Neutral Citation Number: [2020] EWHC 460 (Comm)

Case No: CL-2018-000510

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 28/02/2020

Before :

THE HONOURABLE MRS JUSTICE MOULDER

- -

Between :

MICHALIS S. A. KALLAKIS

Claimant

- and –

(1) AIB GROUP PLC

(2) AIB GROUP (UK) PLC

(3) ACHILLEAS M. KALLAKIS

(4) MICHAEL K. BECKER

(5) ALLIED IRISH BANK PLC

Defendants

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MR MICHALIS KALLAKIS represented himself
MR SANDY PHIPPS (instructed by
CMS Cameron McKenna Olswang LLP) appeared for the **First, Second and Fifth defendants**

Hearing dates: 12 February 2020

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Approved Judgment

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

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THE HONOURABLE MRS JUSTICE MOULDER

Mrs Justice Moulder:

Introduction

1. This is the reserved judgment on the application by the first, second and fifth defendants ("AIB") for summary judgment and/or strike out (the "Application").

2. The Application was made on 26 July 2019. The defendants rely on a witness statement of Ms Vanessa Whitman dated 26 July 2019 in support of the application and a second witness statement from Ms Whitman dated 13 December 2019. Ms Whitman is a solicitor at CMS Cameron McKenna Nabarro Olswang LLP, solicitors to AIB, having day-to-day conduct of this matter

3. In response the claimant relies on his own witness statement dated 31 October 2019.

4. There were two further witness statements before the court, neither of which were relevant to the issues to be determined: one an unsigned witness statement which the claimant says was produced by Mr Michael Cooke, a former employee of AIB, and a witness statement of Mr Andrew Makins dated 29 October 2019. In correspondence it was denied that Mr Cooke made the witness statement. The claimant subsequently obtained a witness summons requiring the attendance of Mr Cooke at the hearing of the Application. However in view of the fact that the witness statement goes largely to the issue of the price obtained on the sale of the properties and having heard the way that the Application was put by counsel for AIB in oral submissions, the court ruled that it was not necessary to hear oral evidence from Mr Cooke to determine the Application.

5. There is also an application by AIB (the "Variation Application") in the event that the Application does not succeed or is granted only in part, to vary the order made (without a hearing) on 12 July 2019 on the application to join the fifth defendant, to permit the joinder of the fifth defendant in substitution for the first and second defendants.

Representation

6. At the hearing the claimant appeared in person and AIB was represented by counsel. The third and fourth defendants were not represented and did not appear.

7. The court exercised its discretion to allow the claimant's McKenzie friend, Mr Darren Stapleford, to address the court on behalf of the claimant. Mr Stapleford told the court that he was called to the Bar in 2011 but is not currently practising, he was not being paid for his attendance but was familiar with the matters in issue having assisted the claimant in, amongst other things, drafting documents including the skeleton argument. Having regard to these factors and the complex nature of the issues raised on this Application, it was in furtherance of the overriding objective for Mr Stapleford to be granted rights of audience on this occasion.

Background

8. The background to these proceedings is taken largely from the first witness statement of Ms Whitman.

9. In summary, the fifth defendant, Allied Irish Banks plc (the "Bank") was introduced to the third defendant who is the father of the claimant. The Bank entered into a number of transactions between October 2003 and November 2007 pursuant to which the Bank lent in excess of £740 million to 14 companies controlled by the third defendant for the purpose of purchasing freehold or long leasehold properties in England. The companies were special-purpose vehicles ("SPVs") incorporated in the BVI which each held a property. The fourth defendant, Michael Becker, was the sole director and shareholder of each of the SPV companies.

10. The structure advanced by the third and fourth defendants was in fact a sham. In September 2008 the Bank discovered that documentation supposedly entered into by Sun Hung Kai Properties Ltd in connection with the properties was not genuine.

11. Negotiations took place between the Bank and lawyers for the third defendant over the period from September 2008. As part of those negotiations, whilst not accelerating the facilities or enforcing its security, the Bank required the third defendant to procure the payment of all rents due from tenants to an account controlled by the Bank. On receipt of those monies, the Bank allocated the funds first to discharge outstanding capital and then to interest. As a result, there was a shortfall in the amount received in respect of the interest amount due on the October payment date and thus a payment default under the facilities. Notwithstanding the default, negotiations appeared to continue regarding arranging a sale of the properties but without warning, the Bank effectively broke off the negotiations on 20 November 2008 serving notice of default under the Facility Agreements and the following day, on 21 November 2008, and in purported exercise of its power of sale, completing the sale of the properties as mortgagee that same day. The properties were sold to 14 individual entities which form part of the Green Property Group ("Green"). The purchase by those entities were funded by AIB through facilities granted to them by AIB which included a provision for additional amounts to be paid if the properties were resold.

12. The Bank denies that the terms of the sale to Green and the associated lending were unusual and further denies that the sale was at an undervalue. The Bank asserts that it did not profit from the sale to Green.

