Neutral Citation Number: [2020] EWHC 1145 (Ch)

Case No: BL-2018-002028

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

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

Date: 14/05/2020

Before :

MR JUSTICE BIRSS

- -

Between :

Barrowfen Properties Limited	**Claimant**
- and -	
(1) Girish Dahyabhai Patel	
(2) Stevens & Bolton LLP	
(3) Barrowfen Properties II Limited	**Defendants**

- -
- -

Lexa Hilliard QC and Tim Matthewson (instructed by **Withers LLP**) for the **Claimant**
Roger Stewart QC and Angharad Start (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second Defendant**
The other defendants did not appear and were not represented
Hearing date: 6th April 2020

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Approved Judgment

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

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MR JUSTICE BIRSS

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30pm on 14th May 2020.

Mr Justice Birss:

1. The action in which this application arises is one of a number of claims brought in different jurisdictions between members of a wealthy family which holds an extensive network of companies around the world. The first defendant, Girish Patel, is a member of the family. I will refer to him as Girish without any disrespect to him. The shares in the claimant company (Barrowfen) are held by vehicles owned by or for the benefit of various family members. Girish is a former director of Barrowfen. The second defendants (Stevens & Bolton) are a solicitors' firm which acted for the company at one time. The third defendant (Barrowfen II) is a company controlled by Girish.

2. The claim is an action for damages and/or equitable compensation and/or an account. It relates to what the claimant contends was an attempt by Girish to take or maintain sole personal control of Barrowfen. The idea was to thereby gain control of a valuable commercial property in Tooting, South London which was held by Barrowfen. The issues include, amongst other things, allegations that before 2015 Girish had improperly removed a BVI company called Bedford Development Ltd from the register of members and that he forged a purported letter of resignation of one of his brothers (Suresh) as a director of Barrowfen. The issues also include a claim against Stevens & Bolton that they breached their fiduciary duties and/or duties of care owed to Barrowfen by acting at the same time for Barrowfen and Girish despite knowing there was a conflict of interest. These allegations are not the subject of the application. The matter is due to come to trial in early 2021.

3. The application relates to the circumstances into which Barrowfen was placed into administration in 2016 by Barrowfen II. The claimant contends that this arose after the initial attempts by Girish to take control had been thwarted. In its draft Amended Particulars of Claim Barrowfen pleads a case against Stevens & Bolton in respect of this episode on three grounds. They are dishonest assistance, deceit and unlawful means conspiracy.

4. Stevens & Bolton applied to strike out the allegations. Amongst other things Stevens & Bolton makes the point that the version in the current draft Amended Particulars of Claim is the fourth version of the claimant's case on these issues, the first having been advanced in draft Particulars of Claim served with the letter of claim in October 2017.

5. The principles applicable to considering the strike out application were not in dispute and are familiar. The case was argued on the basis of the Amended Particulars of Claim. To the extent that there is a difference between considering the striking out of an existing allegation as distinct from deciding whether to give permission to make an amendment, that distinction does not matter in the present case. Put briefly, the relevant principles are that the court will strike out a statement of case if it discloses no reasonable grounds for bringing the claim, if it is an abuse of process, or if it has no real prospect of success. I will refer to the order I am asked to make as a strike out, rather than always adding that it would also include refusal of amendments.

6. Furthermore, all three grounds which are in issue involve allegations of fraud and/or dishonesty. These are treated with particular care by the court and fraud is one of the matters which must be specifically pleaded (CPR Part 16, PD para 8.2).

7. In ***JSC Bank of Moscow v Kekhman*** [2015] EWHC 3073 (Comm) at [12]–[23], Flaux J summarised the principles that apply to a plea of fraud/dishonesty as set out by the House of Lords in ***Three Rivers DC v Bank of England*** [2003] 2 AC 1. I take the following from Flaux J's judgment:

   i) The use of the word "fraud" or "dishonesty" is not necessary in a pleading if the facts which make the conduct fraudulent are pleaded.

   ii) The function of pleadings is to give the party opposite sufficient notice of the case which is being made against them. An allegation of fraud/dishonesty must be sufficiently particularised by pleading the primary facts relied on.

   iii) At an interlocutory stage, the court is not concerned with whether the evidence at trial would establish fraud, but only whether the facts pleaded disclose a reasonable *prima facie* case which the other party will have to answer at trial. If the plea is justified the case must go forward to trial and the assessment of whether the evidence justified the inference is a matter for the trial judge.

   iv) For a valid plea of fraud/dishonesty the claimant does not have to plead primary facts which are consistent only with dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. There must be some fact or facts which tilts the balance and justifies an inference of dishonesty.

8. Turning to the elements of the three grounds relied on, they were not addressed in detail orally and were not in dispute. I summarise them below by reference to what the claimant has to plead in each case. For dishonest assistance, based on ***Group Seven Limited and Ors v Notable Services LLP & Ors*** [2019] EWCA Civ 614, the claimant has to plead:

   i) that there were breaches of duty;

   ii) what the defendant did to assist the breaches;

   iii) how the defendant is alleged to have acted dishonestly in assisting the main perpetrator; and

   iv) how the assistance caused, contributed or resulted in the alleged loss.

9. For deceit, based on ***Derry v Peek*** [1889] UKHL 1 the claimant has to plead:

   i) the factual representation alleged;

   ii) that it was made knowing it was false or reckless as to its truth;

   iii) that the defendant intended the claimant to rely upon it;

   iv) that the claimant did rely upon it to its own detriment.

10. For unlawful means conspiracy, based on ***Kuwait Oil Tanker v Al Bader*** [2000] 2 All E.R. (Comm) 271 (at 108) and ***Elite Properties Holdings Limited & Anor v Barclays Bank plc*** [2019] EWCA Civ 204 the claimant has to plead:

i) an agreement, or "combination", between the defendant and one or more others;

ii) unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant;

iii) the defendant's intention to injure the claimant by the unlawful means;

iv) that the claimant suffered loss as a consequence of those acts.

