Neutral Citation Number: [2023] EWHC 37(Ch)

Case No: BL-2022-000347

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

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

Date: 13 January 2023

Before :

DEPUTY MASTER TEVERSON

- -

Between :

MANOLETE PARTNERS PLC	**Claimant**
- and -	
SAMPSON COWARD LLP	**Defendant**

- -
- -

Joseph Curl KC (instructed by **TLT LLP solicitors**) for the **Claimant**

Siân Mirchandani KC (instructed by **Caytons Law LLP solicitors**) for the **Defendant**

Hearing dates: 24 October and 9 November 2022

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Approved Judgment

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

DEPUTY MASTER TEVERSON

DEPUTY MASTER TEVERSON :

1. By application notice dated 6 April 2022, the Defendant, Sampson Coward LLP, seeks (i) an order pursuant to CPR 24.2 for summary judgment on parts of the Claimant's case as referred to in the witness statement of Sam Moore made in support of the application, (ii) an order pursuant to CPR 3.1(2)(a) that the time for the Defendant to submit a Defence to the parts of the claim which are not subject to the summary judgment application is extended until a reasonable time after the hearing of the summary judgment application, and (iii) an order that the Claimant pay the Defendant's costs of any part of the claim in respect of which summary judgment is awarded and of the application, in both cases to be assessed on the standard basis if not agreed.

2. The application was heard before me on 24 October 2022 and adjourned part heard until 9 November 2022 for submissions in reply. The hearing on 24 October was in person. The hearing on 9 November was a remote hearing. The Defendant/Applicant was represented by Siân Mirchandani KC. The Claimant/Respondent by Joseph Curl KC.

3. As this is a summary judgment application made prior to the filing of a Defence, I shall set out the facts giving rise to the claim by reference to the Particulars of Claim. I do this in order to provide a summary of the facts relied on in support of the claim. I am not to be interpreted as making any findings of fact.

4. The Claimant, Manolete Partners PLC, is the assignee of the claims of UK Property and Land Specialists Limited (in liquidation) ("UKPALS") and Nero Developments Limited (in liquidation) ("Nero") together referred to as "the Companies".

5. The principal activity of the Companies was the acquisition and development of building projects in the Salisbury area. UKPALS was incorporated on 28 September 2010. Nero was incorporated on 3 October 2015. Nigel Jeremy Weir ("Mr Weir") owned 100% of the shares in each Company at all material times.

6. The Companies went into administration on 10 January 2019. In the case of UKPALS, the Administrators were appointed by Strategic Residential Developments Limited ("SRD") and in the case of Nero by UK Property Development Solutions Limited ("UKPDS"). The Companies went into compulsory liquidation on 3 December 2021.

7. SRD was incorporated on 20 September 2013. UKPDS was incorporated on 12 October 2015. I shall refer to them together as "the Lenders". The Lenders had the same directors. The Lenders issued high yield investment bonds to individual private retail investors. The bonds were marketed by Hypa Management LLP ("Hypa"), a fund manager. The proceeds of the investment bonds issued were lent by the Lenders to the Companies. A total of £5,271,700 was lent by SRD to UKPALS and a total of £4,492,000 by UKPDS to Nero.

8. The Defendant is a firm of solicitors based in Salisbury. The Defendant was instructed by UKPALS to act as its solicitor in relation to the financing it was to receive from SRD and the related land acquisitions.

9. Between 30 August 2013 and 29 November 2013 a suite of documents was negotiated and drafted to put in place a commercial structure between UKPALS and SRD under which SRD would make secured loans to UKPALS and the Defendant would act as escrow agent.

10. The documentation included a loan agreement made between SRD as the Lender and UKPALS as the Borrower ("the UKPALS Loan Agreement") under which SRD agreed to make available a facility of up to £20 million to UKPALS. It also included an escrow letter dated 29 November 2013 under which the Defendant agreed and undertook to act as escrow agent.

11. By clause 1.1 of the UKPALS Loan Agreement, the Defendant, in its capacity as UKPALS's solicitor was to maintain with HSBC (i) the First Escrow Account with the Defendant's Client Account details and reference number 10005; (ii) the Second Escrow Account with the Defendant's Client Account details and reference number 10006; and (iii) the Security Account with the Defendant's Client Account details and reference number 10009.

