



Neutral Citation Number: [2022] EWHC 2200 (Ch)

Case No: BL-2021-002297

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES

IN THE MATTER OF TRINITY HOTELS LIMITED

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 19/08/2022

Before :

MR NICHOLAS THOMPSELL

Sitting as a Deputy Judge of the High Court

Between :

- (1) **ONS ULTIMATE HOLDINGS LIMITED**
(2) **PARESH THAKKAR**
(3) **ONS INTERNATIONAL LIMITED**

Claimants

- and -

- (1) **JOHN NAIR**
(2) **TRINITY HOTEL LIMITED**

Defendants

Mr Paul Marshall (instructed by **Radius Law Ltd**) for the **Claimants**
Mr John Jessup (instructed by **Dumonts Solicitors Ltd**) for the **First Defendant**

Hearing dates: 27-28 July 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10:30 am on Friday 19 August 2022

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Mr Nicholas Thompsell:

1. Introduction

1. This judgment relates to two overlapping applications (together "**the Application**") in the above matter asking for judgment to be given for the Claimants in relation to certain matters on a summary basis in accordance with Civil Practice Procedure Rule ("**CPR**") 24.2.
2. Somewhat confusingly, the Application was made by means of two application notices. An application notice was originally filed on 7 February 2022 (the "**February Application**"). A second application notice (the "**July Application**") was filed with the court on 7 July 2022. The matters on which judgment was being sought under the February Application were wider than those set out in the July Application, although there was some overlap and the form of Order that was attached to the February Application covered some of the same ground as that attached to the July Application. It was however, common ground that the relief that the Claimants were seeking was that set out in the draft order attached to the July Application.
3. For the purposes of this judgment, I have benefitted from the skeleton arguments, and oral arguments, of Mr Marshall for the Claimants and Mr Jessup for the First Defendant. I am grateful to both counsel for their learned and subtle arguments.
4. The Second Defendant (which I will additionally refer to as "**the Company**") was not represented at the hearing and the court was told that it had been put into administration. However, both counsel agreed that the Second Defendant was not likely to be affected by the matters to be dealt with at the hearing. I concurred. Accordingly, I considered that the hearing should proceed without the Second Defendant being present or represented.
5. The Application is made in the context of the broader claim which is made under the above claim number by means of a Claim Form dated 31 December 2021. In broad terms the Claimants are making a claim in the tort of conspiracy to injure by unlawful means. They allege a conspiracy (the "**Alleged Unlawful Means Conspiracy**") principally between the First Defendant (whom I will also refer to as "**Mr Nair**") and a Mr Mohammed Al Shamsi ("**Mr Al Shamsi**") and also involving a Mr Ali Al Shamsi, Mr Al Shamsi's brother. Broadly, the allegation is that Mr Nair conspired with these individuals to remove the Second Claimant (whom I will also refer to as "**Mr Thakkar**") as managing director and director of the Company, thereby adversely affecting the rights of the First Claimant as shareholder (by means of its subsidiary and nominee, the Third Claimant, ONS International Limited ("**ONSI**")).
6. I understand that the Claimants are also looking to make a claim on broadly the same facts seeking a remedy for unfair prejudice under section 994 of the Companies Act 2006. It seems to me that the interests of justice would be best served by arranging for these different bases of claim to be dealt with in the same action, or at least being case managed together, but I have not been asked to provide any ruling on this question.

2. Factual Background

7. The Claimants' overall case is that Mr Thakkar has been the victim of an unlawful means conspiracy to oust him from his involvement in the Company. Further, Mr Thakkar contends that he was the victim of a false representation that Mr Nair and Mr Al Shamsi intended to carry on their venture with him. He contends that this

encouraged and induced him to undertake the re-financing of the Company and to enter into a personal guarantee and a subordination deed subordinating his loans to the Company to the interests of the lenders, which he would not otherwise have done.

8. Much of the factual background underlying this action is very well described in the earlier judgment of Mr Jeremy Cousins Q.C. sitting as a Deputy Judge of the High Court in relation to an earlier application for an injunction relating to this matter. His judgment can be found at [2022] EWHC 1573 (Ch).
9. The salient facts relevant to the Application can be stated briefly.
10. Early in 2020, Mr Thakkar entered into what may properly be described as a joint venture with Mr Nair for the acquisition, development and operation of a hotel. Mr Thakkar participated in this by means of a wholly-owned company (the First Claimant) and a subsidiary of that company, ONSI which, he says, holds shares in the Company on trust for the First Claimant. Originally the shareholdings were held 51% in the name of Mr Nair and 49% in the name of ONSI.
11. In July 2020, investment in the Company was sought from Mr Al Shamsi. This resulted in Mr Al Shamsi and his brother Mr Ali Al Shamsi being allotted shares. After this share issue the shareholding percentages were 38% in the name of Mr Nair, 26% in the name of ONSI, 30% in the name of Mr Al Shamsi and 6% in the name of Mr Ali Al Shamsi. The Claimants claim that Mr Al Shamsi was provided with his substantial shareholding on the basis of promises of finance for the Company which have only been partly fulfilled.
12. According to his later statement to the police, sometime in August 2021, Mr Nair became suspicious about financial transactions between the Company and ONSI and arranged for an audit of these transactions.
13. On 21 October 2021 Mr Nair made a statement to the police alleging that Mr Thakkar was taking money from the Company and falsifying bank statements. Mr Nair's statement was described to Mr Thakkar by a police officer during a later interview with Mr Thakkar. The statement (as described to Mr Thakkar) said that Mr Nair and Mr Al Shamsi had become suspicious of wrongdoing by Mr Thakkar in August 2021 and had engaged an accountant to conduct an audit of this, which was completed in September 2021. Upon receiving the audit they had engaged solicitors who (at the time of Mr Nair's statement) had been, according to the transcript of the interview, "*studying our case for the past month or so*". It is understood that the police have taken no further action following the interview with Mr Thakkar.
14. On 12 November 2021 the Company entered into the financing arrangements. These included arrangements for Mr Thakkar to provide a personal guarantee and to subordinate monies owed to him by the Company to the interests of the financiers.
15. Later the same day a letter was handed to Mr Thakkar giving him notice of a disciplinary meeting. The letter set out the date of meeting as being that day, and at a time before the letter was handed to him. The letter was later replaced by a similar letter setting 15 November 2021 as the date for the hearing.
16. Despite Mr Thakkar explaining that he would be on holiday in the United States on that date, the disciplinary hearing went ahead on 15 November 2021 and at that meeting Mr Thakkar's employment with the Company was terminated (or at least purportedly terminated).
17. On 16 November 2021 Mr Thakkar was asked to resign as a director. He refused.