13. The third defendant and his business associate Alex Williams were subsequently found guilty in 2013 of conspiring together with the fourth defendant to defraud the Bank by causing the Bank to advance monies for the purpose of funding the purchase of properties by companies owned or controlled by the third defendant.

14. It appears to be common ground that the SPVs were struck off the BVI register in 2015 for failing to appoint a registered agent (paragraph 15 of the Reply and schedule 2 to the Defence). AIB also accepts that prior to the SPVs being struck off the register in the BVI, two of the companies were placed in liquidation in England at the instigation of AIB and two companies were placed in liquidation apparently on the petition of HMRC.

The Claims

15. The claimant is 21 years old. He was therefore a minor at the time of the events in 2008 and was not involved. However he asserts that he is a beneficiary under the Hermitage Syndicated Trust (the "Trust"). The claimant's case is that Mr Becker was

and is the trustee of the Trust (the "Trustee"), the claimant is one of four beneficiaries (the other beneficiaries being his siblings) and the Trust was the sole shareholder in each of the SPVs.

16. By the present proceedings, the claimant brings three claims (together the "Claims") which in summary are as follows:

    i) that the Bank has caused loss by repossessing the properties and/or by seizing control of the SPVs and/or by making a number of false and/or negligent misrepresentations to gain control of the SPVs and the properties (paragraphs 31 and 32 of the POC) ("Claim 1");

    ii) the Bank sold the properties without legal authority to do so (paragraphs 33 – 36 of the POC) ("sale without legal authority" or "Claim 2"); and

    iii) the Bank owed and breached a duty to obtain the best possible price upon sale of the properties (paragraphs 37 to 47 of the POC) ("undervalue sale" or "Claim 3").

17. The basis of the Claims advanced by the claimant are:

    i) in his personal capacity as a beneficiary of the Trust (Basis 1);

    ii) on behalf of the Trust pursuant to an equitable assignment (Basis 2);

    iii) on behalf of the Trust by way of a derivative action (Basis 3);

    iv) in his personal capacity by way of a derivative action on behalf of the SPVs (Basis 4).

18. The Claims which the claimant seeks to bring on behalf the Trustee are said to be:

    i) losses suffered by the Trust as shareholder of the SPVs (Basis 3A);

    ii) a derivative action in respect of losses suffered by the SPVs (Basis 3B).

Relevant law-Application for strike out/summary judgment

19. CPR3.4 (2) states:

> "The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> …"

20. CPR 24.2 states:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

21. AIB referred the court to the summary of the relevant principles as set out in the judgment of Picken J in *Magdeev v Tsvetkov* [2019] EWHC 1557 (Comm). At **[**30] the judge stated:

> "The principles by reference to which a claim's prospects of success should be assessed at the strike out/summary judgment stage were summarised by Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] (approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]). They are as follows:
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> "i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 2 All ER 91.
>
> ii) 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].
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman.
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements 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].
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed 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.
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided

> without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 .
>
> vii) On the other hand it is not uncommon for an application under Part 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…."”

22. “AIB also referred to PD3A 1.4 and submitted that the case will be suitable for strike out if it pleads a “coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant”.

23. I also note *St Vincent General Partner v Robinson* [2018] EWHC 1230 (Comm) at [5]:

> “The court may give summary judgment against a claimant if the claimant has no real prospect of succeeding at trial and there is no other compelling reason why the case should go to trial: CPR 24.2. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR observed – optimistically but in my view accurately – that "the words 'real prospect of succeeding' do not need any amplification, they speak for themselves". Despite this, a certain amount of case law has built up. For present purposes it is sufficient to say that the claimant need not show that it will probably succeed; what is required is a realistic as distinct from fanciful prospect, that is to say a prospect which is better than merely arguable and which carries some degree of conviction; this is a relatively low hurdle for a claimant to jump.”

<u>The Claims based on the claim of the Trustee</u>

24. The claimant seeks to bring a claim on behalf of the Trustee either relying on the assignment of the claim of the Trustee to the claimant (Basis 2) or a derivative claim (Basis 3). The claim of the Trustee is either on the basis of a derivative claim on behalf of the SPVs or a personal claim of the Trustee.

<u>The derivative claim of the Trustee</u>

25. In relation to the derivative claim of the Trustee, it was submitted for AIB that the fact that the SPVs have been struck off the register is fatal to the derivative claim as a claim cannot be advanced on behalf of a non-existent legal entity: *Shareholder Actions* 2nd ed at 6.49.

26. It appears to be common ground that the law that governs the right of a shareholder to bring a derivative claim in England is, as a matter of English conflicts law, the law of the country of incorporation of the company concerned: *Konananeni v. Rolls Royce Industrial Power (India) Limited and others* [2002] 1 WLR 1269. There was no evidence before the court as to the position under the law of BVI if the company had been struck off the register nor whether a company could be restored to the register for the purpose of bringing a derivative claim.