12. By clause 2.1, SRD was to make available to UKPALS a term facility of up to £20 million.

13. By clause 3.2, all amounts advanced by SRD pursuant to clause 3.1 were to be paid by SRD into the Security Account. Clause 3.1 contained an automatic drawdown or sweep provision. The Security Account as defined was to be in the name of the Borrower.

14. By clause 6.1, UKPALS would pay interest to SRD at the rate of 12% per annum.

15. By clause 7.2, not less than three calendar months before each date on which interest was payable, UKPALS was to procure that the amount held in the First Escrow Account was at least equal to the interest payable on that date until that interest had been paid to SRD.

16. By clause 7.3, upon any Disposals as defined in clause 1.1, by UKPALS of assets of UKPALS subject to security interests created by the Debenture, UKPALS was to immediately pay an amount equal to 75% of the "net value of the consideration pursuant to a Disposal" into the Second Escrow Account.

17. The First and Second Escrow Accounts as defined in clause 1.1 were to be accounts in the name of the Borrowers' Solicitors. The Borrowers' Solicitors were defined in clause 1.1 as the Defendant. By contradistinction, the Security Account as defined in clause 1.1 was to be an account in the name of the Borrower.

18. By an escrow letter dated 29 November 2013 ("the UKPALS Escrow Letter") and executed on behalf of the Defendant by two of its partners the Defendant agreed to act as escrow agent in relation to the Escrow Account in accordance with the instructions and subject to the terms and conditions set out in the letter.

19. Paragraph 1.1 recorded that the purpose of the escrow letter was to set out the terms on which the Defendant had agreed to act as escrow agent in relation to the loan by SRD to UKPALS pursuant to the UKPALS Loan Agreement.

20. By paragraph 2.1 the Defendant agreed to open immediately an interest-bearing instant access deposit account with the Escrow Account Bank in its name and subject to any interest payment pursuant to clause 7.2

of the UKPALS Loan Agreement being deposited in the Escrow Account to deal with such proceeds on the terms set out in the letter.

21. By paragraph 3.1 the Defendant further agreed that so long as any amount due to the Lender[1] under the UKPALS Loan Agreement was outstanding, it would not release any sums from the UKPALS Escrow Account except (a) pursuant to an instruction (defined as a "Lender Notice") in writing or, (b) as expressly permitted by paragraphs 4.3 and 5.1 of the UKPALS Escrow Letter, neither of which exceptions are applicable to any claim made in the Particulars of Claim or, (c) as ordered by a court or legal or regulatory authority of competent jurisdiction.

22. By paragraph 6.1, the Defendant undertook to perform only such duties as were specifically set out in that letter.

23. It is to be inferred from a contemporaneous exchange of emails that a second escrow letter was executed by the Defendant in relation to UKPALS, probably in relation to the intended Second Escrow Account.

24. In paragraph 37 of the Particulars of Claim it is pleaded that despite the intention and expectation in the UKPALS Loan Agreement that there should be three escrow accounts[2], the Defendant set up and operated a single escrow account on the Defendant's Client Account which it named "Strategic Rd Escrow 1/10005 Bond Monies". This is defined in the Particulars of Claim as ("UKPALS Escrow Account").

25. In Paragraph 38 of the Particulars of Claim it is pleaded that the Defendant's operation of the UKPALS Escrow Account was subject to the terms of the Defendant's agreement and undertaking set out in the UKPALS Escrow Letter.

26. Between 4 November 2015 and 3 December 2015, a similar, but not identical, suite of documents was prepared and executed relating to the lending between UKPDS as lender and Nero as borrower. The Nero Loan Agreement dated 3 December 2015 provided for the Defendant to maintain the following accounts with HSBC: (i) the Security Account

[1] Paragraph 3.1 refers to "the Borrower" but the parties agree this is a mistaken reference to "the Lender".
[2] The Loan Agreement in fact provided for two escrow accounts and a security account and not for three escrow accounts.

with the Defendant's Client Account details and reference number 12612, and (ii) the Escrow Account with the Defendant's Client Account details and also with reference number 12612. The Nero Loan Agreement provided for one and not two escrow accounts. The Escrow Account was for holding 75% of the "net value of the consideration pursuant to a Disposal".