18. On 17 or 18 November 2021 Mr Thakkar was removed from the Company's bank mandates at the instigation of Mr Nair.
19. On 21 December 2021 the First Claimant received notice of the meeting called under section 305 of the Companies Act 2006 for the purpose of removing Mr Thakkar as a director of the Company.
20. On 23 December 2021 Mr Thakkar was purportedly removed as a director of the Company and Mr Al Shamsi was purportedly appointed as a director of the Company. It was confirmed by an Order of Deputy Master Linwood (the "**Linwood Order**") dated 22 March 2022 that these resolutions were void and of no effect, and accordingly that Mr Thacker had not been removed as a director on 23 December 2021. This was because no proper or sufficient notice of the meeting being given.
21. On 17 March 2022 Mr Thakkar was removed as a director of the Company and Mr Al Shamsi was appointed as a director of the Company.

3. Matters on which summary judgment is sought

22. The February Application lists various paragraphs of the Claimants' Particulars of Claim and asks for judgment on these matters as well as a declaration in relation to certain other paragraphs. The July Application is more narrowly focussed on an allegation that Mr Nair, Mr Al Shamsi and Mr Ali Al Shamsi conspired and combined together with intent to deprive the Second Defendant of his office as director of the Company.
23. The July Application had attached to it a draft Order, which I considered (and I believe both counsel concurred) provided a succinct indication of what the Claimants were asking the court to order on a summary basis. This proposed that the court should order judgment for the Claimants in relation to four matters set out in four separate paragraphs within the draft Order. I will call these separate paragraphs Orders 1 to 4. They are (after correction of minor drafting errors) as follows:
 - (1) **Order 1:** that there be judgment for the Claimants that prior to 12 November 2021, the First Defendant falsely represented to the Second Claimant that he intended to continue in the business of the hotel venture with the Second Claimant for their mutual benefit and advantage (the "Venture") intending that the Second Claimant should rely upon that representation in completing the refinancing of the Company on 12 November 2021 knowing that to be false and the Second Claimant was induced thereby to complete on the re-financing of the Company and to enter into a personal guarantee for the Company on 12 November 2021;
 - (2) **Order 2:** that there be judgment for the Claimants that the First Defendant combined and conspired with others to falsely represent to the Second Claimant that the First Defendant intended to continue in business with the Second Claimant and that Mr Al Shamsi intended to continue to support the Venture, the First Defendant knowing these representations to be false, intending that the Second Claimant should rely upon those representations in completing on the refinancing of the Company on 12 November 2021 and the Second Claimant was induced thereby to complete on the re-financing of the Company and to enter into a personal guarantee for the Company on 12 November 2021;

- (3) **Order 3:** that there be judgment for the Claimants that the First Defendant caused the Second Claimant to be removed as signatory on the Company bank mandates for HSBC Bank plc and Clydesdale Bank plc in November 2021 without lawful cause or justification;
- (4) **Order 4:** that there be judgment for the Claimants that the First Defendant unlawfully combined and conspired with others to remove the Second Claimant as director of the Company on 23 December 2021.
24. The court is invited to conclude that it could order these matters on a summary basis, that is, without a full trial.
25. It should be noted that the Application is not seeking judgment on the overall claim, but merely on certain underlying facts or issues which form important constituent parts of the overall claim.

4. Test for Summary Judgment

26. Under CPR 24.2 the court may give summary judgment against a defendant on the whole of a claim, or on a particular issue, if the defendant has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.
27. In *Swain v Hillman* [2001] 1 All ER 91 (at pages 94 and 95) Lord Woolf MR explained the purpose and use of this power:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the courts resources being used upon cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that his position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible."

but

"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

28. The key test of "no real prospect" has been extensively discussed through relevant case law, including *Swain v Hillman*; *Three Rivers District Council v Bank of England* (No. 3) [2001] UKHL 16 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. It may be summarised as a test whether the party against which judgment is given has a real, as distinct from a fanciful, prospect of success in relation to the relevant claim or issue.

29. In determining whether the threshold of a real prospect of success is reached the judge must be able to do this without conducting a "mini-trial" (as explained by Lord Woolf MR in *Swain v Hillman*). However, it may be acceptable for some facts relied upon to be probed since (as Potter LJ put it in *ED & F Man* at paragraph [8]):

"in some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable".

30. In a case where the court is asked to make a finding involving fraud or criminality, the court should be especially careful, and it has been said that the more serious the allegation, the more cogent the evidence required to overcome the unlikelihood of what is alleged (as applied, for example, in *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC3199 (Comm), where at paragraphs [1438]-[1439] these points are expanded on by reference to case law). Nevertheless, an allegation of dishonesty does not of itself prevent summary judgment being given. As noted by Cockerill J in *Foglia v Family Officer Ltd* 2021 EWHC 650 (Comm) at paragraphs [13] and [14]:

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

14. Thus, subject to being satisfied that the test in CPR 24.2 is met, there is no impediment to the Court granting summary judgment where dishonesty is alleged".

