Neutral Citation Number: [2024] EWHC 909 (KB)

Case No: QB-2022-001260

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2024

Before:

MR. JUSTICE SHELDON

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Between:

(1) AFAN VALLEY LIMITED (in Administration)	**Claimant**
and Ors	
- and -	
(2) LUPTON FAWCETT (a firm) and Ors	**Defendants**
(7) METIS LAW	
(8) METIS LAW PARTNERS LLP	

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Mr James Pickering K.C., Mr Paul O'Doherty (instructed by **Hewlett Swanson**) for the **Claimants**
Mr Daniel Saoul K.C., Ms Pippa Manby (instructed by **RPC**) for the **Second Defendant**
Mr Ben Hubble K.C., Mr Michael Bowmer (instructed by **Keoghs**) for the **Seventh and Eighth Defendants**

Hearing dates: 7-9 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR. JUSTICE SHELDON

Mr. Justice Sheldon:

1. I have before me an application by 43 Claimants to amend their Particulars of Claim against their former solicitors: Lupton Fawcett LLP ("LF"), Metis Law Ltd and Metis Law Partners LLP (collectively "Metis")[1]. At the same time, I have an application by LF to strike out the Particulars of Claim and/or to dismiss the claim against the firm by summary judgment. I heard oral argument with respect to these applications on 7th-9th February 2024.

2. The Claimants are companies in liquidation, with a deficiency to creditors in excess of £68 million. They describe themselves as the vehicles for, and thereby the victims of, a *Ponzi* fraud. They claim against their former solicitors for professional negligence. It is not alleged that the solicitors were complicit in any way in the *Ponzi* fraud. Rather, it is alleged that if the Claimants had been properly advised they would not have promoted various investment schemes, accepted investment monies and taken out loans, and would not have suffered substantial losses as a result.

3. The Claim Form was initially filed on 14 April 2022. There have been a number of iterations of the Particulars of Claim. The application before the Court concerns the Fifth Amended Particulars of Claim, a document which runs to around 140 pages. This incorporates amendments proposed for both the Third and Fourth Amended Particulars of Claim, and adds further amendments. No Defence has yet been filed by the Defendants. An earlier hearing to consider amendments (to the Third Amended Particulars of Claim) and the strike out/summary judgment application by LF was due to be heard on 29 November 2023 before Freedman J, but was adjourned.

4. A number of witness statements have been produced by the parties in connection with the applications: 3 statements from Graham Reid (an employed barrister representing LF), 2 statements from Christopher Stanton (a solicitor representing Metis), and 2 statements from Lee Dunnill (a solicitor representing the Claimants). These statements exhibit several thousand pages of documents between them.

5. Among the exhibits are the submissions made and the judgment given by Her Honour Judge Claire Jackson (sitting as a Judge of the High Court) in a claim brought by four of the Claimants (Northern Powerhouse Developments Limited, Woodhouse Family Limited, LBHS Management Limited and Fourcroft Hotel (Tenby) Limited) against Gavin Lee Woodhouse for breach of his director's duties and/or for repayment of sums owed to them: [2023] EWHC 3124 (Ch). Mr Woodhouse was the sole director and beneficiary of each of the Claimants. The judge found that some £2.3 million had been misappropriated by Mr Woodhouse.

6. The exhibits also include the decision of the Solicitors Disciplinary Tribunal ("the SDT") with respect to allegations against one of one of Metis' partners, Richard Longton.

[1] The First, Third, Fourth, Fifth and Sixth Defendants have been dismissed from these proceedings.

Factual Background

7. In very brief terms, the factual background can be set out as follows. In 2012, Mr Woodhouse set up the MBi group of companies (the "MBi Group"). In 2014, his then business partner, Robin Forster, became a shareholder and director of each of the companies in the MBi Group. These companies started to promote investment schemes involving the sale of individual rooms in hotels and care homes to retail investors.

8. LF was instructed by the MBi Group to undertake a review of the scheme documents and, in particular, to advise on whether or not the schemes constituted "collective investment schemes" ("CIS") for the purposes of the Financial Services and Markets Act 2000 ("FSMA"). CIS are heavily regulated, and can only be lawfully promoted and operated by businesses authorised for that purpose by the Financial Conduct Authority ("the FCA"). MBi Group was not so authorised.

9. In late 2015/early 2016, Mr Woodhouse and Mr Forster separated their business interests, dividing the MBi Group assets. In early 2016, Mr Woodhouse set up the NPD Group, which comprised a number of companies that were subsidiary companies of Northern Powerhouse Developments (Holdings) Limited, of which Mr Woodhouse was the sole shareholder and director. The NPD Group promoted, operated and managed a series of investment schemes through special purpose vehicle companies ("SPVs"), which involved investors purchasing long lease investments of individual rooms in hotels or care homes, either off-plan or in an existing building. Investments were promoted and sold to investors from both the United Kingdom and overseas. The NPD Group also took control of and promoted a number of former MBi Group schemes. (This is just a summary of the arrangements: the precise arrangements and relationships between the companies set up and owned by Mr Woodhouse are particularised by the Claimants at paragraph 34 of the Fifth Amended Particulars of Claim. The description of these arrangements does not appear to be in dispute.)

10. Investors in the various schemes were offered very high investment returns: this included an annual coupon, described as "rent" of between 8% and 12% per annum; and the right to sell the room back to the SPV which owned the property assets or sold leases in property assets (described as "Asset SPVs"). A further arrangement that was made available was for investors to invest a reduced percentage of the full investment amount, described as a "Developer's Deferred Investment". The investors were told that their investments would be ring-fenced in an SPV company for the purpose of constructing and/or developing and/or refurbishing the particular property which was the subject matter of the scheme into which they had made their investment. A number of the schemes obtained secured financing. (The arrangements with the investors are particularised at paragraphs 38-42 of the Fifth Amended Particulars of Claim. The description of these arrangements does not appear to be in dispute.)

11. In early 2016, the NPD Group instructed LF to advise as to whether its schemes amounted to CIS. LF continued to advise with respect to this matter into 2017 and onwards. From July 2016, the Claimants instructed Metis to advise and carry out legal services in relation to the investment transactions. This included dealing with the various deposits received from investors.

12. The schemes run by the Claimants all failed, and the Claimants went into administration in 2019 and subsequently went into liquidation.

The Claims

13. The Claimants claim damages against LF for a sum of not less than £68,370,803. This is made up of investor receipts that will need to be returned in the sum of £48,634,68; £19,736,121 with respect to the secured loans that need to be repaid plus interest on those loans; as well as administration and liquidation costs; plus interest. They claim damages against Metis in the sum of not less than £57,021,610. This includes a sum for investor receipts that will need to be returned in the sum of £41,920,286; and £14,339,124 with respect to secured loans that need to be repaid, plus interest.

14. The Particulars of Claim (before the amendments that are the subject of these applications) are very extensive. I shall provide a summary of the main elements.

15. It is alleged that each of the schemes are insolvent and "are unable to give restitution to the Investors of the monies that are owing to them".

16. The Claimants allege that each of the schemes was set up in contravention of section 19 of FSMA[2] . As a result of this contravention, it is alleged that each of the agreements entered into by the Asset SPVs and the investors became unenforceable, and the investors are entitled as a matter of statute to recover their investments: section 26 of FSMA[3] .

17. The Claimants allege that the combined effect of one of the features of the scheme (the Developer's Deferred Investment) whereby investors were required to invest only a reduced percentage of the full investment commitment in cash, and the large commission payments made to Sales Agents meant that, from the outset, there were insufficient funds available to deliver each of the schemes.

18. The Claimants also allege that the schemes were operated as a *Ponzi* scheme: investors' monies from later investments were used to pay the returns on investments which had been made earlier in time, rather than out of performance of the underlying business or assets.

19. As against LF, the Claimants allege that the solicitors were expressly instructed in relation to matters concerning whether or not the MBI Group and/or NPD Group

[2] Section 19 of FSMA provides that:

"(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is–
(a) an authorised person; or
(b) an exempt person.
(2) The prohibition is referred to in this Act as the general prohibition."

