Neutral Citation Number: [2024] EWHC 876 (Ch)

Case No: PT-2021-000144

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

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

Date: 18 April 2024

Before :

MASTER BRIGHTWELL

- -

Between :

VALBONNE ESTATES LIMITED	**Claimant**
- and -	
UNITED HOMES LIMITED	**Defendant**

- -
- -

Jennifer Meech (instructed by **Howard Kennedy LLP**) for the **Claimant**
Edward Levey KC and Jonathan Chew (instructed by **Lennons Solicitors Ltd**) for the **Defendant**

Hearing dates: 13 and 14 November 2023
Final written submissions: 21 December 2023

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Thursday 18 April 2024

Master Brightwell:

1. The principal issue raised on the applications before the court is the circumstances in which a contract for the assignment of a lease, containing a requirement for the consent of the landlord to any such assignment, is capable of being specifically enforceable before that consent has been given.

2. The claim concerns the leasehold interest in the property known as the Beckton Arms, Beckton Road, London E16 1PY ("the Property"). The freeholder is the London Borough of Newham ("Newham"). By a contract of sale dated 14 January 2015 ("the 2015 Contract"), Cityvalue Estates Limited ("Cityvalue") entered into a contract for the sale of the Property to the claimant ("Valbonne"), for the price of £495,000. The contract provided for a deposit of £24,750, with a stipulation that 10% of the purchase price at all times remained due. The stated Completion Date was 27 February 2015.

3. Clause 11 of the 2015 Contract provides that the agreement is subject to four documents being provided at least 5 days before the Completion Date. The third of these documents is 'Consent in writing from the London Borough of Newham to the sale of the Property to the Buyer'. It is common ground that this consent was required under the terms of the lease concerning the Property but no copy of that lease is before the court. Clause 12 gives a right to rescind the agreement if the required documentation (i.e. to include Newham's consent) was not provided by [*blank*] 2015. It was Valbonne's position in the Beth Din proceedings referred to below that this date is to be read as 31 December 2015.

4. The background was further explained by Bacon J in a judgment dated 9 March 2021 ([2021] EWHC 544 (Ch)), in which she set aside an injunction obtained by Valbonne against the defendant ("UHL") for material non-disclosure:

> '4. Valbonne and Cityvalue are both companies owned by members of the ultraorthodox Jewish community in North London. The leasehold interest in the disputed property was until at least November 2020 owned by Cityvalue.
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> 5. …. One of the conditions for completion [of the contract for the sale of the Property] was, however, that consent to the assignment should be obtained from the freeholder, the London Borough of Newham. Due to difficulties in obtaining that consent the purchase was not completed, and there was then a dispute as to whether the contract had been rescinded. Among other things, the dispute raised the issue of whether Cityvalue had exercised reasonable endeavours to obtain the consent of Newham. In August 2015, with the dispute unresolved, Valbonne registered a Unilateral Notice on the title of the property, which provided notice that there was a contract for sale between Valbonne and Cityvalue.

6. In 2018, having failed to negotiate a settlement of their dispute, Valbonne and Cityvalue agreed that the dispute would be subject to arbitration before the Beth Din of the Union of Orthodox Hebrew Congregations (also known as the Kedassia Beth Din; for convenience I will simply refer this as the "Beth Din"). The arbitration agreement was signed by Mr Halpert, a director of Valbonne, and Mr Haut on behalf of Cityvalue. The Beth Din arbitration panel consisted of three Jewish halachic judges known as Dayanim, one of whom was Dayan Schwarcz.

7. Meanwhile it appears that in 2017 Cityvalue entered into an option agreement with UHL (a non-Jewish buyer) giving the latter an option to purchase the property for a far higher sum of over £2m. Valbonne discovered this in 2019 during the course of the Beth Din arbitration process.

8. On 1 October 2020 the Beth Din concluded the arbitration with a decision finding that Valbonne was entitled to complete on the purchase; that it had to provide the completion funds within 28 days; and that Cityvalue was then to transfer the property to Valbonne. That decision was provided in writing to the parties in Hebrew, and has subsequently been translated into English. I will refer to this as the First Award.

9. For various reasons – again apparently connected with the consents required from Newham – the funds were not transferred by Valbonne within the 28 day deadline, and on 19 November 2020 there was a further hearing of the Beth Din at which representatives of both Valbonne and Cityvalue were present. Those included Mr Margulies on behalf of Valbonne and Mr Haut on behalf of Cityvalue. In addition Mr Spitzer, the solicitor assisting Valbonne with the arbitration proceedings, attended remotely via video link. That hearing resulted in an oral decision which was not ever put in writing by the Beth Din. I will refer to this for convenience as the Second Award, although as I will explain below the effect of this decision is disputed in various respects. What is not disputed is that the Second Award purported to decide that Valbonne should pay over to the Beth Din the sum of £500,000 by way of completion funds for the purchase of the property, following which Cityvalue was required to provide Valbonne with a TR1 transferring the property to it.

10. The representatives of Cityvalue failed to disclose to the Beth Din, at the hearing on 19 November 2020, that Cityvalue had in fact already signed a TR1 form on 4 November 2020 transferring, or purporting to transfer, the property to UHL. The Beth Din was only informed of this subsequently, although the date on which it was told that is unclear.

> 11. Notwithstanding that signed TR1, on 20 November 2020 the solicitors for Cityvalue wrote to the solicitors for Valbonne saying "My client has informed me that your client must first send the deposit to the Beis Din and he will then honor his obligations". On 23 November 2020 Valbonne duly deposited the £500,000 completion funds with the Beth Din. No TR1 was, however, forthcoming from Cityvalue; instead there was then an exchange of emails between the respective solicitors for the parties (Mr Spitzer for Valbonne and Mr Grunhut for Cityvalue) as to the conditions under which the completion funds would be released to Cityvalue.
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> 12. On 29 November 2020, with that point still unresolved, Mr Halpert was told by Dayan Schwarcz that the Beth Din had learned that Cityvalue had purportedly transferred the property to UHL and had signed a TR1 making that transfer. The next day the solicitors for Valbonne requested the urgent return of the completion funds from the Beth Din. Those funds were returned to them on 1 December 2020.
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> 13. The Beth Din then issued a further written decision on 3 December 2020 which I will refer to as the Third Award. Again, this was issued in Hebrew and was subsequently translated into English. The Third Award recorded that Cityvalue had informed it that a TR1 had been signed in favour of a non-Jewish buyer, and that the Beth Din therefore did not have the power to enforce "anything in this matter". The Beth Din therefore stated that Valbonne could bring proceedings against both UHL and Cityvalue in the secular courts, but that any claim for damages against Cityvalue had to be pursued in the Beth Din.'