31. During the course of this two-day hearing Mr Marshall took the me in some detail through the Claimants' Particulars of Claim and the Defendants' Defence and certain evidence with a view to establishing that the Defendant had no real prospect of defending the facts on which summary judgment is sought.
32. It is appropriate that I consider the many points made by Mr Marshall by reference to the specifics of the four Orders that I have identified.

5. Order 1

33. If I am to give an order in the form of Order 1, I must find that the Defendants have no defence with a real prospect of success against any of the following propositions:
- (1) that Mr Nair prior to 12 November 2021, represented to Mr Thakkar that he intended to continue in the business of the hotel venture with Mr Thakkar;
 - (2) that this representation was false;
 - (3) that Mr Nair intended that Mr Thakkar should rely upon that representation in completing the refinancing of the Company;
 - (4) that Mr Nair knew the representation to be false; and

- (5) that Mr Thakkar was induced thereby to complete on the re-financing of the Company and to enter into a personal guarantee for the Company on 12 November 2021.
34. Mr Marshall took the court at length through what he argued were various deficiencies in the Defendants' Defence and other evidence which he considered demonstrated the conspiracy alleged by the Claimant between Mr Nair and Mr Al Shamsi (and perhaps also Mr Ali Al Shamsi), to remove Mr Thakkar from the Company. Many of these points, however, were more relevant to the Alleged Unlawful Means Conspiracy and provide only a backdrop to the specific matters dealt with in Order 1.
35. The matters relied upon by Mr Marshall which can be thought to pertain particularly to Order 1 include the following:
- (1) the suspicious circumstances whereby although, on the Defendants' own case Mr Nair had concluded that Mr Thakkar was dishonest, sufficiently to make a complaint to the police some three weeks earlier in October 2021, nevertheless he did not raise any concerns with Mr Thakkar or activate any disciplinary action until immediately following the refinancing on 12 November;
 - (2) evidence that detailed preparations had been made to dismiss Mr Thakkar prior to the signature of the refinancing. These included amongst other things:
 - (i) the appointment of a human resources professional to assist with the dismissal process;
 - (ii) the preparation of the original letter giving notice of a disciplinary hearing which clearly was in existence before the meeting for the refinancing;
 - (iii) evidence that Mr Al Shamsi had been identified as a potential replacement director (since the letter stated that he would be involved in the dismissal hearing in the capacity of director);
 - (iv) evidence in the form of a letter from lawyers, engaged by Mr Nair and purporting to act for the Company, to one of the Company's banks, HSBC, that lawyers had been engaged to assist Mr Nair in securing Mr Thakkar's removal as a director and employee of Company;
 - (v) Mr Nair's statement to the police that solicitors had been engaged; and
 - (3) the lack of any credible explanation on the part of the Defendants for the delay in tackling Mr Thakkar in relation to his alleged misconduct until the refinancing was undertaken.
36. More specifically in relation to this last point, Mr Marshall pointed out that no answer to this point has been provided beyond a statement in the Defence that Mr Nair did not want to "tip off" Mr Thakkar and statements made in Mr Nair's witness statement that:
- "It was important that we did not tip him off before actually taking steps to remove him. Once all the steps had been taken to make that removal effective, it was important that it all happened at once. With the benefit of hindsight, the timing of this is regrettable given the implementation of the facility."*
- A. Was there a misrepresentation?**
37. The Claimants have not pointed to any particular statement made by Mr Nair. Instead they invite the court to conclude that Mr Nair's actions in participating in the

refinancing in the circumstances described above amounted to a representation by conduct in that they must have understood that Mr Thakkar would have taken their cooperation as meaning they intended to carry on with what has been described in the Claimants' Particulars of Claim as the "Venture".

38. I find this argument persuasive. In my view, the circumstances here are highly analogous to those dealt with by the Court of Appeal in the case of *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15.
39. In that case, there had been a contract for the appellant company, Spice Girls Ltd to promote motor scooters manufactured by the respondent company, Aprilia. Spice Girls Ltd was the company through which the well-known group of girl singers known as the Spice Girls operated. The court found that there had been misrepresentations by conduct by Spice Girls Ltd. These arose from the participation of all five Spice Girls in a commercial shoot and in approving promotional material depicting all five Spice Girls. It was found that these actions amounted to a representation that it was the present intention for all five Spice Girls to remain working as a group together. This representation was false because one of their number (Geri Halliwell, otherwise known as "Ginger Spice") had at the time of this conduct informed the group of her intention to quit.
40. At first instance the trial judge, Arden J (as she then was) had found as follows:

"Given that the benefits of the commercial shoot could not be enjoyed by Aprilia if one of the Spice Girls left the group before March 1999, participation in the shoot in my judgement carried with it a representation by conduct that SGL did not know, and had no reasonable ground to believe, that any of the Spice Girls had an existing declared intention to leave the group before that date. Nothing was done to correct that representation which was a continuing representation."

41. In the approved judgment of the Court of Appeal, the finding of Arden J on this matter was approved and, indeed the court extended its implications.
42. At paragraph [51] the court reiterated what it said were certain well-established principles:

"First, though the representation must be one of fact representations as to the future or of opinion frequently contain representations with regard to the present or to the knowledge of the representor."

"Second, a representation once made is likely to have continuing effect. So if made for the purpose of unintended transaction it will continue until the transaction is completed or abandoned or the representation ceases to be operative on the mind of the representee."

"Third, if at a time when it is continuing the representor discovers that the representation was false when made or has become false since he should correct it."

