agreement to pay this specific amount of TFO's debt within the Alleged Agreement, this payment seems surprising as an investment. It is of course (again) opportune in the extreme in its timing.

    iii) £45,493 and £45,000 was used to pay off rent arrears owed by Mr Cerri's business Italians Clubhouse to its landlord. While there was provision for investment in this business under the Alleged Agreement, there was no agreement to pay Italians Clubhouse's debts.

    These points are, as I have said, on their surface potentially consistent with the Alleged Agreement. The anomalies which they present do however feed into issues which would certainly arise at trial as to the credibility of that agreement.

96. Secondly however there are a number of payments which seem to lack all credibility as payments which could be said to be properly made under a refinancing agreement, however quixotic. These include:

    i) £153,633 was used to repay a loan given to Mr Cerri's wife by a company named NF Money Limited.

ii) A further payment of £8,303 was made directly to Mr Cerri's wife herself.

iii) £32,434 was used to pay off credit card debts owed by TFO to American Express and Barclaycard.

iv) £23,688 was used to pay off a debt owed by TFO to HMRC.

v) Various payments were made to companies which are owned and controlled by Mr Cerri and which are not even mentioned in the Alleged Agreement. They include: £17,950 and €56,415 paid to Wechsler; and £12,575 paid to Shield Risk.

vi) The payments made also included small payments to Netflix, Uber and Amazon; i.e. it appears that the funds were being used for personal expenditure.

97. I do consider that these payments, although not substantial in themselves, are not remotely credibly accounted for by Mr Cerri's explanation. These payments cannot be seen as investments under any agreement with a customer. They only seem consistent with a wrongful use of the money by Mr Cerri. They are certainly consistent with his being X or working with X; though it is fair to say that they could be consistent with the overall thrust of Mr Cerri's narrative, but with the addition of a breach of his duties to the supposed Mr Aloschi.

Mr Cerri's main points

98. I pause here to look separately at the main points on which Mr Cerri places weight. Logically the first of these is the combination of the Alleged Agreement and the notebook pages which on their face are consistent with an agreement of this nature. These are documents which are certainly consistent with Mr Cerri's case, but (as I have noted regarding the notebook pages already) they could equally be consistent with Mrs Foglia's case.

99. Further there is an odd anomaly with Mr Cerri's explanation. This approach made perfect sense if there was a possibility that the Alleged Agreement was a genuine agreement with a real Mr Aloschi. But once the real Mr Aloschi has to be replaced with X the Alleged Agreement makes no sense. If X was acting alone it would be odd indeed if he were to enter into an agreement which gave the innocent Mr Cerri the right to use a portion of the money abstracted by X.

100. The second of these points is the inherent improbability of Mr Cerri constructing a fraud which was effectively so easily traced back to him. This point elides into what Ms Scott called "*the clash of improbabilities*", namely that if his case was improbable, so too was that of Mrs Foglia, and that where there was such a clash there must be grounds for giving leave to defend.

101. One problem with the inherent improbability argument is that it presupposes a level of reflection and of information as to the way in which funds which are abstracted might be pursued. That may be right, or as Mr Lowenstein argued, it may well not. I am however certainly prepared to accept that there is a considerable degree of improbability in such a simple original direction and in keeping the funds in one place for such a period after an abstraction.

Overview

102. I bear very much in mind that it is highly unusual for such a claim to be decided summarily. While I would not accede to the submission advanced by Ms Scott that, given Mr Cerri's fiduciary position, and absence of history as a fraudster, the standard of proof is essentially the criminal standard, I do agree that I certainly should not drift into simply deciding this case on a normal civil burden of proof as if this were a trial – a route which Mrs Foglia's approach, which did tend to that of a mini-trial, might encourage.