5. It further appears that, on 4 November 2020, UHL entered into an agreement with a company known as Beckton Development Limited ("Beckton"), for the onward assignment of the interest in the Property. Beckton is the current registered proprietor of the Property. An office copy entry for the registered title shows that it was registered as the proprietor on 15 April 2021, and paid £7 million for the transfer to it (whereas according to a TR1 in evidence UHL appears to have paid Cityvalue £1.1 million for its acquisition of the Property). UHL had first been registered as the owner of the Property, on 10 December 2020.

6. The issue of Newham's lack of provision of consent to an assignment of the Property from Cityvalue to Valbonne arose during the course of the Beth Din proceedings. After the making of the First Award on 1 October 2020, Valbonne's solicitors wrote to the Beth Din, saying that, '…at the heart of these proceedings was [Cityvalue's] failure to provide a licence to assign from the freeholder, who is the local council. We are now liaising with the council's lawyers in this regard on our client's behalf, and we cannot be sure that the licence will be provided to us in the coming days, or even weeks.'

7. It is common ground that, as at 4 November 2020, Newham had not given consent to the assignment of the Property to Valbonne. The effect of that lack of consent upon the equitable rights of the parties in the Property, and the (disputed) degree of uncertainty as to whether such consent would in due course be provided, are at the heart of the present application.

8. In these proceedings, issued on 17 February 2021, Valbonne seeks an order declaring that UHL holds the Property on trust for Valbonne, and setting aside the sale of the Property by Cityvalue to UHL which (purportedly) took place on 4 November 2020. A claim is also pursued against UHL for compensation for dishonest assistance with a breach of trust by Cityvalue, and for damages for an unlawful means conspiracy and for procuring a breach of contract.

Procedural background

9. As indicated above, Valbonne obtained a without notice injunction from Mann J on 10 December 2020, restraining Cityvalue from dealing with the Property (including by selling it to UHL) and restraining UHL from acquiring any interest in the Property. Bacon J set aside that injunction because Valbonne relied on a fabricated document which incorrectly set out what the Beth Din had awarded in the Second Award. Her decision was upheld on appeal: [2021] EWCA Civ 973. It was not suggested that the way in which Valbonne misled the court in 2020 was relevant to the substantive matters before me now.

10. On 11 December 2020, Valbonne issued a claim in the Commercial Court seeking permission to enforce the First Award, as varied by the Second Award (which was made on 19 November 2020, after the date on which Cityvalue sold the Property to UHL). Other than the issuing of the claim form, no steps appear to have been taken in those proceedings. There cannot thus be said to be any order of a secular court granting specific performance of the contract between Cityvalue and Valbonne. Valbonne contends that the awards made by the Beth Din themselves constitute an order for specific performance (alternatively that it was a declaration as to its entitlement to complete its agreement with Cityvalue).

11. UHL filed a defence to the claim on 14 July 2021, and counterclaimed a declaration that Valbonne had no right to purchase the Property and an order requiring the removal of the unilateral notice which remained (and remains) registered in favour of Valbonne.

12. At a costs and case management conference on 18 March 2022, the claim was then listed for trial with directions given for disclosure and witness statements and, until around February 2023, both parties proceeded on the basis that the trial would be heard in May 2023. No application was then made for summary

judgment or to strike out the claim and no suggestion was made that it was inadequately pleaded.

13. On 11 April 2023, I made an order by consent, vacating the trial and listing a further CMC in June 2023. Before that hearing, the two applications now before me were issued. On 12 May 2023, Valbonne issued an application for permission to amend the particulars of claim and to add Beckton as a party. Then, shortly before the listed hearing, UHL issued an application for reverse summary judgment, contending that Valbonne has no realistic prospect of establishing at trial that the Property is held on constructive trust for it.

The summary judgment application: specific performance

14. In the original particulars of claim, Valbonne pleads that UHL holds the Property on trust for it. In the draft amended particulars of claim ("DAPOC") accompanying Valbonne's amendment application, Valbonne seeks to plead at paragraph 11 that:

> 'Cityvalue held the Property on trust for the Claimant, [UHL] held the Property on trust for the Claimant and [Beckton] now holds the Property on trust for the Claimant. Alternatively, the Claimant has a proprietary interest in the Property that survives the transfer(s) of the legal title and is entitled to have transferred the Property to itself on such terms as the court directs.'

15. The trust that is said to exist in favour of Valbonne is the constructive trust which arises in favour of the purchaser of an estate in land, once there is a specifically enforceable contract of sale. It is common ground that such a constructive trust arises, and the vendor becomes a constructive trustee of the property for the purchaser, 'if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract': *Howard v Miller* [1915] AC 318 at 326 (Lord Parker of Waddington).

16. Mr Edward Levey KC, for UHL, contends that no constructive trust ever arose in favour of Valbonne. In doing so, he submits that specific performance will not be granted of a contract to assign a lease where the lease contains a requirement for third party consent, and such consent is not forthcoming. One reason for this is that, where the third party consent is not forthcoming, the vendor-assignee cannot provide a good title. Mr Levey submits that as at 4 November 2020, consent had not been provided (which is not in dispute), and that Valbonne must accordingly, but cannot, show that as at that date specific performance would have been granted nonetheless.

17. The requirement for a landlord's consent to the assignment of a lease has been held to be a condition subsequent: Megarry and Wade, *The Law of Real Property*, 10th edn at 14-008, citing *Lehmann v McArthur* (1868) 3 Ch App 496.

As Megarry and Wade explain, at 14-007, the effect of the condition being a condition subsequent is that there is an immediate binding contract for sale of the Property when it is exchanged, but that there is a right of termination in the event that the condition is not performed. There is an obligation on one or both parties to use their best endeavours to bring about the condition (and the Beth Din proceedings were concerned with the question whether that obligation had been complied with). The contract becomes unconditional if the condition is held void for uncertainty, or where it is waived by the party for whose benefit it was included.

18. Ms Jennifer Meech, for Valbonne, accepts that the condition in the sale agreement for Newham's consent was a condition subsequent. In its skeleton argument for the ineffective hearing in June 2023, UHL had argued that the requirement was a condition precedent, i.e. that no binding contract for the sale of land had ever come into existence as between Cityvalue and Valbonne. The evidence filed in support of UHL's application referred only to the 2015 Contract being conditional, without specifying the type of condition it was said to be. Ms Meech had accordingly, and perhaps therefore not unreasonably, prepared her skeleton argument for this hearing in response to this argument, including reliance on authorities such as *Property & Bloodstock Ltd v Emerton* [1968] 1 Ch 94, where the Court of Appeal explained that a requirement for landlord consent to an assignment of a lease was not a condition precedent.