43. In support of this third proposition, the Court of Appeal cited the following exposition provided by Romer LJ in *With v O'Flanagan* [1936] 1 Ch 575 at 586:

"If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A be untrue and B subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A cannot hold B to the bargain. There is ample authority for that statement and, indeed, I doubt myself whether any authority is necessary, it being, it seems to me, so obviously consistent with the plainest principles of equity".

44. The court also endorsed an alternative formulation that in such circumstances the position was based on "*a duty to communicate the change of circumstances*". This point, in my view, answers an argument advanced by Mr Jessup that silence cannot amount to a representation unless there was a duty to speak. In these types of circumstance there is a duty to correct an untrue continuing representation.

45. Furthermore the Court of Appeal in *Spice Girls Ltd* found a fourth principle that:

"Fourth, the meaning and effect of a statement or of conduct must be ascertained in the light of the circumstances pertaining at the time. Those circumstances will include the course of the negotiations and any earlier representations."

46. In the current case I accept Mr Marshall's argument that in the circumstances pertaining at the time, it is clear that Mr Nair's conduct in carrying on and joining in the refinancing arrangements should be regarded as a representation by conduct that Mr Nair intended to continue in business with Mr Thakkar.
47. Mr Nair has not pleaded or provided any evidence that he did anything to disabuse Mr Thakkar that this continuing representation was no longer true.
48. Mr Jessup suggested to me that the current case was distinguished from *Spice Girls Ltd* because in that case the court had found there had originally been some express warranties which remained continuing warranties. I do not accept that there is anything in this point.
49. First, in *Spice Girls Ltd* it was expressly held that there was a representation by conduct as well as (and distinct to) the previous express representations. The original express representations formed the background to how the conduct was to be interpreted, but the case still proceeded on the basis of the representation made by the conduct.
50. Secondly, it is clear in the case before me that there had originally been an express agreement for Mr Nair and Mr Thakkar (and later Mr Al Shamsi) to work together as part of the original arrangements that led to their mutual investment in the Company and to their bringing about a shareholders' agreement and this background is no different from the background in *Spice Girls Ltd*.
51. Accordingly I find that such a representation was made.

B. *Was the representation false?*

52. Having found that Mr Nair's conduct amounted to a representation, I have no doubt that the representation was false. It is abundantly clear from the facts, as well as the statement by Mr Nair when making his earlier complaint to the police, that Mr Nair had every intention, at the time that the refinancing was signed, to remove Mr Thakkar as an employee and director of the company.

C. *Did Mr Nair intend that Mr Thakkar should rely upon the representation in completing the refinancing?*

53. I consider that it is abundantly clear from the circumstances that Mr Nair only delayed in taking the action that he ultimately took to bring disciplinary proceedings against Mr Thakkar in order that he would join in the refinancing.
54. The "tipping off" defence in my view is unsustainable. There is no credible reason, other than the reason that Mr Nair did not want to upset the refinancing, as to why the actions which were taken immediately after the refinancing could not have been taken weeks earlier.

D. *Did Mr Nair know the representation to be false?*

55. Again I consider that it is abundantly clear, even accepting the Defendants' pleadings, that Mr Nair, having clearly planned Mr Thakkar's removal before the date on which the refinancing was effected, must have known the representation to be false.

E. *Was Mr Thakkar thereby induced to complete on the refinancing?*

56. The Defendants do not deny that Mr Thakkar did complete on the refinancing. I consider also that it would be fanciful to believe that he would not have understood Mr Nair's conduct as confirming that Mr Nair was intending to continue in business with him as before. There has been no pleading by the Defendants to contradict this or to the effect that Mr Thakkar did not believe that Mr Nair was intending to continue in business with him.
57. Mr Jessup argues that these facts do not of themselves demonstrate that any misrepresentation induced Mr Thakkar to complete on the refinancing. This is because he might have done so anyway, even if he had not been falsely led to believe that he would continue in business as before with Mr Nair. Mr Jessup points out that the alternative to a refinancing was that the Company would go into administration. If this happened, Mr Thakkar would have lost value in his indirect shareholding and would likely be called upon to honour guarantees that he had already given.
58. Here, I must disagree with Mr Jessup. I do not think there is any real prospect of a defence succeeding based on the argument that Mr Thakkar was not induced by the representation to sign the refinancing documents.
59. First, it is clear that this representation to Mr Thakkar was a material inducement. To found an action in misrepresentation the material inducement does not have to be the only inducement (for example, see *Spice Girls Ltd*, at para 70). It is a fair inference that this material inducement would have influenced Mr Thakkar and the court is entitled to draw that inference. In *Smith v Chadwick (1884) 9 AC 187*, at page 196 Lord Blackburn said:

"I think if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the

plaintiff of such a nature as would been likely to induce a person to enter into a contract, it is a fair inference of fact that he was induced to do so by the statement."

60. Secondly, in the absence of any evidence to the contrary it would be very difficult for the Defendants to gainsay Mr Thakkar's account of his motivations in entering into the refinancing, and of what he would have done had he known that he was on the verge of being dismissed. No evidence to date been provided to the contrary on this point and it is difficult to see what evidence could be brought.
61. Thirdly, I find it inherently extremely unlikely that Mr Thakkar would have acted in the same way in relation to the refinancing had he known this fact. The fact that he has since been willing to act to put the Company into administration also may be considered to provide an indication that he would rather have faced the prospect of an administration, with the consequences mentioned by Mr Jessup, than to increase his exposure to a venture from which he had been personally excluded.
62. Accordingly I do not see that there is any real prospect of a defence to the proposition that Mr Thakkar was induced by the misrepresentation.

