Neutral Citation Number: [2020] EWCA Civ 699

Case No: A3/2019/2217

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT JUSTICE, BUSINESS AND PROPERT COURTS AT BRISTOL, PROPERTY TRUSTS AND PROBATE LIST (ChD)
HHJ Paul Matthews sitting as a High Court Judge
[2019] EWHC 2071 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE ARNOLD

- -

Between :

ROBERT SOFER	**Appellant**
- and -	
SWISSINDEPENDENT TRUSTEES SA	**Respondent**

- -
- -

Leslie Blohm QC and **Alex Troup** (instructed by **Burgess Salmon LLP**) for the **Appellant**
Richard Wilson QC and **James Weale** (instructed by **RadcliffesLeBrasseur**) for the **Respondent**

Hearing dates : 19-20 May 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 5 June 2020.

Lord Justice Arnold:

Introduction

1. This is an appeal against an order dated 14 August 2019 of HHJ Paul Matthews sitting as a Judge of the High Court ("the Judge"), whereby he struck out the Claimant's claim for breach of trust against the Defendant pursuant to CPR rule 3.4(2)(a) on the ground that it did not sufficiently plead a case of dishonesty to overcome a trustee exoneration clause. In his judgment dated 2 August 2019 ([2019] EWHC 2071 (Ch)) the Judge also held that, if the claim had not been struck out, he would have granted reverse summary judgment dismissing part (but not all) of the claim on the ground that it was barred by two Deeds of Indemnity signed by the Claimant.

Background

2. The background to the matter is fully set out in the Judge's clear and comprehensive judgment. For the purposes of this judgment, I can briefly summarise it as follows.

3. The claim concerns the Puyol Trust, which was created in July 2006 by the late Hyman Sofer, a wealthy South African bookmaker and investor who had emigrated to Australia in 1987. Although the Puyol Trust was drafted by an Australian law firm, it is governed by English law.

4. The Puyol Trust was one of three related trusts, the other two being known as the Gabri Trust and the Xavi Trust. Each of these three trusts held units in a fourth trust, known as the Jordi Unit Trust. The Defendant, which is a professional trustee company based in Switzerland, was and remains the trustee of each of all four trusts.

5. Although the three trusts were discretionary in form, it was intended by Hyman Sofer that the Puyol Trust would benefit his son, the Claimant, and that the Gabri and Xavi Trusts would respectively benefit Hyman Sofer's daughter, Tamara, and her issue.

6. Shortly after the Puyol Trust was created, Hyman Sofer was added as a "Specified Beneficiary". As a result, the Claimant, Tamara and her issue became "General Beneficiaries", because the term "General Beneficiaries" is defined to include the children and grandchildren of Specified Beneficiaries.

7. By clause D3(3) of the Puyol Trust, the Defendant, as trustee, had power to "lend any money forming the whole or any part of the assets of this Trust to any person who may for the time being be a Beneficiary upon such terms as to repayment and interest or interest free as the Trustees may in their absolute discretion think fit". The term "Beneficiary" is defined to include any of the Specified and General Beneficiaries.

8. Clause M1(1) of the Puyol Trust provided that the Defendant "must not pay convey or transfer any part of the corpus of the Trust to any Beneficiary for any purpose prior to the date of death of Hyman Sofer".

9. Between 2006 and 2016 the Defendant made 148 payments totalling over US$61.5 million (the greater part of the assets of the Trusts, which amounted to about $78 million) to Hyman Sofer at his request out of the Puyol, Gabri and Xavi Trusts. Although the payments were recorded as being loans, no provision was made for security, interest or repayment. Repayments were made by or on behalf of Hyman

Sofer totalling a little over $3.9 million, leaving a balance due of about $58.5 million. The total net amount paid out of the Puyol Trust to Hyman Sofer was nearly $19.2 million.

10. The Claimant alleges that, prior to the making of these payments, the Defendant: (i) made no enquiry of Hyman Sofer as to the reason why the payment was required; (ii) made no enquiry of the financial position of any Beneficiary under the Trusts, or of any person indicated as a prospective beneficiary as set out from time to time in Hyman Sofer's letters of wishes; and (iii) made no enquiry as to the ability of Hyman Sofer to repay the same, either at the time that the payment was made or at any time in the future after the making of the said payment.

11. Of the total net amount paid out of the Puyol Trust, some $3.27 million was used by Hyman Sofer towards funding the payment of AU$9.5 million in settlement of a tax dispute with the Australian Tax Office ("the ATO"). The terms of settlement were recorded in a Deed of Settlement dated 18 July 2012. The Defendant sought indemnities from each of the potential beneficiaries, including the Claimant, which were duly given by a Deed of Indemnity executed in September 2012. There are two versions of the Deed of Indemnity, the only substantive difference being that the later version included Hyman Sofer's grandchildren as parties.

12. The Claimant alleges that, from about 2012, Hyman Sofer suffered, and was known by the Defendant to suffer, from dementia.

13. Hyman Sofer died on 8 July 2016, aged 97. His estate could not repay the remaining sums he received from the Puyol Trust. Shortly after his death the Defendant released his estate from its purported obligation to repay the outstanding loans.