[3] Section 26 of FSMA provides that:

"(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
(2) The other party is entitled to recover–
(a) any money or other property paid or transferred by him under the agreement; and
(b) compensation for any loss sustained by him as a result of having parted with it. . . "

schemes were CIS. This included seeking counsel's opinion, and considering the adequacy and accuracy of that advice.

20. The Claimants refer to correspondence between the FCA and MBi Consulting in 2014, with respect to which LF had been instructed to advise. It is alleged that LF was, or ought to have been, aware that the way in which the Scheme Documentation operated meant that the schemes were CIS, and that a materially inaccurate description of the schemes was provided to the FCA.

21. The Claimants refer to advice given by counsel, Professor McGee, in October 2015 that the schemes operated by the MBi Group did not fall within the definition of CIS, and advice given by Professor McGee in 2016 to the NPD Group that the schemes did not fall within that definition. It is alleged by the Claimants that the opinion of Professor McGee contained materially incorrect assertions which LF knew or ought to have known were incorrect. Further advice was sought from Professor McGee with respect to a further proposed scheme in August 2016: he advised that the scheme was lawful. It is alleged that the instructions given to Professor McGee by LF were inadequate.

22. The Claimants refer to a warning notice put out by the Solicitors Regulation Authority ("the SRA") in September 2016. This warning notice was concerned with certain investment schemes which were fraudulent. Solicitors' firms dealing with these schemes were warned by the SRA to be vigilant. It is alleged that LF was aware, or ought to have been aware, that the schemes were high risk investment businesses, and that this was evident from the filed accounts of the SPVs, including that of the 24th Claimant (MBI Clifton Moor Ltd) whose filed accounts dated 31 March 2015 (filed at Companies House on 30 November 2015) showed a balance sheet with only £587 cash in the bank, a debtor balance of £2,887,701 and an amount due to creditors of £3,340,154. It is alleged that these accounts evidenced that funds which should have been retained as 'ring fenced' had been paid away. It is alleged that LF should have advised and/or drawn to the attention of the Claimants that there was a serious risk of investor funds being dissipated in a way which was inconsistent with the investment parameters upon which the investment funds had been obtained.

23. Reference is also made to a second warning letter from the SRA in January 2017. It is alleged that LF failed to draw to the attention of the Claimants that their business model was subject to the risks highlighted in both warning letters, and failed to provide independent advice to each Asset SPV in relation to matters raised in the warning letters.

24. The Claimants refer to concerns being raised by potential investors as to the regulatory implications of the structure of the schemes, and the querying of the advice given by Professor McGee that the schemes were not CIS. It is alleged that LF was or should have been aware that the schemes were CIS and that Professor McGee's advice was incorrect.

25. The Claimants refer to further advice being sought from specialist counsel, Oliver Assersohn. It is alleged that Mr Assersohn pointed out that the details of the arrangements explained to him differed from those set out in a letter which had been sent by LF to the FCA. It is alleged that on 12 July 2017, Mr Assersohn advised in writing that the scheme would be considered CIS and arrangements would need to be

significantly altered to bring them outside of the CIS regime. At this point in time, it is alleged that LF was or should have been aware that the schemes were CIS.

26. It is alleged that Mr Assersohn advised later in the year (October 2017) following some amendments which had been made to the lease and sub-lease for the schemes: he advised that there remained a material risk of CIS. At this point in time, it is alleged that LF was or should have been aware that the schemes were CIS.

27. The Claimants refer to advice from yet further counsel, Alexis Hearnden, as to whether the schemes, and lease documentation, gave rise to any concerns. The Claimants contend that it can be inferred that LF had continuing concerns, and that advice should have been given to the SPVs to suspend their activities until a definitive view had been reached as to whether the FSMA was breached.

28. Reference is made to advice from LF to Mr Woodhouse on 30 November 2017, in which Mr Warner Reed (who was a solicitor with LF, and also served as a consultant to the NPD Group) said that "In light of counsel's advice . . . I advise that you become FCA regulated". In spite of this, it is alleged that LF still failed to advise the Claimants of the potential implications for the schemes, including that they should stop raising money until the schemes had been appropriately revised.

29. It is alleged that Mr Assersohn advised again in early 2018 that the schemes were CIS, and that there were further exchanges with Mr Warner Reed at LF. In early July 2018, it is alleged that further clarification was sought by an agency of the NPD Group in Hong Kong that the schemes were not CIS. Mr Warner Reed is alleged to have stated that he did not agree with counsel's advice.

30. After further exchanges with Mr. Assersohn it is alleged that, on 17 July 2018, Mr Warner Reed wrote to Mr Woodhouse to say that Mr Woodhouse needed to come up with another model, or put in further resource, and that "time is limited".

31. The Claimants contend that LF had an express retainer with "the Lead Companies" (NPD Ltd and MBI Consulting (UK) Ltd) and an implied retainer with the SPVs. The Claimants alleged that LF acted in breach of contract or was negligent in failing to advise on the true effect and meaning of the schemes; that LF failed to advise that section 19 of FSMA was contravened; and failed to instruct Professor McGee properly, did not consider his advice adequately, and failed to advise that his advice was incorrect. It is contended that LF failed to advise that the companies should cease promoting, fund raising for, and operating the schemes.

32. It is contended that if LF had advised fully, properly and competently, the schemes would not have been promoted, investments would not have been accepted and the Asset SPVs would not have lost the entirety of their Investor Receipts. As a result, the Claimants would not have become liable for significant civil liabilities under section 26 FSMA. Similarly, they contend that the secured loans would not have been borrowed, and so would not have been liable for the sums that need to be repaid, including interest. The Claimants also seek the costs of the interim management and joint administrations. A claim for loss of profit arising from the operation of the schemes was withdrawn by the Claimants at the hearing before me.

33. With respect to Metis, it is alleged that they were instructed to advise and carry out legal services with respect to the investment transactions themselves. It is alleged that Metis undertook execution work for the Asset SPVs on investment transactions in the sum of £41,920,286, and of these sums £30,750,612 was transferred out to NPD Ltd.

34. It is alleged that Metis were under a duty to provide advice in respect of the risks involved in the investment transactions. It is also alleged that Metis knew that the schemes did not comply with FSMA.

35. It is alleged that Metis should have advised (among other things) about the risks involved in investor receipts not being retained. It is alleged that there was an inherent conflict of interest between NPD Ltd and the Asset SPVs' investor receipts being diverted to NPD Ltd rather than being retained within the Asset SPVs. It is alleged that Metis failed to provide appropriate advice to the Claimants, and as a result the Asset SPVs entered into the investment transactions, transferred the Investor Receipts to or at the direction of NPD Ltd and/or Mr Woodhouse, and promoted/managed or operated the schemes in breach of FSMA.

The proposed amendments

36. The Claimants seek to make a considerable number of amendments to their pleadings. LF has stated that the strike out/summary judgment application should be considered on the basis that the amendments will be allowed, so that the Claimants' case can be judged at its highest. However, if the strike out/summary judgment application fails, LF do not object to the amendments being allowed, save for those relating to advice given by counsel, Mr Green. LF contend that the proposed claim arising from such advice is time-barred.

37. Metis do not object to some of the proposed amendments (described at paragraph 35 of the Claimants' skeleton argument for the hearing before Freedman J), as they accept that these are mainly clarifications or updated information that is not controversial. I direct, therefore, that these amendments be allowed. With respect to the other amendments, Metis takes issue with them on the basis that they do not disclose an arguable case that would survive a strike out or summary judgment application.

38. I shall set out in some detail the main amendments that are sought by the Claimants against LF, and then against Metis.