27. Further I note that (although the provisions do not apply to foreign companies) Section 260(1) of the Companies Act 2006 defines a "derivative claim" as one brought by "a member of a company (a) in respect of a cause of action vested in the company, and (b) seeking relief on behalf of the company". By analogy therefore it seems to me that as a matter of English law that the claim is brought by the Trustee as the shareholder and not the SPV.

28. I therefore reject the submission that this is fatal to the derivative claim.

29. It was further submitted for AIB that if a derivative action could be brought notwithstanding the fact that the SPV has been struck off, or the SPV could be restored to the register in the BVI, in order to bring a derivative action, the permission of the court in the BVI is required under s184C of the BVI Business Companies Act 2004. It was submitted that this is a substantive requirement in order to give the claimant standing: *Novatrust v Kea Investments* [2014] EWHC 4061 at [38]-[46]. At [38] the judge said:

> "In my judgment the effect of s.184C(6) is that by BVI law a member of a company does not have the right to bring proceedings in the name of or on behalf of a company unless that member has complied with the other provisions within s.184C and that is so whether the proceedings are to be brought in the courts of the BVI or elsewhere. Absent this provision I would have agreed that the requirement for leave from the BVI Court was procedural. However, the effect of s.184C(6) is that before the member of a BVI company can have the right to bring derivative proceedings in respect of that company, permission has to be obtained by that member from the BVI High Court ("the Court" being defined for these purposes by s.2 of the act as meaning the BVI High Court). Obtaining that permission is a condition precedent to the ability of the member to bring such proceedings. That provision is entirely general in effect. It is common ground between the experts in this case that the effect of s.184C(6) is to preclude the existence of a parallel common law system relating to derivative claims in the BVI. There is nothing within s.184C that suggests its scope is confined either generally or in part to domestic BVI proceedings. There is first instance authority in the BVI that suggests at least by implication that s.184C(6) applies in relation to derivative proceedings to be brought outside the BVI as it applies to proceedings before the courts of the BVI – see Microsoft Corporation v. Vadem Limited BVI HC (Com). It is noteworthy that neither party in that litigation appears to have

> suggested otherwise. In those circumstances I consider it fanciful to suggest that Novatrust has the right to bring such proceedings in the English courts in the absence of such permission." [emphasis added]

30. It was submitted for AIB that these findings of the English court as to BVI law are admissible under section 4(2) of the Civil Evidence Act 1972, notice having been given by service of the first witness statement of Ms Whitman.

31. Section 4(2) of the Civil Evidence Act 1972 states:

> "Where any question as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, with respect to any matter has been determined (whether before or after the passing of this Act) in any such proceedings as are mentioned in subsection (4) below, then in any civil proceedings (not being proceedings before a court which can take judicial notice of the law of that country, territory or part with respect to that matter)—
>
> (a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country, territory or part with respect to that matter; and
>
> (b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country, territory or part with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved:
>
> Provided that paragraph (b) above shall not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of this subsection in the same proceedings." [emphasis added]

32. I was not addressed in oral submissions on the scope of section 4 of the Civil Evidence Act. However I note that subsection (5) states:

> "(5) For the purposes of this section a finding or decision on any such question as is mentioned in subsection (2) above shall be taken to be reported or recorded in citable form if, but only if, it is reported or recorded in writing in a report, transcript or other document which, if that question had been a question as to the law of England and Wales, could be cited as an authority in legal proceedings in England and Wales".

33. The decision in *Novatrust* was a jurisdictional challenge and there was therefore in this regard only a finding as to whether there was a real issue to be tried. In my view

therefore the finding as to the law of the BVI was not a finding which if it had been a question of English law could be cited as authority. Accordingly the issue of whether permission is a substantive provision as a matter of BVI law is a matter to be established. AIB has not shown that there is no real prospect of the claimant/Trustee bringing a derivative action on the ground that without the permission of the BVI court, the claimant/Trustee has no standing to bring the claim.

34. It was submitted for AIB that the claimant had not complied with the procedure applicable to company derivative actions in CPR 19.9 to CPR 19.9F. In particular it was submitted that CPR 19.9 provides that where a derivative claim is made on behalf of a company, the company must be made a defendant to the claim and, after the issue of the claim form, the claimant must not take any steps in the claim without first obtaining the court's permission.

35. CPR 19.9 provides:

> "(1) This rule—
>
> (a) applies to a derivative claim (where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim is made by a member of it for it to be given that remedy), whether under Chapter 1 of Part 11 of the Companies Act 2006 or otherwise; but
>
> (b) does not apply to a claim made pursuant to an order under section 996 of that Act.
>
> (2) A derivative claim must be started by a claim form.
>
> (3) The company, body corporate or trade union for the benefit of which a remedy is sought must be made a defendant to the claim.
>
> (4) After the issue of the claim form, the claimant must not take any further step in the proceedings without the permission of the court, other than—
>
> (a) a step permitted or required by rule 19.9A or 19.9C; or
>
> (b) making an urgent application for interim relief."