The proceedings

14. The Claimant issued the present claim on 25 September 2018. In his original Particulars of Claim he alleged that, in truth, the payments made by the Defendant to Hyman Sofer between 2006 and 2016 were gifts rather than loans, and were made in breach of the prohibition in clause M1(1). He sought (among other things) a declaration to that effect, together with orders that the Defendant should reinstate the Puyol Trust and be removed as trustee. It should be made clear that it is no part of the Claimant's case that the Defendant benefitted from the breaches of trust he alleges.

15. The Defendant responded to the claim on 3 December 2018 by applying to strike it out, alternatively for summary judgment dismissing it. The strike out application was made on the basis that the Puyol Trust deed contains a trustee exoneration clause which provided a complete answer to the claim, in circumstances where the Particulars of Claim contained no properly pleaded allegation of dishonest breach of trust. The application was supported by witness statements by Nigel West (the Defendant's solicitor) and Andrew Bayles (a director and General Counsel of the Defendant since January 2016). Their evidence was that the payments were intended to be, and were in fact, loans, and that the Defendant believed that it was acting in the best interests of the beneficiaries. Neither of them was involved in the payments at the time, however, and so their evidence was hearsay.

16. The Claimant made two witness statements in response to the application. His evidence, which was based upon his personal knowledge and the documents exhibited to his statement, was that he believed that the Defendant knew that it was acting wrongly when making the payments and never believed that they were loans.

17. By application notice dated 16 May 2019 the Claimant applied to amend his Particulars of Claim in the form of the draft attached to the application, which the Judge referred to as "Version A". At the start of the hearing before the Judge counsel for the Claimant produced a revised draft of the Amended Particulars of Claim, which the Judge referred to as "Version B".

18. Although the Judge considered the adequacy of all three versions of the Particulars of Claim, it is Version B that matters, since if that sets out a non-strikable claim the Claimant should be given permission to make the necessary amendments.

The application to strike out

19. As noted above, the Defendant's strike-out application was based on the proposition that the trustee exoneration clause provided a complete answer to the claim given that the Particulars of Claim contained no properly pleaded allegation of dishonest breach of trust by the Defendant.

20. The exoneration clause in question is contained in clause F4 of the Puyol Trust. Insofar as relevant, it provides that the Defendant shall not be liable for or responsible for any loss or damage:

> "except where the same shall be proved to have been caused by acts done or omissions made in personal conscious and fraudulent bad faith by the Trustee charged to be so liable".

It is common ground that this requires the Claimant to establish a dishonest breach of trust.

21. The judge directed himself that the test for a dishonest breach of trust in this context was that stated by Lewison J (as he then was) in *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch) at [81]:

> "what is required to show dishonesty in the case of a professional trustee is:
>
> i) A deliberate breach of trust;
>
> ii) Committed by a professional trustee:
>
> a) Who knows that the deliberate breach is contrary to the interests of the beneficiaries; or
>
> b) Who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or
>
> c) Whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable

> that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries."

22. Counsel for the Claimant did not challenge this statement of the law, but he submitted that a deliberate breach of trust included a breach committed with reckless indifference as to whether it was a breach or not, relying upon *Re Vickery* [1931] 1 Ch 572 at 583 (Maugham J) and *Armitage v Nurse* [1998] Ch 241 at 252F (Millett LJ). Counsel for the Defendant disputed this. In my view it does not matter for present purposes who is right about this.

23. More important for the purposes of this appeal are the principles governing the pleading of dishonesty. There was little dispute as to these before either the Judge or us. They were summarised, in my judgment accurately, by counsel for the Claimant as follows:

    i) Fraud or dishonesty must be specifically alleged and sufficiently particularised, and will not be sufficiently particularised if the facts alleged are consistent with innocence: *Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1.

    ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded: *Three Rivers* at [186] (Lord Millett).

    iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20]-[23] (Flaux J, as he then was).

    iv) Particulars of dishonesty must be read as a whole and in context: *Walker v Stones* [2001] QB 902 at 944B (Sir Christopher Slade).

24. To these principles there should be added the following general points about particulars:

    i) The purpose of giving particulars is to allow the defendant to know the case he has to meet: *Three Rivers* at [185]-[186]; *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793B (Lord Woolf MR).

    ii) When giving particulars, no more than a concise statement of the facts relied upon is required: *McPhilemy* at 793B.

    iii) Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged: *McPhilemy* at 793D.

25. As is common ground, on an application under CPR rule 3.4(2)(a) to strike out particulars of claim as disclosing no reasonable grounds for bringing the claim, the

facts pleaded must be assumed to be true. That does not mean, however, that the court will not scrutinise particulars of dishonesty with care to see if they disclose a sustainable case.