39. With respect to the claims against LF, the Claimants seek to expand the scope of the duties owed to them. The Claimants seek to allege that it was an express, alternatively implied, term of the retainer that LF was under a duty to advise on matters reasonably incidental to their express duties, namely "the regulatory, legal and commercial implications arising from the issue of whether or not the schemes were CISs", or that this developed into a general retainer to advise on these matters, or that they assumed a duty to so advise. In oral argument, Mr Pickering KC, on behalf of the Claimants explained that the reference to "commercial implications" was a reference to the commercial implications of the schemes being found to be CIS. If they were CIS, then the advice should have been that the schemes should stop being promoted and no further investments should be taken, as the investors would have an immediate right

to restitution. Mr Pickering KC confirmed that the Claimants were not arguing that LF should have identified that the schemes were being operated as *Ponzi* schemes.

40. As a factual matter, the Claimants seek to allege that the development of the retainer arose, among other things, by the close relationship between Mr Woodhouse and Mr Warner Reed, and from the latter's involvement in the business and activities of the NPD Group gained both as a partner of LF advising the Claimants and as a consultant to the NPD Group.

41. The Claimants seek to allege that LF assumed responsibility for advising on the legal, commercial and practical effect and/or impact of matters raised in the SRA warning notices. That is, LF assumed a duty to advise as to how the matters and concerns raised in those warning notices affected and applied to the schemes, whether any changes were required, and what action should be taken in light of those matters. In oral argument, Mr Pickering KC explained that this assumption of responsibility did not extend to auditing or investigating the schemes to see whether they were being conducted fraudulently.

42. The Claimants seek to add to their pleadings the details of a number of company accounts within the NPD Group and the MBi Group filed in 2017 and 2018 from which it is alleged LF was, or should have been, aware that monies received from hotel leases were not being used to fund the acquisition/development/management of the hotels for which the monies had been received. Reference is also made to NPD Group management accounts which would have been seen by Mr Warner Reed.

43. The Claimants seek to amend the Particulars of Claim to introduce material relating to advice given to MBi Consulting and the MBi SPVs by Tim Green, of counsel. The factual material that the Claimants seek to plead is that Mr Green was instructed by LF to give advice about the MBi Group schemes in February and March 2014. On 26 February 2014, Mr Green advised that it was likely that the various property investment schemes described to him would carry a risk of them being CIS, and there was a considerable risk that the schemes needed FCA authorisation. Mr Green advised that there were civil and criminal consequences of schemes being CIS, including that any agreements would be unenforceable. Mr Green considered that there was no straightforward and obvious way for the rules governing CIS to be overcome. In March 2014, Mr Green advised in conference with LF and representatives of MBi Consulting, and followed this up in writing. He advised that it was very likely that the schemes would carry the risk of CIS, and that there were various features which would need to be incorporated into any scheme to reduce that risk.

44. The Claimants seek to plead further material relating to the correspondence with the FCA. They allege that in early September 2014, the MBi Group received a letter from the FCA. In that letter, the FCA stated that from a review of materials on the company's website, it appeared that the individual rooms, apartments and units in the developments into which consumers will invest may be indicative of a CIS, but the company was not authorised to run such a scheme; further that none of the exemptions that are available under the FSMA regime appear to apply. The MBi Group were asked to provide a full and thorough explanation of their activities. The letter was provided to LF, who met with and took instructions from Mr Woodhouse among others as to how to respond. The Claimants seek to allege that none of the

matters that had been raised by Mr Green about the schemes were addressed properly, and that in a substantive response to the FCA on 24 October 2014, it is alleged that LF wrote to the FCA setting out reasons why the MBi schemes did not fall within the statutory definition of CIS. The FCA responded to LF in January 2015, stating that, based on the clarification of the MBi Group's business activities and the structure of its business model, they were satisfied that the MBi Group was not operating a CIS, and the matter was now closed.

45. The Claimants seek to allege that the factual explanation given by LF to the FCA as to the operation of the schemes was materially incorrect and an amendment is proposed by the Claimants that LF ought to have known this from the instructions provided, from its own analysis of the scheme documentation and from the advice provided by Mr Green. The Claimants seek to allege that if LF had provided a complete and accurate explanation to the FCA, the FCA would have required the MBi Group to cease the promotion, fund-raising for and operation of the schemes.

46. The Claimants seek to allege that LF should have provided Professor McGree with Mr Green's advice when he was instructed subsequently. The Claimants also seek to allege that in light of Mr Green's advice to MBi Consulting, LF should have advised that section 19 of FSMA was contravened and that, in any event, pending resolution of the matter the companies should cease promoting, fund raising for, and operating the schemes. Further proposed amendments arise out of the Tim Green documents: that if LF had advised properly following Mr Green's various pieces of advice, the scheme would not have been promoted or operated, and the Asset SPVs would have not suffered loss and damage.

47. The Claimants propose to amend the Particulars of Claim to plead the purpose of their duties, including to guard the Claimants against the risks involved in operating CIS schemes without proper authorisation, such as that investors would demand the return on their investments.

48. With respect to Metis, the Claimants' proposed amendments are to set out five pages of description of the SDT in a matter concerning Richard Longton, a solicitor with Metis. The allegations against Mr Longton before the SDT were that he had acted for both buyers and sellers on property development schemes, giving rise to actual or significant risks of conflict of interest; and that he had provided banking facilities through the Metis client account when there were no underlying transactions.

49. The proposed amendments also include a claim for breach of trust. It is alleged that Metis made transfers in breach of trust with respect to the various Asset SPVs, whose receipts were transferred to a different SPV and/or NPD Ltd and/or Mr Woodhouse among others. It is alleged that Metis knew or ought to have known that each of the transfers was made in breach of trust: they were made in circumstances where they knew or ought to have known that they were not properly authorised by each transferring Asset SPV to make the transfers and that the transfers were contrary to assurances given to investors that monies would be retained by the Asset SPV, were not in the interests of the Asset SPV and were being undertaken in circumstances of unresolved conflict of interest. Similarly, with respect to the transfer of the proceeds of Secured Lending monies in the sum of £14,339,124.

50. The Claimants claim that Metis are liable to account for the monies wrongfully transferred or that they are entitled to equitable compensation.

The applications

51. LF makes an application to strike out the claims and/or for summary judgment. LF argues that the strike out/summary judgment applications should succeed even if the Claimants' amendments related to the firm are allowed. I shall consider this application, therefore, on the assumption that all of the amendments are allowed.

52. I will then consider the amendment application with respect to LF that deals with the Mr Green advice, and the amendment application dealing with the case against Metis. Metis are not making an application for strike out/summary judgment.

The application for strike out/summary judgment by LF

53. There was no dispute before me as to the proper approach that should be taken by the Court in dealing with these applications:

54. The Court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing or defending the claim: CPR r. 3.4(2)(a). This includes the situation where a claim is bound to fail because an essential element of the claim has not been pleaded.

55. The Court may give summary judgment against a claimant or defendant on the whole of the claim or a particular issue if (a) it considers that the relevant party has no real prospect of succeeding; and (b) there is no other compelling reason why the case or issue should be disposed of at trial: CPR r. 24.2.

56. The applicable principles for dealing with a summary judgment application were set out by Lewison J. in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91 ;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a "mini- trial": *Swain v Hillman*;
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where 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: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 ;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction*: ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

The arguments

57. LF contends that there are fundamental analytical flaws in the Claimants' case and that the claim against the firm should be struck out and/or dismissed on summary judgment for the following reasons: (i) no loss has been suffered; (ii) there is an absence of a causal nexus; and (iii) *ex turpi causa*. LF also argues that even if the entire case against the firm is not dismissed, there are limitation arguments which should defeat part of the claim. The Claimants accept that the loss amount has been overstated in the pleadings by some £14 million odd, as these relate to schemes which

were fully funded more than 6 years before the claim was brought, and so are time-barred. LF contends that there are further parts of the claim that are also time-barred.

