



Neutral Citation Number: [2023] EWHC 151(Ch)

Case No: BL-2021-000721

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

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

Date: 27 January 2023

**Before :**

**DEPUTY MASTER TEVERSON**

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**Between :**

**ELEVAR FINANCE SPV PHOTON LLC**

**Claimant**

**- and -**

**MR SABESAN SOMASUNDARAM**

**Defendants**

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**Ololade Saromi** (instructed by **Addleshaw Goddard LLP** solicitors) for the **Claimant**  
**Robin Howard** (instructed by **Lawbriefs Ltd** solicitors) for the **Defendant**

Hearing dates: 8 and 9 December 2022  
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**Approved Judgment**

This Judgment is being handed down remotely at 10.30am on 27 January 2023 when it will be emailed to the parties and sent to the National Archives

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**DEPUTY MASTER TEVERSON**

**DEPUTY MASTER TEVERSON :**

1. This is the adjourned hearing of the Claimant's application by notice dated 1 October 2022, issued on 20 October 2022, to strike out the Defendant's defence dated 23 June 2021 pursuant to CPR 3.4(2)(a) and for consequential judgment to be entered on the claim; alternatively, that summary judgment be entered on the entire claim for the Claimant as claimed pursuant to CPR 24.2 and that the Defendant pay the costs of the Claimant's application and the claim.
2. Since the application was issued, the Defendant was granted permission by Deputy Master Bowles on 18 July 2022 to amend his defence. The amended defence is dated 18 July 2022. It is in relation to the amended defence that the application is pursued and now falls to be determined.
3. The Claimant ("Elevar") is a company incorporated with limited liability and registered in the State of Delaware, United States of America. Elevar carries on the business of providing business finance primarily to companies engaged in technology driven ethical enterprise.
4. Mr Arshabh Sarda ("Mr Sarda") is employed as the Authorised Individual of Elevar. Mr Sarda is also the President of Elevar's ultimate parent entity, EF Labs Inc, a company incorporated and registered in Delaware.
5. The Defendant, Mr Sabesan Somasundaram, is the sole director and shareholder of Teleunique Solutions Limited ("Teleunique") a company incorporated in England and Wales whose registered office is at 226a Northolt Road, Harrow, Middlesex HA2 8DU. At all material times, Teleunique carried on the business of providing international telecommunications services, in particular, international direct dial services via voice over internet protocol data transfers ("VoIP"). The Defendant is referred to as Sabesh in the WhatsApp communications between him and Mr Sarda.
6. Teleunique's primary customer was at all relevant times Dialog Broadband Networks (Private) Limited ("Dialog") a company registered in Sri Lanka which provided services similar to those provided by Teleunique.
7. In December 2019 the Defendant and Mr Sarda began to discuss a proposal for Elevar to provide Teleunique with a factoring facility which would help it provide VoIP transfer services to Dialog by alleviating its cash flow pressures.
8. On 9 December 2019 the Defendant on behalf of Teleunique completed Elevar's Telecom Factoring Questionnaire. In reply to the question "Do you have any other netting relationship with this Obligor?", the Defendant replied "No".
9. In January 2020 the Defendant began negotiating a new carrier agreement with Dialog for the transfer of VoIP traffic. On 24 January 2020 the Defendant sent Mr Sarda an unsigned interconnection agreement dated 24 January 2020 between Teleunique and Dialog. Mr Sarda in an email to the Defendant dated 26 January 2020 said this seemed to be a bilateral contract and that Elevar needed it to be unilateral. Mr Sarda said that at minimum it should be changed to unilateral traffic to eliminate the language that allowed traffic going to Dialog.