26. The key passages in Version B of the draft Amended Particulars of Claim are as follows (amendments indicated by underlining):

> "26. The sums paid from the assets of the Puyol Trust were recorded in the accounts of the Puyol Trust as loans made by the Puyol Trust to Hyman Safer.
>
> 27. In truth and in fact the said sums were not loans, but were gifts or purported advances of the said sum to Hyman Sofer. The Defendant had no power pursuant to the said 2005 Deed as from time to time amended to make gifts or advances of the said sums of money to Hyman Sofer, and by reason of the making of the said payments the Defendant acted in breach of trust.
>
> …
>
> 29. In breach of trust in respect of each payment made by the Defendant to Hyman Sofer out of the Puyol trust:
>
> (1) Failed to exercise the power to lend money to Hyman Sofer;
>
> (2) Advanced the money to Hyman Sofer with the intention that Hyman Sofer should not have to repay the same if he did not wish to (and it is averred that Hyman Sofer also received the money on the footing that he would not have to repay it);
>
> (3) Failed to consider the exercise of the power to lend money to Hyman Sofer;
>
> (4) Advanced the money to Hyman Sofer at his direction;
>
> (5) Advanced the money to Hyman Sofer in breach of the prohibition at clause M1(1) of the terms of the trust;
>
> (6) Was recklessly indifferent to the requirement that the Defendant lend and not advance the money to Hyman Sofer <u>alternatively advanced the money to Hyman by way of advance and not loan knowing that the said money was being provided by way of advance and not loan and contrary to the terms of the trust and (in the premises) in personal conscious and fraudulent bad faith by the Trustee charged to be so liable</u> such that the Defendant is not entitled to rely on the exclusion of liability contained in clause F4 of the trust;
>
> (7) Insofar as the moneys were advanced to Hyman Sofer after 8 October 2015, the said payments amounted to a disposal of a trust asset at less than market value, and were therefore further in breach of the terms of the 2006 trust deed as amended.

Particulars of Dishonesty

30. The Claimant avers that the personal conscious and fraudulent bad faith, alternatively dishonesty of the Defendant in making the advances may be inferred from the following matters:

(i) The Defendant was a party to the Deeds referred to at paras. 4,11, 16, 19 (and purported to exercise its powers under the 2006 Trust Deed by the Deed dated 23 August 2006 exhibited at C.2; the Deed of Amendment dated 8 October 2015 exhibited at C.3and the Deed dated 8 October 2015 exhibited at C.4). It was therefore aware of its express duties and the restrictions upon its powers set out in those documents.

(ii) The Defendant was and is a professional trustee as pleaded at paragraph 3 above. As such it is to be inferred that it was aware both of its duties and the restrictions upon its powers contained within the trust documents, and the restrictions and duties imposed by law as set out at paragraph 18 of the Particulars of Claim.

(iii) As set out at C.5 the Defendant made a number of payments at Hvman's request between 31 October 2006 and 30 November 2014.

(iv) As set out at paragraph 23 of the Particulars of Claim, on each and every occasion that Hyman requested payment from the trust, the Defendant made payment in the sum requested.

(v) The Defendants never made enquiry of Hyman as to the reason why payment was required (para. 25(1) above).

(vi) The Defendant never made enquiry of the financial position of any beneficiary or of the financial position of any prospective beneficiary indicated in Hyman's Letter of Wishes (para. 25(2) above).

(vii) The Defendant made no enquiry as to the ability of Hyman Sofer to repay the same, either at the time that the payment was made or at any time in the future after the making of the said payment (para. 25(3)).

(viii) It is to be inferred from this pattern of request and payment in conjunction with the other matters referred to herein that the payments were made as gifts and not loans; and that the Defendant did not consider the ambit of or restrictions on their powers and duties in making these advances and did not consider whether the advances were for the benefit of the beneficiaries.

(ix) As set out at paragraphs 6, 23, and 24 of the Particulars of Claim, the total amount advanced was $57,558,360 out of a total of $78,000,000 held in the Jordi Unit Trust.

(x) The payments made to Hyman after 8 October 2015 were a disposal of a trust asset at less than market value and in breach of the 2006 trust deed as amended as set out at para. 29(7) above. As a professional trustee and for the reasons set out above the Defendant would have been aware of that restriction and aware that in making the said payments it was acting in breach of trust.

(xi) Further, as set out in Paragraph 22 above, Hyman was suffering from dementia and incapable of making a valid request for a loan. The Defendant would have been aware of Hyman's mental condition by its communication with him. That it continued to act on his instruction indicates that it was not performing its duties as a trustee.

(xii) The sums paid to Hyman were recorded in the accounts of the Defendant relating to the trust as loans made by the Puyol Trust to Hyman asset out at Para. 26 above. It is to be inferred from the fact that these payments were gifts, but was wrongly recorded as loans, that the Defendant was aware that it was acting in breach of trust and sought to hide the same from it is averred the beneficiaries and the Australian authorities.

(xiii) Further, as set out at Para. 31 below, the Defendant released Hyman from his purported obligation to repay the recorded loans on his death. There was in fact no release because there were no loans. This was both evidence indicating that there were no loans; and evidence that the Defendant's actions were dishonest in that it both created and mislabelled a false transaction that did not in truth or fact exist.

(xiv) Further, as the Claimant avers at paragraph 29(3) above the Defendant failed to consider the exercise of the power to l[e]nd monev to Hyman Sofer in making the payments aforesaid.

31. For the avoidance of doubt, the Claimant avers that the standard of probity and honesty reasonably required of an offshore alternatively Swiss trustee is the same standard required of any professional person administering trust funds as a trustee. To the extent that it may be averred that the Defendant in making the payments to Hyman considered itself to be acting in the best interests of the beneficiaries, it is denied that the Defendant acted with that intention in fact, and it is averred that no reasonable professional trustee (or trustee in the same category as the Defendant) could reasonably have considered that it was so acting honestly and/or in the best interests of the beneficiaries in the particular circumstances set out at Para. 30 above."