36. A derivative claim under the Companies Act 2006 applies only to UK incorporated companies: s.260(2) provides that a "derivative claim" may only be brought under the Companies Act 2006 or with the permission of the court under s.994. It would therefore appear that a derivative claim in respect of a foreign company falls outside the statutory provisions and may be pursued independently of it. Lawrence Collins J held in *Konamaneni* at [44], that:

> "there is no basis for restricting CPR r.19.9 to English companies, and in any event to do so would not have the effect of depriving the court of jurisdiction to entertain a derivative claim".

37. It was submitted for the claimant that CPR 19 does not apply to claims made by shareholders against a third-party wrongdoer as opposed to a company insider.

38. Section 260 (3) provides:

> "(3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. The cause of action may be against the director or another person (or both)."

It is thus limited to causes of action which arise from a breach of duty or breach of trust by a director. However whilst there is no definition of a derivative action, it seems to me that the language of CPR 19.9 in referring to "*whether under Chapter 1 of Part 11 of the Companies Act 2006 or otherwise*" [emphasis added] does encompass derivative claims which are brought outside the statutory regime.

39. If the provisions of CPR 19.9 apply, it seems to me that it would be open to the claimant to make a retrospective application for permission under CPR 19.9. However it was submitted for AIB that even if a permission application had been made, there is serious doubt as to whether permission would have been granted as the question of whether a derivative claim can be brought is governed by the common law exceptions to the rule in *Foss v Harbottle*: *Hollington on Shareholder Rights* at 6-08.

40. I accept that this is not a case where the claimant alleges that the claim was being stifled by the wrongdoer so the "fraud on the minority" exception does not apply. Further the claim does not arise from a breach of duty or other default by a director. I have regard to the following summary of the law in *Iesini v Westrip Holdings* [2009] EWHC 2526 (Ch) at [73]-[75]:

> "73. I should begin by saying a little about derivative claims generally. In the first place the new code has replaced the common law derivative action. A derivative claim may "only" be brought under the Act. As section 260 (1) makes clear a derivative claim is one in which the cause of action is vested in the company, but where the claim is brought by a member of the company. This reflects the old law in which a derivative action was an exception to the general principle (known as the rule in Foss v Harbottle (1843) 2 Hare 461) that where an injury is done to a company only the company may bring proceedings to redress the wrong. Allied to this principle was the principle that whether a company should bring proceedings to redress a wrong was a matter that was to be decided by the company internally; that is to say by its board of directors, or by a majority of its shareholders if dissatisfied by the board's decision. The court would not second guess a decision made by the company in accordance with its own constitution. The exception to these principles was necessitated where the company's own constitution could not be properly operated. If the wrongdoers were in control of the company (because they

were a majority of the shareholders) they would not in practice vote in favour of taking proceedings against themselves, even though the taking of proceedings would be in the company's best interests…

75. A derivative claim, as defined by section 260 (3) is not, however, confined to a claim against the insiders. As the concluding part of that sub-section says, the cause of action may be against the director or another person (or both). Nevertheless the cause of action must arise from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. A derivative claim may "only" be brought under Part 11 Chapter 1 in respect of a cause of action having this characteristic (although this restriction does not appear to apply to a derivative claim brought in pursuance of an order made under section 994). Thus the section contemplates that a cause of action may arise from, say, the default of a director, but nevertheless is a cause of action against a third party. A claim against a person who had dishonestly assisted in a breach of fiduciary duty or who had knowingly received trust property would be paradigm examples. It is also to be noted that it is not a requirement that the delinquent director should have profited or benefited from his misconduct. He may be guilty of no more than negligence in managing the company's affairs. However, since the cause of action must arise from his default (etc.) a derivative claim brought under Part 11 Chapter 1 will not allow a shareholder to pursue the company's claim against a third party where that claim depends on a cause of action that has arisen independently from the director's default (etc.). This view would be consistent with what the Law Commission said in their report Shareholders' Remedies which paved the way for this part of the Companies Act 2006. They said:

"6.31 So far as the second situation is concerned, one respondent gave the following example. A profitable company is a victim of a tort by a third party, and the board, although otherwise committed to the well-being of the company, have ulterior motives of their own for not wishing to enforce the remedy for the tort. Although the board would in those circumstances be in breach of duty, their breach would not have given rise to the claim.

6.32 We accept that in this type of situation an individual shareholder would have no right to bring a derivative action against the third-party tortfeasor under our proposals. (There would of course be a potential claim for damages against the directors themselves, although this may give rise to difficulties of causation or quantification, and it is possible that the directors may not have sufficient funds to meet the claim).