19. Ms Meech disputed the proposition that a constructive trust arises only once consent has been provided (or that it is certain that it will be provided), submitting that it arises where there is even the possibility of specific performance being granted at a later date.

20. The parties are agreed that a relevant question is whether the 2015 Contract was specifically enforceable as at 4 November 2020, being the date when Cityvalue in fact sold the Property to UHL. Mr Levey submits that the court can determine at this juncture that specific enforcement would not then have been available because, on the facts as they existed as at that date, it would not have been granted. Ms Meech, on the other hand, submits that specific performance would have been granted on 4 November 2020 because a court would then have been satisfied that consent would be given. She submits that this is a question which can be determined only at trial and that the point is therefore not suitable for summary judgment. This is subject to her primary position, noted above, that the mere possibility of specific performance being granted at some point in the future is enough for a constructive trust to have arisen in favour of Valbonne as purchaser under the 2015 Contract.

21. It is therefore necessary to consider the parties' submissions about the case law on the effect of a lack of freeholder consent on an exchanged contract for the assignment of a lease.

22. In *Hyde v Warden* (1877) 3 Ex D 72, a lease contained a covenant not to assign or underlet premises without the previous consent in writing of the lessor, such consent not to be withheld from any assignment or underlease to any respectable and responsible person. Brett LJ held at 81–82 that the court could be satisfied that the lessor could have no objection to the proposed transaction, and the fact no consent had in fact been given was no reason to refuse specific performance:

> 'The first [objection] was that there was no evidence of the consent in writing of Bayntun or his mortgagees to the proposed underlease. We think that this objection cannot be sustained. It was stipulated that such consent should not be withheld from an assignment or underlease to a respectable and responsible person; and no imputation has been made against the respectability or responsibility of the defendant; and consequently any attempt on the part of Bayntun or his mortgagees to eject the defendant, on the ground that no consent in writing had been given, would fail: see *Treloar v Bigge* (1874) LR 9 Exch 151.'

23. In *Clarence House Ltd v National Westminster Bank plc* [2010] 1 WLR 1216, the Court of Appeal was faced with the question whether a "virtual assignment" of the benefits and burdens of a lease by the tenant to a third party constituted an assignment, parting with possession or declaration of trust over the property, against all of which there were covenants in the lease. Ward LJ considered whether there was a trust as between the tenant and the virtual assignee, but held not because the tenant could not be compelled to assign as this would put it in breach of covenant. As he said at [45]:

> '45 There are parallels in that context with the qualified trusteeship which arises on the sale of land, where the vendor is sometimes said to become a trustee for the purchaser as from the date of the contract (with the property correspondingly being at the purchaser's risk). The trusteeship in the case of vendor and purchaser depends on the availability of specific performance: *Howard v Miller* [1915] AC 318, 326. Specific performance would not be granted of the assignment of a lease in the face of opposition from the landlord if that would result in a breach of covenant and a risk of forfeiture.'

24. These authorities suggest that the question for the court when faced with a claim for specific performance is whether the assignee is at risk of the landlord forfeiting the lease for non-compliance with the requirement for prior consent. The court will not force a doubtful title on a purchaser or lessee: see, e.g., *Re Marshall and Salt's Contract* [1900] 2 Ch 202 at 204, again a case where landlord consent had not been provided. If the court can be satisfied that the landlord would have no grounds to object, specific performance will be granted, even if the landlord has not yet given its consent.

25. In *Lehmann v McArthur*, specific performance of a contract to assign a lease was refused where the lessor refused to give consent. Page-Wood LJ indicated that the plaintiff would be entitled to an order only where the assignor had precluded the plaintiff from obtaining his just rights, i.e. by failing to use his best endeavours to obtain consent. Selwyn LJ indicated that the defendant assignor had done all he could do and had made repeated attempts to obtain the landlord's licence, and the plaintiff had not established that the landlord's refusal to give that licence was unreasonable and vexatious in the circumstances. The clear implication is that specific performance at least might have been ordered had the plaintiff been able to establish either that the refusal was unreasonable, or that the assignor had not done all he could do in order to obtain consent. Such a conclusion would be consistent with the decision in *Hyde*. The difference is that in *Hyde* there was no suggestion that the landlord could in fact have any grounds to refuse to give consent, even though the grant of consent was still outstanding.

26. Byrne J in *Marshall and Salt* put the test this way, in a case where the lessor had objected to an assignment:

> 'What I have to consider is whether the objection taken by the lessor is so unreasonable upon the face of it that I can say there is not (to use the words of Alderson B in *Cattell v Corrall* (1840) 4 Y & C Ex 228 at 237) "a reasonable decent probability of litigation" incurred by the purchaser should he complete under present circumstances.'

27. Mr Levey also relies on the decision of the Court of Appeal in *J Sainsbury plc v O'Connor* [1991] 1 WLR 963, concerned with the meaning of "beneficial ownership" for tax purposes, for the proposition that beneficial ownership in property cannot pass until a condition has been satisfied, and that there is no distinction between beneficial and equitable ownership. At 978-979, Nourse LJ said as follows:

> 'Another case to which section 532(3) [Income and Corporation Taxes Act 1970] can apply is where company A enters into an unconditional contract to sell shares in company B to company C. Shares in company B not being readily obtainable in the market, such a contract is specifically enforceable at the suit of company C. By parity with contracts for the sale of land, it has long been held that the right to specific performance gives company C the equitable interest in the shares, company A becoming a qualified trustee in the sense that it must preserve the shares for company C while remaining entitled to any dividends accruing before completion.
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> ….

> Then take the previous example, but suppose that the contract is subject to a condition precedent. Until the condition is satisfied the equitable interest in the shares will not pass to company C. It will remain in company A. What ground is there for thinking that the beneficial ownership of the shares will not also remain in company A? In order to answer that question we must look to *Wood Preservation Ltd v Prior* [1969] 1 W.L.R. 1077. That is a difficult decision. Goff J. at first instance did not distinguish between the beneficial ownership of the shares and the equitable interest in them. In my view he was right not to make that distinction. However, he thought that, because the purchaser could obtain specific performance of the contract by waiving the condition precedent at any time, "the beneficial interest had sufficiently passed to the purchaser." I respectfully think that that was an error on the part of the judge. Unless and until the condition was either waived or satisfied there could be no right to specific performance and no passing of the equitable interest.
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> It seems that Goff J.'s error was perceived by this court who, in the process of correcting it, gave a decision whose effect was to draw a distinction between the beneficial ownership of the shares and the equitable interest in them. Their approach was bound, as the present case demonstrates, to lead to fine distinctions between different cases in the application of section 532(3). Shortly stated, their view was that Parliament could not have intended that the concept of beneficial ownership should apply to the "mere legal shell" of ownership which the vendor there retained. Lord Donovan, at any rate, was prepared to accept that this view might involve a suspension of beneficial ownership.'