27. It has to be said that this statement of case is not well drafted. In part that may be attributable to the genesis of Version B as the second attempt at amending the Particulars of Claim, but that does not fully excuse the drafting. For example, as counsel for the Claimant himself acknowledged, in paragraph 29(6) what is now the Claimant's primary case (deliberate and conscious breach of trust) is pleaded as the alternative, while what is now the Claimant's alternative case (reckless indifference) is pleaded first. What matters for present purposes, however, is not the felicity of the drafting, but whether as a matter of substance it pleads sufficient particulars to disclose a case of dishonesty.

28. It is relevant to note that even Version B does not plead all the matters which the Claimant relies upon as showing the dishonesty of the Defendant. The Claimant refers in his first witness statement to a number of documents as supporting his case. No doubt these are not referred to in Version B on the basis that they constitute evidence of the facts relied on rather than the facts themselves. For reasons that will appear, however, I will give one example. This is an email from Simon Gray, who was then the Defendant's General Manager, to Hyman Sofer dated 30 June 2015 which states:

> "Payments out of the structure to or for the benefit of Mr Sofer cannot be treated as distributions to him, in accordance with the provisions of the 3 trusts and so are treated as loans, now borne equally by 3 trusts and ultimately owing to them by Mr Sofer (or his estate)."

29. When considering Version A of the draft Amended Particulars of Claim the Judge stated at [86]:

> "… version A does not give any sufficient particulars of the allegation of deliberate breach of trust. Such a breach requires knowledge, and the pleading rules require particulars of knowledge to be given. These must include which individuals with the defendant are alleged to have known, which terms of the trust are alleged to have been breached, and in respect of which payments made by the defendant."

Although the Judge did not expressly repeat this point when considering Version B, it is equally applicable to Version B.

30. Counsel for the Claimant submitted that the Judge was wrong to hold that it was mandatory for particulars of claim to identify at the outset the individuals whom the claimant alleged to have had the relevant knowledge at the relevant time, and that it was permissible for a claimant to provide such particulars subsequently, in an appropriate case following disclosure. In support of this submission he relied before this Court, although not before the Judge, upon *Rigby v Decorating Den Systems Ltd*, an unreported extempore decision of a two-judge constitution of this Court consisting of Peter Gibson LJ and Hale J dated 15 March 1999. In that case Peter Gibson LJ said:

> "It does not seem to me a necessary requirement for a pleading of this nature, where it is quite clear that fraud is being alleged and where the pleading expressly states that the defendants had the relevant knowledge, that particulars of knowledge must be given. That to my mind is sufficient to enable the plea to withstand an application to

> strike out. It was, of course, open to the defendants to seek further particulars of that pleading of knowledge, and if they had not been provided it may be that the defendants could have proceeded to seek some sanction. But in the present case, it has not been asserted that the defendants were unaware of the plaintiffs' case against them and, as I have said, they have at no time sought to have that knowledge particularised in a way which could lead to the striking out of the action."

31. Counsel for the Defendant pointed out that *Rigby* was a pre-CPR authority and that it did not appear to have been cited in any subsequent authority. He also submitted that the decision of Julian Knowles J in *Hersi & Co Solicitors v Lord Chancellor* [2018] EWHC 946 (QB) at [134] was authority to the contrary. I do not accept that submission: the point in *Hersi* was that serious accusations had been made against identified individuals, but no particulars of the facts relied upon as substantiating those allegations had been given.

32. Whether or not it is technically binding, I see no reason to differ from Peter Gibson LJ's statement of principle. I do not doubt that, where an allegation of dishonesty is made against a body corporate, it is necessary to plead the relevant state of knowledge of that body at the relevant time. I do not accept, however, that a mere failure to identify at the outset the directors, officers or employees who had that knowledge means that such an allegation is liable to be struck out without further ado. Clearly such particulars should be given as soon as is feasible, and there may be situations in which the claimant's unwillingness or inability to give such particulars when requested to do so justifies striking out; but that is another matter.

33. I would add that counsel for the Claimant submitted in opening the appeal that in the present case the Claimant was unable to give particulars identifying the relevant individuals until after disclosure. As counsel for the Defendant pointed out, however, the Claimant's own evidence refers to documents identifying individuals whose knowledge appears to be relevant: see the example quoted in paragraph 28 above. Moreover, the Defendant's evidence exhibits further such documents: for example, various documents concerning the payment of the sum of AU$9.5 million to the ATO signed by Mr Gray and/or Sean Breslin, a director of the Defendant at the time. In his reply counsel for the Claimant accepted that that was the position, but submitted that the Claimant was unable to give definitive particulars of the relevant individuals at present. That may be so, but it would not prevent the Claimant giving the best particulars he could pending disclosure.