> However, we do not consider that this is an issue which needs to be addressed for two main reasons.
>
> 6.33 First, we are not aware of any cases under the current law where a derivative action has been successfully brought in circumstances such as those described in paragraph 6.31.
>
> 6.34 Secondly, (and more importantly) it is consistent with the proper plaintiff principle which we endorsed in the consultation paper and which received virtually unanimous support on consultation. The decision on whether to sue a third party (i.e. someone who is not a director and where the claim is not closely connected with a breach of duty by a director) is clearly one for the board. If the directors breach their duty in deciding not to pursue the claim then (subject to the leave of the court) a derivative claim can be brought against them. To allow shareholders to have involvement in whether claims should be brought against third parties in our view goes too far in encouraging excessive shareholder interference with management decisions. This is particularly important as we are proposing that derivative actions are to be available in respect of breaches of directors' duties of skill and care. A line has to be drawn somewhere and we consider that this is both a logical and clearly identifiable place in which to draw the line." [emphasis added]

41. Although the passages cited above would suggest that the position at common law is not certain, it supports a conclusion that a claim outside the Act in the circumstances of the present case would not succeed on common law principles. It seems to me therefore that there is no real prospect of permission being granted under CPR 19.

Conclusion on derivative claim of the Trustee on behalf of SPVs

42. For these reasons I find therefore there is no real prospect of a derivative claim on behalf of the SPVs succeeding at trial.

The personal claim of the Trustee

Claim 1

43. In relation to Claim 1, AIB submitted that the alleged seizure is not properly particularised, that the steps taken by the Bank between September 2008 up to the sale of the properties were with the consent of the third defendant and that the third defendant retained control of the properties.

44. Whilst the court was taken briefly to the correspondence during the hearing of the Application to make good this point, this is a matter which will have to be determined having considered all the evidence, not merely the correspondence and having heard full argument. In particular it seems to the court that the issue of whether Claim 1 is made out relates not only to which entity physically controlled the properties but also

to the issue of the financial control of the rents and other monies. In the circumstances it is not a basis on which summary judgment can be entered or strike out granted.

45. It was submitted for AIB that the claimant has not identified any basis upon which the seizure of the properties or the misrepresentations could vest a claim in the Trustee. In particular it was submitted that Mr Becker was the legal owner of the shares in the SPVs and did not have a proprietary interest in the properties. It was also submitted that whilst the claimant alleges that the misrepresentations were made to the "managers, directors and shareholders" of the SPVs, the claimant does not allege that Mr Becker relied on the alleged misrepresentations.

46. In written submissions on the claim in misrepresentation in deceit, counsel for AIB referred the court to *Clerk & Lindsell on Torts* 22nd edition at para 18–30 and 18.34. I note at 18–31 *Clerk & Lindsell* state that

> "A representation made to the claimant directly causes no problems;...a representation made to a third party with intent that it be passed on to the claimant to be acted on by him will equally suffice...All that is required for these purposes is that the representation be intended, in one way or another, to reach the claimant in order to induce him to act on it. Nor is it even necessary that the defendant know precisely who the statement is intended for, provided he intends it to be relied on by someone in the claimant's position…"

Further at 18.34 *Clerk & Lindsell* state that:

> "To entitle a claimant to succeed in an action in deceit, he must show that he acted (or in a suitable case refrained from acting) in reliance on the defendant's misrepresentation....It seems clear that the claimant must have acted himself to his detriment. If his loss results, not from his own reliance, but from that of third parties, the defendant may be liable for torts of unlawful interference with trade, passing off or malicious falsehood, or even negligence; but he will not be liable in deceit."

47. The claim of the Trustee in misrepresentation is not dependent on his status as legal owner of the shares. The Trustee will need to prove that he acted in reliance on the misrepresentation, however AIB have not shown that there is no real prospect of reliance being established.

48. Further, since the pleaded case is that the representations were false and/or negligent, (as stated above) a claim in negligent misrepresentation does have a realistic prospect of success even if the court found no reliance to found an action in deceit.

49. It was also submitted for AIB that the claimant has no real prospect of establishing that the alleged seizure and misrepresentations caused the "complete loss of the value" of the SPVs. It was submitted that the SPVs would still have owned the properties and would have had considerable value as a result. In my view this is dependent on the evidence at trial as to the steps that were taken during the period from September 2008 leading up to the sale of the SPVs and the evidence before the

court on this Application does not establish that the claimant has no real prospect of success in this regard.

50. The third submission for AIB was that any loss in the value of the SPVs is irrecoverable by reason of the reflective loss rule. This is dealt with below.

Claim 2

51. It was submitted for AIB that there was no real prospect of success on Claim 2 since the power of sale arose under the transaction documentation as soon as the charge was executed.