28. Nourse LJ came to the conclusion that the decision of the Court of Appeal in the *Wood Preservation Ltd* case was binding for what it decided, which was the meaning of "beneficial ownership" for the purposes of a specific taxing statute and, more specifically, whether a taxpayer who retained more than mere legal ownership could be said to be a beneficial owner for tax purposes. He does not address the meaning of the expression "equitable interest" as discussed in the context of the acquisition for consideration of interests in land; rather, he explains how that expression is apt to mislead when considering whether there is, for tax purposes, "beneficial ownership". In that fiscal context, separation of beneficial ownership and equitable interests opens up, as he says, "fine distinctions". Given that context, the decision is of limited assistance here. What Nourse LJ says about the right to specific performance arising only when a condition has been satisfied is an orthodox statement, although the present case is concerned specifically with a condition subsequent.

29. On this point, Ms Meech relies on a series of cases for the proposition that a vendor-purchaser constructive trust arises in favour of the assignee under a contract for the assignment of a lease as soon as the contract containing a

condition of landlord consent is made and as long as it is possible that the condition will in due course be satisfied. She relies on *London and South Western Railway Company v Gomm* (1882) 20 Ch D 562, where it was held by Sir George Jessel MR and Sir James Hannen, when considering whether an option to repurchase land could run with the land, that such an option, just like a contract for the sale of land, creates an equitable interest in the land.

30. Likewise, in *Gordon Hill Trust Ltd v Seagall* [1941] 2 All ER 379, the Court of Appeal made reference to the nature of the purchaser's interest in land after a conditional contract has been entered into. A contract was made for the purchase of a building used as a school, subject to completion not taking place until the vendors had found suitable alternative accommodation (this being a condition subsequent). Ms Meech relies on the following words of Luxmoore LJ, at 388:

> 'As a result of entering into that contract, the defendant, and through him the company of which he was a director, became the owner in equity of the property, certainly as from the date of the contract, for the vendors were precluded from dealing with that property in any way except with the consent of the defendant or the company.

31. The Court of Appeal overturned a finding that the appellant purchaser was liable in deceit to a non-party to the contract, he having represented that he was the owner of the property in order to induce that third party to negotiate. Luxmoore LJ held that 'he was in fact the owner of the property', i.e. in equity, as a result of the contract for sale. I would note, however, that the purchasers had earlier commenced an action for specific performance of the contract. Whilst the judgment does not say so in terms, it is implicit in the decision that this action was not successful as the appellant had not completed the purchase. Luxmoore LJ considered that the purchaser in good faith believed that he had a right to specific performance. He made quite clear that, if the vendors made reasonable attempts to find alternative accommodation but failed, then they would have a defence to a claim for specific performance:

> 'Clause 6 [of the contract], which I have just read, excuses the vendors from completing the purchase until they have made all reasonable endeavours to find suitable accommodation and those reasonable endeavours have been successful, but, since completion is not to take place until the suitable accommodation is found, the defendant cannot insist on completion until such accommodation as is described is in fact found, provided, of course, that the vendors have made every reasonable effort to find that accommodation. If, for instance, they make no attempt at all to find such accommodation, the clause will afford no protection to the vendors in an action for specific performance.'

32. Accordingly, becoming the owner of property in equity (in the sense in which that expression was used in *Gordon Hill v Seagall*) by virtue of a sale contract is a necessary but not a sufficient condition for the grant of an order for specific performance.

33. In *Chattey v Farndale* (1998) 75 P & CR 298, the question arose as to the circumstances in which a purchaser's lien would arise. There, an agreement to purchase a flat in the course of construction was conditional on the vendor obtaining planning permission. That consent was granted on 11 August 1988. There was an issue whether the right to a purchaser's lien was coterminous with the right to specific performance. As Morritt LJ said:

> 'Farndale does not contend that it is necessary that the contract should be specifically enforceable at the time the benefit of the lien is claimed nor when the money for which it is claimed to be security was paid, rather that unless and until the contract is specifically enforceable by the purchaser the lien cannot arise. Thus Farndale accepts, subject to its other submissions, that a lien arose when the contract became unconditional on August 11 1988, but by then it would necessarily be subject to the debenture. They also accept that if the contract is once specifically enforceable so that the purchaser's lien arises the lien is not lost if the right to specific performance is subsequently lost by, for example, delay.
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> ….
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> The statement of Sir George Jessel [in *London and South Western Railway Company v Gomm*] shows that the purchaser has an equitable interest or estate in the land if he has a right to call for the legal estate, albeit future and conditional, which the vendor has no right to refuse. In this case the vendor was contractually bound to use his best endeavours to obtain a satisfactory planning consent on the grant of which the contract became unconditional. The equitable interest or estate of the purchaser was one which entitled him to seek specific relief in the form of injunctions so as to protect that right notwithstanding that a claim for specific performance might have been premature.'

34. It is thus clear that the right to specific performance arose only when planning consent was given, and not when the purchaser acquired an equitable interest or estate in the land. The right arose when the condition was satisfied. Morritt LJ went on to say this:

> 'In my judgment, the circumstances in which a purchaser's lien will arise are not limited to those in which the contract is or has been specifically enforceable but include those in which there is or has been a right to call for the legal estate whether presently, in the future or conditionally so as to

> give rise to the equitable interest or estate to which Sir George Jessel referred. I accept the submissions for the plaintiffs in this respect. This conclusion is in line with that of Blackburne J in dealing with the issue of conditionality. I have not previously referred to the judge's conclusion for he did not deal with the point expressly in connection with the submission for Farndale that the existence of the lien depended on the specific enforceability of the contract. At p76, having referred earlier to *London & South Western Railway Co v Gomm* and *Whitbread & Co Ltd v Watt* [[1902] 1 Ch 835] he said:
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> > "In my view, the plaintiffs became owners in equity of the premises (of which they were contracting to take subunderleases) as soon as their contracts were entered into and, subject to the effect of clause 21, became entitled to liens on those properties on payment of their initial deposits, and it matters not that, until August 1988, their contracts remained purely conditional."
>
> Provided that ownership in equity is understood to refer to the equitable interest or estate to which Sir George Jessel referred in *London & South Western Railway Co v Gomm* I agree with the judge.'