34. The Judge's other reasons for holding that Version B did not sufficiently plead a case of dishonesty were as follows:

> "89. In the paragraph headed 'Particulars of dishonesty' there are 14 sub-paragraphs from which the claimant avers that the 'personal conscious and fraudulent bad faith' of the defendant pleaded in the first proposed amendment of paragraph 29 (version A) 'may be inferred'. It is however notable that, with one exception, all of these 14 subparagraphs are directed to whether or not there were breaches of trust of which the defendant was aware, and were therefore deliberate, and not to whether or not the defendant believed that it was *in the best*

> *interests of the beneficiaries* to commit such breaches of trust (or whether any such belief that there may have been was reasonable). With that one exception, all the allegations in para 30 are consistent with a belief by the defendant that in doing what it did it was acting in the best interests of the beneficiaries.
>
> 90. The one exception referred to above is contained in sub-para (viii). Here it is alleged that the defendant 'did not consider whether the advances were for the benefit of the beneficiaries'. By itself however that is not sufficient. It is consistent with honest incompetence. But then paragraph 31 expressly denies that the defendant had the intention of acting in the best interests of the beneficiaries, and avers that no reasonable professional trustee 'could reasonably have considered that it was so acting honestly and/or in the best interests of the beneficiaries' in the circumstances set out in para 30.
>
> 91. The problem is that this is mere assertion without particulars. The reference back to para 30 cannot supply the necessary particulars, because as I have said those particulars are not directed at belief in acting in the best interests of the beneficiaries, with one exception, and the exception does not take the matter any further. That means that this version too of the claim cannot succeed as against the exoneration clause, and to the extent that the claimant informally seeks permission to amend his claim in these terms I must refuse that also."

35. Although counsel for the Defendant submitted that the Judge had concluded that Version B did not plead a sustainable case in respect of either limb of the *Fattal v Walbook* test, I disagree. As I read this passage, what the Judge held was that (subject to the point on knowledge which I have already dealt with) Version B pleaded a sustainable case in respect of limb (i), but not limb (ii).

36. Counsel for the Claimant submitted that the Judge's analysis with respect to limb (ii) of *Fattal v Walbrook* was flawed for reasons which I would summarise as follows. First, he submitted that the Judge was wrong to say that only sub-paragraph (viii) of paragraph 30 was directed to limb (ii). The Claimant relied upon all the facts pleaded as supporting not only his case that the Defendant had committed deliberate breaches of trust, but also his case that the Defendant had done so with one of the three states of mind identified in limb (ii). The Claimant's case was one of inference, and he relied upon the totality of the particulars as permitting that inference to be drawn. This included, for example, such matters as the fact that the payments were really gifts, the number of the payments, the period over which they were made and the fact that a very large total sum was paid which amounted to the bulk of the Trusts' assets. Those matters supported the Claimant's case that the Defendant either knew that the payments were contrary to the interests of beneficiaries or was recklessly indifferent to the interests of the beneficiaries or was wholly unreasonable in believing that they were in the interests of the beneficiaries.

37. Secondly, counsel for the Claimant submitted that the Judge was wrong to single out sub-paragraph (viii) as being exceptional, when other sub-paragraphs were plainly relevant to the Defendant's state of mind with respect to the beneficiaries, such as sub-paragraph (vi) alleging a failure to make enquiry of the financial position of the

beneficiaries, sub-paragraph (xii) alleging concealment of the breaches of trust from the beneficiaries (and the ATO) and sub-paragraph (xiii) alleging that the Defendant's release of the loans was evidence of dishonesty.

38. Thirdly, counsel for the Claimant submitted that the Judge was wrong to say that sub-paragraph (viii) was consistent with honest incompetence. Read together with the other particulars, it supported the Claimant's case that the Defendant was at least recklessly indifferent to the interests of the beneficiaries.

39. Fourthly, counsel for the Claimant submitted that the Judge had failed to step back and consider all of the particulars pleaded in Version B as a whole to see if there was sufficient to tip the balance.

40. I accept these submissions. In my judgment Version B of the draft Amended Particulars of Claim does contain sufficient particulars to sustain a case of dishonesty in accordance with *Fattal v Walbrook.* Whether the Claimant can prove these allegations will, of course, be a matter for trial.

41. In addition to supporting the Judge's reasoning, counsel for the Defendant advanced a number of submissions which strictly are not open to the Defendant because they amount to additional reasons for the Judge's decision, but there is no respondent's notice. I shall nevertheless deal with them.

42. First, counsel for the Defendant submitted that whether the payments constituted gifts or loans was a question of legal characterisation, and that no such sufficient facts had been pleaded by the Claimant to found the assertion that they were gifts. I do not accept this submission. While I accept that there can be circumstances in which legal characterisation is required, whether a payment is made by way of gift or by way of loan is primarily a question of fact as to the intentions of the parties. I consider that the Particulars of Claim adequately pleads the Claimant's case that the payments were in truth gifts.

43. Secondly, counsel for the Defendant submitted that the particulars of dishonesty in paragraph 30 of Version B were inconsistent and contradictory. For example, he contended that the plea in subparagraphs (i) and (ii) of paragraph 30 that the Defendant was aware of the restrictions upon its powers contained in the Trust deeds was contradicted by the pleas in subparagraphs (viii) and (xiv) that the Defendant failed to consider the restrictions on its powers or the exercise of the power to lend money to Hyman Sofer. I do not accept this submission. Although I agree that the statement of case is not as clear as it preferably should be, it is apparent that the Claimant advances each of the three cases identified in limb (ii) of *Fattal v Walbrook* in the alternative. Particulars which support case (c) may not support case (b) let alone case (a). To that extent, it may be said that there is some inconsistency in the pleaded case; but in my view there is no greater degree of inconsistency than is inherent in pleading alternative cases.