11. In fact nothing turns on the individual elements of these grounds. That is because the matter was argued on the common ground footing that all three grounds require dishonesty or its equivalent on the part of the defendant. In terms of the breakdown set out above, the points are element (iii) of dishonest assistance, elements (ii) and (iii) of deceit, and element (iii) of unlawful means conspiracy. It is this feature which the second defendant contends is lacking and therefore justifies the strike out. If I am not satisfied that an inference of fraud/dishonesty is more likely than one of innocence or negligence then I should strike out one or more of these three grounds, whereas if I am satisfied that it is, then the relevant ground(s) ought to go to trial.

The facts

12. As I have said, the claimant contends that by the summer of 2015 the attempts by Girish to take over Barrowfen had been unsuccessful and so Girish activated a plan to acquire direct control of Barrowfen's main asset by putting the company into administration.

13. By summer 2015, although the BVI company Bedford Development Ltd had been removed from the register of members of Barrowfen, by an order dated 16th February 2015, Girish was ordered to rectify the register so as to acknowledge that Bedford was a shareholder. Also by an order dated 29th June 2015 Suresh was declared not to have resigned as a director.

14. From 7th August 2015 onwards Barrowfen had three directors, Girish, Suresh and their nephew Prashant. The majority of the shares were not controlled by Girish.

15. Barrowfen was indebted to Zurich Assurance Ltd for about £850,000. In a letter dated 22nd September 2015, Zurich wrote asking for proposals for repayment. The loan had been a 10 year loan in 1990. The loan was secured by a debenture with fixed and floating charges over all of Barrowfen's assets, including the Tooting property. That property had a book value of £3.75 million although it may have been worth much more. The claimant's case is that Girish had access to better information about the value than anyone else, and did not share it.

16. On 6th October 2015 Girish informed Prashant and Suresh about the Zurich letter and offered to buy out the other Patel family shareholdings, failing which he said he could see no alternative other than liquidation with costs of about £500,000. On 14th October the solicitors for Suresh and Prashant (Kingsley Napley), wrote to Stevens & Bolton in response to Girish's letter of 6 October 2015, seeking documents from Girish relating to the development of the Tooting property so that they could consider whether selling or developing the property was in the best interests of Barrowfen.

Later, on 21st October, Kingsley Napley proposed a members voluntary liquidation (MVL) as a lower cost alternative. At this time Stevens & Bolton were acting for Barrowfen.

17. Meanwhile, unknown to the other directors, Girish met an insolvency practitioner Dermot Coakley on 26th October. The meeting was at Stevens & Bolton's offices and in the presence of Mr King, the relevant partner at Stevens & Bolton. There was a discussion about the implications and practicalities of an administration, including the idea of Girish acquiring the Tooting property. Mr Coakley denies that he made any agreement at this meeting as to what would happen if he was appointed as administrator of Barrowfen.

18. In an exchange of emails on 28th October between Girish and William Radmore, also unknown to the other directors of Barrowfen, Girish explained that he was proposing to set up a new company to take an assignment of the loan and debenture from Zurich. This new company is the third defendant, Barrowfen II. Girish asked that Mr Radmore accept an appointment as a director of Barrowfen II with his son Kiraj. Girish wrote that he had been advised by Stevens & Bolton that he could not be a director of the new company as he had a conflict of interest as a director of Barrowfen but that Girish would be in day to day control of Barrowfen II. On 2 November 2015 Barrowfen II was incorporated.

19. Stevens & Bolton acted for Girish and Barrowfen II in connection with taking the assignment of the loan and debenture from Zurich. This is shown by an email dated 30 November 2015. The assignment to Barrowfen II was completed on 2 December 2015.

20. On 1 December 2015 Stevens & Bolton were removed as solicitors to Barrowfen. The claimant says that was because Prashant and Suresh were now in operational control of Barrowfen. Stevens & Bolton were informed on 2 December 2015. I should record that this is the claimant's case. Stevens & Bolton's position is that they ceased to act in April 2015.

21. On 4 December 2015, Stevens & Bolton contacted Mr Coakley to inform him that Barrowfen II had taken an assignment of the debenture from Zurich and that Barrowfen may be placed into administration. On the same day Stevens & Bolton wrote to Kingsley Napley stating that Girish would be willing to consider an MVL if a share sale could not be agreed, and suggesting a meeting with Prashant to see if a "a buy out or, in the alternative, an MVL might be progressed". The Stevens & Bolton letter includes the following:

> "There is of course some urgency regarding the future of the Company [*Barrowfen*]. As you will know, and as we have written to you about in our first letter of today's date, the Company has been threatened with winding up proceedings for unpaid business rates. The Company has contested the liability and there is a pending application to set aside the Liability Order on which the winding up proceedings were based. The Company was also threatened with enforcement action by Zurich, the first charge holder. However, that charge has been bought out and has been assigned to Barrowfen Properties II

> Limited (see the attached notice of assignment) so there is no immediate threat to wind up the Company from Zurich."

22. The reference to unpaid business rates is part of the context but does not need to be examined further.

23. A key part of the claimant's case is based on the last sentence in that passage. The claimant submits that the letter does not mention the plan, which by then had already been formulated and which Stevens & Bolton was well aware of, to use the assignment of the charge to Barrowfen II in order to place Barrowfen into administration. Therefore, it is said, in that context Stevens & Bolton's reassurance that there is no immediate threat to wind up the company from Zurich presents a deliberately misleading half-truth.

24. On 8 December 2015 Mr Coakley sent an engagement letter relating to the potential appointment of joint administrators to Mr Radmore, copied to Stevens & Bolton.