103. I conclude that in approaching this application I must bear in mind that while at trial the civil burden of proof applies, caution is even at that point exercised in reaching a conclusion that fraud is proven, perhaps particularly in the context of professionals and fiduciaries, and that I must be satisfied that (bearing in mind the possibilities for further evidence) Mr Cerri's prospects of success are truly fanciful as opposed to real. While I may look critically at the evidence (and some of the evidence which I have rehearsed above does give room for doubt that Mr Cerri really falls to be treated as an entirely honest businessman), bearing in mind the stage of the proceedings the approach of looking to see if any honest explanation is possible, as at the pleading stage, is almost certainly a sound cautionary check.

104. Following the review above I am however left with three major issues which Mr Cerri's explanation does not cover, and each of which provide the basis for either an inference or a strong inference that he was the perpetrator of the fraud (either alone or with others): the mobile phone evidence, the emails and the payments on to Mr Cerri.

105. These three "red flag" points all fall into slightly different places on this spectrum. The mobile phone evidence is damaging but (just) susceptible of an innocent explanation. The *cui bono* evidence is not susceptible of an innocent explanation in broad terms but might (just) be compatible with Mr Cerri's narrative being essentially true, while at the same time he was not faithful to the trust which he believed to be reposed in him by faux-Aloschi. The emails, however, realistically defy any innocent explanation. Taken together they provide a body of evidence which I consider does justify the preliminary conclusion that any innocent explanation is fanciful.

106. I have also considered seriously whether I should look at these points together at all. On one level one might say that one of the points needs to be good enough, because otherwise there is a real prospect of success on each of them. However while it is hard to divide out the way the analysis would work if there were only one point before me, I consider that the email evidence probably would be enough alone to reach this preliminary conclusion. Further, it does seem to me right that where two points at least are extremely close to being enough for summary judgment alone, with there being no obvious real prospect of success on any of them, there is extra weight lent by the accumulation of the three points, given that Mr Cerri would ultimately have to put forward a case which accounted for all three. Certainly I take the view that it is fanciful to suppose that there are, as there would need to be, answers to all three.

107. Pausing here, it should be noted that on the *Doncaster Pharamceuticals* spectrum, this is not a case where I reach my preliminary conclusion on the basis of assessing conflicts of fact. The conclusion is reached on the basis of testing Mr Cerri's evidence against contemporaneous factual documents, common ground and logic. This is perfectly

permissible at the summary judgment stage: *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [10], *Three Rivers* [95]. This is not a question of evaluating the weight of the evidence or eliding powerful cross-examination material with a knockout blow: *Okpabi* [110-1].

108. The next point to consider is: does the improbability point which was the backbone of Mr Cerri's case make the difference to this preliminary conclusion? I am not persuaded that it does. Ms Scott may well be right that a genuine "battle of improbabilities" should go to trial, particularly when there is issue positively joined on specific underlying factual issues. But here we are looking at improbability (on Mr Cerri's side of the argument) versus a compound which includes not just improbability (phone evidence) but also an element of impossibility (spoofed emails), together with evidence which seems to show clearly a lack of honesty on one basis or another (cui bono). I am therefore not persuaded that the improbability argument itself can be said to provide a reason for taking the case further.

109. There is also the point that these central issues merge into an area which itself creates difficulties for Mr Cerri, and that is the questions which find no sensible answer even if one does accept his narrative. Dealing with the emails first, Mr Cerri's attempted explanation does not deal with why these particular emails should have been uniquely difficult to locate, why if he could capture a screenshot, he could not locate the emails (as he claims is still the case in relation to one of them), and why the technical report which he said would be provided last year has never appeared.

110. Then there is the wider field of questions which Mr Cerri has over the course of the proceedings, and in the seven months since this application was made, left absolutely untouched. To give just a few examples:

    i) Why has Mr Cerri not got any information from Mr Colombo or Mr Balestra about the Mobile Phone, verifying whether it was handed over in Genoa in May?

        a) If the account he gives is correct, one would expect some explanation of what contacts he had, or tried to have with Mr Colombo. That is lacking.

        b) There is a short affidavit from Mr Balestra which was produced in June 2020 dealing with the purchase of mobiles for Family Office purposes. Aside from that there is no witness statement – or even an email. This is against a background when the letter of 20 June 2020 indicates that a further affidavit from Mr Balestra would be forthcoming shortly.

    ii) Given that Mr Cerri knew about the fact that the transfer was said to be a fraud and had the information that the emails were spoofed from at least the middle of 2020, what attempts has he made since then to contact those who on his analysis got him into this situation? He seems from the evidence to have made no attempts at all to ascertain what had actually happened, and who was to blame.