44. Thirdly, counsel for the Defendant submitted that the adequacy of the particulars had to be considered by reference to the undisputed facts, and specifically facts which were either pleaded or admitted by the Claimant. The former included the allegation in paragraph 8 of the Particulars of Claim. The latter included the Claimant's acceptance that, as shown by a document he exhibited, some of the sums of money

paid out by the Defendant had been remitted to other beneficiaries, in one case (so counsel submitted) to the Claimant himself, and in some cases purposes for which the money had been paid had been identified (e.g. to fund Tamara's mortgage loan). I do not accept this submission. Paragraph 8 of the Particulars of Claim alleges that the Trusts were "designed and intended to allow Hyman Sofer to deal with and enjoy his assets outside of the jurisdiction of Australia whilst not appearing to have any interest in or entitlement to or ability to benefit from the same". As the Judge recorded at [22], counsel for the Claimant made it clear before the Judge, as he did again before this Court, that the Claimant is not alleging that the Trusts were shams. I do not see that the pleaded allegation is inconsistent with the Claimant's case on dishonesty or impacts on the particulars which the Claimant has given. Nor is the Claimant's acceptance that some of the money was ultimately received by other beneficiaries or the fact that in some cases purposes for the payments were recorded. (I would add that, as I read his witness statement, the Claimant denies receiving the payment he is recorded as having received.) Moreover, I do not accept that the exercise of comparing the Claimant's statement of case with the evidence is a legitimate one. The application to strike out was based on CPR rule 3.4(2)(a), which excludes consideration of the evidence. Although it is true that the Claimant seeks permission to amend the Particulars of Claim, the only basis upon which the application is resisted is that the amended statement of case would also be strikable. There is no application for summary judgment dismissing the whole claim as having no real prospect of success on the facts.

45. Fourthly, and following on from his third point, counsel for the Defendant submitted that the Particulars of Claim lumped all of the payments together, whereas different considerations attended different payments. Thus some of the payments were received and kept by Hyman Sofer, whereas others were remitted to other beneficiaries; and some payments were made before Hyman Sofer was alleged to have suffered from dementia, whereas others were made after. As I understood it, counsel's submission was that the Particulars of Claim needed to address each payment, or at least each category of payments, separately; and in the case of payments remitted to other beneficiaries, the Claimant needed specifically to set out the facts relied upon as showing that the Defendant had the relevant state of mind in relation to those payments. I do not accept these submissions. At this stage the Particulars of Claim does not need to condescend to that level of detail in order to plead a sustainable case of dishonesty.

46. Fifthly, counsel for the Defendant pointed out that Hyman Sofer was himself a beneficiary under the Trusts. Accordingly, payments made to Hyman Sofer were necessarily in the interests of one of the beneficiaries. Furthermore, it is often the case that trustees exercising their powers are called on to make decisions which favour one beneficiary (or class of beneficiaries) over another. It followed, counsel submitted, that the Defendant's decisions to pay Hyman Sofer could not fall within any of three cases in limb (ii) of *Fattal v Walbrook*. I do not accept that this is necessarily so. The fact that Hyman Sofer was a beneficiary did not absolve the Defendant from considering the position of other beneficiaries. Still less did it mean that the Defendant was free to make gifts to Hyman Sofer that it was prohibited from making and which consumed the bulk of the Trusts' assets, thereby inevitably prejudicing the prospects of other beneficiaries benefitting. In those circumstances it seems to me that the Claimant has a sustainable case that falls within at least (c) if not (b) or (a).

The application for summary judgment

47. As noted above, the application for summary judgment was based on the Deeds of Indemnity signed by the Claimant. So far as material, these provide as follows:

"WHEREAS

(A) The Trustee is the present trustee of the Settlement Deeds dated 25 July 2006 made between Cilantro Holdings Ltd and SwissIndependent Trustees SA known as the Gabri Trust, the Puyol Trust and the Xavi Trust (together 'the Settlements').

(B) HYMAN SOFER ('Mr Sofer') is a member of the class of beneficiaries in respect of each of the three Settlements referred to in recital A pursuant to Deeds of Addition of a Specified Beneficiary dated 23 August 2006.

(C) The Trustees have at the request of Mr Sofer previously advanced to him by way of loan the following sums in respect of each of the Settlements:

- Gabri Trust: USD 10,223,073
- Puyol Trust: USD 10,223,073
- Xavi Trust: USD 10,223,073

(together 'the Existing Loans').

(D) The Trustees have been requested to exercise their powers to advance a further loan of AUD9,500,000 to Mr Sofer in accordance with the powers vested in the Trustees under clause D3 (3) of each of the Gabri Trust, the Puyol Trust and the Xavi Trust.

(E) The Trustee has agreed to make further loans to Mr Sofer of AUD 3,166,666.66 from each of the Gabri Trust, the Puyol Trust and the Xavi Trust ('the New Loans') so that the total advances made to Mr Sofer from the Settlements together will total approximately USD 40,603,000 subject to receiving the indemnities hereinafter set out.