F. Conclusion in relation to Order 1

63. For the reasons given above, I consider that there is no real prospect of Mr Nair (or the Defendants) defending against any of the propositions I have listed in paragraph [33.] above.
64. I can see no other compelling reason why it should be left to trial for this issue to be disposed of. Accordingly, I consider that the court should make an order in the form of Order 1.

6. Order 2

65. If I am to give an order in the form of Order 2, I must find that the Defendants have no defence with a real prospect of success against any of the following propositions:
 - (1) that Mr Nair combined and conspired with others to make representations to Mr Thakkar:
 - (i) that Mr Nair intended to continue in business with Mr Thakkar; and
 - (ii) that Mr Al Shamsi intended to continue to support the "Venture";
 - (2) that the representations were false;
 - (3) that Mr Nair knew the representation to be false;
 - (4) that Mr Nair (or possibly Mr Nair and the unnamed others – the drafting of Order 2 is not clear¹) intended that Mr Thakkar should rely upon those representations in completing on the refinancing; and

¹ The matter is put at greater length in paragraphs 62 to 64 of the Defendants' Particulars of Claim, which are some of the paragraphs on which the Claimants have sought summary judgment in the February Application. These paragraphs, however, are not entirely consistent with one another in the matter of precisely who is said to have formed an intention that Mr Thakkar should rely on the alleged false representations. In paragraph 62, the accusation is that Mr Nair, Mr Al Shamsi and Mr Ali Al Shamsi or any two or more of them conspired and combined together to make these implied representations. In paragraph 63 it is said that Mr Nair and Mr Al Shamsi by means of these representations encouraged Mr Thakkar to undertake the refinancing of the Company and that they intended that he should assume fresh and additional personal liabilities as part of this. In paragraph 64 it is said that Mr Nair intended reliance on the implied representations.

- (5) Mr Thakkar was induced by these representations to complete on the refinancing and to enter into a personal guarantee.
66. For the most part Order 2 seeks to establish the same facts as Order 1. Insofar as it does establish the same facts it is otiose.
67. However, there are essentially two key differences:
- (1) an additional alleged false representation that Mr Al Shamsi intended to continue to support the "Venture"; and
 - (2) a statement that Mr Nair combined and conspired with others to make the representations.

A. The additional misrepresentation

68. As to the first point, it is not the Claimants' case that Mr Al Shamsi at the time of the refinancing intended to withdraw his support for the Company. Mr Marshall explained that the reference to Mr Al Shamsi intending to continue to support the "Venture", was to be understood as saying more than that he would continue to support the Company. The reference to the "Venture" meant the original joint-venture arrangement involving Mr Thakkar as an active participant. Accordingly, even if Mr Al Shamsi did intend to continue supporting the Company, he did not intend to continue to support the "Venture" because he intended that the "Venture" be terminated though Mr Thakkar being removed as an active participant.
69. I pointed out to Mr Marshall, and I think he accepted, that, if this was meant, the additional alleged representation concerning Mr Al Shamsi's continuing support for the "Venture" added little or nothing to the first representation that Mr Thakkar was to remain actively involved in the business.
70. That being the case, I consider that the court should not make any order concerning a misrepresentation about Mr Al Shamsi's then present intention to continue to support the Venture. Not only does it add little to the first representation or to what I propose ordering under Order 1, but it creates the possibility for confusion that the court would have found a false representation about Mr Al Shamsi's then present intention to continue to support the Company.

B. The combination and conspiracy

71. As to the second point, Mr Marshall clarified that the drafting was not seeking to enjoin the court to make any finding of facts against the "*others*" with whom Mr Nair was said to be conspiring, or that the others were said to have made the representation alleged. Instead the intention was to confirm that when Mr Nair was making the false representation, he was doing so as part of a conspiracy. In the context of the drafting of Order 2, this conspiracy must be taken as being a conspiracy to induce Mr Thakkar to join in the refinancing by falsely representing that he would remain an active participant in the Company.
72. A problem with the drafting of Order 2 is that it alleges that Mr Nair "*combined and conspired with others*" without identifying those others. From the Particulars of Claim it may be seen that Mr Al Shamsi was one of these alleged "*others*" but it is not clearly

pleaded whether Mr Ali Al Shamsi is said to be involved in the alleged conspiracy to mislead Mr Thakkar.

73. Mr Marshall had put forward a number of arguments to support the proposition that there was a conspiracy between Mr Nair and Mr Al Shamsi as regards the ousting of Mr Thakkar from the business, including, amongst others, the matters that I list at paragraph [111.] below. However, I considered that very little of this argument supported the narrower proposition that there was a conspiracy between Mr Nair and Mr Al Shamsi (and/or Mr Ali Al Shamsi) specifically in relation to the alleged misrepresentation.
74. Facts that were put to me that might tend to support Mr Al Shamsi's involvement in relation to the alleged misrepresentation included:
 - (1) Mr Al Shamsi was a signatory to the refinancing agreement;
 - (2) the undenied allegation made in the Particulars of Claim that Mr Al Shamsi delivered the envelope giving notice of disciplinary proceedings on 12 November and produced it very quickly after the refinancing had taken place;
 - (3) Mr Nair's statement to the police in which he said that Mr Al Shamsi had been involved in the investigation of the alleged wrongdoing by Mr Thakkar and had viewed the results of the accountant's report in September 2021.
75. Having found what I have found in relation to Order 1, concerning a false representation by Mr Nair that Mr Thakkar was to remain in the business, I agree that these points tend towards the conclusion that Mr Al Shamsi had knowledge of this misrepresentation. However, I do not think that this necessarily goes so far as to establish that there is no real defence against the proposition that Mr Al Shamsi's involvement on this point amounted to a combination and conspiracy in relation to the misrepresentation.
76. As far as I can see, the Claimants' Particulars of Claim do not identify any specific ways in which Mr Ali Al Shamsi is said to have participated in the alleged combination or conspiracy specifically in relation to the untrue misrepresentation. Neither do they identify any other person who might have been involved in it.
77. Despite the somewhat convoluted drafting of Order 2, which is focused on the alleged wrongdoing of Mr Nair in making a false representation, I do not see how the court can make an order finding a conspiracy without at least impliedly making a finding against a co-conspirator.
78. Whilst the Defendants have been provided with ample opportunity to provide evidence, (and Mr Marshall has, understandably, made much of their failure to do so), Mr Al Shamsi is not a party to these proceedings and himself has had no opportunity to make an answer against his alleged involvement in a conspiracy (even if through his involvement since 17 March 2022 as a director of the Company he should have been aware of these allegations). I have already cited authority that the court should exercise caution in making a finding of dishonesty on a summary basis. This caution must be increased when any of the alleged conspirators have had no opportunity to give their side of the story.
79. Under CPR 24.2 there are two grounds that I must consider. Not only do I need to consider whether the Defendants have no real prospect of succeeding on the claim or issue. I must also to consider whether there is any other compelling reason why the case or issue should be disposed of at a trial.