35. This again makes plain that the "equitable interest" which a purchaser acquires under a contract subject to a condition subsequent is not coterminous with the purchaser's entitlement to a decree of specific performance. On analysis, the cases relied on by Ms Meech do not support Valbonne's primary position, that a constructive trust arises on an exchange of contracts in cases where the contract is subject to a condition. Rather, they support the conclusion that specific performance is not available until the condition has been satisfied even though the purchaser has some form of equitable interest before then.

36. I therefore do not agree with the proposition that a constructive trust arises in favour of a purchaser whenever there is a mere possibility that specific performance will be available to the purchaser at some point in the future. In each of the cases relied on by Valbonne, in which the purchaser was held to be the owner of property in equity or to have an equitable interest in land distinct from and pre-dating the right to specific performance, the putative purchaser claimed to be entitled to a right other than the right of a beneficiary under a trust. The purchasers in each case did not claim to be entitled under a constructive trust, nor did they claim to be beneficial owners. The fact that an equitable interest arises on exchange of contracts in the case of a contract subject to a condition subsequent is quite consistent with such a contract being legally binding as soon as it is exchanged. Nothing in the cases relied on by Valbonne suggests that the vendor under such a contract is immediately constituted as a constructive trustee, or that the purchaser becomes the beneficial owner, and that phrase is conspicuously absent from the decisions when explaining the

rights that had arisen. Such a conclusion would also be contrary to the House of Lords authority of *Howard v Miller*, and to the other authorities relied on by UHL, which predicate the existence of a trust relationship on the availability of specific performance.

37. Ms Meech suggests that this means that if a landlord has an unconditional right to refuse consent and is considering taking back possession the beneficial interest in the property could pass backwards and forwards between the vendor and the purchaser as the landlord weighs up its options. I disagree. Even where a landlord has such an unconditional right, which is not the case where the right is subject to a requirement of reasonableness, it will (at least where a contracting party is not in default by having failed to take steps to obtain the consent) only be when the landlord decides to provide that consent that specific performance is available. Once that consent has been given, or at least a decision made that it will be given, it could be said with certainty that the assignor could give good title. Given that I have not been told otherwise, I assume that the right of Newham in the present case to refuse consent is subject to a test of reasonableness.

Is the claim of specific enforceability fanciful?

38. I therefore proceed on the footing that, in order to succeed, Valbonne must be capable of establishing at trial that specific performance would have been granted in its favour as at 4 November 2020. UHL submits that Valbonne has no realistic prospect of showing that. In doing so, it relies on the well-established test in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], which does not require to be set out in full here. In summary, Mr Levey suggests that taking full account of the further evidence that may be available at trial, the documents produced by Valbonne (including those put into evidence after the hearing, ultimately without objection), it is fanciful to suggest that Valbonne could establish that specific performance would have been available at the relevant date.

39. The evidence and other facts relied on by Valbonne are, in summary, the following:

    i) The Beth Din determined that Cityvalue 'had not done everything in [its] power to obtain the consent [of Newham].' Even though this finding will not be binding on UHL, UHL does not suggest that such a finding could not be made at trial in these proceedings. I would note that the Beth Din appears also to have said that 'it is not at all clear that [Cityvalue] could not obtain the licence'.

    ii) Evidence of Valbonne's ability to comply with the covenants in the lease was available, in the form of evidence of the means of its director,

Alexander Halpert, who filed such evidence in support of the December 2020 application for an injunction. Details were also given in correspondence in 2019, which was before the Beth Din.

iii) Newham has not objected to the assignment of the Property, first to UHL and then on to Beckton. At the relevant time, both companies had filed dormant accounts with Companies House. Valbonne suggests that UHL must accordingly have considered consent would have been given when it purchased the Property from Cityvalue, and that this is relevant to the question whether consent would have been given to an assignment to Valbonne.

iv) In 2015, Newham indicated to Valbonne that, upon their stated fees being met, they would prepare draft licences for approval (a retrospective application for a licence to underlet also being sought).

v) There was direct correspondence between Newham and both Valbonne and Valbonne's solicitors in the period around, and after, the time of the Beth Din's First Award, up until 2 November 2020 when Cityvalue indicated that it had already sold and transferred the Property to UHL (i.e. two days before this sale in fact apparently took place). UHL's solicitors were also in contact with Newham at this time, and Newham's solicitor was seeking to ascertain with whom she should deal.

vi) Valbonne indicates that its representative who was in direct contact with Newham in October 2020, Bernard Margulies, will give evidence that he was then told by Newham that 'Newham were fine with granting consent and would do so', and that Newham wanted to discuss a purchase of the leasehold interest, and that this would be discussed further once completion had taken place.

vii) On 23 October 2020, the solicitors then acting for Valbonne wrote to the Government Legal Department, seeking confirmation that the disclaimer of the Property was annulled pursuant to the Order dated 1 July 2019 which restored Cityvalue to the Register of Companies. Valbonne also sought confirmation why the lease had been disclaimed and, presumably, assessed to be valueless.

40. In light of the authorities relied on by UHL, therefore, what is the test to apply in the present case, where the question arises retrospectively as to whether specific performance would have been available at a date in the past, i.e. 4 November 2020?

41. Ms Meech submits, in the event I am against her on her primary position, that the question is whether it can be shown that the landlord would not be entitled

to refuse consent, either because the refusal of consent would be unreasonable or because the landlord has waived the right to refuse it. Alternatively, relying on *Re Marshall and Salt's Contract* and *Hyde v Warden*, the question is whether the landlord would be entitled to rely on a breach of the assignor's covenant against assignment in order to forfeit the lease. Ms Meech also submits that, even if it must be a racing certainty that consent would in fact have been granted, that was the position until Cityvalue told Newham to stop corresponding with Valbonne on 2 November 2020, and that Valbonne has a realistic prospect of establishing at trial that consent would have been granted.

42. Mr Levey submits that neither the possibility nor the likelihood of permission being granted at some point in the future would be sufficient. In his supplemental written submissions, in his response to those on behalf of Valbonne, he disavowed as a shorthand the suggestion made at the hearing that it must be a racing certainty that consent will be provided. The defendant suggests that the question for the court is: would the withholding of consent, as at the relevant date, be unreasonable such that the condition can be treated as having been met? In other words, UHL appears to contend that there could have been reasonable grounds for Newham to have withheld consent to the assignment as at 4 November 2020, and for that reason it cannot be concluded that specific performance would have been available to Valbonne as at that date.