25. In response to Stevens & Bolton's letter of 4 December, on 9 December 2015 a meeting took place between Girish, Mr King of Stevens & Bolton and Prashant. It was also attended by Mr Baker of Stevens & Bolton and Ms Le Breton of Withers. There is dispute about the purpose of the presence of these two individuals. The main subject matter of the meeting was the question of a buy-out of Barrowfen shares by one or other shareholder and the right method for valuing the shares failing which it was discussed that an MVL would have to be pursued.

26. Towards the end of the meeting (meeting note para 15), Mr King of Stevens & Bolton asked Prashant whether there was anything else he wished to raise. Prashant said that he would like to discuss Barrowfen's finances as he had no information as regards creditors and required some input from Girish. Later (meeting note para 25) Prashant asked if he could see the terms of the Zurich loan and asked: "whether there is a particular position as regards to this assignment." Mr King of Stevens & Bolton replied:

> "there was nothing in particular to tell P about this, accept (sic) Zurich was pushing for payment. RWK said that within the context of an MVL, GP's side see the proposal of a buyout as the most attractive option and the assignment of the loan was a measure taken to prevent Zurich from enforcing the loan, which it looked certain to do….. P said that he did not want a situation where the company defaults as a result of the assignment and RWK said that he could put forward a cash flow statement to show all the loans."

27. This is the other key plank of the claimant's case. The claimant contends that despite Prashant's direct question to Mr King about the terms of the Zurich loan and in particular the assignment to Barrowfen II, Mr King presented another deliberately misleading half-truth, concealing the plan to enforce the loan by Barrowfen II by placing Barrowfen into administration.

28. At the end of the meeting Mr King offered to provide the cash flow statement showing the exposure of Barrowfen in respect of the loan and other liabilities.

29. After the meeting of 9 December 2015 Girish did not, as the claimant says Prashant had been expecting, make an offer to buy out the shares in Barrowfen. Prashant heard nothing further from him for two months. Stevens & Bolton also did not provide the cash flow statement that Mr King had offered to provide at the end of the meeting.

30. In fact on 17 December 2015, unknown to the other directors Prashant and Suresh, Stevens & Bolton emailed Girish, Mr Radmore and Kiraj stating "As you are aware, we are lining up all documents required in connection with the appointment of administrators".

31. Then, by letter dated 12 February 2016, Girish wrote to Suresh, Prashant, and two other brothers Rajnikant and Yashwant. The letter stated that as a director he was "seriously concerned about the future of the company" and asking for an "unequivocal response to the proposals that I have previously made regarding the purchase of your families' shares … and, in the alternative, a MVL". He continued:

> "If I do not have a clear response from both of you by no later than 10am on Monday 15 February 2016, London Time, I will be forced to consider whether I can continue to act as a director of the company and I may have to take steps to protect my interests as a substantial creditor of the company".

32. From the point of view of Prashant and Suresh, this was out of the blue.

33. Also, on 12 February Stevens & Bolton informed Mr Coakley's solicitors that Barrowfen II was proceeding with the appointment of administrators.

34. On 16 February Stevens & Bolton wrote to Kingsley Napley enclosing (i) a letter from Girish seeking repayment of a loan from Barrowfen (ii) a letter of demand from Barrowfen II, seeking immediate repayment of the loan now owed to it and (iii) a letter of resignation from Girish as a director of Barrowfen.

35. On 17 February a notice of appointment of administrators by Barrowfen II was filed in the High Court. Mr Coakley and Mr Bowell of the firm MBI Coakley were appointed as joint administrators.

36. On 19 February Kingsley Napley, as solicitors for Bedford, Suresh and Prashant made an offer to provide sufficient funds to pay the debts and expenses of Barrowfen and thereby rescue it as a going concern. This approach was opposed by Stevens & Bolton, Barrowfen II and Girish. However it became clear that the joint administrators were at least taking the offer seriously.

37. In an email dated 15 April 2016 Girish complained to Mr Bowell that rescue was contrary to the agreement he had reached with Mr Coakley. The email states:

> "in conjunction with Stevens & Bolton last year in relation your appointment as administrator. I had specifically agreed with Dermot on the exercise that Barrowfen was entering into and the role MBI Coakley will provide. Dermot had agreed to this.

> Your email is contrary to the agreement reached and myself had again checked with Stevens & Bolton officer who had confirmed that your firm fully understood the end exercise to be achieved by myself."

38. Mr Bowell responded by email on the same day stating that there was no "back deal". The notes of a meeting dated 19 April 2016 record Stevens & Bolton's view of Mr Bowell's email:

> "Mike's email had come as a bit of a shock. It presented a very blunt view and he didn't think it was very helpful but this was probably not the time to go into it".

39. In the circumstances the joint administrators made an application to Court for a direction that they could cause Barrowfen to enter the loan agreement with Bedford in order to effect its rescue. That was approved by an order on 8 July 2016.

40. Therefore, contends the claimant, Girish's plan, to put Barrowfen into administration and thereby acquire the Tooting property for less than true value, failed. Nevertheless the claimant contends that Barrowfen suffered substantial financial loss as a consequence of the administration. This includes a sum in excess of £400,000 as the costs and expenses of the administration and also the loss of rental income caused by the delays to the development of the Tooting Property as a consequence. These losses are not only claimed against Girish, they are claimed against Stevens & Bolton on the three grounds relied on. It is the claim as it is put against that firm which is the object of the strike out.

The pleaded cases

41. The cases pleaded against Stevens & Bolton interrelate with one another. I will try to summarise them, without being too lengthy about it. In the end, as I shall try to explain, the issues to be resolved on this strike out turn on the 4th December letter and the 9th December meeting.