80. In my view, the fact that an alleged co-conspirator has not been given an opportunity to answer allegations made against him is a compelling reason that should require question of an alleged conspiracy to go to trial.
81. Taking account of all of these considerations, I do not think that I should make an order in the form of Order 2.

7. Order 3

82. If I am to give an order in the form of Order 3, I must find that the Defendants have no defence with a real prospect of success against either of the following propositions:
 - (1) that Mr Nair caused Mr Thakkar to be removed as signatory on the Company bank mandates for HSBC Bank plc and Clydesdale Bank plc;
 - (2) that he did so without lawful cause or justification.
83. There is no dispute that Mr Nair caused Mr Thakkar to be removed as signatory on the Company bank mandates.
84. The disputed matter is whether he did so without lawful cause or justification.
85. There are two ways in which the proposition that he acted without lawful cause or justification can be argued.

A. The argument on the merits of the removal

86. The first goes to the merits of the cases of the respective parties.
87. It is the Defendants' case that they were justified in removing Mr Thakkar from the bank mandates because they had a justifiable concern that he had been wrongfully and without authority removing money from the Company and then falsifying bank statements to cover this up. Because of this, Mr Nair had instigated steps to remove Mr Thakkar as an employee of the Company and it was then natural for them to change the bank mandate to reflect this.
88. The Claimants' case is that Mr Nair had trumped up charges against Mr Thakkar, and was acting in bad faith in pursuing these charges and was motivated by an intention to wrongfully remove Mr Thakkar from the Company on other grounds. The dismissal of Mr Thakkar was in bad faith and in breach of implied duties arising out of their relationship as co-venturers in what should be considered a quasi-partnership. His removal from the bank mandates was not in any sense justified by this trumped-up, and unlawfully effected, dismissal and was a further instance of bad faith.
89. In my view, such an argument on the merits is not suitable to be determined on summary judgment and would need to go to trial.

B. The argument based on lack of authority for the removal

90. The second argument does not depend on whether Mr Nair was justified in his suspicions of wrongdoing on Mr Thakkar's part or had falsified these suspicions to an ulterior end, or whether he genuinely thought that Mr Thakkar had been removed from his executive position within the Company. Instead it focuses on whether Mr Thakkar's removal as managing director or employee and subsequent removal as a signatory on the bank accounts was properly authorised by the Company.
91. Mr Marshall advanced this as his justification for Order 3. He argued that the decision to sack an employee, or to remove someone from the bank mandate, was a decision to

be made by the Company through its board – not a decision that one director could make unilaterally. At the time this decision was made Mr Thakkar was still a director. Indeed, as a result of the Linwood Order, it was now *res judicata* that Mr Thakkar had remained a director until he had been lawfully removed as a director on 17 March 2022.

92. As the board had not authorised Mr Thakkar's removal from the bank mandate, Mr Marshall argued that the removal must be unlawful and therefore also unjustified.
93. On the pleadings and evidence so far before the court there is nothing to suggest that Mr Thakkar's removal from the bank mandate was approved by the board.
94. In fact the question of board approval is not dealt with in either side's pleadings. Mr Thakkar's pleadings, however, strongly imply that there was no such approval.
95. He has pleaded that he was unaware of the proposal to remove him from the accounts mandates until he attended the Leamington Spa branch of HSBC on 13 December 2021. It may be presumed from this that it is his case that he did not receive notice in his capacity as a director of the proposal to remove him from the mandate. In the absence of his participation in a board meeting, a board resolution could not have been passed. This is because there were only two directors and the quorum for directors' meetings was two directors. Mr Marshall referred me to the decision in *Smith v Butler* [2012] EWCA Civ 314) where the Court of Appeal found that a managing director had no authority to suspend the only other director in a company from his position as chairman. However, I do not think that I needed this reference to conclude that in a two director, three shareholder, company, a board decision would be needed to approve a change to the bank mandate.
96. Because there is no specific pleading in the Particulars of Claim that the removal was not so approved, it may be argued that the Defendants have not been required to deny the point. This is, of itself, a reason to be cautious in determining the question on a summary basis. Nevertheless I do find it extremely unlikely that the Defendants will be able to demonstrate that there was a board meeting, given the requirements of the articles that I have mentioned, to the extent that I do not believe that there is any real prospect that they would be able to establish this point.
97. I am concerned, however, that for the court to order that it was "*without lawful cause or justification*" might be seen as finding something broader in the arrangements and to pre-determine the arguments based on the merits of or reasons behind the removal which, as I have said, should properly go to trial – even taking full account of the arguments made by Mr Marshall as to the limited nature of the evidence offered so far by the Defendants in relation to the circumstances of and reasons for Mr Thakkar's removal from the bank mandate .
98. The furthest, therefore, I would be prepared to go in relation to Order 3 is to give judgment that the removal was made without the sanction of a board meeting and so was unlawful.
99. However, I do not think that I should make an order even in these limited terms.
100. In using the language "*the court may*", CPR 24.2 provides a permission for the court to give summary judgment. It does not go so far as to require the court to order summary judgment whenever the court finds there is a point of fact on which it could make a ruling in favour of one party or the other. Towards the beginning of this judgment I reminded myself of the purposes for which a judge should use this power as explained by Lord Woolf in *Swain v Hillman* – to contribute to the overriding objective by saving