43. While this is perhaps not stated in terms, it is also apparent from UHL's further written submissions that Mr Levey submits that Newham must have been in an actual position to grant consent as at 4 November 2020. Accordingly, he says that the evidence relied on by Valbonne suggests both that it was not ready to complete, and also that Newham was not yet in a position to make a decision whether to grant to consent. Valbonne was not ready to complete not least because of uncertainty regarding the reason for the Crown's disclaimer of the lease following the dissolution of Cityvalue. It also needed to deal with a charging order made in respect of the Property in favour of Newham due to a default on the part of Cityvalue. And Newham was not able yet to indicate whether it would grant consent in favour of an assignment to Valbonne, because the information it required in order to do so was not in its possession. Valbonne's solicitors were in this period, after the First Award, asking Newham what would be required in order for consent to be granted. No undertaking as to fees had been provided. (In fact, before 4 November 2020, it appears that Cityvalue had told Newham that it had already completed on a sale to UHL, and Newham had thus told Valbonne's solicitors that it would no longer communicate with them.)

44. Because Newham had not, as at that date, consented to an assignment and because Newham might have had a number of reasonable bases for refusing

consent, UHL submits that the court would not grant specific performance 'as matters stood on that date'.

45. In particular, reliance is made by UHL on *Hyde v Warden*, where the court was able to treat the condition for assignment as satisfied, because it could form its own view as to whether the assignor was a respectable and responsible person. The Court of Appeal was satisfied that the freeholder could have no grounds to consider that the defendant (who resisted specific performance) did not meet this description. Furthermore, the case of *Ganton House Investments Ltd v Corbin* [1988] 2 EGLR 69 is not as Valbonne suggests an example of the court making an order for specific performance even though consent had not been granted; the case report makes clear that it probably had been granted already.

46. On the basis of the law as I consider it to be, i.e. that a constructive trust arises only where specific performance would be granted, it is common ground that the court must in the circumstances of this case retrospectively carry out an evaluation of whether such a remedy would have been available as at 4 November 2020. The real difference between the parties, even though it is not expressed in quite this way, is whether the court must carry out that evaluation on the footing that Newham is making its decision only on the basis of information that was before it on 4 November 2020, and that Valbonne's readiness and willingness to complete is to be assessed on the basis of the statements that it had made to third parties in the period shortly before then. If the decision is to be made on such footing, then UHL should prevail. Newham had not been provided with all the information it might (and, probably would) reasonably require in order to make a decision whether to consent. And Valbonne had already, on 19 October 2020, written to the Beth Din to ask it to vary the First Award because it was not ready yet to complete within 28 days, this not least because of the need for consent from Newham.

47. Neither party referred me to authority as to how the court is retrospectively to carry out the inquiry as to whether specific performance would have been available at an earlier date, in circumstances where a condition subsequent has not been complied with but where it is alleged by one party that this was caused by the default of the other, who was required to bring about its fulfilment. It seems to me that the authorities to which I have been referred do not preclude an alternative approach. This is an evaluation of whether, objectively, Newham reasonably could and would have declined to provide consent to an assignment to Valbonne as at 4 November 2020 on the basis of the facts as they stood at that date, regardless of whether or not those facts had yet been communicated to Newham. This would also entail an evaluation of what Newham's own approach to the giving of consent would have been, it being assumed of course that it would act reasonably. UHL's position does not take account of the indication in *Lehmann v McArthur* that specific performance may be available

where the person required to seek the consent of the freeholder has not done all they could do in order to obtain that consent. Likewise, in *Gordon Hill Trust Ltd v Seagall*, it was indicated that specific performance may be available as against a party who had failed to take steps to bring about a condition subsequent.

48. The difficulty with the approach urged on me by Mr Levey is, accordingly, that it is potentially unfair to a party in the position of Valbonne, who (for present purposes assuming facts in its favour) has been precluded from obtaining its contractual rights as a result of its vendor's defaults. Valbonne certainly has a realistic prospect of establishing that, as the Beth Din found, Cityvalue was at fault for the failure to obtain Newham's consent very much earlier. It also seems likely at fault for allowing itself to be dissolved and thus causing the Property to pass by way of *bona vacantia*, and for the fact that a charging order in favour of Newham was registered against the title to the Property. If one considers the terms of Valbonne's 19 October 2020 letter to the Beth Din, relied on heavily by UHL as demonstrating that Valbonne was not ready, willing and able to complete on 4 November 2020, it sets out a series of such matters which appear to be the responsibility of Cityvalue. UHL may well retort that this is all irrelevant but a party in Valbonne's position has never had the opportunity to go to court to seek an order for specific performance; its case is that the rug was pulled from under it by a party in default in a number of respects. Mr Levey says that Valbonne has not suggested that it would have been unreasonable for Newham to refuse consent as matters stood on that date. I do not agree. It is implicit in Valbonne's position, that consent would have been given, that Newham could not reasonably have refused to give it. In any event, if it is possible positively to find that Newham would have consented, it may be irrelevant that it might have had grounds to refuse.

49. I accept, of course, the general proposition that a claimant is entitled to an order for specific performance only when it is ready, willing and able to perform its own obligations: see, e.g. *Mugalsingh v Juman* [2015] UKPC 38 at [31] (Lord Neuberger). In this case, however, and unlike the position in the cases to which I have been referred, the court is not concerned with whether a party is now so ready, willing and able to complete. The court is instead concerned with a situation where a retrospective assessment is to be made about whether it would have been in such a position. The relevant test may well be whether, if Valbonne had been required to pin its colours to the mast on the relevant date and indicate that it was ready, willing and able to complete, it would have been able to do so and would have done so. If that is right, and if the test is also whether Newham might (reasonably) have refused consent and if that question can be answered in the negative, then it may well be possible to determine now that specific performance would have been available to Valbonne as at 4 November 2020.

50. I consider that *Hyde v Warden* demonstrates that the assessment is an objective one. It was not in that case suggested that the freeholder had to be in a position to form his own assessment of whether the putative assignee was respectable and responsible. Accordingly, it did not matter that the freeholder had not been provided with the information necessary to enable him to make that assessment. The court was willing to determine that the criteria were satisfied without the freeholder playing any role at all. I consider that there is a good argument that the relevant test is whether Newham would have given consent on the basis of the objective facts. Those facts would include the information which Valbonne could have provided (and would have provided but for Cityvalue's defaults) and the evidence of Newham's stance in relation to whether consent might be given.