27. In paragraph 48 of the Particulars of Claim it is pleaded that the Defendant set up and operated a single escrow account on the Defendant's Client Account which it named "Nero Developments Limited/12612 Escrow Account" ("Nero Escrow Account").

28. In paragraph 49 it is pleaded that the Defendant's operation of the Nero Escrow Account was subject to the terms of the Defendant's agreement and undertaking set out in the Nero Escrow Letter.

29. In paragraph 50 it is pleaded that the Defendant did not operate either the UKPALS Escrow Account or the Nero Escrow Account as it had agreed and undertaken to do by the Escrow Letters.

30. In paragraph 51 it is pleaded that the Defendant allowed the Escrow Accounts to be used for the day to day trading of the Companies as directed by Mr Weir. It is alleged that as such the Defendant wrongly provided banking facilities through the Defendant's Client Account and allowed the Escrow Accounts to be used as ordinary current accounts in breach of rule 14.5 of the SRA Accounts Rules 2011.

31. The Defendant's duties in relation to UKPALS are set out in paragraphs 52 to 57. In paragraph 58 it is pleaded that to the extent that the Defendant operated the UKPALS Escrow Account otherwise than in accordance with those duties, it breached the undertaking contained in paragraph 6.1 of the UKPALS Escrow Letter. It is convenient to refer to this as "the breach of undertaking claim". By paragraph 59 the same duties and breach of undertaking claim is made in relation to Nero.

32. In paragraph 60 it is pleaded that the Defendant improperly acted on three back to back sales of property assets belonging to UKPALS. It is alleged these transactions had no commercial purpose and involved a diversion of profits derived from UKPALS property assets away from

UKPALS. Details of these back to back transactions are set out in paragraphs 61 to 95 inclusive of the Particulars of Claim.

33. In paragraphs 98 to 115 it is pleaded that payments were wrongly paid out of the UKPALS Escrow Account in relation to a joint venture agreement concerning a development at Vine Lodge, Peppard Common, Henley-on-Thames. In paragraph 116 it is pleaded that sums totalling £844,121.65 and £107,281.40 were wrongly paid away on 3 September 2015.

34. In paragraph 120 it is pleaded that a further improper payment of £250,000 was paid on 29 April 2016 from the UKPALS Escrow Account.

35. In paragraph 122 it is pleaded that on 22 June 2016 £250,000 was improperly paid away from the Nero Escrow Account and £118,390.12 on 19 October 2018.

36. The total sums claimed in the Particulars of Claim to have been wrongly paid out and in respect of which equitable compensation is sought to be recovered from the Defendant is £1,959,647.10.

37. The Defendant's application is for summary judgment on parts of the Claimant's case "as referred to in the witness statement of Sam Moore". This refers to the witness statement of Mr Moore, the Defendant's solicitor, dated 6 April 2022.

38. One must therefore go to Mr Moore's witness statement to identify the parts of the claim or issues in relation to which summary judgment is sought. In her skeleton argument, Ms Mirchandani KC broke the application down into three parts: the Escrow Account claim referred to in paragraphs 3 to 23 of Mr Moore's statement, the undertaking claim in paragraph 24 and the back to back transactions in paragraph 25. I will consider each part in turn.

39. In paragraph 5 Mr Moore states that the Claimant's overarching complaint is that the escrow accounts were not properly operated by the Defendant as escrow agents and so the Claimant as the assignee of Nero and UKPALS should be compensated. Mr Moore says the problem with

this is that the money in each escrow account belonged to the respective lender UKPDS/SRD and not the respective borrower Nero/UKPALS. Mr Moore says that if the money has been wrongly paid away, the lenders may have a claim against the Defendant but not the borrowers or the Claimant as the assignee of the borrowers. Mr Moore says it is a short point. He says if a person holds money belonging to X and wrongly pays it away then X and X alone has a claim against the money holder.

40. Mr Moore refers to the terms of the Escrow Letters and in particular to paragraph 3.1. Paragraph 3.1 provides:-
"3.1 For so long as any amount due to [the Lender] under [the Loan Agreement] is outstanding you [the Defendant] hereby agree:
(a) to hold the amount standing to the credit of the Escrow Account from time to time ("the Escrow Balance") as escrow agents for and on behalf of the Lender on the terms of this letter
(b) to accept payments in, make payment from and otherwise operate the Escrow Account in accordance with the written instruction of the Lender;
(c) that you shall not release any sums from the Escrow Account except pursuant to an instruction ("the Lender's notice") in writing from the Lender signed by one of its directors except…" (underling added). [None of the exceptions are relevant to the claim].