expense, achieving expedition or preventing waste of the court's resources. This, in my view, points to how the court should use the discretion provided by the permissive language of CPR 24.2.

101. Where a proposed summary judgment relates only to a finding of particular facts and does not dispose of any major part of the case, these desired outcomes will only be achieved if by making a summary finding of these facts, savings of time will be made at a later trial or hearing.
102. I find it difficult to see how a finding that the removal was made without the sanction of a board meeting would, by itself, do anything to shorten a trial on the main merits of the Alleged Unlawful Means Conspiracy and thereby contribute to the overriding objective. If no new evidence comes to light, it is unlikely that the court would spend any material time in determining whether or not there was a board meeting. If new evidence does come to light, then it would be unfortunate if the court were to be denied considering this evidence as a result of my having made a summary order.
103. In summary in relation to Order 3:
 - (1) I do not think that I should make Order 3 in the form put forward by the Claimants as this might be taken as predetermining matters which should be determined at trial as to whether Mr Nair had genuine reasons for bringing about the removal or instead was acting for an ulterior purpose.
 - (2) Whilst I do strongly doubt whether Mr Nair will be able to defend the proposition that his actions relating to the bank mandate were not authorised by the board, I see no point in making a more narrow order to this effect, and do not think that I should make such an order particularly given the circumstances where this point has not been directly put to the Defendants in the pleadings.

8. Order 4

104. If I am to give an order in the form of Order 4, I must find that the Defendants have no defence with a real prospect of success against either of the following propositions:
 - (1) that Mr Nair removed (or perhaps, more accurately, purported to remove) Mr Thakkar as director of the Company on 23 December 2021; and
 - (2) that in doing this Mr Nair unlawfully combined and conspired with others.
105. There is no dispute on the first of these propositions.

A. Was there unlawful action?

106. The second proposition raises first the question of what is meant by "*unlawfully*".
107. In the case of Order 3, the phrase "*without lawful cause or justification*" was used and I considered that this opened two possible types of argument, one based on justification and one on "*lawfulness*" which depended on whether the proper steps had been taken.
108. In the case of Order 4, the term used is "*unlawfully*". Here, I think the focus is entirely on whether the removal was brought about in accordance with the law. This matter, is *res judicata* following the Linwood Order. There is now no defence to the proposition that the purported removal of Mr Thakkar as a director in December 2022 was unlawful.

B. Was there a conspiracy?

109. As Deputy Master Linwood has already found unlawfulness in relation to the removal, Order 4 only adds something more in its proposition that Mr Nair "*combined and conspired with others*" in bringing about the unlawful purported removal.
110. The allegation of a conspiracy engages similar issues to those I have discussed in relation to Order 2. As with Order 2 the "*others*" who are said to be co-conspirators are not identified within the drafting of Order 2. It is to be inferred from the Particulars of Claim that one of them was Mr Al Shamsi. From the allegation made at paragraph 104 of the Particulars of Claim, it may be inferred that another was Mr Al Shamsi's brother, Mr Ali Al Shamsi.
111. The actions in which Mr Al Shamsi was directly involved and which are alleged to evidence a conspiracy against Mr Thakkar (as opposed to alleged individual wrongdoing by Mr Nair), include Mr Nair and Mr Al Shamsi:
 - (1) appearing to act together in relation to Mr Thakkar's dismissal as an employee of the Company in an unfair manner which included: timing the disciplinary hearing without reasonable notice and at a time when Mr Thakkar could not attend; not providing him with proper information to know of what he was being accused; and not making enquiries of the accountant who had been maintaining the books and (Mr Thakkar says) could have answered any concerns;
 - (2) without informing Mr Thakkar, acting together to form a company with a similar name to the Company and with the same registered office which Mr Thakkar pleads must have been for an unlawful, ulterior and improper purpose and intended to harm the interests of Mr Thakkar or his companies;
 - (3) acting together to replace Mr Thakkar with Mr Al Shamsi on the bank mandates;
 - (4) acting together in relation to the removal of Mr Thakkar as a director, as discussed further below.
112. If the broader conspiracy against Mr Thakkar is said to include Mr Ali Al Shamsi, the only matter in which I think he has been said to have been actively involved in the alleged conspiracy was through his actions as shareholder in purporting to pass a resolution to dismiss Mr Thakkar as a director.
113. The Particulars of Claim allege that the purported removal of Mr Thakkar in December was the result of Mr Nair, Mr Al Shamsi and Mr Ali Al Shamsi conspiring and combining together with intent to deprive Mr Thakkar of his office as director of the Company by unlawful means. Such a conspiracy is denied in the Defence.
114. The Claimants provide no specific allegations as to how the Al Shamsi brothers were involved in this particular action, only the general allegation that they had conspired and combined together. However, as they were shareholders in the Company, it must be presumed that what is complained of is their actions as shareholders in cooperating with the removal process by purportedly passing resolutions to terminate Mr Thakkar's directorship.
115. Whilst the orders that the Claimants seek in the Application, do not include a remedy for this, they are being asked for in the context of establishing the Claimants' main claim relating to the Alleged Unlawful Means Conspiracy. This is particularly true in relation to Order 4. It is appropriate therefore to consider the elements of this tort because, if Order 4 is ordered, it would be interpreted in this light.