58. Taking each of these arguments in turn.

No loss

59. LF explains that the Claimants' case is that had they had been properly advised as to the CIS status of the schemes, the SPVs would not have promoted the schemes. As a consequence, the SPVs would not have received investor monies, and would not have thereby incurred liabilities under section 26 of FSMA to return all of those monies to the investors. The primary head of damage for the Claimants is defined as receipt of the investor monies and the immediately-arising obligation to reimburse, or at the moment when the contract with an investor was entered into which was contemporaneous with the receipt of funds.

60. However, LF contends that no loss was generated at that point, as the SPV had obtained an asset of equal value to the liability it had incurred, and must give credit for it. The financial position of the SPVs is neutral, whether looked at on a balance sheet basis or an economic transaction basis. With respect to the latter, if the Claimants do not have money available to reimburse the investors as a result of legitimate commercial payments (whenever incurred), there is no loss because the Claimants will have received value in exchange for the payments to the third parties. Each payment cancels out the liability to pay and so the financial effect to the companies is neutral. The same analysis applies to the secured lending. No loss arises from the taking out by the Asset SPVs of a loan.

61. LF acknowledges that if the Claimants had alleged that the investors were demanding their money back and this had led to a run on the companies, the cost of interest/borrowing to deal with cash flow issues to make those repayments might be recoverable losses. Similarly, in oral argument, Mr Saoul KC, for LF, contended that the penny in-penny out analysis could be affected if the repayment of the investor monies necessarily incurred other payments, e.g. if a call centre had to be set up to process the return of the monies. The cost of the call-centre might be a "loss" that could be recovered. That, however, was not alleged by the Claimants to be the situation here. Similarly, if the loans were taken out to repay investors, then the interest on the loans might be regarded as a "loss", but that was not the situation here.

62. In reality, LF contends that the loss that has been suffered by the Claimants arises not from the fact that investor receipts were received and are required to be paid under section 26 of FSMA, but from the loss that has been incurred as a result of the way in which the schemes were structured and by the fraud that it is alleged was perpetrated by Mr Woodhouse. Similarly, the liquidation costs arise from the collapse of the schemes, not the claims from investors.

63. In support of the "no loss" argument, Mr Saoul KC seeks to pray in aid the judgment of Sir Geoffrey Vos MR in *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2021] 1 WLR 3507 (approved on this point by the Supreme Court: [2023] A.C. 761); and Balcombe LJ *in Saddington v Colleys Professional Services (a Firm)* (unreported, 14th June 1995).

64. The Claimants contend that the "no loss" analysis has no application here. They contend that the "no loss" analysis might have some force if under a scheme the recipient company was simply to hold and retain investor monies received without doing anything with those monies. Similarly, if the investor monies were used to pay pre-existing liabilities. That was not the case here, however. Monies were paid out not merely to satisfy pre-existing liabilities. Under the terms of the schemes, of which LF was fully aware, significant sums were incurred in paying commissions to sales agents, and other up-front costs to build and refurbish the properties in accordance with the scheme, as well as solicitors' costs and other professional expenses. As soon as the investor invested £100,000, a significant part of that money was spent on upfront costs, and so the Claimants did not have all of the money that it was required to repay to the investors under section 26 of FSMA.

65. In the course of oral argument, Mr Pickering KC also referred to the possibility that the investors would seek compensation from the Claimants, and not merely a return on their investments. It is possible that investors could seek such compensation under the terms of their contractual arrangements with the SPVs, or under FSMA itself. However, I was shown no evidence that any investors had sought compensation, and this was not a matter which was pleaded, in spite of five attempts by the Claimants to plead their case. It was not an argument, therefore, that I was prepared to take into account when considering the applications before me.

Causal Nexus

66. LF contends that the claim should be struck out/dismissed summarily because the pleaded losses fall outside of any scope of duty owed by them. It was not sufficient for the Claimant to say that "but for" the negligence all of the consequences that ensued would not have happened, and so LF should be liable for these. Mr Saoul KC reminds the Court that the Claimants do not allege fraud as against LF.

67. LF refers to the majority judgment in *Manchester Building Society v Grant Thornton LLP* [2022] AC 783, and in particular to the second and fifth questions posed at §6.

> "When a claimant seeks damages from a defendant in the tort of negligence, a series of questions arise:
>
> (1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
>
> (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)
>
> (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)
>
> (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

> (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)
>
> (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)
>
> Application of this analysis gives the value of the claimant's claim for damages in accordance with the principle that the law in awarding damages seeks, so far as money can, to place the claimant in the position he or she would have been in absent the defendant's negligence".

68. LF also notes that the majority of the Court in *Manchester Building Society* point out at §11 that the burden of proof lies on the claimant to show that the loss for which it claims damages lies within the scope of the duty of care.

69. LF contends that the firm was instructed to advise as to whether the schemes were FSMA compliant, and that was the scope of their duties. The firm's duties did not extend to them underwriting the success of the business proposition as a whole. LF was not responsible for how the Claimants spent the monies. LF contends that the Claimants cannot explain how the monies were lost in a way which is properly linked to breaches by LF of the firm's duties to advise on CIS and FSMA issues. The fact that the schemes were not FSMA-compliant did not lead to the alleged losses. Those losses appear to have resulted from what LF describes as Mr. Woodhouse's fraud.

70. The Claimants rely on the *Manchester Building Society* case to make the opposite contention. They argue that the losses that they have suffered were precisely within the risk of harm for which LF owed them a duty of care.

Causation in fact: no difference

71. LF contends that, in any event, any advice to Mr Woodhouse would have made no difference. LF contends that Mr Woodhouse would have proceeded with promoting and operating the schemes irrespective of LF's advice as to whether the schemes were CIS.

72. LF relies on the fact that some schemes raised funds before LF was even engaged, and Mr Woodhouse continued to sell the schemes when he was advised by Mr Green and Mr Assersohn that they were likely to be CIS and/or the documentation had to be redrafted and/or he should become regulated. Mr Woodhouse ignored advice, made no changes to the schemes' operations, and carried on doing exactly as he had done before even when warnings were given. LF contends that the same would have applied even if the firm had ceased acting and alternative advice was sought and obtained.

73. LF points out that the Claimants' case in the claim before HHJ Jackson was predicated on the assertion that Mr Woodhouse knew, or was fully aware of the risk (and likelihood), that the schemes were unlawful CIS from well before the NPD Group's commencement of trading, and that this knowledge continued up and beyond the advice from Mr Assersohn.

74. LF also contends that the argument made by the Claimants that LF's endorsement of the schemes as FSMA-compliant was essential to their promotion has no real prospect of success. It is suggested that LF's involvement was not essential to the sales. A number of schemes (I was referred to those known as MBI Smithy Bridge and Campus House) were already accepting investments before LF was instructed to advise. Indeed, sales were made before the firm's involvement. Furthermore, schemes were set up, and sales took place, even after Mr Assersohn had advised that they were CIS: I was referred in this regard to the scheme known as Bracken Country House. In any event, the making of the investments was not what caused the Claimants' loss.

75. With respect to the correspondence with the FCA, LF contends that Mr Woodhouse knowingly lied to the FCA. The letter to the FCA, which is alleged to be misleading, was sent by LF on instructions and approved by the Claimants. Mr Saoul KC contended that there was no world in which a true explanation would have been given because Mr Woodhouse would have been required to approve it, and the Claimants' own position (as advanced in the case before HHJ Jackson) is that Mr Woodhouse was dishonest. The whole argument is inherently implausible.

76. Similarly, LF argues that there is no realistic prospect that the "assumption of duty" argument based on the SRA warning letters would succeed. Even if LF was under an obligation to raise the matters with the Claimants, it is contended that they did do this, and Mr Woodhouse continued with his operation of the various schemes.