52. Whilst this may be correct, it does not dispose of the issue since the allegation (POC para 33) is that the sale was without lawful authority and whilst the defence of AIB complains that the claimant has failed in the particulars of claim to identify the legal basis of the claim, the Defence (at 68) then goes on to assert that there was a lawful exercise of the power of sale. It is therefore clear that the issue is likely to be not whether the power of sale had arisen but whether it was lawfully exercised. This involves a determination of the facts which the court cannot carry out on this Application. AIB asserts that it was entitled to give notice to accelerate the facilities on 20 November 2008 and then immediately to complete the sale of the properties on 21 November 2008, however this is a matter for full argument at trial having heard all the evidence. I do not regard the letter from Withers on 25 November 2008 referring to the "apparent" exercise of the power of sale as having any real bearing on the legal position.

53. It was submitted for AIB that the equitable duty on a mortgagee exercising a power of sale to act with good faith and to take reasonable care to obtain the best price reasonably available for the property is owed to the mortgagor and does not extend to persons having a beneficial interest in the property. Counsel for AIB referred the court to *Snell* at 39–039 and *PK Airfinance v Alpstream* [2015] EWCA Civ 1318 at [115]-[131].

54. However I note that it was accepted by the defendants in *PK Airfinance* that whilst the parent companies were not the mortgagors, in circumstances where the value of the shares owned by the parents was equal to the assets owned by the Borrowers a duty was owed to the parents: see judgment at [88]. It seems to me therefore that there is a real prospect of establishing that the duty extends to the Trustee as owner of the shares in the SPVs in the circumstances.

55. AIB also rely on the reflective loss rule in this regard which is discussed below.

Claim 3

56. For the purposes of determining this Application it was not submitted for AIB that there was no realistic prospect of success in relation to the underlying merits of Claim 3. In any event there is in my view sufficient on the evidence before the court to conclude that there is a realistic prospect of success on the alleged undervalue sale. The basis of such a claim being vested in the Trustee personally is as set out in 53 and 54 above.

57. In addition AIB rely on the reflective loss rule.

Reflective loss

58. It appeared to be accepted by the claimant that the loss claimed by the Trustee is reflective loss and thus precluded by the rule in *Johnson v Gore Wood* [2002] 2 AC 1 unless it falls within the exception to the rule in *Giles v Rhind* [2003] Ch 618.

59. The narrow scope of the exception in *Giles v Rhind* was set out in the decision of the Court of Appeal in *Sevilleja Garcia v Marex Financial Limited* [2018] EWCA Civ 1468. That decision of the Court of Appeal is currently under appeal to the Supreme Court, the matter having been heard but judgment is still awaited. The law may change prior to trial but the court cannot predict the outcome of the appeal and any impact which it may have on the issues at trial. In the absence of any indication as to when judgment is expected and the relevance of the judgment to the test to be applied to the circumstances of the present case, the court declines to stay the matter and proceeds to consider the Application on the basis of the current law.

60. In *Marex* it was said that:

> "[56] ...In my judgment the exception can only apply in limited circumstances where the wrongdoing of the defendant has been directly causative of the impossibility the company faces in bringing the claim. That was the issue which Chadwick LJ considered at [80] of *Giles v Rhind* should go to trial and the need for that direct causal relationship between the impossibility and the wrongdoing is emphasised in a number of cases, including in Webster at [46] and the judgment of Males J in *St Vincent* at [88].
>
> [57] The exception is a narrow one, only applicable where as a consequence of the actions of the wrongdoer, the company no longer has a cause of action and it is impossible for it to bring a claim or for a claim to be brought in its name by a third party such as Marex in the present case. Contrary to Mr Choo Choy QC's submissions, I consider the impossibility or disability must be a legal one and what might be described as factual impossibility in insufficient. Although, in the passage at [79] of his judgment in *Giles v Rhind* which I have quoted above, Chadwick LJ referred to "[the company] being forced to abandon its claim by impecuniosity attributable to the wrong which has been done to it", he cannot have intended that every case where the impecuniosity of a company is attributable to the wrongdoing would fall within the exception. If that were what Chadwick LJ was saying, given that, in many cases where the rule against reflective loss is in play, the company's assets have been abstracted by the wrongdoer, so that without an injection of funds, for example from a shareholder or creditor, it is not possible for the company to bring a claim, the exception would risk becoming the rule.

> [58] Rather it seems to me that Chadwick LJ intended that the exception would be limited to cases where the impossibility of the company bringing a claim was directly caused by the wrongdoing of the defendant. If, through an injection of funds by a third-party shareholder or creditor, it is possible for the company to bring a claim against the wrongdoer (as in the decision of Birss J in *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 3048 (Ch) where the company could have brought a derivative claim) or the third party can take an assignment of the company's claim, then impossibility which would bring the exception into play is simply not made out. [emphasis added]
>
> 59. The narrowness of the exception is demonstrated by the fact that it has only been invoked successfully in two cases. In Giles v Rhind itself it was arguable that the wrongdoer had made it impossible for a claim to be pursued by the company by making an application for security for costs and, when security could not be provided, inserting a provision in the consent order for discontinuance that precluded the company from bringing further proceedings. In Perry v Day the wrongdoer made it a condition of transferring the land that the company agreed that this was in full and final settlement of any claim against him. Those are both, therefore, cases of legal impossibility directly caused by the wrongdoing." [emphasis added]

61. In this case on the evidence before this court on the Application:

    i) The SPVs have been struck off apparently on the basis that the companies were unable to pay the fees of the agents necessary to maintain them on the register in the BVI;

    ii) the inability to pay the fees of the agents and thus its impecuniosity appears to stem from the Bank's conduct;

    iii) it would therefore appear to be legally impossible for the SPV to bring a claim;

    As noted above, there was no evidence before the court as to the law in the BVI which would entitle the court to assume that the SPV could be restored to the register in order to bring legal proceedings.