10. On 18 March 2020 Elevar and Teleuniquie entered into an agreement (“the Factoring Deed”) pursuant to which Elevar purchased receivables and the right to future receivables from Teleuniquie at a discount to their value. The Factoring Deed was executed by Mr Sarda as authorized signer on behalf of Elevar as the factor and by the Defendant as director on behalf of Teleuniquie as the seller.
11. By Clause 17.1:

“The Seller represents, warrants and undertakes to the Factor on this date of this Deed:

17.1.1 in relation to any Sales Assets, in the form of the Asset Warranties; and

17.1.2 in relation to the Seller itself, in the form of the Seller Warranties,

which Warranties shall be deemed repeated on each Sale Date in relation to the Sales Assets on such Sale Date, and in relation to clause 17.1.2 each date while any Sales Asset sold is outstanding, in each case by reference to the facts and circumstances then subsisting.”
12. The Asset Warranties in Part 1 of Schedule 2 include:-

“5. **Set-off:** Each Sales Asset offered for sale to, and purchased by, the Factor under the terms of this Deed is...an identifiable, unconditional, irrevocable and non-refundable payment obligation by the Approved Carrier or by the obligor of the Related Rights on its Due Date, without any right of set-off or other right,...which may operate to reduce the amount payable.

6. **VoIP Traffic:** Each Sales Asset represents VoIP Traffic which has been terminated on behalf of and accepted by Approved Carriers and shall be free and clear of any offset, deduction, counterclaim, lien, Encumbrance or any other claim or dispute.

10. Seller has not done any act or thing or abstained from doing any act or thing which adversely affects the amount to be paid by the Approved Carrier or obligor of the Related Rights.”

The Seller Warranties in Part 2 of Schedule 2 include:-

7. **No set-off:** The Seller has not exercised any right of set-off in respect of any Sales Asset which would result in the Factor receiving less in respect of the Sales Asset than was due (but for such set-off).”
13. The Factoring Deed provided for Receivables Transfer Offers (“RTOs”) in the Schedule 5 Form to be made by the Seller to the Factor under which the Seller offered to sell, assign and transfer to the Factor on the Sale Date the Sales Assets identified in the attached computer file or invoice. In the RTO the seller repeated in favour of Elevar the representations and warranties mentioned in clause 17.1 of the Factoring Deed.
14. On 19 March 2020 Teleuniquie entered into an interconnection agreement with Dialog incorporating the amendments to clause 4 required by Elevar.
15. Trading started in June 2020. By July 2020 Dialog was late in making a payment on a Teleuniquie invoice.

16. RTOs dated 12 September 2020 and 30 September 2020 (“the September RTOs”) were made and accepted in relation to Unbilled Utilised Capacity as defined in the Factoring Deed for \$123,324.59 and \$188,546.52. These were on terms that the Applicable Discount Factor was 3.5% and the Initial Purchase Price by Elevar was 90%.
17. RTOs dated 10 October 2020, 24 October 2020 and 31 October 2020 (“the October RTO’s”) were made and accepted in respect of Unbilled Utilised Capacity for \$102,171.98, \$144,925.37 and \$92,249.39 on the same terms as the September RTO’s.
18. Elevar paid \$110,992.13 and \$169,691.87 to Teleunique in respect of the September RTO’s and \$91,954.78 and \$130,432.83 in respect of the first two October RTOs. The last of these payments was made on 27 October 2020. Although the 31 October RTO was accepted by Elevar, no payment was made to Teleunique in respect of it because of continuing payment delays by Dialog of 30 days on average.
19. On 1 October 2020 Teleunique issued and on 15 October 2020 delivered via email to Dialog an invoice no 1202 in respect of the Sales Assets acquired by Elevar pursuant to the September RTOs in the sum of \$311,871.11. Payment was due by 31 October 2020.
20. On 1 November 2020 Teleunique issued and on 19 November 2020 delivered via email to Dialog an invoice no 1204 in respect of the Sales Assets acquired by Elevar pursuant to the October RTOs in the sum of \$339,346.73. Payment was due by 1 December 2020.
21. In late October or early November 2020 Elevar stopped accepting RTOs and suspended payments to Teleunique. By then, invoices in the amount of \$651,217.83 were outstanding.
22. On 3 December 2020 Mr Sarda held a video call with Mr Rajith Adikaram, Unit Manager and Head of International Voice Calling at Dialog at the time. Mr Adikaram told Mr Sarda that payment of the October and November invoices would be made as soon as Dialog received certain “backend payments” from a customer of theirs. At Mr Adikaram’s request the October and November invoices were re-sent by Teleunique on 4 December 2020.
23. On 17 December 2020 Mr Sarda sent a WhatsApp message to Mr Adikaram in which he stated:-  
  