C. Was there an unlawful means conspiracy?

116. The law on unlawful means conspiracy was substantially clarified and simplified by the Court of Appeal in *The Racing Partnership Ltd and Ors v Sports Information Services Ltd* [2020] EWCA Civ 1300.
117. At paragraph [104] of that case, Lord Arnold helpfully set out the elements required for the tort. An unlawful means conspiracy requires:
- (1) a combination between two or more people;
 - (2) concerted action pursuant to the combination that is unlawful;
 - (3) an intention to injure the claimant (which need not be the predominant purpose it being sufficient that the conspirators seek a benefit at the claimant's expense); and
 - (4) damage to the claimant.
118. Mr Marshall argued that all these features were present in relation to the matter complained of in Option 4. He noted that *Racing Partnership* had settled a long-running question whether there was an additional requirement of the tort, that the conspirators knew that the unlawful action in question was unlawful. It was now clear that that this is not a requirement of the tort.
119. He considered that he had shown that all the constituents of this tort present as there was:
- (1) a combination between at least Mr Nair and Mr Al Shamsi;
 - (2) they had taken concerted action together;
 - (3) the purported removal of Mr Thakkar from his directorship was established to be unlawful;
 - (4) the conspirators must have intended consequences of their action, one of which was to cause damage to Mr Thakkar through the loss of his directorship; and
 - (5) Mr Thakkar did suffer that damage (at least temporarily until the Linwood Order).
120. Mr Marshall placed great emphasis on the element of unlawfulness in failing to follow the proper procedure in dismissing Mr Thakkar as director in December 2021. He cited *Kuwait Oil Tanker Co SAK v Al Badar* [2000] All ER 271 where Norse LJ, delivering the judgment of the Court of Appeal held

107. It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means. The first is sometimes described simply as a conspiracy to injure and the second as a conspiracy to use unlawful means (see eg Clerk and Lindsell on Torts (17th edn, 1995) pp 1267–1268, paras 23–76). In our view they are both conspiracies to injure and their ingredients are the same, with one crucial difference. In both cases there must be conspiracy to injure the claimant, but in the first case (in which the means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant whereas in the second case, although the defendant

must intend to injure the claimant, injury to the claimant need not be his predominant purpose."

121. Mr Marshall argued that, because of the unlawfulness element, it did not matter whether Mr Nair and the Al Shamsi brothers had any other legitimate purpose in seeking to remove Mr Thakkar as a director. They had acted together, and therefore in concert; their action was unlawful; their action must be intended to have had the purpose of bringing about the removal; that removal manifestly injured him and therefore the elements of the tort were made out.
122. Mr Jessup pointed out that it appeared to follow from Mr Marshall's argument that whenever there was a procedural flaw in dismissing a director, the tort would be committed since the action would have required people (directors or shareholders) acting in concert; the removal would have been unlawful; and there must always be discerned an intention to cause damage to the director by removing his directorship.
123. I am with Mr Jessup on this point. In the circumstances he describes, the tort must require more than just an unlawful act (in the sense that the proper steps needed to undertake the act lawfully had not been followed) and the injury to the claimant naturally arising from that act. Where there is a legitimate aim, such as to remove a dishonest director, there must be some ulterior motive to turn an innocent mistake in following the correct procedure into an actionable tort based on conspiracy. Whilst Mr Marshall would contest the proposition that the mistake was innocent in this case, and has put forward evidence to this effect, in my view this is a matter on which the evidence needs to be tested and is not suitable for summary judgment.
124. The decision in *Kuwait Oil* followed the House of Lords decision in *Lonrho v Fayed* [1992] 1 AC where it was clear that what the court had in mind was a position where the conspirators were acting in order to obtain a benefit at the claimant's expense, and I think something like this will always be required to establish the tort.
125. Of course, in the current case this is exactly what Mr Thakkar alleges, and Mr Jeremy Cousins QC acting as a Deputy Judge of this court has found that he has a good arguable case to this effect. However, the question of ulterior motive is not one suitable for determination on a summary basis. I do not think that it can currently be said that there is no real prospect of a defence against this. If the Defendants make good on their allegations against Mr Thakkar that he transferred money away from the Company, that he did so without the authority of the Company and that he forged evidence, the court might well find that these facts justify any apparent wrongdoing of the Claimants, and they might be enough to answer his accusations of an unlawful means conspiracy.

D. Conclusion in relation to Order 4

126. Although it has been established that Mr Thakkar's removal as a director was unlawful, for the reasons already given, I do not think that the Claimants have made the case that the Defence has no real prospect of a defence against the claim that this unlawful act formed part of a "combination and conspiracy", certainly if this is meant to imply that the case for the Alleged Unlawful Means Conspiracy, insofar as it relates to the removal of Mr Thakkar as director, has been made out.
127. In addition, in considering the second test under CPR 24.2 - whether there is any other compelling reason why the case or issue should be disposed of at a trial – my view is that there is such a compelling reason. As I have already indicated, in my view, the fact that the alleged co-conspirators have not themselves been given an opportunity to

answer allegations made against them is a compelling reason to require the question of an alleged conspiracy to go to trial.

128. Accordingly, I do not think that I should make an order in the form of Order 4.

9. Conclusion

129. In summary, I have been persuaded to make an order in the form of Order 1 (subject to any textual amendments might be put to the court and agreed) but I will make no order in the form of any of Orders 2 to 4 and I will not make a summary finding on any of the further matters on which summary judgment has been sought.