NOW THIS DEED WITNESSES AS FOLLOWS

1. Application

The Trustees, in exercise of the powers conferred by clause D3(3) of the Settlements and of all other relevant powers, have hitherto agreed to advance the Existing Loans and agrees to advance the New Loans to the Beneficiary, these loans being unsecured, interest-free and repayable on demand.

…

6. Indemnity

> In consideration of the advances of the Existing Loans and the New Loans to Mr Sofer, the Beneficiary and the Potential Beneficiaries hereby covenant with the Trustees and the Guardian at all times to fully and effectually indemnify the Trustees and the Guardian and any person that is from time to time an officer or employee of the Trustee and the heirs, assigns, personal representatives and estates of such officers and employees in respect of all liabilities, actions, proceedings, claims, demands, taxes and duties, and all associated interest, penalties and costs, and all other costs and expenses whatever arising out of the agreement of the Trustees to advance the Existing Loans and the New Loans to Mr Sofer."

48. The Defendant contends that the Deeds of Indemnity preclude the Claimant from advancing his claim (or at least a substantial part of it) on a number of different bases. The Judge held that, if the claim were not struck out, the Defendant would be entitled to reverse summary judgment on three of these: contractual indemnity, estoppel by convention and waiver; but only in respect of the payments referred to in the Deeds of Indemnity as the Existing Loans and the New Loan and not in respect of payments thereafter.

49. There was no dispute before either the Judge or this Court as to the principles governing summary judgment applications. They are well known and there is no need to set them out in this judgment. It suffices to say that what the Claimant needs to establish is no more, but no less, than that he has a real prospect of successfully overcoming these defences.

50. So far as contractual indemnity is concerned, the issue turns on the construction of the Deeds of Indemnity. The Claimant contends that the indemnity only applies to payments which were in truth loans, and not to payments which were in truth gifts. In the alternative the Claimant contends that the indemnity is subject to an implied term that it does not apply to payments made dishonestly. The Judge rejected these contentions for the following reasons:

> "156. In my judgment, as a matter of construction, the indemnity is given in respect of payments made by the defendant which the defendant asserts are loans. It is not necessary that they should actually be loans. That is simply their description in the document. The reason for having the indemnity is precisely in case the payment turns out to be unlawful or a breach of trust in some way. To construe the terms of the indemnity as restricted only to the case where the payments concerned ultimately turn out to have been loans (and nothing else) would significantly reduce the width, and therefore the value to the defendant, of the indemnity. That would be uncommercial.
>
> 157. The second part is that the indemnity must be subject to an implied term that it does not apply to any underlying transaction where the defendant had acted dishonestly. I do not need to decide this aspect, as I have already held that no allegation of dishonesty is made by the current or proposed particulars of claim."

51. I am unable to agree with the Judge's reasoning in [156]. Recitals (C), (D) and (E) recite that the Defendant has advanced sums to Hyman Sofer "by way of loan", defined as "the Existing Loans", and has been requested to advance "a further loan"

"under clause D3(3)", defined as "the New Loan". Clause 6 of the Deeds of Indemnity provides that the Claimant and others agree to indemnify the Defendant in respect of claims etc "arising out of the agreement of [the Defendant] to advance the Existing Loans and the New Loans". I cannot see that the indemnity bites if the Defendant did not advance any loans to Hyman Sofer pursuant to clause D3(3), but instead made gifts to him which were prohibited by clause M1(1). I agree that construing the indemnity as being limited to payments which were indeed loans means that it has less width than construing it as extending to payments which purported to be loans, but were in fact gifts; but I do not see why this means that such an interpretation is "uncommercial" or why it should be presumed that the Claimant agreed to the wider indemnity. Furthermore, contrary to the submission of counsel for the Defendant, the fact that the trustee exoneration clause would protect the Defendant from liability for non-dishonest breaches of trust is neither here nor there.

52. As for the implied term, I have concluded that Version B of the draft Amended Particulars of Claim does plead a sustainable case of dishonesty. Given that conclusion, I consider the Claimant's case on the implied term is an arguable one.

53. Turning to estoppel by convention, it was common ground both before the Judge and before this Court that the applicable principle is that stated by Lord Steyn in *The Indian Endurance* [1998] AC 878 at 913:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption … It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

54. The Judge held that it was clear that (a substantial part of) the Claimant's claim was precluded by estoppel for convention for the following reasons:

> "144. There can be no doubt in the present case that the parties to the deeds of indemnity shared the assumption at that time that the payments to Hyman Sofer were loans rather than advances. On the evidence (which, as I have already said, on this application I am not entitled to reject) the defendant was advised and intended to make, and thought it was making, loans: see Mr Bayles's first witness statement at [24]-[28]. Although the claimant now takes a different view, at the time he executed the deeds he had not seen the trust documents or the financial statements, and went along with the assumption that the payments were as they were described in the documents. It is only later that he has come to believe that they were not loans at all: see his witness statement at [43]-[47]. But, as Lord Steyn says, it is enough if the defendant puts forward its assumption and the claimant by signing the deeds acquiesces in it.