77. Against these submissions, the Claimants contend that it is inappropriate to dismiss the case on the basis that causation is not made out on the facts. It is not possible to determine what would have happened had LF advised properly that the schemes were CIS, and that the schemes should cease being promoted and taking investor receipts. Mr. Pickering KC accepted, in oral argument, that he was unlikely to suggest in evidence at trial that Mr Woodhouse was honest, but he contended that had firm advice been provided by LF this would have meant that Mr Woodhouse could not actually proceed with the schemes. He would have had no choice but to cease promoting the schemes and accepting investment monies. It was necessary for the Court to consider why Mr Woodhouse required the services of lawyers. Mr Pickering KC contended that Mr Woodhouse needed legal validation for the schemes and that if this was not forthcoming from LF then the schemes could no longer function. The promotion of the schemes over several years was an ongoing dynamic process, and Mr Woodhouse needed solicitor validation to move the schemes forward.

78. Mr Pickering KC argued that that was consistent with the way in which the Claimants had put the case against Mr Woodhouse before HHJ Jackson. It had been the Claimants' contention in that case that the true purpose for which Mr Woodhouse sought legal advice was not to ensure that the MBi and NPD Group schemes operated lawfully. Rather, it was to provide cover, validation and support for the promotion of their schemes in order to persuade sales agents, potential investors and existing investors that the schemes were not CISs.

79. The Claimants also pointed out that if LF had given advice to Mr Woodhouse to stop and yet he had not ceased promoting the schemes, then LF would have had to issue a suspicious activity report to the National Crime Agency, which would have led to intervention by the FCA. That would have brought the schemes to an end.

Ex turpi causa

80. LF asserts that the claims should be struck out or dismissed summarily according to the *ex turpi causa* principle. LF alleges that it is the Claimants' own case that there was a fraud at the heart of the various schemes. As the losses arose from the dishonest acts of Mr Woodhouse, who was the director and controlling mind of the schemes and individual SPVs, claims for losses arising from his dishonest acts should be barred by *ex turpi causa*, which precludes claims for compensation arising from dishonest acts. LF relies on the principles set out in the Supreme Court decisions of *Patel v Mirza* [2016] UKSC 42, *Singularis v. Daiwa Capital Markets* [2020] AC 1189, and *Grondona v Stoffel* [2021] AC 540.

81. For the Claimants, Mr Pickering KC contends that the *ex turpi causa* argument was a bad one. He contended that the principles set out in *Patel v Mirza* were not satisfied here. It was necessary to consider the underlying purpose of the prohibition that was being transgressed, and consider whether other public policies were served. It was also necessary to consider the question of proportionality, and whether striking out the case was overkill. The illegality in the present case related to the CIS, the purpose of which was to protect investors. Denying the claim would not assist the investors (who were now creditors).

Limitation

82. LF contends that parts of the claim against the firm should be dismissed on limitation grounds. It is submitted that a number of the Asset SPVs received investments, and therefore suffered loss, before 14 April 2016 (6 years before the claim was filed). As time starts running for limitation purposes when the first loss is suffered, all of the subsequent claims for loss with respect to those Asset SPVs are time-barred, whether the later losses involved further investment monies or secured loans. Ms. Manby, who argued the limitation point for LF, relied on the judgment of Clarke LJ in *Polley v Warner Goodman & Streat* [2003] EWCA Crim 1013 at §§15-16 to support this argument.

83. LF also contends that the amendments relating to the advice from Mr Green are also time-barred as his advice was given well over six years before the date of the hearing.

84. Against this, the Claimants contend that each investment or loan constituted a separate transaction. Claims relating to subsequent investments or loans are not time-barred merely because an investment was received by an Asset SPV outside of the 6 year period. The Claimants contend that it is always a question of fact as to whether a cause of action continues after initial advice has been given. On these facts, it is said that LF was under a continuing obligation to advise the Claimants to stop promoting the schemes, and so the mere fact that the initial advice or receipt of investment took place more than six years before the date of the hearing before the Court did not bar the subsequent investments.

85. With respect to the amendments relating to the advice from Mr Green, these arise out of the same or substantially similar facts to subsequent matters that are pleaded and were in time. In any event, the references to the advice from Mr Green are essentially matters of narrative, and the point that the Claimants seek to make with these amendments is that LF was aware of that advice, and should have been relying on it, when it gave advice subsequently to the NPD Group as it involved the same set of scheme arrangements as had previously applied to the MBi Group.

Amendments

86. The principles that apply to whether amendments should be permitted are also not in dispute: CPR r. 17.1(2) provides that, if a statement of case has been served, a party may amend it only (a) with the written consent of all the other parties; or (b) with the permission of the Court.

87. In *King v Stiefel* [2021] EWHC 1045 (Comm) at §§145-51, Cockerill J explained that a pleading serves three purposes: first, it enables the other side to know the case it has to meet, so that (as Lord Neuberger MR observed in *Al Rawi v Security Service* [2010] EWCA Civ 482 at §18 this ensures that the trial can be fairly conducted, and parties can properly prepare their respective evidence and arguments at trial); second, it ensures that the parties properly prepare for trial so that unnecessary costs are not expended and court time wasted chasing points which are not in issue or which lead nowhere; and, third, the pleading operates as "a critical audit for the claimant and its legal team that it has a complete cause of action or defence".

88. What is required for a Particulars of Claim is a concise statement of the facts on which the claimants rely. A pleading should not contain the evidence by which those facts are to be proved. Pleadings which are of indeterminable length, diffuse and lacking in precision are not in keeping with that requirement nor with the intended object of helping the Court and the parties: see *Hague Plant v Hague* [2014] EWCA Civ 1609 per Christopher Clarke LJ at §§76, 78.

89. In considering whether to grant permission to amend, the Court should apply the same test as for summary judgment. Permission should be refused if it is apparent that a proposed claim would have no real prospect of success: see *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] EWCA Civ 480, per Males LJ at §69.

90. Where limitation is in issue, CPR r. 17.4(2) provides that the Court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings. This requires four questions to be answered: (1) is it arguable that the amendments are outside the applicable limitation period; (2) do the proposed amendments seek to add or substitute a new cause of action; (3) does the new cause of action arise out of the same or substantially the same facts as are already in issue; (4) should the Court exercise its discretion to allow the amendment: see *Mulalley & Co Ltd v. Martlet Homes Ltd* [2022] EWCA Civ 32 at §38.

91. With respect to the third question, the Court of Appeal in *Mulalley* held that "substantially the same" is not synonymous with "similar". What is required is a comparative analysis between the original pleaded case and the proposed new pleaded

case: it is enough if the overlap is sufficient for it to be said that the facts are substantially the same; the overlap does not have to be total. One relevant factor is the extent to which the defendant will be obliged, if the amendment is allowed, to investigate facts which are unrelated to the facts he could reasonably have been assumed to have investigated for the purposes of defending the unamended claim.

92. The Court has a discretion as to whether to allow amendments. One factor which is frequently considered by the Court in the exercise of discretion is the delay and impact on the proceedings. In the instant case, the proceedings are at an early stage, with no Defence filed and no disclosure provided by either side, and so this is not a factor that needs to be considered.

93. With respect to the Metis amendments, some of these are consented to (and I direct that these should be allowed). Others are objected to. The objections are to: (i) those amendments that plead at length a significant number of facts and matters about the SDT decision concerning Richard Longton; (ii) the introduction of a claim for breach of trust; and (iii) those amendments designed to clarify certain claims, including a head of loss, but which remain confusing.

94. With respect to (ii), Mr O'Doherty, who made the oral arguments on behalf of the Claimants, contended that Metis should not have executed transfers of money from the Asset SPVs to NPD Ltd without proper instructions from the Asset SPVs. The investment monies and secured loan monies were client account monies and as such were held on trust. Mr O'Doherty argued that Metis knew or ought to have known that there was a direct conflict between the Asset SPVs who had to retain specific monies to undertake projects, and NPD Ltd which was acting as general treasurer to the schemes as a whole. The monies should have been transferred out for the Asset SPVs to buy property, operate the property and develop the property, and should not have been transferred to NPD Ltd which did a wide range of things with the money. Mr O'Doherty contended that support for this cause of action is evidenced by the findings of the SDT hearing involving Mr Longton.