42. Starting with the unlawful means conspiracy claim, the agreement or combination is pleaded at paragraphs 94 and 109 of the Amended Particulars of Claim.

> "94 In around October 2015, by which date Girish would have known that he was about to lose control of Barrowfen, Girish and Stevens & Bolton entered into a common understanding or agreement, which was joined by Barrowfen II upon its incorporation, (together, the "Conspirators") that they would, by using unlawful means, and with an intention to cause loss to Barrowfen, procure the entry of Barrowfen into administration in order to:
>
> > 94.1. enable Girish, or an entity under his control, to take control of the Tooting Property by a purchase from the administrators, thereby achieving Girish's aim of maintaining control over Barrowfen's business and assets

> without the need for the consent of the majority of Barrowfen's directors or shareholders;
>
> 94.2. ensure that the purchase of the Tooting Property by Girish, or an entity under his control, was at a price that was (i) below the price at which the majority of the directors or shareholders would be prepared to sell the Tooting Property to Girish or his nominee; and/or (ii) below market value in that the price would inevitably be depressed because of the depressed nature of the sale and because other potential bidders would not have Girish's knowledge of the development proposals; and/or
>
> 94.3. prevent or delay the investigation by Barrowfen's directors and/or by a liquidator appointed in a members' voluntary winding up of any legal claims that Barrowfen might have; and
>
> 94.4. deprive Barrowfen of the true value of the Tooting Property.
>
> ….
>
> 109. As pleaded above, in around October 2015, the Conspirators reached an agreement or understanding (joined by Barrowfen II upon its incorporation on 2 November 2015) that they would, with an intention to cause loss to Barrowfen, use unlawful means to procure the entry by Barrowfen into administration for the reasons set out in paragraph 94 above.

43. The unlawful means are pleaded in paragraphs 107n to 107s, 108b to 108f and 110. In summary they are alleged to be:

    i) The breaches of fiduciary duty owed by Girish to Barrowfen as a director in devising and implementing a plan to put Barrowfen into administration without informing Barrowfen or Barrowfen's other directors of his plan and deliberately misleading Barrowfen and Barrowfen's other directors as to his true intentions;

    ii) The breaches of fiduciary duty owed by Stevens & Bolton to Barrowfen by its failure to inform Barrowfen at any time down to and including 1 December 2015 (when Stevens & Bolton ceased acting) of Girish's breaches of fiduciary duty.

    iii) The deceit practised by Stevens & Bolton (and Girish) on Barrowfen via the letter of 4th December and at the meeting of 9th December when they deliberately gave the misleading impression to Kingsley Napley and to Prashant that Barrowfen II had taken the assignment of the loan and debenture from Zurich in order to prevent enforcement action against Barrowfen, when at the time that Stevens & Bolton made the statements Stevens & Bolton had for

two months been involved in (and therefore knew of) the plan for Barrowfen II to enforce the debenture and loan by putting Barrowfen into administration.

44. The intention to injure is pleaded in paragraphs 94 and 98B. In substance the points relied on are that Stevens & Bolton:

i) acted for Girish and Barrowfen II in connection with the assignment of the loan and debenture and therefore was well aware that the plan was to put Barrowfen into administration.

ii) did not inform Barrowfen of this fact while Stevens & Bolton was continuing to act for Barrowfen.

iii) knew that the intention behind the administration was to enable Girish to acquire the Tooting property for himself via a sale out of administration to the detriment of Barrowfen.

iv) knew that while the plan to place Barrowfen into administration was being developed, Girish and Prashant were having discussions about the valuation assumptions on which the other Patel family members would be prepared to sell their shares in Barrowfen and/or the Tooting Property to Girish and that Girish had decided (without informing his fellow directors) that an administration was more favourable for him than reaching a consensual agreement to purchase the shares in Barrowfen and/or the Tooting Property.

v) concealed, in the letter dated 4 December 2015 and at the meeting on 9 December 2015, the steps that had been taken and/or the plans that had been put in place to force Barrowfen into administration.

vi) knew that Barrowfen was balance sheet solvent and that had Barrowfen been informed of the plan and the risk that the loan and debenture would be enforced without any notice, the other directors and shareholders would have raised the funds to discharge the loan in short order.

vii) were a party to the decision for Barrowfen II to appoint the joint administrators almost immediately after making demand for repayment of the loan without giving Barrowfen any reasonable opportunity to repay it, immediately before Girish resigned as a director of Barrowfen.

viii) expressed the view, after Girish complained to the joint administrators that rescue was contrary to the "agreement" that he had reached with them, that the joint administrators email to the effect that there was no agreement was "a bit of a shock" and "presented a very blunt view" (recorded in minutes dated 19 April 2016).

45. Damage is pleaded at paras 117 and 117A. I will come back to that.

46. The claimant's case that the necessary inference of fraud/dishonesty is more likely than one of innocence or negligence is advanced addressing two relevant periods separately. The first period is while Stevens & Bolton acted for Barrowfen (until 1

December 2015) and the second period is after Stevens & Bolton ceased to act for Barrowfen. In the first period it is alleged that the firm:

i) Did not inform Barrowfen of the plan to put Barrowfen into administration arranged with Mr Coakley in October 2015;

ii) Incorporated Barrowfen II for the purpose of implementing the plan.

iii) Advised Girish that he could not be a director of Barrowfen II because he had a conflict of interest as a director of Barrowfen, but nevertheless acted for Girish and Barrowfen II knowing that Girish was acting as a shadow director of Barrowfen II and against Barrowfen's interests. In this respect the claimant relies on an email of Stevens & Bolton dated 30 November 2015, which recorded that Stevens & Bolton was acting for Girish in relation to the assignment to Barrowfen II, and informed Kiraj and Mr Radmore, the *de jure* directors of Barrowfen II, that Girish would like the assignment to be completed the next day.

iv) Acted for Girish and Barrowfen II in connection with the negotiation of the assignment of the loan and debenture from Zurich, without informing Barrowfen of that fact.