51. The evidence presently before the court suggests that it may be possible to form an assessment that, once provided with financial information and payment of its fees, Newham not only might but would have consented. This may be the correct inference to be drawn from its conduct in relation to UHL and Beckton. Furthermore, and as Ms Meech submits, further evidence may be available at trial, not least from Newham itself. I consider that disclosure given by UHL and Beckton of their communications with Newham may also be very relevant.

52. A further factor, implicit in what I have said above, leads me to the conclusion that I cannot be satisfied at this stage that Valbonne has no realistic prospect of establishing at trial that specific performance would have been available as at 4 November 2020. As I have indicated, how the court should retrospectively approach this question is not directly addressed in any authority to which I have been referred. The court should be reluctant to determine on a summary basis an involved question of fact when there is uncertainty surrounding the applicable legal test. As I have said, I consider that the court at trial may well be able to conclude, on a balance of probabilities, that Newham not merely might but would have consented on that date if it had known the true facts (and not the, at least arguably, false facts provided to it by Cityvalue). Alternatively, Valbonne may have been entitled to specific performance regardless because Cityvalue had not taken reasonable steps to obtain Newham's consent. The court may also conclude that Valbonne would have been ready, willing and able to complete if this consent (which was at the very heart of the Beth Din proceedings) was not an issue. This may well suffice for the court to conclude that a constructive trust had arisen in favour of Valbonne as at 4 November 2020, for it might conclude that Cityvalue would have risked committing no breach of its covenants under the lease in completing the assignment, or that it had lost the benefit of the condition subsequent by its own defaults. I consider that the precise legal test to apply in these circumstances should be considered by a judge at trial, with the benefit of findings of fact on the involved and controversial questions arising in this case.

Other arguments

53. Both in support of its summary judgment application and in response to Valbonne's amendment application, UHL suggests that Valbonne no longer relies on the 2015 Contract, but on the First Award. Valbonne seeks to amend the particulars of claim to plead (at paragraph 51) that the effect of the First Award 'was either (a) an order for specific performance of the Sale Contract; or (b) a declaration as to the Claimant's entitlement to complete the Sale Contract'. Particularly in light of what is said at paragraph 51(b), it is clear to me that Valbonne does continue to rely on the 2015 Contract, i.e. in addition to but separately from the First Award.

54. I was not referred to any authority to suggest that an order of a non-secular court such as the Beth Din is capable of constituting an order for the purposes of this court. Certainly, I accept Mr Levey's submission that UHL is not bound by the decision of the Beth Din. Valbonne also seeks to amend to plead (at paragraph 76) that the First Award was either an award of specific performance or a declaration that Valbonne was entitled to specific performance. It seems to me that as between Valbonne and Cityvalue, the First Award may have been capable of being treated at least as a declaration to this effect. UHL argues that the First Award cannot have been an order for specific performance because it did not deal with the consent requirement. This is, on its face, a convincing argument but, if correct, would lead back to the alternative plea that the First Award declared the 2015 Contract still to be in existence.

55. UHL also argues that by its terms the First Award varied the 2015 Contract, by providing for payment within 28 days, including the balance of the deposit which under special condition 8 was payable immediately. This provides the basis of an argument that, because the sale contract was varied, Valbonne no longer enjoys the protection of the unilateral notice, or UN1, which was registered against the title to the Property on 21 August 2015. This notice remains registered, and UHL has counterclaimed an order requiring it to be removed from the register.

56. Mr Levey submits that, as the 2015 Contract was varied by the First Award, any variation of it would need to be registered in order for it to retain priority over interests protected by later registration (meaning, for present purposes, the unilateral notice registered by UHL).

57. Furthermore, he submits that the 2015 Contract was registered with a copy on the register, meaning that any interested party could inspect the contract and form its own view as to its interpretation. UHL says that it is not open to a person who has registered a right under a contract to attempt to rely on a private and unregistered arbitration award to alter the position on the face of the register.

58. I see a number of potential difficulties with this argument. First, in the way it is pursued by UHL, it is predicated on Valbonne relying no longer on the 2015 Contract but on the First Award. As I have indicated above, one of the ways in which Valbonne seeks to pursue its claim in relation to the First Award is that it declared the continuing existence of the 2015 Contract. In doing so, Valbonne does not necessarily, as UHL suggests, rely on the First Award directly but on the contract itself. It is true that in other provisions of the draft amended particulars of claim, Valbonne relies on the First Award as an order for specific performance, but that is not the only way in which it pursues its case.

59. Secondly, and following on from that, it is not clear to me that that the parties to the contract, i.e. Cityvalue and Valbonne, have agreed to a variation of the 2015 Contract. They undoubtedly agreed through an arbitration agreement to submit to the jurisdiction of the Beth Din. On UHL's case, the First Award constituted an option to complete in the 2015 Contract within a certain timescale. Especially in the absence of an order making the First Award (or any award) an order of the court, it is not obvious to me that the 2015 Contract had been varied by agreement.

60. Thirdly, I agree with Mr Levey that the First Award does not on its face appear to be an order for specific performance. The argument that it varied the 2015 Contract as such an order (and thus required to be registered accordingly in order to maintain priority) is thus not a compelling argument. It is furthermore not an order of a court for the purposes of section 87(1)(b) of the Land Registration Act 2002. This does not point towards a requirement that it be registered in order for priority to be maintained.

61. Fourthly, I have been referred to no authority as to what constitutes the variation of an interest which has the effect of removing the priority which its protection by unilateral notice had previously afforded. Ruoff and Roper, *Registered Conveyancing*, says this at 42.012:

> 'Where an interest has been protected on the register by a notice and that interest has subsequently been varied, the priority of the interest as so varied can, subject to the considerations as to the priority already obtained by the entry of the original notice, normally be protected by one of two methods. An application may be made to enter a new notice in respect of the interest as varied in place of the existing notice by seeking cancellation or removal of the existing notice as may be appropriate. Alternatively, application may be made for the entry of an additional notice in respect of the varied interest. Where a notice, other than a unilateral notice, is entered in respect of a variation of an interest protected by a notice the entry in the register must give details of the variation.'

62. The references given in footnotes are to the procedure to be adopted in order to have an entry removed from or added to the register. It is not obvious to me that even if (contrary to my doubts, expressed above) there was a variation of the 2015 Contract, it was a variation of "the interest" arising under the contract. If a contract is specifically enforceable, a minor amendment to the terms for payment will not itself affect the nature of the interest held by the party whose rights would have priority by registration in the first instance. The suggestion that a party, being the beneficiary of a constructive trust to give effect to a specifically enforceable contract for the sale of an interest in land, can lose priority to a subsequent purchaser by agreeing merely to a modification to the date for payment is a striking suggestion. UHL's submissions assume that this would be a sufficient variation for these purposes, rather than explain on the basis of principle and authority why this is so. I do not consider this point, which I consider to be novel, to be suitable for determination by summary judgment.