*“To summarise, we have around \$800k outstanding from Dialog currently, of which \$311k is now 47 days overdue, and as I mentioned we will soon be required to start legal action simply from a procedural requirement. I understand that you want to receive all payments without dispute from your backend customer, but this is not something we can wait for indefinitely”*
24. On 18 December 2020 Mr Adikaram replied:-

*“Can you talk with Kumar and the team as we have now cleared the o/S’s and have got confirmation also*

This led to further WhatsApp exchanges on 18 December 2020:-

*Sure-who do you mean when you say Kumar, sorry?*

*Sorry Not Kumar-Krish*

*That's been processed by the bank you mean*

*So will keep a look out for it*

*We also work with sabesh/Teleunique and have \$650,000 outstanding on there.*

*Any idea on those invoices re status?*

*Can you talk with them as these were sorted out*

*You mean all of these were sent to the bank?*

*These 3 invoices*

*They get paid into a bank account we control, but we have not seen any funds clear”*

25. On 5 January 2021 Mr Sarda sent by email a final notice to Dialog for payment of three invoices. Mr Sarda recorded they were for a total of just over \$800k. Two of the three invoices attached were from Teleunique to Dialog being the invoices numbered 1202 and 1204. The third invoice number 2020 was from another VoIP provider financed by Elevar.
26. On 8 January 2021 Mr Sarda by way of escalation sent an email to Mr Shayam Majeed, Chief Corporate Officer at Dialog Axiata, forwarding his email of 5 January and asking for him to investigate.
27. On 9 January 2021 Mr Sarda received an email in reply to the email of 5 January from Mr Adikaram. It stated that Dialog had entered into interconnection agreements with Gayatel Ltd and Teleunique. In the second paragraph it was stated:  
  
*“The amounts indicated in the attached invoices (Invoice No. Dialog/20/11 of Gayatel, 1202 & 1204 of Teleunique) have been set off based on the agreement reached between the parties. Therefore, there is no outstanding payment due and payable by Dialog to Gayatel or Teleunique in respect of the attached invoices.”*
28. The email of 9 January 2021 was attached as Schedule 5 to the Particulars of Claim in a redacted form. The effect of the redaction was to cover up all references to Gayatel Limited. The email in an unredacted form was exhibited to the witness statement of Mr Sarda in support of the application.
29. Upon receipt of the 9 January 2021, Mr Sarda sent a WhatsApp message to the Defendant at 9.31am:-

*“I have just received an email from Rajith saying that you have agreed to setoff the amounts. If you have not already setoff with traffic, do not do so for the time being. It opens you up to the same fraud liability I informed you of earlier, and we will be required to pursue you to the fullest extent of the law. Right now as far as I know you haven't committed fraud, if you actually do the set off, you will have.”*

The Defendant replied at 9.39am:-

*“Not set off anything. And there no way to set off. Also, bank is yours*

Mr Sarda at 9.39am:-

*“OK good”*

Mr Sarda at 10.27am:-

*“Also can you please forward all communication with Dialog since Oct 1*

Mr Sarda at 12.51pm:-

*Rajith insists you/Krish have agreed to set off, and his statement on the other supplier was true. We have already uncovered one fraud today. If you tell me what the amount set off is thus far, we can still salvage the situation. If not we have to get law enforcement involved, no joke.*

Mr Sarda says in paragraph 42 of his witness statement that he informed the Defendant that Dialog “insisted” that Teleunique had agreed to set-off in order to try to gain further information. There does not appear to have been a further communication from Dialog in the interim.