41. Mr Moore says he believes paragraph 3.1 makes it clear that the money in the escrow account belonged to and was held for the lender. He says that since this money belonged to or was held to the order of the lender, he does not believe that the Claimant can make a claim to it. He says it was the lenders' money since the borrowers were still indebted to the lenders. Mr Moore says that had the money not been taken from the escrow accounts, this would not have improved the borrowers' assets or liabilities since the money in the escrow account was not the borrowers', but rather was the lenders'.

42. Mr Moore says that accordingly he believes that those parts of the Particulars of Claim relating to the escrow accounts have no real prospect of success and summary judgment should be given against them.

43. The Claimant's evidence in answer to the application was filed on 17 October 2022 only 7 days before the summary judgment hearing. The evidence was in the form of a witness statement of James Forsyth dated

17 October 2022. Mr Forsyth is a partner and member of the Claimant's solicitors.

44. Mr Forsyth says in his witness statement that following their appointment, the liquidators of UKPALS asked the Defendant to provide copies of any and all account ledgers in respect of the company including any escrow accounts. He says only one ledger was provided ("the UKPALS Escrow Ledger"). He says that the vast majority of credits to the UKPALS Escrow ledger account being operated by the Defendant represented Automatic Drawdowns. He says the same position was found in relation to Nero and the single Nero Escrow Ledger. Mr Forsyth says that whilst the documentation envisaged that Automatic Drawdowns would be credited to the respective Security Accounts, for some reason, which only the Defendant can explain, this did not happen. He says the Claimant's position is in summary that the relevant documents very clearly evidence that the UKPALS Escrow Account and the Nero Escrow Account at all times contained monies which were beneficially owned by UKPALS or Nero respectively.

45. In his evidence in reply, Mr Moore said that the Claimant was advancing an entirely new case which he referred to as "the Reply case" which he said was not pleaded. Mr Moore said that in the Reply case the Claimant was seeking to make out a case concerning alleged incorrect mixing of monies received in by the Defendant and that for the first time it was being claimed that monies paid into the respective escrow accounts were monies already beneficially owned by UKPALS and Nero. Mr Moore said that the Claimant was seeking to advance in the Reply case a new unpleaded case which he said was not a proper answer to the application for summary judgment made in respect of the Claimant's pleaded case.

46. In relation to the claim as pleaded, the core submission made on behalf of the Defendant is that in the Particulars of Claim it is the terms of the Escrow letters that are pleaded against the Defendant. Ms Mirchandani pointed out that whilst clause 3.2 of the Loan Agreements is set out in the Particulars of Claim as one of the terms of the Loan Agreements, no reference is made in the Particulars of Claim to the Automatic Drawdown provision in clause 3.1 nor to the defined term "Committed Commitment" referred to in clause 3.1. She submitted that it was not the function of a pleading to require an opponent to work out what case it faces.

47. In relation to the claim as pleaded, it was submitted by Ms Mirchandani that the claim bears some similarities to *Twinsectra Ltd v Yardley* [2002] UKHL 2. There, an undertaking given by a solicitor was held to have created a trust. Lord Hoffman at paragraph 12 said that the terms of the trust must be found in the undertaking which the solicitors gave to Twinsectra as a condition of payment. At paragraph 13, Lord Hoffman said that the effect of the undertaking was to provide that the moneys in the solicitors' client account should remain Twinsectra's money until such time as it was applied for the acquisition of property in accordance with the undertaking. Lord Millett considered whether a 'Quistclose' trust had been created. At paragraph 74, Lord Millett stated that the question in each case was whether the parties intended the monies to be at the free disposal of the recipient. At paragraph 100, Lord Millett said that the Lender pays the money to the borrower by way of loan, but does not part with the entire beneficial ownership in the money. Insofar as he does not, the money is held on resulting trust for the lender from the outset.

48. Ms Mirchandani submitted that the Claimant does not state any case as to why it is claiming in these proceedings to be beneficially entitled to the monies advanced or explain why the consent of the Lenders' was required before the monies could be paid out.