47. The points which the claimant relies on arising from the second period are that the firm:

i) Continued to act for Girish and Barrowfen II in connection with the plan to put Barrowfen into administration despite the fact that Stevens & Bolton must have known that Girish was in breach of his fiduciary duty to Barrowfen by not informing Barrowfen of his plan.

ii) Lied to the other directors of Barrowfen, and therefore to Barrowfen, in its letter to Kingsley Napley dated 4 December 2015 and at the meeting with Prashant on 9 December 2015 when it gave the deliberately misleading impression that the assignment had been taken in order to protect Barrowfen from enforcement of the Loan and Debenture in circumstances where immediately before the letter and meeting S&B had been finalising plans with Mr Coakley to place Barrowfen into administration.

iii) Sent the letter of demand by Barrowfen II and Girish's letter of resignation to Kingsley Napley on 16 February 2016, knowing that this provided Barrowfen with no reasonable opportunity to repay the Loan before the appointment of administrators on 17 February 2016. It is to be inferred that Stevens & Bolton advised Girish and Barrowfen about these steps, knowing that Girish was acting in breach of fiduciary duty by not informing Barrowfen of his plan.

48. In my judgment the critical point is sub-paragraph (ii) to the previous paragraph, in other words the allegations about the letter of 4th December and about what was and was not said at the meeting on 9th December. Without these, the remaining points relating to both the first period and the second period, individually or together, may well make out a case for a conflict of interest (in the first period, assuming Stevens & Bolton did then act for Barrowfen) and provide important context for what happened,

but they do not make an inference of fraud or dishonesty more likely than innocence or negligence. Before addressing the letter and meeting I will deal with the other two grounds for the claimant's case and then pull things together.

49. The dishonest assistance claim is pleaded in paragraph 112 of the Amended Particulars of Claim as follows:

> "112. Further or alternatively, Stevens & Bolton and Barrowfen II dishonestly assisted the breaches of fiduciary duty committed by Girish pleaded in paragraphs 107n - 107r above in that they knew they were assisting Girish to breach his directors' duties. Reliance is placed on the facts and matters pleaded in paragraphs 94 - 103 above."

50. Unpacking these cross-references the breach of duty relied on is the breach of Girish's fiduciary duty to Barrowfen when, as the claimant puts it, he set in motion and continued the plan to put Barrowfen into administration without informing his fellow directors or giving Barrowfen, through his fellow directors, the opportunity to discharge the loan and redeem the debenture.

51. The claimant contends Stevens & Bolton assisted Girish's breach of fiduciary duty by:

i) Introducing him to Mr Coakley at the meeting at S&B's offices on 26 October 2015.

ii) Incorporating Barrowfen II.

iii) Advising Girish that he would have a conflict of interest if he was a director of Barrowfen II but at the same time taking instructions from Girish in connection with the plan as if he were a director of Barrowfen II.

iv) Negotiating the assignment from Zurich to Barrowfen II.

v) Liaising with Mr Coakley in order to further the plan to put Barrowfen into administration.

vi) Failing to inform Barrowfen of Girish's plan whilst continuing to act for Barrowfen.

vii) Lying in its letter to Kingsley Napley dated 4 December 2015 and in its meeting with Prashant on 9 December 2015 about the intentions of Girish and Barrowfen II as regards Barrowfen.

viii) Advising about the steps necessary to place Barrowfen into administration whilst providing Barrowfen no reasonable opportunity to repay the Loan, and by sending the letter of demand by Barrowfen II and Girish's letter of resignation on 16 February 2016 before the appointment of administrators on 17 February 2016.

52. The claimant contends that the assistance was dishonest in that Stevens & Bolton did not act as an honest person would in the circumstances, because an honest solicitor in such circumstances:

    i) would have informed Girish that his plan ran directly contrary to Barrowfen's interests, and therefore was in breach of Girish's fiduciary duty to Barrowfen.

    ii) would have refused to act for Girish or Barrowfen II in furtherance of his plan.

    iii) would, whilst he still acted for Barrowfen, have informed Barrowfen's other directors (who represented the majority of the shareholders) of the plan.

    iv) would not have given the false impression to Kingsley Napley in the letter of 4 December 2015 or to Prashant at the meeting of 9 December 2015 that the assignment to Barrowfen II was in order to protect Barrowfen from the risk of enforcement of the loan and the debenture.

53. Without diminishing the seriousness of allegations (i) to (iii), and bearing in mind Girish has not waived privilege, while these three points will be relevant to the alleged conflict of interest and also provide context, they do not alone or together, make an inference of dishonesty on the part of Stevens & Bolton more likely than not. As with the first ground, the critical issues are still the 4th December letter and what happened on 9th December.

54. Turning to the deceit claim, it is firmly based on the 4th December letter and 9th December meeting. The fraudulent misstatements by Stevens & Bolton on which the deceit claim is based are pleaded at para 108B of the Amended Particulars of Claim. They are the statements made in the letter and at the meeting. The pleaded case is that the misstatements were deliberate half-truths. I have already summarised the way that is put above but nevertheless, I will set out how the claimant puts its case in the deceit context in particular. It is this way:

    i) The statement in the 4th December letter, that Barrowfen had been threatened with enforcement action by Zurich but the charge had been assigned to Barrowfen II, "*so there is no immediate threat to wind up the Company from Zurich*" was a deliberate half-truth in that it was designed to mislead Prashant and Suresh, as the majority directors of Barrowfen and representing the majority of its shareholders, into believing that there was no immediate threat to Barrowfen of enforcement of the Debenture. However, on the same day Stevens & Bolton had contacted Mr Coakley to inform him that there was a possibility of Barrowfen II placing Barrowfen into administration.