95. With respect to (i), Mr Ben Hubble KC, on behalf of Metis, contends that it was not necessary for the SDT hearing to have been described in the amended pleadings in so much detail. It could have been dealt with in one line.

96. With respect to (ii), Mr Hubble KC contends that an arguable claim is not made out. The trust which it is alleged to have been breached by Metis is a "bare trust". There is no allegation that a *Quistclose* trust[4] was created such that the investment monies were held on trust for the investors. As such, the nature and ambit of the trust was that Metis was bound to deal with the monies as instructed. Reliance is placed on the judgment of Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1995] 1 AC 421 at 436-BC:

> "The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from client account are regulated by the instructions given by the client: they are not part of the trusts on which the property is held. I do not intend

[4] See *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

> to cast any doubt on the fact that moneys held by solicitors on client account are trust moneys or that the basic equitable principles apply to any breach of such trust by solicitors".

97. Mr Hubble KC contends that no claim for breach of trust is identified which has a real prospect of success. The Claimants' own case is that the Asset SPVs acted at the direction of Mr Woodhouse who was the sole director and beneficial owner of the Asset SPVs. Metis was required to transfer funds at the behest of the beneficiary, and did so.

98. Further, Mr Hubble KC points out that limitation issues also arise. As new claims (and the Claimants accept that a breach of trust against Metis has not previously been pleaded: indeed, they specifically deleted reference to breach of trust in the initial claim form), any claims in respect of the transfer of funds before 7 February 2018 (six years before the first date of the hearing before me) are statute-barred. As for whether the allegations arise out of the same or substantially the same facts as are already in issue (per *Mulalley*), this is not possible to discern as the pleading lacks clarity, precision and coherence. Insofar as the pleading seeks to put in issue Metis' state of mind and some form of conscious wrongdoing, these would be new inquiries.

99. As for (iii), this relates to the secured lending claim, and Mr Hubble KC contends that the proposed amendments are not clear and coherent and do not particularise the secured lending in question. The Claimants are said to plead a global figure, and yet the schedule to which it relates also involves secured lending claims against LF which are obviously not relevant to the claim against Metis.

Discussion

No loss/causal nexus

100. I consider that the claims brought against LF should be struck out and/or should be dismissed summarily on the basis that the claims brought by the Claimants fail to establish that they have suffered any loss as a result of the alleged negligent advice by LF.

101. I accept, as a matter of law, the "no loss" arguments made by LF: the monies that are owed to the investors pursuant to section 26 of FSMA must be offset by the investment monies that were received. Similarly for the monies received by way of the secured loans.

102. Furthermore, I also accept that the losses that are alleged to have been suffered by the Claimants were not attributable to LF's alleged negligence. A distinction needs to be drawn between the receipt of the moneys (the investment receipts and the loan monies) and the use to which they were put. It is the use to which these monies were put that is the cause of the losses that the Claimants have sustained, not the receipt of the investment or loan monies themselves.

103. Although Mr Saoul KC argued these two points separately, it seems to me that they are interconnected. Indeed, this is reflected by the analysis of the Court of Appeal in *Saddington* which has a number of parallels to the present case.

104. In *Saddington*, the Court was considering a claim for negligence involving a firm of valuers. The firm was alleged to have negligently valued a property for the purpose of assessing security for a proposed loan to be charged against Mr and Mrs Saddington's home. In reliance on the valuers' report, which valued the property at £350,000, a loan of £175,000 was granted, of which £75,000 discharged the existing mortgage on the property and £100,000 was advanced to Mr. Saddington who invested it in his business. The latter sum was lost by reason of the failure of Mr. Saddington's business. In their claim against the valuers, it was alleged that a financial loss was sustained by the Saddingtons in the sum of £100,000, which was the increased charge on their property.

105. There are similar features in the present case. It is alleged that, as a result of LF's negligence, the Claimants received investments and loan monies that they would not otherwise have obtained – as they would (on the Claimants' case) have not promoted the schemes and stopped accepting investments if they had been told that they were CIS. Furthermore, the sums received have been used: they have been dissipated and so cannot be used to pay back the investors who are entitled to their money under FSMA, or to repay the lenders who are entitled to their money under the various loan agreements.

106. In *Saddington*, the Court of Appeal held that the claim against the valuers disclosed no cause of action and should be struck out. In the course of his judgment, Balcombe LJ referred to the decision of the Court of Appeal in *Galoo Limited v. Bright Grahame & Murray* [1994] 1 WLR 1360 (a case concerning negligence by a firm of accountants with respect to the auditing of a company's accounts), which supported the proposition that the acceptance of a loan cannot, of itself, be described as a loss causing damage. In *Galoo*, Glidewell LJ said at p.1369D-E that:

> "I do not understand how the acceptance of a loan can, of itself, be described as a loss causing damage. If anything it is a benefit to the borrower. Of course, a loss may result from the use to which the loan moneys are put . . . "

107. On the facts of *Saddington*, Balcombe LJ explained that the loss of the £100,000 which had been advanced to Mr. Saddington "resulted from the use to which the loan moneys were put, which cannot be attributed to" the valuers. That subsequent loss was "not damage of a kind which the [valuers] could or should have foreseen". Balcombe LJ said that to make the valuers liable for this loss would be "unfair, unjust and unreasonable" (applying the third element of the *Caparo*[5] test). The same result would have been arrived at if considered as a matter of *causation*. Balcombe LJ held that:

> "If there had been a breach of duty by the [valuers] in over-valuing the property it did not cause the loss of £100,000; at the most it gave the opportunity for that loss to occur. (See Galoo at pp.1374D-1375A)".

108. Similarly, in the instant case, the receipt of the investment monies by the Claimants was not itself "a loss causing damage". At the time when the monies were accepted by the Claimants, they did not cause any damage to them. Rather, they were monies that

[5] *Caparo Industries plc v Dickman* [1990] 2 AC 605.

had a zero effect: penny in, penny out. This is the same point that was made by the Master of the Rolls in *Stanford International Bank Ltd* at §34.

109. In *Stanford International Bank Ltd*, the claimant company was insolvent with debts exceeding $5 billion as a result of being used by the owner as a *Ponzi* scheme. The claimant's liquidators alleged that HSBC, with which the claimant held bank accounts, paid out some £116 million to holders of certificates of deposit issued by the claimant; and had the bank frozen those accounts, as it is alleged they should have done (the *Quincecare* duty[6]), at least £80 million would have been available to pay the claimant's creditors in the insolvency. The Master of the Rolls held that HSBC did not owe any duties to Stanford International Bank's creditors, its duty was to Stanford International Bank. Further, Stanford International Bank did not lose anything as a result of the payment to discharge creditors. At §34, the Master of the Rolls said that:

> "The point here is that SIB itself did not lose anything as a result of the payment of £116.1m to discharge creditors and to another account in its own name. Its net asset position at the end of the period was the same as at the beginning".

Similarly, here, the Claimants did not lose anything as a result of the receipt of the investment monies or the loan monies.

110. Mr Pickering KC, for the Claimants, accepted that this would be the case if the investment monies were simply held by the Claimants, or if they were used to discharge existing liabilities, but argued that this did not apply where the monies are paid to discharge future or ongoing liabilities, especially when those liabilities are the inevitable consequence of the receipt of the investments or form part of the transaction costs for those investments (such as sales agent commissions or solicitors' fees). It seems to me, however, that there is no difference between the two situations. Both involve the payment to discharge liabilities, in respect of which the Claimants have received consideration.

111. In *Stanford International Bank Ltd*, the Master of the Rolls had stated at §29 that:

> "It is, of course, plausible to imagine consequential losses that SIB might have sustained as a result of the failure to freeze the accounts by 1 August 2008. But no such losses form the subject of this issue."

Similarly, in the instant case, there might have been losses sustained by the Claimants if they incurred costs in paying back the investment monies, such as if (as in Mr Saoul KC's example given in oral argument) they had had to set up a call centre to return the monies when requested to do so by investors, or had to use the loan monies to pay back the investors and so the interest on the loan monies might be regarded as consequential losses.