62. It was also said that it would be impossible due to a refusal by the agents to act as registered agent-this may not have been caused by AIB as it was stated orally that this was due to an unwillingness on the part of agents to be associated with the SPVs in question but as there is no evidence that the SPVs could be restored to the register, this additional point has no significance.

63. If it is necessary for there to be additional conduct over and above the original alleged wrongdoing I note that the Bank took action in placing two of the SPVs into

liquidation although the court has not been taken to any evidence as to the circumstances of such action.

64. Further I note that (unlike in *Marex)* this is not a case where on the evidence there were funds available to the Trustee or the beneficiaries which could have been made available to fund litigation by the liquidator against the Bank. In Marex the court stated at [54]:

> "…It was clear that in the present case, Marex could fund litigation in the name of the Companies, such as by appointing its own liquidator (as it had come close to doing in September 2013, but had not pursued its application to do so for some tactical reason) or by putting the existing liquidator in funds or, if he proved recalcitrant, by applying to the Court in the British Virgin Islands to replace him or by taking an assignment of the Companies' claim against Mr Sevilleja. Mr Lewis also relied upon the fact that Marex had chosen to take garnishment proceedings in New York which had garnished US $1.7 million of assets of the Companies which would otherwise have been available to the liquidator as a "war chest". In all the circumstances, it could simply not be said by Marex that it was impossible for the Companies to pursue a cause of action against Mr Sevilleja." [emphasis added]

Here there is no evidence to suggest that the Trustee/beneficiaries could fund the liquidation or put the liquidator in funds and there is no suggestion on the evidence that the Trustee or beneficiaries had chosen to use its assets in other ways. The submission for AIB that the companies had "chosen" to expend their funds on paying the lawyers representing them in their negotiations with AIB and that such funds could have been used to bring proceedings against AIB seems to me to be wrong: the lawyers' fees were incurred as part of the negotiations leading up to the sale of the properties in November 2008; they are not separate from the matter in issue and there was no "war chest".

65. I accept the limited scope of the exception in *Giles v Rhind* and the demanding nature of the test of impossibility caused by the wrongdoing which a claimant must meet (Males J in *St Vincent General Partner v Robinson* [2018] EWHC 1230 (Comm) at [94]). However the judgment of the Court of Appeal at [57] (cited above) leaves open the possibility that the exception can apply in certain cases of impecuniosity and it is difficult to see when the exception in *Giles v Rhind* would ever operate if it does not operate in the present circumstances. The claimant does not have to show that it will probably succeed in order to defeat the Application and in my view there is sufficient to conclude that there is a real prospect that the claimant will show that the alleged wrongdoing has been directly causative of the impossibility.

66. In my view the claimant has a realistic prospect of establishing that the claim by the Trustee is not barred by the principle of reflective loss notwithstanding the very limited scope of the exception in *Giles v Rhind* following the decision of the Court of Appeal in *Sevilleja Garcia v Marex Financial Limited* [2018] EWCA Civ 1468.

Conclusion on personal claim of the Trustee

67. It seems to me for the reasons discussed above that AIB have not established that the personal claim of the Trustee has no real prospect of success. It seems to me that the claimant has a realistic as distinct from fanciful prospect, that is to say a prospect which is better than merely arguable and which carries some degree of conviction.

The claim of the claimant on behalf of the Trustee (Basis 2 and 3)

68. Turning then to consider the Claims brought by the claimant on behalf of the Trustee, this is brought by the claimant either on the basis of an assignment of the claim, or as a derivative claim.

The claim based on an assignment of the personal claim of the Trustee (Basis 2)

69. Assuming that the assignment is proved at trial, having found above that there is a realistic prospect of establishing that the Trustee has a personal claim which is not barred by the principle of reflective loss, AIB has not shown that there is no realistic prospect of such a claim based on an assignment of the personal claim of the Trustee.