Mr Sarda at 12.51pm:-

*“Since you are not taking calls, I have to communicate in this manner via text*

*I’m not trying to threaten anyone, just indicating the procedures that will need to be followed”*

WhatsApp recorded at 19.31pm that the Defendant blocked Mr Sarda – *“You blocked this contact. Tap to unblock.”*

30. On 11 January 2021 Mr Sarda sent a final notice to the Defendant and the Teleunique team. He said that \$522, 634.88 in addition to late fees was due and payable immediately. He said:-

*“Dialog Axiata has stated [Teleunique] has set off these amounts, which is in direct violation of our factoring agreement, in addition to several other breaches of this agreement. [Teleunique] is hereby in default, and the above amounts are due and payable in addition to any damages and legal costs incurred for enforcement of such.”*

31. On 16 January 2021 Mr Sarda sent what he called an update to their prior notice. He said that \$556,956.02 was due and payable inclusive of late fees through January 31<sup>st</sup> 2021. In bold type he stated:-

*“Please note that we will be pursuing all perpetrators for fraud on a personal liability basis, in a global capacity and to the fullest extent of the law, including directors, employees and contractors of [Teleunique], and all other actors or affiliates we believe to be involved (in particular those who may have generated or provided documentation such as CDRs to perpetrate this fraud) for recovery of the full amount, provided that, we reserve the right to decline to pursue charges against those perpetrators who assist in settling this matter in an expedient fashion.”*

32. A letter of claim dated 30 March 2021 was sent by Addleshaw Goddard, the solicitors instructed to act on behalf of Elevar to the Defendant. Under the heading “Claims against you” the letter stated:-

*“We are instructed that you directed the Company to enter into arrangements with Dialog which provided for unapproved outbound VoIP traffic to be supplied by the Company to Dialog in breach of the Agreement and the express undertaking given by you on behalf of the Company. As a result of such arrangements the Company subsequently became indebted to Dialog. In order to reduce the level of indebtedness of the Company you directed Dialog to set off the sums owed by the Company to Dialog against the sums owed by Dialog to Elevar. This extinguished the sums owed to Elevar in respect of the Sales Assets.”*

The letter stated that Elevar had suffered loss and damage in the sum of \$582,688.74 *“and intends to issue proceedings against you in your personal capacity as sole director and beneficial owner of the Company and signatory to the Agreement for, without limitation, fraudulent misrepresentation, procuring the Company to breach the Agreement and/or unlawful means conspiracy.*

33. The Claim was issued on 6 May 2021 with Particulars of Claim attached. The claim in fraudulent misrepresentation is pleaded in paragraphs 19 to 25 of the Particulars of Claim. The allegation that the Defendant made the pleaded representations, warranties and undertakings fraudulently is pleaded in paragraph 25 as based on the facts and matters particularised in paragraphs 12 to 16. Paragraph 16 pleads five matters on 9 January 2021: (i) Mr Adikaram’s response on 9 January 2021 to Mr Sarda’s email informing Elevar that the payments requested under the October and November invoices had been set off by agreement reached between Dialog and Teleunique; (ii) Mr Sarda contacting the Defendant by WhatsApp at 9.31am and querying the alleged agreement to set off; (iii) The Defendant replying at 9.39am stating that Teleunique had *“not set-off anything. And there no way to set off”*; (iv) Mr Sarda further informing the Defendant by another message that Dialog insisted that Teleunique had agreed set off; and (v) the Defendant then evading Mr Sarda’s telephone calls and blocking him on WhatsApp a few minutes later, and no further communication having been received since from the Defendant or Teleunique since.
34. The claim for procurement of breaches of contract is pleaded in paragraphs 27 to 31 of the Particulars of Claim. It is alleged in paragraph 29 that the Defendant (i) sold to the Claimant Sales Assets which were subject to set off; (ii) agreed to an amendment to the Carrier Agreement and/or entered into a new agreement with Dialog, to deliver outbound VoIP traffic to Dialog; and (iii) agreed to set off the sums demanded from Dialog by the October and November invoices against its indebtedness owed to Dialog. In paragraph 29.6 of the Particulars of Claim it is pleaded that Dialog had in fact exercised, with Teleunique’s agreement, a right of set off on or around 14 December 2020.
35. The claim of conspiracy to injure by unlawful means is pleaded at paragraphs 32 to 34 of the Particulars of Claim. In paragraph 32 it is pleaded that the Defendant and Teleunique, with intent to defraud and injure Elevar, conspired and combined together to defraud Elevar by unlawful means, namely by breaching the terms of the Factoring Deed as pleaded in paragraph 29 of the Particulars of Claim.