112. Here, however, the consequential losses arose from the way in which the monies were subsequently used by the Claimants, but the duty of care pleaded by the Claimants does <u>not</u> extend to advising as to the way in which the investment or loan monies

[6] *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.

would or could be used by the Claimants, including (but not restricted to) misuse by Mr Woodhouse.

113. Applying the language of Balcombe LJ in *Saddington*, if there had been a breach of duty by LF in failing to advise that the schemes were CIS, this did not cause the loss of the investment or loan monies: "at the most it gave the opportunity for that loss to occur". The latter is not recoverable.

114. The same conclusion is reached if one looks at the scope of the duty in accordance with the approach described by the majority of the Supreme Court in *Manchester Building Society*: the duty of care imposed on LF concerned the impact of FSMA if the schemes about which LF was advising and seeking advice from counsel about, were CIS. If there was a breach of duty by LF, the only harm arising for which there was a sufficient nexus to the duty of care was the requirement to make restitution to the investors or repayment to the lenders. That requirement is, as already explained, set off in full by the amount received in investment monies (or received in loan monies). Accordingly, no loss is attributable to the duty of care which is alleged to have been breached.

115. The same result is arrived at if the proposed amendments are allowed and the Claimants' case includes the FCA correspondence and the assumption of duty allegation with respect to the SRA warning letters. It was not contended by the Claimants that the correspondence with the FCA or the SRA's warning letters gave rise to any different loss to the allegations of negligent advice more generally. Rather, as Mr Pickering KC acknowledged, in both cases the substance of the breach of duty was that LF should have advised the Claimants that the schemes were CIS and should stop. As already explained, no loss would arise as (i) the loss would need to be offset by the receipt of the investments/loan monies; and (ii) the loss would be outside the scope of the duty.

116. If I had not reached the latter conclusion, however, I would not have dismissed summarily the assumption of duty argument on the basis that it was fanciful as a matter of principle. It seems to me that on the facts, as pleaded, it would have been reasonably arguable that the way in which LF acted on receipt of the SRA warning letters gave rise to a duty to notify and warn the Claimants as to the concerns being raised by the SRA. (I explain below that I would have dismissed this amended claim on the basis that there was no causation in fact.)

117. I note that there was considerable argument in the parties' skeleton arguments about the scope of a solicitor's retainer. It is not necessary for me to set out the competing arguments or to decide any points that are in dispute with respect to this matter, given that whatever the retainer's ambit and the duties owed by LF to the Claimants no loss has been suffered.

Causation in Fact

118. I do not consider that all of the case against LF should be dismissed summarily on the basis that factual causation cannot be made out: that is, that it would have made no difference had LF advised the Claimants that the schemes were CIS and that they should cease promoting them and receiving investors' moneys. The factual causation argument may well be difficult for the Claimants to defeat at trial, especially as the

Claimants are unlikely to suggest that Mr Woodhouse was an honest person, but I cannot say that the matter is entirely fanciful.

119. In considering this matter, I have taken into account the findings made by HHJ Jackson in the claim against Mr Woodhouse: [2023] EWHC 3124 (Ch). I am entitled to do so without contravening the rule in *Hollington v F Hewthorn & Co Ltd* [1943] K.B. 587, which renders a court's findings of fact inadmissible to prove the truth of those findings in subsequent civil proceedings. It is well accepted (see the recent discussion by Mellor J in *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWHC 2437 (Ch)) that there is a limited exception to that rule where a case was at a preparatory stage and the Court had to consider what evidence there might be at trial: this included the situation, as here, where the Court was considering at an interlocutory stage whether there was a serious issue to be tried.

120. I do not accept that the Court does have all the evidence at this stage that would be available at trial. Not all of the relevant documentary material is available to the Court at this stage, as it is possible that further documentary material will be forthcoming from LF. Mr Saoul KC had argued that the administrators and then liquidators for the Claimant companies have been in post for more than four years, and have had time to carry out investigations into the operation of the schemes, and have statutory powers which have enabled them to view much of the documentation held by third parties that would ordinarily be provided on disclosure. Mr Pickering KC contended, on the other hand, that the Claimants are expecting further disclosure from LF. The paper files were said to be incomplete, and there were redactions of some of the material without explanation. It seems to me that what Mr Pickering KC argued is likely to be correct, and that some (albeit not much) further disclosure may be forthcoming.

121. With respect to oral evidence, I acknowledge that there is real doubt as to whether Mr Woodhouse will be called as a witness by the Claimants given that it is their position that he is dishonest, and Mr Pickering KC has told the Court that he would be unlikely to contend otherwise at trial. Nevertheless, there may well be witness evidence from some of the many other personnel who worked for the Claimant companies that may have a bearing on the factual issues. There would also likely be evidence from the solicitors who worked at LF, including Mr Warner Reed.

122. In any event, I am not convinced on the basis of the materials that I have seen, and the submissions made, that Mr Woodhouse would have necessarily carried on with the promotion and operation of the schemes if LF had advised him that the schemes were CIS and had told him that he had to stop. Whilst there is evidence that Mr Woodhouse persisted with the schemes in light of the clear advice from Mr Green in 2014, and subsequently from Mr Assersohn in 2017/18, and he seems to have been aware that the instructions to Professor McGee were inadequate, there is some evidence that Mr Woodhouse relied on LF's advice for validation of his schemes, so that he could present to the outside world (and, in particular, to some investors or their lawyers) a veneer of legitimacy.

123. It is clear that the promotion of the schemes over several years was an ongoing dynamic process, and Mr Woodhouse needed solicitor validation to continue to receive investment monies. An example of this was the correspondence from TQ Property Lawyers in February 2017 querying on behalf of their investor clients

whether the features of the scheme were CIS based on the advice from Professor McGee.

124. A further example of the validation that Mr Woodhouse needed from lawyers is reflected in the email instructions from Mr Warner Reed to Ms Hearnden, of counsel, on 4 July 2017 stated that "Our client wants to go into the market place stating that the process has been looked at by reputable counsel. . . . [I]t is pointless going into the market place if it is never going to get off the ground. Our client wants to be open and transparent."

125. It is possible, therefore, that Mr Woodhouse would have ceased the schemes had he been told by LF that they were CIS and that he had to stop their operation. This matter needs to be tested at trial when all of the evidence is available, and witnesses can be questioned.

126. I also consider that it is somewhat speculative at this stage in the proceedings to make a finding as to what would have happened if LF had said that the firm could not write the letter to the FCA setting out why the schemes were not CISs. There is a possibility that the letter would have been written by the MBi Group directly, and that the FCA would not have investigated further and taken action against the MBI Group to cease promoting the schemes. This matter also needs to be tested at trial when all of the evidence is available, and witnesses can be questioned.

127. There are, however, a couple of aspects of the claim -- the allegations relating to the SRA warning letters and the allegations concerning the filed accounts – that should be dismissed on summary judgment as having no reasonable prospect of success without the matter needing to go to trial.

128. With respect to the allegation made by the Claimants that LF should have drawn to the Claimants' attention the pitfalls that had been associated with these types of schemes, it is clear that LF did take steps to "kick the tires" by asking questions of Mr Woodhouse. LF drew Mr Woodhouse's attention to the SRA's warning letters, and the concerns that were generally being expressed about these kinds of investment schemes by the SRA. It is not realistic to think that further probing of Mr Woodhouse would have made any difference given that he was the controlling mind of the various Claimants, and was well aware of what was taking place in the operation of the schemes as he was their architect.

129. With respect to the allegation that LF could, and should, have investigated the various company accounts that are referred to, it is abundantly clear that several of these could not have made any difference for much of the period in question, given the dates of their filing. For instance, NPD Ltd's accounts for the year ending 31 March 2017 were not filed until October 2017.