111. What is striking about the position which Mr Cerri now adopts is that he has no positive case which even theoretically explains the facts. As to whether such an explanation could exist, two logical possibilities (to which I shall refer as the "X hypotheses") occurred to me, and were accepted by Ms Scott as possible explanations in the course

of argument. But I have concluded that even bending over backwards to construct such an explanation (which Mr Lowenstein – it seems to me rightly - suggested was going rather further than the Court should do) they do not assist Mr Cerri.

112. The first possibility is that Mr Cerri was being used as a cat's paw by X. But that explanation fails to account for (i) why Mr Cerri was seamlessly using a good portion of the funds essentially for his own benefit and (ii) why X did not get the remainder of the money passed on in the significant period (11 days) which passed between the transmission and the balloon going up – in circumstances where, if Mr Cerri's explanation is true, he was in contact with faux-Sacchi, who must be equated with X, and who could therefore have given payment instructions.

113. The second possibility (which Mr Lowenstein derided as "frivolous") was that Mr Cerri had an enemy who wanted to embroil him in trouble and who went to the trouble to set up the faux-Aloschi/faux-Sacchi arrangement as a means of so doing. But Mr Cerri has never begun to suggest that this might be the case, let alone identified any possibilities for who this might be. Indeed his positive case that he is a well regarded and reputable fiduciary would seem to run counter to this possibility.

114. This then leads into Mr Cerri's other main response to the application - the matters which Mr Cerri says he wishes to have the opportunity to investigate. A list of these was set out in the Respondent's skeleton, and included:

i) The role of UF and CITCO in the fraud on which Mr Cerri would wish to obtain evidence. This was probably Mr Cerri's major point in this area. Ms Scott submitted that "*it seems plain that someone with inside information, that is not Mr Cerri, has been instrumental in this fraud*";

ii) Mr Cerri's dealings with Mr Colombo and Mr Aloschi covering Mr Cerri's stored documents and his phone and WhatsApp messages as well as a legalmail account used to send documents to Mr Cerri in August 2019;

iii) Whether the Aloschi Agreement was as alleged "*lacking in any commercial reality*" and whether Mr Cerri was aware of that, which he would wish to have tested in cross-examination;

iv) The purchase, use and any other calls made from the Mobile Phone;

v) The circumstances surrounding the alleged attempt to defraud Mr Aloschi and what the potential fraud was which led to the email from Barclays Bank to Mr Cerri of 19 July 2019 alerting him to a potential fraud;

vi) How various emails that are alleged to have been "spoofed" came to be sent and received and whether it is possible to trace users of Emkei's Mailer;

vii) Miscellaneous matters such as common business practices in the Italian fiduciary community, including the prevalence of legalmail, Telegram, Whatsapp.

viii) Mr Cerri also wishes to have the opportunity to provide character witnesses as to his good standing and reputation.

I have given these matters careful thought.

115. The closest this list comes to "biting" is in relation to UF and CITCO. But the fact that Mrs Foglia might have some negligence or breach of mandate claim against somebody else is neither here nor there. Nor, in reality, is it significant (in the context of a civil claim) that someone in UF or CITCO may have been involved in the fraud – so long as the case against Mr Cerri is sufficiently clear. Is it, on the basis of the evidence I have seen, arguable that the fraud was perpetrated by individuals within one or both of these companies, without Mr Cerri's active involvement? I conclude that it is not, essentially for the reasons I have given regarding the X hypotheses, paired with the spoofed email evidence.