36. The Defendant acknowledged service on 7 June 2021 and filed a defence dated 23 June 2021. In that Defence, the Defendant relied on clause 30.3 of the Factoring Deed which provided:-

*“Notwithstanding any Limited Guaranty (or “Bad Boy Guaranty”) given by the Seller to the Factor, no party to this Deed shall have any recourse against nor shall any personal liability attach to any shareholder, officer, agent, employee or director of any member of the Factor or the Seller in his capacity as such, by any Proceedings or otherwise, in respect of any obligation, covenant, or agreement of any member of the Factor or the Seller contained in the Transaction Documents.”*

The Defence admitted the representations alleged but denied paragraphs 29 to 38 of the Particulars of Claim and the allegations made therein. Before me Mr Howard on behalf of the Defendant did not seek to place reliance on clause 30.3 and I have heard no argument on its scope or effect.

37. The Amended Defence dated 18 July 2022 contains a summary of the Defence in paragraphs 4 to 11. In paragraph 10 it is denied that Dialog has any claim which it is entitled to set off against the invoices. It is denied that anything said or done by the Defendant gives rise to any such set-off or any other defence entitling it to withhold payment on the invoices. In paragraph 11 it is further denied that Teleunique ever entered into a trade or agreement with Dialog under which it might be obliged to pay Dialog, whether an agreement under which Dialog supplied any goods or services to Teleunique or otherwise, or under which Teleunique might become or ever did become indebted to Dialog.
38. In the Amended Defence it is pleaded that Dialog were late in paying from the outset of the agreement in April 2020 and fell further behind in September 2020. It is pleaded that on or before 5 November 2020 Teleunique stopped supplying communication services to Dialog. It is pleaded that the Defendant’s response to Mr Sarda on 9 January 2021 was true. As to the evading of Mr Sarda’s telephone calls and blocking of WhatsApp, the Defendant said that Elevar had by then threatened him with litigation against him personally for fraud and rejected his denial.
39. Elevar’s application is made on two grounds. The first ground is that the Defence and now the Amended Defence should be struck out pursuant to CPR 3.4(2)(a) because it discloses no reasonable grounds for defending the claim. CPR 3.4 provides:-

*(2)The court may strike out a statement of case if it appears to the court-*

*(a)that the statement of case discloses no reasonable grounds for bringing or defending the claim*

*(3)When the court strikes out a statement of case it may make any consequential order it considers appropriate.”*

Paragraph 1.6 of Practice Direction 3A-Striking out a Statement of Case states:-

*“A defence may fall within rule 3.4(2)(a) where:*

*(1)it consists of a bare denial or otherwise sets out no coherent statement of facts, or*



*(2)the facts it sets out, while coherent, would not even if true amount in law to a defence to the claim.”*

40. A statement of case that is suitable to be struck out under rule 3.4(2)(a) include those that raise an unwinnable case. A defence may be struck out as not being a valid defence as a matter of law. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only properly be determined by hearing oral evidence.

41. It is not however sufficient for a defendant simply to deny allegations. CPR rule 16.5(2) provides:-

*“Where the defendant denies an allegation-*

*(a)he must state his reasons for doing so; and*

*(b)if he intends to put forward a different version of events from that given by the claimant, he must state his own version.”*

42. The second ground of the application is for summary judgment under CPR 24.2 which provides:-

*“The court may give summary judgment against a claimant or defendant on the whole of a claim or a particular issue if-*

*(a)it considers that..*

*(ii)that defendant has no real prospect of successfully defending the claim or issue; and*

*(b)there is no other compelling reason why the case or issue should go to trial.”*

43. I was referred to the well-known principles for summary judgment formulated by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]:-

*“(1)the court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: see Swain v Hillman [2001] 1 All E.R. 91;*

*(2)A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*

*(3) In reaching its conclusion the court must not conduct a “mini-trial”;*

*(4) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements of case before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*