49. On behalf of the Claimant, Mr Joseph Curl KC submitted that it was incapable of dispute that the Companies are indebted to the Lenders' assignee. The court was told that the Lenders are now dissolved and their rights have been assigned to a third party. Mr Curl submitted that the Lenders' claim to be a creditor of the Companies is inconsistent with any suggestion that all the money the Defendant handled in fact belonged to the Lenders. Mr Curl submitted that only a trial could resolve the point raised by the Defendant about beneficial ownership of the money in the Escrow Accounts. He submitted that the beneficial ownership issue was highly fact-sensitive and requires careful scrutiny both of the underlying documents and of what actually happened. It was not he submitted a short point, as suggested by Mr Moore.

50. Mr Curl submitted that whilst the contemplated, but never implemented, Security Accounts, may have shared some features in common with a *Quistclose* trust, as explained by Lord Millett in *Twinsectra Ltd v Yardley* [2002] UKHL 12, the contemplated Escrow Accounts were of a different nature. He submitted they were designed to ensure funds

remained available to be applied in satisfaction of the Companies' debts to the Lenders, subject to which the monies remained the Companies' beneficial property.

51. In relation to the Particulars of Claim, Mr Curl submitted that in placing reliance on paragraphs 38 and 49 of the Particulars of Claim, the Defendant was overlooking the Claimant's denial that the Defendant operated either account in accordance with the Escrow Letters. He submitted that the Claimant's pleaded case in paragraphs 50 and 51 of the Particulars of Claim was that the Defendant allowed the Escrow Accounts to be used for the day to day trading of the Companies as directed by Mr Weir and had breached its various duties to the Borrowers by releasing monies as pleaded in the Particulars of Claim from paragraph 60 onwards. Mr Curl submitted that having chosen to pay all monies received into a single escrow account for each borrower, it did not lie in the Defendant's mouth to say, opportunistically, that all monies in the account were the property of the lenders.

52. Mr Curl invited the court to take a step back and look at the position in the Companies' insolvent estates, on the Claimant's case. He submitted this was:-
    (i) the Companies have a huge debt to the Lenders;
    (ii) money that should have been kept safe to repay those debts has been misappropriated;
    (iii) those misappropriations could not have happened if the Defendant had complied with its obligations under the terms of the borrowing facility on which it had advised;
    (iv) the Lenders are standing on their security in the liquidations of the Companies and regard themselves as creditors and not owners.

53. In reply, it was submitted by Ms Mirchandani that it was the terms of the Escrow Letters that had been pleaded against the Defendant. It was submitted that the pleaded case was insufficiently clear given the terms of the Escrow Letters and that the Reply case contained a number of elements that were not pleaded.

54. In her skeleton argument, Ms Mirchandani KC submitted that the Reply case could not be a defence to the summary judgment application which was made in respect of the pleaded case set out in the Particulars of Claim. She said the Defendant pursued its summary judgment application against the case actually pleaded in the Particulars of Claim.

In her oral submissions in support of the application Ms Mirchandani submitted that the court should order the Claimant to plead its case including the Reply case so as to set out its case to beneficial entitlement of the monies in the Escrow Accounts operated by the Defendant. In her submissions in reply, Ms Mirchandani submitted that the court had power to give such a direction under CPR rule 24.6 or to make a conditional order.

55. Practice Direction 24 provides:-

"4 Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order as described below.

5.1 The orders the court may make on an application under Part 24 include-

(1) judgment on the claim,

(2) the striking out or dismissal of the claim,

(3) the dismissal of the application,

(4) a conditional order.

5.2 A conditional order is an order which requires a party-

(1) to pay a sum of money into court, or

(2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply."

56. In these circumstances, I must decide (i) whether to grant summary judgment in favour of the Defendant on the Escrow Account issue which will involve striking out or dismissing that part of the claim or (ii) to make a conditional order under Practice Direction 24 paragraphs 4, 5.1(4) and 5.2(2) or (iii) order the dismissal of this part or the whole of the application.

57. 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 that 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."