63. Fifthly, UHL relies on the fact that a copy of the 2015 Contract is itself registered with the UN1, suggesting that it is unprincipled that any amendments to that contract should have effect whilst not being visible on the register. The Court of Appeal has to an extent left open the question whether a failure accurately to identify the interest protected by a unilateral notice causes priority to be lost: see *Bank of Scotland plc v Joseph* [2014] 1 P & CR 18 at [27] (Patten LJ). It is clear from that decision that there is no policy in the legislation that the register must in all respects be accurate in order for priority to be achieved; the obligation is to include such details of the interest as the registrar considers appropriate: Land Registration Rules 2003, r.84(5). This again returns attention to the question whether the "interest" has in any event been varied. Even without this final point, I am satisfied that this point is not suitable for summary judgment. For that reason I have not considered it necessary to seek the parties' comments on the *Joseph* decision.

Other claims

64. Valbonne also claims equitable compensation and/or damages against UHL for dishonest assistance in a breach of trust, unlawful means conspiracy and for the tort of procuring a breach of contract. UHL seeks order striking out the claims in conspiracy and procurement as it contends that the claims are not properly particularised, and therefore the draft amended particulars disclose no reasonable grounds for pursuing those claims (CPR r 3.4(2)(a)). There is no application by Valbonne to make any material amendment to the short paragraphs in which those claims are made.

65. The unlawful means conspiracy claim is pleaded in this way:

> '94 Further and in the alternative, the First Defendant participated in an unlawful means conspiracy with Cityvalue in that:

(i) There was an agreement between the First Defendant and Cityvalue for the First Defendant to purchase the Property;

(ii) In pursuing the said agreement there was an intention on the part of the First Defendant to injure the Claimant; and

(iii) Pursuant to the agreement the First Defendant and Cityvalue carried out unlawful acts in pursuing the sale of the Property when the First Defendant was aware that the Claimant had a contractual right to purchase the Property and that a purchase of the Property would be a breach of trust and breach of contract on the part of Cityvalue.

As a result of the said conspiracy the Claimant has suffered loss in that at present it is unable to purchase the Property and unless the court finds that the Property is being held on trust for the Claimant, it will be unable to purchase the Property and either sell it on or develop it. The Claimant will have been prevented from renting out the Property pending obtaining the freehold of the Property and in the event of obtaining the freehold, developing the Property.'

66. And the claim alleging the procuring of a breach of contract is pleaded thus:

'95 Further and in the alternative in purchasing the property the First Defendant procured a breach of contract in that:

(i) The Claimant had a contract to purchase the Property from Cityvalue;

(ii) In selling the Property to the First Defendant on 4 November 2020, Cityvalue was acting in breach of contract; and

(iii) The First Defendant knew that the Claimant had exchanged contracts, was in arbitration proceedings to uphold the continued existence of the said contract and that the Beth Din had made an award on 1 October 2020 in favour of the Claimant.

(iv) The First Defendant intentionally caused Cityvalue to breach its contract with the Claimant.

96 As a result of procuring the breach of contract the Claimant has suffered loss in that at present it is unable to purchase the Property and unless the court finds that the Property is being held on trust for the Claimant, it will be unable to purchase the Property and either sell it on or develop it. The Claimant will have been prevented from renting out the Property pending obtaining the freehold of the Property and in the event of obtaining the freehold, developing the Property.'

67. It is immediately apparent that the claim in unlawful means conspiracy is not particularised at all, and certainly not adequately. No explanation is provided why UHL had an intention to injure Valbonne, and no details of the allegedly unlawful means are given. Furthermore, it must be alleged that there was an intention to injure by the use of unlawful means (and why): see *Kuwait Oil Tanker SAK v Al Bader* [2000] All ER (Comm) 271 at [108] (Nourse LJ). The pleading lacks any such allegation or particularisation.

68. As to the claim for procuring a breach of contract, I agree with Mr Levey that the particulars of claim do not at present state what are the acts alleged to have been carried out by UHL which constitute persuasion, encouragement or assistance, as is required in order for the tort to be committed. Furthermore, the alleged acts must have 'a sufficient causal connection with the breach by the contracting party to attract accessory liability', and have operated on the will of the contracting party: see *Kawasaki Kishen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [32]–[33] (Popplewell LJ). For the tort to be made out, the person committing the relevant acts must have knowledge of the contract. On the facts of this case, it would be relevant to assess the knowledge of UHL (as attributed to it) on the date of the acts in question. In particular, Mr Levey comments on the date of the First Award (1 October 2020) and the fact that the 28-day period for complying with it (or, depending on the analysis, exercising the option it purported to provide) had expired. That is a further reason why this aspect of the claim cannot proceed without particularisation of the acts of persuasion, encouragement or assistance on which Valbonne relies.

69. I bear in mind that UHL, for whatever reason, initially took no objection to this pleading, and the claim had originally been close to trial with the relevant paragraphs essentially in the form set out above. For the reasons I have briefly stated, those paragraphs are liable to be struck out in their present form. As a general rule, however, a party who faces strike out in this way should have an opportunity to seek to amend in order to remedy the defect. I will give Valbonne such an opportunity if it wishes, and will therefore direct that Valbonne shall if so advised have permission to serve a further amended draft particulars of claim, amending paragraphs 94 to 96. If UHL does not consent to any such amendments, the court will then need to determine whether they should be permitted. In the absence of such amendments being provided, those paragraphs will stand struck out.

Disposal of the applications

70. For the reasons I have set out above, I will dismiss UHL's application for summary judgment. That is to be subject to the provision mentioned in the paragraph above concerning Valbonne's plea of unlawful means conspiracy and procurement of breach of contract.

71. Mr Levey indicated that, in such circumstances, UHL would not oppose the joinder of Beckton as a party, which I will order accordingly. UHL opposed Valbonne's amendment application on the footing that the court could determine now that no constructive trust had arisen in its favour. It was not submitted that the amendments, or any of them, should be disallowed on another basis. Subject to one point, I will accordingly grant the amendment application, which will again be subject to the provision concerning the claims in unlawful means conspiracy and procurement of breach of contract. Mr Levey has submitted in response to the draft of this judgment that as UHL maintained that the claim that the First Award was not an order for specific performance, what I have said in the judgment above justifies my not granting permission to include that allegation. I consider it appropriate to afford Ms Meech an opportunity to comment on this point more fully than the brief response received from her solicitors before I determine this consequential matter.