> 145. I have already held that as a matter of construction the claimant was not *promising* that the payments would be treated only as loans and that he would never seek to argue otherwise. But that is quite different from the assumption being made in entering into the deeds of indemnity that that is what they were. On the basis of that shared assumption at the time, the defendant thereafter acted to its detriment in paying over a further AUS$9.5 million to Hyman Sofer. That seems to me to be a classic case of estoppel by convention. In my judgment, having allowed the defendant to act to its detriment on the faith of the assumption that the payments were loans, the claimant is now estopped from asserting otherwise in bringing this claim for breach of trust."

55. Counsel for the Claimant submitted that this analysis was flawed for three main reasons. First, although the Judge was right to say that he was not entitled to *reject* the evidence of any of the witnesses (unless it was obviously incredible, which neither side suggested), it did not follow that he was entitled to treat the evidence of the Defendant's witnesses as being *conclusive*, particularly given that (a) it was hearsay and (b) it was in conflict with the Claimant's evidence. Unless the Claimant's case had no real prospect of success even without assuming the truth of the Defendant's evidence, the Claimant was entitled to test the Defendant's evidence by the normal processes of disclosure and cross-examination.

56. Secondly, the Judge was wrong to say that it was a "shared assumption" that the payments were loans: that was a representation made by the Defendant, whose advisors had drafted the Deeds of Indemnity, to the Claimant. If, as the Claimant contended, that representation was false to the knowledge of the Defendant, but not to the knowledge of the Claimant, it could not be described as a shared assumption (or an assumption made by one and acquiesced in by the other). Nor was it a case where the parties had agreed to contract on a basis which both knew to be incorrect, as in *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] AC 436.

57. Thirdly, the Judge had failed to give any reason for his implicit conclusion that it would be unconscionable for the Claimant to be permitted to go back on the assumption. Counsel for the Claimant submitted that there would be nothing unconscionable about it if in fact the payments were gifts and the Defendant had known that was the case, but the Claimant had not.

58. In my judgment counsel for the Claimant's first criticism of the Judge's reasoning is unanswerable. That opens the door to the second and third arguments, which I consider are sufficient to establish a real prospect of success on the part of the Claimant.

59. As for waiver, the judge recorded that counsel for the Claimant had relied before him on the statement of Wilberforce J at first instance in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108:

> "The result of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn

> round and sue the trustees: that, subject to this, it is not necessary that [the beneficiary] should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."

60. Before this Court counsel for the Claimant also relied upon the way in which Wilberforce J had framed the question he was answering in the passage quoted above at 107:

> "Is it enough that he knows what he is doing and the legal effect of that, or must he know that what he is concurring in is a breach of trust? This is a matter of some difficulty on the authorities."

61. Counsel for the Claimant submitted that it followed that, when Wilberforce J said that it was necessary that the beneficiary "fully understands what he is concurring in", he meant that it was necessary that the beneficiary "knows what he is doing and the legal effect of that" other than that what he was concurring in was a breach of trust. I accept that this is at least arguably correct.

62. The Claimant contends that, by signing the Deeds of Indemnity, he did not waive his claim against the Defendant because he did not know what he was doing and the legal effect of it, since he did not know that what were described as "loans" were in fact gifts. The Judge rejected this argument at [113] for the following reasons:

> "As Wilberforce J said, it is only necessary for the beneficiary to know the facts, not the legal consequences of the facts. It is perfectly clear from the deeds of indemnity themselves, as well as the defendant's evidence, that the claimant was well aware that payments had been made in the past, and that more (amounting to AUS$9.5 million) were intended to be made in the future to Hyman Sofer. The claimant was also aware that he was being invited to indemnify the defendant against the consequences of these payments out of the trust fund turning out to be a breach of trust. It is not necessary that the claimant should have understood exactly what was the character of the payments, or whether or not the defendant was complying with its fiduciary duties in making them, only that they were being made by the trustees apparently under the terms of the trust, and that the claimant could not thereafter complain that these payments amounted to a breach of trust. On the other hand, we must note the limits of these deeds. They do not license or consent to payments to Hyman Sofer beyond those already made and the further AUS$9.5 million. At the dates of execution of the deeds of indemnity the claimant could not have known the details of any other future payments."

63. Counsel for the Claimant submitted that this analysis was flawed for the following reasons. First, the first sentence was an incorrect statement of the law for the reason noted above. Secondly, it was in event wrong to say that it was "not necessary that the claimant should have understood exactly what was the character of the payments … only that they were being made by the trustees apparently under terms of the trust". There was a crucial difference, counsel submitted, between the Claimant

understanding that the payments were loans, which were permitted by clause D3(3), and his understanding that they were gifts, which were prohibited by clause M1(1).

64. I consider that, like the Claimant's arguments on contractual indemnity and estoppel by convention, these submissions have a real prospect of success.

Conclusion

65. For the reasons given above, I conclude that the Judge should have granted the Claimant permission to amend the Particulars of Claim in the form of Version B, and on that basis dismissed the Defendant's application to strike out the claim, and should also have dismissed the Defendant's application for reverse summary judgment. I would therefore allow this appeal.

Lord Justice David Richards:

66. I agree.

Lord Justice Patten:

67. I also agree.