116. The next point is that one thing which is striking about this list against the background is the scope for action on many of these points before now; and the absence to date of any action at all by Mr Cerri. So – just as there has been a failure to produce Mr Cerri's emails or his computer - there has been no attempt at all by Mr Cerri to get evidence from UF or CITCO. Similarly, Mr Cerri has had time to get his own documents from storage or WhatsApp, or to try to find out if it is possible to trace users of Emkei's Mailer.

117. Further there is no specific point where evidence is said to be key, there is no currently partly explored avenue which might prove revelatory or counteract a point on which I place weight – particularly in circumstances where I have put to one side many of the points relied on by Mrs Foglia. Mr Lowenstein rather cruelly described these as a "ragbag" of points. But that description is not so far off the mark. Despite heroic attempts Ms Scott could not really point to an issue where these investigations even offered a real chance of finding something significant. Much of it related to matters (such as the use of legalmail in the Italian legal and business community) which could not realistically produce more than additional background. Some of it (such as ascertaining what other calls the Mobile Phone had made) were frankly speculative.

118. In the end I am not persuaded that there is more in this list than what Sir Robert Megarry V-C so famously described as "*surmise and Micawberism*"[1]. Micawberism is a very accurate description indeed, in that having done nothing in the seven months since this application was made, Mr Cerri hopes if I do not grant summary judgment that something under one of these heads will turn up which will utterly transform his fortunes.

119. Further, none of these issues go to address the "red flag" points I have identified. Even looking outside those specific points I cannot be confident that if I permit this to go to trial something of real relevance or utility will emerge. To go back to Mummery LJ's dictum in *Doncaster Pharmaceuticals*, this is not a case where (there being no obvious conflict of fact):

> "reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

[1] *Lady Anne Tennant v. Associated Newspapers Group Ltd* [1979] FSR 298. It is of course a pre-CPR case, but it expresses with characteristic elegance a point which remains equally good post CPR.

120. Here there are no reasonable grounds, there is just blithe optimism, and unfocussed optimism at that. What this list fails to do is grapple with what this evidence would add to the facts of the case on relevant issues- those being the only points which might "*affect the outcome of the case*".

121. As I have indicated, I reach my preliminary conclusion on the basis of the "red flag" points. I then conclude that that preliminary conclusion is not affected by the issues which Mr Cerri raises and which he wishes to investigate. That suffices for the final conclusion.

122. But I would add that when one synthesises the key points with the remainder of the evidence, the picture which emerges itself adds further weight against Mr Cerri and thus adds further confidence to the conclusion already reached. TFO was the direct recipient of the proceeds of the fraud. The telephone calls by which the fraudulent payment instructions were given to CITCO were placed using a handset and SIM card purchased by a TFO employee. At the time those calls were made, the caller was either at or in the vicinity of TFO's office. Immediately after receiving Mrs Foglia's monies, Mr Cerri proceeded to use it to make a number of substantial payments for the benefit of himself, and his companies (and his wife). Emails on which he relied as explaining the payment have proved to be manufactured and his explanation for them is lacking in a credible foundation.

123. Mr Cerri's explanation cannot explain all these things and even those where I am prepared to concede the point might be arguable the explanation is certainly far from likely or compelling; while the case put against him fits closely with the points which he cannot explain.

124. In the circumstances I am prepared, despite the very considerable caution requisite in this area, to grant summary judgment on this claim.

i) TFO and Mr Cerri: judgment should be entered in the sum of €3,543,368 (plus interest), being the balance of the €15m which Mrs Foglia is yet to recover from the Defendants and third party recipients of the proceeds of the fraud. That is on the basis that (i) TFO is liable in unjust enrichment and knowing receipt in respect of the sums it received from Mrs Foglia (i.e., €15m) less recoveries made by her; and (ii) Mr Cerri is liable in dishonest assistance for causing TFO and the Cerri Companies to dispose of her monies (again, less recoveries made by her).