130. In any event, the suggestion that interrogating these accounts and then questioning the Claimants and Mr Woodhouse about what they evidenced about the use of monies within the various schemes would have made any difference is totally incompatible with the way in which the matter was put by the Claimants themselves in the hearing before HHJ Jackson. In that trial, the Claimants' outline closing submissions contained the assertion that Mr Woodhouse was "an accomplished liar. He has consistently lied to investors by presenting to them obviously fundamentally flawed

investment schemes as low risk/high return investments. He has lied in statutory accounts." It is inconceivable that further probing of the accounts and confronting Mr. Woodhouse about this would have made any difference.

Ex turpi causa

131. I do not strike out or dismiss the claim against LF summarily on the basis of the *ex turpi causa* principle. As Lord Toulson explained in *Patel v Mirza* [2017] AC 467 at §101, in considering whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest because it would be harmful to the integrity of the legal system, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed, (b) to consider any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) to keep in mind the possibility of overkill unless the law is applied with a due sense of proportionality. In the present case, I consider that points (a) and (b) would not be served if the claims were struck out on the basis of *ex turpi causa*.

132. With respect to (a), the relevant prohibition which has been transgressed is that schemes that were entered into were CIS and Mr Woodhouse (or his various entities) were not authorised under the FSMA to promote these schemes. The purpose of the authorisation requirement is to protect investors and to ensure that those who unlawfully promote CISs do not gain. Here, the offending entities are now in liquidation, and the purpose of the litigation is to assist the investors and other creditors. If the claims were dismissed for *ex turpi causa*, the purpose of the prohibition that was transgressed would not be served. Not allowing the claim would deny the investors/creditors the possibility of substantial relief, and that would be unfair. It would deny them the opportunity to benefit from the very protection which the FSMA scheme was designed to afford. The same would apply if one looked at the matter more generally on the basis that there was a fraud or dishonesty at the heart of the schemes. The protection of creditors would be impeded if the claim could not go ahead due to the alleged fraud or dishonesty of the controlling mind of the schemes.

133. Furthermore, with respect to (b) looking at other public policy interests, I consider that denial of the claim would also have the effect of undermining the policy interest that is served by the law of solicitor's negligence. This is analogous to the countervailing interest referred to by the Supreme Court in the case of *Grondona v Stoffel* [2021] AC 540 (a claim for negligence against a firm of conveyancing solicitors brought by a claimant who was engaged in a mortgage fraud). In that case, Lord Lloyd-Jones stated at §32 that an important countervailing policy at play was that:

> "conveyancing solicitors should perform their duties to their clients diligently and without negligence and that, in the event of a negligent breach of duty, those who use their services should be entitled to seek a civil remedy for the loss they have suffered."

134. In that case, it was held that permitting solicitors to escape liability for negligence when they discover after the event that a misrepresentation was made to a mortgagee would run entirely counter to these policies. Similarly here, permitting solicitors to

escape liability for negligence would undermine the policy interest that is served by the law of solicitor's negligence.

Limitation

135. The Claimants have accepted that some of their losses against LF cannot be claimed as they are time-barred. With respect to other claims for losses as against LF, I would not have struck them out or dismissed them summarily. I do not accept that for each of the investment schemes (and therefore for particular Claimants) time starts running when the first investment is received, such that any later receipts of investment or loan monies will be time barred if the initial investment was received more than 6 years before the claim was issued.

136. The evidence makes clear that LF was giving, or sourcing, advice as to the schemes' compliance with FSMA on a regular basis after April 2016. In the circumstances, the alleged failures to act should be regarded as separate events. This was not a case where there is one cause of action, which was fixed or crystallised at a particular date, and the consequences arise in different ways over time.

Amendment against LF

137. As already explained, if the claim was to proceed against LF there is no objection to the amendments, save for the pleading with respect to Mr Green's advice. In my judgment, for the reasons already explained, the claim should be struck out or dismissed and so it is not actually necessary to determine this point. Nevertheless, it seems to me that given the way in which the amendment has been described by Mr Pickering KC it would have been appropriate to amend the pleadings to allow the Claimants to contend that LF was aware of Mr Green's advice, or should have had it in mind, when the firm advised NPD from April 2016 onwards. This would not have amounted to a fresh cause of action, but would have been background material which would inform the already pleaded causes of action. Moreover, there is already a reference to Mr Green's advice in the existing pleading, and the further material would simply have built on that reference to Mr Green in the existing pleading.

Amendments against Metis

138. With respect to the amendments of the Particulars of Claim as against Metis, I accept Mr. Hubble KC's arguments that the pleading is already prolix, and any additional material needs to be properly justified.

139. In my judgment, there is no necessity to plead out five pages on the SDT decision involving Mr. Longton, even if the disciplinary finding was relevant context to the subsequent claims against Metis. The SDT's findings are not binding on the Court at trial (see *Hollington v F Hewthorn & Co Ltd*). In any event, one or two lines about the SDT's findings could have sufficed as narrative for the pleadings. During the course of the oral hearing, the Claimants did not suggest some concise wording to reference the SDT decision and so there is no alternative drafting for the Court to consider. Accordingly, I refuse the application to amend the pleadings to reference the SDT's findings.

140. As for the substantive amendment to plead a breach of trust, it does not seem to me to be reasonably arguable that such a claim could be made out. The question that the Court would need to address, if the breach of trust claim was permitted to proceed, would not be whether there was a conflict of interest between the SPVs and the other entities to whom monies were transferred, but whether Metis acted on instructions from the SPVs or not. If they did, then this would have been sufficient for them to have acted in a way that did not breach any trust obligation.

141. It is not expressly pleaded by the Claimants that Metis acted contrary to instructions from the SPVs. Rather, it is said that this can be inferred from the pleadings. Even if I give the Claimants the benefit of the doubt that the point is properly pleaded, it seems to me inconceivable that Metis did not have instructions from the SPVs to transfer the monies out to NPD Ltd. It is clear from the Claimants' own case that Mr Woodhouse was the controlling mind of each of the SPVs and the ultimate beneficial owner. Given that the Claimants accept that instructions were given by Mr Woodhouse to Metis that the investor monies and loan monies should be transferred out, there is no sensible basis upon which it could be contended that he did not give those instructions – whether on each occasion, or in a more general way – on behalf of the SPVs. If he did, then there could be no breach of trust. This amended claim therefore has no realistic prospect of success and cannot be permitted to proceed.

142. If the claim for breach of trust had not been refused for failing to establish a reasonable case, I would not have refused that part of the claim which relates to the transfer of funds before 7 February 2018. Although these allegations would have been *prima facie* time-barred, they do involve substantially the same facts as are already in issue under the existing Particulars of Claim, as they concern the same transactions in respect of which it is alleged that Metis negligently failed to give proper advice. Although some new inquiries would be required as to the state of Metis' mind, this matter is so closely connected to the allegations of negligence that are already pleaded that it would not be unjust or unfair to Metis if the amendments were allowed.

143. With respect to the proposed amendments concerning the secured lending claim, I agree with the submission of Mr Hubble KC that the proposed amendments lack clarity and coherence. They fail to particularise the secured lending in question: the schedule provided by the Claimants includes material relating to claims against LF. Furthermore, the proposed amendments do not particularise who took out the secured lending, in what sums, when it was taken out, what relevant finance documents are relied upon, what sums were raised and by whom was the loss in question claimed to have been suffered. These inadequacies mean that Metis do not know what claim they have to meet, and so the basic principle behind the requirement and content of pleadings is not satisfied. As a result, these proposed amendments should not be permitted to proceed.

144. Accordingly, I refuse to grant the amendments proposed by the Claimants with respect to their claims against Metis, other than those amendments that Metis does not object to.

Conclusion

145. In my judgment, therefore, the claims brought by the Claimants against LF are, therefore, dismissed.

146. The amendments to the Particulars of Claim sought by the Claimants with respect to their claims against Metis are refused, save for those amendments that are agreed by Metis (described at paragraph 35 of the Claimants' skeleton argument for the hearing before Freedman J).