    ii) The statement by Mr King of Stevens & Bolton at the meeting of 9 December 2015 was again a half-truth. Prashant asked whether there was a particular position as regards to the assignment to Barrowfen II, making it clear that he had not seen the terms of the Loan. Prashant also said that he did not want "*a situation where* [Barrowfen] *defaults as a result of the assignment*". Mr King's response was that "*there was nothing in particular to tell P about this, accept (sic) Zurich was pushing for payment …the assignment of the loan was a measure taken to prevent Zurich from enforcing the loan which it looked certain to do*". As Mr King was well aware there was a great deal more to tell

> Prashant about the assignment, if he was not to be misled. Mr King deliberately withheld from Prashant the fact that the assignment had been taken by Barrowfen II in order to enforce the loan and debenture as part of a plan to place Barrowfen into administration. Mr King also withheld from Prashant the fact that only the day before on 8 December 2015 Mr Coakley had emailed an engagement letter (copied to Stevens & Bolton) for the appointment of Mr Coakley and Mr Bowell as joint administrators.

55. The claimant contends that Stevens & Bolton intended that Barrowfen would rely on the misstatements, relying in particular on what happened at the meeting of 9 December 2015, when the alleged misstatement was made by Mr King in response to specific concerns raised by Prashant about the reason for the assignment and not wanting Barrowfen to default as a result of the assignment. The claimant also contends that as a general proposition, solicitors do not generally make statements to opposing parties on behalf of their clients which are not intended to be relied on.

56. In terms of reliance, the claimant contends that Barrowfen did rely on the misstatements by refraining from taking immediate steps to repay the loan to Barrowfen II. It is said that given that the main discussion at the meeting of 9 December 2015 concerned Girish's proposal to buy out the other shareholders in Barrowfen, Prashant's expectation was that Girish would make an offer for the shares. But Girish did not do so and nothing more was heard from him until immediately before the appointment of the joint administrators. The claimant contends that Prashant believes he was deliberately misled by S&B. If he had had any hint that Barrowfen II would enforce the loan and debenture and force Barrowfen into administration only two months later, Suresh and he would have taken immediate steps to repay the loan. The fact that this was not done is said to be cogent evidence of reliance by Barrowfen on what was said in the letter of 4 December 2015 and at the meeting of 9 December 2015. The fact that Suresh and Prashant (as directors and representatives of the majority of shareholders) would have taken immediate steps to repay the loan is said to be demonstrated by the fact that 2 days after the appointment of the joint administrators, Kingsley Napley wrote to the joint administrators stating that their clients had monies at their disposal to repay the loan and debts and expenses of Barrowfen at short notice. Barrowfen was ultimately rescued by a loan from Bedford, after the court order made on the joint administrators' application for directions.

The second defendant's case on this application

57. On Stevens & Bolton's behalf it is pointed out that the claimant has changed the way this aspect of the case is put a number of times and in significant ways. Originally the assignment to Barrowfen II was pleaded as a concealed assignment which was never disclosed or discussed whereas now, as part of the amendments to advance the case set out above, the claimant "hurriedly" seeks to delete it. These points are legitimate observations to make but in my judgment they do not go to the heart of the matter.

58. It is also pointed out that at the relevant dates (4th December and 9th December) Stevens & Bolton was not acting for Barrowfen and owed no duty to Barrowfen. I will come back to that.

59. The objections to the pleaded case are (i) the statements Mr. King made were wholly accurate, (ii) statements were not made to Barrowfen and any alleged claim is not Barrowfen's but that of the shareholders, (iii) there could be no reliance upon any alleged statement at the meeting because Prashant made clear that the meeting was without prejudice, (iv) any statement was not relied on by Barrowfen at all as a matter of fact for a number of reasons and if there was any reliance it was by the shareholders in failing to raise funds to pay Barrowfen II, (v) in fact the deceit claim was compromised by a settlement agreement dated 6th March 2019 and (vi) the causal aspect of the loss claims is unclear and unparticularised.

60. Before going any further, I reject points (iii), (v) and (vi) as free standing grounds for striking out. On point (iii), it is reasonably arguable that any privilege has been waived and also arguable that the exceptions to the without prejudice privilege recognised by Walker LJ in ***Unilever v Procter & Gamble*** [2000] 1 WLR 2436 apply.

61. On point (v), the argument about the settlement is that although at clause 1(f) the agreement expressly excludes this action from its ambit (defined as the Barrowfen Claim), the deceit claim was not part of this action when the agreement was entered into and so is not excluded from its scope. However in the agreement the Barrowfen Claim is described as a claim for breach of duty, unlawful means conspiracy and dishonest assistance. Given the intimate link between the way the deceit claim is advanced and the unlawful means conspiracy and dishonest assistance claims, it is, at least, reasonably arguable that the deceit claim is not caught by the agreement. Also relevant, although it may not be determinative, is that Barrowfen itself is not a party to the agreement.

62. In relation to point (vi), the pleaded losses are put in a terse manner and the claimant would be entitled to further information but this deficiency does not go to the heart of the pleaded case. It could readily be resolved well before trial and does not prevent the defendant firm from knowing the case they have to meet.

63. Before going further, I should note that counsel for Stevens & Bolton submitted that important aspects of the claimant's case as it was advanced at the hearing are still not pleaded, despite the number of iterations through which the pleading has passed. The unpleaded points identified were (a) the alleged failure to provide the terms of the Zurich loan to the majority shareholders as an act or omission involving Stevens & Bolton rather than Girish, (b) the failure to provide the cash flow after the 9th December meeting, (c) the feature of the alleged conspiracy that the way in which Barrowfen would be put into administration was to be without notice, and (d) the interchange between Girish and Stevens & Bolton such that any act or omission of Girish reflected on Stevens & Bolton.