(5) *However in reaching its conclusion the court must take into account not only the evidence actually pleaded before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

(6) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: see Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;*

(7) *On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

44. In relation to summary judgment in fraud claims, I was referred by Mr Saromi to the guidance given by Sir Igor Judge in *Wrexham Association Football Club v Crucialmove Ltd* [2006] EWCA Civ 237:-

*"[57]I do not underestimate the importance of a finding adverse to the integrity to one of the parties. In itself, the risk of such a finding may provide a compelling reason for allowing a case to proceed to full oral hearing, notwithstanding the apparent strength of the claim on paper, and the confident expectation based on the papers, that the defendant lacks any real prospect of success. Experience teaches us that on occasion apparently overwhelming cases of fraud and dishonesty somehow inexplicably*

*disintegrate. In short, oral testimony may show that some cases are only tissue paper strong...*

*[58]This collective judicial experience does not always, or inevitably, provide a compelling reason for allowing the case to proceed to trial, nor for that matter require the judge considering the application to reject the conclusion that there is no real prospect of a successful defence of the claim if he is satisfied that there is none. That is not what the Rules provide, and if that had been intended, express provision would have been made. It is however a factor constantly to be borne in mind, if and when, as here, the reason for concluding summary judgment is appropriate is consequent on a disputed finding, adverse to the integrity of the unsuccessful party.”*

45. I was also referred by Mr Saromi to *King v Stiefel* [2021] EWHC 1045 (Comm) in which Mrs Justice Cockerill stated:-

*23. I should deal specifically with the law on summary judgment and claims in fraud, not least because it was at least implicit in the submissions for the Kings that such serious allegations were not suitable for summary determination.*

*24.The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so..*

*25. In terms of the approach to summary judgment in fraud claims Primekings commended to my attention the judgment of Stuart Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) at [25]-[29], in the context of a claim to strike out a claim in fraud. In summary:*

*i)The Court should bear in mind that cogent evidence is required to justify a finding of fraud or other discreditable conduct, reflecting the court’s conventional perception that it is generally not likely that people will engage in such conduct.*

*ii)Pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty.*

*iii)However, in view of the common feature of fraud claims that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a “generous” approach to pleadings.”*

In relation to paragraph 25 I should make clear I am not concerned with an application to strike out Elevar’s claim in fraud against the Defendant. I am concerned with Elevar’s application whose second ground is for summary judgment where fraud is pleaded against the Defendant.

46. On behalf of Elevar, Mr Ololade Saromi of counsel submitted that both the Defence and the Amended Defence consisted of bare denials. In relation to paragraphs 10 and 11 of the Amended Defence he submitted that these paragraphs only repeat Elevar’s allegations and then deny them. He submitted they do not put forward a substantive defence. He submitted there was an obligation on the Defendant to plead facts which reveal an alternative explanation as to why Dialog communicated as it did and why the

Defendant in one email to Dialog dated 26 March 2021 had requested Dialog not to share any information with a third party.