58. Applying these principles to the issue before me, I do not consider that this is a case that should be decided without the fuller investigation of facts through the trial process. With respect to the pleader, I do consider that there is force in the point that the Particulars of Claim do not make clear that the Claimant is relying on the Loan Agreement pursuant to which the Escrow Letters were stated to be provided. I accept that it is pleaded that the Defendant did not operate the Escrow Accounts as it had agreed and undertaken to do so by the Escrow Letter and allowed the Escrow Accounts to be used for the day-to-day trading of the Companies but it is clear from the Reply case that the Claimant also intends to rely on the Automatic Drawdown provision in clause 3.1 of the Loan Agreement and on the requirement in clause 3.2 to pay all amounts advanced by the Lender pursuant to clause 3.1 in to the Security Account. The Security Account is defined to mean an account in the name of the Borrower. That and the source of the funds is part of the Claimant's case on beneficial ownership.

59. In contrast to an application under CPR rule 3.4(2)(a), on an application for summary judgment the court must take into account not only the evidence actually pleaded before it, but also the evidence that can reasonably be expected to be available at trial. On this application, I must take into account not only the facts and matters pleaded in the Particulars of Claim, but also the Reply case and also the evidence that can reasonably be expected to be available at trial.

60. It is clear from reading the Reply case, that this is not a suitable issue on which to grant summary judgment. In my judgment, the claim as amplified by the Reply case has a realistic prospect of success on the issue of beneficial ownership. I was pressed on behalf of the Defendant to order that the Claimant amend its Particulars of Claim to incorporate the Reply case before giving directions for the filing and service of the Defence. In the context of applications under CPR 3.4(2)(a) to strike out a statement of case, where a statement of case is found to be defective, the court must consider whether the defect might be cured by amendment and refrain from striking out without first giving the party concerned an opportunity to amend it. The application before me is made under CPR rule 24.2 in respect of a particular issue within the claim. It is not a case where without amendment it is alleged that the whole claim will be bound to fail.

61. Further, there is likely to be difficulty in fashioning a conditional order. The application was not supported by a draft order. It is unclear which

parts of the Particulars of Claim would require amendment. The closest Mr Moore in his witness statement in support of the application gets to defining the part of the claim or the issue on which summary judgment on this issue is being sought is to say in paragraph 23 of his statement that he believes that "those parts of the Particulars of Claim relating to the escrow accounts have no real prospect of success". In my judgment, that is not a sufficiently clear formulation on which to attach a striking out or dismissal sanction.

62. On balance, I consider that the better course is to give directions for the filing and serving of a defence pursuant to CPR rule 24.6(a). The Defendant may in its defence, and no doubt will, rely on the issues raised by it in support of this application. It will then be a matter for the Claimant to determine whether to seek permission or agreement to amend its Particulars of Claim.

63. I turn now to the breach of undertaking claim raised by Mr Moore in paragraph 24 of his witness statement in support of the application. Paragraph 6.1 of the Escrow Letters addressed to the Defendant provides:-

"You hereby undertake to perform only such duties as are specifically set out in this letter. In connection with such duties, you shall not be liable to any party for any mistake of fact, error or judgment or act or omission by you of any kind unless caused by your wilful misconduct or negligence."

64. In paragraphs 32 and 47 of the Particulars of Claim it is alleged that the Defendant by paragraph 6.1 gave an undertaking in its capacity as a solicitor to UKPALS and Nero respectively that it would only perform such duties as were specifically set out in the UKPALS and Nero Escrow Letters respectively. In paragraphs 58 and 59 it is alleged that to the extent that the Defendant operated the Escrow Accounts otherwise than in accordance with its duties, it breached its undertaking and such breaches are subject to summary enforcement under section 50 of the Senior Courts Act 1981. It is accepted by Mr Curl that the statutory reference should be to section 50 of the Solicitors Act 1974. In paragraph 138 it is pleaded that the Defendant breached the undertakings particularised at paragraph 58 in the manner particularised at paragraphs 133 to 137 of the Particulars of Claim. Those paragraphs plead breaches under the headings Back-to-back sales, Vine Lodge, Improper payments and Sarah Shuttleworth payments.