64. I agree with the submission. These aspects of the way the case was put are not pleaded. It does not reflect well on the claimant's approach to this litigation. However they are not the core issue, they are matters of context. Referring to them at this stage will not save a pleading which should be struck out, but if the grounds against Stevens & Bolton are to go forward to trial then these matters will need to be pleaded properly.

65. I turn to examine points (ii) and (iv) together since they interrelate. One common theme in the submissions on behalf of Stevens & Bolton is that the statements were

not made to Barrowfen or acted upon by Barrowfen. If they were made to or acted upon by anyone, it was the shareholders of Barrowfen and, for example, it was in his capacity as someone in control of the shares of Barrowfen or representing that control that Prashant was at the meeting on 9th December. That meeting was set up to resolve or at least progress the shareholders' dispute. It is said that the firm Withers were present as Prashant's solicitors and Prashant can reasonably be assumed to have been relying on them to protect their interests. Kingsley Napley, to whom the 4th December letter was sent, were the solicitors instructed specifically to act to represent the separate interests of the shareholders at odds with Girish. At that time Withers were Barrowfen's solicitors, but the letter was not sent to Barrowfen nor to Withers.

66. In my judgment, despite these submissions, it is reasonably arguable that what was said at the meeting and in the letter was not solely directed to their recipients in their capacity as shareholders, but can be said to have been directed to the company and to its other directors Prashant and Suresh in that capacity. At the meeting on 9th December Prashant was a director of Barrowfen and present at the meeting was the company's solicitors Withers. I will not strike out the plea on this ground.

67. A different point is the submission that one can tell from the note of the meeting that Prashant was not relying on the earlier statement in the 4th December letter in the manner alleged, rather he wanted sight of the documents concerning the loan and so on because he was considering the risks and no doubt wanted to look at them with his solicitors. That is a reasonable point but to accept it at this stage would be to conduct a mini trial of the issue, which is not the court's function.

68. A further point which was urged repeatedly by counsel for Stevens & Bolton was that the alleged reliance stretched credulity because the significance of the alleged representations seems to have been forgotten by the claimant. That is because the allegation in the original Particulars of Claim, with a statement of truth signed by Prashant, was that Girish was in breach of duty for failing to disclose the assignment itself. It is pointed out that this was plainly false on the documents now sought to be prayed in aid to support the plea in its current form. This is a strong point which could be put to Prashant at trial in cross-examination, but I am not satisfied it is sufficient to justify the strike out at this stage. The case the claimant (now) wishes to advance is that the statements in the letter and the meeting were sufficiently soothing to cause Prashant not to regard the assignment as something which mattered or which he had to worry about. Considering the inherent likelihoods, in my judgment that has an inherent degree of plausibility. Whether it stands up at trial is another matter.

69. The final point in this context is the submission that what in fact happened, to the extent the statements were relied on at all, was that they were relied on by the shareholders. Paragraph 108B.5 of the Amended Particulars of Claim pleads the claimant's case as follows:

> "108B.5 Barrowfen relied upon the Misstatements by refraining from taking immediate steps to repay the Loan to Barrowfen II. If Prashant and Suresh had known that Barrowfen II intended to enforce the Loan and Charge by placing Barrowfen into administration, they could and would have repaid the Loan by remitting monies to Barrowfen II within a short time period."

70. On behalf of Stevens & Bolton, it is submitted that this allegation that Prashant and Suresh could have repaid the loan is about them acting in their capacity as shareholders. Barrowfen could not refrain from taking steps to repay the loan because it did not have sufficient funds to meet its debts as they fell due. The fact, as pressed by the claimant, that it was not balance sheet insolvent, does not alter the position that at the relevant time Barrowfen did not have cash assets available to repay the loan.

71. These are further reasonable points but I do not agree that it is as simple as the submission makes out to say that a company with a debt concerned about enforcement of a debt cannot refrain from taking steps to repay the debt because it does not have sufficient available funds. The company, which will generally know much more about the debt than the shareholders, can ask its shareholders for help.

72. There was a debate about whether administration was a means of enforcement of a debt. It was said on behalf of Stevens & Bolton that it was not. The significance of the point was that both the letter and the words spoken at the meeting refer to enforcement and so, I think it was argued, the concealment (if that is what it was) of the risk that administrators could be appointed under the debenture now held by Barrowfen II was not misleading because it was not a means of enforcement. I do not accept that. The issue is not about the legal categorisation of remedies. From the point of view of a reasonable person reading the letter or attending at the meeting, putting in train some kind of insolvency process such as appointing an administrator would be regarded as a means of enforcement. The letter itself characterises Zurich's threat to wind up the company as enforcement action by Zurich.

73. So for these reasons I reject points (ii) and (iv) as a basis for striking out the plea.

74. So having dealt with all the other issues, I come to the heart of the matter, which is point (i). On Stevens & Bolton's behalf it is submitted that since everything Mr King actually said at the meeting or in the letter was accurate, in order to succeed the claimant must be able to contend that he came under a duty to add to his statement(s) and that his failure to add to the statement(s) amounted to dishonesty. It cannot do so on reasonable grounds. In any event (or alternatively) an inference of innocence or lack of care is just as likely, if not more likely, than any possible inference of dishonesty. The point is repeated that Stevens & Bolton owed no duty to Barrowfen at the critical time.

75. In relation to lack of duty owed by Stevens & Bolton, in my judgment this is irrelevant and potentially misleading. No-one is entitled to dishonestly and deliberately make a false representation to another person, intending that they rely on that to their detriment and, assuming they do rely on it, commit the tort of deceit, but then attempt to excuse it on the ground that no duty was owed to their victim. Lawyers have no better right than their own client to commit deceit, so as to favour their own client's ends to the detriment of a rival. Or putting it the other way around, Stevens & Bolton did owe a duty to Barrowfen at the relevant time, that duty being the duty everyone owes everyone else not to practice deceit.