47. Elevar's application to strike out is made on the ground that the Defendant has not pleaded his reasons for denying the allegations and has not stated his own version of events. That falls in my judgment to be considered in relation to the allegations pleaded against the Defendant in the Particulars of Claim. The evidence relied on by Elevar in support of its application falls to be considered in the context of the summary judgment application.
48. As Mr Robin Howard, counsel for the Defendant submitted, these are tortious claims made against the Defendant personally based on an underlying allegation of fact that Dialog had and has a set off against the October and November invoices of Teleunique. For the claims to succeed against the Defendant the individual requirements of each tort must be satisfied in relation to the Defendant. In relation to the fraudulent misrepresentation claim, Mr Howard submitted there was an issue as to whether any representations as to the future could be relied upon as against the Defendant who was not a party to the Factoring Deed. In relation to procuring a breach of contract, Mr Howard submitted that a director of a company might be personally liable but only if he had assumed a clear personal responsibility for what had been done for or by the company. In relation to conspiracy to injure by unlawful means Mr Howard referred me to *Raja v McMillan* [2021] EWCA Civ 1103 in which the Court of Appeal said that the issue whether a director could conspire with a company where that company was its alter ego was an arguable point of law not suitable to be determined on a strike out application.
49. Elevar's case is that the only reasonable inference that can be drawn from the facts pleaded at paragraphs 12 to 16 of the Particulars of Claim and the contemporaneous documents disclosed by Elevar as initial disclosure pursuant to PD 51U 5.1 (now PD57A 5.1) is that the Defendant entered into an agreement with Dialog to set off its liabilities to Dialog against the October and November invoices, or an agreement which granted Dialog some other right which operated to reduce the amount payable by Dialog to Teleunique. The documents relied upon are:-
  - (1) Mr Adikaram's WhatsApp message to Mr Sarda on 18 December 2020 in which he told Mr Sarda that the October and November invoices had been "*sorted out*" and "*Can you talk with Kumar and the team as we have now cleared the o/S,s and have got confirmation also*".
  - (2) Mr Adikram's email to Mr Sarda on 9 January 2021 in which he informed Mr Sarda that the October and November invoices had been set off by agreement reached between Dialog and Teleunique. This is the first reference to set off being relied upon by Dialog.
  - (3) WhatsApp messages between the Defendant and Mr Sarda on 9 January 2021 which show that Mr Sarda "blocked" Mr Sarda as a contact.
  - (4) An email sent by Krish Logan to Rajith Adikaram on 10 January 2021. This was one of two documents annexed to a letter dated 29 March 2021 sent by Senior Corporate Counsel on behalf of Dialog to the Attorneys at Law instructed by Elevar in Colombo. The email states:-

*We have clearly said to them that all dialog cleared, all outstanding invoices. In future, if he tries to contact you or your team; Please clearly say that any communications need to come through Teleunique. Also we can't expose any details to third parties who are not participating in the Agreement. (NDA in place)*

*Dialog didn't sign any NDA/Consent form with a third party. So don't worry and any communications just forward to us."*

- (5) A letter dated 26 March 2021 from Teleunique appearing to be signed by the Defendant to Dialog. The letter is headed "Re: Contract between Dialog and Teleunique". This was the other document attached to the letter dated 29 March 2021 from Senior Corporate Counsel on behalf of Dialog. It reads:-

*"We have established the business with Dialog, which is financially supported by Elevar finance. When we signed contract with Elevar, we have been promised to get funded a few millions and accordingly we have invested quite a lot on infrastructure and people.*

*After a few months, Elevar finance pulled out of the commitment without any notice and we are in dispute to justify our costs on this project.*

*We got to know that Dialog has been receiving emails from Elevar Finance which were not copied to us. Elevar should not contact Dialog by any form regarding Teleunique.*

*Also, as Dialog and Teleunique signed the NDA, we are kindly requesting not to share any of our information to a third party".*

(6)The letter dated 29 March 2021 from Dialog's Senior Corporate Counsel to Elevar's Attorneys at Law in Colombo repeating Dialog's position that no payment was due and payable by Dialog to Teleunique for the October and November invoices "since parties have set off all the pending amounts under the said Agreement".

50. On behalf of the Defendant, Mr Robin Howard submitted in answer to the application-

(i)The WhatsApp responses from Mr Sarda on 18 December 2020 suggest his immediate understanding was that payment for the invoices had been or would soon be sent to the bank.

(ii)The email from Mr Adikiram dated 9 January 2021 (which was initially redacted) refers to Dialog having entered into Interconnection Agreements with Gayatel Ltd and Teleunique. The Defendant says in paragraph 16 of his witness statement in answer to the application that he had never heard of Gayatel until he saw that email in unredacted form;

(iii) On the 9<sup>th</sup> January 2021 on being confronted by Mr Sarda with Dialog's set-off claim, the Defendant had without delay responded to Mr Sarda "Not set off anything. And there is no way to set off. Also, bank is yours". Mr Howard said it was perhaps unwise for the Defendant to have blocked contact thereafter, but this was following threats of litigation against him personally.

(iv) It was clear that Elevar had been trading with Dialog through at least one other counterparty for several months before Teleunique had begun to trade with them.