ii) As regards the other Respondents, as with TFO, judgment should be entered in respect of the transfers of Mrs Foglia's monies that they received, less any repayments already made (as to which see para 16 above). Accordingly:

a) Wechsler: judgment should be entered in the sum of £17,950 and €56,416 (plus interest). Mr Cerri has – on oath – already agreed to causing Wechsler to repay this money, but has inexplicably failed to do so.

b) Italians Clubhouse: judgment should be entered in the sum of £63,001.

c) ITS Fashion: judgment should be entered in the sum of £35,000.

d) Shield Risk: judgment should be entered in the sum of £12,575.

e) St Charles: judgment should be entered in the sum of £190,542.

Conditional order

125. I deal with this for completeness.

126. Where it appears to the Court possible that a defence may succeed but "*improbable*" that it will do so, the Court may make a conditional order: PD24, paragraph 4. A conditional order is an order which requires a party (i) to pay a sum into Court, or (ii) to take a specified step in relation to his defence and provides that his defence will be struck out if he does not comply: PD24, paragraph 5.2.

127. The rationale for making a conditional order where it is probable that the claimant will win at trial is that to proceed to trial is expensive and will delay recovery by the claimant: *Kazeminy v Siddiqi* [2009] EWHC 3207 at [68]; and part of the purpose behind the jurisdiction is, to put it colloquially, that "*the Defendant should put his money where his mouth is*": *Industrial and Commercial Bank of China Ltd v Ambani* [2020] EWHC 272 (Comm) at [23].

128. In *Gama Aviation (UK) v Taleveras Petroleum Trading DMCC* [2019] EWCA Civ 119, the Court of Appeal held that whilst it is not necessary to show that a defence is 'shadowy' or dubious in its *bona fides* for a conditional order to be made (at [42]):

> "if a defence is shadowy or of doubtful good faith that will no doubt be a relevant consideration in exercising the power to make a conditional order and deciding the amount of any security which should be ordered."

129. Against this background I would, had I not been prepared to grant summary judgment, most certainly have made a conditional order. Even if I had been satisfied that there was a real prospect of Mr Cerri's defence being accepted at trial, I would have had no difficulty accepting that it is, to say the least, improbable that it will be so accepted. It is a paradigm of a case where to quote the language used by the Court of Appeal in *Gama Aviation*, Mr Cerri's explanation is "*shadowy or of doubtful good faith*."

130. I am not persuaded that the existence of the WFO should make a difference, and this point was wisely not pressed orally by Ms Scott. As is well known a freezing order is not security for a claim.

131. The order sought was for a conditional order for the payment into the Court Funds Office of the outstanding sum of €3,543,368 (plus interest) or the provision of equivalent security in Mrs Foglia's favour.

132. The Respondents have sought more time to address the condition. I would not have been minded to grant this. They were, it is plain, put on notice by letter dated 12 February 2021 that Mrs Foglia would, in the alternative to seeking summary judgment, seek a conditional order against them. In that letter, the Respondents were invited to produce evidence of (i) their available assets and their ability to realise the same in order to make a payment into Court, and (ii) assets held by Mr Cerri's wife, Ms Badea,

and her ability to make funds available to the Respondents to enable them to satisfy a conditional order.

133. That invitation was declined by the Respondents. There is no suggestion of stifling; and indeed there is evidence which suggests that Mr Cerri has reasonable access to funds. Despite being required by the WFO to notify Mrs Foglia's solicitors in advance of drawings to meet reasonable legal expenses, the only such notifications made by Mr Cerri were for sums of £25,000 on 14 May 2020 and then £20,000 on 11 November 2020. Given the representation that Mr Cerri has secured for this hearing (i.e., Withers and Queen's Counsel), it is to be inferred that funds which are not the subject of the WFO are being made available to Mr Cerri by one of his associates. Further in disclosure pursuant to the freezing Order, Mr Cerri claims to have assets in excess of €10 million.