76. The claimant submits that a half-truth or fragmentary statement may amount to deceit if it is, and is intended to be, suggestive of a falsehood. For this the claimant refers to ***Peek v. Gurney*** (1873) LR 6 HL 377 at 403 and to ***Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd*** [1997] AC 254 respectively:

> "there must … be some active misstatement of fact or, in all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."
>
> [per Lord Cairns at p403]
>
> "a cocktail of truth, falsity and evasion is a more powerful instrument of deception than undiluted falsehood."
>
> [per Lord Steyn at p274]

77. Counsel for Stevens & Bolton did not deny the principle but submitted it did not apply on the facts. That is the issue. If it is more likely than not that the statements which were made can be taken to amount to implicit reassuring representations about what Barrowfen II might do then the claimant's case is sufficiently well founded to go to trial. That is because, in terms of knowledge, there is clear evidence and a strong arguable case that Stevens & Bolton were well aware of the plan by Girish to use Barrowfen II, having taken the assignment from Zurich, to appoint an administrator over Barrowfen and thereby acquire the Tooting property from the administrators. Whether the administrators had or had not entered into what would have been an improper agreement to that effect is not the issue. The evidence supports a clear inference that Stevens & Bolton were well aware of Girish's plan at all material times.

78. I agree that what is stated expressly in the letter of 4th December is literally true. The letter was one piece of correspondence between law firms in a hard fought battle between experienced members of a very wealthy family, who were being well advised by their own lawyers. The writer of the letter was entitled to have in mind that the clients who would receive the letter would be advised by their own lawyers about it. The letter makes no express representation about what Barrowfen II might do and, in my judgment, nor is it more likely than not that the letter makes an implicit representation about that either. An experienced lawyer acting for the recipient in this context might well have taken the fact that nothing was being said about what Barrowfen II might do as a hint, and replied with a direct question about Barrowfen II's plans, but that does not turn the letter into a misrepresentation or a half-truth. In my judgment read in its proper context, it was not.

79. However the claimant's case based on the 9th December meeting is a better one than the case based on the letter. The difference is that at the meeting Prashant specifically asked Girish's solicitor a question. It is more likely than not that the solicitor would have understood that it was a question to which an honest answer would have revealed Girish's plan. The context included enforcement of the Zurich loan but the question from Prashant was specifically about the assignment to Barrowfen II. The fact a solicitor does not act for the questioner does not entitle them to give a knowingly misleading answer and practice a deceit. Honest approaches which were available included giving no answer at all or a full one. There may be other alternatives too. Mr King's answer was that there was "nothing in particular to tell" about the assignment save that Zurich was pushing for payment. If Mr King knew about Girish's plan based on the assignment, then to state there is nothing to tell would be knowingly to mislead. Moreover in that context, the reference afterwards to Zurich may well imply that the reason for the assignment was to neutralise the threat

to Barrowfen, whereas the opposite was true. The fact that Prashant knew or ought to have known that Barrowfen did not have sufficient ready cash to pay off the loan does not make any difference to this.

80. I have well in mind the point made by counsel for Stevens & Bolton that the claimant is making very grave allegations against a solicitor. I agree with counsel that the claim, on any of the three grounds, based on an allegation of dishonesty or fraud relating to representation made by the 4th December letter, should be struck out. But I cannot take that approach to the allegations about what was said at the 9th December meeting. Legal representatives are often put in a difficult position when asked direct questions by their client's rivals, as this case demonstrates. This is not the trial and all I am concerned with is whether the claimant's case is sufficient to go to trial. In my judgment the case based on the statements made at the 9th December meeting, set in its overall context and advanced as part of each of the three grounds, should go to trial That part of the application to strike out will be dismissed and the relevant amendments allowed. The claimant will need to resubmit a further set of amendments to the Particulars of Claim taking this decision into account.

81. Various other detailed points were made about individual paragraphs of the claimant's Particulars of Claim. If any remain live once the revised set of amendments are submitted, I will resolve them on that occasion.

Postscript

82. This judgment was circulated in draft on 7th May 2020 to be handed down on 14th May, with the usual request for typographical suggestions and obvious errors to be submitted in advance. The claimant provided its response. Aside from typos, the claimant made a single more substantive point. This was about paragraphs 65-66. The claimant says that what is said there accurately reflects Stevens & Bolton's case but the claimant wishes to make clear that it does not agree with it.

83. After the (extended) deadline for the response, the representatives of Stevens & Bolton submitted a three page brief. The claimant characterises it as an invitation to reconsider, supplement and qualify the judgment. One aspect of Stevens & Bolton's submission is to ask me to make clear that many of the statement made in this judgment about what happened are disputed and represent the case of one side or the other or, I think on one point, neither side's case.

84. An example in the Stevens & Bolton brief is an invitation to record that what paragraph 23 states about the second defendant's knowledge is the Claimant's contention.

85. In case there is any ambiguity about it, I will state here that the whole of this judgment is concerned only with whether matters should go to trial or not. I have sought to examine the strength of arguments and evidence as they stand now, but I am not making any concluded findings of fact at all. No statements in the judgment about the relevant events are binding conclusions. The statements are made to address what the parties say the facts are and in order to address the arguments. This is a purely interim judgment.

86. Stevens & Bolton's representatives invite me to add a further extensive explanation of the procedural background to put their client's position into context. I decline to do so. It is unnecessary and also contentious.

87. I believe I have addressed all the requests made in the brief from Stevens & Bolton's representatives. If and to the extent I have been invited to reconsider the judgment further, I decline to do so.