The claim brought as a derivative claim of the personal claim of the Trustee (Basis 3)

70. The claimant also brings a claim as a derivative claim in respect of the personal claim of the Trustee. In my view there is a realistic prospect of this claim being established:

    i) A derivative claim on behalf of a trustee can be brought only where there are "special circumstances"; the "unifying factor" is the need to avoid injustice: *Roberts v Gill* [2011] 1 AC 240;

    ii) "Special circumstances" exist where there is a failure "excusable or inexcusable" by the trustee to protect the interests of the beneficiaries in the trust estate": *Roberts v Gill* at [53];

    iii) In this case Mr Becker was alleged to be part of the conspiracy with the third defendant and was named as such in the criminal proceedings against the third defendant. He is currently out of the country and cannot (or will not) travel to the UK as he is wanted by the UK authorities;

    iv) In the circumstances it is fanciful in my view for AIB to suggest that Mr Becker is "not unwilling" to bring a claim: the very fact of the (alleged) assignment to the claimant supports an inference that he does not intend to exercise any rights or duties as trustee to protect the rights of the beneficiaries;

    v) Whether or not, therefore, Mr Becker could bring proceedings whilst based abroad, there is in my view, a failure, whether or not excusable, to protect the interests of the beneficiaries in the estate.

71. It was submitted for AIB that the derivative claim must fail because there is a second trustee which could bring a claim and which has not been joined as a party. The court was told by Mr Stapleford for the claimant that this trustee, FTS Worldwide Corporation, ceased to act as such in 2005 and whilst this is not formally in evidence,

that is sufficient for the purposes of this summary judgment application to dispose of that objection.

The Claims based on a personal claim of the claimant (Basis 1)

Claim 1

72. It was submitted for AIB that the claimant cannot have a personal claim because he does not contend that the alleged misrepresentations were made to him. For the reasons set out above in relation to the claim of Trustee in misrepresentation and the paragraphs of *Clerk & Lindsell* referred to above, I do not accept this submission.

73. In relation to the issue of reliance, no basis has been advanced by the claimant for a finding that the claimant personally relied on any misrepresentation. However as set out above, since the pleaded case is that the representations were false and/or negligent, a claim in negligent misrepresentation does not require reliance by the claimant personally.

In my view AIB has not shown that a claim by the claimant in his personal capacity based on negligent misrepresentation has no realistic prospect of success.

Claim based on sale without legal authority (Claim 2) and undervalue sale (Claim 3)

74. In my view the claims advanced by the claimant in his personal capacity in relation to the alleged sale without legal authority and the alleged undervalue sale have no real prospect of success: a mortgagee does not owe a duty to the beneficiary of a trust of which the mortgagor is the trustee: *Parker-Tweedale v Dunbar Bank* [1991] Ch 12*;* by extension, in my view the claimant has no real prospect of establishing that the mortgagee owes a duty to the claimant as the beneficiary of a trust which is the shareholder of the mortgagor.

The personal claim based on the derivative claim of the SPV

75. The personal claim of the claimant based on the derivative claim of the SPV has no realistic prospect of success for the reasons set out above in relation to the derivative claim of the Trustee.

The Variation Application

76. The claimant made an application dated 8 July 2019 to add the fifth defendant to the proceedings. An order was made on paper granting that application.

77. However it is AIB's case that the first defendant, AIB Group plc, and the second defendant, AIB Group UK plc ("AIB UK") are separate and distinct entities from the Bank. In particular it was submitted for AIB that AIB Group plc was not incorporated until 2016 and therefore could not have had any involvement in the matters under challenge.

78. The evidence is that AIB UK is a UK based bank made up of two divisions, Allied Irish Bank (GB) and First Trust Bank and that the party that entered into the relevant arrangements was the fifth defendant and that AIB UK was not engaged in any way.

79. In his application to the court dated 8 July 2019 the claimant stated that he issued the claim against the first and second defendant believing that they had been the banks that had lent money to the SPVs owned by the trust of which he was a beneficiary. The claimant stated:

> "This was a mistake by the claimant and not one that was rectified by the defendants until after the claim was issued and served."

The claimant accepted in his skeleton argument for the hearing of the Application that the Variation Application should be granted. Oral submissions were not made on this issue by either party.

Conclusion on the Application and the Variation Application

80. I find for the reasons discussed above that:

a) AIB has not established that the claim in negligent misrepresentation brought by the claimant against the Bank in his personal capacity (Basis 1) has no real prospect of success and that claim should not therefore be struck out or summary judgment granted;

b) AIB has not established that the Claims brought by the claimant against the Bank on the basis of the assignment of the Trustee's personal claim (Basis 2) has no real prospect of success and the Claims should not therefore be struck out or summary judgment granted;

c) AIB has not established that the Claims brought by the claimant against the Bank as a derivative claim of the Trustee's personal claim (Basis 3A) has no real prospect of success and the claims should not therefore be struck out or summary judgment granted;

d) The Claims insofar as they are based on the derivative claim of the SPVs (Basis 3B and 4) should be struck out; and

e) The claim based on fraudulent misrepresentation insofar as it is based on the personal claim of the claimant (Basis 1) should be struck out;

f) Claims 2 and 3 insofar as they are based on the personal claim of the claimant (Basis 1) should be struck out;

g) The Variation Application is granted.