(v) It was clear that Dialog were late payers even then and throughout.

(vi) The only evidence of set-off is the email sent by Mr Adikaram to Mr Sarda on 9 January 2021 and the letter from Dialog's Senior Corporate Counsel on 29 March 2021.

(vii) Mr Howard submitted both communications were self-serving coming from a party who owed at least \$651,000 and perhaps \$800,000; were unparticularised as to the nature, amount and circumstances of the alleged set-off; and lacked any explanation as to how two unrelated suppliers both agreed to release debts in a single agreement.

(viii) Mr Howard accepted that the Defendant had not commented specifically on Mr Logan's email dated 10 January 2021 to Mr Adikaram or on Teleunique's letter of 26 March 2021 to Dialog. He made the point that neither was pleaded in the Particulars of Claim.

51. In reply, Mr Saromi submitted it was remarkable on the Defendant's case that there was no correspondence from Teleunique to Dialog chasing payment of the outstanding invoices. He submitted the Defendant had had plenty of time to pull together documents and that the court should infer Teleunique was not chasing for payment because it had agreed a set-off. He submitted that it was significant that after four months of non-payment, the letter of 26 March 2021 from Teleunique to Dialog was in terms requesting that information not be shared with any third party rather than chasing payment. He submitted the letter demonstrated an attempt by Teleunique to stop Elevar from getting any information.
52. In my judgment, in this case reasonable grounds exist for believing that a fuller investigation of the facts may add to or alter the evidence before the trial judge. Mr Saromi submitted there was no reason to believe the Defendant would produce any further documents not having to date complied with his initial disclosure obligation and having had since June 2021 to do so. The Defendant did exhibit to his witness statement the full print out of WhatsApp messages passing between him and Mr Sarda. They show that Dialog was a consistently late payer and that Elevar was having payment delay issues with Dialog when financing trading through at least one other provider. I do not consider it would be right to enter summary judgment against the Defendant until the dealings between Dialog and Teleunique have been further investigated. The Defendant has in my view at this stage a real prospect of successfully defending the tortious claims against himself personally and they should be permitted to go to trial.
53. Further this claim falls within the category of case in respect of which guidance was provided in *Wrexham Association Football Club v Crucialmove Ltd* by Sir Igor Judge. The fact that fraud is being alleged by Elevar against the Defendant does not preclude the court from granting summary judgment. It is however the type of case in which the court should be very cautious about granting summary judgment.
54. Further, each of the tortious claims relied upon by Elevar raise issues of mixed fact and law which are not suitable for summary determination. It was accepted by Mr Saromi that the unlawful means conspiracy claim was not suitable for summary determination. The same applies in my view to the tortious claims based on fraudulent

misrepresentation and procuring a breach of contract. Looking at the matter broadly, this is a claim against the Defendant personally. It is the case that the Defendant was the sole director and shareholder of Teleunique but it needs to be established in relation to procuring a breach of contract that the Defendant assumed a clear personal responsibility for what was done by Teleunique and in relation to the alleged fraudulent misrepresentation that the Defendant was knowingly deceiving Elevar and Mr Sarda.

55. I do however consider there is force in the submission of Mr Saromi that the Amended Defence does not comply with CPR 16.5(2). The Amended Defence does not in my view adequately set out the Defendant's reasons for denying the allegations of wrongdoing made against him. It would not in my judgment be right to strike out the Defence on that ground. Striking out is a last resort. Mr Saromi submitted that the Defendant has already put forward a Defence in three versions, the original Defence, the draft attached to his witness statement in answer to the application and the Amended Defence. In my judgment, the proportionate order is to direct that unless the Defendant files and serves a Re-Amended Defence within 28 days from the date of the order consequential upon this judgment which complies with CPR 16.5(2) his Defence will stand struck out. I consider that the Defendant is required to plead his case in response to the assertion by Dialog on 9 January 2021 that a set off was agreed with parties including Teleunique.
56. This judgment will be handed down remotely at 10.30am on 27 January 2023. I will hear counsel on consequential matters.