65. The point taken by Mr Moore is that the Supreme Court has stated that the court cannot summarily enforce an undertaking from an LLP. He relies on *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at paragraphs 137-148. It was held in that case that when giving "the non-compete undertaking" the claimant had been acting in a business rather than a professional capacity and that the non-compete undertaking was not a solicitor's undertaking that was capable of being subject to the supervisory jurisdiction of the court. It was held per curiam that as the law stands, even if the non-compete undertaking had been a solicitor's undertaking it would not have been enforceable against the claimant, since a limited liability partnership is not subject to the court's inherent supervisory jurisdiction over solicitors, which is confined to solicitors as officers of the court.

66. The Supreme Court at paragraphs 138-140 considered whether it was open to it to extend the court's supervisory jurisdiction to cover incorporated law firms. The Court concluded at paragraph 140 that it was open to them as a matter of developing the inherent jurisdiction of the court to treat a solicitor's undertaking as extending to an undertaking given by an incorporated law firm. At paragraph 142 the court stated that there were powerful arguments both ways. At paragraph 143, the court concluded, with considerable reluctance that this was not an appropriate occasion for making a decision whether, and if so how far, to extend that inherent jurisdiction. This was for three main reasons. First, its views would only have the force of obiter dicta. Secondly, a properly informed decision required the assistance of submissions from the Law Society and other professional or regulatory bodies. Thirdly, although an inherent jurisdiction, the question is probably better dealt with by legislation than by the courts. At paragraph 144 the court stated the result was that, as matters stand, the non-compete undertaking would not have been enforceable against Harcus Sinclair even if it had been in the nature of a solicitor's undertaking, because Harcus Sinclair is not an officer of the court and because Harcus Sinclair LLP, as an LLP, is not a solicitor. At paragraphs 144 and 145, the court held the undertaking was not enforceable against Mr Parker personally because he did not give it in his personal capacity, but only on behalf of Harcus Sinclair.

67. At paragraph 148 the court left open for another occasion the question whether a solicitor may attract the court's supervisory jurisdiction by actively procuring the non-compliance by an incorporated law firm with

an undertaking of a type which, if it had been given by a solicitor, would have been a solicitor's undertaking.

68. Ms Mirchandani submitted that this part of the claim had no realistic prospect of success. She submitted that there needed to be a case pleaded stating why the case falls outside the ratio of *Harcus Sinclair LLP v Your Lawyers Ltd*.

69. Mr Curl relied upon the last sentence in paragraph 140 in which the court said it was open to them as a matter of developing the inherent jurisdiction of the court to treat a solicitor's undertaking as extending to an undertaking given by an incorporated law firm. He submitted that, accordingly, the point remained open and was not a basis for summary judgment.

70. The notes in the White Book 2022 at paragraph 3.4.2 state that a claim may be struck out as not being a valid claim as a matter of law. They state however it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas decisions as to novel points of law should be based on actual findings of fact: see *Farah v Halane & Others* CA 1999 WL 1142461 6 December 1999 Chadwick LJ at 42-43 referring to the observations of Lord Browne-Wilkinson in *Barrett v LB Islington* [1999] 3 WLR 83.

71. I accept that paragraph 140 gives the claimant at least some basis for saying that this is an area in which the law either is developing or may be developed. The courts have emphasised the importance of the principle that the development of the law should be on the basis of actual facts found at trial and not on assumed or hypothetical facts. Further, the issue is a small part of a much wider claim against the Defendant. Further the undertaking itself may give rise to a number of issues. For those reasons I do not consider it appropriate to grant summary judgment on the issue. It is better dealt with as part of the wider claim. It can then be considered alongside the full factual background.

72. The third issue raised by Mr Moore relates to the three property transactions where Mr Weir is alleged to have caused UKPALS to sell property to another of his companies which are then alleged to have promptly sold them on to unconnected third parties at a higher price.

The point raised by Mr Moore is that the Claimant has not set out any clear causation case. This was said by Ms Mirchandani in her skeleton argument to require the Claimant to plead what the Defendant should have done and to whom it should have reported given that there were no other directors or shareholders at the time. This in my judgment is not an issue that is suitable to be determined by way of summary judgment application made prior to the filing of a defence. The position of the Defendant in relation to instructions received from Mr Weir and what may or may not be attributed to the Borrowers are likely to be at the heart of the issues in the claim.

73. For the above reasons I decline to grant summary judgment on those parts of the claim. I will instead direct the Defendant is to file and serve its Defence within a time period to be fixed after this judgment is handed down. I will hear counsel on costs and any further consequential matters.